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Saved by *Labell*: Local Taxation of Video Streaming Services

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SAVED BY *LABELL*: LOCAL TAXATION OF VIDEO STREAMING SERVICES

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Over the last few years, Netflix and other video streaming services have erupted to become a preeminent form of entertainment for millennials and the public at large. With traditional forms of entertainment waning, video streaming services represent a novel source of revenue for cities. Local governments currently have numerous tax approaches that may be used to cover these services.

Different cities and states have taken distinctive approaches to taxing these services. Certain jurisdictions tax them in line with traditional pay-TV providers under utility taxes, while other jurisdictions tax them under sales or amusement taxes. This Note considers these different approaches, with a focus on Labell v. City of Chicago*, a 2018 case upholding Chicago's application of its amusement tax to Netflix and other video streaming services.*

Recognizing the various constraints that state and federal laws place on local taxation, this Note outlines the benefits and drawbacks of different approaches and highlights the challenges that cities should consider when issuing interpretive rulings to bring video streaming services into their tax bases. This Note suggests that other cities should draw on Labell *and follow Chicago's lead in taxing these services under existing amusement tax laws where possible, given the easier procedural hurdles, strong theoretical backing, and recent supporting precedent from the U.S. Supreme Court.*

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INTRODUCTION

As the phrase goes, nothing in life is certain but death and taxes.[1] The 2002 smash-hit film *Chicago*,[2] based on the 1975 Broadway musical of the same name, chronicles a satirical murder trial in Chicago during the Roaring Twenties. As the story goes, the brilliant attorney Billy Flynn razzle-dazzles[3] his way to victory against the City, exclaiming: "Believe me, if Jesus Christ had lived in Chicago today and if he had five thousand dollars and he'd come to me, let's just say things would have turned out differently."[4] At the heart of this Note is another Chicago trial, not concerning death but taxes.

In *Labell v. City of Chicago*,[5] a Chicago trial court considered whether the city's taxation of Netflix and other video streaming services was valid, despite municipal tax limitations, dormant Commerce Clause issues, and the

1. *See* Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN, 1789–1790, at 68, 69 (Albert Henry Smith ed., 1907), http://archive.org/details/writingsofbenjam10franuoft/page/68 [http://perma.cc/8kkh-xvc4].
2. CHICAGO (Miramax Films 2002).
3. *See* RICHARD GERE, *Razzle Dazzle*, *on* CHICAGO: MUSIC FROM THE MIRAMAX MOTION PICTURE (Epic Records 2002).
4. CHICAGO, *supra* note 2, at 41:02.
5. No. 15 CH 13399, 2018 BL 212206 (Ill. Cir. Ct. May 24, 2018).

Internet Tax Freedom Act (ITFA).[6] As consumers continue to cut the cord and ditch traditional pay-TV, the decision in *Labell* has potentially massive revenue implications not only for Chicago, but also for the multitude of cities and states mulling these so-called "Netflix taxes."[7] Fortunately for them, the City of Chicago prevailed and the court upheld the tax's validity and provided a roadmap for similar challenges.[8] The issue, however, is far from settled. Judicial challenges continue to pop up,[9] while *Labell* itself remains on appeal.[10] In light of *Labell*, this Note examines the question: Under what authority can cities tax video streaming services such as Netflix?

Part I of this Note addresses the rise of video streaming services and their relationship to traditional pay-TV providers, or multichannel video programming distributors (MVPDs). It then examines basic tools of tax interpretation, including the substance-over-form doctrine and the sliding scale of deference afforded to tax-commissioner rulings. Finally, it considers various principles of local taxation, with a focus on the variety of taxing approaches at a local government's disposal.

Part II of this Note surveys the current state and local government approaches that tax video streaming services differently from MVPDs, with a focus on *Labell*. It then considers approaches that tax video streaming services in line with MVPDs, as illustrated in *Netflix, Inc. v. Finance & Administration Cabinet Department of Revenue*.[11] Lastly, it considers key constraints on local taxation, including state limitations on municipal tax discretion, the U.S. Supreme Court's dormant Commerce Clause jurisprudence, and the ITFA.

Part III argues that in light of *Labell*, *South Dakota v. Wayfair, Inc.*,[12] and the deference afforded to tax commissioner rulings, cities should follow the same roadmap and issue interpretive rulings to bring video streaming services into the taxable fold via an amusement tax. Furthermore, recognizing the substance-over-form doctrine and the practical difficulties

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6. *Id.* at *1.

7. This Note refers to taxes on "video streaming services" rather than "Netflix taxes" because, while the latter is catchy, it is counterproductive, making such taxation politically unpalatable. *See* John Buhl, *Netflix and Bill*, U.S. NEWS & WORLD REP. (Feb. 12, 2018), https://www.usnews.com/opinion/economic-intelligence/articles/2018-02-12/the-netflix-tax-how-states-are-attempting-to-tax-consumption [https://perma.cc/9TUR-BPVK] (suggesting that failed attempts at video streaming service taxation by Louisiana and Virginia were due in part to their "eye-popping label[s]"). A number of cities and states, such as Chicago, Pennsylvania, and Florida, have enacted such taxes. Mike Snider, *A 'Netflix Tax'? Yes, and It's Already a Thing in Some States*, USA TODAY (Aug. 17, 2017), https://www.usatoday.com/story/tech/news/2017/08/17/netflix-tax-yes-and-its-already-thing-some-states/500416001/ [https://perma.cc/QC3Q-4PHU].

8. *Labell*, 2018 BL 212206, at *12.

9. *See, e.g.*, Petition for Declaratory Judgment and Other Relief, City of Creve Coeur v. Netflix, Inc., No. 4:18-cv-01495 (E.D. Mo. Sept. 6, 2018), ECF No. 1-1 [hereinafter Creve Coeur Petition]; Complaint for Declaratory and Injunctive Relief, Apple Inc. v. City of Chicago, No. 2018L05052014 (Ill. Cir. Ct. Aug. 27, 2018) [hereinafter Apple Complaint].

10. *See* Appellants' Brief at 2, Labell v. City of Chicago, No. 1-18-1379 (Ill. App. Ct. Dec. 5, 2018) (stating that the plaintiffs filed a timely notice of appeal on June 21, 2018).

11. No. K-24900, 2015 WL 5692791 (Ky. B.T.A. Sept. 23, 2015).

12. 138 S. Ct. 2080 (2018).

cities face in taxation, this Note concludes by suggesting that cities should feel at liberty to elect any consumption tax they prefer to bring these services within their tax bases.

I. ACT ONE: VIDEO STREAMING SERVICES, LOCAL TAXATION, AND "ALL THAT JAZZ"

To discuss local taxation of video streaming services, it is important to understand the industry, taxation schemes, and "all that jazz."[13] Part I.A describes what video streaming services are and their role in the media and entertainment industry, including their relationship with MVPDs. Part I.B addresses tools of tax interpretation, including the substance-over-form doctrine and the deference afforded to tax commissioner rulings. Part I.C assesses the various approaches that cities have taken to tax these video streaming services.

A. Modern-Day TV: Video Streaming Services

Any discussion regarding video streaming services must begin with an introduction to key terminology. Video streaming services[14] enable users to access video content via the internet without using TV subscription providers or permanently downloading such content.[15] Video streaming services may be further broken down into primarily two distinct models: subscription video on demand (SVOD), and transactional video on demand (TVOD).[16] The SVOD model provides access to a bundle of content for one flat price.[17] Key players in this area currently include Netflix and Hulu.[18] The TVOD model provides access to individual films or TV titles for a limited period, typically structured as a forty-eight hour rental.[19] Key players in this area

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13. *See* CATHERINE ZETA-JONES, *Overture/And All That Jazz*, *on* CHICAGO: MUSIC FROM THE MIRAMAX MOTION PICTURE (Epic Records 2002).

14. Different authors use different terminology to refer to such providers, including, but not limited to: video streaming services, video service providers, over-the-top (OTT) providers, internet streaming service providers, internet-based streaming services, and online video service providers. Although these terms emphasize different aspects of the business, they are interchangeable for purposes of this Note's treatment of the taxation issue. This Note's preferred term is video streaming services.

15. *Outlook Segment Definitions: OTT Video*, PWC, https://www.pwc.com/gx/en/industries/tmt/media/outlook/segment-definitions.html [https://perma.cc/D6C3-MK32] (last visited Feb. 12, 2019); *see also* Sahil Patel, *WTF Is OTT?*, DIGIDAY (July 7, 2015), https://digiday.com/media/what-is-over-the-top-ott/ [https://perma.cc/5DWM-2AZT]. For the purposes of this Note, streamed content does not include permanently downloaded purchases, despite their conflation in the everyday use of the term.

16. *Outlook Segment Definitions: OTT Video*, *supra* note 15; *see also* Patel, *supra* note 15. There is a third category of OTT, advertising video on demand. Due to its relatively small market size compared to SVOD and TVOD, this Note will not discuss this segment.

17. Patel, *supra* note 15; *see, e.g.*, *What Is Netflix?*, NETFLIX, https://help.netflix.com/en/node/412 [https://perma.cc/HP5L-7RTN] (last visited Feb. 12, 2019) (describing Netflix as a service in which a subscriber pays a flat, monthly fee to access unlimited streaming content).

18. Patel, *supra* note 15.

19. *Id.*; *see, e.g.*, *Rent Movies from the iTunes Store*, APPLE, https://support.apple.com/en-us/HT201611 [https://perma.cc/9CKA-7DXM] (last visited Feb. 12, 2019) (explaining that iTunes video rentals last forty-eight hours after a user begins watching).

currently include iTunes and Vimeo On Demand.[20] Amazon's video streaming service, Prime Video, offers users both an SVOD option and a TVOD option.[21]

Over the last decade, video streaming services have reached near ubiquity. While video streaming services continue to grow and dominate the current entertainment and media landscape, related traditional industries have taken massive hits over the last decade. The home-video industry, largely represented by Blockbuster, has been rated the number one dying industry in America.[22] Movie theater attendance in North America is at its lowest point since 1992—the continuation of an ongoing drop in attendance and domestic revenue.[23] Physical disc sales in the United States continue to plummet and have experienced double-digit percentage declines in back-to-back years.[24] Traditional pay-TV providers, including cable and satellite providers, are experiencing larger-than-expected subscriber losses[25] and declining advertising revenues[26] as "cord-cutting" continues to accelerate. Illustrative of this trend, traditional pay-TV providers recently experienced their largest quarterly loss ever.[27] Scholars and practitioners attribute this decline to an ascendant video streaming industry.[28]

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20. Patel, *supra* note 15.

21. Andy Beatman, *What Is Prime Video?*, AMAZON PRIME INSIDER (Aug. 27, 2018), https://www.amazon.com/primeinsider/video/prime-video-qa.html [https://perma.cc/7LE3-6S3T] ("With an eligible Amazon Prime membership, you have access to thousands of Prime Video titles at no additional cost. You also have the option to rent . . . movies and TV episodes not included with Prime Video.").

22. Trey Thoelcke, *Video Rental Is America's Most Quickly Dying Industry*, 24/7 WALL ST. (Dec. 30, 2016), https://247wallst.com/services/2016/12/30/video-rental-is-americas-most-quickly-dying-industry/ [https://perma.cc/W5CK-F7NH]. Based upon data from the Bureau of Labor Statistics, industry employment is down 89 percent from its high in 2006, and Blockbuster has shut all of its locations since declaring bankruptcy in 2010. *Id.*

23. Lizzie Plaugic, *Domestic Movie Theater Attendance Hit a 25-Year Low in 2017*, VERGE (Jan. 3, 2018), https://www.theverge.com/2018/1/3/16844662/movie-theater-attendance-2017-low-netflix-streaming [https://perma.cc/6TUM-EDR7].

24. Ricardo Lopez, *Disc Sales Decline Deepens in Annual Home Entertainment Spending Report*, VARIETY (Jan. 9, 2018), https://variety.com/2018/digital/news/home-entertainment-spending-2017-1202658638/ [https://perma.cc/MFA5-747N].

25. *See* David Z. Morris, *Viewers Are Ditching Cable for Streaming Faster Than Anyone Expected*, FORTUNE (Apr. 29, 2018), http://fortune.com/2018/04/29/viewers-cable-streaming/ [https://perma.cc/3UKD-AFL3].

26. *See* Sapna Maheshwari & John Koblin, *Why Traditional TV Is in Trouble*, N.Y. TIMES (May 13, 2018), http://www.nytimes.com/2018/05/13/business/media/television-advertising.html [https://perma.cc/FSP8-S88G].

27. The loss of more than one million subscribers from July to September 2018 was the largest ever, with pay-TV subscriptions now down from 86 percent in 2013 to 78 percent in 2018. Some predict the downhill trend will continue and that number will continue to fall. *See* Mike Snider, *Cord Cutting Accelerates as Pay TV Loses One Million Customers in Largest-Ever Quarterly Loss*, USA TODAY (Nov. 7, 2018), https://www.usatoday.com/story/tech/talkingtech/2018/11/07/cord-cutting-accelerates-1-m-customers-dropped-pay-tv-last-quarter/1919471002/ [https://perma.cc/A97M-GKLD].

28. *See* Lopez, *supra* note 24 (claiming that decreased ownership of movie titles is due to consumer preference for video streaming services); Maheshwari & Koblin, *supra* note 26 (suggesting that cord-cutters are instead watching video streaming services such as Netflix); Plaugic, *supra* note 23 (attributing declining movie-theater attendance and revenues to video streaming service viewership); Emily Quijano, *The Collapse of the Video Rental Industry*,

The sheer growth and amount of money spent on video streaming services are staggering: more than half of all U.S. homes subscribe to such services, which accounts for more than two billion dollars in monthly receipts.[29] These offerings continue to expand as additional competitors enter the market. For example, the Walt Disney Company recently announced its own streaming platform that is set to feature premier Disney, Pixar, Marvel, and Lucasfilm content.[30] With the modern tech disruption of video streaming services echoing that of the television just decades ago, a comparison of the two is only natural.[31]

Video streaming services are often compared to more traditional video content providers, such as cable television[32] and MVPDs.[33] In short, an MVPD is an umbrella term that includes more traditional forms of video distributors, such as cable and satellite providers.[34] The industry is currently dominated by the "Core Four" MVPDs, which includes AT&T, Comcast, Charter Communications, and Dish Network.[35] Because these MVPDs also serve as the predominant facilities-based internet service providers, their relationship with video streaming services cuts in both directions. On the one hand, as the internet is increasingly used for video streaming, with giants such as Netflix accounting for 15 percent of all worldwide downstream internet traffic alone, MVPDs stand to gain from more internet customers and greater usage.[36] On the other hand, this puts MVPDs in direct

MAGNIFICAT (Apr. 2017), https://commons.marymount.edu/magnificat/the-collapse-of-the-video-rental-industry/ [https://perma.cc/N9PJ-LBBD] (crediting the emergence of digital business models for the downfall of the home video rental industry).

29. Christine Wang, *More Than Half of US Homes Now Subscribe to a Streaming Service, Spending $2.1 Billion a Month*, CNBC (Mar. 20, 2018), https://www.cnbc.com/2018/03/19/streaming-services-americans-spend-2-point-1-billion-a-month-in-55-percent-homes.html [https://perma.cc/C4NE-UZVR].

30. Michelle Castillo, *Disney's New Netflix Rival Will Be Called Disney+ and Launch Late 2019*, CNBC (Nov. 8, 2018), https://www.cnbc.com/2018/11/08/disneys-new-netflix-rival-will-be-called-disney-plus-and-launch-late-2019.html [https://perma.cc/FV3R-GV39].

31. Arne Alsin, *The Future of Media: Disruptions, Revolutions and the Quest for Distribution*, FORBES (July 19, 2018), https://www.forbes.com/sites/aalsin/2018/07/19/the-future-of-media-disruptions-revolutions-and-the-quest-for-distribution/#4b5b64d260b9 [https://perma.cc/E4EQ-PLDN].

32. *Cable Television*, FED. COMM. COMMISSION (Dec. 15, 2015), https://www.fcc.gov/media/engineering/cable-television [https://perma.cc/7BUW-J7Y6] ("Cable television is a video delivery service provided by a cable operator to subscribers via a coaxial cable or fiber optics.").

33. *Id.* ("A multichannel video programming distributor (MVPD) is any person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.").

34. *Id.*

35. Mike Farrell, *Four for the Money*, MULTICHANNEL (Feb. 27, 2017), https://www.multichannel.com/news/top-25-mvpds-411157 [https://perma.cc/249F-J6F8]. Together, these four MVPDs service more than 80 percent of U.S. homes according to a recent study. *Id.*

36. SANDVINE, THE GLOBAL INTERNET PHENOMENA REPORT 7 (2018), https://www.sandvine.com/hubfs/downloads/phenomena/2018-phenomena-report.pdf [https://perma.cc/HP7F-HQY4] (determining that Netflix is the largest downstream internet

competition with video streaming services, which deliver video entertainment of the same look and feel but retain many strategic advantages over their MVPD peers.[37] Video streaming services, unlike MVPDs, remain unregulated by the Federal Communications Commission (FCC) and face comparatively low economic costs since they do not require costly infrastructure investments to deliver their content.[38] MVPDs, on the other hand, are extensively regulated and bear high costs, though they retain benefits not available on video streaming services, like dedicated bandwidth (hence, no buffering) and live broadcast television.[39]

This widespread shift toward online viewing has prompted MVPDs to directly compete with SVODs by making their content available online either ancillary to subscribers' television packages or independently as SVODs themselves.[40] Moreover, even local broadcasters are attempting to reconcile their programming with online viewership trends by making local market content streamable.[41] Taken together, it should come as no surprise that cities are eager to get a bite of the ever-growing apple.

B. Tools of Tax Interpretation

As local governments look to tax video streaming services, the interpretation of these tax laws is guided by certain principles. Part I.B.1 addresses the substance-over-form doctrine, while Part I.B.2 discusses the sliding scale of deference afforded to interpretive rulings of tax commissioners.

1. The Substance-over-Form Doctrine

Courts have employed various doctrines to aid in the interpretation and application of tax laws to particular transactions.[42] One such doctrine is known as the substance-over-form doctrine, which allows a court to disregard how a tax is labeled and look directly to its substance to determine

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application worldwide); Charles R. Naftalin, *Video Distribution Competition in the Internet Age*, *in* RECENT DEVELOPMENTS IN TELECOMMUNICATIONS LAW 105, 109–10 (Aspatore 2013); Sahil Patel, *Why Comcast Argues It's Not Too Worried About Streaming TV Bundles*, DIGIDAY (July 26, 2018), https://digiday.com/media/why-comcast-argues-its-not-too-worried-about-streaming-tv-bundles/ [https://perma.cc/3JE8-DDG7].

37. Naftalin, *supra* note 36, at 110–11.

38. *Id.*

39. *Id.*

40. Take, for example, AT&T making the same content of its premium network, HBO, available in both ways through HBO GO and HBO NOW. While "HBO GO is a streaming service included free with [a user's] paid HBO subscription through a TV provider[,] HBO NOW is a stand-alone streaming service that doesn't require cable or satellite TV." *What Is HBO NOW and How Is It Different from HBO GO?*, HBO GO HELP CTR., https://help.hbogo.com/hc/en-us/articles/204177788-What-is-HBO-NOW-and-how-is-it-different-from-HBO-GO- [https://perma.cc/DHM4-7A72] (last visited Feb. 12, 2019).

41. *See, e.g.*, *CBS to Launch CBSN Local Streaming Service to Expand Digital Reach*, CBS NEWS (Jan. 8, 2019), https://www.cbsnews.com/news/cbs-to-launch-cbsn-local-streaming-service-to-expand-digital-reach/ [https://perma.cc/GWW5-6QRE].

42. Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 5 (2000).

how a tax should apply under specific facts.[43] The doctrine permits courts to ignore or controvert the text of tax codes in light of economic principles, the taxpayer's motivation, or a combination of both.[44] While the doctrine's applicability may vary from court to court according to the type of transaction in question, its use often favors the tax commissioner.[45] The Supreme Court's recent decision in *PPL Corp. v. Commissioner*[46] demonstrates the doctrine in practice.

In that case, the taxpayer, PPL, challenged the IRS's denial of tax credits for its payment of windfall taxes in the United Kingdom.[47] The Internal Revenue Code provided for a tax credit on income taxes paid to a foreign government,[48] and the issue was whether the United Kingdom's tax on windfall profits was considered a foreign income tax for U.S. tax purposes. The Court stressed the importance of putting aside labels and definitions to assess the tax's ultimate economic effect.[49] Applying the substance-over-form doctrine,[50] the Court held that the tax operated as effectively an income tax and thus the taxpayer was entitled to the tax credit.[51] Thus, while these sorts of tax labels may matter to state or local governments, the Court has stressed the importance of looking beyond the labels to assess the true nature and effect of a particular tax.

2. Deference to Tax Commissioner Rulings

Another tool of tax interpretation is the deference afforded to administrative construction and interpretations of tax codes.[52]

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43. Under this treatment, a court will look right through the label as if it did not exist. *Cf.* JOHN C. REILLY, *Mister Cellophane*, *on* CHICAGO: MUSIC FROM THE MIRAMAX MOTION PICTURE (Epic Records 2002). The root of this doctrine can be traced back to the Supreme Court's decision in *Gregory v. Helvering*, 293 U.S. 465 (1935). In *Gregory*, the taxpayer engaged in a series of actions for the sole purpose of paying certain taxes at a preferable tax rate. *Id.* at 467. While the facts fit squarely within the letter of the law as set forth in the tax code, the Supreme Court nonetheless ruled against the taxpayer because her conduct was plainly outside the intent and purpose of the code in question. *Id.* at 470.

44. Allen D. Madison, *The Tension Between Textualism and Substance-over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 701 (2003). The substance-over-form doctrine is broad and encompasses other related doctrines, such as the sham transaction doctrine and other recharacterization doctrines that are applied to cover different factual scenarios. *See id.* at 722–36. For the purposes of this Note, the substance-over-form doctrine will be used broadly as a singular umbrella doctrine rather than distinguishing among the smaller subsets and variations of the doctrine.

45. *See generally* Robert Thornton Smith, *Substance and Form: A Taxpayer's Right to Assert the Priority of Substance*, 44 TAX LAW. 137 (1990).

46. 569 U.S. 329 (2013).

47. *Id.* at 331.

48. I.R.C. § 901(b)(1) (2012).

49. *PPL*, 569 U.S. at 335.

50. *Id.* at 340–41 ("[W]e follow substance over form and recognize that the windfall tax is nothing more than a tax on actual profits above a threshold.").

51. *Id.* at 344.

52. *See generally* Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); Jasper L. Cummings Jr., *The Supreme Court's Deference to Tax Administrative Interpretation*, 69 TAX LAW. 419 (2016); Kristin E. Oglesby, Comment,

Administrative deference is often justified as a matter of comparative competence[53] and political accountability.[54] As administered, it is effectively the court's way of saying "I Can't Do It Alone."[55] Others, including Justice Gorsuch, denounce such deference as "judge-made doctrine for the abdication of the judicial duty"[56] and argue for its curtailment in light of the constitutional principle of separation of powers.[57] Regardless of one's views, a discussion of deference to federal administrative authorities begins with *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*,[58] which set out the framework for modern deference,[59] and its refinement in *United States v. Mead Corp.*[60]

In *Mead*, the Supreme Court had to determine what deference, if any, should apply to a U.S. Customs Service tariff classification.[61] The central issue became which level of deference to apply: (1) *Chevron* deference, which the Court found affords a heightened deference to so-called "legislative" rulings;[62] or (2) *Skidmore* deference,[63] a lesser deference that varies based on a variety of factors, which the Court ultimately applied to "interpretive" rulings.[64] While the legislative-interpretive dichotomy is central to the *Mead* deference analysis, such a distinction may not be as pertinent in tax cases.[65] The muddiness of the distinction arises largely from a 2011 Supreme Court tax case, *Mayo Foundation for Medical Education & Research v. United States*.[66] There, the Court dealt with a rule promulgated by the Treasury Department and ultimately addressed whether *Chevron* deference would apply based solely upon ambiguity in the statute rather than any legislative-interpretive ruling distinction.[67]

Granting Chevron *Deference to IRS Revenue Rulings: The "Charitable" Thing to Do*, 78 LA. L. REV. 631 (2017).

53. *See generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

54. *See* Richard J. Pierce Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 397 (1987).

55. *See* CATHERINE ZETA-JONES, *I Can't Do It Alone*, *on* CHICAGO: MUSIC FROM THE MIRAMAX MOTION PICTURE (Epic Records 2002).

56. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

57. Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 552 (2018).

58. 467 U.S. 837 (1984).

59. Oglesby, *supra* note 52, at 637.

60. 533 U.S. 218 (2001).

61. *Id.* at 221.

62. Legislative rulings are afforded heightened deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226–27.

63. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

64. These factors include the administration's thoroughness, the validity of its reasoning, the consistency of its interpretation over time, and other powers of persuasion. *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 139–40).

65. *See* Cummings, *supra* note 52, at 421.

66. 562 U.S. 44 (2011).

67. *See generally id.*

More importantly, the Court's holding in *Mayo* put tax cases on par with other administrative cases and stressed that in complex areas such as tax, agencies "must be able to exercise [their] authority to meet changing conditions and new problems."[68] To do so, the Court set aside the oft-cited analysis set forth in *National Muffler Dealers Ass'n v. United States*,[69] which provided for limited deference in tax cases after satisfying a complex multistep framework.[70] Thus in the federal tax context, the net effect of *Mayo* collapses these varying deference tests into one sliding-scale approach based upon the facts and circumstances,[71] sometimes without even resorting to *Chevron*.[72]

At the state and local levels, construction and interpretation of tax laws by tax agencies are similarly afforded a sliding scale of deference, unless inconsistent with their other interpretations or contrary to statutory intent.[73] However, this deference is not absolute: questions of constitutionality extend beyond the scope of a tax authority's expertise and are thus not entitled to deference by courts.[74]

C. Principles of Local Taxation

Before the previously discussed tools of interpretation can be applied, an actual tax must be implemented. Local governments have a multitude of taxing options to collect revenue from video streaming services. These include the sales and use tax, the amusement tax, and the utility or telecommunications excise tax.[75] One additional option, while not explicitly a tax, is a provider fee. Each of these regimes will be considered in turn.[76]

A sales tax is a consumption tax on goods or services, typically levied at the point of sale as a percentage of the purchase price.[77] A seller typically collects and then remits sales taxes to the taxing jurisdiction.[78] Sales taxes

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68. *Id.* at 56 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 596 (1983)).

69. 440 U.S. 472 (1979).

70. *Mayo*, 562 U.S. at 53–57.

71. Cummings, *supra* note 52, at 423.

72. *Id.*

73. *See* 67B AM. JUR. 2D *Sales and Use Taxes* § 233 (2018).

74. *See, e.g.*, Crutchfield Corp. v. Testa, 88 N.E.3d 900, 905 (Ohio 2016); Zissi v. State Tax Comm'n, 842 P.2d 848, 853 n.2 (Utah 1992).

75. This Note refers to both "taxes" and "tax bases." A tax base includes every activity subject to the tax. *Tax Base*, BLACK'S LAW DICTIONARY (10th ed. 2014). A tax base may be expanded without changing the tax law itself. For example, when Chicago's amusement tax was held to apply to video streaming services, the amusement tax base grew as more activity was covered by the tax. *See infra* notes 121–24 and accompanying text.

76. There are other taxes which may be applied to video streaming services, such as the property tax and the corporate tax. *See* M. DAVID GELFAND ET AL., STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL 44–61 (3d ed. 2007). This Note, however, focuses solely on consumption taxes, where users ultimately pay the tax directly or indirectly.

77. *Id.* at 65–66. Sales taxes are levied in all but five states: Alaska, Delaware, Montana, New Hampshire, and Oregon. *See* JARED WALCZAK & SCOTT DRENKARD, TAX FOUND., STATE AND LOCAL SALES TAX RATES IN 2017, at 2 (2017), https://files.taxfoundation.org/20170131121743/TaxFoundation-FF539.pdf [https://perma.cc/U4W9-UC5Z]. Alaska and Montana do not levy sales taxes, but their municipalities may. *See id.*

78. *See* GELFAND ET AL., *supra* note 76, at 66–67.

are typically lumped together with use taxes, which are levied at the same rate, because use taxes operate effectively as a proxy for the sales tax on purchases made outside of a consumer's jurisdiction of residence.[79] The use tax applies to goods or services that are purchased outside the taxing jurisdiction but stored or consumed within it.[80] Use taxes are due within the taxing jurisdiction if the purchase would have been subject to sales tax if purchased there and if sales tax was not collected where the purchase was made.[81] To illustrate, take a resident of Dallas who purchases a car in Cleveland for storage and use in Dallas. If Cleveland did not collect sales tax on the purchase, but Dallas would have, then the resident owes use tax in Dallas.

The liability for these taxes typically falls on the consumer, who is ultimately liable if the seller does not collect a sales tax on the transaction.[82] However, whether or not a seller is required to collect taxes is a separate question. If a sale occurs in a jurisdiction which levies a sales tax on a particular good or service, the provider of the good or service must collect and remit the sales tax to the jurisdiction only if it established a substantial nexus with the taxing jurisdiction.[83]

The amusement tax is effectively a specialized sales tax on admission to places of entertainment and is levied as a percentage of the admission price, often at the same rate as the jurisdiction's sales tax.[84] While calculated in the same manner as a sales tax, the amusement tax forms an independent tax base.[85] Given its specialized nature, the amusement tax faces a lesser procedural burden than the general sales tax: while a local government's sales tax often requires specific state legislative authorization, an amusement tax typically does not.[86] However, while most cities have a sales tax, fewer have an amusement tax, and even those cities that do differ in what qualifies as a taxable amusement. For example, while Philadelphia and Santa Cruz

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79. *Id.* at 80–81. *But see* McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944) (positing that while sales and use taxes often "bring about the same result," they are conceptually different and may require different constitutional justifications).

80. GELFAND ET AL., *supra* note 76, at 80–81.

81. *Id.*

82. *Id.* at 67, 81; *see also I Bought a Taxable Item and the Seller Didn't Charge Sales Tax. Do I Have to Pay the Tax Anyway?*, SALES TAX INST., https://www.salestaxinstitute.com/sales_tax_faqs/i-bought-a-taxable-item-and-the-seller-didnt-charge-sales-tax-do-i-have-to-pay-the-tax-anyway [https://perma.cc/G3KF-2RY9] (last visited Feb. 12, 2019).

83. *How Do I Know if I Should Be Collecting Tax in a State?*, SALES TAX INST., https://www.salestaxinstitute.com/Sales_Tax_FAQs/should_I_collect_tax [https://perma.cc/UF97-KPA5] (last visited Feb. 12, 2019). For a discussion of what constitutes a substantial nexus for the purposes of internet taxation, see *infra* Part II.C.2.

84. *Amusement Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* GELFAND ET AL., *supra* note 76, at 91.

85. As such, it has been suggested that the amusement tax may skirt the confines of the substantial-nexus requirement. *See, e.g.*, William L. Fletcher Jr., Note, *Netflix and* Quill*: Using Access and Consumption to Create a Plan for Taxing the Cloud*, 58 WM. & MARY L. REV. 1029, 1031 n.3 (2017); *infra* Part II.C.2 (discussing the substantial-nexus requirement in detail).

86. GELFAND ET AL., *supra* note 76, at 91. The amusement tax also may avoid a vote of local residents. *Id.*

tax admissions to movie theaters, New York City exempts them from its amusement tax.[87]

The excise tax is related to the sales tax, as it operates effectively as a specialized sales tax on particular goods or services.[88] However, the excise tax differs from the general sales tax in three important ways. First, the provider of a good or service is responsible for paying the excise tax.[89] While consumers are mostly unaware of the tax, providers often pass the cost onto the consumer by including it in the price.[90] However, the provider remains ultimately liable.[91] Second, the excise tax is highly specific and traditionally applies only to transactions that have high social costs, such as gasoline, cigarettes, and alcohol.[92] Third, excise taxes tend to be levied as flat taxes assessed on a flat or per-unit basis rather than as a percentage rate applied to a transaction.[93] For example, New York State levies a roughly four dollar tax on a pack of cigarettes, which remains constant whether the price increases or decreases.[94]

The dividing line between excise and sales taxes may sometimes be blurred because the last two distinguishing characteristics do not always exist. The excise tax sometimes applies to goods or services that do not necessarily have high social costs and may apply on a percentage basis, as is the case with taxes on utilities such as telecommunications services.[95]

An additional quasi-tax option is the fee, which operates effectively as a narrowly tailored tax that covers the costs of a specific government program or service.[96] Local governments often prefer fees to taxes for various

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87. *Compare Amusement Tax*, CITY PHILA. https://www.phila.gov/services/payments-assistance-taxes/business-taxes/amusement-tax/ [https://perma.cc/R3W5-3UAC] (last visited Feb. 12, 2019), *and Admission Tax*, CITY SANTA CRUZ, http://www.cityofsantacruz.com/government/city-departments/finance/licenses-fees-and-taxes/admission-tax [http://perma.cc/Z2PC-QDPN] (last visited Feb. 12, 2019), *with* N.Y. STATE DEP'T OF TAXATION & FIN., TB-ST-8, ADMISSION CHARGES TO A PLACE OF AMUSEMENT 2 (2014), https://www.tax.ny.gov/pdf/tg_bulletins/sales/b14_8s.pdf [https://perma.cc/SE25-3XLX]. New York City follows New York State's tax policy on amusement. *See New York State Sales and Use Tax*, N.Y.C. DEP'T FIN., http://www1.nyc.gov/site/finance/taxes/business-nys-sales-tax.page [http://perma.cc/Q5H8-7FHF] (last visited Feb. 12, 2019).

88. GELFAND ET AL., *supra* note 76, at 85.

89. *See* Dan Caplinger, *What Is Excise Tax, and Do I Have to Pay It?*, MOTLEY FOOL (Dec. 17, 2016), https://www.fool.com/retirement/2016/12/17/what-is-excise-tax-and-do-i-have-to-pay-it.aspx [https://perma.cc/WP2S-74Z6].

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See Public Utility*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. Most utilities operate as monopolies but are subject to governmental regulation."). For example, New York State imposes an excise tax on telecommunications services at a rate of 2.5 percent. N.Y. TAX LAW § 186-e(2)(a)(1) (2019).

96. GELFAND ET AL., *supra* note 76, at 98–100; *see also* Rebecca Helmes, *Extras on Excise: The Difference Between a 'Tax' and 'Fee' and Why It Matters*, BLOOMBERG BNA (Sept. 3, 2014), https://www.bna.com/extras-excise-difference-b17179894455/ [https://perma.cc/P9BK-UYP7].

reasons. First, fees are easier to pass and amend from a procedural standpoint because they are not usually subject to voter approval or supermajority requirements.[97] Second, fees are subject to a lesser level of constitutional review because they are designed to cover the government's costs of providing specific services under its regulatory powers, not to raise revenue under commerce powers.[98] As such, a fee need not meet the constitutional substantial-nexus requirement imposed on taxes.[99] Third, fees are often considered more palatable than taxes because of their restitutionary nature.[100] Thus, whether a charge constitutes a fee or a tax is murky but of great significance to local governments.

For example, in *DIRECTV, Inc. v. Tolson*,[101] the Fourth Circuit held that North Carolina's franchise charges levied on cable providers constituted taxes as opposed to fees.[102] In assessing whether the government-imposed charge was a tax or a fee, the court looked at three factors: (1) who imposed the charge, (2) who is subject to the charge, and (3) how the collected monies are used.[103] When the charge falls roughly between a fee and a tax, the court held that the primary factor is how the money is used.[104] In that case, all three factors favored classification as a tax because the charges were not imposed by administrative or regulatory agencies, the charges were not narrowly targeted at certain users or providers, and the monies raised were not discretely used to cover the costs of the specific government service for which they were levied.[105]

II. ACT TWO: LOCAL TAXATION OF VIDEO STREAMING SERVICES: CURRENT APPROACHES AND CONSTRAINTS

There is a growing disparity between the methods by which local governments tax video streaming services, if they do so at all. In general, these various tax schemes fit roughly into two categories: (1) those that tax video streaming services independently from MVPDs, and (2) those that tax them in line with MVPDs. Part II.A considers the former, while Part II.B considers the latter. Part II.C concludes with an analysis of the "macro" constraints that may inhibit local cities from taxing local video streaming services, including constraints created by the states, the Supreme Court, and Congress.

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97. *See* Helmes, *supra* note 96.

98. *See* DIRECTV, Inc. v. Tolson, 513 F.3d 119, 125 (4th Cir. 2008). The fee-tax distinction is critical for constitutional review. Taxes, unlike fees, are subject to rigorous constitutional review in light of dormant Commerce Clause concerns. *See infra* Part II.C.2.

99. *See infra* Part II.C.2.

100. *See* David Segal, *Cities Turn to Fees to Fill Budget Gaps*, N.Y. TIMES (Apr. 10, 2009), https://www.nytimes.com/2009/04/11/business/11fees.html [https://perma.cc/2HEU-H56N].

101. 513 F.3d 119 (4th Cir. 2008).

102. *Id.* at 125.

103. *Id.*

104. *Id.*

105. *Id.* at 125–26.

A. Tax Approaches That Are Distinct from MVPD Taxation

As discussed in Part I.C, local governments have various taxing approaches available to them. This Part considers two particular case studies where video streaming services are taxed independently of MVPDs: (1) Pennsylvania's sales and use tax, and (2) Chicago's amusement tax.

1. Pennsylvania's Sales and Use Tax

In 2016, Pennsylvania modernized its tax code to extend the state's 6 percent sales and use tax to "digital products delivered to a customer electronically, digitally or by streaming."[106] The Pennsylvania Department of Revenue specifically states that these digital products include TVODs[107] and SVODs.[108] The seller must collect and remit the tax if the consumer's billing address is in Pennsylvania, irrespective of where the actual video is viewed.[109] While noteworthy within the state, this sort of tax is far from revolutionary, with calls for such modernization dating back to 2013[110] and similar implementation, for example, taking place in Washington State in 2009.[111]

The approach, however, is not without its drawbacks. One issue is that many local governments exempt services from their sales tax largely due to historical accident.[112] When sales taxes were first implemented during the Great Depression, the economy was largely goods-based.[113] Currently, many statutes still exempt services because they fall outside these taxing statutes, which are difficult to amend from a political perspective given fears of regressivity.[114] Some states attempt to circumvent this issue by treating video streaming services as if they were digital goods rather than services, though only twenty-seven states taxed digital goods as of December 1, 2017.[115] That group is actually even smaller because several of these states

106. *Digital Products*, PA. DEP'T REVENUE, https://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/SUT/Pages/Digital-Products.aspx [https://perma.cc/R6F3-QR6X] (last visited Feb. 12, 2019).

107. *See supra* notes 17–20 and accompanying text.

108. *See supra* notes 17–20 and accompanying text.

109. *Digital Products*, *supra* note 106.

110. *See generally* MICHAEL LEACHMAN & MICHAEL MAZEROV, CTR. ON BUDGET & POL'Y PRIORITIES, FOUR STEPS TO MOVING STATE SALES TAXES INTO THE 21ST CENTURY (2013), https://www.cbpp.org/sites/default/files/atoms/files/7-9-13sfp.pdf [https://perma.cc/7Z7D-W9HA].

111. *Digital Products Including Digital Goods*, WASH. DEP'T REVENUE (May 19, 2009), https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/digital-products-including-digital-goods [https://perma.cc/P8SB-QFZM].

112. NICOLE KAEDING, TAX FOUND., SALES TAX BASE BROADENING: RIGHT-SIZING A STATE SALES TAX 6 (2017), https://files.taxfoundation.org/20171026101536/Tax-Foundation-FF563.pdf [https://perma.cc/4D67-555K].

113. *See id.* at 3.

114. *See id.* at 6.

115. *See* 2018 STATE TAX HANDBOOK 852–54 (Cathleen Calhoun et al. eds., 2017).

tax only permanent digital video downloads and specifically exempt video streaming services.[116]

2. Chicago's Amusement Tax

The City of Chicago took a different approach by levying an amusement tax on video streaming services, which it accomplished through a revenue ruling on a previously enacted municipal amusement tax.[117] The term "amusement" is construed broadly to encompass a wide range of activities.[118] For example, the statute includes, but is not limited to, theatrical performances, motion pictures, circuses, carnivals, and athletic events.[119] While the tax is imposed upon the "patrons of every amusement within the City," providers are jointly and severally liable for the tax imposed.[120]

Chicago Mayor Rahm Emanuel, through his spokesperson Elizabeth Langsdorf, argued that "[i]n an environment in which technologies and emerging industries evolve quickly, the City periodically issues rulings that clarify the application of existing laws to these technologies and industries."[121] Beyond providing clearer guidance, such a ruling, according to Alderman Ameya Pawar, would promote fairness by correcting the tax loophole that allowed online businesses to skirt the tax code to better "reflect[] the realities of the marketplace."[122]

Accordingly, on June 9, 2015, Chicago's Comptroller issued Amusement Tax Ruling #5, which interpreted Chicago's amusement tax to include "charges paid for the privilege to witness, view or participate in amusements that are *delivered electronically*."[123] More specifically, the ruling expands the amusement tax to cover charges for video streaming services provided to

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116. *Compare Digital Products*, *supra* note 106 (including video streaming in the Pennsylvania digital goods tax), *and Digital Products Including Digital Goods*, *supra* note 111 (including video streaming in the Washington digital goods tax), *with* IDAHO CODE § 63-3616(b) (2018) (excluding video streaming from the Idaho digital goods tax), *and* IND. CODE § 6-2.5-4-16.4 (2018) (excluding video streaming from the Indiana digital goods tax).

117. CHI., ILL., MUN. CODE § 4-156-020 (2018) (imposing a 9 percent tax on "the admission fees or other charges paid for the privilege to enter, to witness, to view or to participate in such amusement").

118. In the tax commissioner's interpretive ruling, the broadness is underscored by adding emphasis to highlight that "amusement" includes "*any exhibition, performance, presentation or show for entertainment purposes . . . any entertainment or recreational activity offered for public participation or on a membership or other basis* . . . or . . . *any paid television programming*." City of Chi. Dep't of Fin., Amusement Tax Ruling #5 para. 2 (June 9, 2015) (quoting CHI., ILL., MUN. CODE § 4-156-020).

119. *Id.*

120. CHI., ILL., MUN. CODE §§ 4-156-020 to -030(A).

121. John Byrne & Amina Elahi, *Chicago Extends Taxing Power to Online Movies, Music, More*, CHI. TRIB. (July 5, 2015), https://www.chicagotribune.com/news/local/breaking/ct-chicago-cloud-tax-met-0702-20150701-story.html [https://perma.cc/944R-MB6A].

122. *Id.*

123. City of Chi. Dep't of Fin., Amusement Tax Ruling #5 para. 8 (June 9, 2015) (emphasis added).

Chicago consumers as determined by their primary residential or business address.[124]

Responding to this ruling, the Liberty Justice Center, a libertarian think tank, challenged the extension of the amusement tax on behalf of a group of Chicago internet consumers in *Labell*. The plaintiffs focused on three grounds: (1) a violation of the ITFA, (2) a violation of the dormant Commerce Clause, and (3) a violation of the city's power under Illinois's home-rule provision.[125]

First, as to the ITFA issue,[126] the plaintiffs challenged the new interpretation of the amusement tax as discriminatory.[127] In their view, the tax was discriminatory because similar noninternet entertainment was subject to unequal taxation, including flat yearly taxes on automatic amusement machines and lower rates for live performances in small venues.[128] The court disagreed and found real and substantial differences between in-person entertainment and streaming entertainment and, thus, found no violation of the ITFA.[129]

Second, as to the dormant Commerce Clause issue,[130] the plaintiffs challenged the tax's application to streaming services used outside of Chicago because they lacked a substantial nexus to the City and were unfairly apportioned.[131] The court again disagreed on both accounts.[132] First, the court found that the tax *did* possess a substantial nexus to Chicago because it applied only to those who receive their streaming services in Chicago based upon a "fair assumption that the taxpayers' residence will be their primary places of streaming."[133] Second, the court found that it was fairly apportioned and externally consistent based on this same assumption: using the customer's billing address as the basis for taxation is a "practical solution to the technology of the 21st century,"[134] and the limited possibility of multiple taxation was insufficient to invalidate the tax ruling.[135]

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124. *Id.* paras. 8(a), 13. The tax does *not* apply to permanent digital sales of TV or movies, which are treated separately under the general sales tax base. *Id.* paras. 10–11.

125. Labell v. City of Chicago, No. 15 CH 13399, 2018 BL 212206, at *1 (Ill. Cir. Ct. May 24, 2018). The plaintiffs also challenged the extension as a violation of the Illinois state constitution, but this Note does not address that portion. *Id.*

126. *See infra* Part II.C.3.

127. *Labell*, 2018 BL 212206, at *2.

128. *Id.* at *2–3.

129. *Id.* The court distinguished video streaming on one's personal device as "not in any way similar" to live performances, which foster tourism and business and cultivate the fine arts. *Id.* at *3. The court then distinguished video streaming from automatic amusement machines, which are operated on a coin-per-use basis on shared devices owned by an establishment and to which per-transaction taxation would be administratively inconvenient. *Id.*

130. *See infra* Part II.C.2.

131. *Labell*, 2018 BL 212206, at *4.

132. *Id.*

133. *Id.* at *5.

134. *Id.* at *6.

135. *Id.* at *5–6.

Third, as to the home-rule issue,[136] the plaintiffs claimed that Chicago exceeded its home-rule powers by taxing streaming services beyond its borders and therefore beyond the scope of its taxing authority.[137] The court yet again disagreed, siding with the City on various grounds. First, the court reasoned that the state's home-rule powers are to be construed liberally to give municipalities, such as Chicago, wide latitude to tax absent an express state legislative statement to the contrary.[138] Second, the court found even greater support for such taxing power given that Illinois adopted the Mobile Telecommunications Sourcing Act (MTSA).[139] Passed by Congress in 2002, the MTSA enables state and local taxation of mobile telecommunications services at the customer's "place of primary use" regardless of where the services are actually used.[140] While the MTSA is silent with respect to streaming services provided by *non*-telecommunications companies, the court found that using a customer's billing address as the basis of the tax was reasonable because the MTSA would permit it if the streaming services were instead provided by telecommunications companies.[141] Lastly, the court reiterated that municipal ordinances such as this are presumed constitutional and will be upheld absent a successful facial or as-applied challenge.[142] In sum, the court likened the tax to the Chicago vehicle sticker tax, which is based upon the driver's billing address even if the vehicle is driven outside of the city.[143] Likewise, a streaming service consumer who lives in Chicago is liable for the tax even if the streaming takes place outside of the city.[144]

Though Chicago prevailed on summary judgment, Amusement Tax Ruling #5 is far from settled law. On the one hand, a similar challenge brought by the Entertainment Software Association was voluntarily dismissed, which suggests that challengers may be conceding the validity of *Labell*'s reasoning.[145] On the other, *Labell* is on appeal[146] and Apple has filed a similar lawsuit against Chicago on the same three grounds.[147] For

136. A home-rule provision is a state legislature's conditional allocation of autonomy to a local government. *Home Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also infra* Part II.C.1.

137. *Labell*, 2018 BL 212206, at *8.

138. *Id.* at *9–10; *see also* ILL. CONST. art. VII, § 6(a), (m); Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013).

139. *Labell*, 2018 BL 212206, at *9–10.

140. Mobile Telecommunications Sourcing Act, 4 U.S.C. §§ 117(b), 124(8) (2012).

141. *Labell*, 2018 BL 212206, at *10.

142. *Id.* at *11 (citing City of Chicago v. Pooh Bah Enters., 865 N.E.2d 133, 146 (Ill. 2006)).

143. *Id.* at *12.

144. *Id.*

145. Michael J. Bologna, *Chicago's 'Netflix Tax' OK, but Appeal in Queue*, BLOOMBERG BNA (May 29, 2018), https://www.bna.com/chicagos-netflix-tax-n57982093026/ [https://perma.cc/86ZJ-T37G].

146. *See supra* note 10 and accompanying text.

147. *See generally* Apple Complaint, *supra* note 9. The complaint notably differs from the one filed in *Labell* as it comes from the perspective of an out-of-state provider rather than that of a consumer subject to the tax. The complaint highlights the "significant administrative burden" of the amusement tax's collection and remission and the unfairness of being held

now, the amusement tax remains in effect and all remote sellers are responsible for collecting and remitting as of October 1, 2018.[148]

B. Tax Approaches That Are Consistent with MVPD Taxation

Another approach taken by local governments is to tax video streaming services in line with how MVPDs are taxed. As discussed in Part I.A, video streaming services and MVPDs compete with each other.[149] Whether video streaming services fall into the category of MVPDs may have massive tax implications—telecommunications services, such as MVPDs, are the most heavily transaction-taxed services in the United States, subject to roughly 14 percent taxes on average as opposed to the 6 percent average for other services.[150]

Recognizing the convergence of video streaming services and MVPDs,[151] in 2015 the FCC proposed a rule that would have redefined MVPDs to include at least some video streaming services, which would make these approaches easier.[152] The agency justified this proposal as a modernization of its regulations to (1) recognize the trend of video services increasingly accessed on the internet, and (2) benefit consumers by stimulating innovation and competition.[153] The FCC's current chair, Ajit Pai, served as a commissioner when the change was proposed[154] and expressed his opposition on multiple occasions—gently at first,[155] and then more sharply by cautioning against opening a Pandora's box of video streaming

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directly liable for Chicago residents' tax liability if it fails to collect and remit the taxes accordingly. *Id.* paras. 38–40.

148. *See* Tripp Baltz, *State of Wayfair: Illinois 'Amorphous,' Attempting to Streamline*, BLOOMBERG BNA (Sept. 21, 2018), https://www.bna.com/state-wayfair-illinois-n73014482728/ [https://perma.cc/4SPQ-WMTH].

149. *See supra* Part I.A.

150. JOE CARR ET AL., DELOITTE, UNDERSTANDING TELECOMMUNICATIONS TAXATION 8–9 (2015), https://telestrategies.com/tax/Presentations2015/Wednesday/Deloitte%20101%20PAPER%20May-15_Final.pdf [https://perma.cc/TDR4-Z4ZW]. *See generally* Note, *Taxation of Cable Television: First Amendment Limitations*, 109 HARV. L. REV. 440 (1995) (discussing the differential taxation of cable television and its resulting greater tax burden to consumers).

151. *See supra* Part I.A.

152. This would be done "by including [within the FCC definition of MVPDs] services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming." Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078 (proposed Jan. 15, 2015).

153. *Id.* at 2079.

154. *Ajit Pai: FCC Chairman*, FED. COMM. COMMISSION, https://www.fcc.gov/about/leadership/ajit-pai [https://perma.cc/WG24-8CM9] (last visited Feb. 12, 2019).

155. "[G]iven the dramatic, organic explosion in online video content over the last few years, I have my doubts as to whether additional regulation in this space is necessary." Ajit Pai, Comm'r, FCC, Concurring Statement on Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services (Dec. 19, 2014), https://ecfsapi.fcc.gov/file/60001010395.pdf [https://perma.cc/S4JZ-X4KA].

regulation.[156] Accordingly, the change never occurred and thus video streaming services remain unregulated as distinct from their MVPD peers.[157]

Nevertheless, as a matter of apparent equity, or of convenience, governments continue to attempt such taxation, and while these regulatory issues may seem distinct from the tax considerations at the core of this Note, the differing regulatory treatment does have relevant downstream effects on such attempts. By maintaining such definitional distinctions, state and local governments that seek to conveniently tax video streaming services in line with existing MVPD tax laws might not be able to do so.[158]

For example, in *Netflix, Inc. v. Finance & Administration Cabinet Department of Revenue*, Netflix sought to avoid paying Kentucky state taxes by relying upon the FCC's definitions to distinguish it from classification as an MVPD or cable service under the state's telecommunications tax.[159] The court noted that "[w]hen a Kentucky statute is modeled after a federal counterpart statute, the Kentucky courts state that they 'must consider the way the federal act has been interpreted.'"[160] The core of Netflix's argument was the distinct treatment of video streaming services apart from MVPDs under FCC regulations, which suggests that these federal definitions still matter greatly even as applied to state or local tax statutes.[161]

Of course, state and local governments could circumvent the issue by altering the definitions of MVPDs in their respective telecommunications statutes, though they have had varied success in doing so. While states such as Florida[162] and South Carolina[163] have successfully subjected video streaming services to their telecommunications taxes, other attempts have floundered, become the subject of ongoing litigation, or been abandoned.

Netflix illustrates one such failed attempt. The Kentucky legislature defined MVPDs more broadly than the FCC's definition,[164] and the court

156. Ajit Pai, Comm'r, FCC, Remarks Before the Churchill Club (July 17, 2015), https://docs.fcc.gov/public/attachments/DOC-334437A1.pdf [https://perma.cc/3SRD-G577].

157. *See supra* notes 37–38 and accompanying text.

158. *See, e.g.*, *infra* notes 159–61 and accompanying text.

159. Netflix, Inc. v. Fin. & Admin. Cabinet Dep't of Revenue, No. K-24900, 2015 WL 5692791, at *1–2 (Ky. B.T.A. Sept. 23, 2015).

160. *Id.* at *2 (quoting Harker v. Fed. Land Bank, 679 S.W.2d 226, 229 (Ky. 1984)).

161. *Id.*

162. "'Video service' means the transmission of video, audio, or other programming service to a purchaser, and . . . includes . . . digital video." FLA. STAT. § 14-202.11(24) (2018). This is in stark contrast to Florida's earlier definition of "video services" which explicitly exempted video streaming services from telecommunications tax treatment. FLA. STAT. § 36-610.103(11) (2018) (stating that a video service does not include "video programming provided as part of and via a service that enables end users to access content, information, electronic mail, or other services offered over the public Internet").

163. "The streaming transmission of television programs, movies and music using the Internet is no different from cable and satellite transmission of television programs, movies music, and other similar content, all of which are taxable communications services." S.C. Dep't of Revenue, S.C. Revenue Ruling #16-5, at 5 (July 6, 2016) (interpreting S.C. CODE ANN. § 12-36-910(B)(3)).

164. *See supra* notes 33–34 and accompanying text. Kentucky, on the other hand, defines an MVPD as "programming provided by or generally considered comparable to programming provided by a television broadcast station and shall include but not be limited to: (a) Cable

was thus faced with a taxation statute similar to, but distinct from, the FCC's definition.[165] The court reasoned that even if Netflix would avoid state taxation under the FCC definition of an MVPD, it could still be taxed under the Kentucky statute's definition if it so provided.[166] The court compared the statutory language to that of Florida's communications tax,[167] where the statute explicitly covers digital video streaming. Absent such clear language in the statute, the court instead had to determine whether a video streaming service such as Netflix was generally comparable to a MVPD.[168] While the court noted that both provide video content to consumers, a video streaming service is effectively comparable only to the on-demand portion of an MVPD, which was insufficient to render it generally comparable on the whole.[169] Rather, the court found them to be quite different, since video streaming services do not provide live programming or scheduled linear programming.[170] Because Netflix did not fit within the letter of the law and was not generally comparable to MVPDs, the court held it was not subject to the tax.[171]

Various municipalities across Missouri are currently entangled in litigation regarding their attempts to charge video streaming services as MVPDs, albeit through a provider fee rather than through a tax.[172] In 2007, Missouri passed the Video Services Providers Act (VSPA), which paved the way for municipalities to collect fees from providers of video services.[173] Pursuant to this statute, municipalities such as Creve Coeur have collected 5 percent fees from cable providers and the like, and have since sought a declaratory judgment that video streaming services such as Netflix and Hulu are subject to this same fee.[174] The class action lawsuit, brought on behalf of all similarly situated municipalities in Missouri, alleges that Netflix fits within the VSPA's definition of a video service provider[175] because its video content is delivered over broadband internet connection, a public right-of-way, within the state.[176] Netflix argues that it is not generally comparable to

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service; (b) Satellite broadcast and wireless cable service; and (c) Internet protocol television provided through wireline facilities without regard to delivery technology." KY. REV. STAT. ANN. § 136.602(8) (West 2018).

165. *Netflix*, 2015 WL 5692791, at *1.

166. "The Board concludes that if [video] streaming services fit within the Kentucky statute's definition for 'multichannel video programming,' then Netflix would be a provider of 'multichannel video programming services' for purposes of Kentucky tax law, regardless of its status under federal law for regulatory purposes." *Id.* at *3.

167. *See supra* note 162 and accompanying text.

168. *Netflix*, 2015 WL 5692791, at *3.

169. *Id.*

170. *Id.* at *3–4.

171. *Id.* at *6.

172. *See supra* notes 96–105 and accompanying text.

173. MO. REV. STAT. § 67.2689 (2018).

174. *See generally* Creve Coeur Petition, *supra* note 9.

175. Video services are defined as "the provision of video programming provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including internet protocol technology whether provided as part of a tier, on demand, or a per-channel basis." MO. REV. STAT. § 67.2677(14) (2018).

176. Creve Coeur Petition, *supra* note 9, para. 35.

those providers subject to the fee, relying on both the Kentucky Netflix case[177] and federal telecommunications law.[178] The case remains undecided as of the publication of this Note.

Other attempts, while not the subject of litigation, have been sharply criticized and abandoned. Across California, Pasadena and forty-five other cities have considered issuing interpretive rulings to include video streaming services in their utility tax bases.[179] This would make these services, like their MVPD counterparts, subject to taxes ranging anywhere from 4 to 10 percent.[180] While smaller municipalities did so, Pasadena suspended their efforts following substantial pushback from certain lawmakers.[181]

C. Key Constraints on Local Taxation

This Part outlines the potential roadblocks to the local taxation of video streaming services posed by the states, the Supreme Court, and Congress. Part II.C.1 describes home-rule provisions and state restrictions on local tax discretion. Part II.C.2 discusses the Supreme Court's dormant Commerce Clause jurisprudence and how it impacts internet taxation. Part II.C.3 then addresses congressional limitations on internet taxation as provided for in the ITFA.

1. The States: Home-Rule Provisions

Even if a city wanted to tax video streaming services as discussed in Part II.A and Part II.B, cities "often lack the legal authority to enact meaningful tax reform."[182] Because cities are technically "creatures of the state," their powers are typically constrained by what a state will allow, which varies from state to state.[183] Many states have responded by enacting home-rule provisions as a means of devolution to allow cities greater authority to tackle certain problems.[184] While a number of states explicitly give their local

177. *See supra* notes 159–71 and accompanying text.

178. Memorandum of Law in Support of Defendant Netflix, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 8–9, City of Creve Coeur v. Netflix, No. 4:18-cv-01495 (E.D. Mo. Sept. 13, 2018), ECF No. 10 (citing 47 U.S.C. § 522(20)).

179. Utility taxes are merely excise taxes on utilities. *See supra* note 95 and accompanying text.

180. Jason Henry, *Pasadena Will Tax Netflix, Hulu and Your City Might Be Next*, PASADENA STAR-NEWS (Sept. 23, 2018), https://www.pasadenastarnews.com/2016/09/23/pasadena-will-tax-netflix-hulu-and-your-city-might-be-next/ [https://perma.cc/MK4S-UN6T].

181. MICHAEL J. CATALDO, PILLSBURY, CALIFORNIA CITIES TO TAX STREAMING VIDEO? 3 n.9 (2016), https://www.pillsburylaw.com/images/content/1/0/v2/104731/AlertDec2016TaxUtilityUserTaxonStreamingVideo.pdf [https://perma.cc/A43X-ZMUL]; *see also* Janko Roettgers, *California Bill Aims to Stop Local Netflix Tax Ordinances*, VARIETY (Feb. 10, 2017), https://variety.com/2017/digital/news/netflix-tax-stream-act-1201984291/ [https://perma.cc/M38M-EPJB].

182. Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 296 (2016).

183. *Id.* at 301.

184. *Id.* at 302. Types of home-rule authority include structural, personnel, functional, and fiscal, according to the National League of Cities. *Id.* at 301–02.

governments fiscal control, including tax discretion, these local governments may still be constrained by state constitutional provisions.[185]

Home-rule provisions vary widely depending upon how much deference a state is willing to offer its localities. For example, one recent article compared home-rule provisions from three states—Washington, Wisconsin, and Ohio—to demonstrate the disparity among home-rule provisions.[186] While Washington and Wisconsin offer limited taxing power to their local governments, Ohio offers its local governments general presumptive taxing authority.[187] Whether or not local governments should be given greater leeway to experiment with taxation is a contested question with principled justifications on both sides of the debate.[188]

Proponents of greater local tax discretion cite multiple reasons, principally the potential for greater policy innovation at the local level.[189] Confronted with declining revenues and limited state aid, greater tax innovation at the local level would discourage municipal borrowing and empower local leaders to raise sufficient funds to meet their spending needs.[190] Moreover, local governments are uniquely situated to serve as laboratories of democracy where the stakes are comparatively lower than they are at the state or federal level.[191] In the context of such a multitude of localities—over 3000 counties and 15,000 municipalities—greater tax discretion would allow seemingly endless "opportunities for innovation, experimentation, and reform."[192]

In fact, several now-national fiscal policy proposals were incubated at the local level, such as the Fight for $15 movement to address issues of low-wage work.[193] After just five local governments had minimum wage laws in place in 2012, more than forty local governments joined the Fight for $15 movement and implemented such laws as of June 2018.[194] The Fight for $15

185. *Id.* at 302–03.

186. *Id.* at 305–13.

187. *Id.* at 312.

188. *See id.* at 316–34. As a proponent of expanded home-rule authority, Scharff calls for *presumptive* municipal taxing authority. *Id.* at 298.

189. *Id.* at 316–17. Other reasons include less distortion of city-development choices, greater lines of accountability, and increased regulatory choices. *Id.* at 312.

190. *Id.* at 316–17.

191. *Id.* at 316.

192. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 259 (2004).

193. *See* Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/ [https://perma.cc/B9EL-NRYL] (discussing the history of the Fight for $15 movement).

194. *Inventory of US City and County Minimum Wage Ordinances*, U.C. BERKELEY LAB. CTR. (June 20, 2018), http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/ [https://perma.cc/U3S6-ZLP9]. These changes have upstream effects on states as well. Take California for example. After cities such as Los Angeles and San Francisco experimented with fiscal policy and raised their local minimum wages to fifteen dollars, the State of California followed shortly thereafter and pledged to raise the state's minimum wage to fifteen dollars as well. The state wage increases trail those at the local level and allow the state to maneuver away from the policy should the effects at the local level be suboptimal. *See* Paul Davidson, *California Reaches Deal on $15*

has since continued up the state level to become a centerpiece of the Democrats' national fiscal platform.[195] This bottom-up policy building is not a strange phenomenon by any stretch, as there are countless other examples, including the national drinking age, the national speed limit, and Common Core educational standards.[196]

However, not everyone agrees that local governments should be given greater tax discretion. From the states' perspective, tight fiscal control over localities may help mitigate vertical tax competition, horizontal tax competition, concerns of ultimate fiscal responsibility, and administrability concerns.[197] Vertical tax competition is a concern for states because municipal taxation may compete directly with the state's taxation.[198] Horizontal tax competition is also a concern for states because intrastate competition between municipalities may set off a race for the lowest taxes.[199] This would hurt, rather than help, municipalities and could potentially force them to cut spending or increase their dependence on state aid.[200] A third concern that states may have relates to the perception that they bear ultimate fiscal responsibility: state leaders fear that local fiscal distress might ripple elsewhere, perhaps even upstream to the state level.[201]

The final concern relates to administrability and requires a deeper dive.[202] While states themselves often lack sufficient resources to support their own tax administration, local governments are even less sophisticated and have even fewer resources.[203] Thus, to protect multijurisdictional taxpayers and create greater efficiencies, a state may be inclined to restrict local tax

Minimum Wage, USA TODAY (Mar. 29, 2016), https://www.usatoday.com/story/money/2016/03/28/california-raises-minimum-wage-15-hour/82348622/ [https://perma.cc/ZSZ6-VHNX]; Annemarie Duran, *California Minimum Wage Across Cities and Towns 2018 Guide for Employers*, SWIPECLOCK WORKFORCE MGMT. (Dec. 1, 2017), https://www3.swipeclock.com/blog/california-minimum-wage-across-cities-towns-2018-guide-employers/ [http://perma.cc/GB9E-29UK].

195. Jordain Carney, *Sanders, Democrats Introduce $15 Minimum Wage Bill*, HILL (May 27, 2017), https://thehill.com/blogs/floor-action/senate/335227-sanders-democrats-introduce-15-minimum-wage-bill [https://perma.cc/XTS7-6QDK]; *see also* Ivan Levingston, *Sanders Wins $15 Minimum Wage in Dems Platform Draft*, CNBC (July 1, 2016, 6:19 PM), https://www.cnbc.com/2016/07/01/sanders-wins-15-minimum-wage-in-dems-platform-draft.html [https://perma.cc/F2E9-4KXN].

196. Tom Loveless, *When Does a Policy Start?*, BROOKINGS INSTITUTION (Feb. 13, 2013), https://www.brookings.edu/research/when-does-a-policy-start/ [https://perma.cc/C4DM-K4YN].

197. Scharff, *supra* note 182, at 321.

198. *Id.* at 321–22. While this may not be a problem where demand is inelastic, vertical tax competition may create an issue where the demand is elastic. For example, assume a municipality adds a tax on video streaming services, which are elastic. When consumers no longer purchase them, they reduce not only the municipality's tax revenue but the state's, assuming they tax the same service. *Id.*

199. *Id.* at 324–26. This horizontal competition can occur, for example, by offering tax incentives to businesses to locate in a particular place or by offering lower sales tax rates to residents. *Id.*

200. *Id.* at 326.

201. *Id.* at 326–30.

202. *See id.* at 330–34.

203. *See id.* at 331.

discretion to minimize differences in tax rates and bases among municipalities.[204] Some states have gone even further by not only requiring uniformity across local governments but by bringing themselves into uniformity with other states through the Streamlined Sales and Use Tax Agreement (SSUTA).[205]

The SSUTA is a product of multistate cooperation to reduce tax administration and compliance costs.[206] Since its inception in 1999,[207] the SSUTA has grown to include twenty-four states and encompasses 33 percent of the national population.[208] The SSUTA is designed to make sales tax administration easier through the use of more efficient administrative procedures, novel technology, and simplification of sales tax laws.[209] The Supreme Court itself recently applauded the various taxpayer protections that the SSUTA sets forth, including "a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules."[210] However, it remains unclear whether such SSUTA protections are *required* to tax remote internet sellers without violating the dormant Commerce Clause.[211]

As good as it sounds, not all states are on board with the SSUTA. Notable exceptions include New York, California, Texas, Pennsylvania, Arizona, and Illinois.[212] Perhaps uncoincidentally, these states house all ten of the nation's largest cities.[213] Because the SSUTA requires uniformity across the state, member states and their municipalities are stripped of flexibility in their tax discretion. Take a nonmember state such as New York, which features a complex web of sales and use taxes that vary by locality.[214] Beyond mere variation in county sales and use tax rates that are layered on top of the state's sales and use tax, the state allows for a wide variety of specific sales and

204. *Id.* at 331–32.

205. *Id.* at 333–34.

206. *FAQs—General Information About Streamlined*, STREAMLINED SALES TAX GOVERNING BOARD, https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined#id [https://perma.cc/B2J3-EW84] (last visited Feb. 12, 2019).

207. *Id.*

208. The member states are: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

209. *Id.*

210. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018).

211. Hugh Goodwin, *INSIGHT: 'Quill' Pickle? How 'Wayfair' Could Undermine Some State Sales Tax Economic Nexus Provisions*, BLOOMBERG BNA (June 26, 2018), https://www.bna.com/insight-quill-pickle-n73014476911/ [https://perma.cc/2VS3-TFGW]; *see infra* Part II.C.2.

212. Baltz, *supra* note 148.

213. *The 30 Most Populous Cities*, NAT'L LEAGUE CITIES, https://www.nlc.org/the-30-most-populous-cities [https://perma.cc/68RK-WW85] (last visited Feb. 12, 2019).

214. While the state sales and use tax rate is 4 percent, the counties apply additional county sales and use taxes anywhere from 3 percent to 4.5 percent. *See* Derek Silva, *All About New York Sales Tax*, SMARTASSET (Aug. 20, 2018), https://smartasset.com/taxes/new-york-sales-tax [https://perma.cc/BL96-CAUF].

excise taxes in New York City.[215] For example, New York City levies special sales taxes on beauty-related services (such as those provided by barbers, beauticians, and the like), health and fitness clubs, and amusements.[216] According to the New York State Department of Taxation and Finance, to comply with the SSUTA, such variations in tax rates, bases, and inclusions would be impermissible.[217] Thus, states that house large cities with specialized, unique taxes may be less inclined to seek SSUTA membership, in spite of any potential efficiencies for remote sellers.

2. The Supreme Court: The Dormant Commerce Clause

While states and local governments may impose taxes on sales within their jurisdiction, doing so implicates Commerce Clause concerns.[218] While the Commerce Clause explicitly grants Congress the power to regulate interstate commerce, the Supreme Court has further inferred a dormant Commerce Clause to prohibit states from "impos[ing] regulations that place an undue burden on interstate commerce."[219] Though principally applied as a limitation upon the states, the dormant Commerce Clause applies to cities as well.[220] Because taxation of video streaming services may create such an undue burden, the dormant Commerce Clause represents yet another constraint on local governments attempting this sort of taxation.

Under the dormant Commerce Clause, for a tax law to be valid it must: (1) be levied on "an activity with a substantial nexus with the taxing [jurisdiction]," (2) be "fairly apportioned," (3) "not discriminate against interstate commerce," and (4) be "fairly related to the services provided by the [jurisdiction]."[221] Of these elements, what constitutes a substantial nexus has been the subject of much contention, including a number of controversies that have made it to the Supreme Court.[222]

The first case to address this nexus requirement was *National Bellas Hess, Inc. v. Department of Revenue*.[223] The plaintiffs challenged Illinois's attempt to collect use taxes from a mail-order company whose in-state activity was comprised solely of its shipping of catalogs and goods into the state through

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215. *New York State Sales and Use Tax*, *supra* note 87.
216. *Id.*
217. OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEP'T OF TAXATION & FIN., STREAMLINING NEW YORK'S SALES TAX: EXAMINING REQUIREMENTS FOR COMPLIANCE WITH THE STREAMLINED SALES AND USE TAX AGREEMENT ii–iii (2006), https://www.tax.ny.gov/pdf/stats/policy_special/streamlining_new_yorks_sales_tax_october_2006.pdf [https://perma.cc/Z9H2-9KFK].
218. U.S. CONST. art. I, § 8 (authorizing Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").
219. United States v. Lopez, 514 U.S. 549, 579–80 (1995).
220. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-6 (3d ed. 2000).
221. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
222. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); *Complete Auto Transit*, 430 U.S. 274; Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967).
223. 386 U.S. 753 (1967).

a common carrier.[224] The Supreme Court invalidated the tax because both the Due Process Clause and the Commerce Clause require a physical presence stronger than that between the mail-order company and Illinois.[225] Ten years later in *Complete Auto Transit, Inc. v. Brady*,[226] the Supreme Court explicitly enumerated the substantial-nexus requirement as part of its four-part test.[227] The first major refinement of what constitutes a substantial nexus followed in *Quill Corp. v. North Dakota ex rel. Heitkamp*.[228]

In *Quill*, the Court dealt with essentially the same facts as in *Bellas Hess*.[229] This time around, however, the Court drew a sharper distinction between the nexus required under the Due Process Clause as opposed to the Commerce Clause.[230] While the Due Process Clause requires purposeful direction of activities at the taxing state, irrespective of a physical presence in that state,[231] the Court held that the Commerce Clause requires more because the core constitutional concerns and policies are different.[232] The Court reaffirmed its holding in *Bellas Hess* and stressed a bright-line rule that requires physical presence in the state to satisfy the substantial-nexus requirement.[233] While acknowledging that it tends to favor flexible balancing tests, the Court doubled down on its bright-line rule because of the supposed benefits both to the taxing state and taxpayers.[234]

In the final portion of the opinion, Justice John Paul Stevens invited Congress to step in and act if it disagreed with restricting the states' taxing authority in this way.[235] Congress never accepted his invitation to do so. Professor Brian Galle of the Georgetown University Law Center suggested that "Justice Stevens's gambit was never likely to succeed" because of Congress's recent tendency to restrict rather than expand state taxing power and decision paralysis with strong interest groups at play.[236] Since *Quill* was decided in 1992, the issue has only been exacerbated with the rise of powerful internet retailers and the dominance of e-commerce, which unlike mail-order companies actually have the "power to shutter whole industries."[237]

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224. *Id.* at 753–54.
225. *Id.* at 756, 760.
226. 430 U.S. 274 (1977).
227. *Id.* at 279.
228. 504 U.S. 298 (1992).
229. *Id.* at 301–04; *Bellas Hess*, 386 U.S. at 753–54.
230. *Quill*, 504 U.S. at 305.
231. *Id.* at 308.
232. *Id.* at 312–13 (articulating that while the Due Process analysis largely concerns itself with notice and the "fundamental fairness of governmental activity," the Commerce Clause analysis is more focused on "structural concerns about the effects of state regulation on the national economy").
233. *Id.* at 315.
234. These benefits include clear boundaries of authority that states can easily recognize as well as settled expectations for companies about what sort of conduct does and does not subject them to local taxation. *Id.* at 315–16.
235. *Id.* at 318–19.
236. *See generally* Brian Galle, *Kill* Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 159 (2018).
237. *Id.* at 164.

In response to this very point, Justice Anthony Kennedy fiercely criticized the validity of *Quill* in his concurring opinion in *Direct Marketing Ass'n v. Brohl*.[238] Justice Kennedy highlighted "our increasingly interconnected economy" as a result of the internet and online businesses' widespread growth.[239] He further stressed the fundamental unfairness that results from treating like things unlike for tax purposes and allowing local businesses to remain subject to local taxation while their online competitors easily dodge such tax obligations.[240] Justice Kennedy called for an appropriate case for the Court to reconsider its commitment to the physical-presence requirement.[241] In 2018, his call was answered.

In *Wayfair*, the Supreme Court considered a challenge to the physical-presence requirement after South Dakota sought a declaratory judgment that would require online retailers to collect sales taxes in compliance with a newly enacted state sales-tax law.[242] Faced with the very inequity expressed by Justice Kennedy in his *Direct Marketing* concurrence, South Dakota passed a law that would bring out-of-state sellers in line with in-state sellers "as if the seller had a physical presence in the state."[243] Notably, the law was narrowly tailored and applied only to out-of-state sellers who conducted in-state business above a dollar or transactional threshold while specifically foreclosing any retroactive application.[244] After the South Dakota Supreme Court affirmed the trial court's ruling in favor of the respondents, a group of out-of-state businesses that would be subject to the tax law if it were upheld, the U.S. Supreme Court granted certiorari per South Dakota's request.[245]

In a 5-4 decision, the Supreme Court upheld the constitutionality of the tax law.[246] In his final majority opinion, Justice Kennedy overturned *Bellas Hess* and *Quill*, precedents that were so distant from the economic reality of the twenty-first century.[247] Justice Kennedy reasoned that *Quill* was flawed on three distinct grounds: (1) it unnecessarily conflated a substantial-nexus requirement with a physical-presence requirement, (2) it "create[d] rather than resolve[d] market distortions," and (3) it imposed formalistic distinctions in contravention of modern Commerce Clause jurisprudence.[248] Beyond addressing the incompatibility of the physical-requirement rule in the internet age, he sharply criticized the injustice the judicial branch and out-

238. 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).
239. *Id.* at 1135.
240. *Id.*
241. *Id.*
242. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087–92 (2018).
243. S.D. CODIFIED LAWS § 10-64-2 (2019).
244. *Id.*
245. *Wayfair*, 138 S. Ct. at 2089.
246. *Id.* at 2099–100.
247. In particular, Justice Kennedy stressed how the arbitrary physical-presence requirement ignores the physical aspects of modern technology. *Id.* at 2092. He suggested that physical presence may be theoretically found via the company's various activities in South Dakota, for example, having its website accessible in South Dakota, its cookies saved to a user's computer in South Dakota, its app downloaded to the user's phone in South Dakota, or its data stored even occasionally in South Dakota. *Id.* at 2092, 2095.
248. *Id.* at 2092.

of-state businesses had brought upon the states.[249] He argued that such a requirement violated vertical-federalism norms and unjustly "intrude[d] on States' reasonable choices in enacting their tax systems."[250] Furthermore, such a rule allowed out-of-state sellers to effectively assist in tax evasion and deliberately drive state and local governments to insolvency.[251]

In the absence of a physical-requirement rule, the Court held that South Dakota's sales tax effectively applied with a substantial nexus and was thus constitutional.[252] Since the law was designed with dollar and transactional minimum thresholds before the sales tax remission would be required, it properly applied only to a seller who "availed itself of the substantial privilege of carrying on business" in that jurisdiction.[253] While settled on the substantial-nexus issue, the Court left open the possibility that "some other principle in the Court's Commerce Clause doctrine might invalidate the Act" on remand.[254] However, the Court highlighted key features that minimize any discrimination or undue burden on interstate commerce, including its application only to businesses that meet or surpass certain thresholds,[255] a prohibition on retroactive application, and the state's adoption of the SSUTA, which reduces administrative and compliance costs.[256]

State reactions to *Wayfair* have varied. Some states have developed laws similar to South Dakota and others have gone even further.[257] Generally speaking, states fall into one of three categories: (1) twenty states roughly follow the South Dakota approach, (2) seven states follow the South Dakota approach but limit or eliminate the transaction threshold, and (3) two states allow remission of sales taxes with a nexus to the full extent of the Constitution, which was expanded by *Wayfair*.[258] Notably, Illinois has

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249. *Id.* at 2095.

250. Justice Kennedy observes that forty-one states, two territories, and the District of Columbia have all urged the Court to overturn *Quill*. *Id.*

251. *Id.* at 2096. Justice Kennedy backs up this assertion with a potpourri of data points, comparing market conditions from 1992, the year *Quill* was decided, to 2018, the year *Wayfair* was brought within the Court's purview. *Id.* at 2097. Internet access has exploded from less than 2 percent of households to about 89 percent. *Id.* Remote sales have ballooned from $180 billion to more than $500 billion annually. *Id.* Revenue losses at the state level from the physical-presence rule rocketed from somewhere between $694 million and $3 billion to somewhere between $8 billion and $33 billion annually. *Id.*

252. *Id.* at 2100.

253. *Id.* at 2099.

254. *Id*.

255. For example, South Dakota's law only applies to businesses that, on an annual basis, (1) deliver more than $100,000 in goods or services, or (2) engage in 200 or more separate transactions for the delivery of such goods or services. S.D. CODIFIED LAWS § 10-64-2 (2019).

256. *Wayfair*, 138 S. Ct. at 2099–100; *see supra* notes 206–17 and accompanying text.

257. *See* Irma Esparza Diggs & Brian Egan, *What City Leaders Should Know About* South Dakota v. Wayfair, NAT'L LEAGUE CITIES (June 22, 2018), https://citiesspeak.org/2018/06/22/what-city-leaders-should-know-about-south-dakota-v-wayfair/ [https://perma.cc/3DRS-WMYG].

258. Todd Lard & Jessie Eisenmenger, *Video: Eversheds Sutherland's the Bottom Line: Reactions to* Wayfair, EVERSHEDS (Sept. 11, 2018), https://us.eversheds-sutherland.com/NewsCommentary/Multimedia/214249/Videocast-Reactions-to-Wayfair [https://perma.cc/D3MN-MX9S].

followed suit and adopted the South Dakota approach.[259] This may further bolster the validity of *Labell*, as Chicago has long considered a nexus with Illinois to be a nexus with Chicago.[260]

3. Congress: The Internet Tax Freedom Act

A third potential constraint on local taxation of video streaming services is the ITFA. In a rare act of bipartisanship, Congress enacted the ITFA in 1998 as a means of restricting internet taxation.[261] The sponsor of the House bill, California Representative Chris Cox, stressed that the purpose of the Act was to protect the internet from the "multiple and discriminatory taxation" that it was susceptible to "in a way that commerce conducted in more traditional ways is not."[262] Thus, the ITFA specifically applies to state and local taxation, where multiple and discriminatory taxation would compound across the country.[263] In particular, the ITFA created a moratorium on "[t]axes on Internet access"[264] and "[m]ultiple or discriminatory taxes on electronic commerce."[265] After years of extensions, the ITFA's two-pronged moratorium became permanent law through the enactment of the Trade Facilitation and Trade Enforcement Act of 2015.[266] Each prong of the moratorium offers a distinct protection.[267]

The ITFA broadly defines an "internet access service" as one that "enables users to connect to the Internet to access content, information, electronic mail or other services offered over the Internet."[268] The statute applies whether the tax is imposed on the provider or purchaser, irrespective of what terms are used in describing it.[269] While internet access may include other services made available to users as part of such a service, the statutory language explicitly excludes "video programming . . . that utilize[s] Internet protocol or any successor protocol and for which there is a charge."[270] Although this definition would prohibit taxation on the underlying internet service that a user pays for to access internet content, such as a video streaming service, it would not prohibit taxation of the video streaming service itself. Illustrative

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259. Andrew Olson, *Chicago Shoppers, Retailers Should Be on the Lookout for Change After Wayfair Decision*, CHI. BUS. J. (Aug. 16, 2018), https://www.bizjournals.com/chicago/news/2018/08/16/retailers-should-beware-after-wayfair-decision.html [https://perma.cc/A4AG-95ZD].

260. *Id.*; *see supra* notes 125–46 and accompanying text.

261. Internet Tax Freedom Act, 47 U.S.C. § 151 note (Supp. 2017).

262. H.R. REP. NO. 105-570, at 29 (1998).

263. *See* Comcation, Inc. v. United States, 78 Fed. Cl. 61, 76 n.26 (2007).

264. Internet Tax Freedom Act § 1101(a)(1). It should be noted that the law included a grandfather clause allowing those states that had already imposed and enforced internet access taxes to temporarily continue doing so. *Id.* § 1104(a)(2)(A).

265. *Id.* § 1101(a)(2).

266. While the moratorium was made permanent, the grandfather clause under the ITFA was extended to June 30, 2020. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 922(b) (codified at 47 U.S.C. § 151 note (Supp. 2017)).

267. *See* Internet Tax Freedom Act § 1101(a).

268. *Id.* § 1105(5)(A).

269. *Id.* § 1105(10)(A).

270. *Id.* § 1105(5)(D).

of this point, a recent policy report by the Center on Budget and Policy Priorities[271] stressed this distinction while addressing erosion of the sales tax due to cord-cutting.[272]

The second prong of the ITFA's moratorium involves electronic commerce, or e-commerce, which it defines as "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information."[273] The statute holds that state e-commerce taxation shall be neither multiple nor discriminatory.[274] The prohibition on multiple taxation disallows multiple states or political subdivisions from taxing the same, or essentially the same, e-commerce without offering a credit for the taxes paid in other jurisdictions.[275] The ITFA, however, carves out an exception that allows a state and its own political subdivisions to tax the same e-commerce.[276] The prohibition on discriminatory taxation is more nuanced but effectively disallows a jurisdiction from taxing e-commerce differently from a transaction or activity under traditional commerce.[277] More specifically, the ITFA prohibits discrimination of e-commerce from traditional commerce in terms of which goods and services are taxable,[278] which tax rate applies,[279] and which individual or entity is responsible for collecting or paying the tax.[280]

A good example of how the ITFA is interpreted in practice is the Seventh Circuit's decision in *City of Chicago v. StubHub!, Inc.*[281] In *Stubhub!*, Chief Judge Frank Easterbrook interpreted the ITFA as it applied to the validity of an earlier Chicago amusement tax.[282] The City of Chicago sought a declaratory judgment that StubHub!, an internet ticket auction house, was required to collect and remit sales taxes on Chicago ticket sales to the City in line with its amusement tax.[283] The court first dismissed the issue of multiple taxation because the tax applied only to events in Chicago, and thus the location of the event prohibited other municipalities from levying a tax on

271. *See generally* MICHAEL MAZEROV, CTR. ON BUDGET & POL'Y PRIORITIES, CONGRESS SHOULD END—NOT EXTEND—THE BAN ON STATE AND LOCAL TAXATION OF INTERNET ACCESS SUBSCRIPTIONS (2014), https://www.cbpp.org/sites/default/files/atoms/files/7-10-14sfp.pdf [https://perma.cc/9QWZ-BW7K].

272. *See supra* notes 25–27 and accompanying text.

273. Internet Tax Freedom Act § 1105(3).

274. *Id.* § 1101(a)(2).

275. *Id.* § 1105(6)(A).

276. *Id.* § 1105(6)(B). For example, while Dallas and Houston may not tax the same e-commerce under the ITFA, Dallas and Texas may do so under this carveout. *See id.*

277. *See* JEFFREY M. STUPAK, CONG. RESEARCH SERV., R43772, THE INTERNET TAX FREEDOM ACT: IN BRIEF 3 (2016), https://fas.org/sgp/crs/misc/R43772.pdf [https://perma.cc/2LDK-G52B]. Traditional commerce would include, for example, purchases made in brick-and-mortar stores or through catalogs. *Id.*

278. Internet Tax Freedom Act § 1105(2)(A)(i).

279. *Id.* § 1105(2)(A)(ii).

280. *Id.* § 1105(2)(A)(iii).

281. 624 F.3d 363 (7th Cir. 2010).

282. *Id.* at 366–67.

283. *Id.* at 364–65.

the same e-commerce.[284] Similarly, the court dismissed the issue of discriminatory taxation because the reseller was required to collect and remit the tax whether the sale occurred on the internet, in person, or otherwise: hence, no discrimination.[285]

One final point on the ITFA involves its relation to *Wayfair*.[286] While the Supreme Court never mentions the ITFA in its *Wayfair* opinion, Representative Cox argued in his amicus brief that South Dakota's law would controvert both the ITFA and its policy aims.[287] Representative Cox first argued that it was discriminatory because South Dakota's law would impose the burden of tax compliance on different persons or entities when a South Dakota resident purchases from an out-of-state seller over the internet instead of in person.[288] Furthermore, Cox argued that South Dakota's tax law would subvert the spirit of the ITFA.[289] Cox wrote that even though the law sought to address the "the presumed competitive burden on [South Dakota's] in-state businesses and its purported lost revenue," the law forced internet sellers to sift through a "maze of differing state and local rules and competing definitions, deadlines, filing requirements, and audit demands," which would be a substantial burden on internet sellers.[290]

In spite of Cox's concerns, it appears as though not everyone agrees: the issue was neither raised by the parties nor addressed by the Court.[291] As the Tax Foundation asserted in its post-*Wayfair* analysis, the ITFA was likely not at issue because so long as state tax laws equally apply to electronic and traditional forms of commerce, there is no conflict.[292]

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284. *Id.* at 366.

285. *Id.* at 366–67.

286. *See supra* notes 242–56 and accompanying text.

287. Brief of Chris Cox, Former Member of Congress and Co-Author of the Internet Tax Freedom Act, as Amicus Curiae Supporting Respondents at 4–16, South Dakota v. Wayfair Inc., 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter Brief of Chris Cox]. Cox was the sponsor of the original ITFA. *See supra* note 262 and accompanying text.

288. Cox starts with the notion that a South Dakota resident could purchase from out-of-state sellers in one of two ways: (1) through intermediaries such as the internet, mail, and the like, or (2) in person. Brief of Chris Cox, *supra* note 287, at 11. Cox argued that the South Dakota tax law would violate sections 1105(2)(A)(i) and (ii) of the ITFA because it would "burden[] Internet remote sellers while sparing sellers of exactly the same . . . service[] who accomplish the transaction through other means" and would put the burden of tax compliance on the seller if the sale occurred on the internet but on the purchaser if he or she traveled out of state to purchase the same service. *Id.* at 11–12.

289. *Id.* at 16–20.

290. *Id.* at 12–14.

291. *See generally* South Dakota v. Wayfair Inc., 138 S. Ct. 2080 (2018).

292. Joseph Bishop-Henchman, *What Does the* Wayfair *Decision Really Mean for States, Businesses, and Consumers?*, TAX FOUND. (July 9, 2018), https://taxfoundation.org/what-does-the-wayfair-decision-really-mean-for-states-businesses-and-consumers/#2 [https://perma.cc/N756-TANE]. The tax law at issue required tax remission by out-of-state sellers broadly, effectively treating mail order sellers, phone-call sellers, and Internet sellers alike. *See* S.D. CODIFIED LAWS § 10-64-2 (2019).

III. ACT THREE: FOLLOWING *LABELL*'S LEAD: THE FUTURE OF LOCAL VIDEO STREAMING SERVICE TAXATION

As stated by former New York City Mayor Michael R. Bloomberg, "to the extent we are making progress as a nation, local governments are often driving it."[293] Accordingly, "[b]ecause they are held accountable, local leaders also tend to be more willing to work with members of other political parties and to experiment with bold new ideas . . . mak[ing] city halls more nimble, more pragmatic, . . . [and] more open to experimentation."[294] Given these competencies, cities are uniquely situated to address declining revenues and state aid.[295] As laboratories of democracy with a propensity for fiscal innovation, cities must take control of their own financial futures.[296] In the wake of *Labell*, cities now have an opportunity to reflect and consider how to tax video streaming services, if at all.[297]

As our economy continues to shift toward the internet, cities need to find creative ways to expand their tax bases and tap into the revenue potential that video streaming services provide.[298] What would have once sounded impermissible, if not ludicrous, is increasingly becoming a modern-day reality: internet sellers being taxed without discriminatorily taxing the internet itself. On the retail side, Amazon, for example, now collects and remits sales taxes on goods in forty-six states whether or not it is legally required to do so.[299] Even as these taxes are applied to video streaming services, other notable trade associations and companies, such as the Internet Association and Netflix itself, remain unopposed.[300] What they remain concerned about, however, is *how* the tax is applied. Netflix, for instance, while unopposed to taxation of its services would consider it "a dangerous precedent to start taxing Internet apps and websites using laws intended for utilities like water and electricity."[301] The notion is even more concerning when one considers that such utilities are taxed at roughly 14 percent, making them the most highly taxed services in the United States.[302]

From a bird's-eye view, it is easy to see how video streaming services such as Netflix and Hulu may be considered comparable to utilities like traditional

293. MICHAEL R. BLOOMBERG, BLOOMBERG PHILANTHROPIES ANNUAL REPORT: ANNUAL LETTER ON PHILANTHROPY 10 (2018), https://www.bbhub.io/dotorg/sites/34/2018/05/Bloomberg-Philanthropies-Annual-Report-2018.pdf [https://perma.cc/7JBD-2AHP].

294. *Id.* at 9–10.

295. *See supra* note 190 and accompanying text.

296. *See supra* note 192 and accompanying text.

297. Such reflection is only natural after a trial. *See* RENÉE ZELLWEGER, *Nowadays*, *on* CHICAGO: MUSIC FROM THE MIRAMAX MOTION PICTURE (Epic Records 2002) (conveying Roxie Hart's deeply introspective feeling of posttrial emptiness).

298. For example, applying the Chicago amusement tax to video streaming services is expected to raise well over $12 million and cut into the expected $98 million deficit in 2019. Kristin Tate, *Will You Have to Pay the Netflix Tax?*, HILL (Dec. 12, 2018), https://thehill.com/opinion/finance/421594-will-you-have-to-pay-the-netflix-tax [http://perma.cc/SXJ3-8WGD].

299. *See* Snider, *supra* note 7. Amazon does not collect sales tax in all fifty states because not all states have sales tax. *See* WALCZAK & DRENKARD, *supra* note 77, at 1.

300. *See* Snider, *supra* note 7.

301. The statement was provided by Netflix's then-spokesperson, Jonathan Friedland. *Id.*

302. *See supra* note 150 and accompanying text.

pay-TV and other MVPDs. The user pays a price and in exchange gains access to watch video content.[303] As traditional pay-TV providers make select video content streamable on mobile phones, computers, and the like,[304] the line between the two is blurred even further. But as the Kentucky Board of Tax Appeals held in *Netflix*, while the similarities end there, the distinctions are far greater.[305]

At the federal level, administrative agencies continue to keep MVPDs and video streaming services distinct. The FCC has elected not to retrofit these services into the "clunky and outdated" term of art that is an MVPD, which insulates these services from a myriad of telecommunications regulations.[306] Furthermore, with the U.S. Copyright Office drawing the same distinction, video streaming services may not acquire copyright licenses to show broadcast programming even if they wanted to.[307] As such, these services are unable to provide the live and scheduled linear programming that MVPDs provide.

These distinctions merit different tax treatment. In *Netflix*, the court specifically highlighted aspects of the FCC's distinct treatment of video streaming services in finding Netflix not generally comparable to MVPDs and thus not subject to the state's telecommunications tax.[308] With legal challenges to taxing video streaming services as MVPDs either already in litigation, as in Creve Coeur, or ripe for litigation, such as the various California municipalities, cities should be wary of taxing video streaming services in line with MVPDs, especially when other viable options such as the sales and amusement taxes exist.[309]

Prudent cities should take note of the relevant judicial developments from 2018 as discussed in this Note and use them to guide future tax changes.[310] From the humble chambers of Cook County to the highest court in the land, judges have set forth an effective path for video streaming service taxation apart from MVPDS.[311] It is time for cities to listen.

This Part combines the reasoning of *Labell* and *Wayfair* to set forth a roadmap for future local taxation of video streaming services under the sales or amusement tax base. Part III.A discusses the sales tax as applied to video streaming services. It argues that while this may be an effective way to bring these services into the fold, its practical and theoretical drawbacks should make cities wary. Part III.B instead considers the amusement tax as applied to video streaming services and argues that such an approach may be a

303. *See What Is Netflix?*, *supra* note 17.
304. *See, e.g.*, Dave Schafer, *Which Cable Providers Let Me Stream TV Anywhere?*, CABLETV.COM (Dec. 18, 2017), https://www.cabletv.com/blog/which-cable-providers-let-me-stream-tv-anywhere/ [https://perma.cc/8SX7-DWF4] (comparing various MVPD streaming apps, including SpectrumTV and DISH Anywhere).
305. *See supra* notes 168–70 and accompanying text.
306. *See supra* note 156 and accompanying text.
307. *See supra* note 156 and accompanying text.
308. *See supra* notes 159–71 and accompanying text.
309. *See supra* notes 172–81 and accompanying text.
310. *See supra* Parts II.A, II.C.
311. *See supra* Part II.A.2; *see also supra* notes 242–56 and accompanying text.

preferable option for cities given the easier procedural hurdles, strong theoretical backing, and judicial precedent in its favor.

A. The Sales Tax Approach Is Effective but Suffers from Practical and Theoretical Drawbacks

The sales tax is one effective method to tax video streaming services independently of MVPDs, as illustrated by Pennsylvania.[312] Previously, requiring extrajurisdictional sellers to collect and remit the tax may have been a serious challenge, but the Supreme Court's elimination of the physical-presence requirement in *Wayfair* appears to have mitigated this issue.[313]

A prudent city would be mindful of the key features that contributed to the success of South Dakota's tax in *Wayfair*, more specifically the lack of retroactive applicability and the existence of minimum thresholds before requiring collection and remission by the seller.[314] Although the Court also highlighted South Dakota's adoption of the SSUTA, this aspect appeared in dicta and seems to be more a suggestion to ease administration rather than a concrete constitutional requirement.[315] So long as a city is mindful of these caveats, *Wayfair* not only provides support for the validity of such taxation, but also suggests clear rationales for such taxes, with Justice Kennedy all but endorsing them in light of the modern shift to an internet-based economy.[316]

While an effective way to raise revenue, taxing video streaming services under the sales tax still brings with it two substantial drawbacks, one procedural and one theoretical. From a procedural standpoint, because sales taxes often encompass only goods, extending the sales tax to include video streaming services would seem to require legislative action rather than simple interpretive rulemaking.[317] For example, only twenty-seven states tax digital goods, and even fewer define video streaming services as digital goods.[318] Those that do, including Pennsylvania and Washington, did not simply issue interpretive rulings but instead passed legislative amendments.[319] Given their limited tax discretion under home-rule provisions, cities that seek to do the same would have a procedural burden: not only would these cities need legislative action from their local bodies, but they likely would require state approval as well.[320]

The second major drawback is theoretical. While it is perfectly reasonable to treat a permanent digital video download in line with physical goods under the sales tax, treating a video streaming service as such is a greater stretch. Permanent downloads represent actual ownership of something, an actual

312. *See supra* Part II.A.1.
313. *See supra* notes 242–56 and accompanying text.
314. *See supra* notes 242–56 and accompanying text.
315. *See supra* notes 242–56 and accompanying text.
316. *See supra* notes 242–56 and accompanying text.
317. *See supra* Part II.A.1.
318. *See supra* note 115 and accompanying text.
319. *See supra* note 116 and accompanying text.
320. *See supra* notes 183–85 and accompanying text.

purchase in the truest sense of the word.[321] The same cannot be said for typical video streaming services, where viewing particular video content is restricted to a specific rental period, as is the case for TVODs such as iTunes, or conditioned upon a continued subscription, as is the case for SVODs such as Netflix.[322] Perhaps for this very reason, some states that allow for the taxation of digital goods explicitly exclude video streaming services,[323] and cities that have sales taxes have opted to tax video streaming services outside of the sales tax base, as Chicago did with its amusement tax.[324]

B. The Amusement Tax Has Numerous Advantages, Including Clear Judicial Support

Instead of treating a user's purchase of video streaming services as the use of a utility or purchase of a digital good, tax authorities should consider such a purchase for what it is—a license to view an amusement. For instance, when a consumer pays for a license to view a movie at a movie theater or a baseball game at a stadium, she is subject to the amusement tax.[325] It is a reasonable extension for the same to apply when such amusement takes place on the internet. Using Netflix as an example, when a user pays her monthly subscription bill, she is given a login which allows her to stream all of Netflix's movies and shows.[326] Recasting the user's login as a ticket, the transaction is no different than any other amusement transaction where a user pays for a ticket to view an amusement.

Of course, some may take issue with comparing a solitary Netflix viewing to an amusement like a public sporting event, theatrical performance, or movie. This Note argues two responses in the alternative. First, there is no built-in explicit requirement that a user must take part in an amusement of a social nature for the tax to apply.[327] On the contrary, while one may attend a movie screening at a theater with other individuals, socializing does not take place during the actual viewing of the movie.

Second, assuming some inherent public-facing social requirement under an ejusdem generis argument,[328] the internet nature of video streaming services is both the problem and the solution. Yet another way the internet has changed our world is via its social upheaval. With Facebook, Twitter, Reddit, and a litany of messaging apps, Netflix users can communicate about their experiences with friends and other users in real time and socialize just

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321. *See Purchase*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The acquisition of an interest in real or personal property by sale.").
322. *See supra* Part I.A.
323. *See supra* note 115 and accompanying text.
324. *See supra* Part II.A.2.
325. *See supra* notes 84–87 and accompanying text.
326. *See What Is Netflix?*, *supra* note 17.
327. *See, e.g.*, City of Chi. Dep't of Fin., Amusement Tax Ruling #5 (June 9, 2015).
328. *Ejusdem Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.").

as they would at other in-person amusements.[329] In fact, one of Netflix's core competencies is its ability to provide entertainment that generates greater social media virality than its peers.[330] For example, take the extraordinary social buzz surrounding Netflix's recent film *Bird Box*.[331] The thriller is set in a post-apocalyptic world where survivors must blindfold themselves to outlast mysterious forces that kill upon sight.[332] After its December 21, 2018, launch on the video streaming service, *Bird Box* not only garnered a record-setting forty-five million streams in just two weeks, but spawned countless memes and real-life "challenges" where individuals attempt to navigate life blindfolded.[333] As this illustrates, while viewing video streaming services may seem solitary, video streaming services often generate mass social interactions, both online and in person, and thus may be comparable to the examples provided for in amusement tax statutes.

In practice, a video streaming service need not fit *perfectly* with related amusements under existing amusement tax laws. In 2014, for example, a hotly contested "yoga tax" was passed in Washington, D.C. that treated yoga, an arguably spiritual practice rather than a physical one, in line with gyms and recreational sports despite criticism to the contrary.[334] However, even if video streaming services like Netflix are considered generally comparable to amusements under amusement tax statutes, cities should not sit back and expect these companies to voluntarily make the leap and accept duties to collect from city consumers.[335] It is time for cities to remove their blindfolds, recognize the tax loophole that allows these streaming services to go untaxed, and address the situation head-on. This is the exact purpose of interpretive rulings, which allow a tax commissioner to clarify where ambiguity exists and exercise expertise that is afforded deference by the courts.[336] Where an amusement tax is enumerated with specific examples but included with broad

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329. Over a third of the global population uses social media to communicate, often in real time. *See* Audrey Willis, *6 Ways Social Media Changed the Way We Communicate*, CIRCA INTERACTIVE (Aug. 15, 2017), https://circaedu.com/hemj/how-social-media-changed-the-way-we-communicate/ [https://perma.cc/QD48-DNGM].

330. *See* Thomas Franck, *A Secret to Netflix's Success: Social Media*, CNBC (June 28, 2017), https://www.cnbc.com/2017/06/28/a-secret-to-netflixs-success-social-media.html [https://perma.cc/2J4W-VF4H] (quoting an industry analyst: "If [Netflix]'s platform is more conducive to producing 'viral' content, this could be a sustainable advantage over traditional media.").

331. *See* Aja Romano, *Why Are Bird Box Memes So Popular? It's Complicated.*, VOX (Jan. 4, 2019), https://www.vox.com/2019/1/4/18165825/bird-box-memes-netflix-popular-explained [https://perma.cc/L98B-B5GW].

332. *See id.*

333. *See id.*

334. *See* Antonia Blumberg, *Criticism of Washington D.C. 'Yoga Tax' Raises Questions About Spirituality vs. Fitness*, HUFFINGTON POST (Oct. 9, 2014, 1:16 PM), http://www.huffingtonpost.com/2014/10/09/dc-yoga-tax_n_5958594.html [https://perma.cc/ER98-P43Q].

335. For example, while Amazon collected state taxes even prior to *Wayfair*, the same was not true for local taxes. *See* Ben Casselman, *As Amazon Steps Up Tax Collections, Some Cities Are Left Out*, N.Y. TIMES (Mar. 25, 2018), https://www.nytimes.com/2018/03/25/business/economy/amazon-tax.html [https://perma.cc/4BRV-NHMP].

336. *See supra* Part I.B.2.

encompassing language such as "any" or "similar," the term may be construed descriptively rather than restrictively.[337] An administrative interpretation that clarifies this broad language is not impermissible but is, on the contrary, afforded weight by the courts.[338] This was the very approach taken by Chicago's tax commissioner, which the court upheld in *Labell*.[339]

Labell provides a clear legal roadmap for cities to tax video streaming services under amusement taxes without implicating legal concerns. Particularly, *Labell* suggests answers to the three key constraints on local taxation described in Part II.C, including restrictions by states, the Supreme Court, and Congress.

First, as to state restrictions, many noteworthy cities, including Chicago, Philadelphia, New York City, and Santa Cruz, already have amusement taxes on the books.[340] So long as these tax statutes are written broadly rather than restrictively, it is well within a tax commissioner's powers to issue an interpretive ruling rather than implicate the legislative process and the corresponding home-rule issues.[341] For example, while the plaintiffs in *Labell* originally challenged the tax commissioner's authority in issuing Amusement Tax Ruling #5, the plaintiffs later dropped this argument, and the case largely narrowed to the federal issues at play.[342]

However, even where a city has a restrictive amusement tax, or lacks one altogether, the amusement tax still retains a significant procedural advantage over its sales tax counterpart. As a specialized tax, the amusement tax often skirts cumbersome procedural requirements and avoids required local resident voting or state legislative authorization.[343] As such, changing or implementing an amusement tax is comparatively easy.

Second, as to dormant Commerce Clause issues, *Labell* found the substantial-nexus requirement satisfied, even before the standard was considerably lowered in *Wayfair*.[344] Chicago follows Illinois's nexus requirement, which has since adopted the very sort of tax collection and remission requirements that were upheld in *Wayfair*.[345] While *Wayfair* dealt specifically with a sales tax, the amusement tax may be recast as such under the substance-over-form doctrine given that both are consumption taxes applied on a percentage basis.[346] Thus, even the amusement tax may be bolstered by the Court's holding in *Wayfair*.

Third, as to the ITFA issue, as *Labell* held, taxing video streaming services as amusements does not pose a substantial risk of multiple taxation because

337. *See* Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Sheppard, 123 F.2d 773, 775 (5th Cir. 1941).

338. *See id.*

339. *See supra* Part II.A.2.

340. *See supra* note 87 and accompanying text.

341. *See supra* Part II.A.2.

342. *See supra* Part II.A.2.

343. *See supra* note 86 and accompanying text.

344. *See supra* notes 242–56 and accompanying text.

345. *See supra* note 260 and accompanying text.

346. *See supra* note 84 and accompanying text.

the tax relied on a user's Chicago address and was not discriminatory.[347] Given the ITFA's policy aim of preventing disparate treatment of the internet for fear of internet discrimination, amusement taxes not only conform to such a policy aim but reinforce it. Without video streaming service taxation in line with other amusements, online amusements such as Netflix are not discriminated against but rather given an unfair advantage. Taxing them in line with their in-person counterparts under the amusement tax would place the internet on equal footing with in-person amusements and promote the very sort of equity sought by the ITFA.[348]

CONCLUSION

While the amusement tax provides a usable model for cities to follow, not all cities have such a tax base, especially those in states that have adopted the SSUTA. With extensive variety in consumption taxes and the practical difficulty of passing new taxes given the tight constraints of home-rule provisions, cities should feel empowered to issue interpretive rulings wherever appropriate to bring video streaming service tax revenue into their coffers. While such an attempt may pose greater legal challenges, cities should not be afraid to get creative to raise revenue. They should just remember that when dealing with a tough legal challenge, they should hire Billy Flynn and razzle-dazzle away.

347. *See supra* note 135 and accompanying text.
348. *See supra* note 262 and accompanying text.