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## Missouri's Taxation of Remote Sellers in a Post-Wayfair World

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# Missouri's Taxation of Remote Sellers in a Post-*Wayfair* World

Charles L. Merriweather and John T.M. Whiteman\*

## INTRODUCTION

On June 21, 2018, the Supreme Court of the United States overturned the decades old precedent that prevented states from requiring out-of-state sellers with no physical presence in the state to collect and remit sales tax.<sup>1</sup> While the decision is certainly good news for the states seeking to expand their sales tax base, the decision presents questions that must be answered before states can maximize their responses. This paper will highlight what led to the Supreme Court's decision, what the Court determined in *Wayfair*, and what Missouri can do now.

### I. PROCEDURAL POSTURE OF WAYFAIR

To fully understand the *Wayfair* decision and its impact, one must have some background knowledge. This background information can be broken into three separate categories: constitutional provisions, judicial doctrines, and precedential case law.

The Commerce Clause, the Fifth Amendment's Due Process Clause, and the Fourteenth Amendment's Due Process Clause are the constitutional provisions that played a role in *Wayfair*. The Commerce Clause gives Congress the power "[t]o regulate Commerce... among the several states[.]"<sup>2</sup> The purpose of this clause is to prevent the balkanization of the national economy resulting from states competing with one another.<sup>3</sup> The effect is that Congress can regulate activities with substantial impact on interstate commerce.<sup>4</sup> The Supremacy Clause further provides that certain federal laws trump state regulation of interstate commerce that are in direct contradiction.<sup>5</sup> A state may place regulations

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1. South Dakota v. Wayfair, 138 S. Ct. 2080, 2084 (2018).

2. U.S. CONST. art. I, §8, cl. 3.

3. *Wayfair*, 138 S. Ct. at 2089 (citing *Hughes v. Oklahoma*, 441 U.S. 332, 325-236 (1989)).

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

5. *Id.* at 27.

on interstate commerce, so long as the regulations do not discriminate against, or unduly burden, interstate commerce.<sup>6</sup>

The Due Process Clauses of the Fifth and Fourteenth Amendments ensure fairness of the government's action, and in the context of state taxation the Court has interpreted due process as requiring states to give taxpayers fair warning of the tax.<sup>7</sup> The Due Process Clause of the Fifth Amendment provides “[n]o person shall ... be deprived of life, liberty, or property, without due process of law[.]”<sup>8</sup> Similarly, the Due Process Clause of the Fourteenth Amendment provides “nor shall any State deprive any person of life, liberty, or property, without due process of law[.]”<sup>9</sup>

Finally, while the Dormant Commerce Clause is not expressly stated in the Constitution it still plays an important role in the *Wayfair* decision. This judicially created doctrine has not been codified or added to the language of the Constitution.<sup>10</sup> The idea behind the Dormant Commerce Clause is that, even in the absence of Congressional action, a state cannot impose regulations that discriminate or unduly burden interstate commerce.<sup>11</sup>

This article will also review the major cases the Court highlighted in *Wayfair*.<sup>12</sup> These cases include: *National Bella Hess v. Illinois*, *Complete Auto Transit Inc. v. Brady*, *Quill Corp. v. North Dakota*, and *Direct Marketing Ass'n v. Brohl*.<sup>13</sup>

The road to *Wayfair* began in 1967 when the Court decided the *Bella Hess* case.<sup>14</sup> In a decision written by Justice Potter Stewart that was joined by five other Justices, including Justice Byron White, the Court ruled that Illinois could not collect use-tax from mail order sellers unless the seller had a physical presence in the state.<sup>15</sup> The Court held that a mail order

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6. *Id.* at 31.

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

8. U.S. CONST. amend. V.

9. U.S. CONST. amend. XIV, §1.

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

11. *Id.* at 142.

12. *Wayfair*, 138 S. Ct. 2080.

13. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 396 U.S. 753 (1967); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015).

14. *Wayfair*, 138 S. Ct. at 2087-2088.

15. *Nat'l Bellas Hess*, 396 U.S. at 759.

company whose only connection with the state was through common carriers or the United States Post Service lacked minimum contacts with Illinois.<sup>16</sup> The Court went on to state that a physical presence, such as selling agents or a building, in the taxing state was required for a seller to demonstrate it had sufficient contacts with the state for both due process and Commerce Clause purposes.<sup>17</sup>

The next major state taxation case the Court decided was *Complete Auto Transit*.<sup>18</sup> In a unanimous opinion authored by Justice Harry Blackmun, the Court held that if a state tax does not have an effect forbidden by the Commerce Clause, a state may tax interstate commerce.<sup>19</sup> To aid in assessing whether a state's taxation policy violated the Commerce Clause, the Court introduced a four-prong test.<sup>20</sup> The four prongs of the test are: the tax (1) applies to an activity with a substantial nexus with the taxing state, (2) it is fairly apportioned, (3) it does not discriminate against interstate commerce, and (4) it is fairly related to the services the state provides.<sup>21</sup>

In 1992, a quarter century after *Bella Hess*, the Court issued *Quill*, which ultimately became the precedent that South Dakota sought to overturn in *Wayfair*.<sup>22</sup> While the Court in *Quill* did overturn the Due Process portion of *Bella Hess*' holding, it upheld the Commerce Clause portion of the Court's holding in *Bella Hess*.<sup>23</sup> By upholding the Commerce Clause portion of *Bella Hess* the Court reaffirmed the physical presence requirement of a state's sales tax.<sup>24</sup>

In 1987, North Dakota revised its sales tax laws to require certain out of state sellers with no physical presence in North Dakota to collect and remit sales tax.<sup>25</sup> Almost immediately after passing this law North Dakota sought a declaratory judgment against several out of state retailers

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16. *Id.*

17. *Id.* at 758.

18. *Wayfair*, 138 S. Ct. at 2085.

19. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977).

20. *Id.* at 279-80.

21. *Id.* at 279-80. This four prong test is common referred to as the *Complete Auto* test.

22. *Wayfair*, 138 S. Ct. at 2085.

23. *Quill Corp. v. North Dakota*, 504 U.S. 298, 308, 314 (1992).

24. *Id.* at 314.

25. *Id.* at 303.

including the Quill Corporation.<sup>26</sup> Quill, a Delaware corporation, was a mail order retailer who solicited orders exclusively by mail or phone.<sup>27</sup> All of Quill's sales into North Dakota were delivered into the state by a common carrier or the United States Postal Service.<sup>28</sup> Quill had no selling agents, employees, or any other physical presence in North Dakota.<sup>29</sup> After receiving an unfavorable ruling in the North Dakota Supreme Court, Quill appealed to the Supreme Court.<sup>30</sup>

The Court in *Quill* overruled the Due Process holding of *Bella Hess*, but reaffirmed the physical presence rule by not overruling the commerce clause holding of *Bella Hess*.<sup>31</sup> Under *Quill*, a company with no physical presence in a state may have sufficient contacts for due process purposes, but not have sufficient contacts for Commerce Clause purposes.<sup>32</sup> The Court provided that a physical presence in the taxing state was required to have substantial nexus with the taxing state, which is required by the first prong of the test laid out in *Complete Auto Transit*.<sup>33</sup> The Court went on to describe the physical presence rule as a bright line test that “further[ed] the end of the Dormant Commerce Clause[.]”<sup>34</sup>

The Court overruled the Due Process holding in *Bella Hess* because the jurisprudence of Due Process cases had significantly evolved in the time between cases.<sup>35</sup> In resolving Due Process issues the Court went from using rigid formalistic tests to more flexible inquiries into the contacts the taxpayer had in the taxing state.<sup>36</sup> The Court pointed out that Quill purposefully directed its activities at North Dakota residents, which was sufficient for Due Process purposes, and the tax was related to the benefit Quill received by having access to North Dakota.<sup>37</sup>

There were two notable things about Justice Scalia's concurring opinion

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26. *Id.*

27. *Id.* at 302.

28. *Id.*

29. *Id.*

30. *Id.* at 298.

31. *Id.* at 308, 314, 317.

32. *Id.* at 313.

33. *Id.* at 312.

34. *Id.* at 314.

35. *Id.* at 307.

36. *Id.*

37. *Id.* at 308.

in *Quill*. The first is that he says the court should have upheld *Bella Hess* on stare decisis alone, because stare decisis is given extra weight in cases where Congress has the power to act but has yet to do so.<sup>38</sup> Second, his concurring opinion was joined by Justices Clarence Thomas and Anthony Kennedy, the only two Justices who were on the Court for both *Quill* and *Wayfair*.<sup>39</sup> In his dissent, Justice White pointed out that case precedent should not be applied to a new case if the economic realities have drastically changed in the timespan between the two cases.<sup>40</sup>

Finally, the last case that helped pave the way for the *Wayfair* decision is *Direct Marketing Ass'n v. Brohl*. The State of Colorado had passed a law that required out-of-state sellers to provide Colorado customers information on their use tax liability and provide the State of Colorado records of Colorado sales.<sup>41</sup> The Court held that Colorado could require out-of-state sellers with no physical presence in the state to provide this information to the customer and the state.<sup>42</sup> The Supreme Court also remanded the case to the court of appeals to determine whether Colorado's law passed the *Complete Auto* test, and the 10th Circuit ultimately held the law met the test.<sup>43</sup>

The most important takeaway from the *Brohl* case is Justice Kennedy's concurring opinion. In his concurring opinion, Justice Kennedy openly questioned whether or not the Court should still follow *Quill* given the growth of e-commerce and the tax revenue state and local governments were unable to collect because of *Quill*.<sup>44</sup> Many think this concurring opinion was a starting gun of sorts for states to try and overturn *Quill*.<sup>45</sup>

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38. *Id.* at 320 (Scalia, J., concurring).

39. *Id.* at 319.

40. *Id.* at 333 (White, J., dissenting).

41. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127 (2015).

42. *Id.* at 1134.

43. *Id.* at 1134; *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1136 (10th Cir. 2016).

44. *Brohl*, 135 S. Ct. at 1135 (2015) (Kennedy, J., concurring).

45. See, e.g., Clark Calhoun & Andrew Yates, *The Wayfair Brief: What You Should Know*, LAW360 (June 22, 2018, 6:07 PM), <https://www.law360.com/articles/1050883/the-wayfair-brief-what-you-should-know>; Ernst Hunter, *Sales Tax Slice: Will Justice Kennedy Have the Last Word on Physical Presence Nexus?*, SALT TALK BLOG (Jan. 18, 2018), <https://www.bna.com/sales-tax-slice-b730144742>

78/; Sarah Horn, Jill McNally, Rebecca Newton-Clarke, & Melissa Oaks, *Supreme Court Abandons Physical Presence Standard: An In-Depth Look at South Dakota v. Wayfair*, THOMSON-REUTERS (June 22, 2018), <https://tax.thomsonreuters.com/news/supreme-court-abandons-physical-presence->

## II. HISTORY OF WAYFAIR

The Petitioner was the State of South Dakota.<sup>46</sup> This paper will focus on the three actions taken by South Dakota the Court identified as most relevant to its holding. These three actions are: becoming a member of the Streamlined Sales and Use Tax Agreement, enacting a remote collection sales tax statute, and seeking a declaratory judgment against the four respondents in the case.<sup>47</sup>

The first of the three aforementioned steps that the State of South Dakota took was becoming a member of the Streamlined Sales and Use Tax Agreement, more commonly referred to as the SSUTA. The SSUTA of the Streamlined Sales Tax Governing Board, began in 2000 as a result of the Supreme Court's decisions in *Bella Hess* and *Quill*.<sup>48</sup> In those cases, the Court created and upheld the physical presence rule, because the differences in every state's sales tax law made compliance with them an undue burden on interstate commerce.<sup>49</sup> After *Quill*, a group of states came together and worked on bringing uniformity between their sales tax laws.<sup>50</sup>

After years of collaboration, the Streamlined Sales Tax Governing Board came up with the SSUTA. "The purpose of the Agreement is to simplify and modernize sales and use tax administration in order to

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standard-an-in-depth-look-at-south-dakota-v-wayfair.

46. *Id.* at 2084.

47. *2018 Certificate of Compliance*, STREAMLINED TAX SALES GOVERNING BRD., INC.<http://www.streamlinedsales.org/uploads/downloads/Forms/F0006%202018%20Certificate%20of%20Compliance%202018-5-3.docx> (last visited Sept. 23, 2018); *Streamlined Sales Tax and Use Agreement Petition for Membership*, STREAMLINED TAX SALES GOVERNING BOARD, INC., <https://www.streamlinedsales.org/uploads/downloads/State%20Compliance/South%20Dakota/SD%20Petition%20For%20Membership.pdf> (last visited Sept. 23, 2018); History of S.D. S.B. 106, SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL, [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=106&Session=2016](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=106&Session=2016) (last visited Sept. 23, 2018); *State v. Wayfair Inc.*, 901 N.W.2d 754, 756 (S.D. 2017).

48. *About Us Page*, STREAMLINED TAX SALES GOVERNING BRD., INC., <https://www.streamlinedsales.org/index.php?page=About-Us> (last visited Sept. 23, 2018).

49. *Id.*

50. *Id.*

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substantially reduce the burden of tax compliance.”<sup>51</sup> Specifically, the SSUTA focuses on:

(1) State level administration of sales and use tax collections, (2) Uniformity in the state and local tax bases, (3) Uniformity of major tax base definitions, (4) Central, electronic registration system for all member states, (5) Simplification of state and local tax rates, (6) Uniform sourcing rules for all taxable transactions, (7) Simplified administration of exemptions, (8) Simplified tax returns, (9) Simplification of tax remittances, (10) Protection of consumer privacy.<sup>52</sup>

To date, twenty-four states, representing approximately 31 percent of the United States' population and over half of the states with a sales tax, are full members of the SSUTA.<sup>53</sup> South Dakota was one of the first states to join the SSUTA on October 1, 2005.<sup>54</sup>

The second action that South Dakota took was passing Senate Bill 106, a remote collection statute.<sup>55</sup> A remote collection statute is a sales tax law that requires out-of-state sellers with no physical presence in a state to collect and remit sales tax based, not on having a physical presence in the state, but rather based on their economic nexus with the state.<sup>56</sup> Economic nexus with a state is met if certain thresholds, which measure sales into a state, are met.<sup>57</sup> For example, South Dakota's thresholds look at the dollar amount of sales and the number of transaction an out-of-state seller with no physical presence has every year.<sup>58</sup>

S.B. 106 was introduced in the South Dakota State Senate on January 27, 2016, and was passed by that chamber unanimously on February 19,

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51. *Id.*

52. *Id.*

53. *Id.*

54. *South Dakota Membership Page*, STREAMLINED TAX SALES GOVERNING BRD., INC., <http://www.streamlinedsalestax.org/index.php?page=south-dakota> (last visited Sept. 23, 2018).

55. History of S.D. S.B. 106, *supra* note 55.

56. Ned Lenhart, *Economic Nexus Sales Tax Rules: How Did We Get Here?*, TAX JAR: SALES TAX 101 (Apr. 26, 2016), <https://blog.taxjar.com/economic-nexus-explained/>.

57. *Id.*

58. 2016 S.D. SESS. LAWS ch. 70 § 1.



2016.<sup>59</sup> The South Dakota State House passed the bill on March 1, 2016, and Governor Dennis Daugaard signed S.B. 106 into law on March 29, 2016.<sup>60</sup> The language of the bill that was signed by the Governor provided, in part:

§1. Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars;

or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.<sup>61</sup>

The third action taken by South Dakota was to seek a declaratory judgment against four out-of-state retailers who had no physical presence in South Dakota.<sup>62</sup> All four of these retailers met either the sales amount or the transaction threshold of S.B. 106.<sup>63</sup> Three out of the four companies pushed back and sought to have the South Dakota court deny the judgment instead, which began the litigation process that ended in the *Wayfair* decision.<sup>64</sup>

South Dakota sought a declaratory judgement against four retailers: Wayfair, Inc., Overstock.com, Newegg, and Systemax.<sup>65</sup> Wayfair, Inc. is

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59. *Id.*

60. *Id.*

61. *Id.*

62. *State v. Wayfair, Inc.*, 901 N.W.2d 754, 759 (S.D. 2017).

63. *Id.* at 759-60.

64. *Id.* at 759.

65. *Id.* at 754, 759.

an online retailer that sells various home furnishings throughout the United States, Canada, and parts of Europe. They had over \$4 billion dollars in revenue for the year 2017.<sup>66</sup> Overstock.com is also an online retailer that sells home furnishings along with clothing and accessories.<sup>67</sup> They make sales across the United States and had revenues of just over \$1 billion dollars in 2017.<sup>68</sup> Finally, Newegg is an online retailer who conducts business throughout North America and specializes in computer hardware and consumer electronics, with revenues of \$2.7 billion in 2017.<sup>69</sup> Systemax, registered to collect and remit South Dakota sales tax shortly after being named in South Dakota's Motion for Declaratory Judgment instead of participating in the litigation.<sup>70</sup> The other three retailers sought to have the court deny the Declaratory Judgment on the grounds that *Quill* prevented the court from granting such a judgment.<sup>71</sup>

After South Dakota sought a declaratory judgment in South Dakota Circuit Court, Respondents removed the case to federal court.<sup>72</sup> However, the case was remanded back down to South Dakota Circuit Court.<sup>73</sup> Respondents won their Motion for Summary Judgment, and the State appealed this decision to the South Dakota Supreme Court.<sup>74</sup> The South Dakota Supreme Court held that S.B. 106 was unconstitutional because it violated the Dormant Commerce Clause.<sup>75</sup> South Dakota appealed the decision to the United States Supreme Court.<sup>76</sup>

#### Wayfair Decision

This case was a 5-4 decision in South Dakota's favor, with the Justices

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66. 2017 ANNUAL REPORT, WAYFAIR INC.  
[https://s2.q4cdn.com/848638248/files/doc\\_financials/2017/annual/2017-Annual-Report.pdf](https://s2.q4cdn.com/848638248/files/doc_financials/2017/annual/2017-Annual-Report.pdf).

67. 2017 FISCAL YEAR REVIEW, OVERSTOCK.COM,  
<http://investors.overstock.com/phoenix.zhtml?c=131091&p=irol-newsArticle&ID=2338378>.

68. *Id.*

69. #173 *Newegg.com*, FORBES (Aug. 7, 2017), <https://www.forbes.com/companies/newegg>.

70. *Wayfair, Inc.*, 901 N.W.2d at 759.

71. *Id.* at 760.

72. *Id.* at 759.

73. *Id.*

74. *Id.* at 760.

75. *Id.* at 761.

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

splitting in a rather unique way.<sup>77</sup> The majority opinion was authored by long-time swing vote, Justice Anthony Kennedy, who was on the Court when *Quill* was decided.<sup>78</sup> The Justices that joined Justice Kennedy's opinion include three conservatives in Neil Gorsuch, Clarence Thomas, and Samuel Alito, in addition to Justice Ruth Bader Ginsburg.<sup>79</sup> Justice Thomas and Justice Gorsuch authored separate concurring opinions as well.<sup>80</sup>

The majority opinion can be broken down into three main parts. In the first part, the Court overturned their previous holdings in *Quill* and *Bella Hess* in terms of their physical presence requirement.<sup>81</sup> In the second part of the opinion, the Court analyzed whether South Dakota's S.B. 106 satisfied the first prong of the *Complete-Auto* test.<sup>82</sup> The final part is the majority opinion responding to criticisms of its decision, as mentioned in the dissent.<sup>83</sup>

The majority held that the physical presence rule in *Quill* and *Bella Hess* was "unsound and incorrect".<sup>84</sup> The opinion further stated that the first prong of the *Compete Auto* test did not require physical presence.<sup>85</sup> The Court stated that physical presence was not required to demonstrate whether there was a substantial nexus for due process purposes, and it changed that requirement in *Quill* by looking at the change of circumstances from *Bella Hess*, specifically the economic realities.<sup>86</sup> It appears that the Court reasoned, if it can overturn the physical presence rule for due process purposes by looking at the economic realities, then it can do the same for the Commerce Clause. Another reason the Court gave was the change in the Court's analysis of Commerce Clause issues.<sup>87</sup> Since

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77. *Id.* at 2087

78. *Id.* at 2087, 2092.

79. *Id.* at 2087.

80. *Id.* at 2100.

81. *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 396 U.S. 753, 754 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Wayfair*, 138 S. Ct. at 2084.

82. *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *Wayfair*, 138 S. Ct. at 2080.

83. *Wayfair*, 138 S. Ct. at 2080.

84. *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 396 U.S. 753 (1967), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Wayfair*, 138 S. Ct. at 2099.

85. *Nat'l Bellas Hess*, 396 U.S. at 753; *Quill*, 504 U.S. at 298; *Wayfair*, 138 S. Ct. at 2099.

86. *Nat'l Bellas Hess*, 396 U.S. at 753; *Quill*, 504 U.S. at 298; *Wayfair*, 138 S. Ct. at 2092-93.

87. *Id.* at 2096.

*Quill*, the Court has moved away from using rigid bright line tests to determine if a state action violated either the Commerce Clause or the Dormant Commerce Clause, instead favoring a more flexible case-by-case analysis that accounted for the economic realities of the times.<sup>88</sup>

Overturing *Quill*'s physical presence holding did not, by itself, render S.B. 106 constitutional.<sup>89</sup> The Court did a separate analysis to see if S.B. 106 violated the Dormant Commerce Clause.<sup>90</sup>

Justice Kennedy began the Dormant Commerce Clause examination by applying the first prong of the *Complete Auto* test.<sup>91</sup> The first prong of the *Complete Auto* test asks whether the tax applies to an activity with a substantial nexus with the taxing State.<sup>92</sup> According to the Majority opinion, the South Dakota sales tax had a substantial nexus to Respondent's sales to South Dakota customers because of the retailers' "substantial virtual presence" in South Dakota.<sup>93</sup> The respondents had substantial virtual presence because they all had over one hundred thousand dollars (\$100,000) in South Dakota sales or more than 200 transactions from the preceding calendar year.<sup>94</sup> Justice Kennedy determined that those thresholds could not have been met without some sort of purposeful availment to South Dakota.<sup>95</sup> This availment is demonstrated by a Wayfair advertisement that expressly says that South Dakota customers do not have to pay sales tax on their purchases.<sup>96</sup> Due to this substantial virtual presence via purposeful availment, the Court found that *Wayfar* had a substantial nexus with South Dakota. Therefore, S.B. 106 passed the first prong of *Complete Auto*.<sup>97</sup>

The majority further held that South Dakota's law did not impose an undue burden on interstate commerce.<sup>98</sup> The Court gave numerous reasons

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88. *Id.* at 2097.

89. *Quill*, 504 U.S. at 298; *Wayfair*, 138 S. Ct. at 2099.

90. *Id.*

91. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Wayfair*, 138 S. Ct. at 2091-92.

92. *Complete Auto*, 430 U.S. at 279.

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

94. *Id.*; S.B. 106, 91st Legis. Assemb. (S.D. 2016), <https://sdlegislature.gov/docs/legsession/2016/Bills/SB106ENR.pdf>.

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

96. *Id.* at 2096.

97. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Wayfair*, 138 S. Ct. at 2099.

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

as to why South Dakota's law did not impose an undue burden on interstate commerce. The ones given the most weight by the Court were the relatively high thresholds required to trigger sales tax liability, South Dakota's membership in the SSUTA, the law's nonretroactivity, and the potential for certain software solutions easing the process of collecting, reporting, and remitting.<sup>99</sup>

Finally, the majority opinion addressed some of the criticism from the dissent. These criticisms echoed Justice Scalia's concurrence in *Quill* in that this is an area where Congress, rather than the Court, is best suited to act, and this decision may have an unintended consequence of hampering the growth of e-commerce.<sup>100</sup> Justice Kennedy justified the judicial branch taking action regarding an area of law that Congress traditionally occupies.<sup>101</sup> First, he reasoned that *Quill* was essentially a judicially created tax shelter, and since the judicial branch created it, it had the authority to kill it.<sup>102</sup> Next, the majority opinion pointed out that *Quill* created market distortions, and the Supreme Court had the authority to rectify these distortions.<sup>103</sup> Finally, Justice Kennedy indicated that just because Congress can take action did not preclude the judicial branch from taking action that it had the authority to take.<sup>104</sup>

In Justice Thomas' short concurring opinion he stated why he changed his stance from *Quill*.<sup>105</sup> He stated that a quarter-century of experience had convinced him that *Quill* and *Bella Hess* could no longer be justified.<sup>106</sup> Justice Gorsuch went into more depth in his concurring opinion as to why he thought *Quill* could no longer stand.<sup>107</sup> Essentially, Justice Gorsuch believed that *Quill* and *Bella Hess*' holdings were judicially created tax shelters that put brick and mortar stores at a disadvantage.<sup>108</sup> Justice Gorsuch went on to provide that only Congress could create tax shelters like this, but since these were judicially created the Court had the authority

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99. *Id.* at 2099-100.

100. *Id.* at 2101 (Roberts, C.J., dissenting).

101. *Id.* at 2096-97.

102. *Quill Corp. v. North Dakota*, 504 U.S. 298, 317 (1992); *Wayfair*, 138 S. Ct. at 2094, 2096-97.

103. *Quill*, 504 U.S. 298; *Wayfair*, 138 S. Ct. 2092-93.

104. *Wayfair*, 138 S. Ct. at 2096.

105. *Id.* at 2100 (Thomas, J., concurring).

106. *Id.*

107. *Id.* at 2100-01 (Gorsuch, J., concurring).

108. *Id.* at 2100.

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to end them.<sup>109</sup>

The dissent did not claim that *Quill's* holding was correct, but rather it focused on what actions the judicial branch should have taken in response to it.<sup>110</sup> The dissenting opinion pointed out that Congress is in a much better position to act because they can apply the nuance needed in such a complex matter.<sup>111</sup> Finally, the dissent pointed out that e-commerce's unprecedented growth has taken place despite *Quill* being in place, and to overturn *Quill* could easily cause unintended consequences to the national economy.<sup>112</sup>

### III. QUESTIONS AFTER *WAYFAIR*

The questions that remain after *Wayfair* fall in to two main categories. The first involves the meaning of some of the language, phrases, and terms of art used in Justice Kennedy's opinion. An example of this is, what does Justice Kennedy mean by "substantial and virtual presence"? The second category deals with how far this holding can be stretched by facts and circumstances not yet known.

The pressing questions the State of Missouri is facing post *Wayfair* fall into these two categories. These questions deal with the sales thresholds that trigger tax liability, potential software solutions, and safeguards that must be implemented by non-SSUTA states like Missouri.<sup>113</sup> Finally, what happens to the meaning of the phrase "substantial and virtual presence" as technology evolves and the impact e-commerce has on the economy changes?

Justice Kennedy dedicated a considerable amount of his opinion discussing and analyzing these thresholds in S.B. 106.<sup>114</sup> The Court made it clear that these thresholds play a key role in S.B. 106 not violating the Dormant Commerce Clause.<sup>115</sup> Lawmakers will need to consider the

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109. *Id.*

110. *Id.* at 2101–05 (Roberts, C.J., dissenting).

111. *Id.* at 2104.

112. *Id.*

113. STREAMLINED SALES TAX GOVERNING BRD., INC., [www.streamlinedsalestax.org](http://www.streamlinedsalestax.org) (last visited Nov. 15, 2019).

114. *Wayfair*, 138 S. Ct. at 2084, 2089, 2098, 2099.

115. *Id.* at 2099.

adequacy of similar safe harbors to ensure future laws like S.B. 106 do not create an undue burden on vendors.

Throughout oral arguments and the decision, the Justices highlighted the importance that software will play in reducing the burden on interstate commerce.<sup>116</sup> Specifically, the cost of compliance with a state's remote collection statute will be reduced if there was a single software program that could determine a company's sales tax liability for each state.<sup>117</sup> As of the publication of this paper however, no such software program is available to the general public.<sup>118</sup> This leaves the following question: when will such a software program be made widely available? Lawmakers should weigh the cost of offering such software with the expected returns from collection on remote sellers. Additionally, Justice Kennedy mentioned in his opinion that some members of the SSUTA could reduce a taxpayer's potential liability if they used a software program provided by the state.<sup>119</sup> This means lawmakers, especially those in non-SSUTA states, need to consider what guarantees they are willing to make about any software they provide or endorse.

One question that pertains to Missouri in particular is what safeguards must non-SSUTA members put into place.<sup>120</sup> The majority gives the fact that South Dakota is a member of the SSUTA a considerable amount of weight.<sup>121</sup> In particular, the majority highlighted the fact that SSUTA members have to have certain safeguards in place that ensure their individual sales tax law does not impose an undue burden on Interstate

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116. Transcript of Oral Argument at 46, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-494\\_9o6b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-494_9o6b.pdf); *Wayfair* 138 S. Ct. at 2098.

117. Transcript of Oral Argument at 37–39, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-494\\_9o6b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-494_9o6b.pdf); *Wayfair* 138 S. Ct. at 2098.

118. Transcript of Oral Argument at 7, 46, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-494\\_9o6b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-494_9o6b.pdf).

119. *Wayfair*, 138 S. Ct. at 2100.

120. *Id.*; Missouri is not a member state of SSUTA. *Streamlined Sales Tax State Members, STREAMLINED SALES TAX GOVERNING BRD., INC.* (Sept. 14, 2018), <https://www.streamlinedsalestax.org/index.php?page=state-info>.

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

Commerce.<sup>122</sup> They go on to state that non-members will be fine if they put similar safeguards into place.<sup>123</sup> Yet Justice Kennedy does not expressly state which safeguards need to be implemented.<sup>124</sup> For states like Missouri that are non-members of the SSUTA, what safeguards in particular must non-SSUTA states put into place?<sup>125</sup> How similar must the safeguards be to those enacted by SSUTA members? Will it be a better use of time and resources for non-members to join the SSUTA instead of overhauling their individual sales and use tax laws?

Finally, as technology continues to evolve and e-commerce's role in the national economy continues to expand, does the holding of *Wayfair* also expand? Specifically, does the phrase "substantial and virtual presence" change meanings along with changes in technology and e-commerce?<sup>126</sup> If the ultimate answer is no, then the *Wayfair* holding will likely have the same fate as the *Quill* holding. The fatal flaw in *Quill's* holding was that it was narrowly tailored to the technology at the time, when applied to different circumstances that involve different technology that has a different impact on the national economy.<sup>127</sup> If the meaning of the phrase "substantial and virtual presence" does change along with changes in technology, then the need for safeguards in states sales tax laws and uniformity of sales tax laws will become more and more needed.

#### IV. THE CURRENT STATE OF MISSOURI'S SALES AND USE TAX & MISSOURI'S NEXT MOVE

Even though the aforementioned questions will remain unanswered for the foreseeable future, the State of Missouri can still capitalize on the *Wayfair* decision in several different ways. The following gives an overview of the current state of Missouri's sales and use tax laws, and courses of action that Missouri can take in response to *Wayfair*.

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122. *Id.* at 2099–2100.

123. *Id.* at 2091.

124. *Id.*

125. *Id.*; State Guide to the Streamlined Sales Tax Project, STREAMLINED SALES TAX GOVERNING BOARD, INC. (MAY 2018), <http://www.streamlinedsalestax.org/uploads/downloads/MC%20Misc%20Docs/2018%20Misc/MC18001A02%20-%20State%20Guide%20to%20Streamlined.pdf>.

126. *Wayfair*, 138 S. Ct. 2080; *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015).

127. *Wayfair*, 138 S. Ct. at 2097-98.



*A. Missouri's Current Sales and Use Tax Laws*

Missouri's sales and use tax laws can be found in Section 144 of the Revised Missouri Statutes.<sup>128</sup> As currently drafted, the State of Missouri imposes sales tax on sales made at retail of tangible personal property.<sup>129</sup> In order for a sale to be considered made at retail, the seller must be engaging in business in Missouri.<sup>130</sup> Further, for a seller to be engaging in business in Missouri they must have some kind of physical presence in the state.<sup>131</sup> Additionally, the State of Missouri has authorized certain local municipalities to impose a sales tax, and the statutes also allow for the creation of certain special taxing districts that may also impose a sales tax. Currently there are approximately 2,300 of these local jurisdiction that can impose a sales tax.<sup>132</sup>

In addition to sales tax, Missouri also imposes a use tax on “the privilege of storing, using, or consuming within this state any article of tangible personal property[.]”<sup>133</sup> When a purchaser located in Missouri makes more than \$2,000 in purchases with no physical presence in Missouri, use tax liability is triggered.<sup>134</sup> The consumer is responsible for collecting and remitting use tax, unless the taxpayer can show this responsibility is extinguished.<sup>135</sup> One instance where the responsibility is extinguished is if the out-of-state seller has a sufficient nexus with Missouri.<sup>136</sup>

Amendment IV to the Missouri Constitution was approved by the voters in Missouri in 2016.<sup>137</sup> This Amendment prohibits transactions and

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128. MO. REV. STAT. §§ 144.008-.1015 (2016).

129. § 144.020.

130. § 144.010.

131. *Id.*

132. Joel Walters, *Tax Policy Reform: Issues to be Addressed to the Benefit of All Missourians*, 1 BUS. & ENTREPRENEURSHIP TAX L. REV. 427, 455 (2017)

133. MO. REV. STAT. § 144.610.

134. MO. REV. STAT. § 144.655.

135. *Id.*

136. § 144.635.

137. OFFICE OF SEC'Y OF STATE, OFFICIAL REPORT ON RESULTS OF STATE OF MISSOURI NOV. 8, 2016 GENERAL ELECTION, <https://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750003949> (click on submit prompt to bring up results) (SoS Documentation showing it passed); MO. CONST. art. X, § 26.

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services that were not subject to tax as of January 1, 2015 from being subjected to a transaction based tax in the future.<sup>138</sup> To date there has been no litigation that would provide clarity on what the terms “transaction” and “subject to tax” mean.<sup>139</sup> Between its restraining intent and uncertain language, Amendment IV will need to be considered regardless of the course of action Missouri decides to take in response to *Wayfair*.

#### *B. Potential Responses to Wayfair*

One response to *Wayfair* that Missouri can take is to not respond at all, and to keep its current sales and use tax scheme. One downside of this approach is that Missouri will be unable to expand its sales and use tax base to include out-of-state sellers with no physical presence in the state.<sup>140</sup> While it is unlikely that Missouri's response to *Wayfair* will be nothing, it is worth noting, however, that nothing in *Wayfair* requires Missouri to change its laws.

Another potential response to *Wayfair* is for Missouri to change its sales tax laws so that it has a remote collection statute in place similar to South Dakota's S.B. 106.<sup>141</sup> To do this, however, Missouri would have to do a major overhaul to its current sales tax laws, which are based on a physical presence.<sup>142</sup> To implement a remote collection law similar to South Dakota's S.B. 106, Missouri would need to change every place in the tax code where physical presence is mentioned or implicated. In addition, Amendment IV could present a potential issue, because a taxpayer could argue that an economic nexus statute taxes transactions that were not subject to tax prior to January 1, 2015.

Even though there are some drawbacks to changing the sales tax laws, doing so would also have benefits such as broadening the sales tax base to include certain out-of-state sellers who do not have a physical presence in Missouri. Additionally, overhauling Missouri's sales tax laws would present another opportunity for the state to become a member of the

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138. MO. CONST. art. X, § 26.

139. *Id.*

140. *South Dakota v. Wayfair*, 138 S. Ct 2080, 2099 (2018).

141. *Id.* at 2092, 2099-2100.

142. MO. REV. STAT. §§ 144.010-.527 (2016).

SSUTA, which has been attempted several times but all attempts have fallen short.<sup>143</sup>

As implied above, Missouri could also change its use tax laws to require remote sellers to collect and remit use tax. Changes to the use tax statutes, specifically changing who is required to collect and remit vendors use tax, will have to be made.<sup>144</sup> However, these changes will be far less extensive than the ones to the sales tax statutes mentioned above.<sup>145</sup> Because the changes to be made will cost less in terms of time and resources than sales tax, going the use tax route may be considerably faster. Additionally, changing the use tax laws will adversely affect local taxing jurisdiction, because most local taxing jurisdictions impose a sales tax rather than a use tax.<sup>146</sup>

Missouri could also entertain a scheme similar to the one that the Court approved of in *Brohl*.<sup>147</sup> Under this scheme, Missouri would not require sellers to collect and remit tax.<sup>148</sup> Instead, out-of-state sellers that meet certain sales thresholds would be required to provide the taxpayer notification of their use tax liability and provide the state with records of taxable sales.<sup>149</sup> The state would then assess use tax based on this information.<sup>150</sup> The benefits of this scheme are Missouri would only need to make small changes to its use tax statutes, the courts have already approved this scheme, and Missouri will not have to expand its sales and use tax registration to accommodate hundreds if not thousands of companies registering. One shortfall to this scheme is, as of writing this paper, it has yet to be implemented so it is unclear how effective it will be in terms of increased consumers use tax reporting rates.<sup>151</sup>

Another response Missouri can take is to wait for Congress to act. Currently, there are four pieces of legislation that have been introduced in

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143. See, e.g., S.B. 795, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016), <https://www.senate.mo.gov/16info/pdf-bill/intro/SB795.pdf> (one of many examples of Streamline failing to pass in the Missouri).

144. MO. REV. STAT. § 144.635.

145. *Id.*

146. MO. REV. STAT. §§ 144.757-.761.

147. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015).

148. *Id.* at 1129-32.

149. *Id.* at 1128.

150. *Id.* at 1131.

151. See generally, South Dakota v. Wayfair, 138 S. Ct. 2080, 2094 (2018).

the 115<sup>th</sup> Congress that deal with codifying the Court's holding in either *Quill* or *Wayfair*.<sup>152</sup> The two introduced in the Senate are the Stop Taxing Our Potential Act (commonly referred to as the STOP Act), and the Market Place Fairness Act (MFA).<sup>153</sup> The two bills introduced in the House are the Remote Transaction Parity Act (RTPA) and the No Regulation Without Representation Act (NWRA).<sup>154</sup>

The MFA would allow states that are members of the SSUTA to require out-of-state sellers to collect and remit sales tax under the terms of the SSUTA. MFA would make some exceptions for small sellers.<sup>155</sup> States that are not members of the SSUTA, like Missouri, could also require out-of-state sellers to collect and remit sales if they adopt certain minimum safeguards and uniformity provisions.<sup>156</sup> Essentially, by passing the MFA Congress would be codifying the Court's holding in *Wayfair*.

Senator Mike Enzi of Wyoming first attempted to pass the MFA in 2011 during the 112<sup>th</sup> Congress, but this bill never made it out of the Senate Finance Committee.<sup>157</sup> In 2013, during the 113<sup>th</sup> Congress, the MFA was actually passed by the Senate by a vote of 69-27, but was not considered in the House of Representatives.<sup>158</sup> Other attempts were made to pass the MFA in the 114<sup>th</sup> and in the 115<sup>th</sup> Congresses, but almost no progress has been made to date.<sup>159</sup>

The RTPA has very similar language to the language of the MFA.<sup>160</sup>

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152. CONG. RESEARCH SERV., 115TH CONG., BILL SUMMARY OF S.976 – MARKETPLACE FAIRNESS ACT OF 2017, (MFA for 115th Congress), <https://www.congress.gov/bill/115th-congress/senate-bill/976>; CONG. RESEARCH SERV., 115TH CONG., BILL SUMMARY OF H.R. 2193 – REMOTE TRANSACTIONS PARITY ACT OF 2017, (RTPA for 115th Congress), <https://www.congress.gov/bill/115th>

-congress/house-bill/2193; CONG. RESEARCH SERV., 115TH CONG., SUMMARY OF H.R. 2887 –NO REGULATION WITHOUT REPRESENTATION ACT OF 2017, (NRWA for 115th Congress), <https://www.congress.gov/bill/115th-congress/house-bill/2887>; See Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong. (2018), <https://www.congress.gov/115/bills/s3180/BILLS-115s3180is.pdf>.

153. Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2018); Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong. (2017).

154. Remote Transactions Parity Act of 2017, H.R.2193, 115th Cong. (2017); No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. (2017)..

155. S. 976.

156. *Id.*

157. See Marketplace Fairness Act, S.1832, 112th Cong. (2011).

158. Marketplace and Internet Tax Fairness Act, S. 2609, 113th Cong. (2014).

159. See Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); S. 976.

160. S. 976; H.R. 2193.

The RTPA would allow states with certain safeguards and uniformity provisions to their sales or use tax law to require out-of-state sellers to collect and remit sales tax.<sup>161</sup> The RTPA was first introduced by Rep. Jason Chaffetz of Utah in 2015, during the 114<sup>th</sup> Congress, but ultimately died in the House Judiciary Committee.<sup>162</sup> The RTPA was again introduced in the House in 2017 during the 115<sup>th</sup> Congress, this time by Rep. Kristi Noem of South Dakota.<sup>163</sup>

The NWRA seeks the opposite goal of the RTPA and the MFA because its goal is to codify the Court's holding in *Quill*. This bill would require physical presence in a state in order for a state to regulate the interstate commerce a person or entity is engaged in.<sup>164</sup> Additionally the NWRA would provide a de minimis physical presence exception and give U.S. district courts original jurisdiction to hear civil actions seeking to enforce or grant relief from provisions of the NWRA.<sup>165</sup> Originally the NWRA was introduced in 2016 during the 114<sup>th</sup> Congress by Rep. Sensenbrenner of Wisconsin, but it stalled in the House Judiciary Committee.<sup>166</sup> Rep. Sensenbrenner was not deterred and introduced the NWRA again in 2017 during the 115<sup>th</sup> Congress.<sup>167</sup> Yet this time he picked up an ally in Rep. Goodlatte of Virginia the Chair of the House Judiciary Committee.<sup>168</sup> To capitalize on this support however, supporters of the NWRA must act quickly because Rep. Goodlatte is not seeking reelection in 2018.<sup>169</sup>

The fourth and final piece of legislation pertaining to this issue that has been introduced is the STOP act.<sup>170</sup> This bill was introduced on June 28, 2018, by Senator Joe Testor of Montana and is joined by three other senators from states that do not impose a sales tax.<sup>171</sup> This bill is almost

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161. H.R. 2193.

162. See Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

163. Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017).

164. *Id.*

165. *Id.*

166. See No Regulation Without Representation Act of 2016, H.R. 5893, 114th Cong. (2015).

167. No Regulation Without Representation Act of 2017, H.R. 2887, 115th Cong. (2017).

168. *Id.*; see *House Judiciary Comm. Members*, <https://judiciary.house.gov/subcommittee/full-committee/> (last visited Sept. 12, 2018).

169. See Richard Lardner, *House Judiciary Chairman Bob Goodlatte to Retire*, USA TODAY (Nov. 9, 2017), <https://www.usatoday.com/story/news/politics/2017/11/09/house-judiciary-chairman-bob-goodlatte-retire/848051001/>.

170. Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong. (2018).

171. *Id.*

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identical to the NWRA in that it not only codifies the *Quill* holding, but it also allows for a de minimis physical presence in the state and gives US courts jurisdictions over its claims.<sup>172</sup> To date, the only action that has been taken on this bill is that it has been introduced, and it is too early to predict its ultimate fate.<sup>173</sup>

### CONCLUSION

By overturning the physical presence requirement of *Quill*, the Supreme Courts gave states a reason to rejoice. However there may be less reason for Missouri to rejoice than others as its non-membership in the SSTUA and physical nexus requirements leave more questions as to what path to take. Missouri can now begin the process that will require certain out-of-state sellers with no physical presence in Missouri to collect and remit sales tax. Throughout this process obstacles to the ultimate goal will certainly present themselves. These obstacles include, but are certainly not limited to, questions about software, what safeguards need to be implemented, and the thresholds that need to be met in order to trigger sales tax liability. However, with resources like this paper the decision makers will be equipped with the tools to not only overcome these obstacles, but to have Missouri's response to *Wayfair* be tailor-made for the state's economy.

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172. *Id.*

173. *Id.*