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A UNIFYING APPROACH TO NEXUS UNDER THE DORMANT COMMERCE CLAUSE

*Adam B. Thimmesch**

INTRODUCTION

The Supreme Court has long debated the existence and scope of its power to restrict state regulation under the so-called negative or dormant Commerce Clause. The Court took a broad view of that power in the late 1800s, but it has refined and restricted its role over time.[1] One area where the Court has continued to wield considerable power, however, has been in the context of state taxes. Specifically, the Court has continued to restrict states' power to compel out-of-state vendors to collect their sales and use taxes based on a physical-presence "nexus" rule.[2] That rule dates back to the Court's early oversight of how states taxed itinerant drummers and vendors who sold their goods via catalogue, but it has a very different meaning in today's world.[3] States now lose an estimated $20 billion of tax revenue annually due to the combination of the physical-presence rule and the amount of commerce that is done online.[4]

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* Associate Professor of Law, University of Nebraska College of Law. I am grateful to the many wonderful colleagues who reviewed and commented on this essay and to the editors at the *Michigan Law Review* for their thorough and expeditious editing. All errors and omissions are my own.

1. *See* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01–.10 (2d ed. 2013) (outlining the history of the Court's dormant Commerce Clause doctrine).

2. The tax that should be collected on most online sales is technically a "use tax" rather than a "sales tax." The taxes are functionally equivalent, but technically different. Sales taxes apply to in-state *transactions* whereas use taxes apply to in-state *uses* of taxable property or services. *See* Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147, 151–57 (2015). The difference between these taxes has proven to be of constitutional significance. *See, e.g.*, McLeod v. J.E. Dilworth Co., 322 U.S. 349 (1944); General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944).

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

4. *See* DONALD BRUCE ET. AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE (2009), http://cber.utk.edu/ecomm/ecom0409.pdf [https://perma.cc/NM5J-ESAL]; *Collecting E-Commerce Taxes*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 14, 2014), http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx [https://perma.cc/D8H6-N6E9]. This number is

The Court last upheld its physical-presence rule in 1992 in *Quill Corp. v. North Dakota*,[5] but it is set to reexamine that case this term. On January 12th, the Court granted certiorari in *South Dakota v. Wayfair, Inc.*,[6] a case where the only question presented is the ongoing validity of *Quill* and its physical-presence mandate.[7] This review is long overdue. States and scholars have critiqued *Quill* for decades and have nearly uniformly called for the Court to overrule that precedent.[8] They argue that it is illogical, harmful, and on an infirm doctrinal foundation.[9] They also argue that the principles of stare decisis no longer counsel toward judicial restraint.[10] What they have not done, though, is evaluate what the Court should do post-*Quill*. If the Court were to abandon its anachronistic physical-presence rule, what jurisdictional rule, if any, should apply instead? And where would the Court find such a rule?

This Essay evaluates these issues by placing the Court's nexus requirement in its appropriate context—as an exercise of judicial power to override state autonomy in support of the framers' goal of a common national market.[11] The Court's regulation of state taxation is often evaluated independent of this more general context, but that should change. The issues presented in *Wayfair* are not unique to sales and use taxes. Cumulative tax-compliance costs that occur because of nonuniform state taxation raise the same issues that the Court has always addressed under the dormant Commerce Clause regardless of the type of state regulation involved. Evaluating *Wayfair* through this lens shows why the best approach for the Court would be to eliminate any special nexus requirement under the

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subject to extensive debate. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 28–31, South Dakota v. Wayfair, Inc., No. 17-494, (U.S. Dec. 7, 2017). One of the big differences in estimates is whether they address revenue losses due only to online sales or revenue losses from all sales protected by *Quill*, which would include sales made via catalogue or television as well.

5. 504 U.S. 298 (1992). *See also* Hayes R. Holderness, *Questioning* Quill, 37 VA. TAX REV. 313, 314–16 (2018).

6. No. 17-494 (petition for cert. granted Jan. 12, 2018).

7. Petition for Writ of Certiorari at i, South Dakota v. Wayfair, Inc., No. 17-494 (U.S. Oct. 2, 2017).

8. *See, e.g.*, Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269, 394–95 (1997); Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U. L. REV. 1115, 1121 (2016); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 337–44 (2003) (questioning *Quill* on many grounds); *see also* Pomp, *supra* at 1120 (noting that "[m]any, many articles have discussed *Quill*" and that "[a]lmost all of these articles . . . agree" that *Quill* should be overruled).

9. *See supra* note 8.

10. Brief of Amici Curiae Law Professors and Economists in Support of Petitioner at 3–8, South Dakota v. Wayfair, Inc., No. 17-494 (U.S. Nov. 2, 2017); Swain, *supra* note 8, at 338–39.

11. *See infra* Section II.A.

dormant Commerce Clause rather than trying to replace the physical-presence rule.

The following Parts make that case. Part I evaluates the nexus requirement and its place in the Court's dormant Commerce Clause doctrine. Part II evaluates how the Court might replace that rule with a different nexus limitation. It concludes that doing so would require the Court to sacrifice on the interests that it has previously identified as animating its doctrine in this area. Part III then builds the case for the Court's removal of any special nexus limitation on state taxing power under the dormant Commerce Clause and shows how that approach would better align the Court's otherwise uncertain doctrine.

I. THE NEXUS REQUIREMENT

Wayfair involves the constitutionality of a South Dakota statute that requires out-of-state vendors to collect the state's use tax without regard to their physical presences in the state.[12] The South Dakota statute, instead, requires collection of that tax by vendors that have generated over $100,000 of sales to South Dakota customers or that have engaged in 200 or more transactions with South Dakota customers.[13] South Dakota adopted that law following decades of widespread criticism of the physical-presence requirement and the issuance of an opinion by Justice Kennedy in which he explicitly called for a case in which the Court could overturn *Quill*.[14] South Dakota answered that call.

The literature critiquing *Quill* is vast, and the Court has plenty of reasons to abrogate that precedent if it so desires.[15] What is less clear is whether and how the Court would regulate state taxing power post-*Quill*. If the physical-presence rule will no longer govern, what will? That is a question that surprisingly has not been addressed in the literature to date. I believe it to be answered, though, by the Court's general approach to the dormant Commerce Clause in non-nexus cases.

To start, it is important to recognize that a nexus requirement can serve many different functions. At a very basic level, states should not have the ability to tax just anyone that they please. Not only would that be unfair, but it could result in the taxation of people or transactions with no connection to a state, and it could result in undue economic impediments to firms engaging in interstate commerce. These concerns are all reasonable, but only the last is properly addressed with a nexus requirement under the dormant Commerce Clause. Concerns about fairness or state overreach are property

12. The statute may have a technical error related to its application to the state's sales tax instead of its use tax, but the plain intent is to have use tax collected on online sales into the state. *See* Hayes R. Holderness & Matthew C. Bock, *Did South Dakota Neglect Transactional Nexus in Its Bill to Kill Quill?*, BLOOMBERG BNA (Dec. 7, 2017), https://www.bna.com/south-dakota-neglect-n73014472885/ [https://perma.cc/U6H3-FNAC].

13. S. 106, 2016 Leg. Assemb., 91st Sess., (S.D. 2016).

14. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

15. *See supra* note 8.

handled under the Due Process Clause.[16] That means that any judicial review of the nexus requirement should be guided only by the interest underlying the Court's dormant Commerce Clause doctrine—ultimately the pursuit of a common national market.

A. The Dormant Commerce Clause

The dormant Commerce Clause was born from the experience of early America under the Articles of Confederation. Under the Articles, states often protected their own markets to the detriment of commerce between them.[17] Those actions effectively erected trade barriers between the states and undermined the common market that would be the source of great American success. These issues were squarely addressed in the Constitutional Convention, where the framers granted Congress an affirmative power to regulate interstate commerce under the Commerce Clause.[18]

But the early Court was faced with a dilemma. Did the grant of power to Congress deprive states of any ability to regulate matters impacting interstate commerce or did Congress merely have a veto right over those state actions? If the latter, would Congress have the capacity to evaluate the laws and regulations of all states, and would the Court ever be able to intercede to protect interstate commerce in Congress' stead? From those tensions was born the so-called dormant or negative Commerce Clause.

The Court originally protected interstate commerce by relying upon distinctions between taxes and regulations that "directly" or "indirectly" impacted interstate commerce or those that impacted "national" versus "local" subjects, but it since has adopted less formalistic approaches.[19] In the tax area, it now implements a four-part test that strikes down state laws only if they (1) apply to taxpayers without a substantial nexus with the state, (2) are discriminatory, (3) are not fairly apportioned, or (4) are not fairly related to the services provided by the state.[20] That test stems back to the Court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*,[21] and it stands today.

The Court analyzes nontax state regulations very similarly, but under a different line of authority. In nontax cases, the Court looks for state regulations that are discriminatory or protectionist, whether on their face or

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16. Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

17. *See generally* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2006); Denning, *supra* note 1, § 6.06; Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1884–94 (2011).

18. U.S. CONST., art. 1, § 8, cl. 3.

19. Denning, *supra* note 1, §§ 6.03, 8.02.

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

21. 430 U.S. 274.

in purpose or effect.[22] Regulations that fall in those categories are virtually per se illegal.[23] Regulations that are not discriminatory are evaluated under a balancing test commonly attributed to the Court's 1970 decision in *Pike v. Bruce Church*.[24] In *Pike*, the Court explained that:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[25]

Regardless of whether under the tax or nontax formulation, the Court's requirements are all instrumental to the basic goal underlying its dormant Commerce Clause doctrine—the pursuit of a common national market.[26] Both tests also reflect, however, that the Court does not exclusively pursue that objective. The Court must also respect states' retained autonomy under the 10th Amendment,[27] which necessary requires the Court to sometimes subordinate that goal.

For firms to experience a truly common national market, they would have to experience the same legal burdens—tax included—regardless of where they made sales or located their operations.[28] That would, in turn, require completely uniform legal and tax systems.[29] The pursuit of true neutrality is thus futile, barring a fundamental shift in how the Court views its power and our federal structure. The Court recognizes this and allows states to tax interstate business even if it increases the cost of that activity.[30] It has even developed a test for determining how it will evaluate the cumulative tax burdens that are surely to occur—its internal consistency test.

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22. *See* Denning, *supra* note 1, §§ 6.06[A][1]–[2]; Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 260–64 (2017).

23. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978); *see generally* Denning, *supra* note 1, § 6.06.

24. 397 U.S. 137 (1970).

25. *Pike*, 397 U.S. at 142 (citation omitted).

26. Denning, *supra* note 1, § 6.06.

27. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48–50 (1940).

28. Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 910 (1992).

29. *Id.* (noting that locational neutrality is "utterly unattainable other than by actually establishing a uniform national taxing system"); *see also* Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014, 1046 (2012) (concluding that locational neutrality can only be obtained, in the absence of "global harmonization of tax rates and bases," if states limit their taxation to only residents or allow unlimited credits for their residents who face tax obligations in other jurisdictions).

30. *McGoldrick*, 309 U.S. at 48; Swain, *supra* note 8, at 341; *cf.* Robbins v. Shelby Cty., 120 U.S. 489, 497 (1887) (stating that "[i]nterstate commerce cannot be taxed at all").

The internal consistency test helps the Court to identify whether the cumulative tax burdens that arise under a state law are the result of discrimination or simply a lack of uniformity between states. It does that by assessing firms' tax burdens as if every state had the same law as the state whose tax is at issue.[31] If cumulative taxation would occur under that condition, then the state's statute must have some element in it that discriminates against interstate commerce. If cumulative taxation would not occur under that condition, then any cumulative taxation must occur simply because of a lack of state uniformity.

Quite notably, the Court affirmed its use of that test as recently as 2015 with its decision in *Comptroller v. Wynne*.[32] In that case, the Court not only recommitted to this principle, it tied its use of that test to an academic theory that mathematically proves that state tax systems can never produce a common market in the absence of national uniformity.[33] The *Wynne* Court recognized and approved this as a natural consequence of a constitutional structure that allows states to adopt nonuniform tax rules.[34] This is critically important for evaluating the purpose of the nexus requirement. We know that it is not about fairness and we know that it is not about preventing cumulative tax burdens. That does not leave much ground for the nexus requirement. The only real role that it can serve is to act as a type of safety valve to ensure that a vendor's connection with a state is "enough" to justify the assured duplicative tax costs that come with engaging in interstate commerce.

This characterization, alone, is not particularly novel. Discussions about the physical-presence rule have long been about the tradeoffs between state revenue and the compliance costs associated with tax-collection obligations.[35] What is important about putting nexus squarely in this frame is that it reveals the nexus requirement as nothing more than blunt-force *Pike* balancing.

B. Nexus as Pike *Balancing*

The Court has never squarely characterized the nexus requirement as the result of a *Pike* like balancing, but its status as such is not all together surprising. Though the Court and scholars have addressed tax and nontax

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31. Hellerstein, *supra* note 3, ¶ 4.16[1][a]; Comptroller v. Wynne, 135 S. Ct. 1787, 1802–03 (2015).

32. 135 S. Ct. at 1804.

33. *See Wynne*, 135 S. Ct. at 1802 (referencing the work of Professors Ruth Mason and Michael Knoll); *see generally* Mason & Knoll, *supra* note 29. *But see* Adam B. Thimmesch, Comptroller v. Wynne *and the Futile Search for Non-Discriminatory State Taxation*, 67 VAND. L. REV. EN BANC 283, 288–91 (2014) (discussing the distinction between neutrality and internal consistency).

34. *See Wynne*, 135 S. Ct. at 1802–04.

35. *See* John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 355 (2003).

cases under the dormant Commerce Clause separately, the case law in those areas has developed very similarly.[36] The Court originally barred both tax and nontax state regulation that impacted "national" interests.[37] That approach eventually gave way to formalistic approaches, again in both areas, that attempted to distinguish between regulations that "directly" and "indirectly" impacted interstate commerce.[38] That formalistic approach then gave way to the "balancing era" in nontax cases and the *Complete Auto* approach for tax cases.[39] Under both approaches, discrimination against interstate commerce leads to almost *per se* unconstitutionality.[40] They both look for that discrimination on the face of state statutes and in their purpose and effect.[41]

The Court's general dormant Commerce Clause doctrine and its tax-specific doctrine diverge at this point, but only in form. *Complete Auto*'s fourth prong requires that a state's tax be "fairly related to the services provided by the State,"[42] but the Court has admitted that the prong serves very little function beyond ensuring that state taxes are not arbitrary.[43] That prong is thus of little use and only tangentially relates to traditional dormant Commerce Clause concerns.[44] That brings us to *Pike* balancing and to nexus.

Pike balancing is the Court's way of determining when state regulations, in the parlance of its precedential case, simply "go too far."[45] That is where *Pike* seems to diverge from *Complete Auto*, because the Court does not exercise a similarly broad oversight function in its tax cases. It does not strike down state taxes because they are too high or because they result in

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36. *See* Brannon P. Denning, *The Dormant Commerce Clause Wins One: Five Takes on Wynne and Direct Marketing Association*, 100 MINN. L. REV. HEADNOTES 103, 114–15 (2016) ("The collapse of internal consistency and the anti-discrimination principle, as well as the abandonment of both the 'fairly related' factor and the physical presence requirement for substantial nexus, would roughly approximate the Court's doctrinal journey in non-tax cases.") (footnote omitted).

37. *See* Denning, *supra* note 1, §§ 6.03, 8.02; Hellerstein, *supra* note 3, ¶ 4.07.

38. Denning, *supra* note 1, §§ 6.04, 8.02; Hellerstein, *supra* note 3, ¶ 4.08[2]. The Court's movement between these positions was not necessarily linear. *See* Denning, *supra* note 1, § 6.03; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1093–94 (1986).

39. Denning, *supra* note 1, §§ 6.05, 8.10.

40. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008); Hellerstein, *supra* note 3, ¶ 4.14[1][a].

41. Denning, *supra* note 1, §§ 6.06[A][1]–[2]; Francis, *supra* note 22, at 260–65; Hellerstein, *supra* note 3, ¶ 4.14[1][a]–[c].

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

43. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625–29 (1981); *see also* Hellerstein, *supra* note 3, ¶ 4.18[2][d] (discussing the "emasculation" of the fourth prong of *Complete Auto*).

44. Hellerstein, *supra* note 3, ¶ 4.18[2][c] (noting that the requirement of *Complete Auto*'s fourth prong had originally been a Due Process requirement).

45. Denning, *supra* note 1, § 6.05 (quoting S. Pac. Co. v. Arizona, 325 U.S. 761, 781 (1945)).

cumulative tax burdens.[46] Rather, states are free to tax as they see fit as long as their taxes are nondiscriminatory and are fairly apportioned. The one exception, of course, is that states cannot go "too far" in *who* they impose those burdens on.[47]

This framing helps the nexus requirement stand out as serving the same role as *Pike*'s balancing test. It operates differently only because the *Quill* Court avoided actually balancing by adopting a uniform, national nexus rule. The Court made that clear, even without directly citing *Pike* or its nontax cases, when it noted that:

> Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach . . . .[48]

This excerpt makes very clear that the nexus test serves the same catchall function as *Pike* balancing. The Court just avoided the difficulties of real balancing by giving conclusive weight to the perceived benefits of a bright-line safe harbor.[49]

C. Nexus Under Pike Balancing

Acknowledging that nexus is ultimately an expression of *Pike* balancing allows us to analyze *Wayfair* in context. It is not just a tax case. It is a dormant Commerce Clause case, and its resolution will depend as much on the nuances of state taxation as on the Court's general feelings regarding the efficacy and scope of the dormant Commerce Clause. Within that frame, the future of nexus does not look good. The Court has not struck down a state statute applying balancing since the 1980s.[50] The Roberts Court has generally been unwilling to even engage in balancing.[51]

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46. *Commonwealth Edison*, 453 U.S. at 625–29; Swain, *supra* note 8, at 341 ("Regarding the absence of a rule prohibiting a burdensome but non-discriminatory tax, the Court has implicitly determined that there is no such thing. The Court is not in the business of evaluating the *economic burden* of a state tax *liability*.") (footnote omitted).

47. *See* Hellerstein, *supra* note 3, ¶ 4.18[2][d] (discussing how courts will only invalidate tax regimes if they violate the "substantial nexus, fair apportionment, and nondiscrimination" ideas established in previous jurisprudence).

48. Quill Corp. v. North Dakota, 504 U.S. 298, 314–15 (1992).

49. *Id.* at 315.

50. Denning, *supra* note 1, § 6.05, at 6–33.

51. *See* Dep't of Revenue v. Davis, 553 U.S. 328, 354–56 (2008); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007); Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 568–69, 624–27 (2010) (questioning the ongoing validity of *Pike*'s balancing test). *See also* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 453–58 (2008) (noting

The Court's unease with balancing makes imminent sense as a matter of judicial discretion. There is no concrete way to calculate or weigh the benefits and burdens of state regulation—at least as an exercise of judicial rather than legislative judgment.[52] Justice Scalia offered some of the most colorful expressions of this difficulty, likening the required balancing to "judging whether a particular line is longer than a particular rock is heavy"[53] and "whether three apples are better than six tangerines."[54]

Of course, it is possible that balancing the relevant interests might be easier when the issue is nexus and that the Court should not be similarly wary of exercising its own judgment in that realm. After all, the interests on both sides seem to easily reduce to the common metric of the dollar. That view of the issue might make balancing seem more appealing, but it is inaccurate. A Commerce Clause treatise makes this point quite well:

> At first glance . . . the balancing of rival economic interests might seem to be better suited to the tax area, where the competing economic effects of the challenged state levy could, one might think, be quantified with reasonable accuracy. On second thought, however, the assignment of dollar amounts to two competing interests—the national interest in holding down the expenses of interstate enterprise and the state's interest in raising funds for its governmental functions—seems to invite a stalemate, rather than a reasoned judgment for which courts have any special expertise or aptitude.[55]

The interests involved might reduce to dollars, but that hardly tells the whole story.

II. THE BALANCING ACT OF NEXUS

Balancing the interests involved in *Wayfair* would be challenging. The state interest is not easily calculable and it varies between states and over time. The burdens imposed on interstate commerce are similarly difficult to quantify and to generalize.

A. The State Interest

The state interest in the exercise of taxing power beyond that allowed by the physical-presence rule is immense. The revenue interest alone is tens of billions of dollars each year,[56] and recouping those losses is obviously of great interest to states. But it is difficult to evaluate exactly how that loss would be factored into any analysis of a new nexus test. To start, any

common critiques of *Pike*'s balancing test); Regan, *supra* note 38, at 1092 ("Despite what the Court has said, it has not been balancing.").

52. *See* Denning, *supra* note 1, § 6.05.

53. Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

54. *Davis*, 553 U.S. at 360 (Scalia, J. concurring).

55. Denning, *supra* note 1, § 8.03, at 8–10.

56. Brief of Law Professors and Economists, *supra* note 10, at 9.

national nexus rule would impact states differently, and it would be difficult to calculate those losses with any precision. Even if the Court could decide upon the particular revenue amounts at issue, it would have to consider how to weigh the impact of that tax revenue to different states. Would South Dakota's interest in $20 million be the same as California's? The Court would also have to consider whether the state interest in expanded sales-tax collection authority is greater for states that rely more heavily on that tax. South Dakota, for example, has no income tax and relies very heavily on sales taxes to fund its expenditures.[57] Does that make its interest greater than another state's?

Another issue complicating the analysis is that the amount of tax revenue at stake is also variable depending on how businesses structure their affairs. For example, when Amazon decided to collect tax for all jurisdictions in 2017, it significantly reduced the revenue impact of the physical-presence rule on the states where it had not previously collected tax, and Amazon could have an even greater impact on state finances if it decided to collect tax on the sales that it facilitates for vendors using its platform.[58] If nexus is a function of states' aggregate interests in tax collection, would those moves change the constitutional analysis? Should business decisions by individual retailers be constitutionally significant? What if Amazon had excluded one state from its change in practice?

A final complication with using tax revenue as the metric by which to judge the state interest is that states surely have more at stake than just collecting additional revenue. Currently, the physical-presence rule creates an impediment to attracting businesses into a state because businesses that open a location, store inventory, or hire employees in the state will lose the protection of *Quill*.[59] That nexus rule thus creates a ripple effect with greater impact than just the lost tax from online sales. States also have interests in not putting their own businesses at a competitive disadvantage and in not inefficiently pursuing use tax from each of their residents individually. Do these interests go on the scale? If so, how?

B. The Burdens of Taxation

Determining the state interest is complicated. Determining the burdens of tax compliance is complicated as well. If the dormant Commerce Clause is

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57. Hellerstein, *supra* note 3, ¶ 20.01 n.5; Lawrence Hurley, *U.S. Supreme Court Takes up State Tax Dispute*, REUTERS (Jan. 12, 2018, 3:26 PM), https://www.reuters.com/article/us-usa-court-tax/u-s-supreme-court-takes-up-state-online-sales-tax-dispute-idUSKBN1F12JG [https://perma.cc/TP29-7FPH] ("South Dakota has no state income tax and relies heavily on sales taxes to fill state coffers.").

58. *See* William F. Fox, *Inability to Collect Sales Tax on Remote Sales Still Harms the Economy*, 86 ST. TAX NOTES 575, 580–81 (2017) (noting that Amazon's decision to collect tax "on its own sales [has] reduce[d] e-commerce sales tax losses" but noting that "about one-half of sales transacted on the Amazon website are made for other vendors").

59. Brief of Law Professors and Economists, *supra* note 10, at 914–17.

fundamentally about the pursuit of a common market, then the appropriate burdens to consider are the cumulative tax costs that a vendor incurs due to selling in inter- rather than intra-state commerce. When dealing with use-tax collection specifically, that means looking at the additional *compliance* costs that firms incur when collecting for multiple states. Those stem, broadly, from states having different tax laws and administrative processes.[60] Identifying those categories of costs is not difficult, but identifying their amount is. That is because they are both (1) not uniform among firms or jurisdictions and (2) because they are not consistent year-over-year.

Compliance costs will vary for a firm depending on its existing operations and the particular state in which it is newly required to collect. A firm expanding from one SSUTA state into another might find the costs to be minimal while a firm expanding into New York from South Dakota might not.[61] In addition, a firm's costs will likely be highest in its first year of operating in a state, but they should be reduced thereafter. A firm utilizing software to manage many of these burdens might find their costs to be more stable. Firms will also pass those costs onto their consumers to different degrees. All of this considered, it is clear that the costs of compliance are of unequal magnitude between firms and that they are variable over time.[62] No simple dollar amount can be used in a balancing of interests.

Even if the Court could determine some dollar amount as *the* burden of having to collect state use taxes, it would still need to determine whether and how those costs impacted interstate commerce. Just as dollars are not of equal significance to states, they are unequal impact on vendors. A $1,000 cost on a small firm might require it to shut its doors, while a $1,000 cost on another might be completely manageable. This suggests that maybe nexus should relate to firm size rather than firm activity. But firm size does not necessarily tell the whole story either. Firms have very different profit margins and costs of capital. A firm with very high sales, but with low profit margins or with demanding capital providers may not be able to shoulder the burden of taxation any more than a smaller firm.

It is also worth recognizing that tax compliance costs may not represent purely additional costs, but instead substitute for other costs—at least to a degree. For example, some states require vendors that do not collect and remit their use taxes to instead provide information reports to their revenue authorities and to the vendors' in-state consumers.[63] Those requirements represent regulatory burdens just like tax-collection obligations, but are

60. *See* William Joel Kolarik II, *Untangling Substantial Nexus*, 64 TAX LAW. 851, 886–87 (2011); Shaviro, *supra* note 28, at 919–20.

61. "SSUTA states" are states that are members of the Streamlined Sales and Use Tax Agreement, which means that they have adopted sales tax laws that contain many uniform provisions. *See* Hellerstein, *supra* note 3, ¶ 19A.

62. *See* Kolarik II, *supra* note 60, at 887 (noting firms' economies of scale with respect to sales-tax collections).

63. Adam B. Thimmesch et al., *Consumer-Based Use Tax Enforcement and Taxpayer Compliance*, 86 ST. TAX NOTES 319, 322 (2017).

permissible.[64] What this means is that the compliance burdens of tax collection would not necessarily be new or additional burdens for those vendors. They might just replace other permissible burdens.

C. Possible Approaches

The discussion in the prior Section suggests that it would be exceedingly difficult for the Court to balance interests to create a new nexus rule in any reasoned way that is consistent with its traditional judicial function. This does not mean that the *Wayfair* Court would have no options for replacing the physical-presence rule though. First, the Court could adopt an arbitrary, national bright-line rule like the South Dakota law. Second, the Court could also abandon its attachment to bright-line rules and adopt a nexus *standard* instead. This latter route might be particularly appealing, especially given the wide-spread adoption of economic-nexus standards at the state level. Neither approach is ultimately satisfactory, as explained below.

1. Crafting a New Bright-Line Rule

It would not be difficult for the Court to adopt a new bright-line nexus rule. It could pick out a dollar threshold, a sales threshold, or it could adopt a rule that prevents states from taxing any business with fewer than fifty desks. Thinking of bright-line rules is easy. Thinking of bright-line rules *that make sense* is substantially more difficult. It seems unlikely that the Court would create such a rule from whole cloth, but it could, in theory, provide bright-line guidance by blessing the South Dakota formulation at issue in *Wayfair*. Evaluating that option shows just how unlikely it is that the Court could adopt any reasonable bright-line rule post *Quill*.

Under the South Dakota law, vendors must collect the state's tax if they generate more than $100,000 in sales to, or engage in 200 or more transactions with, South Dakota customers during the current or prior taxable year.[65] The use of thresholds like those would simplify the Court's nexus test and provide bright-line guidance, but it would be nearly as arbitrary as a fifty-desk test. Sales and transactions are surely relevant to nexus in that they ensure that the subject vendor has received some level of benefit from, and has expressed some commitment to, a particular market. That level of economic connection might be "enough" to justify the friction of taxation by the state. But this type of quantitative test suffers from significant defect.

To start, determining a particular dollar threshold as *the* constitutional standard would be remarkable.[66] Even ignoring the basic issue of inflation,

64. Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016).

65. S.D. S. 106.

66. *See* Swain, *supra* note 35, at 364.

the dollar is a poor metric for the reasons discussed above.[67] There is no set amount of revenue from a state that is "enough" to offset the costs of compliance. Firms have very different profit levels and costs of capital. A sales metric suffers from the same defect. Two hundred transactions might generate very little profit for a firm or they might generate a significant amount. A transaction amount might make sense as a matter of state-specific legislative judgment, but it makes virtually no sense as a matter of constitutional adjudication.

This type of bright-line rule would be of equally questionable impact on states. The thresholds in the South Dakota law might make sense for South Dakota, but they might be wholly inappropriate for other states. South Dakota relies very heavily on its sales tax,[68] it is a SSUTA state,[69] and it has fewer than one million residents.[70] Surely, the level of connection that best balances that states' interest with the national interest in a common market is not universal. Adopting that test as a national nexus rule would be wholly arbitrary, and as experience has shown under *Quill*, adopting rules like that can lead to hardship for states, distortions in the market, and legal uncertainty as states respond. The Court should not be influenced by the facial appeal of this approach.[71]

2. Nexus as a Standard?

Moving to a nexus standard would eliminate many of the issues that the Court would face if it attempted to formulate a new nexus rule. It would not need to do a direct balancing nor would it need to make sweeping changes to its existing doctrinal structure in the area. Given these benefits, this approach might be tempting. This is especially true because state courts have already developed a standard that the Court could adopt—economic nexus.

The *Quill* Court's reluctant acceptance of the physical-presence rule, and its explicit recognition that it had not applied that rule to taxes other than state sales and use taxes, has led many states to reject that rule for purposes

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67. *See supra* Sections II.A–B.

68. Hurley, *supra* note 57.

69. *See supra* note 61.

70. *Quick Facts: South Dakota*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/SD [https://perma.cc/GLX7-M3PE] (providing a population estimate of 869,666 as of July 1, 2017).

71. On this point, is also fair to note that experience under the physical-presence rule suggests that the benefits of a bright-line rule may not be as strong as the *Quill* Court thought. Despite the apparent simplicity of a physical-presence rule, state courts have had to deal with many questions about that concept. That includes the question of how much of a physical presence is required, whose physical presences count, and what a physical presence actually is. *See, e.g.*, Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954, 958–62 (N.Y. 1995) (evaluating the physical presence needed under *Quill*); Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 625–26 (2013) (evaluating whether the use of in-state residents to direct traffic to a website was sufficient to create physical-presence under *Quill*); KFC Corp. v. Iowa Dep't of Revenue., 792 N.W.2d 308, 323–24 (Iowa 2010) (evaluating whether the use of intellectual property in a state was sufficient to create physical presence in that state).

of their income taxes.[72] They instead apply as the relevant constitutional standard something referred to as "economic nexus."[73] The economic-nexus concept provides a convenient substitute for the physical-presence rule. The biggest problem with the concept is that it isn't really clear what economic nexus means. The state courts that have blessed that standard have generally just found it to be met on the facts presented. The most extensive discussion of economic nexus at the state-court level was provided by the West Virginia Supreme Court.[74] Even there, the court explained the concept very briefly, noting only that

> [A] substantial economic presence standard "incorporates due process 'purposeful direction' towards a state while examining the degree to which a company has exploited a local market." Further, "[a] substantial economic presence analysis involves an examination of both the quality and quantity of the company's economic presence." Finally, under this test, "purposeful direction towards a state is analyzed as it is for Due Process Clause purposes" and the Commerce Clause analysis requires the additional examination of "the frequency, quantity and systematic nature of a taxpayer's economic contacts with a state."[75]

That limited formulation does not offer much by way of real guidance, and the court's application of it was no more helpful. The court determined that MBNA had "continuously and systematically engaged in direct mail and telephone solicitation and promotion in West Virginia," and it pointed to the eight to ten million dollars of annual revenue that MBNA had derived from West Virginia customers during the two years at issue.[76] The Court labeled those amounts as "significant"[77] and determined that MBNA had "a significant economic presence sufficient to meet the substantial nexus prong of *Complete Auto*."[78] And that was it.

Notwithstanding the limited development of this concept at the state-court level, the Supreme Court could certainly adopt a similar, qualitative standard for nexus if it were to overrule *Quill*. That approach would maintain the four-prong test of *Complete Auto*, and it would show some respect for the interest of taxpayers in having a nexus requirement. It would also allow the Court to decide *Wayfair* without getting into the uneasiness of

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72. *See* Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 173–75 (2012).

73. *Id.*; *see also* Capital One Auto Fin. Inc. v. Dep't of Revenue, No. TC 5197, 2016 WL 7429522, at *7 (Or. T.C. Dec. 23, 2016); Crutchfield Corp. v. Testa, 88 N.E.3d 900, 902 (Ohio 2016).

74. Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 234 (W. Va. 2006).

75. *Id.* (citations omitted) (quoting Christina R. Edson, Quill*'s Constitutional Jurisprudence and Tax Nexus Standard in an Age of Electronic Commerce*, 49 TAX LAW. 893, 943–45 (1996)).

76. *MBNA Am. Bank*, 640 S.E.2d at 235–36.

77. *Id.* at 236.

78. *Id.*

balancing, and it would align the prevailing nexus standard for all types of taxes. There is a lot of merit to this approach, but it is far from perfect.

A qualitative nexus standard ultimately provides very little in terms of real guidance for states or vendors. The existing economic-nexus case law involves the imposition of state income taxes on large companies with millions of dollars of revenue in the taxing states.[79] Those are the easy cases though. How would states and vendors evaluate situations where the in-state connections were much more limited? States will certainly want smaller vendors to collect their use taxes, and economic nexus tells us nothing about where the line is.

This is where the Court could conceivably leverage the South Dakota formulation. If it were to adopt an economic-nexus standard but bless the South Dakota statute as requiring enough, it could provide a bright-line safe harbor and take some comfort in that. That approach would certainly provide benefits to states and to vendors, but it would leave significant questions unanswered. Namely, it would simply beg the question of why those thresholds were sufficient to pass muster. Was it because South Dakota is a SSUTA state and so vendors' marginal costs of compliance might generally be lower in that state? Did it have anything to do with the size of the South Dakota market or the nuance of it tax-collection systems? Maybe it related to the importance of sales tax to the state. Could states adopt even lower thresholds if technology made marginal compliance costs fall even lower? Simply blessing the South Dakota standard under an economic-nexus test would provide no help on these questions and could lead to significant ongoing litigation.

Ultimately, then, an economic-nexus approach might provide a stop gap while states and vendors waited for Congress to act, but it would leave significant uncertainty in the interim. Lower courts would be forced to determine how much of an economic nexus was constitutionally sufficient with little guidance from the Court. The question would again become one of magnitude and how to balance a state's interest in having vendors collect tax. If that is where economic nexus gets us, why not just go directly to *Pike* where we at least know that the burden on vendors would have to be incredibly high to get a state standard overturned?[80] In the end, I believe that adopting an economic-nexus standard may be of great utility, but that is a second-best approach. The best approach remains eliminating any special test for nexus under the dormant Commerce Clause.

79. *See, e.g.*, Capital One Bank v. Comm'r of Rev., 899 N.E.2d 76, 86 (Mass. 2009) (taxpayer received "millions of dollars in income" from the state); Capital One Auto Fin. Inc. v. Dep't of Revenue, No. TC 5197, 2016 WL 7429522, at *6 (Or. T.C. Dec. 23, 2016) (taxpayer "extracted upwards of $150,000,000 in fees from Oregon"); Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 235–36 (W. Va. 2006) (taxpayer received eight to ten million dollars of revenue from the state).

80. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

III. Moving Beyond Nexus

The Court's best option in *Wayfair* is to repeal the physical-presence rule and to not replace it. That approach would free states to collect the growing amount of tax revenue that has been outside of their grasp. It would remove an artificial commercial distortion from the market.[81] It would provide bright-line guidance, and it would obviate the need for the Court to engage in *Pike*-like balancing to develop a broad national rule.

Removing the nexus requirement would also bring some much-needed consistency to the Court's dormant Commerce Clause doctrine, both within and without the tax context. Within its tax cases, the Court has never expressed a nexus requirement for taxes other than sales and use taxes. Instead, the Court generally looks for discrimination on the face of a statute and then evaluates whether the tax being imposed is fairly apportioned. The apportionment inquiry looks for whether facially neutral statutes have discriminatory impacts, which might evidence a discriminatory purpose.[82] Eliminating the nexus requirement would align these inquiries for purposes of all taxes. It would also result in an approach in tax cases that more closely resembles the Court's nontax doctrine.

Perhaps more fundamentally, rejecting the nexus requirement—and the exercise of judgment that it would require—would be entirely consistent with the evolution of the Court's approach to the "fairly related" prong of *Complete Auto*.[83] That prong ostensibly requires that a state's tax imposition be "fairly related to the services provided by the State."[84] That formulation seems to suggest a balancing much like the balancing required in formulating a nexus requirement. That similarity in purpose is not imagined. The Court has explicitly recognized that the nexus requirement and the fairly-related requirement are closely related in purpose.[85] It did so in a case in which it rejected a taxpayer's attempt to have it engage in a similar balancing.

In *Commonwealth Edison Co. v. Montana*, the Court was asked to determine that a state's tax imposed too high of a burden on out-of-state taxpayers based on the benefits that they received from the state.[86] The Court declined that invitation with language that could be adopted word for word in *Wayfair*:

> [I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application

81. *See* Brief of Law Professors and Economists, *supra* note 10, at 14–17.

82. Francis, *supra* note 22, at 269–70.

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

84. *Id.*

85. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625–26 (1981).

86. *Id.* at 620–21.

> in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[87]

These conclusions should apply no less to determinations of when tax-compliance costs are "acceptable" than to determinations of when direct-tax costs are acceptable. Tax burdens are burdens regardless of their form.

The question presented by *Wayfair*, as it was in *Commonwealth Edison*, is when the burden of a nondiscriminatory state tax is too heavy. The Court has consistently refused to make that determination. It instead balances the national interest in a common market against states' retained autonomy by looking for facial discrimination and by use of its internal consistency test.[88] It rejected a more direct role in monitoring the costs of state taxation in *Commonwealth Edison*, and it should apply the same approach in *Wayfair*.

A. *The Costs of Eliminating the Nexus Requirement*

Lest the analysis above seem Panglossian, I admit that removing the nexus requirement is not a perfect option; it is just the best one. It would certainly expand state power, and it is possible that states could use that power to erect barriers around them in a way that injures smaller vendors. It would thus effectively shift the costs of federalism from states to those vendors. It is easy to see the potential problems that might follow. The California crafter who sold a blanket online to a person in Minnesota could find a Minnesota state auditor requesting a meeting and a payment of tax. The Idaho vendor selling iPhone cases online could find herself subject to the taxing jurisdiction of many states, all with different rules and regulations.[89] The potential compliance costs that could be incurred by firms in a world with no nexus requirement would surely cause many smaller firms to think twice before selling into a state, or even putting products for sale online. That would clearly be inconsistent with the economic goals of the framers.

These concerns are all valid, and it is worth recognizing that vendors, and the common national market, might be negatively impacted by the proposed approach of this Essay. Undoubtedly, the ability to sell to a national market from a limited base of operation—even one's own home—is an incredible economic benefit that has inured from the development of

87. *Id.* at 628 (footnote omitted).

88. *See supra* text accompanying notes 28–33.

89. Brief of Chris Cox as Amicus Curiae in Support of Respondents at 14–16, South Dakota v. Wayfair, Inc., No. 17-494 (U.S. Dec. 7, 2017) (discussing this hypothetical situation).

internet commerce. The Court should not take the potential impact of its decision on this important part of the economy lightly.

It is equally important, however, to recognize that this important part of the economy has developed precisely because firms are able to avoid many of the traditional costs of doing business. The argument that states' authority should be reduced because firms can otherwise cheaply enter their markets is not necessarily overwhelming. It is also not the case that removing the nexus requirement would subject vendors to a world of unlimited taxation. There are many reasons that states would not wield unbridled power in a post-nexus world.

A world without a dormant Commerce Clause nexus requirement is not a world without rules. To start, the Due Process Clause would continue to prevent states from exercising power over firms that did not have minimum contacts with them.[90] Firms would also have protection under the remaining prongs of *Complete Auto* so that any state tax would still have to be fairly apportioned and nondiscriminatory. As a final protection, vendors could challenge state impositions directly under *Pike* and try to show that the burden of collecting tax was "clearly excessive in relation to the putative local benefits."[91]

States also have prudential reasons to provide *de minimis* exemptions from their nexus provisions. First, resource constraints should limit states' interests in going after smaller vendors. It just isn't worth the expense. Second, states will also face pressure to exercise restraint because of the looming risk of Congressional intervention. Congress can step in at any point to discipline states if they push too far. Congress has lacked the right political coalition to act with the backdrop of a physical-presence rule, but aggressive state actions post-*Quill* could provide the impetus for Congress to get something done.[92]

In sum, completely eliminating the nexus requirement would give states great power and could potentially cause some smaller vendors to proceed

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90. *See generally* Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565 (2015); Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371 (2017); Eric S. Smith, *Due Process Implications Related to State Notice and Economic Nexus Laws*, 70 TAX LAW. 833 (2017).

91. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted); *see* Paul Jones & Jad Chamseddine, *Court Likely to Kill* Quill*, Method Unclear*, TAXANALYSTS (Jan. 23, 2018), http://www.taxanalysts.org/content/court-likely-kill-quill-method-unclear [https://perma.cc/ZB9H-SS4S] (quoting Darien Shanske regarding the potential role of *Pike* post-*Quill*).

92. This is, of course, precisely what happened with the enactment of P.L. 86-272. The Supreme Court created great angst in the business community with its decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), by blessing state impositions of income tax obligation on vendors who did no more in a state than solicit sales with in-state drummers. That decision led Congress to enact P.L. 86-272 within the year. Interstate Income Act of 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified as amended at 15 U.S.C. § 381).

warily into the interstate market. But states would not have unfettered power and there are significant pragmatic reasons for them to exercise restraint. The Court might need to trust that Congress would stand ready to provide discipline in the form of federal oversight, but even those proposing to keep *Quill* suggest that Congress is up to the task.[93]

B. *The Costs of* Not *Eliminating the Nexus Requirement*

Repealing the nexus requirement would certainly come with costs, as noted above, but so would retaining that requirement. Those costs include the obvious monetary costs to states and the distortionary effects that the physical-presence rule has on interstate commerce. They also go further. First, upholding *Quill* would just mean that states couldn't require remote vendors to collect their taxes, but they could still impose other burdensome obligations like use-tax notification and reporting requirements.[94] More states are adopting laws imposing those requirements,[95] so a retention of *Quill* might just result in an increase in these other costs.

Second, retaining *Quill* would most likely impede much needed Congressional action. Legislating against the status quo of the physical-presence rule has proven to be hard for Congress because the politics are "brutal."[96] It risks being assigned political blame for "increasing taxes" while states get the resulting revenue.[97] But the situation would fundamentally change if the Court were to repeal *Quill*. Suddenly, Congress would be able to play the hero rather than the villain.

Finally, it would actually be helpful for Congress to be able to legislate on a clean slate. The most prominent bill that has been offered in this area, the Marketplace Fairness Act, actually incorporates the Court's existing nexus doctrine and purports to regulate on top of existing constitutional restrictions on state taxing power.[98] The act even leaves room for states to

93. Respondents' Brief in Opposition, *supra* note 4, at 2; Brief of Chris Cox, *supra* note 89, at 23–24; Brief of Amici Curiae Representative Robert W. Goodlatte et al. in Opposition to the Petition, South Dakota v. Wayfair, Inc., No. 17-494, (U.S. Dec. 7, 2017).

94. *See* Thimmesch et al., *supra* note 63.

95. *Id.*

96. Pomp, *supra* note 8, at 1142; *see generally* Edward A. Zelinsky, *The Political Process Argument for Overruling* Quill, 82 BROOK. L. REV. 1177, 1189–99 (2017).

97. *See* Zelinsky, *supra* note 96, at 1194. It is actually worse than this because vendors' compliance costs would be deductible business expenses, which would reduce federal revenue.

98. "The [Marketplace Fairness Act] operates by granting states authority to require remote vendors to collect tax on remote sales . . . if specific conditions are met." Adam B. Thimmesch, *State Taxing Power after* Direct Marketing Association v. Brohl, 80 ST. TAX NOTES 299 (Apr. 25, 2016) (discussing the version of that bill introduced in the 114th Congress). "[I]t defines [remote sales] as sales into states 'in which the seller would not legally be required to pay, collect, or remit State or local sales and use taxes' but for the bill." *Id.* (quoting Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 4(5) (2015)); *see also* Marketplace Fairness Act of 2017, S. 976, 115th Cong. § 4(5) (2017). It thus necessarily incorporates the Court's nexus doctrine. As currently drafted, the Marketplace Fairness Act

operate outside of its safe harbor and for the Court to bless those moves.[99] This is not to say that Congress could not take a different approach to solve this issue, but it is clear that the presence of any rule from the Court could impact whether and how Congress acts. It would be better for Congress to act without the crutch of an existing judicial formulation.

C. Deciding *Wayfair*

The previous discussion has built the case for the Court to completely remove the nexus requirement from *Complete Auto* and to not fear the consequences of that choice. This Section moves from evaluating *why* the Court should take that step to addressing *how* it should do so. The mechanics certainly matter less than the result but are still worth evaluating because of the doctrinal impact of the Court's choice and because it will dictate the form of the Court's opinion.

The Court could achieve many of the positive results discussed above by retaining the nexus requirement in form, but by evaluating states' nexus provisions by reference to *Pike*. It could do that by simply changing the way that it evaluates nexus under *Complete Auto*, or it could limit its impact by recognizing an error that it made decades ago—analyzing tax-collection costs as taxes. Use-tax collection costs are not taxes, they are regulatory burdens like any other imposed by a state. One option for the Court, were it not inclined to make broader changes to its doctrine, would be for it to simply hold that state statutes imposing tax-collection obligations on vendors would be evaluated like any other regulatory burden. That is, that they would be directly subject to the Court's nontax dormant Commerce Clause doctrine and not evaluated under *Complete Auto*.

The benefit of either of those approaches would be that they would leave in place much of the framework of the Court's existing dormant Commerce Clause doctrine and thus might appear to narrow the impact of its decision. The Court might prefer that more limited approach, but its benefits are also its biggest drawbacks. *Wayfair* presents the Court with an opportunity to streamline much of its doctrine. Going the extra step and dispensing with the nexus requirement as a special requirement under *Complete Auto* would help to harmonize the Court's tax and nontax cases[100] and start to untangle some of the thicket that it has created.

Of course, eliminating the nexus requirement would not mean that states' decisions of who to tax would be completely free from judicial review. Instead, the Court could clarify that they were subject to the review process of *Pike*. States' statutes would be evaluated for whether the burdens that they

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also explicitly provides that it has "no effect on nexus" and does not preempt state authority except as provided in the act. S. 976 §§ 3(b), 6.

99. Thimmesch, *supra* note 98, at 301.

100. The Court could do one better by dispensing with both the nexus and fairly related prongs—perhaps by admitting their Due Process roots.

imposed on interstate commerce were "clearly excessive in relation to the putative local benefits."[101] A state imposing tax-collection obligations on the remote vendor with $100 of local sales would still be susceptible to rebuke. A state imposing tax-collection obligations only on remote vendors with more than $100,000 of such sales should be fine.

The suggestion that this is the best path for addressing *Wayfair* necessarily begs the question of whether this approach would accomplish anything at all. The discussion above suggests that the Court should avoid getting into *Pike* balancing. Why is this path any different? It is different because the difficulties of balancing only occur if the Court were to attempt to craft a non-arbitrary national nexus test. But it need not do that in *Wayfair*, even if it rules that state nexus provisions are subject to balancing going forward.

First, it could simply hold that South Dakota's laws satisfied the required balancing. In that regard, one can look to Justice Souter's opinion in *Kentucky v. Davis*, where he rejected a challenge to a state law not by balancing the relevant interests, but by noting that the Court was "not institutionally suited to draw reliable conclusions of the kind that would be necessary for [the challengers] to satisfy a *Pike* burden."[102] Detailed balancing was not necessary because the result was clear. The Court could evaluate the South Dakota statute in the same way and uphold it under *Pike*.[103]

Another option, and perhaps the better one, would be for the *Wayfair* Court to simply repeal *Quill* and remand the case to the South Dakota Supreme Court to apply *Pike* itself. That approach probably makes the most sense given the variety of opinions held by the current justices on *Pike* balancing and the posture of the case. Indeed, one of Wayfair's primary arguments against the Court granting certiorari was that the lower courts had not developed the record regarding the state's interest and the burdens of tax compliance.[104] That is true, but that argument did not prevent the Court from granting certiorari and it should not prevent the Court from eliminating the physical-presence rule. Those issues have not been fully considered because, to date, *Wayfair* has been about *Quill*. But *Wayfair* isn't really about *Quill*. It is about *Pike*. The Court should abandon the physical-presence rule and make that clear.

CONCLUSION

Wayfair presents the opportunity for the Court to abandon the much-maligned physical-presence rule. Identifying *Quill* as a prime candidate for reversal is not difficult, but determining what the Court should do post-*Quill* is. The case presents issues that have long plagued the Court and the

101. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
102. Dep't of Revenue v. Davis, 553 U.S. 328, 353 (2008).
103. Lower courts could, of course, follow suit.
104. Respondents' Brief in Opposition, *supra* note 4, at 13–18.

country. How do we balance the national interest in a common economic market with our federal structure and states' retained taxing autonomy? In most situations, the Court does that by looking for discrimination and then putting a heavy burden on those who would have it subvert the authority of states by exercising the authority that has been directly granted to Congress. It can take that same approach in *Wayfair*. There are surely costs that stem from that approach, and the nation's small vendors will bear many of them. But the alternatives are worse and there is a branch of the federal government that is specifically designed to address those issues. The *Wayfair* Court should reject *Quill* and set the stage for Congress to fulfill its role in this area.