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Sales and Use Tax Nexus: The Way Forward for Legislation

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SALES AND USE TAX NEXUS: THE WAY FORWARD FOR LEGISLATION

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I. INTRODUCTION

For years, merchants with customers in more than one state have relied on the relatively simple rule that sales and use[1] taxes only need

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to be collected and remitted on sales to customers in states where the merchant has an office, a storefront, employees or some other physical presence.[2]

This rule had its origin in two pre-Internet Supreme Court decisions: *National Bellas Hess, Inc. v. Illinois Department of Revenue*[3] and *Quill Corp. v. North Dakota*.[4] In *Bellas Hess*, the Court held that the Commerce and Due Process Clauses prohibit states from imposing use tax collection obligations on businesses that do not have a physical presence in the taxing state.[5] Twenty-five years later, *Quill* clarified that it is the Commerce Clause, not the Due Process Clause, that requires physical presence in the taxing state.[6]

These cases were decided in the twentieth century. In the new millennium, the Internet has made it considerably easier to conduct cross-border sales without setting foot in another state. Ecommerce has grown exponentially.[7] By selling products and services online instead of establishing physical storefronts or hiring salespeople in different states, many ecommerce businesses have been able to avoid liability for taxes in every state except the one in which the company is physically located. This has resulted in severe revenue shortfalls for states and municipalities.[8]

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1. Sales and use taxes are taxes on consumption. In theory, they are taxes on purchasers. Most states require merchants to collect and remit them on behalf of purchasers, though. *Sales* taxes are taxes on transactions. *Use* taxes are taxes on a buyer's use of a purchased product. In practice, they are functionally equivalent, with sales taxes being imposed on in-state purchases and use taxes being imposed on purchases from out-of-state vendors. *See* Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147, 151–57 (2015).

2. *See* JEROME R. HELLERSTEIN ET AL., STATE TAXATION ¶ 19.02 (3d ed. 2017) (describing the history of the Court's nexus requirement).

3. 386 U.S. 753 (1967)

4. 504 U.S. 298 (1992).

5. Nat'l Bellas Hess, Inc. v. Ill. Dep't of Revenue, 386 U.S. 753, 758 (1967).

6. Quill Corp. v. North Dakota, 504 U.S. 298, 308, 317–18 (1992).

7. In 1992, less than 2% of Americans had Internet access, and all forms of remote sales in the United States, including mail-order, totaled $180 billion. Today 89% of the population has Internet access and e-commerce retail sales amount to approximately $453.5 billion per year. Since the beginning of the millennium, e-commerce sales have increased from 0.8% to 8.9% of total retail sales in the United States. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018).

8. As of 2017, states were losing up to 33 billion dollars in sales tax revenues annually as a result of the physical presence rule. *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-114, REPORT TO CONGRESSIONAL REQUESTERS: SALES TAXES, STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 5 (2017).

Several states responded to revenue shortfalls by expanding their tax bases to include services and/or digital products,[9] enacting "affiliate nexus" tax laws,[10] treating cookies on a person's computer as a "physical presence" in the computer owner's state,[11] and imposing tax obligations on online service providers (such as Amazon, Shopify, or Etsy) that facilitate other vendors' sales.[12] Another common approach has been to require out-of-state retailers to report untaxed sales, to notify buyers of the obligation to pay use taxes, or both.[13]

Other states took a bolder approach. They deliberately imposed use tax collection obligations on out-of-state sellers with no physical presence in the state, hoping to provoke a constitutional challenge that would give the United States Supreme Court an opportunity to overrule *Bellas Hess* and *Quill*.[14] South Dakota was one of these states. It required an out-of-state seller, whether it was physically present in the state or not, to collect and remit use tax if the seller either delivered more than $100,000 of goods or services into the state or conducted 200 or more transactions for the delivery of goods or services into the state.[15]

The strategy was successful. Wayfair, Inc. and other large Internet retailers with no physical presence in South Dakota refused to collect the tax. South Dakota courts declared the law unconstitutional and the U.S. Supreme Court granted certiorari to reconsider the physical

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9. *See, e.g.*, N.J. STAT. ANN. § 54:32b-3 (West 2018) (taxing digital downloads).

10. Sometimes called "click-through nexus" or "Amazon laws," these statutes deem a vendor to be physically present in a state if a resident of the state receives a payment whenever a sale by the vendor results from a customer clicking on a link to the vendor's product or website that the resident has placed on his or her website. *See*, *e.g.*, N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2018). Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington have enacted similar laws. Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present Day:* South Dakota v. Wayfair, 2017-2018 CATO SUP. CT. REV. 269, 292 n.90. For another kind of "Amazon law," see note 12 and accompanying text.

11. *See, e.g.*, OHIO REV. CODE ANN. § 5741.01(I)(2)(i) (LexisNexis 2018); 830 MASS. CODE REGS. § 64H.1.7(1)(b) (2018).

12. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-5044 (2019). For another kind of Amazon law, see note 10.

13. *See, e.g.*, COLO. REV. STAT. § 39-21-112 (2018).

14. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088–89 (2018).

15. S.B. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016).

presence requirement.[16] Finding *Quill* to have been "flawed on its own terms,"[17] the Court overruled *Bellas Hess* and *Quill* to the extent they prohibited states from imposing tax obligations on merchants without a physical presence in the state. The decision, *South Dakota v. Wayfair, Inc*., established that a state may impose tax obligations on a business if it has an "economic nexus" with the state even if it has no physical presence there.[18]

The elimination of the physical presence requirement created a great deal of uncertainty. Language in *Wayfair* seemed to suggest that physical presence, large sales volume, or large revenues are needed to establish the requisite nexus with a state for tax purposes.[19] States therefore scrambled to enact volume- and revenue-based use tax thresholds.[20] Unfortunately, volume and revenue thresholds are not a great improvement over the physical presence standard. They are vulnerable to the same kinds of criticisms. A better solution is needed.

II. THE NEXUS REQUIREMENT

A. The Dormant Commerce Clause

The Constitution gives Congress power "[t]o regulate Commerce . . . among the several States."[21] Known as the Commerce Clause, this provision was intended "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[22] Accordingly, the Supreme Court has interpreted it to mean that states may neither discriminate against interstate commerce[23] nor unduly burden it.[24] Together, these implied limitations on state power

16. *Wayfair*, 138 S. Ct. at 2089.

17. *Id.* at 2092.

18. *Id*. at 2099

19. *Id.*

20. Sarah Horn, Jill McNally & Rebecca Newton-Clarke, *How States Responded to South Dakota v. Wayfair in 2018*, THOMSON-REUTERS (Dec. 21, 2018), https://tax.thomsonreuters.com/blog/how-states-responded-to-south-dakota-v-wayfair-in-2018/

21. U.S. CONST. art. I, § 8.

22. Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

23. Granholm v. Heald, 544 U.S. 460, 476 (2005).

24. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be

comprise what is known as the "dormant" Commerce Clause.[25]

The theory of an implied "dormant" Commerce Clause has been the subject of a fair amount of criticism.[26] The premise upon which it rests, though, seems sound: if the country is to function as one nation, then individual states cannot try to isolate themselves economically. Although *Wayfair* upheld a state's imposition of use tax collection obligations on interstate sellers, the Court did not repudiate the doctrine. To the contrary, by applying the four-prong test articulated in *Complete Auto Transit, Inc. v. Brady*[27] for assessing the validity of sales and use taxes under the dormant Commerce Clause, the Court reaffirmed it.

The four-prong *Complete Auto Transit* test requires state sales and use taxes to

(a) not discriminate against interstate commerce;

(b) be fairly apportioned;

(c) be fairly related to the services the State provides; and

(d) apply only to activities having a substantial nexus with the taxing State.[28]

1. Nondiscrimination

Nondiscrimination is central to the principle of federalism

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upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"); *see also* S. Pac. Co. v. Arizona *ex rel*. Sullivan, 325 U.S. 761, 779 (1945).

25. The phrase probably comes from Chief Justice John Marshall's opinion in *Gibbons v. Ogden*, in which he wrote that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." Gibbons v. Ogden, 22 U.S. 1, 189 (1824).

26. Justice Scalia took the position that discrimination is prohibited by the Privileges and Immunities Clause, not the Commerce Clause. Tyler Pipe Indus. v. Wash. Dep't of Revenue 483 U.S. 232, 264 (1987) (Scalia, J., concurring in part and dissenting in part). Under this view, nothing in the Constitution would protect businesses from discriminatory taxes. The Privileges and Immunities Clause, by its terms, only protects citizens. U.S. CONST. art. IV, § 2, cl. 1. Business entities are not citizens. Western & Southern Life Insurance Co. v. State Bd. of Equalization, 451 U.S. 648, 658 (1981); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 176–77 (1868); *cf.* Adam Thimmesch, *A Unifying Approach To Nexus Under The Dormant Commerce Clause*, 116 MICH. L. REV. 101, 116 (2018) (arguing that the "nexus" prong of the dormant Commerce Clause should be abolished because it is subsumed under the "fair apportionment" and "relationship to services" prongs of the *Complete Auto Transit* test).

27. 430 U.S. 274 (1977).

28. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279.(1977).

underlying the dormant Commerce Clause.

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units . . . "[W]hat is ultimate is the principle that one state, in its dealings with another, may not place itself in a position of economic isolation."[29]

For this reason, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."[30] As applied to state sales and use taxes, this means that a state may not apply higher tax rates to interstate sales than to intrastate sales.[31]

2. Undue Burden

Discrimination is not the end of the inquiry. A state law that is nondiscriminatory on its face may nevertheless run afoul of the dormant Commerce Clause if it imposes an undue burden on interstate commerce.[32] The three other prongs of the *Complete Auto Transit* test—fair apportionment, relationship to state-provided services, and nexus— are tools for determining whether a burden on interstate commerce is undue or not.

"Fair apportionment" means state taxes on interstate commerce must be apportioned to reflect the taxpayer's activities in the taxing

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29. H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537–38 (1949) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935)).

30. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also* Granholm v. Heald, 544 U.S. 460, 476 (2005); *H. P. Hood & Sons*, 336 U.S. at 533; Toomer v. Witsell, 334 U.S. 385, 403–06 (1948); *Baldwin.*, 294 U.S. at 511; Buck v. Kuykendall, 267 U.S. 307, 315–16 (1925).

31. George M. Johnson, *State Sales Taxes and the Commerce Clause*, 24 CALIF. L. REV. 155, 165 (1936).

32. State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

jurisdiction.[33] Multiple or duplicative taxes unduly burden commerce.[34] Each state should tax only the portion of the tax base that reflects the taxpayer's activities in the state.[35] This advances the goal of nondiscrimination against interstate commerce by preventing multiple taxation of interstate commerce, a burden that is not borne equally by wholly intrastate commerce.[36] The "fair apportionment" requirement also ensures that states tax only those activities or values that have a substantial nexus with the state.[37]

The third prong of the *Complete Auto Transit* test requires taxes to be reasonably related to services or benefits the taxing authority provides the taxpayer.[38] Retailers with a physical presence in a state meet this requirement because they benefit from state-provided services like police and fire protection, roads and so on. Some kinds of services benefit all retailers, whether they have a physical presence in the state or not. These include things like courts for the collection of the purchase price from customers,[39] sound local banking institutions to support credit transactions,[40] and commercial and consumer protection laws that create a climate of consumer confidence inuring to the benefit of merchants.[41] Sales and use taxes help sustain the market to which merchants sell goods and services.[42]

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33. *See, e.g.*, Maine v. Grand Trunk Ry. Co., 142 U.S. 217, 217–19 (1891); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891). Unfairly apportioned taxes also raise Due Process Clause issues. *See* Standard Oil Co. v. Peck, 342 U.S. 382 (1952); Johnson Oil Ref. Co. v. Oklahoma *ex rel*. Mitchell, 290 U.S. 158 (1933); Union Tank Line v. Wright, 249 U.S. 275 (1919); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

34. Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 57 (1987).

35. Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 150 (2002). Fair apportionment is determined by internal consistency. In other words, if imposing the tax in every jurisdiction would result in more than 100% of the tax base (e.g., the sale price of a product), then the tax is not fairly apportioned. *See, e.g.*, Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

36. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255–56 (1938). *See generally* Hellerstein, *supra* note 34.

37. Joondeph, *supra* note 35, at 151.

38. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

39. Quill Corp. v. North Dakota, 504 U.S. 298, 328 (1992) (White, J., dissenting).

40. *Id.*

41. *Id.*

42. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) ("Taxes . . . are essential to create and secure the active market they supply with goods and services.").

a. The Physical Presence Requirement

The fourth prong of the *Complete Auto Transit* test is "nexus." A tax must be "apportioned to local activities within the taxing State forming sufficient nexus to support the tax."[43]

The "substantial nexus" prong of the *Complete Auto Transit* test seems to be grounded more in the Due Process Clause than the Commerce Clause.[44] In reaching the conclusion that both Clauses prohibit the imposition of tax collection obligations on out-of-state sellers with no physical presence in the state, the *Bellas Hess* Court drew no distinction between the Due Process Clause and the Commerce Clause insofar as the "nexus" requirement was concerned.[45] The Court later clarified, in *Quill*, that the Due Process and Commerce Clause "nexus" requirements are not identical. Physical presence is not required for Due Process nexus, but it is required for Commerce Clause nexus.[46]

The physical presence of a person or property in a state creates a substantial nexus to the state because states provide protection and services to the people and property that are located within their territorial boundaries.[47] In fairness, a company or property owner that receives state-provided benefits and protections should expect to be required to contribute to their cost. The *Quill* Court went further, holding that physical presence was not only a sufficient basis for imposing sales and use taxes; it was a necessary condition for the imposition of a tax collection obligation.[48] The Court reasoned that if states could impose tax obligations on out-of-state merchants, then merchants who sell their products or services throughout the country could be subjected to collection obligations in thousands of different taxing jurisdictions.[49] This, the Court believed, would unduly burden interstate commerce.[50]

The *Wayfair* Court rejected the notion that physical presence is necessary to establish the requisite nexus for either Due Process or

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43. *Complete Auto Transit*, 430 U.S. at 285.

44. *Quill*, 504 U.S. at 327 (White, J., dissenting); *Complete Auto Transit*, 430 U.S. at 281–82, 285.

45. Nat'l Bellas Hess v. Ill. Dep't of Revenue, 386 U.S. 753, 758 (1967).

46. *Quill*, 504 U.S., at 307–08, 311, 317–18 (majority opinion).

47. *Bellas Hess*, 386 U.S at 757; Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 365 (1941)

48. *Quill*, 504 U.S. at 317–18.

49. *Id.*

50. *Id.* at 313 n.6.

Commerce Clause purposes.[51] The burden of compliance with a tax obligation, the Court observed, is largely unrelated to whether a company has a physical presence in a state or not.[52] "The physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States."[53]

This is a valid point. Some examples will help bring the problem into sharper relief. (For the sake of simplicity, assume compliance costs of $20 per state.)

> (a) Artemis.com, an online merchant, has a thousand employees and salespersons in New Hampshire but has no physical presence in any other state. Each year it makes over 1,000,000 sales to residents of other states. Because New Hampshire has no sales or use tax, and because Artemis.com has no physical presence in any other state, the physical presence requirement results in zero compliance costs for the company.
>
> (b) Ma & Pa Kettle Co. is a small local retailer that has decided to start selling to customers in other states. To that end, it enters into a contract with one individual in each state under which the individual will receive a commission on sales made to residents of that state. Each salesperson ends up making one $20 sale. If physical presence alone is determinative of nexus, then each of those states could require Kettle Co. to register with the state and to collect and remit use taxes. Compliance costs will put Kettle Co. out of business.

The physical presence test also harms wholly local businesses. Exempting interstate retailers from sales and use tax obligations while requiring wholly intrastate retailers to comply with those obligations puts intrastate retailers at a competitive disadvantage.[54] Further, the rule distorts the operation of markets, giving companies an incentive to avoid establishing storefronts and distribution centers, or to hire

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51. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).
52. *Id.* at 2093.
53. *Id.*
54. *Id.* at 2094 ("In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.")

employees in different states.[55] This makes little sense, inasmuch as physical and virtual presence are functionally indistinguishable. In fact, "[a] virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores."[56]

b. Economic Nexus

For all these reasons, it was reasonable for the *Wayfair* Court to discard the physical presence requirement. It raised a difficult question, though: If physical presence is not the requisite nexus, then what is? The Court would not say. Refusing to establish another bright-line test, the Court was only willing to commit to the proposition that "a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[57] The Court asserted that the volume of sales or revenue specified in the statute and alleged in the case before it "could not have occurred unless the seller had availed itself of the substantial privilege of carrying on business in South Dakota."[58] The South Dakota legislature had imposed tax collection and remission obligations on out-of-state sellers who deliver goods or services in an amount greater than $100,000 into the State or who engage in 200 or more separate transactions for the delivery of goods or services into the State.[59] Despite the Court's express disavowal of any intent to establish another bright-line test for nexus,[60] state taxing authorities have interpreted the decision as establishing a sales volume threshold

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55. *Id.*

56. *Id.* at 2095.

57. *Id.* at 2099 (citing Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

58. *Id.*

59. S.D. CODIFIED LAWS § 10-64-2 (2016). The statute was enacted pursuant to an "[a]ct to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S. 106, 20156 Leg. Assembly, 91st Sess. (S.D. 2016). Evidently the South Dakota legislature perceived the collection of sales taxes from out-of-state sellers as an emergency.

60. South Dakota had not sought to impose a tax obligation on low-volume out-of-state merchants. Consequently, it was not necessary for the *Wayfair* Court to address the question whether sales volume thresholds are necessary. "Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here." *Wayfair*, 138 S. Ct. at 2019.

for the taxation of out-of-state businesses. Several have already enacted laws specifying sales volume and/or dollar amount thresholds identical or very similar to South Dakota's.[61]

The idea that large sales volume and/or revenue are necessary to establish nexus may stem from the Court's consistent use of the word *substantial* as a modifier of *nexus*.[62] The Court has also used *substantial* as a modifier of *privilege of carrying on business*.[63] To many people, *substantial* means a large amount. *Substantial* can also mean *real* or *essential*. Using the term as a modifier of *privilege* rather than *business* in the phrase *privilege of doing business in a state* suggests the Court meant to use the term in the latter sense.

Eschewing the judicial establishment of a volume or revenue threshold for tax nexus also comports with separation of powers doctrine. Courts do not have legislative power. That power is vested in Congress.[64] As one commentator has observed, "A decision establishing quantitative measures to determine when 'substantial nexus' exists . . . encroaches on the legislative responsibilities of Congress or the sovereign authority of state governments."[65]

The Court used the volume of sales in the case before it as circumstantial evidence of purposeful availment,[66] but it did not indicate that this was the only possible kind of evidence of purposeful availment.[67] If there is direct evidence of purposeful availment in

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61. Horn, McNally & Newton-Clarke, *supra* note 20.

62. *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

63. *Wayfair*, 138 S. Ct. at 2099.

64. U.S. CONST. art. 1, § 1; *see also* John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT 295, 299 (2016) ("A law-applying institution cannot announce a wholly new rule, not derived from existing law . . . .."). For an overview of the principal rationales for separating judicial functions (adjudication) from legislative functions (policymaking), see Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837 (1955).

65. Jonathan E. Maddison, *Why Wayfair Won't Matter: Supreme Court Raises 'Substantial Nexus' Controversy in Internet Age, Capturing Attention of Tax Specialists—and the Public* TAX EXECUTIVE (May 31, 2018), http://taxexecutive.org/why-wayfair-wont-matter/.

66. The Court noted that the tax at issue applied only to merchants that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into South Dakota each year. "This quantity of business," the Court declared, "could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Wayfair*, 138 S. Ct. at 2009.

67. For example, the Court suggested that evidence that out-of-state merchants "are large, national companies that undoubtedly maintain an extensive virtual presence" might support a finding of purposeful availment. *Id*.

connection with a single sale, or if another kind of circumstantial evidence supports an inference of purposeful availment in connection with a single sale, nothing in *Wayfair* precludes a finding that a single sale may furnish a sufficient nexus for purposes of a state's authority to impose a use tax obligation.

B. Due Process

For Commerce Clause purposes, the relevant question is whether a tax discriminates against or unduly burdens interstate commerce, not whether it is fair or unfair to a particular individual.[68] The *Wayfair* Court blurred this distinction somewhat by deeming it essential to Commerce Clause analysis to decide whether taxpayers had purposefully availed themselves of the privilege of doing business in the taxing state or not.[69] Purposeful availment is relevant to fairness to an individual; it is a Due Process concept.[70]

The Due Process Clause of the Fourteenth Amendment has been interpreted to mean, among other things, that a state's regulatory power extends only to its territorial boundaries.[71] State power over property may be predicated on the presence of the property within the state (*in rem* jurisdiction). State power over a person may be

68. *Id.* at 2092.

69. "*Wayfair*'s holding undoes some of *Quill*'s precision and again blurs the distinction between the Due Process Clause and the Commerce Clause as they apply to interstate taxation." Alston & Bird, *Thanks for the Memories, Quill: The Supreme Court Adopts a New Nexus Standard for Use Tax Collection*, JDSUPRA (June 25, 2018), https://www.idsupra.com/legalnews/thanks-for-the memories-quill-the-88517/. The Court cited Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009) for the proposition that "nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in the jurisdiction." *Wayfair*, 138 S. Ct. at 2099. *Polar Tankers*, however, was a case interpreting the Tonnage Clause; it addressed neither Commerce Clause nor Due Process issues. *Polar Tankers*, 557 U.S. at 6. Moreover, the *Polar Tankers* Court cited *Quill* in support of the quoted proposition. *Id.* at 11. Ironically, *Quill* had carefully distinguished between Due Process nexus, which is concerned with fairness to the individual, and Commerce Clause nexus, which is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

70. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Kulko v. Super. Ct., 436 U.S. 84, 94 (1978); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

71. Pennoyer v. Neff, 95 U.S. 714, 720 (1877) (suggesting that extraterritorial regulation would be an abuse of power).

predicated on the presence of the person within the state (*in personam* jurisdiction). A state generally lacks jurisdiction, however, over non-residents who have no property in the state.[72]

While this principle is easy to state, it is difficult to apply to business entities. Corporations and certain other business entities are juridical "persons,"[73] but they do not have a physical existence. Courts initially treated them as if they had a physical presence in the state of incorporation.[74] Because corporate activity often extended beyond the boundaries of the state of incorporation, however, courts adopted alternative theories for the exercise of power over out-of-state business entities.[75] One of these was consent. Relying on the principle that consent is an independent basis for the exercise of personal jurisdiction, courts reasoned that when a state's permission is needed for a foreign corporation to do business in the state, the foreign corporation implicitly consents to the state's exercise of jurisdiction over the business transactions the corporation conducts within the state.[76] Under the agency theory, the presence of a human being conducting business on the corporation's behalf within the state may establish the corporation's physical presence in the state.[77] Because the act of transacting business within a state is the deciding factor under either theory, they came to be subsumed under the general theory that a state has jurisdiction over any company that is "doing business" in the state.[78]

International Shoe Co. v. Washington[79] eliminated the consent and physical presence requirements altogether.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it such that the

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72. *Id.* at 722, 724.

73. *See, e.g.*, *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019); Christine M. Kailus, *Diversity Jurisdiction and Unincorporated Businesses: Collapsing the Doctrinal Wall*, 2007 U. ILL. L. REV. 1543, 1545.

74. "[T]he corporation . . . dwell[s] in the place of its creation." Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839). "[I]t must live and have its being in that state . . . ." *Id.*

75. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 355 (1882).

76. *Id.* at 356; Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404, 407–8 (1855).

77. Int'l Harvester Co. of America v. Kentucky, 234 U.S. 579, 586 (1914).

78. Gary W. Westerberg, Case Note, 36 J. AIR L. & COM. 346, 347 (1970).

79. 326 U.S. 310 (1945).

> maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[80]

This rule, known as the "minimum contacts" test, means that a state may exercise power over a business that has no physical presence if the business has "purposefully availed itself of the privilege of conducting activities within the forum State" such that the business "should reasonably anticipate being haled into court there."[81] In the sales and use tax context, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[82]

It was established very early on that the connection ("nexus") the Due Process Clause mandates does not require physical presence.[83] *Bellas Hess* seemed to mark a retreat from this position. This case involved Due Process and Commerce Clause challenges to the constitutionality of state taxes on sales by an out-of-state mail-order company to residents of the state.[84] The company's only contacts with the state were by mail and common carrier; it had no physical presence there.[85] Asserting that analysis of the issues under the Due Process and Commerce Clauses is essentially the same,[86] the Court held that the imposition of tax obligations on a mail-order company is unconstitutional when the company's only contacts with the state are by mail and common carrier.[87] The Court insisted that a "sharp distinction" must be maintained between mail-order companies with retail outlets, solicitors, or property within a State and those that "do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."[88] Because the Court did not distinguish between the Due Process and Commerce Clauses in reaching its decision, the case seemed to stand for the

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80. *Id*. at 316 (citations omitted).

81. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

82. Miller Brothers Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

83. *See, e.g.*, Scripto Inc. v. Carson, 362 U.S. 207 (1960) (holding that a company's use of sales solicitors in another state may support tax jurisdiction over a company even if the solicitors are independent contractors and not agents or employees of the company).

84. Nat'l Bellas Hess v. Ill. Dep't of Revenue, 386 U.S. 753, 756 (1967).

85. *Id*. at 754.

86. *Id*. at 756.

87. *Id*. at 758, 760.

88. *Id*. at 758.

proposition that both the Due Process and Commerce Clauses require some sort of physical presence in the state in order to support a state's imposition of sales or use tax obligations.

In *Quill*, the Court acknowledged that it had erroneously conflated Due Process and Commerce Clause analysis in *Bellas Hess*.[89] While reaffirming the holding in *Bellas Hess* to the extent it rested on the Commerce Clause, the Court overruled it to the extent it rested on the Due Process clause.[90] Quill Corp. was a mail- and phone-order marketer of office and business supplies whose only contacts with the state of North Dakota were by mail and common carrier. Like National Bellas Hess, Quill Corp. argued that a state could not constitutionally impose taxes on sales to residents that are made by a mail-order company with no physical presence there. The North Dakota Supreme Court sustained the tax, holding that *Bellas Hess* had become obsolete.[91] The United States Supreme Court reversed. The Court clarified that there is no Due Process Clause violation if the business sought to be taxed has had minimum contacts with the state such that the imposition of the tax does not offend traditional notions of fair play and substantial justice.[92] So long as a company's sales efforts are purposefully directed toward residents of a state, physical presence in the state is not necessary insofar as the Due Process Clause is concerned.[93] Irrespective of physical presence, a business that purposefully avails itself of the benefits of an economic market in another state has "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign."[94] Consequently, there is nothing unfair about imposing tax obligations on an out-of-state seller that "purposefully avails itself of the benefits of an economic market in the forum State."[95]

In the absence of physical presence or consent, a state may not exercise jurisdiction over an out-of-state company with respect to a claim that is unrelated to the company's contacts with the state unless the company has continuous or systematic contacts with the state.[96]

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89. Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) ("The two constitutional requirements differ fundamentally.").

90. *Id*. at 308, 314, 317–18..

91. *Id*. at 303–4, 310.

92. *Id*. at 307.

93. *Id*. at 308; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

94. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

95. *Quill*, 504 U.S. at 307.

96. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

This may be the source of the idea that systematic and/or continuous contacts with a state are essential to a state's Due Process authority to impose a sales or use tax on an out-of-state merchant. It must be kept in mind, however, that contacts only need to be "continuous or systematic" when the claim in question is unrelated to the contact with the state upon which jurisdiction is predicated.[97] If contact with the state is continuous and systematic, then a court may exercise jurisdiction whether the claim relates to or arises out of a particular contact or not.[98] An exercise of jurisdiction may nevertheless be appropriate, however, even if a company's contacts with the state are not continuous and systematic. The fact that the claim in question in a particular case relates to or arises out of a contact the company has had with the state may suffice. Sometimes even a single contact may suffice if it is related to the claim that is being asserted against the company.[99] When a state only seeks to impose tax obligations for sales to which the tax directly relates, the state's exercise of jurisdiction is directly related to the contact with the state. Since there is a direct connection between a sale and a tax on the same sale, proof of continuous or systematic contacts with the state should not be necessary. The sale to which the tax relates is the minimum contact that provides the necessary Due Process nexus.

The rationale for the "purposeful availment" principle is that if a merchant knowingly and intentionally sells a product or service to a resident of a different state, then it should come as no surprise if the taxing authority in that state requires out-of-state merchants to collect and remit the same tax on the sale that a local merchant is required to collect and remit. There is nothing unfair about requiring interstate

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97. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); *see also* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 414, 414–16 (1984) (requiring "continuous and systematic" contacts where the parties had conceded that the case did not arise out of and was not related to contacts with the forum state).

98. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445–46 (19523). This is known as *general* jurisdiction. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81.

99. *McGee*, 355 U.S. 220; *cf.* Hess v. Pawloski, 274 U.S. 352 (1927) (upholding a state's exercise of jurisdiction over a nonresident individual who was involved in an automobile accident while driving on the state's roads, where the claim arose out of the accident). This is known as *specific* jurisdiction. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1148 (1966); *see also Helicopteros*, 466 U.S. at 414–16.

commerce to pay its fair share of taxes.[100]

Unless a merchant has a physical presence in the taxing state or has consented to the state's exercise of jurisdiction, the Due Process issue in sales and use tax cases is whether the merchant intended to direct a sale to a resident of the state. If so, then a Due Process nexus exists.

III. THE INADEQUACY OF VOLUME THRESHOLDS

Declaring the existence of constitutionally mandated volume thresholds, revenue thresholds, or both, without specifying what they are is problematic. How are courts to decide what volume or dollar amount is the appropriate threshold? South Dakota selected $100,000 or 200 sales, but another state might specify $20,000 and 100 sales, $1,000 and 90 sales, $100 and 10 sales, or $10 and 1 sale. Without a foundation in principle, the economic nexus test is entirely arbitrary.

The rationale for volume thresholds is that requiring small businesses to comply with multiple state tax obligations would be burdensome.[101] There are roughly 10,000 sales and use tax jurisdictions in the United States, each with the capacity to specify its own tax base and rate.[102] Complying with all of these regulations would be burdensome. That much is obvious. The more difficult question is whether it would be *unduly* so.

To be grounded in the Commerce Clause, the term *undue* needs to be construed with reference to its purpose, namely, to prevent states from either discriminating against interstate commerce or enacting laws that have the effect of favoring intrastate commerce over interstate commerce.[103] Every tax is a burden on taxpayers. The burden is of constitutional significance only if it is heavier for merchants engaged in interstate commerce than for local merchants.[104]

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100. D. H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988); *see also* Commonwealth Edison Co. v. Mont., 453 U.S. 609, 623 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden.")

101. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103 (2018) (Roberts, C.J., dissenting).

102. *Id*.

103. *See* discussion *supra* Part II.A.

104. *Wayfair*, 138 S. Ct. at 2099 (majority opinion) ("[S]ince in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided.") A state law violates the Commerce Clause if it mandates "differential

Complying with multiple tax obligations can be as burdensome for wholly intrastate businesses as for interstate businesses. The 10,000 taxing jurisdictions in which merchants are potentially subject to collection and remittance obligations are not evenly distributed throughout the country. Iowa, for example, is a destination-based sales tax state[105] with 994 different sales tax jurisdictions.[106] Both the interstate and the wholly intrastate state merchant may potentially need to comply with 994 sets of tax regulations. If they both make the same kinds of sales to the same customers in the same parts of the state, their compliance burdens will be identical, regardless of whether they each make 200 sales and earn revenues of $100,000 or they make only one $1 sale. Volume of sales or revenue is no better proxy for the burden of compliance than physical presence.

Moreover, limiting economic nexus to companies with the requisite "large" volume of sales and/or revenue from sales in a state will still give many interstate merchants a competitive advantage over local merchants. To see this, consider the following scenario (assume Wyoming has established volume/revenue thresholds like South Dakota's):

> For years Bob, a Wyoming retailer, has made a living selling lawn tractors out of his store to Wyoming residents. He charges $2,000 plus $50 shipping and $150 sales tax, for a total of $2,200. This year, several dozen out-of-state companies established internet websites where they offer the same tractor for the same price but without charging sales or use taxes to Wyoming residents. Presented with an opportunity to

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treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Ore. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 99 (1994); *see also* New Energy Co. v. Limbach, 486 U.S. 269, 274 (1988). "The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." Granholm v. Heald, 544 U.S. 460, 476 (2005); *see also* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

105. Destination sales taxes are taxes that are calculated at the rate in effect in the jurisdiction whether the buyer is located. Origin sales taxes are calculated at the rate in effect where the seller is located. Mark Faggiano, *Origin-Based and Destination-Based Sales Tax Collection 101*, TAXJAR (Sept. 5, 2017), https://blog.taxjar.com/charging-sales-tax-rates/

106. Joseph Bishop-Henchman & Richard Borean, *State Sales Tax Jurisdictions Approach 10,000*, TAX FOUNDATION (Mar. 24, 2014), https://taxfoundation.org/state-sales-tax-jurisdictions-approach-10000.

> save $150, every person in Wyoming who buys a lawn tractor this year purchases it online and not from Bob. Although Wyoming residents bought hundreds of lawn tractors this year, no single online retailer sold more than 100 tractors or earned more than $100,000 from sales to Wyoming residents. Not having individually met the state's "high volume or revenue" use tax thresholds, none of these businesses needs to collect and remit any taxes on these sales. Meanwhile Bob, having made no sales due to the ability of online retailers to undersell him by virtue of being tax-exempt, goes out of business.

Just as the physical presence requirement puts intrastate merchants at a competitive disadvantage, so volume- and revenue-thresholds for use tax liability put intrastate merchants at a competitive disadvantage.

In his dissenting opinion in *Bellas Hess*, Justice Fortas suggested that "large-scale, systematic, continuous solicitation and exploitation" of a consumer market furnishes the requisite economic nexus to justify the imposition of tax obligations on out-of-state retailers.[107] As has been shown, large sales volume is a poor proxy for the compliance burden. "Systematic" and "continuous" are not any better. An individual who makes a single multi-million-dollar sale to a resident of a state could not be said to be engaged in "systematic and continuous" sales in the state, yet requiring the collection of sales or use tax on this sale would be no more burdensome for the merchant than it would be for a local merchant. "Solicitation" should not suffice as a basis for imposing a tax, either.[108] The only term Justice Fortas mentioned that might possibly suffice is "exploitation."[109]

Exploit can mean different things. It can mean "to make use of meanly or unfairly for one's own advantage."[110] Of course, a person's

107. Nat'l Bellas Hess v. Ill. Dep't of Revenue, 386 U.S., 753, 761–62 (1967) (Fortas, J., dissenting).

108. *Cf.* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997) (establishing a sliding scale for Due Process nexus purposes, with websites that merely solicit customers through advertising having no nexus with the state, and those that are used for actually conducting business, such as entering into a sales contract, having a nexus).

109. *Bellas Hess*, 386 U.S. at 761–62 (Fortas, J., dissenting).

110. *Exploit*, MERRIAM WEBSTER DICTIONARY ONLINE, http://www.merrian-webster.com/dictionary/exploit (last visited October 23, 2019).

mean or selfish disposition does not provide a constitutional basis for state tax powers. If it did, then every taxing authority in the country would have constitutional authority to tax people in every state irrespective of any retailer's physical presence or transaction of business there. *Exploit* can also refer to making productive use of something.[111] Making use of a market means using the market to acquire value. A business that makes productive use of a market is availing itself of the privilege of carrying on business in the market. That is the relevant nexus.[112]

It is well established that a sale has a sufficient nexus with the state in which it occurs to be taxable by that state.[113] Provided it does not result in multiple taxation, a tax may be imposed even if the seller is located outside the state.[114] "It [is] not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[115]

High sales or revenue volume is a poor proxy, as well, for the "purposeful availment" the Due Process Clause requires when a merchant neither consents to jurisdiction nor has any physical presence in a state. A vendor that uses an online marketplace to sell products might intend to sell only to residents of the state in which the vendor is located. It might even display a notice on its web page that sales are restricted exclusively to residents of the vendor's state. If the vendor is selling digital downloads, neither the vendor nor the online marketplace provider may ever know which states the computers onto which files are downloaded are located. In these circumstances, it would make no difference whether the vendor sold thousands of downloads or only one. In neither case would a sale have been knowingly or intentionally made to a buyer in a particular state.

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111. *Id.*

112. A "nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

113. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995); Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938) (rejecting the claim that the "mere formation of the contract between persons in different states" is not sufficient for purposes of tax nexus); *see also* 2 C. TROST & P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2d § 11:1, p. 471 (2003) ("Generally speaking, a sale is attributable to its destination.")

114. *Western Live Stock*, 303 U.S. at 254.

115. *Id.*

Meanwhile, a vendor who makes only one sale, a $99,999 item that he sells to a buyer whom he knows resides in a particular state, is knowingly and intentionally availing himself of the consumer market in that state despite the fact that the sale is below a "$100,000 or 200 sales" threshold. High sales/revenue volume is no better proxy for purposeful availment than it is for the compliance burden.

IV. LEGISLATIVE PROPOSALS

Of course, there can be no real doubt that sales and use taxes burden both interstate and intrastate commerce. There can also be little doubt that the prospect of multiple use tax obligations in multiple jurisdictions, all of which determine their own bases and rates, may deter companies from conducting sales in more than a handful of jurisdictions. If physical presence and volume thresholds are not viable limitations on state power to tax interstate sales, then what can be done to foster interstate commerce without at the same time disadvantaging wholly intrastate businesses?

A. The Streamlined Sales and Use Tax Agreement

After *Quill* was decided, the National Governor's Association and the National Conference of State Legislatures created a Streamlined Sales and Use Tax Project. The goal was to simplify state sales and use tax collection to reduce the burden on interstate commerce. The result of this work was the Streamlined Sales and Use Tax Agreement (SSUTA).[116] Among other things, the SSUTA calls for participating states to administer state and local taxes at the state level, rather than requiring businesses to remit taxes to individual local taxing jurisdictions.[117] It also attempts to standardize state and local tax bases, rates, and definitions, in order to engender more uniformity among state and local tax laws.[118] Simplified administration, returns, remittance and other procedures are also part of the program.[119]

A downside to the SSUTA is that it does not prevent states from adopting volume and/or revenue thresholds. As has been seen, these

116. STREAMLINED SALES TAX GOVERNING BD., STATE GUIDE TO THE STREAMLINED SALES TAX PROJECT 3 (2019), https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project-2019-03-01.pdf,

117. *Id.* at 5.

118. *Id.* at 5–6.

119. *Id.*

features can produce inequitable results and they continue to put local businesses at a competitive disadvantage relative to interstate merchants. Further, allowing states to define their own volume and revenue thresholds increases the complexity of the matrix of state and local sales and use taxes. This is not consistent with the goals of simplification and uniformity.

A more fundamental drawback to the SSUTA is that it is entirely voluntary. However commendable its objectives may be, the success of the program depends entirely on voluntary state cooperation. To date, only twenty-four states are full SSUTA members.[120] The top six sales tax collection states by population—California, Florida, Illinois, New York, Pennsylvania, and Texas—have not signed on.[121]

B. Federal Legislation

Congress may enact legislation regulating interstate commerce, and where it has done so, the legislation controls.[122] So long as it does not overstep Due Process limitations, Congress may at any time replace judicially created rules regulating interstate commerce with rules of its own making.[123] With that in mind, several proposals for congressional legislation have been advanced since *Wayfair* to lessen the burden of multiple state and local sales and use tax obligations on interstate commerce.

1. Restoring the Physical Presence Requirement

One way to lighten the burden on interstate merchants would be to reinstate the physical presence requirement. Congress could legislatively overrule *Wayfair*. This is the objective of a pending bill for a Stop Taxing Our Potential Act.[124] Next to leaving states with revenue shortfalls, the most significant drawback to this approach is that it would return wholly intrastate businesses to their position of competitive disadvantage relative to interstate merchants.

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120. *See State Information*, STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/Shared-Pages/State-Detail.(last visited October 26, 2019).

121. *Id*.

122. S. Pac. Co. v. Arizona *ex rel*. Sullivan, 325 U. S. 761, 769 (1945).

123. *See* Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 424–25 (1946)

124. S. 128, 116th Cong., 1st Sess. (2019).

2. Small Business Exemption

Another approach that Congress could take would be to federalize volume thresholds. H.R. 6824[125] was an example of this approach. It would have prohibited states from imposing tax collection obligations on out-of-state sellers with under $10 million gross annual revenues until the states enter into a congressionally approved sales and use tax compact.

Any legislation establishing volume thresholds, of course, will be vulnerable to a Due Process challenge unless it excludes the possibility that tax collection obligations may be imposed on vendors who have not purposefully availed themselves of a consumer market in the taxing jurisdiction. Accordingly, the legislation should address the phenomenon of vendors selling digital downloads through an automated third-party online marketplace provider.[126] Even if the legislation is drafted in a way that addresses that concern, a federally imposed volume threshold will still yield the same inequities that state-imposed volume thresholds do.[127] Moreover, setting the threshold at $10 million will put wholly intrastate businesses at a competitive disadvantage relative to all but a few interstate businesses.

3. Retroactive Enforcement

Several bills prohibiting retroactive enforcement of sales and use taxes against businesses lacking a physical presence in a state have been introduced.[128] So far, none have been passed.

4. Simplification, Centralization, Uniformity

One promising approach is to require states that wish to impose tax collection obligations on out-of-state merchants to enact simplified, uniform sales and use tax laws that provide for centralized collection. The proposed Protecting Businesses from Burdensome Compliance Costs Act of 2019[129] is an example. It would prohibit a

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125. 115th Cong., 2d Sess. (2018); *see also* S.B. 3725, 115th Cong. (2018), which also would have established an exemption for remote sellers with less than $10 million gross annual revenues.

126. *See* discussion *supra* Part II.B.

127. *See* discussion *supra* Part III.

128. *See, e.g.*, Protecting Businesses from Burdensome Compliance Cost Act of 2018, H.R. 6724, 115th Cong., 2nd Sess. (2018).

129. H.R. 369, 116th Cong. 1st Sess. (2019).

state from imposing a tax collection obligation on a remote seller that lacks a physical presence in the state unless the state has established a uniform sales tax rate and a centralized collections system.[130] Local taxes, if any, would need to be collected through the state's centralized collections system, as opposed to requiring remote sellers to remit payments to each of the potentially thousands of local taxing jurisdictions individually.[131] The state sales and use tax rate would be uniform throughout the state, and the combined state and local tax would be the same for both remote and local sellers.[132]

Because it does not simply call for reinstating the physical presence requirement, and does not impose volume or revenue thresholds, this bill is fairer to local businesses and better serves state revenue-raising interests than other proposals. The requirement of centralized collection and disbursement of state and local taxes should benefit both interstate and wholly intrastate businesses, without operating to the advantage or disadvantage of either.

The bill could be improved by requiring states to make available a free software program, or at least a publicly accessible web page merchants and/or buyers could use to calculate sales or use tax at the time of sale. Ideally the web page or program would correlate a purchaser's zip code to the appropriate state and local sales tax rate on the purchase. This would involve some cost. The costs, however, would be offset, in whole or at least in part, by increased compliance with sales and use tax collection and remittance obligations.

V. CONCLUSION

The Commerce Clause generally should not present an obstacle to a state's imposition of the same sales or use tax obligations on out-of-state merchants as are imposed on wholly intrastate merchants. It should only be a problem if an out-of-state seller would incur greater compliance costs than an intrastate seller would incur for the same number, amount and kinds of sales in the state. Whether a merchant has low or high sales volume or revenues, a sufficient nexus may exist for the imposition of a tax collection obligation if a merchant has purposefully availed itself of the consumer market in that state by knowingly or intentionally making an actual sale to a resident of the state.

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130. *Id.*
131. *Id.*
132. *Id.*

Neither physical presence nor high sales volume or revenue thresholds are adequate proxies for either purposeful availment or substantial nexus. The time is ripe for Congress to exercise its Commerce Clause power to ameliorate the burden on commerce that state and local sales and use taxes impose. Proposals to legislatively overrule *Wayfair* by reinstating the physical presence requirement, or to establish a national volume threshold, are unsound. Federal legislation mandating simplicity, centralization of administration and collection, and greater uniformity is a more promising approach. Coupled with accessible tax calculation software or web-based resources keyed to zip codes, this approach would accommodate state revenue interests while facilitating commerce in a way that does not disadvantage either interstate or intrastate commerce, thereby coming closer to realizing the Founders' vision of a coalition of individual states working together as one nation.