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Cover Page Footnote

Ethan T. Kirner is a Class of 2019 Juris Doctor Candidate at DePaul University College of Law and Executive Editor of the DePaul Business and Commercial Law Journal. He earned a B.A., cum laude, in Accounting and Finance from Carthage College in 2016. He would like to thank his parents, Scott and Debbie Kirner, for their guidance throughout his academic career. He would also like to thank Emily Miller for her helpful comments and moral support.

The Overturning of Quill and the New Nexus Standard

*Ethan T. Kirner**

I. INTRODUCTION

Online retailers such as Amazon.com, Inc. (“Amazon”) consistently battle with state governments over the collection of sales and use tax. Although Amazon has historically not collected tax on its sales since its founding in 1995, it decided in early 2017 to collect taxes in the forty-five states that currently have a sales tax.¹ This, however, did not end the problem because there is a loophole that Amazon has been able to use to its benefit. Amazon currently only collects tax on sales of inventory in which it owns, otherwise known as first-party sales.² First-party sales make up over half of the goods sold on Amazon.³ The other half of Amazon’s sales are from merchandise owned by other sellers, which are known as third-party sales.⁴ There are two million merchants that use Amazon as a platform to make their sales.⁵ Amazon leaves the responsibility of collecting the tax on the millions of individual merchants, but many of them are unaware of this requirement and therefore, the tax is left uncollected.⁶

Third-party sellers that have been eluding the collection of sales tax on their transactions have been given a significant price advantage, as much as 10% in certain cases, over brick-and-mortar retailers and products that are directly owned and sold by Amazon.⁷ In looking to find additional revenue to make up for significant deficits, many states

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1. Wolf Richter, *A Key Advantage Amazon Has Over Walmart is Doomed*, BUS. INSIDER (Oct. 10, 2017), <http://www.businessinsider.com/amazon-sales-tax-walmart-2017-10>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Nick Wingfield, *Amazon Sellers Brood as States Come Calling for Taxes*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/technology/amazon-sales-tax.html>.

7. Laura Stevens, *Next Target for States Seeking to Collect Sales Taxes: Sellers on Amazon*, WALL ST. J. (Mar. 30, 2017), <https://www.wsj.com/articles/next-target-for-states-seeking-to-collect-sales-taxes-sellers-on-amazon-1490866207>.

would like to rely upon the collection of tax from many of these e-commerce sales that take place over online marketplaces such as Amazon. To give an idea of how much money states lose every year, the National Conference of State Legislatures estimates that states lost out on \$17.2 billion in revenue in 2016 because they were unable to collect sales tax on many online sales.⁸ In efforts to try and recover some of this lost revenue, many states have sought or are considering measures that aim to force companies like Amazon and eBay to start collecting tax on its third-party remote sellers.⁹ There is much criticism surrounding this issue, which stems from the belief that new tax collection requirements on third-party remote sellers located outside the state will likely create logistical headaches. These logistical issues occur because the parties effected are often small businesses that are not always able to track where their goods are held and sold.¹⁰

One of the reasons why states have struggled with this issue stems from a Supreme Court case, *Quill Corp. v. North Dakota*, which disallowed states from forcing companies to collect sales taxes if a company did not have a physical presence in the state.¹¹ Because Amazon has built many distribution centers and warehouses throughout the country in an attempt to allow its customers to save money and receive quicker shipping, Amazon has developed a physical presence in many states. This has prompted Amazon to start collecting sales tax in those states under the physical presence doctrine which was affirmed in *Quill*.¹² However, because the e-commerce marketplace and various selling platforms available today could not have been predicted by the Supreme Court in 1992, the problem of how to treat third party remote sellers who do not have a physical presence in the states in which they sell still remains.

This article will discuss: the legal history behind sales tax on mail-order and e-commerce platforms; the history of Amazon and their sales tax issues with states; the recent efforts by states to close the sales tax loophole that Amazon and other e-retailers have taken advantage of; and the impact states' efforts will have on smaller businesses who use Amazon and other e-retail platforms for their businesses. One of the main questions that will need to be addressed is whether the benefits of added state revenues outweigh the negative

8. Richter, *supra* note 1.

9. Stevens, *supra* note 7.

10. Richter, *supra* note 1.

11. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

12. Richter, *supra* note 1.

externalities that small businesses may face if forced to collect the tax on their own.

Section II will discuss sales tax history and the cases that have shaped sales tax law. Section III will discuss the growth of the online market, particularly Amazon. Section IV will discuss responses from the states. Section V will discuss federal legislative efforts. Section VI will discuss the efforts of overturning the *Quill* decision. Finally, Section VII will discuss the ramifications of overturning the physical presence doctrine established in *Quill*.

II. RELEVANT CASE LAW

There is no federal sales tax in the United States, rather each state creates its own sales tax laws. Currently, forty-five states and the District of Columbia levy general sales taxes to all goods and certain services, each with varying rates and exceptions on certain items.¹³ When a state seeks to implement a sales tax there are constitutional requirements that must be met relating to the Due Process Clause and the Commerce Clause. First, under the Fourteenth Amendment of the U.S. Constitution, no state shall “deprive any person of life, liberty, or property, without due process of law”.¹⁴ The Supreme Court has interpreted the Due Process Clause to mean that states are prohibited from taxing a corporation unless there is a “minimal connection” between the company and the state in which it operates.¹⁵ Second, under the Commerce Clause of the U.S. Constitution, Congress is authorized to “regulate commerce with foreign nations, and among several States.”¹⁶ The Supreme Court has interpreted the Commerce Clause to mean that states are prohibited from enacting laws that might unduly burden or inhibit the free flow of commerce between the states.¹⁷ In summary, the Due Process Clause requires a definitive link or minimum connection between the state and the transactions that it seeks to tax.¹⁸ The Commerce Clause requires a higher level of connection that includes a substantial presence in the

13. *How to State and Local Taxes Work?*, TAX POLICY CTR., <http://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-sales-taxes-work> (last visited Dec. 21, 2017).

14. U.S. CONST. amend. XIV, § 1.

15. Monika Miles, *Commerce Clause, Due Process and Quill Corp*, SALES TAX SUPPORT, <http://www.salestaxsupport.com/sales-tax-information/sales-tax-101/commerce-clause-due-process-and-quill-corp/> (last visited Dec. 21, 2017).

16. U.S. CONST. art. I, § 8, cl. 3.

17. Miles, *supra* note 15.

18. *What is Nexus?*, SALES TAX INST., www.salestaxinstitute.com/Sales_Tax_FAQs/What_is_nexus (last visited Jan. 2, 2018).

taxing state.¹⁹ Over the years, the Supreme Court has shaped the interpretation of these requirements and their application to sales taxes.²⁰

As applied to taxation, the Supreme Court ruled in *Complete Auto Transit, Inc. v. Brady* that the taxpayer must have substantial nexus with the taxing state in order for the state to impose a tax.²¹ *Complete Auto* established that the Court will sustain a tax so long as the tax (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services that the state provides.²² Since *Complete Auto*, the Supreme Court has required that a taxpayer have a physical presence in a state in order to be required to collect and remit state sales or use tax. In e-commerce, the state where the buyer takes possession of the item is considered the location of the sale.²³ With regard to online retailers, this means that a state cannot require them to collect sales tax unless the online retailer has a physical presence in the state, such as an office, an employee, or a warehouse.²⁴ The sufficient nexus approach was further developed through a series of Supreme Court cases that were decided long before the rapid development of the e-commerce market. With the emergence and dominance of the internet and e-commerce platforms, states have implemented or proposed legislation going directly against Supreme Court precedent. Through their efforts, the Supreme Court has since reevaluated the law and overturned the physical presence doctrine which was established and affirmed through the following cases.

A. *Scripto, Inc. v. Carson*

In *Scripto, Inc. v. Carson*, the Supreme Court decided whether a Georgia retailer, that did not have offices located in Florida, was required to collect tax on sales made in Florida.²⁵ *Scripto* did not have a physical office in the state, but it would solicit orders from customers in Florida by using specialty brokers that it employed as independent

19. *Id.*

20. *Id.*

21. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

22. *Id.* at 279.

23. Jennifer Dunn, *Should You Use Billing Addressor Shipping Address When Calculating Sales Tax?*, TAXJAR (May 9, 2016), <https://blog.taxjar.com/use-billing-address-shipping-address-calculating-sales-tax/>.

24. *Sales Tax Guide For eCommerce Sellers*, TAXJAR (June 14, 2016), <https://www.taxjar.com/guides/intro-to-sales-tax/#determining-sales-tax-nexus>.

25. *Scripto, Inc. v. Carson*, 362 U.S. 207, 208-09 (1960).

contractors who were Florida residents.²⁶ Because of these brokers' activities in the state, Florida ordered Scripto to register as a dealer under its state tax statute. Scripto challenged the statute as unconstitutional by claiming that it violated the Due Process Clause and unjustly burdened interstate commerce.²⁷

The Court held that Scripto's use of specialty brokers in Florida was sufficient to subject them to tax collection.²⁸ The Court recognized that even though the specialty brokers were not actual employees of Scripto, the distinction between an employee and an independent contractor was constitutionally insignificant in determining whether or not the physical presence requirements were met to impose a tax.²⁹ Justice Clark argued that if the Court were to allow this distinction, it would open up the flood gates for tax avoidance techniques.³⁰ According to the Court, the functional reality was that Scripto had a real presence in Florida and had purposefully reached out through their brokers, even though they were not employees of the company.³¹ *Scripto* ultimately established that when the Supreme Court is discussing tax cases under the Due Process and Commerce Clause, it will care more about the function or substance of the presence rather than the form.³² The Court next addressed the nexus requirement issue for sales tax seven years later regarding a mail-order company.

B. *National Bellas Hess, Inc. v. Department of Revenue of Illinois*

In a 1967 case, *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, the Supreme Court addressed whether a mail-order company was required to collect taxes in the states in which it sold products in.³³ In *Bellas Hess*, the Court held the Illinois Department of Revenue did not have the power to collect sales taxes from residents of Illinois in which Bellas Hess sold products because Bellas Hess did not have a distribution center, warehouse, office, or sales representative in the state.³⁴

26. *Id.*

27. *Id.* at 207-08.

28. *Id.* at 211-12.

29. *Scripto, Inc.*, 362 U.S. at 211.

30. *Id.*

31. Chris Atkins, *Important Tax Cases: Scripto v. Carson and the Agency Theory of Nexus*, TAX FOUND. (Aug. 25, 2005), <https://taxfoundation.org/important-tax-cases-scripto-v-carson-and-agency-theory-nexus/>.

32. *Id.*

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

34. *Id.* at 760.

Bellas Hess was a mail order company that was only licensed to do business in Delaware and Missouri.³⁵ Further, it did not employ a sales person or agent within Illinois.³⁶ In contrast, Illinois argued that by sending advertising flyers and catalogues to past, present, and potential customers in Illinois, Bellas Hess was subject to tax in that state.³⁷ Bellas Hess claimed that by requiring it to be subject to its taxing authority, Illinois violated the Due Process Clause and unconstitutionally burdened interstate commerce.³⁸ The Court found that the minimal advertising was insignificant and insufficient to hold Bellas Hess liable for collection of the tax because the only contacts that Bellas Hess had with Illinois was through common carrier or U.S. mail.³⁹ The physical presence doctrine was ultimately affirmed twenty-five years later in a case that became the main law on the sales tax subject until it was overturned by the Supreme Court in 2018.

C. *Quill Corp. v. North Dakota*

The Court revisited the sufficient nexus issue twenty-five years later in its 1992 decision *Quill Corp. v. North Dakota*.⁴⁰ The Supreme Court held that a physical presence is required to impose sales and use taxes on out-of-state, or remote sellers.⁴¹ In *Quill*, North Dakota attempted to tax Quill, a Delaware company that shipped office equipment and supplies to customers in North Dakota.⁴² Quill did not have any offices, warehouses, or employees in North Dakota. Quill did, however, solicit sales from customers in North Dakota through catalogs and advertisements, and all of its deliveries were done by mail or common carrier.⁴³

A North Dakota statute required retailers who solicited in the state to collect sales taxes from sales to North Dakota customers and remit the taxes back to the state.⁴⁴ Quill refused to pay the taxes after North Dakota filed an action in state court, which compelled Quill to pay taxes on sales made to North Dakota residents. Quill contended the North Dakota statute violated the Due Process and the Com-

35. *Id.* at 753-54.

36. *Id.*

37. *Id.* at 755.

38. *Nat'l Bellas Hess*, 386 U.S. at 756.

39. *Id.*

40. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

41. *Id.* at 317.

42. *Id.* at 302.

43. *Id.*

44. *Id.* at 302-03.

merce Clause because Quill had not established sufficient nexus within the state.⁴⁵

The Court held a substantial nexus between North Dakota and Quill did not exist in order to justify the collection of the tax.⁴⁶ In particular, the Court determined due process may be satisfied even if the entity is not present physically in the state.⁴⁷ This means “if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s personal jurisdiction even if it has no physical presence in the State.”⁴⁸ Therefore, the Court held Quill’s advertising activities sufficiently met the Due Process Clause nexus requirement.⁴⁹ Under the Commerce Clause requirement, however, a corporation’s requirement to collect tax does not turn on minimum contacts as it does under the Due Process Clause. Instead, it turns on an actual physical presence in the taxing state.⁵⁰ Therefore, because Quill did not have a physical presence in the state such as a sales force, plant, or office, it failed the physical presence test under the Commerce Clause. Thus, Quill also ultimately failed the substantial nexus requirements that would be needed for North Dakota to collect the tax.⁵¹

This decision affirmed the decision in *Bellas Hess* where the Court upheld that substantial nexus exists only where there is a non-trivial physical presence in the state. Today, after serving as Supreme Court precedent for twenty-five years, the *Quill* decision is no longer good law. After much controversy surrounding the decision given the rapid advancement in e-commerce, many states have passed legislation that defies the *Quill* decision by requiring a business to collect tax on their sales, even if the person or business has no physical presence in the state. Through these state efforts, the issue was able to make its way back to the Supreme Court in 2018, where the physical presence standard was ultimately overturned. This decision and its ramifications will be discussed later in this article. Advancements in the e-commerce market, particularly those of Amazon, likely had the greatest influence over the physical presence doctrine’s upheaval.

45. *Quill Corp.*, 504 U.S. at 303.

46. *Id.* at 318.

47. *Id.* at 307.

48. *Id.* at 307-08 (quoting *Burger King v. Rudzewics*, 471 U.S. 462, 476 (1985): “So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction here.”).

49. *Id.* at 308.

50. *Quill Corp.*, 504 U.S. at 315.

51. *Id.* at 314-15.

III. THE GROWTH OF AMAZON AND THE ONLINE MARKET

As previously discussed, *Quill* had been the standard for mail-order retailers and companies that operate over the internet for many years. When *Quill* was decided, the internet was not as advanced as it is today. The *Quill* decision was certainly influential in the creation of Amazon.⁵² Exploiting the sales-tax loophole that was created in *Quill* was definitely on the mind of Jeff Bezos, the founder of Amazon, when he started the company in 1995, three years after *Quill* reaffirmed the physical presence doctrine.⁵³ Bezos knew that a physical location would be crucial to the success of his online business.⁵⁴ In discussing his rationale for an initial headquarters for Amazon, Bezos stated:

In the mail-order business, you have to charge sales tax to customers who live in any state where you have a business presence. It made no sense for us to be in California or New York. . . I even investigated whether we could set up Amazon.com on an Indian reservation near San Francisco. This way we could have access to all the talent without all the tax consequences.⁵⁵

Taking sales tax considerations in mind, and eventually deciding on a headquarters located in Seattle, Bezos allowed early customers to avoid state and local taxes that amounted to pricing advantages in the retail market of as much as 10%.⁵⁶ To take advantage of the physical presence loophole in *Quill*, Amazon located its early fulfillment centers in states with a small population or no sales tax.⁵⁷ This allowed Amazon to enjoy a competitive advantage over physical retailers because it was able to keep its prices lower compared to brick and mortar retailers such as Wal-Mart and Best Buy.⁵⁸

Since 2011, however, Amazon has begun to focus more extensively on providing the fastest possible delivery system to its customers, and less on reducing its physical presence.⁵⁹ In order to make delivery times as fast as possible, Amazon has established a physical presence in many states by building fulfillment centers close to almost every

52. Peter Elkind and Doris Burke, *Amazon's (Not So Secret) War on Taxes*, FORTUNE (May 23, 2013), <http://fortune.com/2013/05/23/amazons-not-so-secret-war-on-taxes/>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Emel Akan, *The Tax Loophole Behind Amazon's Rapid Growth*, THE EPOCH TIMES (Feb. 23, 2017), https://www.theepochtimes.com/the-mystery-behind-amazons-low-prices-2_2225327.html.

58. *Id.*

59. *Id.*

major U.S. city.⁶⁰ Through its expansion, Amazon may have given up its tax advantage. This expansion strategy, however, has included the company receiving massive tax subsidies from states that allow it to build facilities.⁶¹ States have been willing to give up collecting taxes from Amazon in exchange for Amazon's promise to create jobs through their distribution centers and warehouses.

In 2017, Amazon started the year with a commitment to expand its rapid-delivery business model, and many states offered their support. In less than three months, the company had received \$92 million in tax credits⁶² and exemptions to create warehouses and fulfillment centers in California, Illinois, Kentucky, Maryland and Michigan.⁶³ Some of the more recent deals include \$43 million in tax credits for a facility built in Baltimore, \$32.1 million in tax credits for a facility in Wisconsin, and \$29.5 million in credits for a facility in Illinois.⁶⁴ In rationalizing these tax incentives, Amazon has emphasized its success as a job creator.⁶⁵

Recently, U.S. cities have offered Amazon billions of dollars in tax breaks if it chooses to locate its second headquarters in their city.⁶⁶ Many city officials are excited at the opportunity of Amazon's \$5 billion-plus investment and up to 50,000 new jobs that will come with the company's new headquarters.⁶⁷ In particular, city and state leaders from Illinois have offered incentives of around \$2 billion or more in order for Amazon to call Chicago its next home.⁶⁸ In total, Amazon received 238 bids from various cities⁶⁹ It had ultimately settled on New York City and Virginia to be home to its second headquarters,

60. *Id.*

61. Michael J. Bologna, *Amazon Close to Breaking Wal-Mart Record for Subsidies*, BNA (Mar. 10, 2017), <https://www.bna.com/amazon-close-breaking-n57982085432/>.

62. A tax credit reduces tax liability dollar-for-dollar, as opposed to a tax deduction, which lowers taxable income.

63. Bologna, *supra* note 61.

64. Bologna, *supra* note 61.

65. Bologna, *supra* note 61.

66. Jeffrey Dastin, *Billions in Tax Breaks Offered for Amazon Second Headquarters*, REUTERS (Oct. 19, 2017), <https://www.reuters.com/article/us-amazon-com-headquarters/billions-in-tax-breaks-offered-to-amazon-for-second-headquarters-idUSKBN1CO1IP>.

67. *Id.*

68. Monique Garcia & Bill Ruthhart, *Illinois, Chicago Letter to Amazon: \$2 Billion in Tax Breaks, Maybe More*, CHI. TRIB. (Oct. 24, 2017), <http://www.chicagotribune.com/news/local/politics/ct-met-illinois-amazon-tax-incentives-20171023-story.html>.

69. Nick Wingfield, *Amazon Chooses 20 Finalists for Second Headquarters*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html>.

but has since withdraw its plans on New York City after political pressure from local politicians.⁷⁰

Amazon is no stranger to engaging with governments for tax incentives. Since 2000, Amazon has garnered approximately \$1 billion in subsidies.⁷¹ The growth of Amazon coupled with the shift in consumers turning to the e-commerce market over the last twenty years cannot be understated in its relation to efforts to overturn the physical presence doctrine. The expansion of the e-commerce market, aided in large part by Amazon, has caught the attention of states as well as the current presidential administration.

The retail market's shift from brick-and-mortar stores to the online market is increasingly evident. The U.S. Commerce Department reported that online sales reached \$453.46 billion in 2017, a 16% increase from the previous year.⁷² This is the largest growth since 2011, when online sales grew 17.5% over 2010.⁷³ It should come as no surprise that much of the growth in the online retail market is attributed to Amazon, which accounted for 44% of U.S. e-commerce sales in 2017.⁷⁴ Amazon's e-commerce sales are expected to be up nearly 30% in 2018, resulting in a capture of nearly half of the U.S. e-commerce market.⁷⁵ A large factor in this growth is the result of sales generated from the Amazon marketplace, which are forecasted to be more than 70% of Amazon's overall e-commerce business by the end of 2019.⁷⁶ In 2018, Amazon experienced its most successful holiday season, which included millions of new Prime Memberships and a record breaking number of sales.⁷⁷ Amazon is the leader of the e-commerce marketplace and its dominant share of the market is only increasing with each year. As states struggle to collect tax on e-commerce sales, the growth of Amazon and similar e-commerce market-

70. Lauren Feiner, *Amazon says it will not build a headquarters in New York*, CNBC (Feb. 14, 2019 11:45 AM), <https://www.cnn.com/2019/02/14/amazon-says-it-will-not-build-a-headquarters-in-new-york-after-mounting-opposition-reuters-reports.html>.

71. Pat Garofalo, *Don't Play Amazon's Tax-Break Game*, U.S. NEWS (Sept. 8, 2017), <https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-09-08/dont-give-amazon-tax-breaks-for-its-new-headquarters>.

72. Stefany Zaroban, *US E-commerce sales grow 16.0% in 2017*, DIGITAL COMMERCE 360 (Feb. 16, 2018), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>.

73. *Id.*

74. Lauren Thomas and Courtney Reagan, *Watch out, retailers. This is just how big Amazon is becoming*, CNBC (July 12, 2018, 11:24 AM), <https://www.cnn.com/2018/07/12/amazon-to-take-almost-50-percent-of-us-e-commerce-market-by-years-end.html>.

75. *Id.*

76. *Id.*

77. Dennis Green, *Amazon announces record-breaking holiday sales with more orders than ever*, BUS. INSIDER (Dec. 26, 2018, 8:46 AM), <https://www.businessinsider.com/amazon-holiday-sales-broke-records-company-says-2018-12>.

places has certainly been influential in their efforts to create legislation to address the problem.

Amazon is a drastically different business from when it first began in 1995, and through its rapid expansion and market dominance, it has actually moved towards supporting federal legislation to address the issue of online sales taxation.⁷⁸ The reason for Amazon's support of legislation is likely because Amazon is already required to collect tax in most states because of its warehouses and shipping centers throughout the country.⁷⁹ The legislation that Amazon has supported, however, does not address the loophole that has benefited third-party merchants.

This tax loophole, which many businesses might not know they are taking advantage of, seems to be over.⁸⁰ Commenting on the loophole, Minnesota Senator Roger Chamberlain stated, “[i]t’s a fairness issue. Right now, there’s an unlevel playing field that disadvantages brick-and-mortar stores.”⁸¹ President Trump also commented on the issue in August of 2017, stating that Amazon was causing “great damage to tax paying retailers.”⁸² Treasury Secretary Steven Mnuchin also commented on Amazon’s sales tax practices by stating:

So this is an issue that we’ve been looking at very carefully within the administration and we expect to come out with a position shortly. I am encouraged that Amazon is now charging tax, I believe, on their own sales but not the marketplace. I’m not sure I understand the consistency on that, but I respect the states’ ability that there’s an awful lot of money that’s not being collected.⁸³

To further indicate the administration’s views, President Trump continues to have a long-standing feud with Amazon and its founder Jeff Bezos, who owns the *Washington Post*. President Trump has consistently attacked Bezos, who he once claimed is “using the *Washington*

78. Lauren Thomas, *Amazon Celebrates ‘Biggest Holiday’ as Prime Members Surge*, CNBC (Dec. 26, 2017), <https://www.cnbc.com/2017/12/26/amazon-celebrates-biggest-holiday-as-prime-members-surge.html>.

79. Brad Plumer, *Here’s What Amazon Lobbies for in D.C.*, THE WASH. POST (Aug. 6, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/06/heres-what-amazon-lobbies-for-in-d-c/?utm_term=.cefc177d29c8.

80. Thomas, *supra* note 78.

81. Thomas, *supra* note 78. Minnesota became the first state to enact “Marketplace Sales Tax” legislation, which would hold marketplace providers like Amazon responsible to collect sales tax on behalf of their third-party sellers. *See* Minn. Stat. 297A.66.

82. Thomas, *supra* note 78.

83. Tae Kim, *Treasury Secretary Comments on Amazon’s Tax Practices in Sign Trump May Be Taking Aiming at Bezos*, CNBC (July 26, 2017), <https://www.cnbc.com/2017/07/26/mnuchin-comments-on-amazons-tax-practices.html>.

Post for power so that politicians in Washington don't tax Amazon."⁸⁴ Making his views on the issue evident, President Trump recently stated that, "they're going to have to start paying sales tax because it's very unfair what's happening to our retailers all over the country that are put out of business."⁸⁵ Therefore, the question then seems to become not whether tax changes on online sales are coming, but how they will be implemented and how they will ultimately impact smaller online businesses and those who rely on the Amazon marketplace to make a living. Over the last decade many states have attempted to address the issue.

IV. STATE RESPONSES

The physical presence doctrine affirmed by *Quill* has made it difficult for states to collect sales tax revenue from online sales. In recent years, states have enacted laws, often called "Amazon laws" to address the issue. These laws seek to capture uncollected taxes on internet sales, while still complying with the Constitution's requirements.⁸⁶ The two basic approaches that states have used are: (1) click-through nexus statutes, which impose the responsibility for collecting tax on those retailers who compensate state residents for online referrals; and (2) requiring remote sellers to provide information about sales and taxes to the state and customers.⁸⁷ New York became the first state to adopt a click-through nexus law, which provides that a seller is presumed to be a vendor if it entered into an agreement with a resident of New York and the resident refers customers to the vendor's website.⁸⁸ The law implemented a gross receipts threshold of \$10,000 during the preceding quarterly periods.⁸⁹ Amazon challenged the constitutionality of the law and the New York Court of Appeals ultimately found that the law did not violate the Commerce or Due Process Clause.⁹⁰ As a result, Amazon has since stopped its affiliate programs in many states.⁹¹

84. Brad Tuttle, *Donald Trump's Twitter Obsession with Amazon, Explained*, TIME (Aug. 17, 2017), <http://time.com/money/4904871/donald-trump-amazon-taxes-twitter-jeff-bezos/>.

85. Teri Webster, *Trump Leaning Toward Internet Sales Tax Because 'It's Very Unfair What's Happening to Retailers'*, THE BLAZE (Jan. 1, 2018), <https://www.theblaze.com/news/2018/01/11/trump-leaning-toward-internet-sales-tax-because-its-very-unfair-whats-happening-to-retailers>.

86. Erika K. Lunder, "Amazon Laws" and Taxation of Internet Sales: *Constitutional Analysis*, CONG. RES. SERV. (Apr. 9, 2015), <https://fas.org/sgp/crs/misc/R42629.pdf>.

87. *Id.*

88. Corey L. Rosenthal, et al., *Understanding Click-Through Nexus*, CPA JOURNAL (Jan. 2017), <https://www.cpajournal.com/2017/01/22/slt-understanding-click-through-nexus/>.

89. *Id.*

90. *Id.*

91. *Id.*

As an additional alternative, many states have enacted legislation requiring retailers that did not collect sales tax to notify customers of their obligation to self-report and pay use tax, and to provide an annual report to the state including the name, address, and total amount of purchases to each of their customers.⁹² Notice and reporting legislation, which was first enacted by Colorado, was quickly challenged as being unconstitutional.⁹³ The challenge involved a lengthy procedural history in which the court of appeals had initially held that it was barred from hearing the case by the Tax Injunction Act (“TIA”) because the challenge sought to restrain the collection of sales and use taxes.⁹⁴ The decision was appealed to the Supreme Court in which it issued a unanimous decision in favor of the taxpayer.⁹⁵ Justice Clarence Thomas explained that Colorado’s enforcement of its notice and reporting regime is not encompassed by the terms “levy, assessment, or collection” as used in the TIA.⁹⁶ On remand to the Tenth Circuit, the court ultimately found the notice and reporting regime was not an undue burden on taxpayers and that the *Quill* standard should not apply because the Supreme found that the notice and reporting requirements do not constitute a form of tax collection.⁹⁷ Once it was determined that the Colorado legislation was constitutional, many states subsequently enacted their own reporting requirements.⁹⁸

One of the greatest takeaways from the entire case was Justice Anthony Kennedy’s concurring opinion in *Directing Marketing Association v. Brohl* (“DMA”), in which he expressed his frustration with the Court’s 1992 decision in *Quill*.⁹⁹ Kennedy stated that the *Quill* Court “should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy.”¹⁰⁰ Kennedy further stated that because of the Court’s previous decision, states have not been able to

92. *Reporting Requirements-The Next Big Trend in Remote Seller Legislation*, SALES TAX INST. (Oct. 30, 2017), <https://www.salestaxinstitute.com/resources/reporting-requirements-the-next-big-trend-in-remote-seller-legislation>.

93. *Id.*

94. *Direct Mktg. Ass’n v. Brohl*, 735 F.3d 904 (10th Cir. 2013).

95. *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124 (2015).

96. *Id.* at 1131.

97. *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016).

98. *Reporting Requirements-The Next Big Trend in Remote Seller Legislation*, SALES TAX INST. (Oct. 30, 2017), <https://www.salestaxinstitute.com/resources/reporting-requirements-the-next-big-trend-in-remote-seller-legislation>.

99. *Direct Mktg. Ass’n*, 135 S. Ct. at 1134-1135.

100. *Id.*

collect many of the taxes due on mail and internet purchases.¹⁰¹ Kennedy stated that a “case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier,” which has resulted in “extreme harm and unfairness on the States.”¹⁰² Kennedy closed his opinion by stating that the legal system should “find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.”¹⁰³ This call for an “appropriate case” certainly caught the attention of states, who soon after sought to implement legislation to address the issue.¹⁰⁴

A majority of states have recently moved away from the click-through and notice and reporting options. Instead, they have instituted economic nexus policies in order to directly attack *Quill*. Economic nexus correlates with a select level of sales or gross receipts activity within a particular state.¹⁰⁵ A common economic nexus threshold may be \$100,000 of sales into a state or 200 or more transactions within the state in a calendar year.¹⁰⁶ If an out-of-state seller who does not have physical presence in a state with economic nexus legislation meets one of those conditions, they will be considered to have nexus in the state and will be required to collect and remit sales tax.¹⁰⁷ The first state that sought to directly challenge *Quill* through economic nexus was Alabama, whose regulation provided that out-of-state sellers that lack an Alabama physical presence but that are making retail sales of tangible personal property into the state exceeding \$250,000 per year have a substantial economic presence in Alabama for sales and use tax purposes.¹⁰⁸ Many states have subsequently passed economic nexus legislation, but the most notable legislation was passed by South Dakota in 2016. South Dakota’s Senate Bill 106, which will be discussed later in this article, obligated sellers with no physical presence in the state to collect and remit sales tax if the seller’s gross revenue exceeded \$100,000 annually in the state or if the seller conducted 200 or more separate transactions annually in the state.¹⁰⁹ South Dakota’s reason for this legislation is due to the state’s

101. *Id.* at 1135.

102. *Id.*

103. *Id.*

104. David M. Vistica and Jeremy Sharp, *Direct Marketing v. Brohl—Son of Quill?*, DELOITTE (Oct. 10, 2016), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-in-side-deloite-direct-marketing-brohl.pdf>.

105. *Economic Nexus: The New Standard??*, SALES TAX INST. (May 9, 2017), <https://www.salestaxinstitute.com/resources/economic-nexus-the-new-standard>.

106. *Id.*

107. *Id.*

108. Ala. Admin. Code r. section 810-6-2-.90.03.

109. S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).

inability to collect sales or use tax from remote sellers, which is eroding the sales tax base of the state.¹¹⁰ The emergence of economic nexus provisions were likely a result of Justice Kennedy's concurring opinion in *DMA*, which offered an opportunity for the Supreme Court to reevaluate the physical presence doctrine. Before the Supreme Court could reevaluate the physical presence doctrine, however, certain states have attempted to collect sales tax from remote sellers in the absence of economic nexus legislation.

For example, in June of 2017, South Carolina filed a complaint alleging that Amazon failed to collect sales taxes on sales made by third-party sellers.¹¹¹ South Carolina is claiming that for the first quarter of 2016, Amazon owes \$12.5 million in taxes, penalties and interest, which they say will accrue until the matter is resolved.¹¹² South Carolina is arguing that under state law, Amazon is considered the seller because the company controls a large part of the sales process for its third-party merchants.¹¹³ As previously mentioned, Amazon handles the shipping and storing of many third-party sellers as well as certain elements of the transaction such as payment processing and customer support.¹¹⁴

Darien Shanske, a law professor at the University of California, Davis, stated that South Carolina's case is plausible because it seems clear that Amazon and the state have more than a passive relationship.¹¹⁵ Professor Shanske mentioned that Amazon will likely be deemed responsible for tax collection if the state can prove the company is "sufficiently important" to helping out of state merchants complete their sales within the state.¹¹⁶ He also mentioned that because third-party sellers are choosing Amazon for its particular setup and benefits, it seems that there is a relationship that is similar to an agent or an independent contractor.¹¹⁷ It is also expected that if South Carolina were to be successful, that other states would likely follow.¹¹⁸ Regarding these claims, Amazon stated in its quarterly statement that "we believe the assessment is without merit," but that

110. Gail Cole, *Economic Nexus Trumps Affiliate Nexus*, AVALARA (Aug. 15, 2016), <https://www.avalara.com/blog/2016/08/15/economic-nexus-trumps-affiliate-nexus/>.

111. Eugene Kim, *Amazon Faces a Tax Fight in South Carolina That Could Change How Online Sellers Do Business*, CNBC (Aug. 15, 2017), <https://www.cnbc.com/2017/08/15/amazon-faces-a-tax-fight-in-south-carolina-that-could-change-how-online-sellers-do-business.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Kim, *supra* note 111.

117. Kim, *supra* note 111.

118. Kim, *supra* note 111.

if South Carolina were successful “we would be subject to significant additional tax liabilities.”¹¹⁹ This language seems to indicate that Amazon might be worried that a change may occur for its business. South Carolina’s resolution has been consistently delayed and is currently set for a hearing before the state administrative law court in early February 2019.¹²⁰

Given these efforts by states to collect substantial revenues from online sales, the implementation of economic nexus legislation has been the most effective. As previously stated, the state whose economic nexus legislation has had the most impact is South Dakota’s, whose case was heard by the Supreme Court in June of 2018 and led to the overturning of the physical presence doctrine. With the overturning of *Quill*, state taxing authorities seem to have been given unlimited power. As a result, proponents of federal legislation are fearful that any attempt to implement federal legislation will be futile, as states will likely oppose any legislation that would seek to limit the new taxing authority that they have gained.¹²¹ Proponents of federal legislation also feel that by *Quill* being overturned without legislation, businesses would immediately be responsible for collecting and remitting sales taxes throughout many states composing of approximately 10,000 different tax structures.¹²² Congress has failed in recent years to pass legislation, and given the overturning of *Quill*, future action remains uncertain.¹²³

V. FEDERAL EFFORTS

Along with individual state efforts, federal proposals have been set forth, but these proposals have ultimately failed to materialize. In April 2017, a bipartisan group of senators introduced the Marketplace Fairness Act of 2017 (“MFA”) to address the online sales tax issue.¹²⁴ Very similar proposals were introduced in 2013 and 2015 but both failed to be enacted. This legislation would authorize states to require remote sellers to collect state and local sales and use tax unless the remote seller fell under the small seller exception, which is set at \$1

119. Kim, *supra* note 111.

120. Andrew M. Ballard, *Amazon’s Fight Against South Carolina’s Online Sales Tax Delayed*, BNA (Oct. 9, 2018), <https://www.bna.com/amazons-fight-against-n73014483093/>.

121. Ryan Prete, *Court or Congress? State Online Sales Tax Power Set for Change*, BNA (Feb. 27, 2018), <https://www.bna.com/court-congress-state-n57982089317/>.

122. *Id.*

123. *Id.*

124. *Congress Introduces Marketplace Fairness Act of 2017 and Remote Transactions Parity Act of 2017*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/congress-introduces-marketplace-fairness-act-2017-and-remote-transactions-parity-act> (last visited Mar. 5, 2018).

million on remote sales annually.¹²⁵ If the act were to pass, online sellers who make more than \$1 million in remote sales per year would be required to collect sales tax in states where they do not have a significant physical presence.¹²⁶ The \$1 million exception refers to remote sales, and not profits. If passed, instead of collecting tax in only the states in which a seller has nexus, they would also be required to collect tax in states where they have no nexus.¹²⁷ Under the MFA, sellers would have to report how much sales tax was collected from buyers in various states along with being required to file sales tax every month in each of those states.¹²⁸ This is likely to lead to administrative problems.

The MFA would also be troublesome for small businesses because sales tax rules vary from state to state.¹²⁹ According to the Tax Foundation, there are around 10,000 sales tax jurisdictions in the United States and the laws in each jurisdiction are problematic because they all vary in interpretation of what is taxable.¹³⁰ The burden of these complexities would be impactful on small online retailers. Therefore, it would be an advantage to larger online-retailers like Amazon. Smaller online retailers would carry the burden of trying to apply the online sales tax, which would require special software to understand the sales tax rules of each state, and they would also likely have to hire new employees to handle these sales tax issues.¹³¹ This would also likely lead to a reduction in sales as consumers would look elsewhere for lower prices. This impact on smaller online retailers may be why large online retailers have advocated for the passing of the MFA. Companies like Amazon already have the infrastructure and manpower to handle the complexities of the different sales tax requirements in each state.¹³² Passage of the MFA would ultimately be unfair for smaller businesses and would likely not solve the problems of growing deficits within the states.

125. *Id.*

126. Mark Faggiano, *What Reintroduction of Internet Sales Tax Means for Online Sellers*, TAXJAR (May 4, 2017), <https://blog.taxjar.com/internet-sales-tax-2017-online-sellers/>.

127. *Id.*

128. *Id.*

129. Allen Johnson, *Congress Should No Bring Back the Marketplace Fairness Act*, CITIZENS AGAINST GOV. WASTE (Dec. 20, 2017), <https://www.cagw.org/thewastewatcher/congress-should-not-bring-back-marketplace-fairness-act>.

130. Jared Walczak, Scott Drenkard & Raymond Roesler, *Sales Tax Rates in Major Cities, Midyear 2017*, TAX FOUND. (Oct. 23, 2017), <https://taxfoundation.org/sales-tax-rates-major-cities-midyear-2017/>.

131. Johnson, *supra* note 129.

132. Johnson, *supra* note 129.

The Remote Transactions Parity Act (“RTPA”) of 2017 was also introduced in April. A similar piece of legislation was introduced in 2015 but failed to be enacted. It is similar to the MFA and would essentially create sales and use tax obligations for remote sellers with a few differences and provisions. The RTPA works on a tiered system where online sellers who make \$10 million or more in sales are subjected to the law in the first year.¹³³ Online sellers making \$5 million in sales or more are subject in the second year, and seller making more than \$1 million are subject in the third year.¹³⁴ Under the RTPA, however, all sellers who use a channel like Amazon or eBay, regardless of their sales volume, would have to collect sales tax in remote states.¹³⁵ Because this Act would potentially open up small business owners who make sales on online marketplaces to collecting tax in all forty-five states, the law is effectively discouraging Americans from operating businesses. The RTPA was meant to make up for some of the concerns regarding the MFA, but in the end, small businesses will be severely impacted by both options. Therefore, it is likely that these federal solutions will not pass any time soon.

VI. OVERTURNING QUILL

In 2018, Black Friday resulted in \$6.22 billion in online sales, up 23.6 percent from a year ago.¹³⁶ Cyber Monday sales were also expected to reach a record \$7.8 billion in sales, up 18 percent from a year ago.¹³⁷ By comparison, mail order sales totaled approximately \$35.5 billion for the entirety of 1992 when the *Quill* decision was made.¹³⁸ Because of the continued rise of e-commerce sales, the costs of the *Quill* decision will only keep increasing for states. According to market analysis, state and local governments stand to lose about \$34 billion in revenue in 2018 because of the physical presence doctrine.¹³⁹ The number of lost revenues is expected to also rise to \$52 billion by

133. Faggiano, *supra* note 126.

134. Faggiano, *supra* note 126.

135. Mark Faggiano, *New Internet Sales Tax Grab Decimates Channel Sellers*, TAXJAR (June 18, 2015), <https://blog.taxjar.com/new-internet-sales-tax-grab-decimates-channel-sellers/>.

136. Lauren Thomas, *Black Friday pulled in a record \$6.22 billion in online sales: Adobe Analytics*, CNBC (Nov. 24, 2018), <https://www.cnbc.com/2018/11/24/black-friday-pulled-in-a-record-6point22-billion-in-online-sales-adobe.html>.

137. *Id.*

138. Gail Cole, *Challenging Quill: What Started With North Dakota Could End With South Dakota*, AVALARA (Nov. 27, 2017), <https://www.avalara.com/blog/2017/11/27/challenging-quill-started-north-dakota-end-south-dakota/>.

139. David J. Herzig, *States Pay the Price When You Buy Online*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/opinion/online-shopping-sales-tax.html>.

2022, a substantial increase from 1992 when losses were estimated to be between \$700 million and \$3 billion.¹⁴⁰

In response, South Dakota passed a senate bill 106 (“SB 106”) in 2016. This bill required businesses that made sales exceeding \$100,000 annually over the internet or had 200 separate transactions within the state to collect and remit sales tax even if they do not have a physical presence in the state.¹⁴¹ South Dakota lawmakers purposely created the law in order to give the Court another opportunity to overturn the physical presence doctrine.¹⁴² The “Legislative Findings” even state that the statute was designed to directly challenge *Quill*.¹⁴³ To get online retailers to comply with SB 106, the South Dakota Department of Revenue sued four online retailers including Wayfair, Inc., Newegg Inc., Overstock.com Inc., and Systemax Inc.¹⁴⁴ The state admitted in court filings that its remote sales tax statute is facially unconstitutional under *Quill* but that its goal was to advance the case to the Supreme Court in an effort to overturn the physical presence standard which impedes it from collecting large revenues from online retailers not collecting sales and use tax. The Circuit Court sided with the retailers and granted their motion for summary judgment, invoking the Dormant Commerce Clause doctrine, which prohibits a state from passing laws that discriminate against interstate commerce.¹⁴⁵ The Dormant Commerce Clause is a tool that courts may apply to strike down state laws that seem to impede cross-border trade when there is no explicit guidance from Congress on the issue. The South Dakota Supreme Court affirmed the lower court’s opinion, deciding to follow Supreme Court precedent. This paved the way for the Supreme Court to revisit the issue and ultimately grant certiorari, which they did in early 2018.¹⁴⁶

140. *Id.*

141. Jennifer McLoughlin, *Online Sale Tax Law Heads to South Dakota Supreme Court*, BLOOMBERG (Apr. 6, 2017), <https://www.bna.com/online-sales-tax-n57982086318/>.

142. Daniel Hemel, *The Supreme Court Didn’t See E-Commerce Coming*, SLATE (Sept. 18, 2017), http://www.slate.com/articles/technology/technology/2017/09/the_supreme_court_can_fix_its_mistake_on_taxing_e_commerce_companies.html.

143. Matt Mock & Laura Grace Mezher, *The Possible Upshot of South Dakota’s Master Plan to “Kill Quill”*, SALT SAVVY (Dec. 28, 2016), <http://www.saltsavvy.com/2016/12/28/the-possible-upshot-of-south-dakotas-master-plan-to-kill-quill/>.

144. *Id.*

145. *Challenge to Sales Tax “Physical Presence Test” To Be Heard by the Supreme Court*, JD SUPRA (Mar. 13, 2018), <https://www.jdsupra.com/legalnews/challenge-to-sales-tax-physical-84755/>.

146. Greg Stohr, *U.S. Supreme Court to Review Bid to Collect Internet Sales Tax*, BLOOMBERG (Jan. 12, 2018), <https://www.bloomberg.com/news/articles/2018-01-12/bid-to-collect-internet-sales-tax-gets-u-s-high-court-review>.

A. *South Dakota v. Wayfair, Inc.*

1. Commerce Clause Jurisprudence

In its decision decided on June 21, 2018, the Supreme Court overruled the physical presence rule of *Quill*.¹⁴⁷ The majority, led by Justice Anthony Kennedy, and joined by Justices Clarence Thomas, Samuel Alito, Ruth Bader Ginsberg, and Neil Gorsuch, began by discussing the history of the Commerce Clause as well as the history of the Court's Dormant Commerce Clause¹⁴⁸ jurisprudence.¹⁴⁹ The Court further determined that the two principles that guide courts in all cases challenging state law (including the validity of state taxes) under the Commerce Clause are: (1) that state regulations may not discriminate against interstate commerce; and (2) that States may not impose undue burdens on interstate commerce.¹⁵⁰ A state law, which discriminates against interstate commerce, is per se invalid. If the state law, however, regulates even-handedly to effectuate a legitimate local interest, then it will be upheld unless the burden imposed is excessive in relation to local benefits.¹⁵¹ After explaining the history of the Court's state tax Dormant Commerce Clause decisions in *Bellas Hess*, *Complete Auto*, and *Quill*, the majority stated that the physical presence rule was an incorrect interpretation of the Commerce Clause and that the physical presence rule was incorrect given the economic advancements since *Quill*.¹⁵²

2. *Quill* is Flawed on Its Own Terms

The Court stated *Quill* is flawed on its own terms because: (1) the physical presence rule is not a necessary interpretation of the requirement of substantial nexus; (2) the physical presence rule creates rather than resolves market distortions; and (3) the physical presence rule imposes an arbitrary, formalistic distinction that the modern Commerce Clause precedents disavow.¹⁵³ In determining that the physical presence rule is not necessary for substantial nexus, the court relied on its decision in *Quill*, which rejected the physical presence rule for due process purposes but not for Commerce Clause purposes. The

147. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018).

148. The Dormant Commerce Clause, although not a part of the Constitution, is used to prohibit states from discriminating against interstate commerce or unduly burdening interstate commerce, even in the absence of federal legislation regulating the activity.

149. *Wayfair, Inc.*, 138 S.Ct. at 2090.

150. *Id.* at 2090-91.

151. *Id.* (citing *Granholm v. Heald*, 544 U.S. 460, 476 (2005); and *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970)).

152. *Id.* at 2092

153. *Id.*

Court stated that because there are significant similarities between due process and Commerce Clause standards, there should not be any difference between the two standards as they relate to whether physical presence is required to force out-of-state sellers to collect and remit sales taxes.¹⁵⁴ As a result, physical presence is not required to create substantial nexus under the Commerce Clause. The majority disagreed with the idea that, absent the physical presence rule, the administrative costs of having to comply with thousands of tax jurisdictions would create an undue burden on interstate commerce. The Court stated that costs of compliance, especially in today's modern economy, are unrelated to whether the company has a physical presence in the State.¹⁵⁵ For example, a small company that has a diverse physical presence could be faced with high burdens of compliance, while a large remote seller that had the ability to easily comply with the requirements of multiple tax jurisdictions would not be faced with any burden. According to the Court, the physical presence rule is a poor proxy for compliance costs of companies that make sales in multiple states.

The Court then explained how the physical presence rule creates rather than resolves market distortions because the rule creates a “judicially created tax shelter” for businesses that limit their physical presence in the state but sell their goods and services to the state's consumers.¹⁵⁶ This practice, according to the Court, created an artificial competitive advantage that should be prevented. The Court stated the distortions caused by businesses trying to avoid tax collection could mean that the market may currently lack storefronts, distribution points, and employment centers that would otherwise be efficient or desirable.¹⁵⁷ Therefore, rejecting the rule is essential to ensure that the Court's precedents did not create artificial competitive advantages.

The majority explained how the Court's Commerce Clause jurisprudence has “eschewed formalism” in favor of a fact-sensitive case-by-case analysis, but that *Quill* gives different treatment to different businesses for arbitrary reasons.¹⁵⁸ As justification, the Court explained how the physical presence rule would tax a sale online by a retailer located in the state, but would not tax a sale of the same item sold by an out-of-state retailer that did not have a warehouse located in the

154. *Wayfair, Inc.*, 138 S.Ct. at 2093.

155. *Id.*

156. *Id.* at 2094.

157. *Id.*

158. *Id.*

state, even if the sale had nothing to do with the warehouse. This distinction, according to the Court, did not make sense and that as long as state law avoids an effect that goes against the Commerce Clause, that courts should not rely on anachronistic formalism to invalidate it.¹⁵⁹ The Court analyzed the physical presence rule in light of the modern e-commerce market, of which the majority concluded that the rule was “artificial in its entirety.”¹⁶⁰ The Court stated it did not see how an individual employee, or a warehouse creates substantial nexus, but modern pervasive technology does not. Between targeted advertising and instant access to consumers by way of the internet, a business has a meaningful in-state presence without actually having an in-state physical presence. The Court found that they should not maintain a rule that ignores substantial virtual connections to the State.¹⁶¹ The Court also found the rule was unjust because it essentially allows a remote seller’s customers to avoid paying sales taxes of which are essential to create and secure the active market they supply with goods and services. According to the Court, *Quill* harms federalism and free markets because the state’s ability to seek prosperity is limited, and market participants are prevented from competing on a level playing field.¹⁶²

The majority also rejected upholding *Quill* based on *stare decisis* because they did not believe that *stare decisis* would support the Court’s prohibition of a valid exercise of the States’ sovereign power.¹⁶³ The Court determined that its Commerce Clause decisions might prohibit the States from exercising their lawful sovereign powers, and that the Court should be vigilant in correcting that error.¹⁶⁴ The majority also stated it would be wrong to ask Congress to resolve the issue because it would be inconsistent with the Court’s proper role to ask Congress to address a false constitutional premise the Court itself created.¹⁶⁵ The majority dismissed the idea that the physical presence rule was easy to apply, and that arguments for reliance based on the physical presence rule’s clarity are misplaced. The Court mentioned Massachusetts’s as well as Ohio’s attempts in recent years to expand the rule by placing cookies on a computer of an in-state resident, and other arbitrary rules that more than likely result in large

159. *Wayfair, Inc.*, 138 S.Ct. at 2094-95.

160. *Id.* at 2095.

161. *Id.*

162. *Id.* at 2096.

163. *Id.*

164. *Wayfair, Inc.*, 138 S.Ct. at 2096.

165. *Id.*

amounts of litigation.¹⁶⁶ Finally, the majority noted that Congress could potentially resolve the problems associated with increased administrative burdens that small businesses or others engaged in interstate commerce might face. In conclusion, the majority held the physical presence rule of *Quill* was “unsound and incorrect”.¹⁶⁷ Therefore, *Quill* and *Bellas Hess* were overruled.¹⁶⁸

3. Substantial Nexus Sufficiency Test

Besides overruling *Quill* and *Bellas Hess*, the Court also created a new sufficiency test to determine if substantial nexus exists. According to the majority, substantial nexus will be established “when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”¹⁶⁹ This new standard was satisfied in *Wayfair* because of the economic and virtual contacts that the remote sellers had with South Dakota. The Court determined that the large national companies involved in the case maintained an extensive virtual presence with South Dakota, meaning that the substantial nexus requirement of *Complete Auto* was satisfied. The majority, however, did not conclude that the entirety of South Dakota’s law was constitutional under the Commerce Clause. Instead, the Court decided to remand the case to the South Dakota Supreme Court in order to determine whether the law violated another principle of the Court’s Commerce Clause doctrine. The Court did, however, note that the South Dakota law contained several features that appear designed to prevent discrimination or an undue burden on interstate commerce. These factors were: (1) the law contained a safe harbor for those with limited business in South Dakota; (2) the law ensured that no obligation to remit the sales tax may be applied retroactively; and (3) South Dakota is one of more than twenty states that have adopted the Streamlined Sales and Use Tax Agreement, which standardizes taxes to reduce administrative and compliance costs.¹⁷⁰

4. The Concurring and Dissenting Opinions

Justice Thomas and Gorsuch filed concurring opinions. Justice Thomas explained how he should have joined Justice Byron R.

166. *Id.* at 2097-98. See 830 Code Mass. Regs. 64H.1.7 (2017) (Proposed regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents’ web browsers.); Ohio Rev. Code Ann. § 5741.01(I)(2)(i) (Adopting a similar standard to Mass.)

167. *Id.*

168. *Id.* at 2099.

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

170. *Wayfair, Inc.*, 138 S.Ct. at 2099-100.

White's dissenting opinion in *Quill* and how he believes that there is no rational justified reason for the Court's entire Dormant Commerce Clause jurisprudence.¹⁷¹ Justice Gorsuch stated how the physical presence rule was a "judicially created tax break" that the Court lacked the authority to create, but he emphasized that his agreement with the majority discussion of Dormant Commerce Clause jurisprudence should not be interpreted as his agreement with all aspects of the Dormant Commerce Clause doctrine.¹⁷²

In Justice Robert's dissenting opinion, he agreed that *Bellas Hess* was wrongly decided but that the *Wayfair* Court should not have departed from the doctrine of *stare decisis* because Congress has the power in the area of state and local taxation and could have overridden the decision of *Bellas Hess* and *Quill* with new legislation. Justice Roberts was also concerned that the majority's decision may cause Congress to avoid consideration of the issue. Further, Justice Roberts raised issue with the majority's focus on unfairness and injustice, but not the public policy concerns of the *Wayfair* decision's effect on the economy. Justice Roberts was ultimately concerned that the decision might alter the marketplace itself and that significant compliance costs will be brought upon market participants. Therefore, in his opinion, Congress would be better suited to balance the many competing interests of the issue.¹⁷³

5. The New Nexus Standard

The *Wayfair* decision left many unanswered questions. Substantial nexus after *Wayfair* turns on whether a taxpayer or retailer has availed itself of the substantial privilege of carrying on business in the taxing jurisdiction. The Court in *Wayfair*, however, did not define what the minimum threshold of this sufficiency test was. Rather, it chose to have the lower court determine if sufficient nexus was met. The only guidance that states are given in determining the sufficiency of the economic and virtual contacts are the contacts with South Dakota that the businesses in *Wayfair* had. The issue is that the Court did not adequately analyze those businesses' contacts with the state. The Court concluded that each of the businesses, by being large national companies, had an extensive virtual presence within South Dakota. The Court left unanswered the question of what constitutes something that is less than an extensive virtual presence, and whether something less would also be sufficient to establish substantial nexus.

171. *Id.* at 2100.

172. *Id.* at 2100-01.

173. *Id.* at 2104-03.

The Court raised the possibility that contacts such as substantial virtual connections, targeted advertising, or instant access to most consumers via any internet-enabled device may satisfy the new sufficiency test. Contacts that also meet the test may include such things as cookies on an in-state customer's computer, or a mobile app that is downloaded on an in-state customer's phone. In the end, it is not clear at all how the Court would like the lower courts to apply the new sufficiency test that they have created, and there is no guidance that taxpayers or retailers can rely on to determine whether they have substantial nexus with the state. Because the Court did not reference the other prongs of the *Complete Auto* test, it will be interesting to see how South Dakota will determine whether the state statute satisfies the requirements of the Commerce Clause. Because the *Wayfair* court did not provide any bright line rules for courts to determine whether a state statute satisfies the requirements of the Commerce Clause, courts will likely review the facts on a case-by-case basis, with the assistance of the four factors that were identified in South Dakota's law.

5. Post-*Wayfair* Congressional Action

The prospect for congressional action after *Wayfair* is slim. The sufficiency test for substantial nexus will more than likely be found to be favorable for states and localities. Given that South Dakota sought to have *Quill* overturned, the lower court will likely consider the new standard constitutional on remand given that the *Wayfair* decision seems to give states much deference in their tax collection power. Given the amount of deference given to states, there will not be much incentive to pressure Congress for clarification on the *Wayfair* decision. As a result, states are more likely to lobby against any attempt for congressional action. On the opposite end, taxpayers, and specifically remote retailers (who may be subject to tax in up to 10,000 jurisdictions) will have incentive to lobby congress to mitigate the added and costly administrative compliance and tax burdens that will have economic consequences as a result of *Wayfair*.

VII. CONCLUSION

The advancements in technology and the growth of online marketplaces such as Amazon have certainly been the main factor in creating a new sales tax landscape. E-commerce has grown to a size today that could not have been predicted when the physical presence standard was established. As a result, state tax revenues have declined because of their inability to collect tax from online purchases. A change was

needed, and Justice Kennedy's concurring opinion in *DMA* opened the door for the Court to make that change. After twenty-five years, the Court was given that opportunity, but it ultimately failed in creating new guidance going forward. The lack of guidance given from the Supreme Court is leaving many businesses and many states confused on how they should proceed. The fallout of the *Wayfair* decision is yet to be determined, and many states are currently in the process, or have recently reacted to the decision in order so that they may try to stabilize their deficits. The large on-line retailers brought the issue to the forefront of the Supreme Court, but it will ultimately be smaller businesses that suffer the consequences as they try and navigate the new complex nexus standard. Although the added revenue from additional sales tax will help state economies and infrastructure, consumers and smaller businesses will likely be impacted the most, not large corporations such as Amazon. Although brick-and-mortar stores are at a disadvantage, and tax policy ideally should treat all businesses similarly, requiring remote online sellers to comply with tax laws and reporting requirements of potentially 10,000 different jurisdictions becomes a logistical nightmare. By having businesses comply with all the different distinctions and requirements of each jurisdiction's tax code, many businesses will have to hire additional staff to comply, which will further reduce their bottom line and potentially discourage Americans from being business owners. Therefore, going forward, it would be helpful for large online marketplaces to handle tracking and tax requirements for third-party sellers who use their marketplaces. Finally, because the Supreme Court ultimately failed to define what will make economic nexus laws constitutional, it would be in the best interest of Congress to develop guidance that promotes fairness and establishes a sufficient framework for states in light of *Wayfair*.