



Federally Mandated Online Sales Tax: A Logistical Solution For The Future Of E-Commerce

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FEDERALLY MANDATED ONLINE SALES TAX: A LOGISTICAL SOLUTION FOR THE FUTURE OF E-COMMERCE

*Daniel O'Connor**

INTRODUCTION

Until recently, almost all goods and services were purchased in person at physical, brick-and-mortar stores or by ordering over the phone. When these purchases occurred, they were typically accompanied by a sales tax charge. These sales taxes were then used to fund a variety of State government activities and programs. Then, in 1994, this would all begin to change. That year, one shopper made history by purchasing a C.D. online, becoming the first person to engage in a retail transaction over the Internet.¹ Nearly two decades later, online purchases have become the most popular method for consumers to purchase retail goods. Because making purchases online is such a new concept, US laws have not been able to keep up with the rapidly expanding e-commerce industry. One important area of government interest is sales taxes and how they should be charged for online purchases.

A common difficulty that arises when purchasing goods online is determining which State's sales tax to charge once the purchased goods are shipped to one State and delivered from a different State. States also grappled with how to collect sales tax from online purchasers in light of the Supreme Court's holding in *Quill Corp. v. North Dakota*. The Supreme Court in *Quill Corp. v. North Dakota* held that States could not require businesses with no physical presence in the State to collect its sales tax.² While this may sound reasonable on the

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1. Brad Tuttle, *8 Amazing Things People Said When Online Shopping Was Born 20 Years Ago*, Money (August 14, 2014), <http://money.com/money/3108995/online-shopping-history-anniversary/>.

2. *Quill Corp. v. N.D.*, 504 U.S. 298 (1992); overruled by *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

surface, the decision required consumers to manually file and pay use tax for purchases that they made online that were not subject to sales tax. Consumer compliance rates with the collection and remitting of sales taxes were notoriously low, and States suffered as a result. As more consumer purchases were made online rather than at retail stores, States began to lose more money through a lack of sales tax payments. It was clear that the standard set out in *Quill* would not provide a sufficient solution to this problem going forward. State and local budgets are now being threatened by sales into their jurisdictions from afar, particularly in the area of sales over the Internet.³

In 2018, the Supreme Court made a ruling that completely changed the way sales taxes are collected on online purchases. In *South Dakota v. Wayfair, Inc.*, the Supreme Court had to decide whether it was constitutional for States to enact legislation forcing online distributors to collect and remit the State sales tax levied by the state to which they were shipping their products to.⁴ The legislation in question would force online distributors to collect and remit the sales tax to the State even if the distributor did not have a physical presence within that State, subject to other constitutional limits.⁵ The Court ended up ruling that it was constitutional for States to enact that legislation, and that online distributors would now be responsible for collecting States' sales taxes and remitting them to the States where goods are being distributed.⁶ This important decision overturned the previous standard for online sales taxes set out in the *Quill Corp.* case, and many find this new standard to be far more preferable than the previous standard.⁷ Since online purchases are only becoming more prevalent, shouldn't lawmakers and the courts establish a system for collecting State sales taxes that is simple and effective? Most would probably say yes to that question, and while the new standard for collecting sales taxes on online purchases may be better than the previous one, there is likely a better and more efficient way for these taxes to be collected.

3. For some earlier scholarly discussions of the scope of this problem, see *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement ("SSUTA")*, 40 U.C. Davis L. Rev. 1381, Kendall L. Houghton & Walter Hellerstein, *State of Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 BYU L. Rev. 9, 10-12, 51; Walter Hellerstein, *Deconstructing the Debate over State Taxation of Electronic Commerce*, 13 Harv. J.L. and Tech. 549, 559-60 (2000); Walter Hellerstein, *State and Local Taxation of Electronic Commerce: Reflections on the Emerging Issues*, 52 U. Miami L. Rev. 691, 694-97 (1998).

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

5. *Id.* at 2084.

6. *Id.* at 2099.

7. *Id.*

Under the new sales tax collection standard set out in *Wayfair*, some online customers who normally did not pay sales taxes on certain purchases will now be forced to pay sales taxes from whichever State they are residing in. This new standard also places a complicated burden on sellers of online goods. For instance, if a customer is buying from California, then the seller must look to see that California's statewide sales tax rate was 7.25% in 2020, and the seller must then collect that sales tax from their customers.⁸ Each State has a different sales tax, and it is now up to the sellers to look for that information and make sure that the proper sales tax is collected and then given to the State that they are delivering to.

While the ruling in the *Quill Corp.* case was heavily criticized by vendors with physical storefronts, it also allowed for the "explosion of online retail in the United States."⁹ They argued that online distributors received an unfair advantage from that ruling because they were not responsible for paying sales taxes. The unfair advantage may exist, but most, large online retailers (like Amazon – the country's largest) have actually been voluntarily paying state sales taxes for years.¹⁰ "Amazon has been collecting sales tax nationwide since April 1, 2017."¹¹ This means that the new standard established in the *Wayfair* case will mainly place a burden on "earlier stage companies that don't have the same sort of scale and will be facing more operational costs as a result."¹² Only time will tell how States decide to handle the way smaller online retailers collect and remit sales taxes. For example, in South Dakota, online sellers that have sales in the state exceeding \$100,000 or more than 200 transactions to residents in the state have to remit sales tax.¹³ This seems like a reasonable way to handle compliance with online sales tax, but it is not clear whether other states will apply the same standard or if they will create a different standard that places harsher requirements on online retailers. The fact that the decision in the *Wayfair* case allows for this uncertainty with online sales taxes is a problem and should be resolved. E-commerce sales in the U.S. were \$435.5 billion in 2017, and they will only increase in the

8. *Sales Tax 101 for Online Sellers*, TurboTax Intuit (2020), <https://turbotax.intuit.com/tax-tips/self-employment-taxes/sales-tax-101-for-online-sellers/L4uTQCaIx>.

9. Jonathan Shieber, *States will be able to charge sales tax on online purchases thanks to the Supreme Court*, Tech Crunch (June 21, 2018) <https://techcrunch.com/2018/06/21/states-will-be-able-to-charge-sales-tax-on-online-purchases-thanks-to-the-supreme-court/>.

10. *Id.*

11. Darla Mercado, *Here's what that Supreme Court sales tax decision means for you*, CNBC (June 21, 2018), <https://www.cnbc.com/2018/06/21/heres-what-that-supreme-court-sales-tax-decision-means-for-you.html>.

12. Shieber, *supra* note 9.

13. Mercado, *supra* note 11.

future.¹⁴ It is clear that a newer, simpler standard should be proposed to allow for a seamless collection of sales taxes for online purchases.

This new standard could come in the form of a federal provision that sets a flat tax rate on all online sales. The proceeds from this flat sales tax would then be remitted to the states based on how many goods were purchased within their borders. With a federally mandated flat tax obviously comes constitutional issues, but based on recent Supreme Court decisions, there should not be any issues with the passing of this law. Congress probably has the power to pass this law on the states through the Supremacy Clause, and Congress may also have the power to collect this tax much like the Individual mandate in the *Sebelius* case. If there are any issues with the taxing powers of Congress, there are alternative routes that can be taken to achieve a similar effect. One route starts with the Streamlined Sales and Use Tax Agreement, which has been adopted by more than 20 states and standardizes taxes to reduce administrative and compliance costs: “It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.”¹⁵ Based on the passage of the Sales and Use Tax Agreement and the fact that more than 20 states have signed onto it, one could predict that more states would prefer to sign onto the SSUTA rather than have a federally mandated flat tax rate. This could still be beneficial going forward, as the end goal is to create a seamless and easy method for the collection of sales taxes on goods purchased online.

Another important question that needs to be answered is how far, exactly, could a state stray from what South Dakota did in the *Wayfair* case. South Dakota enacted its own legislation for collecting sales taxes for online goods, and they included a provision that exempted small retailers from having to abide by the law. There could be circumstances where other states enact legislation dictating how sales taxes are to be collected, and those states could choose to not exempt smaller retailers the way South Dakota did. Perhaps those states would also not choose to opt into the SSUTA. This would create a situation where maybe the federal government would have to get involved for the sake of creating a fair standard for the collection of sales taxes on online goods. The previously discussed scenarios are completely hypothetical, but they are worth discussing when deciding

14. Shieber, *supra* note 9.

15. Wayfair, Inc., *supra* note 4, at 2100.

whether or not the federal government should get involved in an issue like this that will be extremely common in the near future.

BACKGROUND

Early Standard: Quill Corp Decision

Before the Supreme Court's decision in the *Wayfair* case, the standard for collecting sales taxes on online purchases was set out in *Quill Corp. v. North Dakota*. In that case, the Supreme Court held that states could not require a business to collect its sales tax if the business lacked a physical presence in the State.¹⁶ If the online seller did not have that physical presence, the States had to rely on the residents to pay the tax owed on their purchases from vendors who were not present within the State. "The impracticability of this collection from the multitude of individual purchasers is obvious."¹⁷ Consumer compliance rates with these sales tax collection for online purchases were notoriously low. As a result, states lost billions of dollars each year due to consumers not paying their sales taxes for purchases they made online. This proved to be especially problematic for states who heavily relied on sales taxes for funding. South Dakota, for example, did not have a state income tax, and had to "put substantial reliance on its sales and use taxes for the revenue necessary to fund essential services."¹⁸ Under the standard set out in the *Quill Corp.* decision, states like South Dakota would just have to take the loss and suffer as a result of consumers not complying with their online sales tax payments.

The Supreme Court in *Quill Corp.* was heavily influenced by the precedent created in *National Bellas Hess, Inc. v. Department of Revenue of Ill.* The Court seemed unwilling to overrule that case at the time and therefore reversed the decision of the State Supreme Court of North Dakota. In doing so, the Supreme Court in *Quill Corp.* established a nexus requirement and concluded that businesses need to be strongly connected to the state that they are selling to in order for a state to require them to collect and remit sales taxes. The Court in that case probably did not foresee the massive popularity of online purchases that would soon come in the future, and that decision would allow for the fast growth of many large online retailers that consumers are familiar with today. Now that online retailers have been able to

16. *Id.* at 2081.

17. *Nat'l Geographic Soc. V. California Bd. of Equalization*, 430 U.S. 551, 555, 97 S. Ct. 1389, 1390 L. Ed. 2d 631 (1977).

18. *Wayfair, Inc.*, *supra* note 4, at 2088.

grow to the point where they are a dominant presence in today's society, the time has come for an updated standard with regards to collecting sales taxes for online purchases. Simply relying on consumers to pay taxes on their own has proven to be too unreliable and will only cost the States more money in the future. *Quill* imposed fiscal and dignitary harms on states without any real hope that these injuries would spur legislative action.¹⁹ Online retailers have already begun to collect sales taxes on their own. This should be evidence of a shift in the way that online purchases should be conducted going forward, and the answer involves a mandatory collection of sales tax. The new standard in the *Wayfair* case attempted to remedy this problem, but that does not mean that there are not more efficient ways of handling this issue. Since online purchases will only increase in the future, it is imperative that the government provides a clear solution. It would be well within the government's powers to do so. Congress is often said to have superior fact-finding capabilities and a democratic pedigree.²⁰

New Standard: South Dakota v. Wayfair

After over two decades of operating under the sales tax standard set out in the *Quill Corp.* case, the Supreme Court revisited the issue and made an important decision that would overrule the old standard and change the way online distributors operate. In *South Dakota v. Wayfair*, the Supreme Court held that states were allowed to enact legislation that requires remote sellers to collect and remit sales taxes on goods and services purchased within their state, even if those sellers do not have a physical presence within the state.²¹ The specific piece of legislation at issue in *Wayfair* only required online distributors to collect sales taxes if they delivered more than \$100,000 of goods and services to the state and engaged in over 200 separate delivery transactions for goods sold to the state.²² Ostensibly, this legislation will serve as a model for future statutes that focus on the collection of sales taxes on online purchases. The purpose is to make sure that larger online retailers collect these sales taxes, and smaller retailers will not have the burden of having to collect and remit these taxes. While this is a fair solution and easier way to handle the problem of sales tax collections for online purchases, there should be an

19. Brian Galle, *Kill Quill, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 *Stanf. L. Rev.* 158, March 2018.

20. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *Yale L.J.* 425, 435-44 (1982).

21. *Wayfair, Inc.*, *supra* note 4, at 2088.

22. *Id.* at 2084.

even better way where sales taxes can be collected for all online purchases.

As of right now, it is up to the States to decide how online sales taxes are collected for goods and services purchased online. They are able to do this because states are allowed to regulate interstate commerce as long as the State regulations do not discriminate against interstate commerce, and they do not impose an undue burden on interstate commerce. Each state has different sales tax rates, so there will not be a consistent sales tax that must be collected and remitted by large distributors.

The Respondents in *South Dakota v. Wayfair* were online retailers of home goods and furniture that had no employees or real estate in the state of South Dakota.²³ Each of the respondents in that case met the minimum sales or transactions requirement of the Act drafted by South Dakota, “but none collects South Dakota Sales tax.”²⁴ The lower courts granted summary judgment to the respondents, because the standard established in the *Quill Corp.* case had not been overruled. In overruling that decision, the Supreme Court in *Wayfair* was heavily influenced by the massive growth of online sales as well as the great loss in revenue that states like South Dakota faced. The Court was also influenced by other opinions which criticized the decision in *Quill Corp.* “The physical presence rule has been the target of criticism over many years from many quarters.”²⁵ The court also cited commentaries from law review entries. “While nexus rules are clearly necessary, the Court should focus on rules that are appropriate to the twenty-first century, not the nineteenth.”²⁶ The change in times made it so the decision in *Quill Corp.* just could not be useful during a time where consumers were making more purchases online and states were losing important revenue from sales taxes.

The Supreme Court in *Wayfair* stated that the decision in *Quill* created rather than resolved market distortions.²⁷ It used these distortions to allow for establishing a new standard that would bring money back to the states. The physical presence requirement was a dated standard and did not account for the possibility that many commercial transactions can be conducted outside of a state and a business can still have a strong connection to that state. The court in *Quill* even

23. *Id.* at 2084.

24. *Id.* at 2084.

25. *Direct Marketing Assn. v. Brohl*, 814 F. 3d 1129, 1148, 1150-1151 (CA10 2016) (Gorsuch, J., concurring).

26. Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 *Harv. J. L. & Tech.* 549, 553 (2000).

27. *Wayfair Inc.*, *supra* note 4, at 2085.

acknowledged the fact that “the requirements of due process are met irrespective of a corporation’s lack of physical presence in the taxing State.”²⁸ That line of reasoning was persuasive in the Supreme Court’s analysis, and the Court knew that physical presence was no longer a key requirement for corporations to have a strong connection to a state. In overruling the decision in *Quill* the Court acknowledged the expressed concern in that case that the physical presence requirement prevents interstate commerce from being unduly burdened by state taxes which would force retailers to “tax-collection obligations in thousands of different taxing jurisdictions.”²⁹ The Supreme Court in *Wayfair* turned this reasoning on its head and stated that under that rationale, “a small company with diverse physical presence might be equally or more burdened by compliance costs than a large remote seller.”³⁰ The Court in *Quill* also did not account for the massive cost dealt to the states who relied heavily on sales tax collections. Consumer compliance rates were extremely low when it came to paying online sales taxes, and the states took a large hit as a result.

The standard created under the *South Dakota v. Wayfair* decision will greatly change the way online sales taxes are collected and will have an impact on state legislation as well as online retailers. Whether or not this is the best possible standard will depend on how State governments handle the drafting of legislation surrounding online sales taxes. For now, it is safe to say that the decision was a step in the right direction. However, just because the decision in the *Quill* case was overruled and outdated, there still may be some important portions of the standard set out in that case that can be applied in making a new standard. What is most important is establishing a standard that complies with the Commerce Clause, allows for online businesses to grow or continue to prosper, and also enables states to receive sales taxes on the online purchases made within their boundaries.

PROPOSAL

No problems have arisen under the new online sales tax standard, but that does not mean that new proposals should be disregarded. As consumers continue to make more purchases online, the need for an efficient and fair system will become more important. Just this year, the total market share of online U.S. retail sales was higher than gen-

28. *Quill*, *supra* note 2, at 308.

29. *Wayfair*, 138 S. Ct. at 2093 (citing *Quill*).

30. *Wayfair Inc.*, *supra* note 4, at 2093.

eral merchandise sales for the first time in history, and it is anticipated that the online sales market share will only increase in the future.³¹ The only thing keeping brick-and-mortar sales higher than online sales is the inclusion of auto and restaurant sales.³² “Online sales is now the fourth largest sector overall, bringing in about \$59.8 billion in adjusted sales for February.”³³ One of the largest contributors to this increase in online sales is the creation of Amazon Prime, which allows for cheap and fast delivery of most products provided on Amazon’s website. As the online market continues to grow, the need for an efficient standard for collecting sales taxes grows with it.

In order to make for a problem-free future for online sales tax, the best possible solution will be to impose a federally mandated, flat tax rate for all purchases made online. Rather than force online distributors to collect sales tax and then remit that money to the state where the purchase was made, the government can make the entire process easier by enforcing the same tax rate for all online purchases. The standard created in the *South Dakota v. Wayfair* case resolved many of the issues that came from the standard created in the *Quill* case, but that does not mean that there is no room for more improvement. The *Wayfair* decision is important because it corrected the massive problem of consumers not complying with paying online sales taxes, and it allowed for states to have a way to force distributors to collect sales tax so they could receive that precious source of revenue.³⁴ The remaining issue is that there will now be inconsistencies with the collection and remission of these sales taxes. Under the *Wayfair* decision, each state will be able to enact legislation that forces online distributors to collect sales taxes on the goods purchased.³⁵ The state legislation in *Wayfair* provided an exemption for smaller distributors who did not have a significant amount of sales within the state, but there is no guarantee that other states will enact similar legislation. Complying with the variety of standards set out by each state’s legislature will be difficult for online distributors to follow. The federally mandated, flat tax would be a better solution because it would make it so each state does not have to enact their own legislation governing the taxation of online purchases, each state will be able to easily collect sales taxes that formerly went unpaid, and online distributors will not have

31. Kate Rooney, *Online shopping overtakes a major part of retail for the first time ever*, CNBC (April 2, 2019), <https://www.cnbc.com/2019/04/02/online-shopping-officially-overtakes-brick-and-mortar-retail-for-the-first-time-ever.html>.

32. *Id.*

33. *Id.*

34. *Wayfair*, *supra* note 4, at 2080.

35. *Id.* at 2084.

to deal with the difficulty of collecting and remitting the differing sales taxes that each state has.

The federal statute should be designed in a way that most of the taxes collected for online purchases would be remitted to the states by the federal government, and the remaining funds from the tax would be kept as a federal tax. This would allow for not only an increase in State revenue, but also an increase in the federal budget. The online retail industry is a huge money-maker that has gone untaxed for far too long. It would be best for the government to resolve that issue by imposing this federal tax.

The federal mandate takes the pressure out of the online retailer's hands and places the responsibility of collecting and remitting online sales taxes in the hands of the federal government. This will allow for businesses to grow and not worry about having to collect taxes, because the burden will now be on the federal government to collect these sales taxes. Each State will also not have to go through the hassle of enacting specific legislation just so they can receive sales taxes for online purchases made within their borders.

By having each State enact different legislation with regards to online sales taxes, that could create a problem where online distributors will relocate to states with more preferable laws surrounding this issue. The federal mandate would resolve this potential problem as well.

Each State Will Not Have to Enact Their Own Legislation

The first reason why the flat tax would be a better solution is because it would make it so each state does not have to enact their own legislation regarding online sales taxes. The Supreme Court in the *Quill* case was worried that business would be unduly burdened if they were forced to comply with whatever standard that each state decided to establish with regards to collecting online sales taxes. The act in the *Wayfair* case would be perfectly fine, but there is no guarantee that other states would adopt similar policies. Some states might not include the portion that excludes small time distributors from having to collect and remit the state sales taxes, which would harm small time distributors. As mentioned earlier, larger online distributors like Amazon have already been voluntarily collecting sales taxes for purchases made on their website, so they will not be heavily impacted by the *Wayfair* decision.³⁶ The online retailers that are most at risk are the smaller businesses who have not been accustomed to the idea of col-

36. Mercado, *supra* note 11.

lecting these sales taxes. This standard could prove to be too difficult a task for these businesses to handle while also maintaining profitability.

The standard in *Wayfair* could also hurt the growth of newer online retailers. These companies will most likely not have the resources or capital to comply with the differing standards for collecting state sales tax. The federally mandated flat tax rate would help these newer businesses and small online retailers by eliminating the inconsistencies of State sales tax standards. Even if the statute in *Wayfair* exempted small time retailers from collecting the sales tax for online purchases, there is no guarantee that other States would do the same when enacting their online sales tax legislation. Rather than deal with that problem, it would be best to simply impose a mandatory tax for all online sales taxes.

Easy Collection of Sales Tax

The second reason why the flat tax rate would be a better solution is because each state will be able to easily collect sales taxes on goods purchased and shipped within their boundaries. One of the main concerns addressed in the *Wayfair* case was the fact that states like North Dakota were missing out on millions of dollars in revenue because consumers were not complying with paying sales taxes on online purchases. This was clearly one of the major flaws of the *Quill* decision, and it is important to note that the standard in *Wayfair* perfectly handles it. That being said, the flat tax rate will also resolve the issues of missed State revenue while providing a consistent and convenient standard for online sales tax collections in the future. The aforementioned large sums of money that went unpaid would no longer be an issue. States that do not enact their own legislation regarding online sales taxes would benefit from the flat tax, and it would bring in a consistent flow of revenue. States that normally do not collect sales taxes would also benefit, as they would be receiving an additional source of revenue through the federally mandated flat tax on online purchases.

Consistency for All States

The third reason why the flat tax rate would be a better solution is because it would provide a consistent rate for all states. This would make it easier on online distributors, because they would know exactly what rate to collect at and to then remit to the state where they are shipping to. This third and final reason is why the flat tax rate is the perfect solution to the problem of online sales tax collections.

Both the *Wayfair* and the *Quill* courts justified their reasoning for differing reasons and concerns. Forcing online distributors to comply with different state sales taxes would be unduly burdensome but placing the responsibility of paying online sales taxes in the hands of the consumers also creates a problem of poor compliance and a significant decrease in a state's revenue from retail purchases. The federally mandated, flat tax resolves both issues.

COMMERCE CLAUSE ISSUE

Enacting a federally mandated, flat tax rate on goods purchased online could lead to some Commerce Clause issues. It is important to conduct a Commerce Clause analysis before making such a proposition. As applied to the modern interpretation of the Commerce Clause, the federally mandated, flat tax rate should not have any constitutional issues with regards to the Commerce Clause. The Constitution gives Congress the power to "regulate commerce . . . among the several states."³⁷ As of right now, the Court generally allows Congress (1) to regulate the channels of interstate commerce, (2) to protect the instrumentalities of interstate commerce and any goods or persons that travel in interstate commerce, and (3) to regulate any activities that "substantially affect interstate commerce."³⁸ If the regulated activity has a "substantial effect" on interstate commerce, then Congress has the power to pass legislation that regulates that particular activity.³⁹ The Courts almost always uphold legislation that regulates activities that have any sort of impact on interstate commerce. In the *Gonzales* case, the Court held that the United States Supreme Court has "never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech."⁴⁰ The Court in that case held that Congress had the power to regulate production of marijuana for home-consumption because of its effect on interstate commerce.⁴¹

Under the rationale of *Gonzales*, Congress should have no issue in employing the federally mandated, flat tax rate on purchases of online goods. The law would be regulating an activity that has a clear and substantial impact on interstate commerce, and the activity falls within the instrumentalities and channels of interstate commerce. Selling goods online and distributing them between states is interstate com-

37. Art I, §8, cl. 3.

38. *Gonzales v. Raich*, 545 U.S. 1 (2005).

39. *Id.* at 19.

40. *Id.* at 21.

41. *Id.* at 19.

merce. Even if the goods are bought from a purchaser in a state and the distributor also resided in that state, it can be easily argued that this also has a substantial effect on commerce. Under the current standard, each State will pass their own laws that regulate the taxation and remission of sales taxes for online purchases. If Congress were to decide to pass legislation that simplified this process and provided an easy and clear tax rate on these purchases, they would have the power to do so. Online purchases are only increasing, and it is safe to say that they will be one of the clearest examples of interstate commerce.

One of the most persuasive cases that would support the federal flat tax rate for online purchases would be the *National Federation of Independent Business v. Sebelius* case, which considered whether the Affordable Care Act was constitutional. While the Court held that the Individual Mandate portion was outside of Congress' powers under the Commerce Clause, the mandate still passed under Congress' taxing powers.⁴² The federal flat tax on online goods would probably get passed without any problems with the Commerce Clause, because unlike the individual mandate in the Affordable Care Act, the flat tax would be regulating activity. The Court in the *Sebelius* case struck down the Individual Mandate in the Affordable Care Act because it regulated inactivity rather than activity, which is unconstitutional.⁴³ The federal tax on online purchases would not have a problem with that rationale. The tax on online goods would clearly be a regulation of activity. The process of purchasing goods online and having them distributed across state lines or within certain states should only be characterized as activity. For that reason, the Court would probably hold that the federal flat tax for online purchases would not violate the Commerce Clause of the Constitution.

Even if the Court were to hold that the flat tax for online purchases violated the Commerce Clause, it is likely that the legislation would still pass as a part of Congress' taxing powers. Congress may "lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common Defense and general welfare of the United States."⁴⁴ The Court has held that this clause has allowed for Congress to broaden its regulatory authority in areas where it normally does not have the power to do so. The Court in the *Sebelius* case held that the Individual Mandate portion of the Affordable Care Act could be passed under Congress' taxing powers. Similarly, this mandate is clearly a tax and should therefore pass without any issues. The Indi-

42. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

43. *Id.* at 572.

44. U.S. Const., Art. I, § 8, cl. I.

vidual Mandate in the Affordable Care Act operated as a penalty, and the Supreme Court still allowed it to pass as a tax. The tax in this proposition does not operate as a penalty; it is simply a required tax for online purchases much like purchases made in physical retail stores. It is the right of Congress to collect taxes on such a business, especially since it has grown so rapidly and continues to be a part of our society.

“In exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with special conditions.”⁴⁵ The first portion of this quote is relevant for the federally mandated flat tax. Not only does Congress have the power to collect taxes through legislation, but it also has the power to offer funds to the States and spend that money how Congress pleases. The ability to collect the tax is authorized by Congress’s taxing powers, and the ability to then remit the collected sales taxes to the States where goods are distributed is authorized under Congress’ spending powers. The Court’s interpretation of the taxing and spending powers of Congress make it so that this legislation will most likely pass without any constitutional issues.

If a State or business were to challenge this federal flat tax, the Court would most likely hold that Congress has the power and authority to enact such a statute due to its enumerated powers in the Constitution. Regulating the taxes that are collected for online purchases is certainly an activity that has a substantial effect on commerce. The purchasing and distribution of goods across the country is one of the clearest examples of interstate commerce that we have today. Even if some of the online purchases are bought and delivered within the same State, it can still be argued that those purchases will still have an effect on interstate commerce and could therefore be regulated. Also, this statute is distinguishable from the Affordable Care Act, because it does not regulate inactivity, rather it would be regulating the activity of online purchases and sales tax collection.

NECESSARY AND PROPER

The Constitution authorizes Congress to make “all laws which shall be necessary and proper for carrying into execution the foregoing powers.”⁴⁶ This provision has allowed for Congress to have broad authority when enacting legislation and exercising its powers. As long as

45. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)).

46. Art. I § 8, cl. 18.

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the end is legitimate, and the means are appropriate, Congress can pass any particular legislation that is constitutional.⁴⁷

Applying this clause to the present statute, it is highly likely that the federal flat tax for online purchases would pass. The end goal of making sure that consumers pay sales taxes for online purchases and that States receive these vital sales taxes is more than a legitimate purpose. Most States are heavily reliant on these sales taxes for funding, and they have gone years without being able to collect them for online purchases. The means by which Congress would be enacting this statute are also legitimate. As mentioned earlier, it is within Congress' authority to collect and remit taxes under its taxing and spending powers. Any Commerce Clause issues can be run through the tests set out by the Court's precedent cases. It is very likely that this statute will not have any issues with the Commerce Clause.

The Court has always been deferential to Congress's determinations that certain regulations are necessary.⁴⁸ This deference is important in the present instance, because it could be argued that the federally mandated, flat tax is not a necessary exercise of Congress's power. Some could argue that the current standard set out in the *Wayfair* decision is perfectly applicable, and that there is no need for such legislation. The Court should still give deference to a Congressional claim that this statute would allow for a much easier collection method for online sales taxes. Citing to the rapid and massive growth of online purchases, Congress should be able to make a viable claim that the present statute is a necessary exercise of its powers.

In the *Sebelius* case, the Court held that the Necessary and Proper Clause prevented Congress from passing the Individual Mandate. It held that upholding laws under that Clause "involved exercises of authority derivative of, and in service to, a granted power."⁴⁹ Unlike that case, this federal law would be enacted as a derivative of, and in service to, a granted power. That power would be the Commerce Clause. The Individual Mandate did not meet the requirements to be passed under the Commerce Clause, but this mandate, as previously mentioned, would easily meet the Commerce Clause requirements.

SUPREMACY CLAUSE

Some may argue that the federally mandated flat tax rate would come in conflict with currently existing State legislation governing

47. *McCulloch v. Maryland*, 17 U.S. 316.

48. *See Sebelius*, 567 U.S. 519 (2012).

49. *Id.* at 521.

sales tax collection. This would all be resolved by the Supremacy Clause. “The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”⁵⁰ The Court in the *Gonzales* case went on to say that “[i]t is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be.”⁵¹ This interpretation makes it so there is no State law that can triumph over regulatory power afforded to Congress under the Commerce Clause.

Applying that doctrine to this case, any State law that regulated the collection of sales taxes for online purchases would be voided or subordinated to the federal law. The government would have the sole right to collect and remit sales taxes for online purchases, and the State laws would no longer have relevance. This statute, like the statute in the *Gonzales* case, would be a part of an important regulatory scheme and should therefore triumph over any existing state law.

POTENTIAL STATE BENEFITS

Since this proposition involves the federal government collecting all sales taxes for online purchases conducted throughout the country, some may try to argue that the States will be unnecessarily harmed by it. As of right now, states have the power to charge sales tax for online purchases conducted within their borders. There are also some states that do not have sales taxes on purchased goods, so this provision would not harm them. As of right now, only five states do not have a state sales tax.⁵² Those states are Alaska, Montana, Oregon, Delaware, and New Hampshire.⁵³ Under the new federally mandated online sales tax, the government will remit a portion of the collected tax to whichever state that the goods are purchased in. The rate will be the same for all states. Under that policy, each state will receive the proper share of sales taxes based on the number of goods that are purchased online within their state. States like the five mentioned above would simply begin to receive sales taxes for online goods purchased within their borders. That being said, those states would still be free to not charge sales taxes for goods purchased in retail stores.

50. *Gonzales*, *supra* note 38, at 29.

51. *Id.* at 29.

52. Melissa Parietti, *States Without Sales Tax*, <https://www.investopedia.com/articles/personal-finance/112415/5-states-without-sales-tax.asp>.

53. *Id.*

Those decisions will be left up to the individual states in deciding how they want their tax policies to be structured.

Similarly, there are several other states that currently charge sales taxes for goods purchased. Some of them charge higher rates than others, which could potentially lead to some problems when imposing a new, consistent tax rate for online sales purchases. Since each state charges different rates for sales taxes, it is more than likely that the flat tax will be lower than some states' current rates. While this may seem unfair, the loss in revenue will most likely be miniscule for these states, and the states are still allowed to maintain whatever sales tax rate that they desire for all goods that are not purchased online. All other states will be receiving an increase in revenue, and they will not have to go through the hassle of collecting the sales taxes on their own.

Currently, the states with the highest sales tax rates in the country are California, Indiana, Mississippi, Rhode Island, and Tennessee.⁵⁴ California charges 7.25% sales tax, while the remaining four states charge 7% sales tax.⁵⁵ The lowest non-zero, state sales tax is Colorado, with a rate of 2.9%.⁵⁶ The next five states with the lowest non-zero sales tax rate are Alabama, Georgia, Hawaii, New York, and Wyoming, and all of those states charge 4 percent rates for sales tax.⁵⁷ Taking this information into consideration, the federally mandated flat tax rate should probably be somewhere between 7.25 percent and 4 percent. The issue with picking an exact amount between those two figures is that the federal government will not want to force states like California to miss out on too much revenue if the flat tax rate is too low, and similarly, the federal government will not want to force residents in states like Wyoming to have to start paying high sales taxes for goods purchased online. This could lead to residents in those states resorting to shopping at retail stores within their states rather than purchasing goods online. On the other hand, in states like California with high sales tax rates, residents will probably be incentivized to purchase goods online since the sales taxes will be lower than those charged at retail stores within their state. For these reasons, the federally mandated flat tax rate should probably be around 5.5% for goods purchased online. This will be a reasonable rate for state residents who are not used to the idea of having to pay sales taxes for purchased

54. Cammenga, Janelle. "State and Local Sales Tax Rates, 2019." *Tax Foundation*, 27 Aug. 2019, taxfoundation.org/sales-tax-rates-2019/.

55. *Id.*

56. *Id.*

57. *Id.*

goods, and it will also not be too low where resident in states like California will exclusively look to online retailers to purchase all of their goods. This is merely a starting point for figuring out the right tax rate for goods purchased online.

The federally mandated flat tax rate could also help to reduce competition between bordering states with extremely different sales taxes. This type of competition is exemplified in areas where there is a significant difference between two jurisdictions' rates and people seek to take advantage of this difference to avoid high sales tax rates.⁵⁸ For example, evidence suggests that Chicago-area consumers have shown that they will either make major purchases in surrounding suburbs or online to avoid Chicago's 10.25 percent sales tax rate.⁵⁹ Rather than travel across state lines to avoid high sales taxes, consumers will have the easier option of just purchasing their goods online. The Chicago example also serves as evidence that consumers will always find ways to avoid paying sales taxes that are too high. This is vital information when considering what the exact rate should be for the sales taxes on goods purchased online. Those who complain that the flat tax rate will have a bad effect on the consumer market, should look to the current tax system and see that consumers already find ways to avoid paying sales taxes in districts where the rates are high and flock to districts where the sales taxes are low. That is not a strong enough argument to strike down the federal flat tax for online purchases.

ALTERNATE ROUTE: SSUTA

As mentioned in the beginning of this note, the drastic rise of electronic commerce is proving to be extremely detrimental to states and their finances. If the federal government is not able to provide a solution to this problem through the federal flat tax rate, there are still some alternatives that the states can take. One of these alternatives is available through the Streamlined Sales and Use Tax Agreement ("SSUTA").⁶⁰ States are heavily dependent on sales tax for revenue, and if they are unable to tax the millions of transactions that are occurring online, then they will take a financial hit as a result. This is why the *Quill* decision was so detrimental to the states, because in it the court stated that only sellers who had a "physical presence" within a state's borders would have to comply with that state's demands.⁶¹ In

58. *Id.*

59. *Id.*

60. See Streamlined Sales Tax Governing Bd., Inc., Streamlined Sales and Use Tax Agreement (Dec. 14, 2006), www.streamlinedsalestax.org/agreement.

61. *Quill*, supra note 2, at 311-15.

response to this decision, the states developed the SSUTA, which was an agreement between the states to harmonize their sales tax systems in order to obtain congressional approval to collect sales taxes from sellers that are not within a state's boundaries.⁶² On top of creating the SSUTA, the states also sought congressional authorization to force sellers to collect their sales and use taxes.⁶³ As previously mentioned, SSUTA is a pact between the states. This pact is voluntary. Membership is dependent on approval of the existing members, and approval is granted by a governing entity known as the Governing Board.⁶⁴

The SSUTA sets out four major requirements for the simplification of state level tax codes. The first is state level administration which means that sales taxes are remitted to a single state agency, thus making it so businesses do not have to file multiple tax returns for each state that they conduct business within. The next requirement is a uniform tax base for each state member in the SSUTA. This means that each state is required to make their jurisdictions use the same tax base. Each state member would have their goods and services taxed at the same rate or exempt the same way. The third requirement is simplified tax rates for each member, which requires that the same tax rates be applied across jurisdictions. The final requirement makes it so that sellers within the states would be responsible for collecting the appropriate tax rate for the vendor location.

The aforementioned requirements and provisions of the SSUTA were seen as a solution to the decision in *Quill*. Now that the decision has been overturned, states are free to create their own laws governing the collection of sales taxes for goods purchased online. This could hurt the uniformity that was created by the SSUTA and could lead to states choosing to enact their own tax laws that best suit themselves. This may help with state revenue streams, but it would also be harmful to consumers who have no say in the tax rates of their home states. However, if more states choose to join the SSUTA, then that would in effect serve as a uniform tax system for online purchases, and the goal of the federally mandated flat tax rate would be achieved.

IMPACT

This subject is important because the growth of the online sales industry and e-commerce have caused states to become uncertain about

62. *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement* ("SSUTA"), 40 U.C. Davis L. Rev. 1381.

63. *Id.*

64. *Id.*

the collection of online sales tax. While the *Wayfair* decision provided some guidance and a solution going forward, that case also overturned a decision that was much different than what the standard is today. It is important to create a uniform standard that all states can follow easily. It is also important that electronic distributors can still prosper without being hindered by differing state laws. While there are several potential constitutional issues with this proposition, there is still a chance that it could be passed based on recent cases dealing with the Commerce Clause.

CONCLUSION

The federally mandated flat tax rate should go into effect because e-commerce is only expanding, and the US needs an efficient and easy system for collecting online sales taxes. The standards set out in *Wayfair* and *Quill* are rational for different reasons, and both decisions have their flaws. The federally mandated tax rate resolves both issues and will allow for states to collect taxes on online purchases while also allowing online retailers to grow and prosper. The current standard is a good, temporary fix to the problem, but the government can provide an even better one with this federal mandate.

The states will not suffer under this new tax rate, since they shall receive a portion of the taxes collected. The proposed rate of around 5% should be workable, and that can also be adjusted based on the states' responses to the statute.

Any constitutional questions can be easily resolved, as this federal tax is within Congress's powers under the Commerce Clause, and Congress also has the power to collect taxes and spend them how it so chooses. Since the federal tax would be within Congress's enumerated powers, the Necessary and Proper Clause would also enable Congress to enact this statute because it is a proper use of Congressional authority. The Supremacy Clause would also allow Congress to pass this legislation and not have any issues with any of the existing State laws that regulate the collection of sales taxes for online purchases.