

DING DONG *QUILL* IS DEAD: HOW *SOUTH DAKOTA V. WAYFAIR* ALTERS THE SUBSTANTIAL NEXUS TEST UNDER *COMPLETE AUTO*

ABSTRACT

We have been groomed from an early age, as consumers, to understand that the advertised price of an item is more often than not, not the actual price to be paid—the advertised price typically does not include state and local sales tax—\$.99 actually means more like \$1.08. However, in the world of e-commerce, the opposite is, or was, true. Since 1967, under the regime of *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, and its predecessor *Quill Corp. v. North Dakota*, a state could not impose or collect sales tax from an out-of-state or online retailer unless the retailer had a physical presence in that state. This standard was known as the physical presence rule. For online and out-of-state retailers, the physical presence rule served as a judicially created tax shelter that resulted in a discriminatory effect on in-state, brick-and-mortar retailers. For states and localities, the physical presence rule severely impeded the ability to generate tax revenue, which ultimately hindered the ability to provide fundamental public benefits and services.

Finally, in 2018, in *South Dakota v. Wayfair*, the U.S. Supreme Court overruled *National Bellas Hess* and *Quill*, consequently abrogating the physical presence rule. And, although this ruling was revolutionary and long overdue, it was also defective.

This Comment first argues that the Supreme Court correctly decided *Wayfair*. However, this Comment will also argue that, despite correctly deciding the case, the Supreme Court's replacement for the physical presence rule, the economic and virtual contacts rule, fails to provide intelligible guidance as to how to measure substantial nexus under *Complete Auto v. Brady*. Last, this Comment argues that the *Wayfair* economic and virtual contacts rule blurs the demarcation between the Commerce Clause and the Due Process Clause in the context of substantial nexus. Though case law suggests that *Complete Auto* interprets the Commerce Clause exclusively, *Wayfair* upsets that scheme and injects due process concerns into an examination of substantial nexus under *Complete Auto*. And thus, going forward, courts should look to due process principles, particularly those established in *International Shoe Co. v. Washington*, its progeny, and *World-Wide Volkswagen Corp. v. Woodson*, for guidance on how to apply the economic and virtual contacts rule in measuring when an out-of-state or online retailer's contacts with a state are such that a substantial nexus has been established.

TABLE OF CONTENTS

INTRODUCTION.....	262
I. BACKGROUND.....	264
<i>A. History and Constitutional Principles Regarding State Tax</i>	264
1. Origin and Basics of State Sales and Use Tax	264
2. Constitutional Limits on State Tax Jurisdiction	265
<i>B. A Survey of Case Law: The Constitutionality of Interstate Tax</i> ..	267
1. Constitutionality of Interstate Sales Tax and Use Tax Pre-Complete Auto	267
2. Constitutionality of Interstate Sales Tax and Use Tax Post-Complete Auto	271
II. <i>SOUTH DAKOTA V. WAYFAIR</i>	273
<i>A. Facts</i>	273
<i>B. Procedural History</i>	274
<i>C. Majority Opinion</i>	274
<i>D. Justice Thomas's Concurring Opinion</i>	276
<i>E. Justice Gorsuch's Concurring Opinion</i>	276
<i>F. Chief Justice Roberts's Dissent</i>	277
III. ANALYSIS	278
<i>A. National Bellas Hess and Quill Warranted Overruling</i>	279
1. The Physical Presence Rule Was a Virus that Plagued States' Economies	279
2. The Physical Presence Rule Violated the Dormant Commerce Clause	281
3. Physical Presence is Not a Necessary Interpretation of Substantial Nexus.....	282
<i>B. Substantial Nexus Post-Wayfair</i>	283
1. A Replacement Standard Without Instructions	283
2. Trimming the Standard: Virtual Contacts	285
<i>C. The Instructions We Need: International Shoe, its Progeny, and World-Wide Volkswagen</i>	286
1. The Door to Due Process is Propped Open.....	286
2. The Guiding Principles of <i>International Shoe</i> , its Progeny, and <i>World-Wide Volkswagen</i>	287
CONCLUSION.....	291

INTRODUCTION

It's the Thursday before a holiday weekend road trip, and it's time to stock up on snacks for the car ride. You head to the local dollar store, where a plethora of your favorite candies, chips, and the like greet you as you walk in. Each item is advertised as costing \$1.00. You fill your basket indiscriminately and justify it because eight items here would equal four items at the gas station, or even one item at the movie theater. As the cashier scans your items, you see the total for each item flash on the register: \$1.08. This was expected—though you're at the dollar store, nothing is

merely a dollar because of state sales tax—you’ve been groomed from an early age to understand this concept.

Now, imagine if this entire scenario were translated to an online retail experience at *fictionaldollarstore.com*.¹ Instead of making your way to the brick-and-mortar dollar store, you sit down in front of your computer and click your way through the aisles. After you fill your online shopping cart to the virtual brim, you click “check out.” Your screen changes to an itemization of each of the snacks in your shopping cart, and you are prompted to enter in your payment details. As you scroll through your items (eight of them), each one is listed as \$1.00, and your grand total is displayed as \$8.00. You click “pay now,” and a receipt shows that you have been charged \$8.00 exactly. You find it interesting that you are exempt from paying sales tax for the exact same things online, and you wonder why there is a line drawn in the sand—aren’t all retailers required to collect state sales tax?

The answer to this question was *no*, for the past twenty-five years.

Since 1967, under the regime of *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,² and its predecessor *Quill Corp. v. North Dakota*,³ a state could not impose or collect sales tax from an out-of-state or online retailer unless the retailer had a physical presence in that state. This standard was known as the physical presence rule.⁴ For online retailers, like *fictionaldollarstore.com*, the physical presence rule served as a judicially created tax shelter that resulted in a discriminatory effect on in-state, brick-and-mortar retailers.⁵ For states, the physical presence rule impeded the ability to generate tax revenue, which ultimately hindered states’ ability to provide public benefits and services.⁶

Finally, in 2018, the U.S. Supreme Court overturned *National Bellas Hess* and *Quill* in *South Dakota v. Wayfair*.⁷ The Supreme Court abrogated the physical presence rule and replaced it with the sufficient economic and virtual contacts rule.⁸ In doing so, the Supreme Court reinterpreted what constitutes a substantial nexus under *Complete Auto Transit, Inc. v. Brady*.⁹

1. For example’s sake, I am suspending the reality of shipping and handling costs.

2. 386 U.S. 753, 753 (1967), *overruled by* *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2087 (2018).

3. 504 U.S. 298, 301 (1992), *overruled by* *Wayfair*, 138 S. Ct. at 2087.

4. *Wayfair*, 138 S. Ct. at 2091.

5. *Id.* at 2100.

6. *Id.* at 2085–86.

7. *Id.* at 2084.

8. *Id.* at 2099.

9. *Wayfair*, 138 S. Ct. at 2099; 430 U.S. 274, 279 (1977). The *Complete Auto* test is used to examine the constitutionality of a state tax law that targets out-of-state retailers. The first prong of the five-part test requires that a substantial nexus exist between a retailer and the taxing state. In *National Bellas Hess* and *Quill*, the Court stated that a substantial nexus exists only when an out-of-state retailer has a physical presence in the taxing state.

This Comment will commence with a background that briefly details the history of state sales and use tax. The background will then survey the line of case law that has examined the constitutionality of state tax laws that target out-of-state retailers. This Comment will also summarize *South Dakota v. Wayfair*'s majority opinion, as well as the concurrences authored by Justice Thomas and Justice Gorsuch, and the dissent authored by Chief Justice Roberts. This Comment will then transition to an analysis section, which first argues that the Supreme Court correctly decided *Wayfair*. However, this Comment will also argue that despite correctly deciding the case, the Supreme Court failed to replace the physical presence rule with a new rule that provides clear guidance as to how to measure substantial nexus under *Complete Auto*.

Last, this Comment argues that the *Wayfair* economic and virtual contacts rule blurs the demarcation between the Commerce Clause and the Due Process Clause in the context of substantial nexus. Though case law suggests that *Complete Auto* interprets the Commerce Clause exclusively, *Wayfair* upsets that scheme and injects due process concerns into an examination of substantial nexus under *Complete Auto*. And thus, going forward, courts should look to due process principles, particularly those established in *International Shoe Co. v. Washington (International Shoe)*,¹⁰ its progeny, and *World-Wide Volkswagen Corp. v. Woodson*,¹¹ for better guidance on when a substantial nexus between a retailer and a taxing state exists.

I. BACKGROUND

A. History and Constitutional Principles Regarding State Tax

First, this Section introduces the notion that states have the implicit power to impose and collect a variety of taxes. Second, this Section provides a general overview of state sales and use tax. Last, this Section closes with a discussion of how the Commerce Clause and the Due Process Clause limit a state's ability to impose tax obligations.

1. Origin and Basics of State Sales and Use Tax

When the U.S. Constitution was ratified in 1788, the federal government was granted the authority to "lay and collect Taxes."¹² And, while the federal government had an express grant of power to impose and collect taxes, the states did not.¹³ However, the federal government has always recognized the states' powers to tax because the states, formerly the thirteen colonies, had the power to tax before the U.S. Constitution was

10. 326 U.S. 310, 311 (1945).

11. 444 U.S. 286, 287 (1980).

12. U.S. CONST. art. I, § 8, cl. 1.

13. *State and Local Taxes*, U.S. DEP'T OF TREASURY, <https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx> (last updated Dec. 5, 2010) (the U.S. Constitution is devoid of a clause that grants the states with the express power to impose and collect tax).

ratified—under the Constitution’s Tenth Amendment, the states reserved whatever powers they had that were not expressly granted to the federal government.¹⁴ Therefore, the states retained their own power to tax, subject to other constitutional limitations.¹⁵

Among the common types of taxes that states impose are personal income tax, corporate income tax, real property tax, sales tax, and use tax.¹⁶ Sales tax and use tax are specifically relevant to this Comment. A sales tax is a tax levied on the sale of goods and services.¹⁷ In addition to sales tax, many states also have use tax.¹⁸ A use tax is imposed on transactions subject to sales tax but for which sales tax is not actually charged.¹⁹ Use tax “makes up” for the sales tax that was not charged, and is generally collected from end users, whether individuals or businesses, on items that are purchased out-of-state and that will be used, stored, or consumed in the state in which the end user lives or does business.²⁰ However, end users often fail to pay use tax because states are generally unaware of the out-of-state purchases, and the burden to calculate and remit the tax is solely on the purchaser.²¹ Moreover, states have generally “given up” on trying to enforce use tax, so many end users do not feel the pressure to adhere to use tax regulations in the same way as income tax regulations.²² In fact, as a result of this systemic noncompliance, many states have begun to impose use tax obligations on vendors instead of purchasers or end users.²³

2. Constitutional Limits on State Tax Jurisdiction

The Due Process Clause of the Fourteenth Amendment and the Commerce Clause limit a state’s power to impose and collect tax.²⁴ Commerce Clause case law establishes that state laws are governed specifically by the

14. U.S. CONST. amend. X.; *State and Local Taxes*, *supra* note 13.

15. *State and Local Taxes*, *supra* note 13.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. James L. Wood, *General Sales and Use Taxes and Commerce Clause*, 32 CALIF. L. REV. 281, 281 (1944) (“the object of use take is to complement the sales tax by taxing the use of property purchase at retail which has for some reason escaped the local sales tax, in an attempt to place all persons selling to local purchasers in the same competitive position.”); Gail Cole, *Do You Know the Difference Between Sales Tax and Use Tax?*, AVALARA (Apr. 23, 2019), <https://www.avalara.com/us/en/blog/2019/04/what-businesses-need-to-know-about-sales-tax-consumer-use-tax-and-seller-use-tax.html>. For example, I am a Colorado resident. Colorado charges a 2.9% sales tax. If I bought a candle from an online vendor that does not collect Colorado sales tax, I would technically owe Colorado a use tax of 2.9% of the purchase price.

21. See *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2088 (2018) (“[a state] must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. The impracticability of this collection from the multitude of individual purchasers is obvious.”); see also Chana Joffee-Walt, *Most People Are Supposed to Pay This Tax. Almost Nobody Actually Pays It*, NPR (Apr. 16, 2013, 3:55 AM), <https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax>.

22. Joffee-Walt, *supra* note 21.

23. *Id.*; see *infra* p. 267 and note 35.

24. U.S. CONST. amend. XIV, § 1; *Id.* art. I, § 8, cl. 3; WALTER HELLERSTEIN, *STATE TAXATION* §19.02, at 17 (3d ed. 2018); *State and Local Taxes*, *supra* note 13 (the respective state constitutions also govern the states’ power to tax).

negative aspect of the Commerce Clause, commonly known as the Dormant Commerce Clause.²⁵ The Dormant Commerce Clause stands for the principle that a state law is unconstitutional if it places an undue burden on interstate commerce.²⁶ The central question in a Dormant Commerce Clause analysis is: does a state law discriminate against out-of-staters such that the law constitutes an undue burden on interstate commerce?²⁷ If a state law explicitly distinguishes between in-staters and out-of-staters, it is facially discriminatory and unconstitutional per se unless the state can demonstrate that the law serves a legitimate and important government interest, and that there is no less discriminatory alternative.²⁸ However, if the state law is facially neutral, meaning it applies equally to in-staters and out-of-staters, the law will only be considered unconstitutional if it has a discriminatory effect, and the burden on in-state commerce outweighs the legitimate and important state interest.²⁹

The Due Process Clause, in the context of state taxing authority, centrally concerns whether an “[out-of-state] individual’s connections with a state are substantial enough to legitimate that [s]tate’s exercise of power over him.”³⁰ General principles of personal jurisdiction provide standards for measuring conformity with due process.³¹ The state where an individual is domiciled retains general jurisdiction over that individual.³² Similarly, the state where a business entity is incorporated, and where that entity’s principal place of business is, retains general jurisdiction over that entity.³³ Where a state retains general jurisdiction over an individual or business entity, that jurisdiction or exercise of state power is always considered in conformity with due process.³⁴ Thus, a resident of South Dakota does not have standing to challenge a South Dakota sales tax law under the Due Process Clause because South Dakota has general jurisdiction over that resident.³⁵

A complication arises when a state seeks to impose and collect tax from an out-of-state individual or entity. Traditionally, a state’s power is

25. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause & the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 575–79 (1987).

26. See *South Carolina State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 189–90 (1938).

27. See *id.*; see also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 (1978); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 787 (1945).

28. See *City of Philadelphia*, 437 U.S. at 617.

29. See *Barnwell Bros., Inc.*, 303 U.S. at 189; *S. Pac. Co.*, 325 U.S. at 761.

30. HELLERSTEIN, *supra* note 24, at 8.

31. *Id.* at 16.

32. See *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945); *Pennoyer v. Neff*, 95 U.S. 714, 723 (1878).

33. *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014).

34. See *Int’l Shoe Co.*, 326 U.S. at 315–16.

35. According to *Int’l Shoe Co.*, general jurisdiction always comports with “traditional notions of fair play and substantial justice.” *Id.* at 158; see also *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 345 (1954) (“Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally reciprocal duties of protection by the state and of allegiance and support by the citizen.”).

confined within the limits of its territory.³⁶ However, a state may exercise power over an out-of-state individual or entity only if that exercise of power does not violate due process.³⁷ Thus, when a state exercises its power over an out-of-state individual or entity based on the individual or entity's activities in the state, that state would be exercising specific jurisdiction.³⁸

Specific jurisdiction is governed by *International Shoe*.³⁹ *International Shoe* stands for the principle that, for a state to exercise power over an out-of-state individual or entity, that individual or entity must have sufficient minimum contacts with the state.⁴⁰ This governing principle ensures that the maintenance of the suit (or tax) does not offend traditional notions of fair play and substantial justice.⁴¹ Thus, if an individual travels into South Dakota and buys a bag of Sour Patch Kids at a dollar store, South Dakota is constitutionally permitted to charge and collect sales tax from that individual.⁴² This example does not present a complicated analysis of due process. However, the same cannot be said of a situation involving out-of-state and online retailers.

B. A Survey of Case Law: The Constitutionality of Interstate Tax

This Section surveys the case law that has wrestled with the constitutionality of state tax laws that target out-of-state retailers. This Section first discusses the pre-*Complete Auto* view of the constitutionality of state tax, with particular attention directed towards *National Bellas Hess* and the origin of the physical presence rule. This Section then transitions to a discussion of *Complete Auto*, accompanied by an overview of the constitutionality of state tax post-*Complete Auto*. This Section wraps up with a discussion of *Quill*, with particular focus placed on the Court's interpretation of the constitutional principles underlying the physical presence rule.

1. Constitutionality of Interstate Sales Tax and Use Tax Pre-*Complete Auto*

McLeod v. J.E. Dilworth Co.,⁴³ and *General Trading Co. v. State Tax Commission of Iowa*⁴⁴ established the constitutional framework governing

36. See *Pennoyer*, 95 U.S. at 714.

37. *Id.* at 715.

38. See *Daimler AG*, 571 U.S. at 127.

39. See *Burnham v. Super. Ct. of Cal., Cty. of Marin*, 495 U.S. 604, 606 (1990) (where the U.S. Supreme Court affirmed that transient jurisdiction was a valid exercise of state jurisdiction under *Pennoyer*); but see *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (standing for the principle that all exercises of state jurisdiction must be evaluated according to the standards set for in *Int'l Shoe Co.*, and its progeny); *Int'l Shoe Co.*, 326 U.S. at 316.

40. See *Int'l Shoe Co.*, 326 U.S. at 316.

41. *Id.*

42. *Id.* at 323–25; see *Hanson v. Deckla*, 357 U.S. 235, 251–53 (1958) (a passive contact is not sufficient to satisfy the minimum contact standard. An individual must “purposefully avail” himself of the enjoyment of conducting activities within the state).

43. 322 U.S. 327 (1994).

44. 322 U.S. 335 (1994).

the taxation of interstate retail transactions under the Commerce Clause.⁴⁵ Under *McLeod* and *General Trading*, the Commerce Clause forbade the taxation of interstate sales because a tax on interstate sales was a tax on interstate commerce itself.⁴⁶ On the other hand, a use tax on property that was the subject of an interstate sale did not offend the Commerce Clause because the taxable event was the local use of property that lay within the state's taxing jurisdiction.⁴⁷

Significantly, *McLeod* and *General Trading* did not define precisely what contacts an out-of-state vendor must have had with the taxing state to justify a state's imposition of a use tax.⁴⁸ Thus, the critical constitutional question that dominated efforts to enforce use tax collection following *McLeod* and *General Trading* was whether an out-of-state vendor had a sufficient connection with the taxing state that would validate the state's imposition of a use tax collection duty.⁴⁹

*Miller Brothers Co. v. Maryland*⁵⁰ established the constitutional framework governing the taxation of interstate retail transactions under the Due Process Clause.⁵¹ *Miller Brothers Co.* was a Delaware store that sold a variety of merchandise to consumers in Delaware and Maryland.⁵² *Miller Brothers Co.* did not accept phone or mail orders, but it did solicit and advertise business via newspaper, mail, and radio.⁵³ Some of its advertisements reached Maryland residents who would visit the store in Delaware, make purchases, and then return to Maryland.⁵⁴ The customers would either take their purchases with them or have them delivered by a common carrier or a truck owned and operated by *Miller Brothers Co.*⁵⁵

Maryland levied a use tax on its residents, requiring all vendors—regardless of where they were—who sold goods to Maryland residents to collect the use tax.⁵⁶ *Miller Brothers Co.* did not collect the Maryland use tax.⁵⁷ And thus, on one occasion when a *Miller Brothers Co.* truck entered

45. *McLeod*, 322 U.S. at 328–30; *Gen. Trading Co.*, 322 U.S. at 339–40; HELLERSTEIN, *supra* note 24, at 1.

46. *McLeod*, 322 U.S. at 330–32; *Gen. Trading Co.*, 322 U.S. at 338.

47. *McLeod*, 322 U.S. at 331–32; *Gen. Trading Co.*, 322 U.S. at 336.

48. In *General Trading Co.*, the Court held that the presence of an out-of-state vendor's traveling sales representatives in the state was enough to satisfy Due Process and Commerce Clause concerns. 322 U.S. at 338.

49. HELLERSTEIN, *supra* note 24, at 2; Wood, *supra* note 20, at 287–88 (“it must be assumed...that where a state purports to tax a sale as did Arkansas in the [McLeod] case, the sale must take place within the state, using “both business and legal notions” to determine where it takes place. One objection to the limitation is that the test to determine where the sale takes place is vague. If the majority opinion in the [McLeod] case is an indication, the method apparently involves a balancing of the various attributes of the transaction which takes place in each state, such as passage of title, delivery, making of contract, and payment, and the place of business of the seller.”).

50. 347 U.S. 340 (1954).

51. *Miller Bros. Co.*, 347 U.S. at 341.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

Maryland to make a delivery, the state of Maryland seized it.⁵⁸ The seizure prompted Miller Brothers Co. to challenge the constitutional validity of the Maryland use tax under the Due Process Clause.⁵⁹ Though the lower court held the Maryland use tax constitutionally valid, the U.S. Supreme Court held that the use tax violated due process because Miller Brothers Co. did not purposefully avail itself of the privilege of doing business in Maryland simply by utilizing a common carrier or delivering goods into the state.⁶⁰ Thus, *Miller Brothers Co.* stands for the rule that, in consideration of state tax jurisdiction, “due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”⁶¹

Thus, the pre-*Complete Auto* framework for the constitutionality of state tax was split between (1) *McLeod* and *General Trading*, which interpreted the Commerce Clause; and (2) *Miller Brothers Co.*, which interpreted the Due Process Clause.⁶² *McLeod* and *General Trading* barred a state from imposing an interstate sales tax but validated a state’s general imposition of use tax.⁶³ *Miller Brothers Co.* reigned in use tax under *McLeod* and *General Trading* and held that use tax must also comport with due process in that there must be a “definite link” between the taxpayer and the state.⁶⁴

Operating under the pre-*Complete Auto* view of the Commerce Clause and Due Process Clause, in 1967, the Supreme Court decided *National Bellas Hess, Inc. v. Department of Revenue of Illinois*.⁶⁵ *National Bellas Hess* is the origin of the physical presence rule.⁶⁶

At issue in *National Bellas Hess* was whether a state could require an out-of-state, mail-order vendor, with no physical presence in the state, to collect a use tax on goods sold to in-state purchasers.⁶⁷ *National Bellas Hess* was a mail-order business incorporated in Delaware, with its principal place of business in Missouri.⁶⁸ *National Bellas Hess* did not maintain a sales office, or corporate office, or any other place of business in Illinois; nor did it have any employees or any tangible property, real or personal, in Illinois.⁶⁹ Despite the company’s lack of material presence in Illinois,

58. *Id.*

59. *Id.* (Miller Brothers Co. challenged the use tax under the Commerce Clause as well, but the Court declined to reach a decision based on its Due Process holding. It is likely that Miller Bros Co. would have lost its Commerce Clause argument because of the broad scope of the constitutionality of use tax established in *McLeod* and *General Trading Co.*).

60. *Id.* at 345, 352.

61. *Id.* at 344–45.

62. See HELLERSTEIN, *supra* note 24, at 2.

63. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1994); *General Trading Co. v. State Comm’r of Iowa*, 322 U.S. 335, 336 (1994)..

64. *Miller Bros. Co.*, 347 U.S. at 344–45.

65. *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 760 (1967), *overruled by* *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2087 (2018).

66. *Nat’l Bellas Hess, Inc.*, 386 U.S. at 754, 759–60.

67. *Id.* at 753–54.

68. *Id.*

69. *Id.* at 754.

the state of Illinois sought to compel National Bellas Hess to collect a use tax on goods sold to Illinois purchasers under the Illinois Use Tax Act, which specifically imposed use tax liability on out-of-state, mail-order firms.⁷⁰ National Bellas Hess refused to collect the use tax, and Illinois subsequently brought an action seeking to compel compliance.⁷¹ The case made its way up to the Illinois Supreme Court, ruling in favor of the State.⁷²

The U.S. Supreme Court granted certiorari and reversed.⁷³ After reiterating that the constitutionality of a state use tax is measured under the Commerce Clause and the Due Process Clause, and after specifically reiterating the *Miller Brothers Co.* due process test (that a definite link or minimum connection between the out-of-state vendor and the state was a prerequisite to imposing the duty to collect use tax on a vendor), the Court concluded that Illinois had exceeded the limits of its jurisdiction.⁷⁴ The Court stated that it “never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.”⁷⁵

The Court also concluded that Illinois’s use tax placed an undue burden on interstate commerce and was, thus, unconstitutional under the Commerce Clause.⁷⁶ The Court found that the many variations in tax rates, allowable exemptions, and administrative and record-keeping requirements could “entangle National[] [Bellas Hess’s] interstate business into a virtual welter of complicated obligations to local jurisdictions.”⁷⁷ The Court also concluded that a state’s imposition of a use tax on an out-of-state retailer was constitutional only when that retailer maintained a physical presence in the taxing state.⁷⁸ This conclusion became known as the physical presence rule.⁷⁹

Significantly, the Court never indicated that there was any distinction between an analysis of the Due Process Clause and an analysis of the Commerce Clause under the physical presence rule.⁸⁰ This lack of distinction made physical presence a bright-line rule for determining the constitutionality of state tax.⁸¹ If an out-of-state retailer maintained a physical presence in a taxing state, Due Process and Commerce Clause concerns were both

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 760.

74. *Id.*; see HELLERSTEIN, *supra* note 24, at 3.

75. *Nat’l Bellas Hess*, 386 U.S. at 758.

76. *Id.* at 759–60.

77. *Id.*

78. *Id.* at 758.

79. *Id.*

80. *Id.* at 756, 760; see HELLERSTEIN, *supra* note 24, at 6.

81. See HELLERSTEIN, *supra* note 24, at 6, 10.

satisfied.⁸² If an out-of-state retailer did not maintain a physical presence, neither the Due Process Clause nor the Commerce Clause was satisfied.⁸³

2. Constitutionality of Interstate Sales Tax and Use Tax Post-*Complete Auto*

In 1977, the Supreme Court rejected *McLeod* and *General Trading*'s proscription against the direct taxation of interstate commerce (interstate sales tax) in *Complete Auto Transit, Inc. v. Brady*.⁸⁴ In *Complete Auto*, the Court prescribed a four-part test for measuring the constitutionality of an interstate sales tax under the Commerce Clause.⁸⁵ Under *Complete Auto*, an interstate sales tax is valid when the tax: (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State.⁸⁶

The *Complete Auto* test is still used to examine the constitutionality of an interstate sales tax under the Commerce Clause.⁸⁷ Moreover, though *Miller Brothers Co.* examined the constitutionality of use tax under the Due Process Clause, it is now also used to examine the constitutionality of an interstate sales tax.⁸⁸

In 1992, the U.S. Supreme Court considered *Quill Corp. v. North Dakota*.⁸⁹ The facts in *Quill* were essentially identical to those in *National Bellas Hess*.⁹⁰ In response to North Dakota's attempt to compel Quill Corp. to collect use tax, Quill Corp. challenged the constitutionality of North Dakota's use tax regime under the Commerce Clause and the Due Process Clause.⁹¹ The North Dakota Supreme Court surprisingly upheld the use tax under the Due Process Clause and the Commerce Clause.⁹² The North Dakota Supreme Court recognized its departure from *stare decisis* and justified its departure from *National Bellas Hess* on two grounds.⁹³ First, it reasoned that the economic, social, and commercial landscape

82. *Nat'l Bellas Hess*, 386 U.S. at 756, 760; see HELLERSTEIN, *supra* note 24, at 6.

83. See HELLERSTEIN, *supra* note 24, at 3.

84. *Id.*

85. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (the test focused on the Commerce Clause because *McLeod* and *General Trading Co.* invalidated interstate sales tax because the Court viewed that such a tax placed an undue burden on interstate commerce).

86. *Id.*

87. *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2085 (2018).

88. *Id.* at 2093 (*Miller Bros. Co.* was decided under the regime of *McLeod* and *General Trading Co.*, where interstate sales tax was unconstitutional per se under the Commerce Clause).

89. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992), *overruled by Wayfair*, 138 S. Ct. at 2099.

90. Quill Corporation was an Illinois-based vendor of office equipment and supplies. Its only contacts with North Dakota were via mail, telephone, or common carrier. Despite its lack of material presence in the state, North Dakota passed legislation that required any retailer engaging in "regular or systematic solicitation of a consumer market in th[e] state," which included three or more advertisements within a twelve-month period, to collect use tax. Quill Corporation refused to collect the use tax, and North Dakota subsequently sought compliance through a declaratory judgment action.

91. *Quill*, 504 U.S. at 301.

92. *Id.* at 301–02.

93. *Id.* at 303.

upon which *National Bellas Hess* was premised no longer existed because the mail-order market had grown “from a relatively inconsequential market niche in 1967” to a goliath with annual sales of close to \$200 billion in the late '80s and early '90s.⁹⁴ Second, and most importantly, the court reasoned the legal landscape had been substantially altered since *National Bellas Hess* was decided.⁹⁵

With respect to the Commerce Clause specifically, the North Dakota Supreme Court noted that *Complete Auto* marked the U.S. Supreme Court’s adoption of a new standard for examining the constitutionality of a state tax under the Commerce Clause.⁹⁶ With respect to the Due Process Clause, the North Dakota Supreme Court noted that *International Shoe* revolutionized due process doctrine—the court was now guided by the principle that if an out-of-state corporation purposefully availed itself of the benefits of an economic market in the forum state, that corporation subjected itself to the state’s in personam jurisdiction even if it had no physical presence in the forum state.⁹⁷

Recognizing the new era, the North Dakota Supreme Court found that Quill Corp.’s pervasive and highly profitable marketing campaign directed at North Dakota satisfied both Due Process and Commerce Clause concerns, despite the fact that Quill Corp. did not maintain a physical presence in North Dakota.⁹⁸

The U.S. Supreme Court followed in close step of the North Dakota Supreme Court, and overturned *National Bellas Hess*’s due process holding: “[To] the extent that our decisions have indicated that the Due Process Clause required physical presence in the State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by the developments in the law of due process.”⁹⁹ However, despite abrogating *National Bellas Hess*’s due process holding, the Court departed from the North Dakota Supreme Court and reaffirmed *National Bellas Hess*’s Commerce Clause holding (the physical presence rule).¹⁰⁰

As evidenced by its distinctive holdings, the *Quill* Court analyzed substantial nexus independently under the Commerce Clause and the Due Process Clause.¹⁰¹ The *Quill* Court determined that the standards governing substantial nexus under the Commerce Clause and the Due Process Clause were not identical because the underlying constitutional concerns

94. *Id.*

95. *Id.*

96. *Id.* at 310–11.

97. *Id.* at 306–07 (citing the principles established by *Int’l Shoe Co.*, and its progeny).

98. *Id.* at 304.

99. *Id.* at 308.

100. *Id.* at 318–19.

101. *Id.* at 305.

and policies were fundamentally different.¹⁰² Thus, whereas *National Bellas Hess* did not distinguish between the Commerce Clause and the Due Process Clause in regard to substantial nexus, *Quill* did.¹⁰³

Twenty years after *Quill*, Justice Kennedy, who authored *Wayfair*, endorsed overturning *National Bellas Hess* and *Quill* in his concurring opinion in *Direct Marketing Association v. Brohl*.¹⁰⁴ Justice Kennedy's suggestion that *National Bellas Hess* and *Quill* were ripe for reconsideration was taken as an invitation for judicial challenge, and states around the nation subsequently enacted "kill-*Quill*" legislation.¹⁰⁵ South Dakota was one such state.

II. SOUTH DAKOTA V. WAYFAIR

A. Facts

South Dakota, concerned with lack of sales tax revenue being generated from out-of-state and online sellers, began its 2016 legislative session with the mission to challenge the sales tax regime developed under *National Bellas Hess* and *Quill*.¹⁰⁶ Senate Bill 106 (S.B. 106) embodied that mission and provided that "any sellers of 'tangible personal property' in South Dakota without a 'physical presence in the state . . . shall remit' sales tax according to the same procedures as sellers with 'a physical presence.'"¹⁰⁷ The bill limited the "obligation to sellers with 'gross revenue' from sales in South Dakota of over \$100,000.00 per calendar year or with 200 or more 'separate transactions' in the state within the same time frame."¹⁰⁸ The bill also authorized the State to bring a declaratory judgment action in South Dakota state court to establish the validity of the tax obligation under state and federal law.¹⁰⁹

S.B. 106 passed the South Dakota Senate and the House of Representatives with large majorities and was signed into law by the Governor on March 22, 2016.¹¹⁰ Shortly thereafter, the South Dakota Department of Revenue issued written notices to out-of-state and online retailers it believed met the bill's requirements.¹¹¹ "The notices[] informed the sellers

102. *Id.*

103. *Id.*

104. 135 S. Ct. 1124, 1127–28, 1134–35 (2015) (Kennedy, J., concurring) (In 2010, the state of Colorado passed a law that required out-of-state vendors to collect and provide information to its citizens regarding their total purchases, so that the residents could determine their tax liability for the state. Colorado arguably passed the law because *Quill* prevented the state from collecting sales tax or forcing Colorado citizens to pay use tax for purchases made out-of-state. The Court upheld the law in the face of a Dormant Commerce Clause challenge).

105. Rebecca Newton-Clarke, *Nexus Consideration: Navigating the "Kill Quill" Revolt*, 29 THOMSON REUTERS CHECKPOINT: STATE AND LOCAL TAXES WEEKLY, Jan. 22, 2018, at 1, 1–5.

106. *State v. Wayfair*, 901 N.W.2d 754, 756 (N.D. 2017); S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).

107. *Wayfair*, 901 N.W.2d at 758; S.B. 106, § 1.

108. *Wayfair*, 901 N.W.2d at 758; S.B. 106, § 1.

109. *Wayfair*, 901 N.W.2d at 756; S.B. 106, § 2.

110. *Wayfair*, 901 N.W.2d at 759.

111. *Id.* at 756, 759.

of the passage of the law; explained the requirements; advised the sellers to register for South Dakota sales tax licenses; and warned that the failure to register could result in a declaratory judgment action, as authorized by the . . . [bill itself].”¹¹² The respondent retailers, Wayfair, Inc., Overstock.com, Inc., NewEgg, Inc., and Systemax, Inc., refused to register for South Dakota sales tax licenses.¹¹³

B. Procedural History

Prompted by Wayfair, Inc., Overstock.com, Inc., NewEgg, Inc., and Systemax, Inc.’s refusal to register for South Dakota sales tax licenses, South Dakota commenced a declaratory judgment action in South Dakota state court (circuit court) seeking compulsory compliance.¹¹⁴ The respondent retailers subsequently argued that S.B. 106 was unconstitutional under the Commerce Clause and moved for summary judgment.¹¹⁵ The circuit court, adhering to U.S. Supreme Court precedent (*Quill*), granted summary judgment and enjoined South Dakota from enforcing S.B. 106.¹¹⁶ The State timely appealed to the Supreme Court of South Dakota.¹¹⁷ The Supreme Court of South Dakota, like the circuit court, acknowledged that *Quill* remained controlling precedent at the time, and affirmed that S.B. 106 offended the Commerce Clause.¹¹⁸ The State then appealed to the U.S. Supreme Court, who granted certiorari.¹¹⁹

C. Majority Opinion

Justice Kennedy delivered the opinion of the Court, in which Justices Alito, Ginsburg, Thomas, and Gorsuch joined.¹²⁰ The Court vacated the judgment of the Supreme Court of South Dakota and remanded the case.¹²¹

Justice Kennedy introduced the majority opinion with an explanation that the Court granted certiorari to reconsider the scope and validity of the physical presence rule.¹²² In doing so, Justice Kennedy established the central issue of the case: whether, under the Commerce Clause, a state can require an out-of-state seller with no physical presence in the state to collect and remit sales tax.¹²³

112. *Id.* at 759.

113. *Id.*

114. *Id.* (stating, “Following service of the State’s complaint, Systemax, Inc. voluntarily registered for a [South Dakota] sales tax license and immediately began collecting taxes” pursuant to S.B. 106. The State subsequently dismissed Systemax from the lawsuit).

115. *Id.* at 759–60.

116. *Id.* at 760.

117. *Id.*

118. *Id.* at 763 (emphasizing, particularly, if it offended the Dormant Commerce Clause).

119. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2088 (2018).

120. *Id.* at 2087.

121. *Id.* at 2100 (the Court remanded the case back to South Dakota courts for determination of whether the legislation violates any other constitutional provisions besides the Commerce Clause and the Due Process Clause).

122. *Id.* at 2088.

123. *Id.* at 2087–88.

After briefly surveying the line of case law that wrestled with the constitutionality of interstate sales tax under the Commerce Clause, Justice Kennedy initiated an exacting critique of *Quill* where he foreshadowed the main holding of the case: that *National Bellas Hess* and *Quill* were overruled.¹²⁴

First, Justice Kennedy undermined the *Quill* Court's reason for validating the physical presence rule.¹²⁵ He explained that the administrative costs of compliance with the multitude of tax jurisdictions within a state did not place an undue burden on interstate commerce such that it violated the Commerce Clause.¹²⁶ Justice Kennedy pointed out that the Internet and modern technology largely eased the burden of compliance, and more importantly, that the costs of compliance are largely unrelated to whether a company happens to have a physical presence in a state.¹²⁷

Second, Justice Kennedy explained that *Quill* created, rather than resolved, market distortions.¹²⁸ Justice Kennedy pointed out that *Quill* came to serve as a judicially created tax shelter for businesses that decided to limit their physical presence and still sell their goods and services to a state's consumers.¹²⁹ In turn, the tax shelter affected states' ability to generate and maintain a tax base.¹³⁰ Justice Kennedy highlighted that the large discrepancy between online revenue and state sales tax generated from that revenue meant that states were being locked out of potential funds that would assist them in subsidizing essential services and public resources.¹³¹

Third, Justice Kennedy explained that *Quill* prohibited states from exercising their lawful sovereign powers, and that the physical presence rule represented a false constitutional premise of the Supreme Court's own creation.¹³² Justice Kennedy ended his exhaustive critique of the physical presence rule with the explicit overruling of *National Bellas Hess* and *Quill*.¹³³

Rather than merely abrogating *National Bellas Hess* and *Quill*, and the physical presence rule, the majority also offered an updated interpretation of substantial nexus.¹³⁴ Justice Kennedy first reiterated that *Complete Auto* is the accepted framework for evaluating the constitutionality of state taxation.¹³⁵ Second, Justice Kennedy stated that the substantial nexus prong of the *Complete Auto* test embodies both Due Process and

124. *Id.* at 2087–92.

125. *Id.* at 2092.

126. *Id.* at 2093.

127. *See id.*

128. *Id.* at 2092, 2094.

129. *Id.* at 2094.

130. *Id.* at 2095–97.

131. *Id.* at 2095–96.

132. *Id.* at 2096–97.

133. *Id.* at 2099.

134. *See id.*

135. *Id.* at 2091, 2099.

Commerce Clause considerations.¹³⁶ This statement was a clear departure from *Quill*'s discrete treatment of substantial nexus. Third, Justice Kennedy concluded that substantial nexus, under *Complete Auto*, is satisfied when a taxpayer has sufficient "economic and virtual contacts" with the taxing state.¹³⁷ This conclusion is now known as the economic and virtual contacts rule, and it replaces the physical presence rule.¹³⁸

Justice Kennedy then exemplified how S.B. 106 satisfied the majority's new rule.¹³⁹ Recall that S.B. 106 stated that an out-of-state merchant would be required to collect and remit sales tax only when that seller delivered more than \$100,000 of goods or services into South Dakota or engaged in 200 or more separate transactions for the delivery of goods and services into the state on an annual basis.¹⁴⁰ Justice Kennedy concluded that those thresholds satisfy the economic and virtual contacts rule because such a "quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in" that state.¹⁴¹ Justice Kennedy inferred that the thresholds created by the South Dakota legislature served as a legitimate bar for measuring the sufficiency of a retailer's contacts.¹⁴²

Despite the clarity supposedly provided by South Dakota's legislative thresholds, it is critical that the majority only provided an example of what would satisfy the economic and virtual contacts rule. The majority did not lay out a framework or give guidelines on how to actually determine whether an out-of-state seller has sufficient economic and virtual contacts with the taxing state such that a state could justifiably impose a tax collection obligation.

D. Justice Thomas's Concurring Opinion

Justice Thomas authored a short concurring opinion.¹⁴³ Justice Thomas acknowledged that he previously joined the majority opinion in *Quill* and voted to affirm *National Bellas Hess*.¹⁴⁴ Justice Thomas recanted his support for *Quill* and *National Bellas Hess* and lamented that he should have joined Justice White's dissenting opinion.¹⁴⁵

E. Justice Gorsuch's Concurring Opinion

Justice Gorsuch, like Justice Thomas, authored a short concurring opinion.¹⁴⁶ Justice Gorsuch highlighted Justice White's astute criticism

136. *Id.* at 2085.

137. *Id.* at 2099.

138. HELLERSTEIN, *supra* note 24, at 12–13, 15.

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

140. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).

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

142. *See id.*

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

144. *Id.*

145. *Id.*

146. *Id.* (Gorsuch, J., concurring).

that *National Bellas Hess* and *Quill* formed a “judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals.”¹⁴⁷

Justice Gorsuch notably distanced himself from the majority opinion’s discussion of the Dormant Commerce Clause, apparently revealing his disagreement with the doctrine.¹⁴⁸

F. Chief Justice Roberts’s Dissent

Chief Justice Roberts authored a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.¹⁴⁹ Chief Justice Roberts wove an institutional competency argument throughout his dissent, arguing that because Congress has plenary power to regulate commerce among the States, Congress should establish the rules regarding state tax jurisdiction, not the Judiciary.¹⁵⁰ Chief Justice Roberts had various other reasons for dissenting as well.

First, Chief Justice Roberts argued that e-commerce developed against the backdrop of established rules like the physical presence rule, and that abrogating it would disrupt a critical segment of its foundation.¹⁵¹ Second, Chief Justice Roberts argued that the majority offended *stare decisis*—overruling two landmark cases jeopardized the tradition and legitimacy of the Court.¹⁵² Third, Chief Justice Roberts highlighted that Justice Kennedy was already poised to upend *National Bellas Hess* and *Quill* and objected to the majority’s “inexplicable sense of urgency” in overturning the cases.¹⁵³

Chief Justice Roberts explained that the Court does not overturn precedent absent “‘exceptional action’ demanding ‘special justification,’” and that the standard is even higher in areas where Congress exercises its primary authority.¹⁵⁴ Because commerce is one of those areas where Congress retains plenary power, Chief Justice Roberts argued the Court should have applied the higher standard.¹⁵⁵ Chief Justice Roberts consequently opined that the higher standard was not met in this case because the Court had twice considered this issue before, and twice “tossed [the ball] into Congress’s court, for acceptance or not.”¹⁵⁶ Moreover, Chief Justice Roberts explained that Congress was already in the process of considering whether to “alter the rule” established in *National Bellas Hess*, and that

147. *Id.*

148. *Id.* 2100–01.

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

150. *Id.* at 2101–02 (explaining that Congress has been considering whether to “alter the rule” established in *National Bellas Hess* for some time).

151. *Id.* at 2101.

152. *Id.* at 2101–03.

153. *Id.* at 2103; see *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring).

154. *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting).

155. *Id.* at 2102, 2104–05.

156. *Id.* at 2102.

the Court usurped Congress's role by making the decision for it.¹⁵⁷ Chief Justice Roberts closed his dissent by explaining that Congress was in a better position to make such a critical decision—Congress has the ability to consider the wide-range of competing interests at stake, as well as the flexibility to address fundamental questions in ways the Court cannot.¹⁵⁸

III. ANALYSIS

The U.S. Supreme Court correctly decided *South Dakota v. Wayfair* because it recognized that the physical presence rule was founded on artificial grounds that were exposed by the modern economy. As a result, the Court properly concluded that South Dakota's S.B. 106, requiring certain online and out-of-state retailers to collect state sales tax, did not violate the Commerce Clause.¹⁵⁹

The Supreme Court justifiably abrogated the physical presence rule and modernized the way substantial nexus operates under *Complete Auto* by introducing the economic and virtual contacts rule.¹⁶⁰ Unfortunately, the economic and virtual contacts rule is not without defects: namely, it lacks a framework guiding its application, and what exactly constitutes a virtual contact is unclear. However, because the economic and virtual contacts rule injects due process considerations into an analysis traditionally viewed as exclusively dealing with the Commerce Clause, principles rooted in due process, specifically those having to do with personal jurisdiction, may resolve any shortcomings.¹⁶¹

This Section will first explore the Court's critique of *National Bellas Hess* and *Quill*, and it will also endorse the Court's decision to overrule the two cases. This Section will then discuss the Court's replacement of the physical presence rule with the economic and virtual contacts rule, and it will also highlight defects in the new rule. Next, this Section will explain how *Wayfair* injects due process into substantial nexus under *Complete Auto* and how this change in the tide is beneficial. Last, this Section will argue that principles guiding personal jurisdiction, specifically those gleaned from *International Shoe*, its progeny, and *World-Wide Volkswagen*, may resolve the defects in the economic and virtual contacts rule.

157. *Id.* at 2102–03.

158. *Id.* at 2104.

159. *Id.* at 2080, 2099.

160. *Id.*

161. Sarah Horn, Jill McNally, Rebecca Newton-Clarke & Melissa Oaks, *Supreme Court Abandons Physical Presence Standard: An In-Depth Look at South Dakota v. Wayfair*, THOMAS REUTERS CHECKPOINT: RIA STATE & LOCAL UPDATE, Jun. 22, 2018, at 1, 1–4

A. National Bellas Hess and Quill Warranted Overruling

1. The Physical Presence Rule Was a Virus that Plagued States' Economies

The physical presence rule, by sheltering a majority of out-of-state and online retailers from state tax obligations, harmed states' economies and depleted the tax base on an immense scale.¹⁶² And, though the physical presence rule was considered a bright-line test for interpreting whether an interstate tax was constitutional, the negative effects of its application in the modern economy severely diminished the test's legitimacy.¹⁶³

First, the physical presence rule choked states' potential revenue because it produced an incentive for businesses to avoid physical presence in multiple states.¹⁶⁴ Distortions caused by the desire of businesses to avoid tax collection meant that local markets lacked store fronts, distribution points, and employment centers that would otherwise be efficient and desirable to state and local economies.¹⁶⁵ Moreover, by avoiding physical presence, retailers could decrease overhead costs, like rent, and a variety of other business expenses, like cleaning and maintenance; the cost of which could have stimulated local economies.¹⁶⁶ And, with technological advancements allowing vendors to sell products and services without having to establish a physical retail space, a business could avoid physical presence in multiple states with ease.¹⁶⁷ The desire to avoid tax collection, and the ease with which a business could avoid that obligation via the physical presence rule, meant that local revenue streams dried up around the nation.¹⁶⁸ Ultimately, by incentivizing business entities to avoid physical presence in multiple states, the physical presence rule caused severe depressions in local markets with attendant job shortages.¹⁶⁹

Second, the physical presence rule created a judicially sanctioned tax shelter for out-of-state and online sellers that crippled states' ability to collect sales tax revenue.¹⁷⁰ Under the regime of *National Bellas Hess* and *Quill*, out-of-state and online retailers could avoid the regulatory burdens of tax collection simply by avoiding any physical presence in a state.¹⁷¹

162. Michael Giovannini & Matt Hedstrom, *Thanks for the Memories, Quill: The Supreme Court Adopts a New Nexus Standard for Use Tax Collection*, 23 No. 7 CYBERSPACE LAWYER NL, Aug. 2018, at 1, 1–2.

163. *Id.*; Edward A. Zelinsky, *The Political Process Case to Overturn Quill v. South Dakota*, OXFORD U. PRESS BLOG (Mar. 5, 2018), <https://blog.oup.com/2018/03/quill-south-dakota-wayfair-supreme-court/>.

164. *Wayfair*, 138 S. Ct. at 2085, 2094.

165. *Id.* at 2094; Jun Li & Andrew Wu, *SCOTUS' Online Sales Tax Ruling Crucial for Many Small Businesses*, HILL, (Apr. 23, 2018, 1:00 PM), <https://thehill.com/opinion/finance/384399-online-sales-tax-exemptions-critical-to-many-small-businesses>.

166. Li & Wu, *supra*, note 165.

167. Horn, McNally, Newton-Clarke & Oaks, *supra* note 161, at 3.

168. Donald Bruce et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, U. TENN. CTR. FOR BUSINESS AND ECON. RES., April 2009, at 1, 11 (Table 5).

169. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

170. Horn, McNally, Newton-Clarke & Oaks, *supra* note 161, at 3.

171. *Wayfair*, 138 S. Ct. at 2094.

The ability of out-of-state vendors to thwart state sales tax effectively put both intrastate businesses and interstate business with a physical presence at a competitive disadvantage.¹⁷² Out-of-state sellers could offer de facto lower prices because consumers were not only not charged sales tax but sellers could also not be forced to pay use tax.¹⁷³ Local vendors, on the other hand, could not escape the obligation to impose and collect sales tax, or even use tax, which meant higher prices, and likely, fewer customers.¹⁷⁴ Not surprisingly, the rise of e-commerce made it much easier to avoid physical presence in a state.¹⁷⁵ Consequently, the prevalence of e-commerce exacerbated the negative impact of the physical presence tax shelter.¹⁷⁶ And, though some out-of-state and online retailers, like Amazon, voluntarily opted to collect state sales tax, most vendors did not because states could not impose a compulsory tax collection obligation.¹⁷⁷ In 2016 alone, this loophole cost states \$17.2 billion in lost sales tax revenue.¹⁷⁸

The resulting shortage in collected sales tax revenue aggravated states' struggle to fund and provide public services and benefits.¹⁷⁹ The physical presence rule locked states out of generating tax revenue on "e-commerce sales [totaling] over \$3.16 trillion per year in the United States."¹⁸⁰ For example, Colorado's tax revenue losses in 2012, under the *Quill* regime, were estimated to be around \$170 million.¹⁸¹ From 2007 to 2012, Colorado's tax revenue losses totaled \$790 million.¹⁸² In the national aggregate, in 2018, states' inability to tax out-of-state and online retailers resulted in an estimated \$34 billion in lost state tax revenue, a number projected to reach \$52 billion annually by 2022.¹⁸³ So, while corporate officers and shareholders reaped widespread benefits, states' education systems, police and fire departments, healthcare services, and infrastructure were weakened and depleted.¹⁸⁴

172. *Id.*

173. *Id.*

174. *Id.* at 2094–95; Zelinsky, *supra* note 163.

175. Tom Popomaronis, *E-Commerce in 2018: Here's What the Experts are Predicting*, FORBES (Dec. 5, 2017, 1:40 PM), <https://www.forbes.com/sites/tompopomaronis/2017/12/15/e-commerce-in-2018-heres-what-the-experts-are-predicting/#1a99c1676deb>.

176. Chris Isidore, *Amazon to Start Collecting State Sales Taxes Everywhere*, CNN (Mar. 29, 2017, 2:59 PM), <https://money.cnn.com/2017/03/29/technology/amazon-sales-tax/>.

177. *Id.* (Amazon's opting-in is misleading because, to satisfy demands for one day and two day shipping, Amazon has had to build distribution centers and warehouses, which likely satisfies the sufficient economic and virtual contacts standard).

178. *Id.*

179. *Wayfair*, 138 S. Ct. at 2088.

180. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015).

181. Bruce et al., *supra* note 168, at 11.

182. *Id.*

183. David J. Herzig, *States Pay the Price When You Buy Online*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/opinion/online-shopping-sales-tax.html>.

184. *Id.*; *State & Local Expenditures*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-expenditures> (last visited Oct. 10, 2019). Second only to property taxes, and tied with individual income taxes, sales and use taxes are one of the largest sources of state and local tax revenue. In 2015, about one-third of state and local spending went toward elementary and secondary education (twenty-

In sum, the physical presence rule strangled states' ability to fund and perform important government function at all levels.¹⁸⁵ Consequently, the *Wayfair* majority was correct to hold that the ease of administrative burden in regard to complying with differing tax jurisdictions was substantially outweighed by the widespread prejudice that the physical presence rule imposed on states and businesses.¹⁸⁶

2. The Physical Presence Rule Violated the Dormant Commerce Clause

The physical presence rule's affront to public policy was complimented by the fact that it was also quintessentially discriminatory against intrastate vendors such that it violated the Dormant Commerce Clause.¹⁸⁷ *Quill* concluded that the physical presence stood as a proxy for the balance of tax compliance costs against benefits received from state protection and services.¹⁸⁸ In effect, the physical presence rule stood for the presumption that the burden on out-of-state and online retailers to comply with tax obligations always outweighs the state benefits received.¹⁸⁹ To the contrary, the modern economy has proven the opposite. First, the costs of complying with differing tax laws and obligations have lowered significantly through access to technology and interstate agreements.¹⁹⁰ And second, out-of-state and online sellers use state and local law enforcement, transportation infrastructure, and other state-provided amenities just as much as, if not more than, their brick-and-mortar counterparts.¹⁹¹ Simply, the presumption created by the physical presence rule is wrong.

In addition, the physical presence rule cut against the primary goals of the Dormant Commerce Clause: inhibiting states' protectionist impulses and promoting the creation of a cohesive national market.¹⁹² The physical presence rule worked directly against these objectives by encouraging out-of-state and online entities to concentrate in as few states as possible to avoid incurring additional obligations to collect and remit sales taxes.¹⁹³ Consequently, the market was riddled with favoritism and biases

two percent) and higher education (ten percent). Public welfare was the second-largest source of direct general spending at the state and local level in 2015, and it has been since 1977. States also fund a wide variety of other services, including transportation, corrections, pension and health benefits for public employees, care for persons with mental illness and developmental disabilities, assistance to low-income families, economic development, environmental projects, state police, parks and recreation, housing, and aid to local governments.

185. *State & Local Expenditures*, *supra* note 184.

186. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018).

187. *South Dakota Supreme Court Holds Unconstitutional State Law Requiring Internet Retailers Without In-State Physical Presence to Remit Sales Tax*, 131 HARV. L. REV. 2089, 2094–95 (2018).

188. *Id.*

189. *Id.*

190. *Streamlined States*, STREAMLINED STATES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/for-businesses/remote-seller-faqs/scotus-ruling---south-dakota-v-wayfair> (last visited Oct. 10, 2019).

191. *South Dakota Supreme Court Holds Unconstitutional State Law Requiring Internet Retailers Without In-State Physical Presence to Remit Sales Tax*, *supra* note 187.

192. *Id.*

193. *Id.*

that created a disjointed national market that preyed on local business and markets, while immunizing large, cash-flush entities from tax obligations.¹⁹⁴ The application of the physical presence rule in a modern economy actually sponsored discrimination between intrastate and out-of-state vendors.¹⁹⁵ In sum, the physical presence rule violated the Dormant Commerce Clause because it fractured the common market by promoting unconstitutional interstate discrimination.¹⁹⁶

3. Physical Presence is Not a Necessary Interpretation of Substantial Nexus

Beyond the massively prejudicial effect of the physical presence rule on states' economies, *National Bellas Hess* and *Quill* warranted overruling because the physical presence rule was not a necessary interpretation of *Complete Auto's* substantial nexus prong.¹⁹⁷

The notion that physical presence is not just sufficient but necessary to form a substantial nexus between a taxpayer and taxing state in today's age is manifestly unsound and incorrect.¹⁹⁸ Physical presence is no longer the singular avenue by which the goals behind substantial nexus, fundamental fairness, and reasonableness, can be achieved.¹⁹⁹ The reality of the modern economy is that out-of-state and online retailers maintain meaningful and voluminous contacts in states without necessarily maintaining a physical presence.²⁰⁰ An example best illustrates how physical presence is an artificial and arbitrary interpretation of substantial nexus: a retail entity having a single employee or owning a single piece of real estate in a state would create a substantial nexus. However, another retail entity having over 300 employees only in one state but a website accessible in every state would not create a substantial nexus.²⁰¹

The example above highlights how the physical presence rule is now an irrelevant and antiquated interpretation of substantial nexus under *Complete Auto*. The dramatic technological advancements that have occurred in the last twenty-five years have brought consumers closer to retailers than ever before, effectively making physical presence an erroneous proxy

194. *Id.* at 2094.

195. *Id.* at 2094–95.

196. *Id.* at 2094.

197. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018).

198. *Id.* at 2099, 2101–02 (Roberts, C.J., dissenting). In his dissent, Chief Justice Roberts argued for the conservation of the physical presence rule. He argued that it should be preserved because it now forms the basis for proposed congressional legislation that addresses state taxation of out-of-state vendors. Chief Justice Roberts's argument fails in consideration of the fact that the legislation would be based on a rule of law that is tone-deaf to the realities of the modern economy. Upholding the physical presence rule because of pending legislation is an insufficient reason for upholding a rule that has produced severely detrimental and damaging effects on states' economies, tax base, and public welfare.

199. Redish & Nugent, *supra* note 25, at 575–77.

200. *Wayfair*, 138 S. Ct. at 2095.

201. *Id.*

for substantial nexus.²⁰² Consequently, the majority correctly concluded that physical presence is not a necessary construct of a substantial nexus.²⁰³

The advent of the Internet and the growing prevalence of e-commerce demands a standard that recognizes that a business may be present in a state in a meaningful way without that presence being physical in the traditional sense of the term.²⁰⁴ The *Wayfair* Court's answer to that demand was the economic and virtual contacts rule.²⁰⁵

B. Substantial Nexus Post-Wayfair

This Section defines and critiques the economic and virtual contacts rule (the *Wayfair* standard). This Section specifically highlights two defects in the majority's replacement standard. The first being that the standard is wanting of clarity and of a framework that outlines its application. The second being that the notion of virtual contacts is ill-defined and ironically rooted in the rule that it replaces.

1. A Replacement Standard Without Instructions

Wayfair did not redefine what substantial nexus means; however, *Wayfair* did redefine when substantial nexus, under *Complete Auto*, is considered satisfied.²⁰⁶ *Wayfair* broadened the scope of substantial nexus by holding that it is satisfied when an out-of-state or online business maintains sufficient economic and virtual contacts with the taxing state.²⁰⁷

To illuminate what constitutes sufficient economic and virtual contacts, such that a substantial nexus between the taxpayer and the taxing state exists, the Court looked to the threshold requirements of South Dakota's S.B. 106.²⁰⁸ "The Act applies only to sellers that deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods or services into the state on an annual basis."²⁰⁹ The Court stated that "this quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."²¹⁰ Thus, the Court concluded that because South Dakota identified *Wayfair, Inc.*, *Overstock.com, Inc.*, and *NewEgg, Inc.*, as companies that met the thresholds of S.B.106, the respondent companies had presumptively maintained sufficient economic and virtual contacts with the state such that a substantial nexus had been established.²¹¹ That was the end of the inquiry.

202. *Id.* at 2093.

203. *Id.* at 2095.

204. *Id.*

205. *Id.* at 2099.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

Though the Court provided an example of what constitutes sufficient economic and virtual contacts, the Court did not provide a framework guiding an application of the new standard.²¹² The Court did not explain how to determine what *sufficient* is under the standard. Does sufficient mean that an entity's contacts have to be equal to or more than S.B. 106's thresholds, or can they be less? Does the rule only apply to large corporations such that individual or small vendors are exempt from a tax collection obligation? Can a state make legislative thresholds that are less than S.B. 106's and still be constitutionally compliant?

The Court failed to consider and answer these critical questions, so that unlike physical presence, where an application is guided by its name-sake, "sufficient[,] based on both economic and virtual contacts," is defectively imprecise.²¹³ As a result, states and courts wrestling with the constitutionality of an interstate sales tax have been left to guess as to what actually constitutes sufficient economic and virtual contacts.²¹⁴ Furthermore, retailers and businesses have been left clueless as to when, or at what point, they subject themselves to state tax jurisdiction.²¹⁵

Some states have copied South Dakota's approach to taxing out-of-state and online sellers by establishing revenue or volume thresholds. Connecticut, for example, targets out-of-state sellers making \$250,000 in gross receipts or engaging in 200 or more retail sales at Connecticut during a twelve-month period.²¹⁶ Connecticut's higher threshold likely satisfies the *Wayfair* standard because South Dakota's standard was \$150,000 less, and the Court stated that such a threshold presumptively satisfies substantial nexus. But, what if a state established a threshold of \$50,000, or \$10,000, or \$500? For a small company, or individual merchant, \$500 in sales would likely amount to substantial nexus. But, if that same scenario was grafted onto a large company that sold only \$500 worth of product, the result would likely be the opposite, meaning there would be no substantial nexus. This same discrepancy would be present in an analogous volume threshold (100,000 units versus ten units). The propensity for underinclusiveness and overinclusiveness reveals defective ambiguity in the way the Court introduced the *Wayfair* standard.²¹⁷ Unfortunately, the Court's lack of clarity is compounded by an equivalent lack of instruction as to what the Court means by "virtual contacts."

212. HELLERSTEIN, *supra* note 24, at 16.

213. *Id.* at 15.

214. *Id.* at 16–18.

215. *Id.*

216. Horn, McNally, Newton-Clarke & Oaks, *supra* note 161, at 3 (Connecticut, in its new nexus standard, also redefines retailers to include marketplace facilitators. According to S.B. 417, a marketplace facilitator is defined as a person who facilitates retail sales of at least \$250,000 during the prior twelve-month period by providing a forum that lists or advertises taxable, tangible personal property for sale by marketplace sellers; directly or indirectly collects receipts from the customer and remits payments to the marketplace seller; and is compensated for such services. Examples include Amazon, eBay, and Etsy).

217. HELLERSTEIN, *supra* note 24, at 16–18.

2. Trimming the Standard: Virtual Contacts

The *Wayfair* standard should be trimmed down to just sufficient economic contacts because the notion of “virtual contacts” breeds even more ambiguity. First, the virtual contacts prong of the *Wayfair* standard relies on the now-abrogated physical presence rule.²¹⁸ The virtual contacts notion was born out of states’ desire to circumvent *Quill*’s rigid physical presence requirement.²¹⁹ States enacted legislation where virtual contacts, like software code and apps, were treated as physical and tangible markers such that states could exercise taxing jurisdiction over out-of-state and online sellers.²²⁰ Because the notion of virtual contacts rose out of the physical presence rule, the notion of virtual contacts is no longer a necessary construct for states struggling to establish substantial nexus.

Second, the term virtual contacts is not expressly defined by the majority.²²¹ Justice Kennedy proffers that a “virtual showroom” that provides a forum for interaction between the consumer and seller would suffice as a virtual contact.²²² A clearer example of a virtual contact is likely cookies, which are pieces of code stored on a device connected to the Internet.²²³ In fact, three states—Iowa, Ohio, and Massachusetts—have enacted “cookie nexus” legislation.²²⁴

Under cookie nexus legislation, a seller whose website or app leaves a cookie on a buyer’s device must comply with a state-imposed obligation to collect and remit sales tax.²²⁵ For example, Massachusetts, analogously to South Dakota, imposed thresholds designed to prevent small sellers from the obligation to collect sales tax.²²⁶ Under the Massachusetts’s regulation, retailers who target the state and sell less than \$500,000 annually are excluded from the tax obligation.²²⁷

Both the Massachusetts and Ohio cookie nexus legislation have been challenged.²²⁸ Tellingly, the parties’ briefs contain arguments for and against the physical attributes of cookies, which occasionally “devolve into the physicality of molecules and electrons.”²²⁹ It is readily apparent

218. Giovannini & Hedstrom, *supra* note 162.

219. Newton-Clarke, *supra* note 105, at 1–3.

220. *Id.* at 2.

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

222. *Id.* at 2095.

223. Shane Ratigan, *What to Know About Sales Tax and Cookies*, ACCT. WEB (June 4, 2018), <https://www.accountingweb.com/tax/sales-tax/what-to-know-about-sales-tax-and-cookies>.

224. Horn, McNally, Newton-Clarke & Oaks, *supra* note 161, at 2–3.

225. Ratigan, *supra* note 223.

226. *Id.*

227. *Id.*

228. *Id.*; *see* Crutchfield Corp. v. Harding, No. CL17001145 (Va. Cir. Ct. 2017) (filed Oct. 24, 2017) (Massachusetts’ legislation has been challenged in the lawsuit in Albemarle County Circuit Court. The lawsuit challenges the validity of the Massachusetts cookie nexus legislation under the Commerce Clause. However, the plaintiff relies on *Quill*’s physical presence rule to contest the legislation. Therefore, the plaintiff likely lacks standing now as a result of *Wayfair*).

229. Ratigan, *supra* note 223.

that states and retailers are already struggling with the notion of virtual contacts in the context of substantial nexus.²³⁰

A virtual contact, by definition, is not a physical contact, and states have stretched the interpretation of physical presence to capture e-commerce sales tax.²³¹ Because states are no longer bound by the physical presence rule, the virtual contacts rationale is invalid and should no longer act as a proxy for measuring substantial nexus.²³²

C. The Instructions We Need: International Shoe, its Progeny, and World-Wide Volkswagen

This Section attempts to resolve the defects of the *Wayfair* standard. This Section first argues that *Wayfair* expands the scope of substantial nexus under *Complete Auto* to include due process, and not just the Commerce Clause. This Section then argues that because the door to due process is now open, principles underlying personal jurisdiction are an appropriate tool to examine how to apply the economic and virtual contacts rule. Last, this Section argues that courts should particularly look to *International Shoe*, its progeny, and *World-Wide Volkswagen* for guidance.

1. The Door to Due Process is Propped Open

Prior to its opinion in *Quill*, the Court had never indicated that there was any distinction between a Due Process Clause and Commerce Clause nexus analysis.²³³ *Quill* changed the landscape and expressly indicated that substantial nexus required distinct examinations under the respective constitutional requirements.²³⁴ In the wake of *Wayfair*, it seems the distinction has once again collapsed into a blended examination—*Wayfair* reinstated the pre-*Quill* view that there is no meaningful distinction between a due process nexus analysis and a Commerce Clause nexus analysis.²³⁵ Indeed, the principles behind the doctrines may still be distinct; however, the goals underlying the nexus requirement in the *Complete Auto* test are essentially the same: determining whether it would be fair and reasonable for a state to exercise its taxing power over an out-of-state taxpayer.²³⁶ Most importantly, the apparent melding of Due Process and Commerce Clause concerns post-*Wayfair* opens the door to a body of case law that illuminates how a court could apply the *Wayfair* standard: personal jurisdiction.²³⁷

230. Newton-Clarke, *supra* note 105, at 3.

231. *Id.*

232. South Dakota v. Wayfair, 138 S. Ct. 2080, 2093 (2018).

233. See Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill., 386 U.S. 753, 756 (1967), overruled by South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).

234. See Quill Corp. v. North Dakota, 504 U.S. 298, 312–13 (1992), overruled by Wayfair, 138 S. Ct. at 2080; HELLERSTEIN, *supra* note 24, at 7–8.

235. HELLERSTEIN, *supra* note 24, at 1, 10, 16, 18; Giovannini & Hedstrom, *supra* note 162.

236. HELLERSTEIN, *supra* note 24.

237. See Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316–18 (1945).

2. The Guiding Principles of *International Shoe*, its Progeny, and *World-Wide Volkswagen*

When applying the *Wayfair* standard, a court should look to the principles established in *International Shoe*, its progeny, and *World-Wide Volkswagen* to examine when a retailer's economic and virtual contacts establish a substantial nexus such that a state could justifiably impose a tax collection obligation.²³⁸

International Shoe states that a court may not exercise its jurisdiction over an out-of-state individual (or entity) unless that individual has sufficient minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.²³⁹ Two of *International Shoe*'s progeny further clarify the minimum contacts standard: *Burger King Corp. v. Rudzewicz* and *Hanson v. Deckla*.²⁴⁰

Burger King held that “a business need not have a physical presence in a state to satisfy the demands of due process,” meaning that a business could have meaningful contacts with a forum state without having a physical presence in that state.²⁴¹ *Hanson* held that merely having a contact with the forum state is not enough; to support an exercise of state jurisdiction over an out-of-state defendant, that defendant's contact must be the result of the defendant purposefully availing themselves of the privilege of conducting business, or simply themselves, in the forum state.²⁴²

International Shoe and its progeny provide a guideline for courts to follow in applying the *Wayfair* standard. For example, if an out-of-state retailer directs a sale at a state, that retailer has purposefully availed itself because the retailer is availing itself of the privilege of conducting business in the state.²⁴³ Because an intentional sale of this kind satisfies the *International Shoe* minimum contacts standard, it also means that a substantial nexus has been established via an economic contact.

In this analysis, it is critical that there is no consideration of volume or revenue thresholds—one direct sale would be enough for a state to legally impose a tax obligation. The *Wayfair* standard should be blind to

238. *Id.* at 312–13, 316–17 (Personal jurisdiction jurisprudence suggests that the Due Process Clause of the Fourteenth Amendment limits a court's exercise of jurisdiction over defendants).

239. *Id.* at 316; *see* *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (after *Shaffer*, all exercises of a Court's jurisdiction over an out-of-state defendant must be in accordance with the *Int'l Shoe* minimum contacts standard).

240. *Burger King v. Rudzewicz*, 471 U.S. 462, 476–78 (1985); *Hanson v. Deckla*, 357 U.S. 235, 251 (1958).

241. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2093 (2018) (citing *Burger King*, in which a contract between a franchisee and a franchisor was determined to be a sufficient “minimum contact” with the forum State (Florida). 471 U.S. at 476. The Court also concluded that the contract alone did not satisfy the *Int'l Shoe* standard and looked to the circumstances of the commercial relationship like prior negotiations and contemplated future consequences, terms of the contract, and the parties' actual course of dealing).

242. *Hanson*, 357 U.S. at 253.

243. *Id.*

thresholds and lines drawn in the sand because anything otherwise would violate separation of powers.²⁴⁴ The real mark of the *Wayfair* standard is whether an online or out-of-state retailer, by directing a sale or business into a state, purposefully availed itself of the privilege of conducting business in the state.

Unfortunately, the majority muddied the waters when it exclusively focused on South Dakota's legislative thresholds to explain sufficiency of contacts. However, courts should not be misled by the majority's approach. Rather, courts should focus on the measure of an entity's purposeful availment when examining whether a substantial nexus exists between an entity and the taxing state.

A complication arises when a market facilitator is party to the transaction.²⁴⁵ Instead of making a sale directly to a customer, a retailer funnels their activity through an intermediary, like Amazon or Etsy.²⁴⁶ The market facilitator model of e-commerce is very prevalent, and it blurs an analysis of purposeful availment because the connection between a retailer and the ultimate purchaser is indirect.²⁴⁷ The answer to this predicament in regard to examining whether sufficient economic and virtual contacts exists is *World-Wide Volkswagen*.²⁴⁸

In *World-Wide Volkswagen*, the plaintiffs bought a car (an Audi) in New York from a dealership named Seaway.²⁴⁹ The plaintiffs were on their way to Arizona and were driving through Oklahoma when they were in a car accident.²⁵⁰ The plaintiff's brought a civil suit against Seaway (the dealership), Audi (the manufacturer), Volkswagen of America (the importer), and World-Wide Volkswagen (the regional distributor) in Oklahoma.²⁵¹ The defendants challenged the court's ability to exercise jurisdiction over them because there was no evidence that the retailers and distributors had ever made any transactions in Oklahoma.²⁵² Initially, the trial court held that it had jurisdiction over the defendants in Oklahoma.²⁵³ World-Wide appealed to the Supreme Court of Oklahoma, who affirmed.²⁵⁴ World-Wide then appealed to the U.S. Supreme Court.²⁵⁵

244. See *Wayfair*, 138 S. Ct. at 2101 (Roberts, J., dissenting) (this premise is in line with Chief Justice Roberts's dissenting opinion. However, this Comment limits Chief Justice Roberts's institutional competency argument and suggests that Congress or states should be the one setting thresholds that would protect smaller businesses and individuals from burdensome tax obligations. However, the Court is well within its power to establish the economic and virtual contacts rule).

245. Newton-Clarke, *supra* note 105, at 3–5.

246. *Id.* at 3.

247. *Id.* at 3–4.

248. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296–99 (1980).

249. *Id.* at 288.

250. *Id.*

251. *Id.*

252. *Id.* at 288–89.

253. *Id.* at 289.

254. *Id.*

255. *Id.* at 289–91.

The U.S. Supreme Court granted certiorari and reversed the Supreme Court of Oklahoma.²⁵⁶ The U.S. Supreme Court held that World-Wide did not purposely avail itself of the laws of Oklahoma, and therefore, did not satisfy the *International Shoe* minimum contacts test.²⁵⁷ The Court concluded that a contact must be deliberate and meaningful such that an entity must “reasonably anticipate being haled into court” in the forum state.²⁵⁸

In *World-Wide Volkswagen*, the Court also determined that it would use a five-factor test for a situation where a contact with the forum state exists, but where there is no purposeful availment (and, thus, where the *International Shoe* minimum contacts standard is not met).²⁵⁹ The *World-Wide Volkswagen* factors measure whether it is reasonable to exercise jurisdiction over an out-of-state defendant that lacks the requisite minimum contacts.²⁶⁰ The factors are: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.²⁶¹

Transposing the *World-Wide Volkswagen* framework—to a situation where a court is examining whether a state could justifiably impose a sales tax obligation on an online or out-of-state retailer—requires the taxpayer to assume the role of defendant, and the state to assume the role of plaintiff. The *World-Wide Volkswagen* test is not an element test; it is a factor test that balances the defendant's, or in this case, the taxpayer's, burden with the state's interest in exercising jurisdiction.²⁶²

The first factor, the burden on the defendant, can vary depending on the administrative costs of compliance with the multitude of tax jurisdictions in a state.²⁶³ However, the *Wayfair* majority expressly stated that those costs are considerably low “especially in the modern economy.”²⁶⁴ Those costs can be even lower if the taxing state adopts, or has adopted, the Streamlined Sales and Use Tax Agreement, through which member states have sought to reduce sales and use tax compliance burdens.²⁶⁵ A major goal of the “streamlined states” is to obtain express congressional

256. *Id.* at 296, 299.

257. *Id.* at 295.

258. *Id.* at 297 (but the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there).

259. *Id.* at 292.

260. *Id.* at 291–92.

261. *Id.* at 292.

262. *Id.* at 291–92.

263. *Id.* at 292.

264. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2093 (2018).

265. HELLERSTEIN, *supra* note 24, at 2, 16.

authority to impose a use tax obligation on out-of-state sellers in recognition of the reduced compliance burdens in these states.²⁶⁶

The second and third factors, the state's interest in adjudicating the dispute and obtaining convenient effective relief, weigh in favor of the state. As discussed, states rely heavily on sales tax revenue to provide public services and benefits.²⁶⁷ Elevating the burden of complying with a sales tax obligation over a state's ability to fund and provide essential government functions is what *National Bellas Hess* and *Quill* did—and, as this Comment argues, that did not work out well.

The fourth factor, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, relates back to the first factor regarding administrative compliance. The more difficult it is for a retailer to comply with varying taxing jurisdictions, the less efficient the collection of tax will be and, thus, the less the tax is justified.²⁶⁸ The fifth factor, the shared interest of the several states in furthering fundamental substantive social policies, is clear: it is against public policy and public welfare to allow remote and Internet retailers to avoid paying taxes.²⁶⁹

Applying these factors, in a general sense, reveals the reasonability of a state tax obligation on vendors using market facilitators to collect and remit sales tax. However, the strength of this test also lies in its demand for an ad hoc application, and there may well be a situation where the burden on a retailer is high enough that it weighs against requiring compliance with a state sales tax regime. Regardless, the *World-Wide Volkswagen* factor test provides a framework for courts to measure whether it would be reasonable, and therefore justified, for a state to require a retailer utilizing a market facilitator to collect and remit state sales tax.

In sum, an application of the *Wayfair* standard should be guided by both *International Shoe*, its progeny, and *World-Wide Volkswagen*. If a retailer intentionally directs a sale into a state (one contact, plus purposeful availment), the *International Shoe* minimum contacts standard is satisfied. As a result, that contact should be considered a sufficient economic contact under *Wayfair*, and a taxing state should be permitted to exercise jurisdiction over that retailer. However, if that retailer does not intentionally direct a sale to a consumer, but rather to a market facilitator, the minimum contacts standard is not satisfied, and a court should look to the *World-Wide Volkswagen* factors to determine if a state's exercise of its taxing power is reasonable and fair.

266. *Id.* at 2, 11, 18.

267. Herzig, *supra* note 183; *State & Local Expenditures*, *supra* note 184.

268. *Quil Corp. v. North Dakota* used this argument, alone, as justification for the physical presence rule. See 504 U.S. 298, 306–07 (1992), *overruled by Wayfair*, 138 S. Ct. at 2080.

269. See generally *Wayfair*, 138 S. Ct. at 2092–94.

CONCLUSION

South Dakota v. Wayfair did three important things. First, it justifiably overruled *National Bellas Hess* and *Quill* and abrogated the physical presence rule. Second, the Court replaced the physical presence rule with the more modern and flexible economic and virtual contacts rule. Third, the Court remanded Commerce Clause and Due Process Clause concerns into substantial nexus under *Complete Auto*.

In doing all of this, the Court altered how substantial nexus operates under *Complete Auto*. Most importantly, *Wayfair* expanded the scope of doctrine that a court could rely on to elucidate the economic and virtual contacts rule. This is important because, as discussed, the economic and virtual contacts rule is defective. To resolve the majority's shortcomings in introducing the economic and virtual contacts rule, courts should look to due process principles, specifically those expounded in personal jurisdiction case law. Particularly, courts should look to *International Shoe*, its progeny, and *World-Wide Volkswagen* for guidance on how to measure when an out-of-state or online retailer's economic or virtual contacts with a state are such that a substantial nexus has been established.

*J. Scott Rosenbach**

* *Denver Law Review* editor and J.D. Candidate 2020 at the University of Denver Sturm College of Law. First, I would like to thank Professor Beto Juárez for his insight and critical feedback. Second, I would like to thank my fellow Executive Board members, and the Associate Editors and Staff Editors, of the *Denver Law Review* for their hard work and diligence on this Comment. Third, and above all, I would like to thank my family and my boyfriend for their unqualified love and unceasing encouragement and support. This Comment is dedicated to Peyton.