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### Wayfair or No Fair: Revisiting Internet Sales Tax Nexus and Consequences in Texas

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## COMMENT

### **WAYFAIR OR NO FAIR: REVISITING INTERNET SALES TAX NEXUS AND CONSEQUENCES IN TEXAS**

**JENNIFER MENDEZ LOPEZ\***

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## I. INTRODUCTION

“As any basic text teaches, any thing or event can be used as a basis of taxation. . . . Despite the potential for long-term effects, to date the controversies over taxes and the Internet have exponentially produced more heat than light.”<sup>1</sup> If consumer purchases are going to be subject to tax, all purchases should be taxed.<sup>2</sup> The sales tax has many exclusions, one of the most important being sales made by remote sellers that are subject to a de facto exemption.<sup>3</sup> However, these sales may also be subject to a use tax, which is a form of sales tax on purchases made outside the purchaser’s home state for taxable items the purchaser will store, use, or consume in their home state on which no tax was collected in the state purchased.<sup>4</sup>

Use taxes are better understood to be companions of sale taxes because credits are given for the sales tax paid to avoid double taxation.<sup>5</sup> Put simply,

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1. William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649, 651 (2001) (reviewing debates on taxes and Internet transactions). William V. Vetter is an assistant professor at Indiana University-Purdue University Fort Wayne. He earned his J.D. from University of Oregon and an L.L.M in Taxation from George Washington University, D.C.

2. See John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 345 (2003) (describing the nuances of sales and use tax from a policy perspective).

3. See *id.* at 353 (identifying statewide patterns in U.S. sales taxes).

4. In Texas, the rates for sales and use taxes are both 6.25% of the sales price. TEX. TAX CODE ANN. §§ 151.051, 151.101. The Texas Tax Code also contains provisions defining when a retailer conducts business in Texas. TAX § 151.107.

5. See Vetter, *supra* note 1, at 663 (describing use tax as a protective measure from double taxation).

if you do not pay a state sales tax, you owe your domicile state a use tax. If you do pay a state sales tax, you still technically owe your home state a use tax, but you are credited by the amount you paid.<sup>6</sup> In many states, the use tax rate is the same as the sales tax rate.<sup>7</sup> The most notable difference is that sales taxes are collected by sellers who act as an agent of the state, whereas use taxes are self-assessed and reported by consumers—if they are reported at all.<sup>8</sup>

Consider the position of a seller with an obligation to collect sales tax on every transaction. Should every seller be subjected to this requirement? Or should the application of this requirement be limited and allow for exceptions? How should states approach widespread variations in tax rates? The taxing jurisdiction has a significant impact because the tax rates vary within states, cities, and counties. For example, a business may want to be subject to the sales tax in Alaska, Delaware, Montana, New Hampshire, or Oregon, where the base sales tax rate is a whopping 0%.<sup>9</sup> Businesses will likely avoid tax jurisdiction in Louisiana because it is the state with the highest combined rate and second highest average local rate, with a combined local and state tax rate of up to 10%.<sup>10</sup>

These are only some of the questions we face in light of *South Dakota v. Wayfair, Inc.*,<sup>11</sup> and the taxation without representation debate.<sup>12</sup> The purpose of this Comment is to explore the answers to these questions. Ultimately, this Comment concludes the Supreme Court correctly revisited the issue of nexus requirements for e-commerce taxation collection;

6. See *id.* (conceptualizing credit for sales tax paid in another jurisdiction).

7. See *id.* (“With respect to every significant factor, except taxable event, sales taxes and use taxes are identical.”).

8. For additional background information into sales and use taxes, see generally Emily L. Patch, Note, *Online Retailers Battle with Sales Tax: A Physical Rule Living in a Digital World*, 46 SUFFOLK U. L. REV. 673 (2013) (providing a historical account of the evolution of e-commerce).

9. *State Rates*, AVALARA, <https://www.avalara.com/taxrates/en/staterates.html?referrer=https%3A%2F%2Fwww.google.com%2F&lastReferrer=www.avalara.com&sessionId=1545578349394> [http://perma.cc/VR6Z-34KX].

10. See Michael B. Sauter, *States with the Highest and Lowest Sales Taxes*, USA TODAY (Apr. 2, 2018), <https://www.usatoday.com/story/money/taxes/2018/03/27/states-highest-and-lowest-sales-taxes/452512002/> [http://perma.cc/UX52-25NQ] (providing the sales tax and combined sales tax of multiple states); *State Rates*, *supra* note 9.

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

12. See *id.* at 2099 (holding states may impose sales taxes on out-of-state transactions regardless of physical presence in the taxing state).

however, this Comment aims to fill in the gaps the Court incorrectly decided were better left to Congress.

This Comment will begin with an overview of online sales tax to create a foundation for the discussion in Part II. The overview will describe the purpose and need for a reform of the sales tax nexus standards. It will also provide a historical background as well as an analysis of case law to show how the Supreme Court has shaped their view over time. Part III will discuss who decided the issues correctly and why based upon the decision's impact, burden, and government intervention. Part IV analyzes current responses and criticism, and proposes a resolution.

## II. AN OVERVIEW OF ONLINE SALES TAX

### A. *Purpose and Need for Reform*

Electronic commercial transactions, or e-commerce, has developed exponentially over the last fifty years.<sup>13</sup> By 2011, business to consumer e-commerce “totaled \$4.1 trillion [in sales] and had grown at an annual compounded rate of 13.0 percent since 2000.”<sup>14</sup> This development has created implications for state governments because “[s]ellers only collect sales tax” when the seller has a nexus in the consumer’s home state.<sup>15</sup> The result is essentially a tax evasion—the consumers that are not charged sales tax usually do not pay the use tax their home state imposes.<sup>16</sup> This tax evasion reduces the price, which electronic retailers, or e-tailers, appear to take advantage of by avoiding the creation of nexus and, ultimately, tax responsibility.<sup>17</sup>

Consequently, states have experienced a steady decline in tax collections as e-commerce continues to grow.<sup>18</sup> In 2012, a University of Tennessee study approximated that states lost almost \$23 billion from their inability to

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13. Taxation issues arising from nontraditional retailers, those that conduct sales without a brick-and-mortar store, date back to 1967. *See* Nat’l Bellas Hess v. Dep’t of Revenue, 386 U.S. 753, 757–59 (1967) (holding mail-order sellers were not required to collect sales tax unless it had some form of physical presence in the state).

14. Donald Bruce et al., *E-Tailer Sales Tax Nexus and State Tax Policies*, 68 NAT’L TAX J. 735, 736 (2015).

15. *See id.* (examining how state tax policy affects the establishment of nexus in each state).

16. *See id.* (explaining consumers not charged a sales tax will not pay, resulting in a form of tax evasion).

17. *See id.* (“[E]-tailers appear to arrange their affairs to avoid establishing nexus . . .”).

18. *See id.* (“Annual e-commerce sales tax revenue losses are estimated to be \$11.4 billion . . . for 2012 . . . and will likely continue to grow rapidly . . .”).

collect taxes on online purchases from different states.<sup>19</sup> In 2018, both the National Conference of State Legislatures (NCSL) and the International Council of Shopping Centers (ICSC) updated these numbers, and estimated uncollected taxes increased to almost \$26 billion per year, of which more than \$17 billion were from e-commerce.<sup>20</sup> Unsurprisingly, states have tried to tap into this revenue for years.<sup>21</sup> States will likely remain unsuccessful; since many Internet businesses are solely online, incorporated in one state, and sell products across all states, the Commerce Clause of the United States Constitution regulates e-commerce transactions.<sup>22</sup>

The Fourteenth Amendment of the United States Constitution sets forth the right of equal protection, stating that no state shall “deprive any person of life, liberty, or property without due process of law.”<sup>23</sup> The Supreme Court has interpreted the Fourteenth Amendment as meaning “that citizens cannot be unfairly taxed and thus deprived of their tax dollars.”<sup>24</sup> Thus, states may not tax sellers unless minimum contacts or a nexus has been satisfied.<sup>25</sup> An inquiry into due process focuses on whether the out-of-state taxpayer’s connections with the forum state are sufficient to give notice that it may be taxed by the state.<sup>26</sup> The Commerce Clause, which is more restrictive than the Due Process Clause, expressly provides Congress with the power “to regulate commerce . . . among the states.”<sup>27</sup> Though Congress may not authorize states the right to tax without satisfying the

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19. See Max Behlke & Jake Lestock, *Remote Sales Tax Collection*, NAT’L CONF. ST. LEGIS. (June 6, 2018), <http://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx> [<http://perma.cc/RYH4-6CMS>] (describing the massive losses states endure due to consumer sales tax evasion).

20. See *id.*

21. See Christina T. Le, *The Honeymoon’s Over: States Crack Down on the Virtual World’s Tax-Free Love Affair with E-Commerce*, 7 HOUS. BUS. & TAX L.J. 395, 401 (2007).

22. See *id.* (explaining how the regulation of Internet business falls within the powers of the Commerce Clause).

23. U.S. CONST. amend. XIV.

24. Le, *supra* note 21, at 401.

25. *Id.*

26. See Sidney S. Silhan, Comment, *If It Ain’t Broke Don’t Fix It: An Argument for The Codification of the Quill Standard for Taxing Internet Commerce*, 76 CHL.-KENT L. REV. 671, 679 (2007) (“The Due Process analysis centers on whether a taxpayer’s connections with the jurisdiction are sufficient to give notice that it may be haled into court, or subject to a tax, in that jurisdiction.”).

27. U.S. CONST. art. I, § 8, cl. 3 (setting forth congressional powers to regulate commerce); see Silhan, *supra* note 26, at 680–81 (reiterating the power Congress possesses through the Commerce Clause).

requirements of the Due Process Clause,<sup>28</sup> the Commerce Clause allows Congress to legislate the level of physical presence required to establish a substantial nexus with the forum state.<sup>29</sup>

Nevertheless, because Congress has not done so, the Supreme Court has stepped in to make a decision on the constitutionality.<sup>30</sup> The Supreme Court has debated its scope of power in restricting state regulation under the dormant Commerce Clause for decades.<sup>31</sup> Though the Supreme Court has restricted their role over time, it has continued to exercise considerable power over state taxes.<sup>32</sup>

### B. *Historical Background*

Since 1967, people have tried defining when a substantial nexus between states and taxpayers exists.<sup>33</sup> The debate has continued for over fifty years.<sup>34</sup> The conflict boils down to who and what creates physical presence.<sup>35</sup> Before *Wayfair*, the Supreme Court last addressed this issue of tax nexus in 1992.<sup>36</sup> In the meantime, the Court left the issue to be determined by state judiciaries that have “resolved” the same questions with conflicting solutions—only adding to the ambiguity and unpredictability

28. Silhan, *supra* note 26, at 680.

29. *Id.* (“The dormant Commerce Clause allows Congress to prevent the states from imposing taxes that are restrictive of interstate commerce. It also allows Congress to require minimum standards, such as physical presence in the state, before taxation can occur.”).

30. *See id.* at 681 (stating the Supreme Court created a four-part test).

31. *See* Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, 116 MICH. L. REV. ONLINE 101, 101 (2018).

32. *See id.* (“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.”).

33. *See* Jonathan E. Maddison, *Why Wayfair Won't Matter*, TAX EXEC. (May 31, 2018), <http://taxexecutive.org/why-wayfair-wont-matter/> [http://perma.cc/SR8X-H71C] (explaining the difficulty in determining when a nexus exists).

34. *Id.*

35. *See id.* (“For over fifty years, states and businesses have struggled to understand when a ‘substantial nexus’ exists between a state and a taxpayer, leading to the unavoidable debate over two words: physical presence.”).

36. *Id.* The last time the Supreme Court addressed the issue of tax nexus was in the 1992 case *Quill Corp. v. North Dakota*. *See generally* *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (creating the physical presence test).

that encompasses substantial nexus.<sup>37</sup> As technology continues to develop and influence our nation's economy, the debate has intensified.<sup>38</sup>

In *Nat'l Bellas Hess v. Dep't of Revenue*,<sup>39</sup> the Supreme Court decided retailers were not required to collect taxes where the seller did not have a physical presence in the consumer's state.<sup>40</sup> In 1992, this decision was reaffirmed in *Quill Corp. v. North Dakota*,<sup>41</sup> which regulated the collection of online sales tax for almost twenty-five years.<sup>42</sup> However, as Kennedy wrote, it is important to note that when *Quill* was decided, fewer than 2% of people in the United States had access to the Internet,<sup>43</sup> whereas today that number has increased to almost 89%.<sup>44</sup> Kennedy also stated that in 1992, "the Court could not have envisioned a world in which the world's largest retailer would be a remote seller."<sup>45</sup>

Consequently, in 2018 the Supreme Court revisited the issue in *South Dakota v. Wayfair, Inc.*, in which the Court was left to choose between affirming or rejecting the physical presence rule.<sup>46</sup> The controversy led to a 5–4 split in the decision.<sup>47</sup> In his dissenting opinion, Justice Roberts wrote:

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37. See Maddison, *supra* note 33 (highlighting how contradicting answers have resulted in further ambiguity).

38. See, e.g., *id.* ("To many, *Wayfair* is good reason to hope for clarity in a landscape riddled with uncertainty. That hope is bolstered by the prospect of the Court clarifying not only questions dating to 1967 but also questions stemming from the growth of the internet and online shopping.").

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

40. See *id.* at 758 (recognizing retailers do not have to collect taxes when they have no physical presence in a particular state); see also Maddison, *supra* note 33 ("[A] state cannot require an out-of-state seller to collect and remit use tax for sales to in-state purchasers.").

41. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992) (reaffirming states cannot force an out-of-state retailer to collect taxes).

42. See Maddison, *supra* note 33.

43. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018) (noting the drastic change in Internet usage since the *Quill* decision).

44. *Id.*; see Maddison, *supra* note 33 ("These issues were (and continue to be) exacerbated by the evolution of technology and its impact on the national economy.").

45. *Wayfair, Inc.*, 138 S. Ct. at 2097 (citing Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, L.A. TIMES, July 24, 2015, <http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html> [<https://perma.cc/6YFL-ZCCM>]; see Maddison, *supra* note 33 (reaffirming the Supreme Court did not foresee how popular online shopping would become)).

46. See *Wayfair, Inc.*, 138 S. Ct. at 2097 (revisiting the physical presence rule); see also Maddison, *supra* note 33 (representing the culmination of the physical presence debate).

47. See *id.* at 2087 (revealing there was not a unanimous opinion).



This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage “third time’s a charm” has in daily life, it is a poor guide to Supreme Court decisionmaking.<sup>48</sup>

In order to better understand the impact of the decision and whether it is the best decision for approaching the nexus of remote sellers in e-commerce, a closer look at the precedential cases is required.

### C. *Analysis: Changes in Law, Distinctions, Where Are We Now*

#### 1. Discussion of *Bellas Hess*

National Bellas Hess (National) was a popular merchandise catalog and mail-order house in the 1900s.<sup>49</sup> Customers mailed their orders to National’s Missouri plant, and National either mailed the goods to customers or delivered the goods through a common carrier.<sup>50</sup> National did not have an office, distributor, warehouse, business, or representative in Illinois.<sup>51</sup> In this case, the Supreme Court held that a company must have a nexus with a state to be responsible for tax liability.<sup>52</sup> Further, the Commerce Clause prohibits a state from imposing use tax on a seller whose only connection in the state is common carrier or mail.<sup>53</sup> Justice Stewart wrote that imposing this kind of burden on the state could create “unjustifiable local entanglements” that “Congress alone has the power [to regulate] and control.”<sup>54</sup>

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48. *Id.* at 2102 (Roberts, J., dissenting); see generally Debra Weiss, *Supreme Court Clears Way for States to Collect Sales Tax from Internet Retailers*, ABA J. (June 21, 2018, 9:50 AM), <http://www.abajournal.com/news/article/supreme-court-clears-way-for-states-to-collect-sales-tax-from-internet-retailers> [http://perma.cc/54UN-S4TN] (quoting Justice Roberts’ dissenting opinion in the *Wayfair* case).

49. *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 753–54 (1967).

50. *Id.* at 754–55.

51. *Id.* at 754.

52. *Id.* at 755–56.

53. *Id.* at 758.

54. *Id.* at 759–60 (1967) (Justice Stewart continued: “[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record keeping requirements could entangle National’s interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose ‘a fair share of the cost of the local government.’”).

## 2. Discussion of Complete Auto Transit

In 1977, consistent with the holding of *Bellas Hess*, the Supreme Court established the standard for applying the Commerce Clause to state taxes in *Complete Auto Transit Inc. v. Brady*.<sup>55</sup> Here, a corporation was “engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation.”<sup>56</sup> The corporation claimed that the taxes assessed by the Mississippi Tax Commission were unconstitutional based on Supreme Court holdings that taxing on the privilege of engaging in an activity may not be applied to activities that are a part of interstate commerce.<sup>57</sup> The Court affirmed a four-prong test, requiring: (1) a substantial nexus between the state and the taxpayer, (2) the tax not discriminate against interstate commerce, (3) the tax not be unfairly apportioned, and (4) that is unrelated to services provided by the state.<sup>58</sup> In *Complete Auto Transit Inc.*, the Court held that if these factors are met, the tax will be sustained under the Commerce Clause.<sup>59</sup>

## 3. Discussion of *Quill*

Quill Corporation, a mail-order house, refused to collect a use tax from customers in North Dakota because it had no offices, warehouses, or employees in North Dakota.<sup>60</sup> The Supreme Court held that the Due Process Clause did not bar enforcement of use taxes if contact with the forum state made such enforcement reasonable.<sup>61</sup> The Court concluded: (1) that Quill Corporation purposefully directed activities to North Dakota; (2) Quill Corporation’s contacts with North Dakota sufficiently satisfied due process; and (3) that the tax was related to the benefits Quill Corporation received from North Dakota.<sup>62</sup> However, the Court also reasoned that if the only connection in a state is made by way of mail or a

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

56. *See id.* at 276.

57. *Id.* at 277–78.

58. *See id.* at 279 (reaffirming the four-prong test established in past cases).

59. *Id.*

60. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992).

61. *See id.* at 308 (affirming the North Dakota Supreme Court’s conclusion that the Due Process Clause does not bar enforcement of that State’s use tax against Quill Corporation because the use tax is related to the benefits Quill Corporation receives from access to the State).

62. *See generally id.* at 306–08 (determining Quill Corporation’s activities and benefits received from the state constitute sufficient contacts to satisfy due process).

common carrier, the seller does not meet the level of nexus required by the Commerce Clause.<sup>63</sup>

Additionally, the Supreme Court emphasized that Congress has the ability and ultimate power to decide the extent and role of states in this analysis.<sup>64</sup> Put simply, retailers must be physically present in the state to satisfy the substantial nexus requirement set out in *Complete Auto Transit*.<sup>65</sup> The Court based this decision on both Commerce Clause and stare decisis grounds.<sup>66</sup> First, the Court found that the requirements of due process were met regardless of physical presence in the taxing state.<sup>67</sup> Second, stare decisis provides that courts will determine points in litigation according to precedent,<sup>68</sup> though the Court put too much weight onto these factors, which preserved the “antiquated” physical presence rule.<sup>69</sup> Although “the flaws with the rules were evident,” the Court believed that the issue was better suited for Congress.<sup>70</sup>

#### 4. Discussion of *Wayfair*

In *Wayfair*, the Supreme Court reconsidered the validity of the physical presence rule set out in *Bellas Hess* and *Quill*. Critics of *Quill* recognize that a nexus standard is necessary, but argue that the Supreme Court should

63. *Id.* at 311.

64. *Id.* at 318.

65. *Id.* at 317.

66. *See id.* at 317 (concluding the physical presence rule aligns with the principles of stare decisis); *see also* Swain, *supra* note 2, at 357 (“*Quill* Corporation fared better under the Commerce Clause.”).

67.

The requirements of due process are met irrespective of a corporation’s lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

*Quill Corp.*, 504 U.S. at 308.

68. *Id.* at 317; *see also* Swain, *supra* note 2, at 317 (“The doctrine of stare decisis provides that courts will adhere to existing precedent and not disturb settled points.”).

69. *See* Swain, *supra* note 2, at 360 (arguing “[t]he Court may have given too much weight to the pragmatic factors,” and thus “perpetuate[d] an antiquated rule”).

70. Nicole Soulsby, *Strength in Numbers: South Dakota v. Wayfair, Inc. and the Ripple Effect Occurring in State Legislatures to Circumvent the Quill Corp Physical Presence Test for Use Taxation*, 11 CHARLESTON L. REV. 583, 593–94 (2017) (“[T]he Supreme Court was borderline apologetic in defending the controversial physical presence rule—stating that . . . the flaws with the [physical presence] rule were evident, and that Congress can correct their decision by enacting legislation that does away with the rule . . .”).

address the issue appropriately with regard to current times.<sup>71</sup> In *Wayfair*, Justice Kennedy opined *Quill* actually created market distortions that the rule was meant to resolve.<sup>72</sup> Further, the Supreme Court stated that “[p]hysical presence is not necessary to create a substantial nexus.”<sup>73</sup> The Court also recognized that the physical presence rule provides an incentive for avoiding physical presence by acting as a tax shelter.<sup>74</sup> The technological development since 1992 requires a different perspective on physical presence because consumers are now closer to retailers than ever before, regardless of the location of the storefront.<sup>75</sup> The Supreme Court “should not maintain a rule that ignores these substantial virtual connections to the State.”<sup>76</sup> Though Supreme Court precedent previously required a bright-line physical presence rule, “[t]he rejection of the historic physical presence test leads to the conclusion that an economic presence can be sufficient to create the substantial nexus required under *Complete Auto Transit*.”<sup>77</sup> However, *Wayfair* only addressed the first prong (requiring a substantial nexus to the taxing state), so trial courts must still determine whether a tax meets the remaining requirements.<sup>78</sup>

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71. See Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000) (“[W]hile nexus rules are clearly necessary in the existing environment . . . the debate should focus on rules that are appropriate to the twenty-first century, not the nineteenth.”).

72. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) (“*Quill* creates rather than resolves market distortions.”).

73. *Id.* at 2093.

74. See *id.* at 2094 (“In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State’s consumers[.]”).

75. See *id.* at 2095 (“The ‘dramatic technological and social changes’ of our ‘increasingly interconnected economy’ mean that buyers are ‘closer to most major retailers’ than ever before—‘regardless of how close or far the nearest storefront.’” (quoting *Direct Marketing Ass’n v. Brohl*, 575 U.S. 1, 18 (2015) (Kennedy, J., concurring))).

76. *Id.*

77. Erin M. Haney et al., *Supreme Court Overturns the Quill Physical Presence Test for State Tax Collection*, VARNUM ATTYS AT L. (June 21, 2018), <https://www.varnumlaw.com/newsroom-publications-supreme-court-overturns-the-quill-physical-presence-test-for-state-tax-collection> [http://perma.cc/U6XE-3CHG].

78. See *id.* (observing while the *Wayfair* decision held the “substantial nexus” requirement was satisfied, it did “not result in a conclusion as the case now must return to the trial court for a determination whether the tax at issue satisfies the remaining three requirements”).

## III. WHO GOT IT RIGHT AND WHY

A state has “enforcement jurisdiction” over a person when a state has the ability to enforce the collection or payment of a tax.<sup>79</sup> Though the growth in technology makes it more challenging to apply state tax laws, this alone should not suffice as an excuse for avoiding the issue or waiting for Congress to find a way to handle it.<sup>80</sup> When *Wayfair* was decided:

[N]ew sales tax legislation had been passed or was pending in thirty-two out of the forty-five states that impose a sales tax. This legislation asserted either a nexus based on the sales activity in a state without regard to the seller's physical presence in the state or imposed requirements similar to Colorado's notice and reporting requirements previously discussed. Additionally, forty-one out of the forty-five states that impose a sales tax had instituted some form of legislation that expanded physical nexus, such as New York did in its Amazon statute, by using affiliate programs as a way of establishing a physical presence.<sup>81</sup>

However, to determine a meaningful solution to the e-commerce problem, it must address who is subject to the tax and whether it is administrable.<sup>82</sup>

A. *Impact*

The rise of e-commerce resulted in a massive loss in state sales tax revenue.<sup>83</sup> These losses not only take away from state services and infrastructure, but contribute to the “effectively tax-free status of Internet

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79. See Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371, 375 (2017) (“When a state has the ability to require a person to collect or pay a tax, the state has what is termed ‘enforcement jurisdiction’ over the person. Understanding the requirements of the Due Process Clause for enforcement jurisdiction is critical to understanding when a state may require a remote vendor to collect and remit a use tax or pay an income tax.”).

80. See Soulsby, *supra* note 70, at 619 (“*South Dakota v. Wayfair* is the right case for the Supreme Court to implement a system not defined solely by physical presence.”).

81. Nick Surma, *Overturing Quill: Why Wayfair Was Correctly Decided and What Lies Ahead*, 93 N.D. L. REV. 521, 538 (2018).

82. See Hellerstein, *supra* note 71, at 550–54 (reviewing the main constitutional and practical issues states face in administering taxes against e-commerce vendors).

83. See Holderness, *supra* note 79, at 377–78 (“The relative ease with which transactions can be initiated and completed over the Internet has contributed to, and likely accelerated, the growth of interstate transactions in the United States. This growth is presumably good for the economy but presents challenges for many states as they struggle to apply their tax laws to these interstate transactions. For example, one recent study found that the states’ struggles resulted in the non-collection of \$11.4 billion in sales and use tax revenues from sales made through e-commerce in 2012.”).

sales.”<sup>84</sup> Thus, we must review the impact that *Wayfair* had on the government, economy, businesses, consumers, and practitioners following the decision. Doing so makes it clear that the Supreme Court’s binary decision was not enough to resolve the issues that followed.

### 1. Government

Though *Wayfair* re-examines state nexus questions, the implications of the decision “extend to other state-imposed taxes” as well.<sup>85</sup> This comes after the opinion removed any doubts about physical presence by creating a bright-line rule.<sup>86</sup> While *Wayfair* primarily resolved nexus issues, it has “effectively endorsed assertions by states that physical presence was not a prerequisite for the imposition of income tax and other entity-level taxes.”<sup>87</sup> This new ability to collect taxes from Internet retailers creates a revenue windfall.<sup>88</sup> One of the reasons this issue arose was because there was a widespread problem in states enforcing use tax.<sup>89</sup>

A significant impact on the government is that most states are not prepared to enforce these taxes without making considerable legislative changes. Following the Supreme Court decision, the Tax Foundation suggests following what they term “the *Wayfair* checklist.”<sup>90</sup> The checklist

84. Edward A. Zelinsky, *The Political Process Argument for Overruling Quill*, 82 BROOK. L. REV. 1177, 1199 (2017) (describing the *Quill* controversy and providing reasons why the Court should overturn the decision).

85. See Chris Hopkins, *Implications of Wayfair Beyond Sales Tax*, FIN. EXECs. INT’L (Aug. 7, 2018), <https://www.financialexecutives.org/FEI-Daily/August-2018/Implications-of-Wayfair-Beyond-Sales-Tax.aspx> [http://perma.cc/NF6R-VXV7] (“[T]he *Wayfair* decision’s implications extend to other state-imposed taxes.”).

86. See *id.* (“[I]mplicit in the *Wayfair* decision is an acceptance by the [C]ourt of a statutory bright-line activity threshold for the imposition of state tax under the commerce clause.”).

87. *Id.*

88. See Jon Chesto, *In Wayfair Case, Supreme Court to Let States Collect Internet Sales Tax*, BOS. GLOBE (June 21, 2018), <https://www.bostonglobe.com/business/2018/06/21/supreme-court-let-states-collect-internet-sales-tax/OZYKuuHcqN9yJgHYQPSWnK/story.html> [http://perma.cc/L9CF-WZ9A] (“The US Supreme Court on Thursday opened the door for states to collect more sales taxes from Internet retailers, dealing a blow to Boston-based online seller Wayfair but potentially creating a revenue windfall for Massachusetts.”).

89. See William R. Stromsem et al., *Sales Taxes After Wayfair—Challenges and Opportunities for CPAs*, TSCPA (July 2018), <https://www.tscpa.org/advocacy/governmental-affairs/news/sales-taxes-after-wayfair-challenges-and-opportunities-for-cpas> [http://perma.cc/LAN9-HE49] (“One of the reasons South Dakota asserted economic nexus for sales taxes was the widespread lack of compliance and problems with enforcing their use tax.”).

90. Joseph Bishop-Henchman et al., *Post-Wayfair Options for States*, TAX FOUND. (Aug. 29, 2018), <https://files.taxfoundation.org/20180904165435/Tax-Foundation-FF6091.pdf>

is satisfied by “adopting a *de minimis* threshold, explicitly rejecting retroactive enforcement, and adhering to uniformity and simplification rules in the Streamlines Sales and Use Tax Agreement (SSUTA).”<sup>91</sup> The Supreme Court has strongly encouraged SSUTA.<sup>92</sup> State policy choices include deciding on the generosity of the threshold to adopt, the qualifying period, the enforcement date, the inclusion of local taxes, and how to use revenues.<sup>93</sup> In making a law that follows the new constitutional standard, states must look at the following factors: safe harbor, no retroactive collection, single state-level administration, uniformed definitions, simplified tax rate structure, software (provided by the state), and immunity.<sup>94</sup>

Though South Dakota is compliant with this checklist, the Tax Foundation has reviewed state statutes and regulations and classified them according to their status.<sup>95</sup> There are states that are compliant with the checklist; those that should proceed with caution; states that should only proceed after making legislative changes; those that are not compliant; and states with no sales tax.<sup>96</sup> Texas is one of the majority of states that should only proceed to tax Internet sellers after making legislative changes.<sup>97</sup> Texas would have to undergo significant simplifications because it is not a SSUTA member and has 1,594 tax jurisdictions.<sup>98</sup> Additionally, Texas does not adhere to uniform definitions or provide tax lookup software.<sup>99</sup> The Tax Foundation suggests Texas “should pursue SSUTA membership and/or significant simplification of its local sales tax . . . .”<sup>100</sup> Policymakers

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[<http://perma.cc/7TEN-L7K4>]. The Tax Foundation is a tax policy nonprofit and research institution founded in 1932.

91. *Id.*

92. See Sofia Morales, *The Amazon Tax: Collecting the Use Tax in the Aftermath of the New York Appellate Court's Recent Holding*, 13 HOUS. BUS. & TAX L.J. 56, 80 (2012) (“[T]he SSUTA is not only appropriate but has been strongly encouraged by the Supreme Court.”).

93. Bishop-Henchman et al., *supra* note 90.

94. *Id.*

95. *Id.*

96. *Id.* (classifying states as “green lights,” “flashing yellow lights,” “steady yellow lights,” or “red lights” according to their completion of the *Wayfair* checklist).

97. See *id.* at 18 (“[Texas] should pursue SSUTA membership and/or significant simplification of its local sales taxes prior to pursuing enabling legislation similar to South Dakota’s. The Texas Comptroller has issued a statement inviting input for future legislation and disavowing any retroactive application.”).

98. *Id.*

99. See *id.* (“[Texas] does not adhere to common definitions or provide base/rate lookup software . . . .”).

100. See *id.*

should focus on statutory longevity by making decisions that are likely constitutional, immune from suit, and uphold voluntary compliance.<sup>101</sup>

## 2. Economy

In an interview with George Kelemen, CEO of the Texas Retailers Association, Kelemen commented that *Quill* was decided two years before “the first online sale in history.”<sup>102</sup> Twenty-six years later, the Department of Commerce now claims that \$450 billion of retail sales, or more than 13% of all retail sales, are conducted online.<sup>103</sup> Kelemen focuses on fairness, stating the physical presence systems put brick-and-mortar retailers at an 8.25% disadvantage compared to out-of-state retailers.<sup>104</sup> In Texas, the tax rate by which traditional retailers are disadvantaged is 6.25%, but local tax jurisdictions impose a 2% tax that combines to equal that 8.25%.<sup>105</sup> While states do collect from some big chain online retailers that have physical presence, there is an estimated \$13 billion in potential tax flow from websites that are not paying.<sup>106</sup> Bill Longley, legislative counsel at the Texas Municipal League, commented: “It’s not a big- or small-city issue. It could theoretically increase the sales tax base in every city across the state.”<sup>107</sup> Texas does not have an income tax, so it relies on sales taxes.<sup>108</sup> Sales tax dollars constitute more than 50% of sales tax revenue along with city revenues as well.<sup>109</sup> A previous comptroller estimate shows that these taxes could generate an additional \$800 million for the state and another

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101. See *id.* at 21 (“[P]olicymakers should build systems meant to last; ones that are surely constitutional, that are free from the threat of lawsuit, and that uphold a system of voluntary compliance.”).

102. Paul Flahive, *How Supreme Court Decision Could Mean \$1 Billion For Texas*, TEX. PUB. RADIO (May 29, 2018), <http://www.tpr.org/post/how-supreme-court-decision-could-mean-1-billion-texas> [<http://perma.cc/3CGA-EPKA>].

103. *Id.*

104. *Id.*

105. TEX. TAX CODE ANN. § 151.051 (imposing use tax and defining the rate as the same percentage as sales tax); see also *State Rates*, *supra* note 9 (offering an option to calculate local taxes in Texas based on address).

106. Flahive, *supra* note 102.

107. *Id.*

108. Paul Takahashi, *How the Supreme Court Ruling on Online Sales Taxes Affects Texas Online Shoppers*, SAN ANTONIO EXPRESS-NEWS (June 21, 2018), <https://www.expressnews.com/business/local/article/How-the-Supreme-Court-ruling-on-online-sales-13014783.php> [<http://perma.cc/3GWL-VNA4>].

109. Flahive, *supra* note 102.



\$200 million for cities.<sup>110</sup> For these reasons, local retailers have complained about the creation of an unfair marketplace.<sup>111</sup> With somewhere between 10,000 and 12,000 different taxing authorities across the United States, this complicates business compliance.<sup>112</sup>

### 3. Businesses

Both large and small businesses alike will face compliance issues.<sup>113</sup> The major impacts on these businesses can be broken down into the following: (1) the state must individually tax across boundaries, (2) Internet retailers must track all sales and tax changes where they conduct business, (3) Internet retailers must establish systems to collect sales tax, (4) Internet retailers will need to reevaluate bottom line profit and loss numbers, and (5) brick-and-mortar retailers will benefit from consumers who used to state taxes by shopping online.<sup>114</sup> This Comment takes the position, along with others such as David Agrawal, that compliance costs fall disproportionately on small businesses.<sup>115</sup> “Smaller online companies may find themselves subject to [tax] nexus in new jurisdictions and are less likely to have multistate . . . software and in-house expertise.”<sup>116</sup> This will add to their compliance costs by potentially requiring small businesses to hire someone for compliance efforts or using third party consultants.<sup>117</sup>

Larger businesses have more factors to consider, such as the physical presence of their warehouse or even delivery vehicles.<sup>118</sup> Another problem arising in large businesses that adds to the complexity are cases where online retailers simply serve as platforms for third party sales.<sup>119</sup> Such circumstances have led the Texas Comptroller to suggest amending the

110. *See id.*

111. *See* Takahashi, *supra* note 108 (“Brick-and-mortar retailers have also complained that the precedent creates an unfair marketplace, putting them at a disadvantage to Internet businesses.”).

112. Flahive, *supra* note 102.

113. *See* Stromsem et al., *supra* note 89 (“*Wayfair* will greatly complicate state sales tax compliance for smaller companies. . . . Larger online companies likely have sales or use tax nexus in many states, and some possibly in all states[] . . .”).

114. Tom Wheelwright, *How Will the ‘Wayfair’ Supreme Court Decision Affect Retailers? 5 Ways*, LMTONLINE (July 18, 2018, 7:00 AM), <https://www.lmtonline.com/news/article/How-Will-the-Wayfair-Supreme-Court-Decision-13082332.php> [<http://perma.cc/37TH-XTKJ>].

115. David Agrawal is an assistant professor at the University of Kentucky, where he teaches public policy and economics. Flahive, *supra* note 102.

116. Stromsem et al., *supra* note 89.

117. *Id.*

118. *Id.*

119. *Id.*

definition of “seller” and “retailer” in the Texas Tax Code to include marketplace platforms.<sup>120</sup>

Another concern among businesses is the retroactive application of *Wayfair*.<sup>121</sup> This is because many states do not have a statute of limitations for assessments against taxpayers.<sup>122</sup> Though Rhode Island is the only state that has announced potentially applying *Wayfair* retroactively, statements made in briefs are not binding.<sup>123</sup> While Texas continues to review rules, it is important to stress that businesses should not be subjected to taxation without bounds if remote sellers do not have a physical presence in Texas.<sup>124</sup> There is also the fear that, along with owing back taxes, e-commerce merchants would owe interest on those back taxes.<sup>125</sup> Before, the physical presence test may have made businesses reluctant to have offices or warehouses in other states.<sup>126</sup> However, because of *Wayfair*, businesses may begin to expand activities which will ultimately benefit consumers by enhancing sales and improving customer service.<sup>127</sup>

The New York Times goes so far as to relate this to “taxation without representation” because it puts the responsibility on the seller to calculate, collect, and remit sales taxes to the home state of the buyer even when the retailer has no stores, employees, voting power, or political voice.<sup>128</sup> States have been losing out on billions of dollars in tax revenue even though some larger Internet retailers “have begun collecting sales tax regardless of . . . physical presence.”<sup>129</sup> It is up to the Texas Comptroller of Public

120. *Id.*; see TEX. TAX CODE ANN. § 151.008 (defining the terms “seller” and “retailer”).

121. Stromsem et al., *supra* note 89.

122. *Id.*

123. *Id.*

124. *Id.*

125. Morales, *supra* note 92, at 83.

126. Stromsem et al., *supra* note 89.

127. *See id.* (“With nexus possibly determined by revenues and the location of online buyers instead of a seller’s physical presence, companies may be less reluctant to establish an in-state physical presence if they will be subject to a state’s tax collection obligation under a state’s economic nexus standard in any event.”).

128. Jessica Melugin, *Supreme Court’s Wayfair Decision Will Hurt Online Shopping*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/opinion/supreme-court-wayfair-south-dakota-online-shopping.html> [https://perma.cc/J3PG-Q595].

129. Mark Walsh, *Opinion Analysis: Court Expands States’ Ability to Require Internet Retailers to Collect Sales Tax*, SCOTUSBLOG (June 21, 2018), <http://www.scotusblog.com/2018/06/opinion-analysis-court-expands-states-ability-to-require-internet-retailers-to-collect-sales-tax/> [http://perma.cc/M66M-FGJU]. *See generally* Daniel Tyler Cowan, Recent Development, *New York’s Unconstitutional Tax on the Internet: Amazon.com v. New York State Department of Taxation & Finance and the Dormant*

Accounts to implement the principles of Supreme Court decisions in a manner that best serves the state itself, its citizens, and the businesses operating in the state.<sup>130</sup> The amount of tax collection and revenue increase will depend on how the agency implements and resolves issues that the Supreme Court's ruling raises.<sup>131</sup>

Though there is much to gain, states struggle to impose these tax obligations.<sup>132</sup> Sellers that engage in e-commerce carry a heavy burden because compliance requires:

a seller [to] determine within which states it has nexus, whether the items sold are taxable in the consumer's state, and whether a customer is exempt from the tax. In addition to these steps, a seller in compliance must maintain adequate books and records, the standards for which vary from state to state.<sup>133</sup>

Other struggles include unique sourcing problems, such as when no delivery address is provided or when billing information is inadequate.<sup>134</sup>

#### 4. Consumers

On the other hand, from the consumer perspective, many believe *Wayfair* diminishes the beneficial rivalry that essentially allows them to “vote with their wallets.”<sup>135</sup> Because states can essentially export their tax policies to tax businesses in other states, many argue that the online buyer is put at a disadvantage.<sup>136</sup> It creates fewer political consequences on businesses and states, minimizing the incentive to maintain reasonable tax

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*Commerce Clause*, 88 N.C. L. REV. 1423, 1423–24 (2010) (explaining the “Amazon Tax” that requires out-of-state retailers to collect use tax if they have marketing affiliates in the state producing at least \$10,000 in sales).

130. Press Release, Tex. Comptroller Pub. Accts., Comptroller Issues Initial Guidance on Remote Seller Sales Tax Decision by U.S. Supreme Court (June 27, 2018), <https://comptroller.texas.gov/about/media-center/news/2018/180627-wayfair.php> [<http://perma.cc/K99K-5GQ2>].

131. *Id.*

132. See generally Sara Schoenfeld, *Much Ado About Nexus: The States Struggle to Impose Sales Tax Obligations on Out-of-State Sellers Engaged in E-Commerce*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 263, 280 (2013); (describing how state revenue losses from uncollected sales taxes are motivating states to “apply[] their state sales tax collection laws to out-of-state vendors more aggressively”).

133. *Id.* at 282 (citations omitted).

134. *Id.* at 282–83.

135. Melugin, *supra* note 128.

136. See, e.g., *id.*

rates.<sup>137</sup> This decision likely means consumers will see an increase in online prices.<sup>138</sup>

However, this Comment does not agree with this position from the consumer perspective. The Tax Foundation has made an effort to clarify *Wayfair* and eliminate consumers' confusion related to the decision.<sup>139</sup> A major concern of consumers is whether *Wayfair* will make online purchases more expensive or hurt e-commerce.<sup>140</sup> In short, e-commerce will not be hurt because e-commerce retailers will have to collect the same taxes collected by every other retailer.<sup>141</sup> These are not new taxes, but taxes that should have always been reported and paid—whether by retailers or consumers.<sup>142</sup> Additionally, even if retailers had to increase prices to comply, Internet retailers have many other benefits over brick-and-mortar retailers.<sup>143</sup> Online shoppers still benefit from the ease, convenience, and wider selection that e-commerce has to offer. As the collection of e-commerce taxes “grew from almost zero to half of all sales, e-commerce has continued to grow sharply.”<sup>144</sup> Thus, *Wayfair* “is almost certainly too late” to create a dramatic shift from shopping online to shopping in brick-and-mortar stores.<sup>145</sup>

##### 5. Practitioners

The decision also creates opportunities and challenges for those whose job it is to comply with the new requirements.<sup>146</sup> When the Supreme Court looked at South Dakota's law, six features were designed to prevent any

137. *See id.* (“With fewer political consequences, there is less incentive to keep tax rates reasonable.”).

138. Takahashi, *supra* note 108.

139. *See generally* Joseph Bishop-Henchman, *What Does the Wayfair Decision Really Mean for States, Businesses, and Consumers?*, TAX FOUND. (June 9, 2018), <https://taxfoundation.org/what-does-the-wayfair-decision-really-mean-for-states-businesses-and-consumers/> [http://perma.cc/P3L8-HXNX] (eliminating confusion about the *Wayfair* decision by providing answers to interpretation questions).

140. *Id.*

141. *Id.*

142. *See id.* (“Internet purchases were not exempt from tax[.]”).

143. *See id.* (“[E]-commerce’s strengths over brick-and-mortar are more about convenience, wider selection, and lower costs, it’s unlikely this decision will hurt large e-commerce firms.”).

144. *Id.*

145. Alana Semuels, *Will a New Supreme Court Decision Change Online Shopping?*, ATLANTIC (June 21, 2018), <https://www.theatlantic.com/technology/archive/2018/06/what-the-supreme-courts-decision-on-online-sales-tax-means/563405/> [http://perma.cc/8FJZ-H24Z].

146. *See* Stromsem et al., *supra* note 89 (describing the benefits and challenges the *Wayfair* decision imposes).

undue burden on interstate commerce: (1) a safe harbor that would exclude small retailers (2) no retroactive tax collection (3) single administration on the state-level (4) simplified tax structure (5) uniform definitions and rules, and (6) state software access with immunity privileges for those who rely and try to comply.<sup>147</sup> States that attempt to collect sales taxes on e-commerce without meeting these provisions will face a legal challenge as they try to rationalize their statutes using the *Wayfair* decision as a guide to what is permissible. The current software will need to be reprogrammed in order to meet compliance requirements as well.<sup>148</sup>

However, many compliance services will likely be offered to large e-commerce sellers.<sup>149</sup> “Congress could also potentially pass RTPA,” which would provide protections limiting interstate audits, requiring states to help pay for integration software, and establishing a sales threshold to exempt small businesses from some rules to alleviate the burden on these retailers.<sup>150</sup> South Dakota has received overwhelming support in *Wayfair*. Many states will likely follow in updating registration, reporting, and collection statutes in response to the decision.<sup>151</sup> Other states are challenging or in the process of challenging different aspects of nexus requirements.<sup>152</sup> Retailers should expect states to expand their assertion in the context of tax collection.<sup>153</sup> Tax compliance entities will be monitoring economic activity, and that will affect thousands of jurisdictions, locally and statewide.<sup>154</sup> Some states are targeting e-commerce groups, while others are considering enacting notice and reporting rules.<sup>155</sup> For example, Missouri uses an economic nexus approach in what is now termed the

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147. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–2100 (2018); Bishop-Henchman, *supra* note 139.

148. *See* Stromsem et al., *supra* note 89 (“Computers will need to be reprogrammed to capture sales by taxing jurisdictions.”).

149. *See* Bishop-Henchman, *supra* note 139 (“It is likely that large e-commerce platforms will provide sales tax compliance services for their sellers.”).

150. *Id.*

151. *See* Scott E. Vincent, *Report: Taxes in Your Practice: Supreme Court Overturns Physical Presence Standard for Sales Tax Nexus*, 74 J. MO. B. 201, 202 (2018) (“Practitioners will need to monitor new laws, rules, and regulations as states attempt to stretch nexus and sales tax collection under these new standards.”).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

“Amazon Law” or the Amazon Tax.<sup>156</sup> More specifically, the Missouri statute requires Internet retailers with click-through arrangements to collect use taxes.<sup>157</sup>

### B. *Types of Proposals*

Several approaches can be made in attempting to propose a way to tax or not to tax e-commerce. In 1999, the Advisory Commission on Electronic Commerce (ACEC) invited interested parties to submit proposals, which ACEC evaluated based on eighteen criteria.<sup>158</sup> ACEC focused on simplification, changes to taxation, burden on sellers, discrimination, international application, technology, privacy, and constitutionality.<sup>159</sup>

ACEC thoroughly discussed the constitutionality of proposals. It first divided the proposals into categories based on how restrictive the proposals were.<sup>160</sup> ACEC defined radically restrictive proposals as those that would ban e-commerce taxation altogether in a broad range of transactions.<sup>161</sup> An example would be the Internet Tax Elimination Act that was cosponsored by Ohio Representatives Kasich and Boehner.<sup>162</sup> Another example would be the proposal to prohibit both sales and use taxes on e-commerce transactions from businesses to consumers.<sup>163</sup> Moderately restrictive proposals are those that significantly immunize e-commerce economic activity.<sup>164</sup> Moderate proposals impose specific limits on state taxation power.<sup>165</sup> The eCommerce Coalition, including businesses such as Cisco Systems, Inc., Citigroup, Microsoft, and Wal-Mart, proposed an approach that would require establishing standards for the state to simplify the current

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156. See MO. REV. STAT. § 144.605 (2017) (describing the Missouri Amazon Law); see also Vincent, *supra* note 151, at 202 (“Missouri has what is sometimes called an ‘Amazon’ law, which takes an economic nexus approach similar to the South Dakota Act in *Wayfair*.”). See generally Cowan, *supra* note 129, at 1423–24 (defining the Amazon use tax nexus through the production of \$10,000 in sales by marketing affiliates in the state).

157. MO. REV. STAT. § 144.605(2)(e) (2017).

158. See Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 BYU L. REV. 9, 45 (2000).

159. *Id.* at 45–47.

160. See *id.* at 47–48 (separating proposals by either restrictiveness or simplification).

161. *Id.* at 48.

162. *Id.*

163. This proposal was advanced by Virginia Governor Gilmore. *Id.*

164. *Id.* at 49.

165. *Id.*

system.<sup>166</sup> Simplification was a common theme throughout the proposals, while others focused on technology or origin.<sup>167</sup>

### C. Government Intervention

Though there seems to have been some government involvement throughout the course of history, it has not been enough to resolve the nexus issues. In 1997, five years after *Quill*, the Internet Tax Freedom Act was introduced.<sup>168</sup> The purpose of the Internet Tax Freedom Act (ITFA) was to establish a national policy against interfering with interstate e-commerce.<sup>169</sup> Because it was met with heavy opposition, it did not garner support until Congress passed a weaker version of the original in 1998.<sup>170</sup> It banned both multiple and discriminatory taxes on e-commerce.<sup>171</sup> ITFA defines e-commerce broadly to include transactions conducted over or through Internet access.<sup>172</sup> Under ITFA, multiple taxes are imposed by the government on an e-commerce transaction that is also subject to taxation by another government.<sup>173</sup> A discriminatory tax occurs when the tax policies place e-commerce at a disadvantage compared to more traditional or brick-and-mortar means.<sup>174</sup> A tax is also considered discriminatory if it places the tax collection burden on a third party in an e-commerce transaction.<sup>175</sup> While these were important moves by Congress, it only postponed decisions which Congress has still chosen to avoid.

In 1999, Congress continued its efforts by approving a non-binding resolution to encourage Clinton to seek a ban on e-commerce tariffs.<sup>176</sup>

166. *See id.* at 49–50 (“The eCommerce Coalition . . . urged the Commission to recommend congressional legislation . . . for state-initiated simplification . . .”).

167. *See id.* at 50–52.

168. *See* Kevin J. Smith, *Internet Taxes: Congressional Efforts to Control States’ Ability to Tax the World Wide Web*, 7 RICH. J.L. & TECH. 3, at ¶ {5} (2000), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1100&context=jolt> [<https://perma.cc/EQT2-XBY7>] (“[T]he state may receive its tax dollar at the expense of the small businesses.”).

169. *Id.* ¶ {10}.

170. *See id.* ¶¶ {10}–{11} (“The ITFA was initially met with strong opposition from organized groups such as the National League of Cities, the National Governor’s Association and others. After eighteen months of debate, Congress finally passed the ITFA in 1998.”).

171. *See id.* ¶ {11} (listing which tax levies ITFA bars).

172. *Id.* ¶ {43}.

173. *See id.* ¶ {50} (defining multiple taxes).

174. *See id.* ¶ {45} (defining discriminatory taxes).

175. *Id.* ¶ {47}.

176. *See id.* ¶ {8} (“In the Fall of 1999, both houses of Congress approved a non-binding resolution encouraging President Clinton to seek a permanent international ban on tariffs on electronic commerce.”).

The resolution called upon the World Trade Organization to negotiate and enact a moratorium on e-commerce tariffs.<sup>177</sup> One of the problems with the rise of technology and e-commerce transactions is the Internet nexus, the main point of discussion.

Believing that ITFA would soon expire, legislatures and governmental agencies reassessed e-commerce policies, specifically those that affect economic objectives.<sup>178</sup> Potential e-commerce tax revenue raises concerns on how to proportion the income among states.<sup>179</sup> Another important consideration is that the classification of e-commerce affects how the income will be sourced.<sup>180</sup>

Congress has also made efforts to aid in the debate. In 1999, Congress introduced H.R. 3252 as the Internet Tax Elimination Act.<sup>181</sup> It amended ITFA to make the prohibition on sales or use tax on e-commerce permanent.<sup>182</sup> Then, in 2000, the congressmen who proposed ITFA introduced the Internet Non-Discrimination Act (INDA), making ITFA permanent.<sup>183</sup> H.R. 3709, or the INDA, permanently extended provisions that prohibited multiple or discriminatory taxes on e-commerce.<sup>184</sup> More recently, Congress introduced H.R. 6724, the Protecting Businesses from Burdensome Compliance Cost Act.<sup>185</sup> The bill limits the authority of states and subdivisions to collect taxes owed and to collect information incident

177. *See id.* (“It also calls upon the WTO to enact a permanent moratorium on electronic commerce tariffs.”) (internal quotations omitted) (citation omitted).

178. *See generally* Jonathan Bick, *Implementing E-Commerce Tax Policy*, 13 HARV. J.L. & TECH. 597 (2000) (introducing e-commerce tax proposals in context of the expiration of IFTA).

179. This also has implications on sales and use taxes, which are discussed in the introduction of the comment. *See id.* at 598 (describing “the misclassification of the product and erroneous treatment for tax purposes [as] a real danger”).

180. There are three classification options: tangible personal property, intangible property, or services. *Id.* E-commerce categorized as tangible personal property is normally sourced to the destination state, while intangible property and services are sourced to the vendor state. *See id.* at 598–600 (2000).

181. H.R. 3252, 106th Cong. (1999).

182. *Id.*

183. *See* Smith, *supra* note 168, ¶ {80} (“[They said they would introduce the Internet Non-Discriminatory Act (INDA) that will make the ITFA permanent.”).

184. H.R. 3709, 106th Cong. (2000).

185. This bill was introduced September 6, 2018. *See* H.R. 6724, 115th Cong. (2018) (“To limit the authority of a state to require remote sellers to collect taxes and fees owed by purchasers then located in such State incident to their purchases of goods and services from such sellers, and for other purposes.”).



to the purchase.<sup>186</sup> Congress also introduced H.R. 6824 as the Online Sales Simplicity and Small Business Relief Act of 2018.<sup>187</sup> This bill prohibits states from imposing tax collection duties on certain remote sellers.<sup>188</sup> It also bans retroactive taxation of e-commerce.<sup>189</sup> The bill aims to phase in compliance in an orderly manner.<sup>190</sup> However, it does include an exemption for small business remote sellers:

In the case of a sale made by a small business remote seller, no State may impose a sales tax collection duty on any person other than the purchaser if the sale is made on or after June 21, 2018, and before the date that is 30 days after the date on which the states develop and Congress approves an interstate compact, applicable to the State and sale, governing the imposition of tax collection duties on remote sellers.<sup>191</sup>

H.R. 6824 also delves into the sense of Congress:

It is the sense of Congress that the States should develop an interstate compact for the collection of sales tax by remote sellers that identifies a clearly defined minimum substantial nexus between the remote seller and the taxing State, that simplifies registration, collection, remittance, auditing, and other compliance processes to the greatest extent possible in order to avoid undue burdens on interstate commerce, and that, due to such simplification, eliminates the need for the continuation of the small business remote seller exemption under section 4.<sup>192</sup>

Another similar bill introduced by Congress is H.R. 7184, the No Retroactive Online Taxation Act of 2018.<sup>193</sup>

186. See H.R. 6724, 115th Cong. (2018) (providing exceptions and definitions within the bill).

187. This bill was introduced September 13, 2018. See H.R. 6824, 115th Cong. (2018) (“To prohibit States from retroactively imposing a sales tax collection duty on a remote seller, and for other purposes.”).

188. See *id.* (defining a remote seller as “a person without a physical presence in the State who makes a sale in the State”).

189. See *id.*

190. See *id.* (“A state may impose a sales tax collection duty on a remote seller for a sale that occurs after January 1, 2019.”).

191. See *id.* (defining a small business remote seller as “a remote seller with gross annual receipts in the United States during the preceding calendar year in an amount that is not more than \$10,000,000”).

192. *Id.*

193. This bill was introduced on November 28, 2018. See H.R. 7184, 115th Cong. (2018) (“To provide for a ban on the retroactive taxation of internet commerce, and for other purposes.”).

States have also attempted to regulate the matter. The goal for states is to create legislation that will aid in their efforts and uphold constitutional scrutiny.<sup>194</sup> For example, in November 2018, Texas introduced S.B. 70.<sup>195</sup> The purpose of S.B. 70 is to provide an “optional, simplified means of computing the amount of local use tax remote sellers are required to collect” as a result of *Wayfair*.<sup>196</sup> The act intends to do so by amending the Tax Code and Government Code.<sup>197</sup>

#### IV. SUGGESTING A POTENTIAL RESOLUTION

##### A. *Current Responses*

In creating a potential resolution to e-commerce taxation issues, it is useful to look at other states and how they have reacted to the Supreme Court’s decision to overrule the physical presence test to determine nexus sufficiency. Since *Wayfair* was decided, many states responded by issuing administrative guidance or announcing that they are contemplating their next steps before taking action.<sup>198</sup> In their responses, most states have focused on the overruling of the physical presence requirement.<sup>199</sup> While most states have chosen to avoid interpreting what is unduly burdensome, Texas has proven to be an exception.<sup>200</sup>

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194. Joseph Bishop-Henchman, *Supreme Court Decides Wayfair Online Sales Tax Case*, TAX FOUND. (June 21, 2018), <https://taxfoundation.org/supreme-court-decides-wayfair-online-sales-tax-case/> [http://perma.cc/S8DY-UV8R] (“In the states, a reminder, 31 states currently have laws taxing internet sales. Today’s decision will certainly change how states look at these laws but we may see states trying to see if their versions could survive even if they are less simplified and direct than South Dakota’s law.”).

195. See Tex. S.B. 70, 86th Leg., R.S. 2019 (“[R]elating to a single use tax rate as an alternative to combined local use tax rates for computing the amount of local use taxes remote sellers are required to collect and to the allocation of tax revenue collected at that rate.”).

196. See *id.* (referring to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)).

197. See generally *id.* (setting forth suggested changes in laws to simplify computation).

198. See generally Jeffrey Reed, *A Range of State Responses After Wayfair*, JD SUPRA (Oct. 24, 2018), <https://www.jdsupra.com/legalnews/a-range-of-state-responses-after-wayfair-48789/> [http://perma.cc/8S2U-J7CT] (summarizing a variety of state reactions to the decision).

199. See *id.* (“[S]tate responses have generally focused on . . . the lifting of the physical presence requirement.”).

200. See *id.* (asserting Texas has deviated from interpreting the Court’s unduly burdensome component).

Some states took *Wayfair* as a green light and followed the decision by issuing guidance and praise to the decision almost immediately.<sup>201</sup> These states believed the decision was consistent with the current nexus sales tax law.<sup>202</sup> Examples of states that followed this approach are: Alabama, Hawaii, Iowa, North Dakota, and Rhode Island.<sup>203</sup>

Other states that did not enact laws serving a similar function quickly announced that they would try to act on the decision for state benefit.<sup>204</sup> However, states have shown different ways to do so. For example, Utah is working on legislation to force remote sellers to collect taxes.<sup>205</sup> Another approach taken by states such as South Carolina and Wisconsin show states intend to use force by administrative fiat.<sup>206</sup> Meanwhile, other states are looking at their present statutes to determine whether additional regulations will be necessary to force tax collection by remote sellers.<sup>207</sup>

*Wayfair* created a feeling of obligation among states to make an official announcement regardless of whether they were ready to make that decision following the opinion, leading to ambiguity and confusion. One example is the Maryland Comptroller, which issued a question and answer document.<sup>208</sup> The document addressed whether a seller not currently collecting sales tax must now do so following the opinion.<sup>209</sup> The Maryland Comptroller responded by providing a link to the Supreme Court opinion, stating that sellers should review and analyze the decision in the case “to identify how it affects you.”<sup>210</sup>

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201. *See id.* (explaining some states reacted with enthusiasm by the Court's decision by providing praise).

202. *See id.* (“[C]oncluding [the decision] is consistent with the state's already-enacted economic nexus sales tax law.”).

203. *See id.* (listing the states following the approach consistent with current nexus sales tax law).

204. *See id.* (explaining many states are reviewing their current code to ensure remote sellers will collect sales and use tax).

205. *See id.* (claiming Utah is attempting to force remote sellers to collect taxes).

206. An administrative fiat is an authoritative decree, sanction, or order that is issued that does not necessarily have the force of law. *See id.* (“It might be thought that a statute would be necessary. But the logic seems to be that the general state definitions . . . are already sufficiently broad to cover remote sellers.”).

207. *See id.* (“[S]tates are . . . determining whether additional legislation or regulations may be necessary.”).

208. *See, e.g., id.* (describing how vague the Maryland Comptroller responded in a question and answer document).

209. *See id.* (“One of the questions asks if a seller not currently collecting and remitting Maryland sales tax needs to begin doing so in the wake of the opinion.”).

210. *See id.* (encouraging sellers to review the *Wayfair* decision to understand its impact).

The Texas Comptroller of Public Accountants also seemed hesitant to disclose any specific guidance.<sup>211</sup> The Comptroller's office was brief, mentioning that it "expects the Texas Legislature to play an important role in addressing key issues when they return in January 2019."<sup>212</sup> However, unlike most states, the Texas Comptroller acknowledged the unduly burdensome test.<sup>213</sup> The Comptroller's office stated that "in order to avoid posing an undue burden on interstate commerce, the state will likely relieve some out-of-state sellers from collection responsibilities."<sup>214</sup> It did not provide any details on how it intended to balance the changes.<sup>215</sup>

Another interesting example is New Hampshire because it is one of the few states that does not impose a sales tax. New Hampshire has taken an approach that seeks to protect businesses from being forced to collect instead of attempting to collect revenue from online sellers.<sup>216</sup> Governor Chris Sununu and state leaders have vowed to fight the Supreme Court case on sales tax by suggesting a strategy that would require states to notify the New Hampshire State Department of Justice before states audit a New Hampshire remote seller.<sup>217</sup> They also want to allow the state's Department of Justice the opportunity to weigh in on the constitutionality of the tax obligation and allow the Department of Justice to block tax collection by filing a suit to protect New Hampshire businesses.<sup>218</sup>

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211. *See generally* Press Release, *supra* note 130 ("The agency anticipates that the state and local governments will see tax collections increase, but the amount depends on the implementation and resolution of several significant issues raised by the Supreme Court's ruling.").

212. *Id.*

213. *See* Reed, *supra* note 198 ("[T]he thinking from the Texas Comptroller's guidance appears to be that a delicate balance must be struck between forcing additional remote sellers to collect tax while also taking steps to ensure the tax collection regime is not unduly burdensome in the abstract and as applied to certain remote sellers.").

214. Press Release, *supra* note 130.

215. *See id.* ("More specific estimates will be available as the implementation and legislative process continues.").

216. *See* Reed, *supra* note 198 ("New Hampshire has vowed to 'fight back' by seeking to 'erect every possible . . . permissible legal and procedural hurdle to prevent other states from forcing our businesses to collect and use taxes.'").

217. *See id.* (referencing a press release from New Hampshire Governor Chris Sununu).

218. *See id.* (purporting New Hampshire's strategy is to allow "the New Hampshire Department of Justice to the opportunity to opine on the constitutionality of the tax collection obligation assertion, potentially even filing suit to block any attempt to impose tax collection on the New Hampshire Business.").

B. *Criticism*

While both significant praise and criticism have followed *Wayfair*, one question comes to mind: is there a better way? This analysis will discuss the benefits of physical presence and keeping with the *Quill* decision versus defenses for doing away with the requirement as decided in the *Wayfair* decision.

One perspective is that the physical presence test is the better standard because it is a bright-line rule that is easily understood by taxpayers, and it is not subject to interpretation.<sup>219</sup> The physical presence test is also favored because it is believed to reduce the probability that a business will be subject to multiple, or double, taxation.<sup>220</sup> Those that prefer *Quill* also claim that it is a more stable and predictable test, which leads to lower administrative and compliance costs.<sup>221</sup> *Quill* supporters understand that complications may arise where intangible property and e-commerce are involved, but they still believe that there is no reason to abandon the physical presence rule.<sup>222</sup> They believe the issues can be resolved by uniform state definitions for the location of the sales to establish nexus.<sup>223</sup>

Further, many find that *Wayfair* is not fair.<sup>224</sup> Those that agree with this point of view believe that the decision “may encourage some aggressive states (California and New York come to mind), and some desperate to collect more taxes (New Jersey, Connecticut, and Illinois, for instance) to try to squeeze much more in revenue out of this ruling than South Dakota did.”<sup>225</sup>

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219. See Vivian Lei, Geoffrey v. Commissioner: *The Fall of “Toys R Us” and the Rise of “Tax R Us”*, 10 HOUS. BUS. & TAX L.J. 340, 361 (2010) (providing policy arguments in support of the physical presence test).

220. See *id.* (arguing *Quill* helps to reduce multiple taxation of a corporation by various states).

221. See *id.* (describing a major effect of *Quill* is its ability to provide “stability and predictability in the state and local tax systems by lowering administrative and compliance costs.”).

222. *Id.*

223. *Id.* at 361–62.

224. See Steven Malagna, *Why Wayfair Isn't Fair*, CITY J. (June 26, 2018), <https://www.city-journal.org/html/why-wayfair-isnt-fair-15990.html> [<http://perma.cc/W24X-3FQS>] (commenting on the need for Congress to set limits in response to the Supreme Court's decision on Internet taxes).

225. *Id.* This fear is based on the fact that the opinion does not define a nexus standard. See *id.* (“What Wayfair mainly does is admit that the old standard of physical presence is no longer adequate, which means that states can now set a much lower threshold for when they can start requiring a merchant to collect taxes.”).

On the other hand, others favor the result of the *Wayfair* opinion.<sup>226</sup> Supporters believe that if Amazon is already doing it, then other businesses should be able to follow, especially since software will be made available to facilitate the change.<sup>227</sup>

### C. *Proposal*

Looking to the future of e-commerce taxes, “[w]hether the change is mandated by Congress, a Supreme Court decision or just the fear of bad publicity, the sooner businesses get ready to collect state sales taxes in every jurisdiction around the country, the better off they will be.”<sup>228</sup> The ideal solution will provide incentives<sup>229</sup> and eliminate discrimination.<sup>230</sup>

The Supreme Court should have answered the issue more directly in a way that would resolve the debate.<sup>231</sup> Some believe this issue rests solely in the hands of Congress.<sup>232</sup> However, Congress may not be in the best position to make this decision if it means that “there are potent concentrated interests on both sides of potential legislation [that makes a] stalemate seem

226. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018) (“Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.”).

227. Michael C. Dorf, *Congress, the Dormant Commerce Clause, and the Wayfair Case*, DORF ON L. (June 21, 2018), <http://www.dorfonlaw.org/2018/06/congress-dormant-commerce-clause-and.html> [<http://perma.cc/DA6E-ZZ3A>] (arguing *Wayfair* is defensible on its merits).

228. Alex Paladino, *E-commerce Companies don't pay Local Sales Taxes. They Need to get Serious About That.*, RECODE (Apr. 17, 2018), <https://www.recode.net/2018/4/17/17248244/e-commerce-government-local-internet-sales-tax-supreme-court-trump-amazon> [<http://perma.cc/S9PJ-2PB9>].

229. See generally Darien Shanske, *State Options After Wayfair*, MEDIUM (June 22, 2018), <https://medium.com/whatever-source-derived/state-options-after-wayfair-3bfe9c87eef5> [<http://perma.cc/3RUP-P7S6>] (advising states to “offer meaningful vendor reimbursement for compliance costs and/or free compliance software”).

230. See Tony Mauro & Marcia Coyle, *Supreme Court's Internet Sales Tax Ruling is Billion-Dollar Boon for States*, NAT'L L. J. (June 21, 2018), <https://www.law.com/nationallawjournal/2018/06/21/supreme-courts-internet-sales-tax-ruling-is-billion-dollar-boon-for-states/> [<http://perma.cc/T6QM-WVWX>] (“[T]he *Quill* decision was . . . giving [an] unfair advantage to internet retailers over brick-and-mortar stores that must pay sales tax.”).

231. See Brian Galle, Essay, *Kill Quill, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 161 (2018) (“Congress is not a fully trustworthy custodian of state taxing power.”).

232. James R. Eads Jr. & David F. Golden, *E-Commerce Taxation Issues for Online Businesses*, 5 GA. B.J. 14, 17 (2000) (stating Congress is in a better position to require the collection of e-commerce taxation from vendors).

likely.”<sup>233</sup> The Supreme Court did not clear up any confusion.<sup>234</sup> It has also failed to offer a clear alternative.<sup>235</sup>

Constructing a new approach requires a deeper analysis of *Wayfair*.<sup>236</sup> Many other states have adopted aggressive laws that test constitutional restrictions.<sup>237</sup> Texas needs to follow this trend because it is too early in the legislative process to know whether any of the proposed bills by Congress will be enacted or move forward at all. The Supreme Court is headed in the right direction, but it did not answer any questions regarding the substantial nexus debate. Instead, states will continue asking the same questions, but instead through the scope of economic nexus.<sup>238</sup>

Texas should move forward because this author does not believe *Wayfair* will negatively impact businesses or individuals. The Supreme Court did not impose any new tax on e-commerce. They are just changing regulations on how online retailers collect the sales tax that all other retailers have to collect.<sup>239</sup> One of the biggest reasons for the shift from brick-and-mortar stores to e-commerce is convenience, selection, and sometimes even lower costs.<sup>240</sup> Additionally, because legislation seems to be headed in the right direction to protect smaller businesses, I do not think it should raise concern.<sup>241</sup> South Dakota has received praise for setting a good example

233. Galle, *supra* note 231, at 162.

234. Bryan S. Masterson, *Collecting Sales and Use Tax on Electronic Commerce: E-confusion or E-collection*, 79 N.C. L. Rev. 203, 204–05 (2000) (providing an overview of the Streamlined Sales Tax System which was created to clarify the confusion arising from the tax regime at that time); Jeffrey Krasney, *Wayfair, Quill & The Physical Presence Test: Bright-Line Standard or Diminished Relevance Paradox*, 37 ABA TAX TIMES 17, 20 (2018) (“[C]ongress had chosen not to act. Congress is well aware that the change in landscape has been significant.”).

235. Matthew C. Boch, *Way(un)fair: United States Supreme Court Decision Ends State Tax Physical Presence Nexus Test*, 53 ARK. L. 18, 2522 (2018) (“*Wayfair* has overruled *Quill* but it has not provided a clear alternative, instead offering essentially a balancing test of contacts and burdens.”).

236. See generally Timothy M. Todd, *Supreme Court’s Quill and Wayfair Cases Explained*, FORBES (June 27, 2018, 2:26 PM), <https://www.forbes.com/sites/timtodd/2018/06/27/supreme-courts-quill-and-wayfair-cases-explained/#649c5fe772a4> [http://perma.cc/82W7-XAA7] (“After *Wayfair*, it’s a new world for online retailers.”).

237. See Soulsby, *supra* note 70, at 596–97 (discussing states adopting aggressive laws testing constitutional bounds).

238. See Maddison, *supra* note 33 (“[I]f [*Quill*]’s physical presence rule is retired, state courts will ask the same questions, but through the lens of ‘economic nexus.’”).

239. See Bishop-Henchman, *supra* note 139 (“Internet purchases were not exempt from tax, but in many cases it looked that way to consumers.”).

240. See *id.* (stating e-commerce sales will not suffer from any new taxes due to other benefits which make them still more favorable than brick-and-mortar stores).

241. See H.R. 6824, 115th Cong. (2d Sess. 2018) (setting forth the Online Sales Simplicity and Small Business Relief Act of 2018).

by including compliance software and simplified state rules in its provision.<sup>242</sup> Legislation has also been proposed to account for compliance costs and ease the transition.<sup>243</sup> Because states will be reaping the benefit of a potentially increased tax revenue, states should be required to pay or subsidize the cost of integrating tax collection software.<sup>244</sup>

It is “imperative that Congress use its constitutional power over interstate commerce to make clear, through legislation, what constitutes a sufficient nexus for a state to impose sales-tax.”<sup>245</sup> In creating legislation, Congress must also consider that there are several benefits to having tax revenue collected by someone other than the taxpayer: the tax is more likely to be paid because it is not their money, it reduces the number of people tax authorities must interact with to collect, and it reduces the risk of administrative problems because the taxes are collected by a third party.<sup>246</sup>

There are two prominent models that Texas could implement to future legislation to mandate sales tax for e-commerce.<sup>247</sup> Some states follow a notice and report model, which gives remote sellers the choice to “either pay a tax on their tangible goods or record customers and inform them that they have to pay.”<sup>248</sup> This Comment proposes Texas follow a model similar to South Dakota, one that generates revenue directly by mandating that retailers pay if they meet a revenue or sales quota, because such a model is more efficient.<sup>249</sup> States should also determine if an origin or destination-based tax is in its best interest.<sup>250</sup> Texas is currently an origin-based tax

242. See Bishop-Henchman et al., *supra* note 139 (“For instance, South Dakota gives immunity from audit to sellers who encounter errors made by sales tax software programs. It is likely that large e-commerce platforms will provide sales tax compliance services for their sellers.”).

243. See H.R. 6724, 115th Cong. (2d Sess. 2018) (setting forth the Protecting Businesses from Burdensome Compliance Cost Act).

244. See Bishop-Henchman et al., *supra* note 139 (“Sellers may need to monitor their new compliance requirements and seek a new software solution, but these costs can be minimized if states provide the necessary simplifications and protections.”).

245. Malagna, *supra* note 224.

246. Vetter, *supra* note 1, at 706.

247. See Taylor N. Armstrong & Caitlin E. Correa, *Revenue and Taxation: Sales and Use Taxes*, 35 GA. ST. U.L. REV. 187, 197 (2018) (“[I]here are two prominent models mandating sales tax for remote sellers.”).

248. *Id.* at 197.

249. See *id.* at 197–98 (2018) (“South Dakota’s model generates revenue directly through the online retailer by collecting and remitting a sales tax.”).

250. See Juliana Frenkel, *Something’s Gotta Give: Origin-Based E-Commerce Sales Tax*, 12 BROOK. J. CORP. FIN. & COM. L. 133, 133 (2017) (“[I]t is prudent for Congress to finally resolve the circuit split and agree on a unifying Online Sales Tax Law.”).



state, but it may be time to change if a uniform model is in sight.<sup>251</sup> A uniform law may be a viable resolution because it would minimize confusion and difficulty in administration across the country.<sup>252</sup>

The biggest concern in resolving the debate should consider any burdens on interstate commerce that may be created.<sup>253</sup> *Quill* is flawed because “[t]he Court’s reason cannot have been that the Commerce Clause shields remote vendors from paying the same taxes or bearing the same compliance obligations as do in-state vendors.”<sup>254</sup> The Supreme Court correctly overturned the physical presence rule because e-commerce should not be a venue to shelter taxes.<sup>255</sup> Such a rule holds states back from receiving additional tax revenue.<sup>256</sup> Even if “individual state residents legally owe use taxes,” many are confused about or simply ignore this responsibility.<sup>257</sup>

Further, use taxes are not efficient because it is based on an honor system.<sup>258</sup> It does not work “because individuals purposefully underreport their unverifiable use tax obligations for the year, or because they are genuinely ignorant to whether they owe the tax and, if so, on what.”<sup>259</sup> The primary burden in implementing *Wayfair* placed on taxpayers by states is to

251. See Mark Faggiano, *Origin-based and Destination-based Sales Tax Collection 101*, TAXJAR (Sept. 5, 2017), <https://blog.taxjar.com/charging-sales-tax-rates/> [<http://perma.cc/7GVU-MFX9>] (changing Texas’s tax laws may happen if there is a change to the model code).

252. See Sally P. Schreiber, *Supreme Court overrules Quill’s physical presence requirement*, J. ACCT. (June 21, 2018), <https://www.journalofaccountancy.com/news/2018/jun/supreme-court-sales-tax-decision-201819203.html> [<http://perma.cc/W6BK-C2LT>] (discussing a national standard for online sales and use tax collection).

253. See David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U.L. REV. 483, 486–87 (2012) (arguing that “interstate commerce is only burdened when an out-of-state vendor bears reporting or compliance costs as a result of a state’s imposing tax collection duties on the out of state vendor”).

254. *Id.* at 499.

255. See Clark Calhoun & Andy Yates, *Are New Tax Rules for Out-of-State Retailers Unconstitutional*, CFO (July 11, 2016), <http://ww2.cfo.com/tax/2016/07/new-tax-rules-state-retailers-unconstitutional/> [<http://perma.cc/H2GG-4GYK>] (describing the physical presence rule as an “unfair constraint” on the ability to collect sales tax).

256. See *Wayfair Ruling Overturns Quill Physical Presence Requirement*, GRANT THORNTON (June 25, 2018), <https://www.grantthornton.com/library/alerts/tax/2018/SALT/General/wayfair-ruling-overturns-quill-physical-presence-requirement.aspx> [<http://perma.cc/T6QC-53SU>] (“[P]hysical presence rule is moving further from economic reality and causing the states to experience significant sales tax revenue decreases.”).

257. Gamage & Heckman, *supra* note 253, at 502.

258. See Jennifer Weidler Karpchuk, *Farewell Physical Presence: Was the U.S. Supreme Court’s Decision Way off, or Way Fair*, 37 ABA TAX TIMES 13, 13 (2018) (describing the use tax system as an honor system that simply does not work).

259. *Id.*

comply with tax law and accessing the tax base.<sup>260</sup> If an undue burden results from *Wayfair*, it is because the states were left alone without financial help to support compliance and transition costs.

## V. CONCLUSION

“State governments and Congress must now focus on providing a workable tax framework so that state and local governments, businesses, and consumers can thrive in light of the [Supreme] Court’s most recent decision.”<sup>261</sup> A review of the information shows that *Wayfair* is moving in the right direction for the future of nexus and e-commerce tax laws. Historically, this topic has been revisited to keep up with social and technological advancements. Recognition of the burden and role that implementation will play on the government, economy, businesses, consumers, and practitioners will help to create better policy decisions in future legislative decisions. Consequently, there is still a need for reform as states individually and collectively implement *Wayfair*.

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260. See generally Hayes R. Holderness, *Questioning Quill*, 37 VA. TAX REV. 313, 331 (2018) (“[T]he basis of the substantial nexus requirement is to prevent undue burdens on taxpayers engaged in interstate commerce.”).

261. *Surma*, *supra* note 81, at 523.