

2019

South Dakota v. Wayfair. Erasing a Dull Bright-Line

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Aidan V. Nuttall, *South Dakota v. Wayfair: Erasing a Dull Bright-Line*, 51 Loy. U. Chi. L. J. 623 (2020).
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Note

South Dakota v. Wayfair: Erasing a Dull Bright-Line

*Aidan V. Nuttall**

For over half a century, states were unjustly deprived access to a significant portion of their tax bases due to Supreme Court precedent that was dated since its very inception. South Dakota v. Wayfair, Inc. righted this wrong by granting states the power to lay taxes on out-of-state businesses that actively solicit sales from in-state customers. For decades the judicially-created physical presence rule prevented states from collecting sales taxes on these transactions, moving tens of billions of tax dollars out of reach. The rule led to exploitation by businesses at states' expense.

Aside from its detrimental effect, this rule has always been bad law. The constitutional principles and jurisprudence applied to adopt this rule were taken from outdated and rejected Supreme Court opinions that had no place at the physical presence rule's inception, and certainly have no place today. The Court's focus on this rule's effect represents a return to constitutional form through its rejection of hyper-formal distinctions and embrace of practical considerations.

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* J.D. Candidate, Loyola University Chicago School of Law, 2020. I want to thank the staff at the *Loyola University Chicago Law Journal* for their support, as well as family and friends for all the help along the way. Dedicated to Phineas, a very good boy.

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INTRODUCTION

Looking through Supreme Court jurisprudence, one will notice trends in the Court’s interpretation of certain subjects that differ from—and even contradict—evidence of the Court tirelessly working towards a common and logical interpretation of law.¹ One of the most hotly contested and inconsistent arenas of Supreme Court interpretation surrounds the outermost limits of the dormant Commerce Clause.² The contradiction throughout dormant Commerce Clause history lies in two methods of the clause’s interpretation: a formal and objective inquiry, which seeks a unified standard through jurisprudence, versus a realistic and practical inquiry, which focuses on consequences concerning the effect of the Court’s interpretation on a given case and area of law affected by it.³ Our

1. See, e.g., Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (tracing the history of the Court’s interpretation of the Sixth Amendment’s Confrontation Clause back to sixteenth century English common law through contemporary application in formulating a new rule which rejected the former standard requiring reliability analysis for a more objective standard); see also Hugh Evander Willis, *Some Conflicting Decisions of the United States Supreme Court*, 13 VA. L. REV. 155, 164, 169 (1927) (examining trends in the Supreme Court’s definition of commerce and declaring the evolution of the Court’s definitions created distinctions equal to “conflicting decisions or so fine that they are practically incomprehensible”).

2. See Quill Corp. v. North Dakota, 504 U.S. 298, 309–11 (1992) (detailing the Supreme Court’s back-and-forth holdings regarding formal versus practical readings of the states’ power under the dormant Commerce Clause); see also Peter A. Lauricella, *The Real “Contract with America”: The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1397 (1997) (describing the Supreme Court’s decisions interpreting the Commerce Clause as some of the Court’s most famous decisions of its precedent); see also Willis, *supra* note 1, at 169 (concluding in 1927 “that the decisions of the United States Supreme Court upon the [C]ommerce [C]ause are in hopeless conflict”).

3. See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994) (defining formalism as legislative language which “erects barriers to commerce” and pragmatism as a “case-by-case analysis of purposes and effects”); see also Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1089 (quoting GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 195 (3d ed. 1996)) (“Under the *formal* approach, the Court examined the statute and the regulated activity to determine whether certain objective criteria are satisfied. . . . In

country's history is closely tied to the multiple eras of judicial interpretation of the Commerce Clause, eras that have gone so far as to invoke direct action from the executive branch.⁴ A general understanding of the dichotomy between formalism and pragmatism is important to understanding the scope of this Note, as it touches on trends in law that have most recently favored pragmatism in interpreting the Commerce Clause.⁵ While an expansive topic, and one with a considerable background in academic analysis,⁶ the mere existence of this contradiction is not the subject of this Note.⁷

Instead, this Note dives deeper to focus on a product of formal interpretation, an abnormality in contemporary judicial interpretation of the Commerce Clause—the physical presence rule.⁸ Birthed on the tail end of formalism in 1967, it missed the boat on a course set towards pragmatism.⁹ The precedential vitality of the physical presence rule is an

contrast, the *realist* approach attempted to determine the actual economic impact of the regulation.”).

4. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3 (1998) (discussing President Roosevelt's attempt to use his popularity in Congress to override the Court's conservative interpretation of the Commerce Clause through the failed Judicial Procedures Reform Bill of 1937, a plan to pack the Supreme Court with liberal Justices to favorably rule for Roosevelt's New Deal legislation); Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. 49, 54 (2000) (discussing that President Roosevelt “is thought to have forced the Court to back down” from the labor movement).

5. See *infra* Section I.C. See also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (emphasis added) (finding that the rule in question in this case had been “stripped of any practical significance” and that “[t]here is no economic consequence that follows necessarily from the . . . [rule] . . . and a focus on that *formalism* merely obscures the question whether the tax produces a forbidden effect”).

6. See, e.g., Cushman, *supra* note 3, at 1089 (dedicating an entire law review article to the subject of realism versus formalism exclusively between the years of 1895–1942); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092–94 (1986) (discussing exclusively interpretations of the dormant Commerce Clause between 1935–86 to support a thesis, founded in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), that certain cases related to interstate commerce should face a balancing test); Willis, *supra* note 1, at 163–69 (discussing the already-apparent contradiction in Commerce Clause cases only a quarter-century into the 1900s); see also Lauricella, *supra* note 2, at 1377–80 (analyzing the defined federal limitations on regulating interstate commerce rather than state limitations).

7. See *infra* notes 23–33 and accompanying text (discussing the direction and focus of this Note).

8. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (explaining that the precedent for the physical presence rule “might not dictate the same result were the issue to arise for the first time today”); see also *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (“Everyone before us acknowledges that *Quill* is among the most contentious of all dormant commerce clause cases.”).

9. To be sure, recent examples of formalistic interpretation of the Commerce Clause existed in 1967. See, e.g., *Freeman v. Hewit*, 329 U.S. 249, 256 (1946) (discussing formal distinctions between direct and indirect burdens upon interstate commerce); *Spector Motor Servs., Inc. v. O'Connor*, 340 U.S. 602, 609–10 (1951) (delineating interstate and intrastate taxation as applied to

enigma amongst modern Commerce Clause interpretation, and for fifty years it has diametrically opposed pragmatic approaches in favor of a supposedly simpler solution in Commerce Clause readings.¹⁰ The Court recently overturned the physical presence rule in *South Dakota v. Wayfair, Inc.*, updating its stance on taxation of interstate commerce in light of contemporary pragmatism through interpretation of the dormant Commerce Clause.¹¹

Specifically, the physical presence rule required that for a State to force sellers or distributors to collect and remit sales or use taxes on products sold into its jurisdiction,¹² the seller must have had either property or

the same transaction). *But compare* Ry. Express Agency v. Virginia (*Railway Express I*), 347 U.S. 359, 369 (1954) (invalidating a tax based on the language of the tax which taxed the “privilege” of interstate business), *with* Ry. Express Agency v. Virginia (*Railway Express II*), 358 U.S. 434, 445 (1959) (affirming a similar tax with different language five years after the first reached Supreme Court review), *and Complete Auto*, 430 U.S. at 284 (“There was no real economic difference between the statutes in *Railway Express I* and *Railway Express II*.”). However, there was reliable evidence that trends in formalism were on the decline. *See Railway Express II*, 358 U.S. at 441 (noting the effect of “magic words” or loopholes that crafty legislative language had upon the validity of legislation); *see also Quill*, 504 U.S. at 310 (“[The case creating the physical presence rule] was decided in 1967, in the middle of the latest rally between formalism and pragmatism.”).

10. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) (describing the physical presence rule, particularly as justified in *Quill*, as “the sort of arbitrary, formalistic distinctions that the Court’s modern Commerce Clause precedents disavow”); *see also Direct Mktg. Ass’n*, 814 F.3d at 1148 (Gorsuch, J., concurring) (first citing *Direct Mktg. Ass’n*, 814 F.3d at 1137 n.14; then citing *Quill*, 504 U.S. at 319–20 (Scalia, J., concurring in part and concurring in the judgement); then citing *id.* at 321–33 (White, J., concurring in part and dissenting in part); and then citing *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015)) (“Everyone before us acknowledges that [the physical presence rule has] been the target of criticism over many years from many quarters, including from many members of the Supreme Court.”).

11. *See Wayfair*, 138 S. Ct. at 2099 (expressly overruling the physical presence rule and precedents supporting it); *see also id.* at 2100 (Thomas, J., concurring) (writing separately only to express that he believed his former participation in the *Quill* majority opinion was an error, concluding that the physical presence rule was rightly overturned).

12. To clarify, sales taxes are excise taxes imposed on transfers or transactions of tangible personal property or services; whereas use taxes are “complementary taxes to the sales tax” and are applied by the State in which the actual use of tangible personal property or services occurs. Nathaniel T. Trelease, *Taxing Internet Sales: Bringing the Old Economy to the New Economy*, 32 COLO. LAW., Dec. 2003, at 11, 12; *see also McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (defining sales and use taxes, respectively, as a tax upon the freedom of purchase and a tax upon the enjoyment of goods sold). The sales tax is typically collected by the seller in addition to the transaction so it can be subsequently remitted to the jurisdiction in which the transaction is consummated. *See Wayfair*, 138 S. Ct. at 2088 (describing this common method of collection and concluding that “[m]any States employ this kind of complementary sales and use tax regime”). The common issue with use taxes, for the purposes of this article, is that use tax compliance is low because the jurisdiction is forced to rely upon the consumer to evaluate, report, and pay the tax. *See id.* at 2088 (describing consumer use tax compliance rates as “notoriously low,” and in some instances as low as 4 percent) (first citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-114, SALES TAXES 5 (2017) [hereinafter Sales Taxes Report], <https://www.gao.gov/assets/690/688437.pdf> [<https://perma.cc/XBH6-RS2K>]; and then citing CA. STATE BD. OF EQUALIZATION, REVENUE ESTIMATE: ELECTRONIC COMMERCE AND MAIL ORDER SALES 7 tbl.3 (2013)).

employees in that State.¹³ This requirement enabled out-of-state (“remote”) sellers to exploit the substantial connection they had to states that they did business in to avoid sales taxes on products, giving them an unfair advantage over local sellers and traditional brick and mortar businesses.¹⁴ The rule was created in 1967 in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, and only once faced a significant Supreme Court challenge in 1992 in *Quill Corp. v. North Dakota*, which upheld the rule’s Commerce Clause foundation.¹⁵ It was not until the South Dakota legislature drafted Senate Bill 106, a desperate plea to the Supreme Court, that the Court reexamined the rule in *South Dakota v. Wayfair* and ultimately overturned it in June 2018.¹⁶ In its decision, the Court rejected the “bright line”¹⁷ rule for a standard that focuses on pragmatic considerations in determining whether states may levy taxes upon interstate commerce.¹⁸

13. See *Quill*, 504 U.S. at 306–07 (differentiating “between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier”); see also Matthew C. Boch, *Way(un)fair? United States Supreme Court Decision Ends State Tax Physical Presence Nexus Test*, 53 ARK. LAW., Summer 2018, at 18, 18 (explaining the physical presence rule as a limitation “that a business whose contacts were limited to mail and deliveries by common carrier could not be required to collect tax”).

14. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 763 (1967) (Fortas, J., dissenting) (explaining that the rule gives an unfair advantage to sellers who make “calculated, systematic exploitation[s]” of foreign markets); see also *Wayfair*, 138 S. Ct. at 2092 (quoting ARTHUR B. LAFFER & DONNA ARDUIN, PRO-GROWTH TAX REFORM AND E-FAIRNESS 4 (July 2013), <https://www.sos.ms.gov/Policy-Research/Documents/2ArtLafferStudy.pdf> [<https://perma.cc/3RGG-85QG>]) (“*Quill* created an inefficient ‘online sales tax loophole’ that gives out-of-state businesses an advantage.”).

15. The Court initially accepted the physical presence rule under two arguments, one supported by the Commerce Clause, and the other by the Due Process Clause. See generally *Bellas Hess*, 386 U.S. 753. See also *infra* Section I.B (briefly detailing the Court’s position supported by the Due Process Clause). However, the *Quill* Court rejected the Due Process Clause support for the physical presence rule, but ultimately chose to uphold the rule as an “artificial” boundary of the dormant Commerce Clause. See *Quill*, 504 U.S. at 315–16 (explaining that the physical presence rule is an arbitrary bright-line rule for the sake of clarity and business development in interstate commerce); see also *infra* Section I.D (detailing the *Quill* opinion and its rationale in support of the physical presence rule under the Commerce Clause).

16. See *Wayfair*, 138 S. Ct. at 2088 (emphasis added) (citing S.B. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016) [hereinafter S.B. 106]) (explaining that South Dakota legislators enacted “[a]n Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency”); see also *State v. Wayfair Inc.*, 901 N.W.2d 754, 758 (S.D. 2017) (quoting S.B. 106, *supra*) (“[T]he Act contained an emergency clause declaring it ‘necessary for the support of the state government’ . . .”).

17. See *Quill*, 504 U.S. at 315 (emphasis added) (“Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges . . .”); see also *Wayfair*, 138 S. Ct. at 2095 (alteration in original) (quoting *Quill*, 504 U.S. at 315) (“What may have seemed like a ‘clear,’ ‘bright-line tes[t]’ when *Quill* was written now threatens to compound the arbitrary consequences that should have been apparent from the outset.”).

18. See *Wayfair*, 138 S. Ct. at 2099 (alterations in original) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)) (“[S]uch a nexus is established when the taxpayer [or collector]

This Note aims to not only support the idea that *Wayfair* correctly decided that the physical presence rule was an unnecessary application of the Commerce Clause in 2018, but also to combat the assertion that the physical presence rule was ever a correct interpretation.¹⁹ The physical presence rule has never been good law.²⁰ Its formalistic approach to Commerce Clause interpretation was dated even at its inception.²¹ For over half a century the rule tormented state legislators who could do nothing to defend against their state's eroding tax base as the rule prevented them from collecting taxes on remote transactions that cost them millions, and more recently billions, of dollars on an annual basis.²²

Part I of this Note will briefly discuss the origins of the rule, touching on the historical and jurisprudential circumstances of its creation.²³ This part will also give a brief description of the Commerce Clause, that details the Court's recognition of its negative implications.²⁴ Part I will conclude by tracing the rule's limited progression through Supreme Court precedent, briefly touching on the practical effect it had on commerce.²⁵ Next, Part II will provide the facts of *South Dakota v. Wayfair* and the procedural history leading to the Supreme Court's holding, which is the

avails itself of the substantial privilege of carrying on business in that jurisdiction.”).

19. See *infra* Part III (analyzing *Bellas Hess*, *Quill*, and *Wayfair* to demonstrate the originally misinterpreted rule in 1967, and the hazardous effects it has had since); see also *infra* Part V (concluding same).

20. See *Wayfair*, 138 S. Ct. at 2092 (“[T]he physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”); see also *Bellas Hess*, 386 U.S. at 765–66 (Fortas, J., dissenting) (failing to understand the majority's logic, which precluded businesses that regularly engaged with foreign markets as exempt from collecting sales tax).

21. See *Bellas Hess*, 386 U.S. at 764–65 (criticizing that the majority's reference to a “sensible, practical conception of the Commerce Clause” in precedent to create a meaningless distinction in the case at bar); see also *Quill*, 504 U.S. at 310 (detailing the Court's history of interpretation and concluding that *Bellas Hess* was decided during the shift away from formalistic interpretation and towards pragmatism).

22. See Sales Taxes Report, *supra* note 12, at 11 (explaining that states are losing out, on the low end of the estimate, at least \$8 billion annually through inability to collect sales taxes on remote sellers); see also Brief for the United States as Amicus Curiae Supporting Petitioner at 5–6, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* U.S. Amicus Curiae] (alterations in original) (quoting S.D. CODIFIED LAWS § 10-64-1(1) (2017)) (“According to the statute's legislative findings, the obstacles to collecting [sales] taxes have ‘seriously erod[ed] the sales tax base of th[e] state’ and have ‘caus[ed] revenue losses and imminent harm . . . through the loss of critical funding for state and local services.’”).

23. See *infra* Part I (detailing the rationale of *Bellas Hess* and *Quill* to expose the flawed foundation of the physical presence rule).

24. See *id.* (detailing the origins of the dormant Commerce Clause and its modern approach to interpretation).

25. See *id.* (detailing the only chances at direct Supreme Court review that the rule has had and the rationale for maintaining it).

focal point of this Note.²⁶ It will also briefly outline the concurring and dissenting opinions.²⁷ Then, Part III will analyze the Court’s holding against a backdrop of historical judicial interpretation, as well pragmatic considerations.²⁸ It will contend that the Court correctly rejected the physical presence rule as a necessary interpretation of the dormant Commerce Clause.²⁹ Part III will also show that the physical presence rule had disastrous implications, demonstrating its misplacement in jurisprudence in the first place.³⁰ Further, Part III will examine how states have been legitimately prepared to not only survive, but thrive without the restrictions of the physical presence rule.³¹ It will then discuss several states’ proactive legislation that allows them to claim taxes that they have a constitutional right to collect.³² Ultimately, Part IV will conclude with an examination of dated concerns that some states who choose not to levy sales or use taxes purport, which contradict the foundation of their arguments against protectionism.³³

I. COURT AND CONSTITUTIONAL ORIGIN

A. *What is the Dormant Commerce Clause?*

The Commerce Clause allows Congress “[t]o regulate Commerce with foreign Nations, and among the several States”³⁴ Implicit within the Commerce Clause is the dormant Commerce Clause, which prevents states from unduly burdening or discriminating against interstate commerce.³⁵ It has been a subject of both scrutiny and disinterest since

26. *See infra* Part II (detailing the recent *Wayfair* decision’s procedural history and South Dakota’s regulation which led to Respondents’ complaint).

27. *See id.* (detailing Justice Thomas’s and Gorsuch’s concurring opinions and Chief Justice Roberts’s dissenting opinion).

28. *See infra* Part III (detailing and analyzing the *Bellas Hess* and *Quill* opinions to expose the physical presence rule’s formalistic foundation).

29. *See id.* (detailing and analyzing *Wayfair*’s correct rejection of the physical presence rule).

30. *See id.* (detailing and analyzing the actual negative effects of the physical presence rule through history and the likely negative effects it would have as e-commerce continues to grow).

31. *See infra* Part IV (detailing the impact of the decision in the months since *Wayfair*).

32. *See id.* (detailing the legislative efforts of States to formulate new tax statutes to comply with the Supreme Court’s newly endorsed limitations).

33. *See id.* (detailing the concerns of Respondents and supporters of the physical presence rule and exposing them as baseless).

34. U.S. CONST. art. I, § 8, cl. 3. *But see* Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381, 381–82 (2013) (footnote omitted) (“The negative or dormant aspect of the Commerce Clause . . . presumes that certain national issues are reserved exclusively to Congress and state and local governments are prohibited from intruding into those areas absent congressional assent.”).

35. *See* *South Dakota v. Wayfair, Inc.* 138 S. Ct. 2080, 2090–91 (2018) (“Modern precedents rest upon two primary principles that mark the boundaries of a State’s authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and

its conception, inviting both criticism and encouragement from the judiciary and legal scholars.³⁶ Some even believe the dormant Commerce Clause is unfounded in anything except precedent.³⁷ But, right or wrong, the dormant Commerce Clause is a judicially recognized doctrine that is very much alive today.³⁸ In sum, it is a nebulous concept that concerns the outermost-limit of states' ability to regulate interstate commerce against Congress's plenary claim to regulate interstate commerce.³⁹ It represents the assumption, drawn from the Commerce Clause's silence about state power, that state legislatures must be entitled to some form of authority to regulate commerce.

The dormant Commerce Clause is derived from the dicta of Chief Justice Marshall in two seminal cases, both quoted by the Supreme Court in *Wayfair*.⁴⁰ The first case, *Gibbons v. Ogden*, surrounded an issue of infringement upon the powers of Congress by New York legislators who granted exclusive commercial access to waterways between New York and New Jersey.⁴¹ In his opinion, while questioning the theory of strict

second, States may not impose undue burdens on interstate commerce.”); *see also* *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (explaining that the purpose of the dormant Commerce Clause “prohibits economic protectionism,” which would allow States to levy burdensome or discriminatory taxes upon interstate commerce for the benefit of its own jurisdiction).

36. *See* *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 259–65 (1987) (Scalia, J., concurring in part and dissenting in part) (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)) (“It takes no more than our opinions this Term, and the number of prior decisions they explicitly or implicitly overrule, to demonstrate that the practical results we have educed from the so-called ‘negative’ Commerce Clause form not a rock but a ‘quagmire.’”); *see also* *Tenn. Wine and Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (noting a split of opinion regarding the doctrine’s legitimacy between its originator, Chief Justice Marshall, and his immediate successor, Chief Justice Taney); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 570–71 (1987) (describing the dormant Commerce Clause as “an arcane aspect of American constitutional law” but noting a surge in interest and examination by scholars as well as the Supreme Court in the 1980s).

37. *See* Redish & Nugent, *supra* note 36, at 599 (rejecting all conceivable justification for recognition of the dormant Commerce Clause).

38. *See* *Tyler Pipe Indus.*, 483 U.S. at 259–60 (citing *Case of the State Freight Tax*, 82 U.S. 232 (1872)) (“[T]he doctrine of the negative Commerce Clause was formally adopted as holding of this Court.”).

39. *See* Lauricella, *supra* note 2, at 1397 (“[T]he so-called ‘dormant’ commerce clause question, which involves ascertaining how far state regulatory laws can go in burdening interstate commerce without intruding upon the power granted to Congress to regulate interstate commerce.”); *see also* Regan, *supra* note 6, at 1094–95 (defining dormant Commerce Clause protectionism as legislation that benefits local jurisdictions specifically against other states).

40. *See* *Wayfair*, 138 S. Ct. at 2090 (first citing *Gibbons v. Ogden*, 22 U.S. 1 (1824); and then citing *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829)) (“And so both a broad interpretation of interstate commerce and the concurrent regulatory power of the States can be traced to *Gibbons* and *Willson*.”).

41. *Gibbons*, 22 U.S. at 212. *Gibbons* was larger in effect than merely defining the dormant

constitutional construction, Marshall states, “[w]hich power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”⁴²

The second, and more direct, utterance in case law came from *Willson v. Black-Bird Creek Marsh Co.*, where Justice Marshall pens:

We do not think the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to *the power to regulate commerce in its dormant state*, or as being in conflict with any law passed on the subject.⁴³

Willson was one of many decisions to clarify the extent of the states’ ability to regulate local, in-state commerce when it technically infringed upon Congress’s ability to regulate interstate commerce.⁴⁴ However, it was not until *Case of the State Freight Tax* in 1872 that the Supreme Court formally recognized the doctrine.⁴⁵

The line which separates State and Congressional territory under the Commerce Clause is blurry at best.⁴⁶ Still the Supreme Court must strike

Commerce Clause; it is commonly referenced as the beginning of the Court’s efforts towards defining commerce. *See Wayfair*, 138 S. Ct. at 2090 (internal citation omitted) (“*Gibbons v. Ogden* began setting the course by defining the meaning of commerce.”).

42. *See Gibbons*, 22 U.S. at 189 (referencing the Constitution of the United States, Marshall explains that it is a document “of enumeration, and not of definition” in support of a reflexive interpretation of the Constitution).

43. *See Willson*, 27 U.S. at 252 (emphasis added) (explaining that although regulating the tributary in question does technically fall into the scope of regulating interstate commerce, it is so negligible a regulation that the Federal Government is, and should be, unconcerned with the outcome of what the many states do with their smallest streams); James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl.3—Supreme Court Cases*, 41 A.L.R. Fed. 2d § 31 (2009) (explaining that the remedial nature of the State’s legislation was not in contravention of Congressional action or “the powers of the federal government”).

44. *See, e.g., Brown v. Maryland*, 25 U.S. 419, 430–31 (1827) (interpreting the Import-Export Clause and Commerce Clause of the Constitution to prohibit States from levying discriminatory taxes upon imported goods); *see also Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888) (“[N]o State has the right to lay a tax on interstate commerce in any form.”); *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256–58 (1938) (rejecting a focus on formal concerns such as direct versus indirect analysis of State taxation, and instead focusing on whether a tax subjected States to multiple or duplicative taxation); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946) (returning to formal considerations, specifically the direct versus indirect analysis of taxation); *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (holding that Oklahoma was allowed to tax transportation services for interstate travel when the tickets were purchased in Oklahoma).

45. *See generally Case of the State Freight Tax*, 82 U.S. 232 (1872); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 259–60 (1987) (Scalia, J., concurring in part and dissenting in part) (internal citations omitted) (recognizing *Case of the State Freight Tax* as the origin of the dormant Commerce Clause.”).

46. The Supreme Court will often approach its analysis of this line by examination of whether the rule offends interstate Commerce via discriminations or burden rather than an examination of the States’ limitation itself. *See Wayfair*, 138 S. Ct. at 2091 (noting that concerns of burdens upon

a balance. On the one hand, the Court must strike down state legislation that engenders state protectionism intruding upon Congress' plenary ability in interstate commerce, and on the other, it must reject burdensome congressional action that shuts out state legislatures from this area of law-making altogether.⁴⁷

B. *The Inception of the Physical Presence Rule*

This is where formalism and pragmatism enter the frame as a judicial means of reaching this delicate balance between federal and state authority in commerce legislation.⁴⁸ In reaching this middle ground, the Supreme Court has historically fallen on both sides of the line.⁴⁹ The modern era of interpretation embodies a practical reading of legislation under the dormant and affirmative Commerce Clauses.⁵⁰ *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois*, the case which crafted the physical presence rule, was decided in 1967 by a Court leaning away from formalism.⁵¹

or discrimination against interstate commerce are the "two principles [that] guide the courts in adjudicating cases challenging state laws under the Commerce Clause"; see also *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–41 (1978)) ("We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause.").

47. See *Case of the State Freight Tax*, 82 U.S. at 248 ("The clause which vests in Congress the power to regulate commerce does not, *ipso facto*, take from the States the right to also regulate commerce, provided that the regulation of the latter do not come in conflict with those of the former."). Protectionist legislation is legislation which violates Congress's plenary power to regulate interstate commerce. See generally Regan, *supra* note 6 (explaining that the dormant Commerce Clause assists the Court in balancing concerns between local and interstate commerce to ensure that states do not engage in protectionism, or in a simpler sense, state-enacted legislation which discriminates against interstate commerce in favor of local commerce thus infringing upon Congress's plenary power to regulate commerce).

48. See *Jefferson Lines*, 514 U.S. at 181–82 (tracing a portion of the history of these methods of interpretation in highlighting the court's endorsement of formalism in the late 19th century into the Roosevelt era when the court began crawling towards pragmatism); see also Cushman, *supra* note 3, at 1089 ("Exegesis of the principal Commerce Clause cases decided by the Supreme Court between 1895 and 1942 typically proceeds with the aid of two rough and ready organizational rubrics: 'formalism' and 'realism.'").

49. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 309–10 (1992) (detailing the Court's evolution of dormant Commerce Clause interpretation and its contemporary rejection of formal interpretation). See generally Cushman, *supra* note 3 (detailing and defining moments of formalism and pragmatism in the Court's jurisprudence between the Civil War and World War II).

50. This is evidenced by the controlling standard for State legislation of interstate commerce birthed in *Complete Auto*. See *infra* Section I.C (discussing pragmatism through detailing of *Complete Auto*); see also *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1137 (10th Cir. 2016) (quoting *Complete Auto, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) ("The [*Complete Auto*] test focuses on a statute's 'practical effect' rather than its 'formal language' . . .").

51. See *Quill*, 504 U.S. at 310 ("*Bellas Hess* was decided in 1967, in the middle of this latest rally between formalism and pragmatism."). See also *Complete Auto*, 430 U.S. at 279 n.8 (first

National Bellas Hess, Inc. (Bellas Hess) was a large mail-order house fixed in North Kansas City, Missouri, which had no tangible or real property nor employees in Illinois.⁵² The only relation it had to Illinois was through United States Mail or common carrier.⁵³ Despite its position out of state, Bellas Hess also managed to accrue over \$2 million in sales from Illinois business over the fifteen-month period that taxes were assessed before the company filed suit.⁵⁴

The Illinois Use Tax Act (UTA) became effective in 1955.⁵⁵ The UTA initially only applied a tax on retailers maintaining a place of business in Illinois, but subsequent to a 1961 amendment the definition of in-state retailers was changed to encompass those “engaging in soliciting orders within [Illinois] from users by means of catalogues or other advertising, whether such orders are received or accepted within or without [Illinois].”⁵⁶ This amendment provoked Bellas Hess to file suit.⁵⁷

Bellas Hess challenged the UTA under both the Due Process Clause and the Commerce Clause, arguing that the UTA imposed an undue burden on interstate commerce and claimed that Bellas Hess held

citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); then citing *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948); and then citing *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940)) (referencing several decisions prior to 1967 which endorsed pragmatic interpretation); see also Cushman, *supra* note 3, at 1093–94 (explaining the “realist” tradition’s rise in the late 1930s, though taking it a step further in opining that both methods of interpretation have fallen by the wayside).

52. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 753–54 (1967) (quoting *Dep’t of Revenue v. Nat’l Bellas Hess, Inc.*, 214 N.E.2d 755, 757 (Ill. 1966)) (“The appellant, National Bellas Hess, is a mail order house with its principal place of business in North Kansas, City Missouri [Bellas Hess] does not maintain in Illinois any office . . . [and] it does not have in Illinois any agent”); see also Brief for Appellee at 5–6, *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753 (1967) (No. 241), 1967 WL 113902, at *5–6 [hereinafter *Bellas Hess* Brief for Appellee] (detailing same).

53. See *Bellas Hess*, 386 U.S. at 754 (“All of the contacts which [Bellas Hess] does have with the State are via the United States mail or common carrier.”). *But see id.* at 761 (Fortas, J., dissenting) (discussing the “large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market”); *Bellas Hess* Brief for Appellee, *supra* note 52, at 14–15 (arguing that the Court should focus its distinction on the realistic and regular effect of Bellas Hess’s engagement with Illinois).

54. See *Bellas Hess*, 386 U.S. at 761–62 (finding that Bellas Hess’s sales into Illinois “amounted to \$2,174,744” in the period which the taxes at issue were assessed); see also *Bellas Hess* Brief for Appellee, *supra* note 52, at 20 (detailing same).

55. See 120 ILL. COMP. STAT. 439/1 (1963) (defining the effective date as July 14, 1955); see also *Bellas Hess*, 214 N.E.2d at 757 (detailing same).

56. See *Bellas Hess*, 214 N.E.2d at 757 (citing 120 ILL. COMP. STAT. 439/2 (1965)) (altering the definition for what constitutes a taxable retailer by encompassing out-of-state retailers as well).

57. See *id.* at 757 (detailing Bellas Hess’s arguments founded in the amendments defining in-state retailers); see also *Bellas Hess* Brief for Appellee, *supra* note 52, at 6 n.4 (describing the amendment as “critical”).

insufficient minimum contacts to the state to establish due process.⁵⁸ The Court accepted both of these arguments.⁵⁹

The opinion blurred the Commerce Clause and Due Process Clause defenses in favor of *Bellas Hess*, making scarce distinction between the two justifications other than their actual definitions.⁶⁰ Ultimately, the Court derived the physical presence rule via comparison to pre-established Supreme Court limitations on interstate taxation.⁶¹ The Court noted that the furthest extension of a state's ability to lay tax on interstate commerce is shown in *Scripto, Inc. v. Carson*, where the Court upheld a Florida tax on a Georgia seller when only ten of the company's salesmen worked in Florida.⁶² The Court then attempted to define the opposite end of the spectrum by citing to *Miller Bros. Co. v. Maryland*, which held that Maryland could not impose a tax obligation on a Delaware seller with no property, sales solicitors, or even direct advertising in Maryland.⁶³ Through this comparison the Court derived the physical presence rule.⁶⁴ The Court reasoned that a transaction by mail constituted only "general interstate business" and that most courts recognized an informal distinction based on physical presence, so it officially endorsed physical

58. See *Bellas Hess*, 386 U.S. at 756 (explaining the foundation of *Bellas Hess*'s arguments against the amended statute); see generally *Bellas Hess* Brief for Appellee, *supra* note 52 (addressing both arguments through the brief).

59. See *Bellas Hess*, 386 U.S. at 760 (reversing the State Supreme Court's judgment).

60. See generally *Bellas Hess*, 386 U.S. 753 (addressing both arguments through comparison of mostly two cases without much reference to the Due Process Clause or Commerce Clause through the analysis); see also *id.* at 762 (Fortas, J., dissenting) (disagreeing with the Court's application of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), stating that it is not sufficiently related to the case at bar).

61. See *id.* at 757–60 (majority opinion) (first citing *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); and then citing *Miller Bros.*, 347 U.S. 340) (analyzing the furthest extent of Due Process Clause and Commerce Clause approval of State-imposed taxation duties versus an example of the Court's rejection of State-imposed taxation duties based on the Due Process Clause and Commerce Clause).

62. See *id.* at 757 (characterizing the States' ability to lay tax upon interstate commerce in *Scripto* as the "furthest constitutional reach to date"); see also *Scripto*, 362 U.S. at 213 (Whittaker, J., dissenting) (expressing his disagreement in the judgment on *only* Due Process grounds, endorsing the Court's application of the Commerce Clause allowing for tenuous physical presence).

63. See *Bellas Hess*, 386 U.S. at 758 (detailing the facts of *Miller Bros.* in an effort to compare the rationale there to the case at bar); see also *Scripto*, 362 U.S. at 212–13 (comparing its rationale to *Miller Bros.* and setting the foundation for the Court's errant comparison in *Bellas Hess*). But see *Bellas Hess*, 386 U.S. at 758 (explaining that regular marketing, quarterly advertising releases, and substantial sales into the State were still insufficient grounds to support taxation).

64. See *Bellas Hess*, 386 U.S. at 757–60 (citing *Scripto* and *Miller Bros.* to work towards a common rule regarding state taxation of interstate commerce). But see *Scripto*, 362 U.S. at 213 (Frankfurter, J., concurring) (writing separately only to disagree with the majority's attempt to compare the decision in *Scripto* to the rationale in *Miller Bros.*).

presence as a minimum threshold.⁶⁵ In defense of its new rule, the Court added that exposing *Bellas Hess* to a sales tax absent physical presence in Illinois might subject it, and other businesses like it, to a “virtual welter of complicated obligations to local jurisdictions with no legitimate claim” to impose a tax.⁶⁶

The Court was not unanimous in its decision, and Justice Fortas voiced his concerns through a dissent joined by Justices Black and Douglas.⁶⁷ The dissent focused on *Bellas Hess*’s meaningful and systematic engagement with Illinois.⁶⁸ It viewed the majority decision as prejudicing local businesses by giving remote sellers a competitive advantage to engage with in-state markets.⁶⁹ The dissent briefly conceded that some form of the majority’s rule was necessary in the context of irregular or individual transactions,⁷⁰ lending general support towards formalist interpretation. But it qualified that concession in the same breath, explaining that a business engaging in a “calculated, systematic exploitation of the market” was practically as connected to a state as any physically-present business would be.⁷¹ According to the dissent, the

65. See *Bellas Hess*, 386 U.S. at 758 (footnote omitted) (“In order to uphold the power of Illinois to impose use tax burdens on [Bellas Hess] in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.”). But see *id.* at 764–65 (Fortas, J., dissenting) (explaining the “sensible, practical conception” of the Commerce Clause applied in *Scripto* and its accurate comparison here, while failing to endorse the distinction which the majority reached when off-setting the *Scripto* rationale with *Miller Bros.*).

66. See *id.* at 759–60 (majority opinion) (“The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [Bellas Hess’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.’”).

67. See generally *Bellas Hess*, 386 U.S. at 760–66 (Fortas, J., dissenting). Also note that Justice White was included in the majority opinion, but then he dissents twenty-five years later in *Quill* for the majority’s failure to give “*Bellas Hess* the complete burial it justly deserves.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 322 (1992) (White, J., dissenting).

68. See *Bellas Hess*, 386 U.S. at 762–63 (“Under the present arrangement, it conducts its substantial, regular, and systematic business in Illinois and the State demands only that it collect from its customer-users—and remit to the State—the use tax which is merely equal to the sales tax which resident merchants must collect and remit.”); see also *Bellas Hess* Brief for Appellee, *supra* note 52, at 7–8 (arguing that the “substantiality of the business results obtained” by *Bellas Hess* sufficiently meets minimum contact criteria).

69. See *Bellas Hess*, 386 U.S. at 763 (describing the rule adopted by the Court as “competitive discrimination”).

70. See *id.* (explaining that “where sales are occasional, minor and sporadic” that the states should not have the ability to tax said transactions); see also *Bellas Hess* Brief for Appellee, *supra* note 52, at 14 (explaining that Court’s nexus requirement is decided by systematic engagement, which adequately addresses concerns of those occasionally involved in interstate commerce).

71. See *Bellas Hess*, 386 U.S. at 763 (“[Advantage to remote sellers] certainly should not be

“welter of complicated obligations” referenced in the majority was insufficient rationale to justify having such a broad-stroke rule.⁷² Ultimately, Justice Fortas concluded that both Due Process Clause and Commerce Clause requirements were met, and declined to support the physical presence rule.⁷³

C. Pragmatism Gains Ground

Before it reexamined the physical presence rule in *Quill*, the Court took a much more affirmative step toward pragmatism through *Complete Auto Transit, Inc. v. Brady*.⁷⁴ Specifically, *Complete Auto* overturned two pertinent decisions that supported formalistic interpretation of the Commerce Clause:⁷⁵ *Spector Motor Service, Inc. v. O'Connor* and *Freeman v. Hewit*.⁷⁶ Both of these decisions were valid jurisprudence

extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis.”); see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (explaining that the physical presence rule puts “both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers”).

72. See *Bellas Hess*, 386 U.S. at 766 (explaining that local retailers will be subject to the same tax, and that if they were to engage in a remote market, they would be equally responsible for collecting and remitting that market’s tax if so required); see also *Bellas Hess* Brief for Appellee, *supra* note 52, at 37–38 (“We respectfully suggest that what [*Bellas Hess*], in the context of this case, and other mail order firms are attempting to do, is not eliminate a discrimination—allegedly directed at them—but perpetrate a present discrimination against local sellers.”).

73. See *Bellas Hess*, 386 U.S. at 765–66 (“[I]t seems to me entirely clear that a mail order house engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State in competition with local retailers, and soliciting deferred-payment credit accounts from the State’s residents, is not excused from compliance with the State’s use tax obligations by the Commerce Clause or the Due Process Clause of the Constitution.”); see also *Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1943) (“[T]he mere fact that property is used for interstate commerce or has come into an owner’s possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share.”).

74. See generally *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (observing the success of practical applications versus the arbitrary results of formal ones through jurisprudence and applying pragmatism in crafting a test for the validity of State legislation imposing tax duties on interstate commerce); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (citing *Complete Auto*, 430 U.S. at 279) (alteration in original) (internal citation omitted) (“*Complete Auto* emphasized the importance of looking past ‘the formal language of the tax statute [to] its practical effect,’ and set forth a four-part test that continues to govern the validity of state taxes under the Commerce Clause.”).

75. See generally *Freeman v. Hewit*, 329 U.S. 249 (1946) (applying the now-rejected formal analysis which differentiated between direct and indirect taxation); *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602 (1951) (applying the same rule). But see *Spector Motor Serv.*, 340 U.S. at 612 (Clark, J., dissenting) (emphasis added) (arguing that the application of *Freeman* to this case was incorrect and arguing that the tax in question “meets every practical test of fairness and propriety”).

76. See *Complete Auto*, 430 U.S. 288–89 (expressly overruling *Spector* and, by association, *Freeman*); see also *Quill*, 504 U.S. at 309–10 (detailing the effect of *Complete Auto* on Commerce

when the Court decided *Bellas Hess* and undoubtedly influenced the Court's formal interpretation.⁷⁷

Complete Auto was a Michigan corporation engaged in transporting vehicles by rail to Mississippi.⁷⁸ A portion of this transport involved Complete Auto's agents crossing into Mississippi to secure the transfer of goods by truck to their final destination in Mississippi.⁷⁹ The State of Mississippi assessed a sales tax on Complete Auto based on the privilege of doing business within the State, so Complete Auto brought suit to recover taxes paid to Mississippi for various transports.⁸⁰

This case provided an example of technical physical presence in the taxing State, but did not squarely address physical presence as an issue.⁸¹ Instead, *Complete Auto* focused on whether the *Spector* rule, that taxing the "privilege" of doing business in interstate commerce was per se invalid, should be applied to invalidate the Mississippi privilege tax.⁸² Complete Auto's argument against taxation was largely based on the rule from *Spector*, which stated that a tax on the "'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce."⁸³ The Court rejected this argument after tracing the language "privilege of doing business" through recent case law, proving two relevant findings: first, "the underlying philosophy to this idea is that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation[;]"⁸⁴ and second, the phrasing of this rule proved arbitrary

Clause interpretation and the meaning of overturning *Spector* and *Freeman*).

77. See *Bellas Hess*, 386 U.S. at 756 (quoting *Freeman*, 329 U.S. at 253); see also *Quill*, 504 U.S. at 310 (alluding to *Freeman*'s impact in pulling the Court back into an era of formal interpretation of the dormant Commerce Clause).

78. *Complete Auto*, 430 U.S. at 276; see also Brief of the Appellee at 5, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (No. 76-279), 1976 WL 194487, at *5 [hereinafter *Complete Auto* Brief for Appellee] ("The appellant, a Michigan corporation, had contracted with General Motors to haul certain motor vehicles from Jackson, Mississippi . . .").

79. *Complete Auto*, 430 U.S. at 276; see also *Complete Auto* Brief for Appellee, *supra* note 78, at 5 (describing appellant as a hired distributor within the State of Mississippi, the state which levied the tax duties).

80. *Complete Auto*, 430 U.S. at 276–77; *Complete Auto* Brief for Appellee, *supra* note 78, at 1.

81. See generally *Complete Auto*, 430 U.S. 274 (1977); see also *id.* at 277 (citing *Complete Auto Transit, Inc. v. Brady*, 330 So.2d 268, 272 (Miss. 1976)) (briefly addressing the opinion of the State Supreme Court which eschewed the concerns of *Bellas Hess* that Complete Auto might be "smothered by cumulative taxes of several states.").

82. See generally *Complete Auto*, 430 U.S. 274 (1977); see also *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951) ("This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character.").

83. *Complete Auto*, 430 U.S. at 278 (first citing *Spector*, 340 U.S. 602; and then citing *Freeman v. Hewit*, 329 U.S. 249 (1946)).

84. The underpinning of this philosophy is essentially anti-protectionism—the idea that interstate commerce is untouchable by states. *Complete Auto*, 430 U.S. at 278; see also JEROME R.

because it tested the formalism of written statutes, but not the effects of the statutes.⁸⁵ The Court also compared precedent and determined this rule was unworkable because it created different outcomes in substantially similar situations.⁸⁶

To rectify these inconsistencies, the Court came up with a test that concerned the “practical effect” of taxes levied on interstate commerce, and declared that a tax would be sustained “against a Commerce Clause challenge 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.”⁸⁷ This test is still applied today when examining the link between a taxing state and the interstate transaction that it attempts to tax.⁸⁸

HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.11 (3d ed. 2001) (“[T]he Court repudiated the ‘underlying philosophy [of the *Spector* rule] that interstate commerce should enjoy a sort of ‘free trade’ immunity from state taxation.”).

85. See *Complete Auto*, 430 U.S. at 288 (opining that the Court’s “focus on that formalism merely obscures the question whether the tax produces a forbidden effect” and that the *Spector* rule did not actually address the Commerce Clause concerns in the case at bar); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (detailing *Complete Auto*’s rejection of the *Spector* rule as a recognition that—under the rule—two “differently denominated tax[es] with the same economic effect” could lead court to a finding that one is constitutional and the other is unconstitutional).

86. The Court determined that the *Spector* rule would have actually allowed for the tax in a nearly identical situation, all the legislature would have had to do was rename the tax without changing any of its pertinent features. See *Complete Auto*, 430 U.S. at 285 (citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464 (1959)) (“The reason for attaching constitutional significance to a semantic difference is difficult to discern.”); see also *supra* note 9 (comparing *Railway Express I* and *Railway Express II* through *Complete Auto*, which recognized that there was no discernable economic difference between the tax in each of the *Railway* cases, but formal interpretation led the Court to different treatment of the tax).

87. *Complete Auto*, 430 U.S. at 279; *Quill*, 504 U.S. at 311. The first prong is the most relevant for the purposes of this note, as the physical presence rule essentially is a determination that the “substantial nexus with the taxing State” is defined, at minimum, by physical presence. See *Quill*, 504 U.S. at 299 (citation omitted) (“[*Bellas Hess*] concerns the first part of the *Complete Auto* test and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”); see also *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2099 (2018) (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)) (concluding, after having rejected the physical presence rule, that “the first prong of the *Complete Auto* test simply asks whether the tax applies to activity with a substantial nexus” which is established when the taxpayer avails itself of the substantial privilege of carrying on business in that jurisdiction).

88. See, e.g., *Wayfair*, 138 S. Ct. at 2091 (citing *Complete Auto*, 430 U.S. 274) (detailing the “now-accepted framework” laid by *Complete Auto*); see also *Quill*, 504 U.S. at 310 (detailing that the four-part test from *Complete Auto* “continues to govern the validity of State taxes under the Commerce Clause).

The *Complete Auto* Court signaled the end of formalism in Commerce Clause interpretations in contemporary judicial review.⁸⁹ However, the physical presence rule somehow managed to remain in good-standing through decades of the Court's updated approach to interstate commerce issues.⁹⁰ Justifications alleging the complexity remote sellers would face in determining where they were subject to tax,⁹¹ enhanced forms of stare decisis,⁹² and others have been cited in defense of the rule through the years.⁹³ The Court endorsed these concerns in the first test of the physical

89. See *Quill*, 504 U.S. at 310 (first citing *Railway Express II*, 358 U.S. 434, 441 (1959); and then citing *Complete Auto*, 430 U.S. at 281) (“*Spector* . . . created a situation in which ‘magic words or labels’ could ‘disable an otherwise constitutional levy.’ *Complete Auto* emphasized the importance of looking past ‘the formal language of the tax statute [to] its practical effect,’ and set forth a four-part test that continues to govern the validity of state taxes under the Commerce Clause.”); *Wayfair*, 138 S. Ct. at 2094 (explaining how the physical presence rule acts as a “tax shelter” for remote sellers who engage in out-of-state markets, thus creating an unfair competitive advantage which favors remote sellers over local businesses); see also Walter Hellerstein et. al., *Commerce Clause Restraints on Taxation After Jefferson Lines*, 51 TAX L. REV. 47, 48 (1995) (citations omitted) (“The Supreme Court’s 1977 decision in [*Complete Auto*] signaled a paradigmatic shift in the Court’s approach to state tax adjudication under the dormant Commerce Clause.”); PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 2.17 (1981) (“After decades of distinctions based upon insubstantial and pointless formalism, in 1977 the Court cut the Gordian knot in [*Complete Auto*].”).

90. See generally *Quill*, 504 U.S. at 298 (applying the physical presence rule); see also *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (first citing *Direct Mktg.*, 814 F.3d at 1137 n.14 (majority opinion); then citing *Quill*, 504 U.S. at 319–20 (Scalia, J., concurring in part and dissenting in part); then citing *id.* 321–33 (White, J., concurring in part and dissenting in part); and then citing *Direct Mktg. Ass’n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015)) (“Everyone before us acknowledges that [the physical presence rule has] been the target of criticism over many years from many quarters, including from many members of the Supreme Court.”).

91. The most commonly asserted justification rests on the risk of subjecting taxpayers to multiple taxation or complications in determining where they are subjected to jurisdiction at all. See, e.g., *Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 759–60 (1967) (footnotes omitted) (“The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [Bellas Hess’s] interstate business in a virtual welter of complicated obligations”); see also *Quill*, 504 U.S. at 313 n.6 (explaining that the multiple tax jurisdictions within states would be too complicated to navigate for taxpayers); *Wayfair*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting) (considering over ten thousand jurisdictions that levy taxes as a reason to maintain the physical presence rule).

92. Another popular defense is that the rule justifies the application of an enhanced stare decisis. See *Quill*, 504 U.S. at 317–18 (explaining that “the continuing value of a bright-line rule in this area and the doctrine and principles of stare decisis indicate that” the rule remains good law, especially considering that the issue is one “that Congress may be better qualified to resolve”); see also Respondents’ Brief at 28, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Respondents’ Brief] (citing *Quill*, 504 U.S. at 320 (Scalia, J., concurring)) (explaining that stare decisis “applies with enhanced strength with respect to the Court’s dormant Commerce Clause decisions because Congress ‘remains free to alter what [the Court has] done’”).

93. Some arguments have consisted of the reliance interest based on the rule’s breadth in jurisprudence. See *Wayfair*, 138 S. Ct. at 2101 (“E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical presence rule.”). Consider also the challenge it would take to overrule an area of law based

presence rule following the *Complete Auto* decision—*Quill Corp. v. North Dakota*.⁹⁴

D. Affirmation: Quill Corp. v. North Dakota

In 1987, North Dakota amended the statutory definition of the term “retailer” to include remote sellers that regularly did business in North Dakota, thus requiring them to collect and remit a use tax.⁹⁵ Quill was a corporation with no property or employees in North Dakota, though about \$1 million of its \$200 million in annual sales was attributable to sales made in North Dakota.⁹⁶ After Quill refused to comply with the amended regulation, the North Dakota Tax Commissioner filed suit to seek enforcement.⁹⁷ The trial court ruled in favor of Quill based on *Bellas Hess* as precedent, but the North Dakota Supreme Court reversed on the grounds that “wholesale changes” in the economy and law justified a departure from *Bellas Hess*.⁹⁸

Justice Stevens penned the opinion reversing the decision of the North Dakota Supreme Court and upholding *Bellas Hess*.⁹⁹ The Court upheld only in part, and overruled any holdings that the Due Process Clause required physical presence for taxation.¹⁰⁰ The Court explained that it

on the Eleventh Amendment’s operation in this scope. See Trelease, *supra* note 12, at 18 (discussing the Eleventh Amendment’s restriction preventing suits against a State in federal court, forcing the issue to chance appeal to rise to the Supreme Court through the State’s various levels of appeal first).

94. See generally *Quill*, 504 U.S. 298; Brief for Petitioner, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (No. 91-494), 1991 WL 538773 [hereinafter *Quill* Brief for Petitioner].

95. See *Quill*, 504 U.S. at 302–03 (citing N.D. CENT. CODE § 57-40.2-01(6) (2019)).

96. *Id.* at 302; see also Brief for Respondent at 3, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (No. 91-194), 1991 WL 538776, at *3 [hereinafter *Quill* Brief for Respondent] (quantifying Quill’s sales into North Dakota as “in excess of \$970,000 during the tax periods at issue”).

97. *Quill*, 504 U.S. at 303; *Quill* Brief for Respondent, *supra* note 96, at 2–3.

98. See *Quill*, 504 U.S. at 303, 331 (stating that States were losing \$3.2 billion in 1992 from a failure to collect sales and use taxes on transactions with remote sellers) (citing *Quill* Brief for Respondent, *supra* note 96, at 9); see also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE TAXATION OF INTERSTATE MAIL-ORDER SALES: ESTIMATES OF REVENUE POTENTIAL 1990–1992, at 3 (1991) [hereinafter ACIR ESTIMATES OF REVENUE POTENTIAL] (showing that, considering their inability to collect on sales and use taxes of remote sellers direct-marketing alone, states lost \$3.08 billion in 1991 and that states were set to lose \$3.27 billion in 1992).

99. *Quill*, 504 U.S. at 301–02; see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2087–88 (2018) (explaining that *Quill* endorsed *Bellas Hess*’s holding to uphold the physical presence rule).

100. See *Quill*, 504 U.S. at 308 (explaining that the Due Process Clause is no longer sufficient justification to uphold the physical presence rule); see also *Quill* Brief for Respondent, *supra* note 96, at 28 (first citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985); then citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980); then citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957); and then citing *Hust v. N. Log, Inc.*, 297 N.W.2d 429, 433 (N.D. 1980)) (relying upon several cases which advanced the Court’s application of the Due

was common for meaningful business to be solely carried out by mail based on modern business practices.¹⁰¹ The Court also stated that there is “fair warning” to a corporation that directly aims its business at the forum state.¹⁰² Thus, the Due Process Clause could not prop up the physical presence rule.¹⁰³

The Court reversed the North Dakota Supreme Court and reaffirmed the physical presence rule based on *Bellas Hess*'s Commerce Clause justification.¹⁰⁴ The Court compared the Due Process Clause and Commerce Clause and showed that the former is related to fair notice to the defendant, while the latter is concerned with regulating the national economy.¹⁰⁵ Through this distinction, the Court explained that a corporation may have “minimum contacts” with a taxing state as the Due Process Clause requires, even though they simultaneously lack the “substantial nexus” with that state as the Commerce Clause requires under *Complete Auto*.¹⁰⁶ The Court attempted to show that physical presence was a practical distinction between satisfying nexus in the context of the Commerce Clause versus the Due Process Clause, reaching the conclusion that only physical presence could satisfy Commerce Clause nexus under *Complete Auto*, while the Due Process Clause required less.¹⁰⁷

Process Clause in stating that it is “beyond argument that North Dakota courts could assert personal jurisdiction over Quill”).

101. See *Quill*, 504 U.S. at 308 (explaining that it is an “inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail”); see also *id.* (quoting *Burger King*, 471 U.S. at 476) (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).

102. See *Quill*, 504 U.S. at 308 (alterations in original) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)) (detailing that a corporation has “‘fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign’”).

103. See *id.* (striking the Due Process Clause as justification for the physical presence rule).

104. See *id.* at 318 (explaining that *Bellas Hess* is consistent with the Commerce Clause); see also *Quill* Brief for Petitioner, *supra* note 94, at 9 (“Any realignment of Commerce Clause applications is more suitably undertaken by Congress.”).

105. *Quill*, 504 U.S. at 313; see also Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 14 (2008) (“[D]istinguishing nexus under the Due Process Clause from nexus for Commerce Clause purposes and identifying Due Process nexus with economic presence and Commerce Clause nexus with physical presence—at least in use tax collection cases.”).

106. See *Quill*, 504 U.S. at 313 (explaining that the different foundations of the Commerce Clause and Due Process Clause suggests that each will require an independent threshold for nexus). *But see id.* at 325 (White, J., concurring in part and dissenting in part) (noting that the Court has never made this distinction before).

107. See *id.* at 312–13 (majority opinion) (disagreeing that the *Complete Auto* decision “undercut the *Bellas Hess* rule”); see also *Quill* Brief for Petitioner, *supra* note 94, at 14 (stating that the State’s application of the *Complete Auto* test “eviscerates both the first and fourth prongs” relating to nexus); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–77 (1985)

Prior to Supreme Court review, the North Dakota Supreme Court had attempted to surpass the physical presence requirement by reasoning that the Supreme Court's trend towards pragmatism supported a finding absent an application of the rule.¹⁰⁸ In fact, Justice Stevens's opinion briefly traced the history of the dormant Commerce Clause, and he too recognized the trend away from formal readings of tax issues.¹⁰⁹ Still, the majority warily accepted the physical presence rule because *Bellas Hess*, in the opinion of the Court, did not specifically rely on the hyper-formal distinctions described in *Spector* and *Freeman*.¹¹⁰

In a lengthy dissent, specifically against the majority's interpretation of the dormant Commerce Clause, Justice White explained that the Court did not go far enough.¹¹¹ He argued that though *Freeman* and *Spector* expressly denied the labels and "magic words" of formalistic language, the physical presence rule should also succumb to the *Complete Auto* rationale because it was wholly based on the notion that interstate commerce is immune to state taxation.¹¹² Additionally, Justice White pointed out the Court had never before found that Due Process Clause nexus was satisfied without also satisfying Commerce Clause nexus.¹¹³

(discussing the underpinnings of the Due Process Clause such as purposeful availment, minimum contacts, and other standards—many of which were endorsed by the Court after *Bellas Hess*).

108. See *Quill*, 504 U.S. at 314 (citing *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 214 (N.D. 1991)) ("The State Supreme Court reviewed our recent Commerce Clause decisions and concluded that those rulings signaled a 'retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach' and thus supported its decision not to apply *Bellas Hess*.").

109. See *id.* at 309–11 (first citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 285 (1977); then citing *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1951); and then citing *Railway Express II*, 358 U.S. 434, 441 (1959)) (detailing a brief, but informative, history of the Supreme Court's past interpretations of the dormant Commerce Clause surrounding limitations on taxation, and how the Court has abandoned distinguishing formal notions of direct versus indirect burdens or the "privilege of doing interstate business," focused on a practical interpretation through the lens of the *Complete Auto* test); see also *id.* at 314 (expressing agreement with the State Supreme Court's recognition of the trend towards pragmatism but declining to reach the same conclusion that the physical presence rule offends modern interpretations).

110. See *Quill*, 504 U.S. at 310–11 (citing *Complete Auto*, 430 U.S. at 281) (differentiating the case at bar from *Spector* and *Freeman* because the physical presence rule was not vulnerable to exploitation by clever legislative language or allowing the validity of statutes to hinge on "draftsmanship and phraseology").

111. See generally *Quill*, 504 U.S. 298 (White, J., concurring in part and dissenting in part); see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (reminiscing that his complicity with the majority in *Quill* as a mistake).

112. See *Quill*, 504 U.S. at 323 (citations omitted) (citing *Complete Auto*, 430 U.S. at 288) ("What we disavowed in *Complete Auto* was not just the 'formal distinction between "direct" and "indirect" taxes on interstate commerce,' but also the whole notion underlying the *Bellas Hess* physical-presence rule—that 'interstate commerce is immune from state taxation.'").

113. See *id.* at 325 ("The Court freely acknowledges that there is no authority for this novel interpretation of our cases and that we have never before found, as we do in this case, sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause."); see also

Justice White next analyzed the background of the *Complete Auto* test's nexus requirement to show it was substantially grounded in the Due Process Clause and that such a distinction between the requirements is meaningless.¹¹⁴

Ultimately, Justice White rested his argument on logic.¹¹⁵ The physical presence rule, even before the modern e-commerce boom, was dated in light of the economic realities of contemporary business practices.¹¹⁶ He detailed the rule's indifferent permission to businesses to exploit a judicially-created loophole at states' disadvantage on an otherwise lawful opportunity to tax.¹¹⁷ But his opinion, while correct in hindsight, stood in the majority's shadow for another quarter-century.¹¹⁸

II. RETURN TO FORM

The *Wayfair* Court overturned the physical presence rule for three reasons: it is an unnecessary hold on state's ability to tax interstate commerce, it creates market distortions, and its formal background contradicts contemporary Commerce Clause precedent.¹¹⁹ The Court

Wayfair, 138 S. Ct. at 2092 (“*Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.”).

114. See *Quill*, 504 U.S. at 327–28 (detailing the history of the *Complete Auto* nexus requirement which contains a strong background in Due Process rationale without reference to Commerce Clause concerns); see also *id.* at 327 (“For the Court now to assert that our Commerce Clause jurisprudence supports a separate notion of nexus is without precedent or explanation.”).

115. See *id.* at 329 (“The majority clings to the physical-presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule.”); see also *Quill* Brief for Respondent, *supra* note 96, at 24 (“[L]ogic compels common application of the same minimum contacts standards to personal and taxing jurisdiction questions.”).

116. See generally *Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. at 760–66 (1967) (Fortas, J., dissenting); see also *Wayfair*, 138 S. Ct. at 2092 (“These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”).

117. See *Quill*, 504 U.S. at 329 (describing the majority’s opinion as “perpetuating a rule that creates an interstate tax shelter for one form of business”); see also *Quill* Brief for Respondent, *supra* note 96, at 17–18 (quoting *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 215 (N.D. 1991)) (detailing that the rule gives remote sellers a competitive advantage to local sellers, comparing it a “sword to carve out a tax-free mail order niche”).

118. See generally *Wayfair*, 138 S. Ct. 2080 (overruling the physical presence rule); see also *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (“Everyone before us acknowledges that *Quill* is among the most contentious of all dormant commerce clause cases.”).

119. See *Wayfair*, 138 S. Ct. at 2092 (citations omitted) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be “applied to an activity with a substantial nexus with the taxing State.” Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.

also referenced the dawn of internet technology, reasoning that it lessens the burden of compliance upon remote sellers to collect and remit tax to the State.¹²⁰ The thrust of the Court's opinion focused on the harmful effects of the rule.¹²¹ As explained below, the Court dissected the physical presence rule to show that its fundamentally flawed origin yielded unconstitutional results.¹²²

A. Facts

Before *Wayfair*, the South Dakota legislature enacted S.B. 106 ("the Act"), which required out-of-state sellers with no employees or real estate within South Dakota to collect and remit a sales tax on all transactions consummated within the state.¹²³ The legislature deemed the Act a necessary emergency response to the state's eroding tax base.¹²⁴ The Act limited the requirement to collect and remit the sales tax to those remote sellers that, on an annual basis, deliver more than \$100,000 of goods or services into the State, or engage in two hundred or more separate transactions for the delivery of goods or services into the state.¹²⁵ S.B. 106 directly challenged the physical presence rule, and the South Dakota legislature fully anticipated Supreme Court review, evidenced by provisions that placed a hold on its effect while waiting for a judicial verdict on its constitutionality.¹²⁶

Respondents were three of the leading remote sellers in South Dakota, none of which collected the required sales tax.¹²⁷ The three parties, Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., all met the minimum requirements of the act.¹²⁸

Id.

120. See *id.* (first citing LAFFER & ARDUIN, *supra* note 14, at 4; and then citing Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000)) ("Quill created an inefficient 'online sales tax loophole' that gives out-of-state businesses an advantage. And 'while nexus rules are clearly necessary,' the Court 'should focus on rules that are appropriate to the twenty-first century, not the nineteenth.'").

121. See generally *Wayfair*, 138 S. Ct. 2080; *Wayfair* Respondents' Brief, *supra* note 92.

122. See *infra* Section II.C (detailing the majority's opinion in *Wayfair*); see generally *Wayfair*, 138 S. Ct. 2080.

123. S.D. CODIFIED LAWS § 10-64-1 (2019); see also *Wayfair*, 138 S. Ct. at 2088–89.

124. § 10-64-1; see *Wayfair*, 138 S. Ct. at 2088 (drafting the Act because it was "necessary for the support of the state government and its existing public institutions"); see also *Wayfair* U.S. Amicus Curiae, *supra* note 22, at 5 (quoting 2016 S.D. Sess. Laws ch. 70 § 8, at 217) ("An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.").

125. S.D. CODIFIED LAWS § 10-64-2 (2018), *invalidated by Wayfair*, 138 S. Ct. 2080; see also *Wayfair*, 138 S. Ct. at 2089.

126. S.D. CODIFIED LAWS § 10-64-4 (2019); see also *Wayfair*, 138 S. Ct. at 2089.

127. *Wayfair*, 138 S. Ct. at 2089; *State v. Wayfair, Inc.*, 901 N.W.2d 754, 756 n.3 (S.D. 2017).

128. *Wayfair*, 138 S. Ct. at 2089; see also *Wayfair*, 901 N.W.2d at 759–60 (citations omitted)

B. Procedural History

South Dakota filed for a declaratory judgment against the respondents in state court pursuant to the Act.¹²⁹ The respondents moved for summary judgment, arguing the Act was unconstitutional based on *Quill*, and the trial court granted the motion.¹³⁰ The South Dakota Supreme Court affirmed the lower court's decision on direct review, though it acknowledged the persuasiveness of the State's arguments.¹³¹ Specifically, the South Dakota Supreme Court accepted that the physical presence rule was inconsistent with the remainder of the United States Supreme Court's Commerce Clause precedent and yielded inconsistent results.¹³²

C. Majority Opinion

The Court began its opinion by addressing the physical presence rule's origin.¹³³ After a brief description of what sales and use taxes are,¹³⁴ and a recitation of the facts, the Court began its dormant Commerce Clause analysis.¹³⁵ It detailed the history of the Court's understanding of states' ability to regulate interstate commerce from its earliest precedent through modern law.¹³⁶ The Court found that states may regulate interstate

("[E]ach lacked a physical presence in South Dakota; each met the sales and transaction requirements for application of [the Act]; and none were registered to collect South Dakota sales tax.").

129. *Wayfair*, 138 S. Ct. at 2089; *Wayfair*, 901 N.W.2d at 756.

130. *Wayfair*, 138 S. Ct. at 2089; *Wayfair*, 901 N.W.2d at 756.

131. *Wayfair*, 138 S. Ct. at 2089 (quoting *Wayfair*, 901 N.W.2d at 761) ("However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes.").

132. *Id.* at 2089; *see also Wayfair*, 901 N.W.2d at 761 ("The State also claims that the Supreme Court's application of the physical presence requirement to the collection of sales tax differs from its application of other Commerce Clause requirements to similar collection obligations. This has led to inconsistent results.").

133. *See Wayfair*, 138 S. Ct. at 2087–88 ("The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by [*Bellas Hess* and *Quill*].").

134. The Court explains that South Dakota enforced a sales tax on transactions and assigned seller's the responsibility of collecting and remitting this tax. *Id.* at 2088. If the seller were to refuse to collect and remit the tax, the responsibility would shift to the consumer to pay a use tax on the transaction, a decisively less reliable schema. *See id.* (quoting *Nat'l Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551, 555 (1977) ("[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious."); *see also supra* note 12 and accompanying text (detailing the difference between sales taxes and use taxes).

135. *See Wayfair*, 138 S. Ct. at 2089 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–36 (1979)) (beginning an analysis of the dormant Commerce Clause by addressing its purpose as preventing "economic Balkanization that had plagued relations among the Colonies").

136. *See id.* at 2089–91 (first citing *Gibbons v. Ogden*, 22 U.S. 1, 6 (1824); and then citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)) (detailing the history of the Commerce Clause from 1824 through modern precedent).

commerce only to the point that such regulation does not discriminate against, or impose undue burdens upon, interstate commerce.¹³⁷ The purpose is to ensure that states have an adequate ability to manage local interest, while not intruding on Congress's plenary control of interstate commerce.¹³⁸

The Court's limitation on burdensome or discriminatory legislation foreshadowed its examination of the *Complete Auto* test.¹³⁹ The Court began at the test's first prong, and investigated what threshold requirements for substantial nexus actually looked like in jurisprudence.¹⁴⁰ The Court acknowledged that the requirements of Due Process and the Commerce Clause are not the same, but noted their shared aspects, particularly when examining a substantial nexus.¹⁴¹ After a brief look at *Bellas Hess* and *Quill*, the Court noted that *Quill* recognized the arbitrary distinction between the origins of *Complete Auto*'s nexus requirement and notice requirements under the Due Process Clause.¹⁴² With this background set, the Court comfortably stated that since its inception, the physical presence rule has stood starkly out of place in Commerce Clause jurisprudence.¹⁴³

137. *See id.* at 2090–91 (“Modern precedents rest upon two primary principles that mark the boundaries of a State’s authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce.”).

138. *See Wayfair*, 138 S. Ct. at 2091 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)) (explaining that the Court will focus on the State’s ability to “even-handedly” legislate to pursue its legitimate interests while not infringing upon congressional territory).

139. The *Complete Auto* test’s second and third prongs ensure that the State’s regulation of interstate commerce is both “fairly apportioned” and “does not discriminate against interstate commerce.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992) (“The second and third parts of [the *Complete Auto* test] require fair apportionment and non-discrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce.”). Though the Court expresses this boundary upon states’ ability to regulate, the substance of its analysis handles the first prong which focuses on nexus. *See generally Wayfair*, 138 S. Ct. 2080; *see also Quill*, 504 U.S. at 313 (detailing that the first and fourth prongs of the test require substantial nexus).

140. *See Wayfair*, 138 S. Ct. at 2093 (“[T]he requirements of due process are met irrespective of a corporation’s lack of physical presence in the state.”); *see generally Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954).

141. *See Wayfair*, 138 S. Ct. at 2093 (quoting *Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 752, 756 (1967)) (noting that the nexus requirements between the Due Process Clause and Commerce Clause are “closely related”); *see also Hellerstein et al., supra* note 89, at 70 (separating his analysis of due process and interstate commerce requirements except for nexus, which he considers with due process).

142. *See Wayfair*, 138 S. Ct. at 2092 (citing *Quill*, 504 U.S. at 311–13) (noting that *Quill* recognized that the physical presence rule likely would not have been created had *Bellas Hess* been decided before *Complete Auto*, but “nevertheless, the *Quill* majority concluded that the physical presence rule was necessary”).

143. *See id.* (“Each year, the physical presence rule becomes further removed from economic

The majority accentuated the fact that *Quill* recognized parallels to the Due Process Clause, but that it rested on the fact that parallels do not equal identical standards and failed to adequately address whether physical presence would be *required* by the Commerce Clause.¹⁴⁴ *Quill* instead drew the line between the Due Process and Commerce Clause thresholds at physical presence.¹⁴⁵ As an example of the arbitrary effect this had, the Court explained that several hundred salespersons in one state with internet access made no difference to a company's ability to transact in any state under modern constraints when compared to one salesperson in every state.¹⁴⁶

Turning to its next point, the Court explained that the purpose of the Commerce Clause is to foster a thriving national economy, and not to excuse those engaged in interstate commerce from their share of taxation.¹⁴⁷ It also recognized that the physical presence rule is an extraordinary imposition on interstate commerce regulation, directly defying Commerce Clause principles.¹⁴⁸ The Court described market distortions created by the physical presence rule and how it exhibits a

reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”); *see also* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that the physical presence rule has “been the target of criticism over many years from many quarters”).

144. *See Wayfair*, 138 S. Ct. at 2093 (detailing the history of substantial nexus under and how *Quill* recognized that this nexus was satisfied without physical presence under the Due Process Clause); *see also id.* at 2101 (Roberts, C.J., dissenting) (“I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.”).

145. While the Court conceded that *Quill* analyzed Due Process concerns finding physical presence as unnecessary to establish nexus, it did not reverse the question upon the Commerce Clause. *See id.* at 2093 (majority opinion) (“The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus.”); *see also Quill*, 504 U.S. at 325 (White, J., concurring in part and dissenting in part) (describing the *Quill* Court's comparative analysis of the Due Process and Commerce Clauses as “an uncharted and treacherous foray”).

146. *Wayfair*, 138 S. Ct. at 2093; *see* Reply Brief at 14, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Reply Brief] (“Under *Quill*'s odd rule, that unintentional, minor, and arbitrary physical presence suffices.”).

147. *See Wayfair*, 138 S. Ct. at 2093–94 (alterations in original) (citations omitted) (first citing *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978); and then citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977)).

The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. But it is “not the purpose of the [C]ommerce [C]ause to relieve those engaged in interstate commerce from their just share of state tax burden.”

Id.

148. *See id.* at 2095–96 (explaining the massive implication the physical presence rule has on interstate commerce and the major boundary it sets in front of states seeking collection of a just tax); *see also Wayfair* Reply Brief, *supra* note 146, at 12 (“*Quill* is far too overbroad to retain.”).

preference towards remote sellers.¹⁴⁹ The rule created, rather than prevented, market distortions by encouraging fewer storefronts and discouraging the physical growth of companies.¹⁵⁰ In a practical sense, that geographically-removed businesses were excused from tax collection in states which they meaningfully engaged with defied logic and encouraged bad faith in business practice.¹⁵¹ The Court noted that Wayfair itself engaged in this sort of behavior, advertising lower prices and more attractive offers based on its ability to omit sales taxes from prices.¹⁵²

Moving to its third point, the Court highlighted the formalistic logic the rule endorsed—something the Court did away with a long time ago.¹⁵³ The Court relied on an example to prove this point, in which two businesses sell furniture remotely. One business had a small warehouse in South Dakota, unrelated to any sales it made in the state, and the other had a major warehouse that contributed to South Dakota sales just across the border in North Dakota.¹⁵⁴ Based on the locations of their warehouses, the first business would collect and remit a sales tax, even though the items sold were unrelated to the warehouse, while the second business would owe no sales tax.¹⁵⁵ This forces an arbitrary tax against

149. See *Wayfair*, 138 S. Ct. at 2094 (describing the physical presence rule as a “tax shelter for business”); see also *Quill*, 504 U.S. at 329 (describing the physical presence rule as an “interstate tax shelter for one form of business . . . but [one with] no countervailing advantage for its competitors”).

150. See *Wayfair*, 138 S. Ct. at 2094 (“Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court’s precedents.”); see also *Quill*, 504 U.S. at 315 (acknowledging that the rule that it was endorsing was “artificial at its edges”).

151. See *Wayfair*, 138 S. Ct. at 2094 (detailing that the rule creates an incentive to avoid presence in a State solely to reduce prices below that of brick and mortar competitors); see also *Complete Auto*, 430 U.S. at 288 (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)) (detailing that it is “not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden”).

152. See *Wayfair*, 138 S. Ct. at 2096 (describing Wayfair’s advertisement of reduced taxation as a “subtle offer to assist in tax evasion”).

153. This formalistic viewpoint was abandoned even before the rule itself was crafted. See *Quill*, 504 U.S. at 309–11 (detailing the history of the Court’s interpretation of the Commerce Clause and noting that *Bellas Hess* was penned as the Court’s precedent regarding the Commerce Clause shift towards pragmatism); see also *supra* note 9 (referencing *Complete Auto*, which noted that the Court’s formal approach towards testing State legislation allowed for careful drafting of laws to circumvent Commerce Clause restrictions); *Wayfair*, 138 S. Ct. at 2094 (citing *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)) (“The Court’s Commerce Clause jurisprudence has ‘eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.’”).

154. *Wayfair*, 138 S. Ct. at 2094; see *Wayfair Reply Brief*, *supra* note 146, at 7 (recognizing the same distortions that this example points out and concluding that it treats identical actors differently “based on the wholly arbitrary fact that some have a footprint in one corner of States as large as California”).

155. See *Wayfair*, 138 S. Ct. at 2094 (detailing the arbitrary nature of the physical presence

the former business because the sales are unrelated to property or employees within the state.¹⁵⁶ From an economic standpoint this example demonstrated that the physical presence rule treated businesses making the same amount of money in the same state differently.¹⁵⁷

Moreover, the Court added that the rule defied the Commerce Clause by ignoring realistic considerations.¹⁵⁸ A practical reading of the rule reveals unanswered questions on either side of the bright line, chief among them—why is physical presence a necessary threshold?¹⁵⁹ Neither *Bellas Hess* nor *Quill* sought to answer this question, and the Court asked several more that the rule could not answer.¹⁶⁰

The Court ended its analysis with the determination that the physical presence rule was too great of an error to let stand because the rule's foundation was flawed on its own terms.¹⁶¹ It reasoned that the constitutional default rule prevented the Court from asking Congress to change a rule when the rule itself was created through judicial

rule's effect as it levies a tax upon one business, who may even be more actively engaged in the market, but not another only a few miles away only because the latter holds no property or agents, relevant to the transaction or otherwise, in the state in question); *see also* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150–51 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that this “guarantees a competitive advantage to certain firms simply because of the organizational form they choose”).

156. *See Wayfair*, 138 S. Ct. at 2094 (“This distinction simply makes no sense.”); *see also* Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977) (confirming that physical presence entirely unrelated to the sale of goods into a jurisdiction will satisfy the rule).

157. *See Wayfair*, 138 S. Ct. at 2094 (showing that the rule “treats economically identical actors differently, and for arbitrary reasons”); *see also Wayfair* Reply Brief, *supra* note 146, at 14–15 (explaining that the physical presence rule is “logically arbitrary”).

158. *See Wayfair*, 138 S. Ct. at 2095 (explaining that the rule should be, but is not, concerned with the actual practical effect it has on the market rather than formalistic distinctions for nothing other than the sake of drawing a clear line in interpreting the Commerce Clause); *see also Quill*, 504 U.S. at 330–31 (detailing that it is “very doubtful” that the Court's bright-line rule will actually create firm boundaries that reduce litigation).

159. *See Wayfair*, 138 S. Ct. at 2095 (postulating that the physical presence rule's lack of clarity in jurisprudence will further manifest as to why “a single employee or a single warehouse should create a substantial nexus while ‘physical’ aspects of pervasive modern technology should not”); *see also Wayfair* Reply Brief, *supra* note 146 at 14–15 (discussing questions that the Court's will likely face in defining the limits of physical presence in conjunction with modern technological advancements).

160. The Court referenced *Quill*, which stated that a few floppy diskettes in the state would fail to establish physical presence for tax purposes but failed to say why. *Wayfair*, 138 S. Ct. at 2095 (citing *Quill*, 504 U.S. at 315). Applying a more modern example, the Court ponders whether a business's website leaving cookies on a user's browser would satisfy property in the user's state. *Id.*

161. *See Wayfair*, 138 S. Ct. at 2096–97 (explaining that the Court is at fault for the rules existence in the first place, robbing Congress of its plenary power regardless of its silence on adjusting the rule); *see also Wayfair* Reply Brief, *supra* note 146, at 21 (asserting that Respondents misunderstand that Congress's plenary power is infringed upon by the existence of the judicially created physical presence rule).

interpretation.¹⁶² As a doctrine of its own creation, reversing the physical presence rule did not limit the lawful prerogatives of Congress; *stare decisis* was the only thing that stood in the way.¹⁶³ The dramatically different technological landscape of today means that access to interstate sales burdened states unlike in the past, pushing significant portions of their tax base out of lawful reach.¹⁶⁴ The Court highlighted states' struggle to cope with the rule in attempts to reclaim some of their declining transaction-based taxes, crafting unworkable solutions that might subject courts to frivolous litigation.¹⁶⁵ Reliance interests, the Court reasoned, simply did not supersede the harm of the physical presence rule.¹⁶⁶

The Court concluded by defining the new, practical threshold for substantial nexus with the taxing state as when a taxpayer or collector "avails itself of the substantial privilege of carrying on business in that jurisdiction."¹⁶⁷ Under this standard, S.B. 106 passed the first prong of *Complete Auto* with ease.¹⁶⁸ Though it did not squarely address the remainder of the *Complete Auto* test on appeal, the Court hypothesized

162. See *Wayfair*, 138 S. Ct. at 2096 ("It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation."); see also *Wayfair* Reply Brief, *supra* note 146, at 22 ("Relatedly, it is unfair to read Congress's failure to intervene as reflecting implicit support for *Quill*.").

163. *Wayfair*, 138 S. Ct. at 2096–97; see *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring) (detailing the several technological advancements that lend to overturning the physical presence rule, using States' efforts and failures to legislate around the rule as evidence).

164. See *Wayfair*, 138 S. Ct. at 2097 (first citing Brief of Amici Curiae Law Professors and Economists in Support of Petitioner at 11 n.7, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Law Professors and Economists Amici Curiae]; and then citing SALES TAXES REPORT, *supra* note 12, at 11–12) (demonstrating that e-commerce sales are expected to reduce states' taxable income by up to \$33 million dollars, a number up to ten times as high as the sales lost in 1992 under *Quill*).

165. States crafted imaginative examples in desperate attempts to reclaim sales tax revenue, and the Court relished the thought of handling these proposed statutes in Court when a simpler solution existed. *Wayfair*, 138 S. Ct. at 2097–98; see also Brief for Tax Foundation as Amicus Curiae in Support of Neither Party at 26–27, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Tax Foundation Amicus Curiae] (detailing examples of three states which created threshold requirements similar or identical to South Dakota's).

166. See *Wayfair*, 138 S. Ct. at 2098 (alterations in original) (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)) (stating that "*stare decisis* accommodates only 'legitimate reliance interest[s]'").

167. This new standard relinquishes the distinction between the first prong of the *Complete Auto* test and its Due Process Clause origins. *Wayfair*, 138 S. Ct. at 2099 (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

168. See *id.* at 2099 ("Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State.").

that the test would be satisfied based on the adequate safeguards the Act offered to interstate commerce through small business protection.¹⁶⁹

D. Concurrences

Justice Thomas's concurrence voiced no opposition to major points of the Court's opinion, rather, he wrote separately to reflect on his participation in the *Quill* majority. He compared himself to Justice White, who helped solidify the physical presence rule in *Bellas Hess*, but eventually saw his error by the time the Court was able to substantively reevaluate it.¹⁷⁰

Justice Gorsuch started his opinion by reasserting the majority's stance that the sales tax imposed by South Dakota did not discriminate or unduly burden interstate commerce, rather it evened the playing field between local business and interstate commerce.¹⁷¹ However, he also made a point to voice his tentative disagreement with the Court's examination of the dormant Commerce Clause.¹⁷² Ultimately, neither Justice Thomas, nor Justice Gorsuch sought to amend any of the substantive findings of the Court's opinion.¹⁷³

E. Roberts's Dissent

Chief Justice Roberts began his dissent discussing the stare decisis concerns of the Court, and then argued that the economic magnitude of this decision should disqualify the Court from overruling *Quill* so that Congress may address it instead.¹⁷⁴ Roberts believed that stare decisis

169. The threshold requirements for meeting taxable minimums under the Act are well-known as Safe Harbor provisions. *See infra* Part IV (defining Safe Harbor provisions under the Streamlined Sales and Use Tax Agreement); *see also Wayfair*, 138 S. Ct. at 2100 (specifically referring to the Streamlined Sales and Use Tax Agreement as an adequate body for lessening the cost of compliance with the Court's decision).

170. *See Wayfair*, 138 S. Ct. at 2100 (Thomas, J., concurring) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 333 (1992)) ("And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and *Quill* 'can no longer be rationally justified.'").

171. *See id.* (Gorsuch, J., concurring) (citing *Direct Marketing Ass'n. v. Brohl*, 814 F.3d, 1129, 1150 (10th Cir. 2016) (Gorsuch, J., concurring)) (explaining that the advantage offered directly disadvantages local sellers).

172. *See id.* at 2100–01 ("Meanwhile our dormant commerce cases suggest Article III courts may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by stare decisis, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day.").

173. *See generally id.* at 2100 (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring).

174. *Id.* at 2101 (Roberts, C.J., dissenting). *But see id.* ("I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.").

demanded “special justification,”¹⁷⁵ especially when Congress exercises primary authority that can override Court precedent.¹⁷⁶ He cited the Court’s prior deference in context of the dormant Commerce Clause.¹⁷⁷ Essentially, Roberts opined that the Court’s deference to Congress’ plenary power in the realm of Commerce Clause jurisprudence meant that the Court should not venture to overturn a decision that would greatly affect the national economy.¹⁷⁸

Roberts also believed that the majority rushed into its decision without apt consideration of the economic effect.¹⁷⁹ He argued that between 87–96 percent of the taxes from internet retailers is collected already, and that the number would likely grow as the industry evolved and began to solve the problem itself.¹⁸⁰ He then spoke to the “likely baffling” challenges the decision creates for retailers who have to cater to more than ten thousand jurisdictions that levy sales taxes.¹⁸¹

III. WHAT WENT WRONG

This Part will examine physical presence rule precedent and dissect the Court’s rationale in *Bellas Hess*, *Quill*, and then *Wayfair*.¹⁸² This will show that the foundation for the rule is flawed,¹⁸³ the rule is unworkable,¹⁸⁴ and that modern realities require a rejection of the rule.¹⁸⁵ This Part will also briefly address contentions of the Respondents that

175. *See id.* (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); *see also Quill*, 504 U.S. at 320 (Scalia, J., concurring) (detailing that *stare decisis* applies with “special force” in areas where Congress has plenary power to regulate).

176. *See Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting) (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)).

177. *Id.* at 2102 (Roberts, C.J., dissenting) (citing *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 770 (1945)).

178. *See generally id.* at 2101–02 (2018) (Roberts, C.J., dissenting).

179. *See id.* at 2103 (“The Court proceeds with an inexplicable sense of urgency.”).

180. *See id.* (explaining that the magnitude of this decision is larger than the problem which the majority claims existed) (citing to SALES TAX REPORT, *supra* note 12, at 8).

181. The Chief Justice nearly mimics the language applied by the *Bellas Hess* majority fifty years earlier. *See id.* (stating that the majority undersells the hardship that retailers will face in coping with the many tax jurisdictions that they now have to be aware of); *see also Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 759–60 (1967) (describing this same concern as a risk that might “entangle” businesses “in a virtual welter of complicated obligations to local jurisdictions”).

182. *See infra* Sections III.A–C (analyzing the opinions of the three cases which most squarely deal with the physical presence rule).

183. *See infra* Section III.A (analyzing *Bellas Hess* which founded the physical presence rule).

184. *See infra* Section III.B (analyzing the *Quill* decision which justified the physical presence rule in contradiction to the Court’s contemporary interpretation of the rule which yielded harmful results).

185. *See infra* Section III.C (analyzing the *Wayfair* decision which displays the exacerbated effect of a formal rule in the modern economy, high-lighting that the rule is out of place).

likely factored into the Court’s pause in addressing this issue over the last fifty years.¹⁸⁶ Finally, this Part will explain that *Wayfair* has provided a return to form in a traditionally foggy area of constitutional law.¹⁸⁷

A. National Bellas Hess, Inc. v. Department of Revenue of Illinois

First, a word of understanding: The Court in *Bellas Hess* was at an obvious disadvantage to its physical presence rule progeny—it lacked the later-developed constitutional tools, interpretations, and understandings of Due Process and Commerce Clause rationale.¹⁸⁸ The fact that the Court did not yet have the *Complete Auto* test itself speaks to the disadvantage between the Court’s comparisons of threshold limitations on taxing interstate commerce.¹⁸⁹ However, it remains that the Court was able to find a more workable decision with the case law that it had.¹⁹⁰ The very foundation of the dormant Commerce Clause in Supreme Court precedent explained that when Congress fails to regulate interstate commerce, states can fill in the blanks.¹⁹¹ *Bellas Hess* fell in line with a dying trend of judicial interpretation that had lost sight of this purpose, misconstruing burdens upon interstate commerce that reflected a similar deference to cases like *Scripto* and *Freeman*, without adequately analyzing what that precedent meant and how to interpret it.¹⁹² With a

186. See *infra* Section III.C (analyzing the Respondents’ concerns and dispelling them).

187. See *infra* Section III.C (detailing how the decision restores logic to this area of law).

188. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (detailing the now-accepted standard that “purposefully directed” efforts of an actor at another state satisfy due process concerns); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992) (“Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*.”); *Quill* Brief for Respondent, *supra* note 96, at 23 (citing *Burger King*, 471 U.S. at 474) (defining the minimum contacts rationale of *Burger King* as the “touchstone” in defining nexus for due process).

189. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (detailing the four-pronged test to establish threshold limits on taxation under the Commerce Clause); see also *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (citing *Complete Auto*, 430 U.S. 274) (“The Court explained the now-accepted framework for state taxation in [*Complete Auto*].”); *Quill*, 504 U.S. at 310 (detailing that *Complete Auto* “govern[s] the validity of state taxes under the Commerce Clause”).

190. See, e.g., *Ctr. Greyhound Lines of N.Y. v. Mealey*, 334 U.S. 653, 661 (1948) (“[T]he real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce which the State bears a special relation.”); see also *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (emphasis added) (“A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, *if by the practical operation of a tax* the State has exerted its power in relation to opportunities which it has given . . . to benefits which it has conferred by the fact of being an orderly, civilized society.”)

191. *Case of the State Freight Tax*, 82 U.S. 232, 249 (1872).

192. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 765 (1967) (Fortas, J., dissenting) (“The present case is, of course, not at all controlled by [*Miller Bros.*].”); see also *Gen. Trading Co. v. State Tax Comm’n*, 322 U.S. 335, 338 (1944) (emphasis added) (“[T]he mere fact that property is used for interstate commerce or has come into an owner’s possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the

proper evaluation of jurisprudence, the rule should not have been formulated.¹⁹³

The Court correctly relied on *Scripto* to determine that physical presence in a State is always sufficient to establish nexus.¹⁹⁴ However, with little rationale in support, the Court propped up *Miller Bros.* as an opposite extreme in order to start working towards a rule somewhere in the middle.¹⁹⁵ This is where the Court erred. The comparison between the two cases was incorrect, as Justice Frankfurter noted in his concurrence in *Scripto*.¹⁹⁶ *Miller Bros.* involved a business engaged in no meaningful solicitation other than occasional and indirect advertising,¹⁹⁷ whereas *Bellas Hess* made over \$2 million from Illinois in only fifteen months.¹⁹⁸ While understanding that physical presence is always sufficient, the Court struggled with defining a limitation relating to state taxation of remote sellers and so it opted to accept physical presence as that boundary.¹⁹⁹

upkeep of which does not diminish the protection which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce.”). This rhetoric was soon overturned in *Complete Auto* the following decade. See generally *Complete Auto*, 430 U.S. 274.

193. See *Wayfair*, 138 S. Ct. at 2092 (“[T]he physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.”). Even those who endorse the rule agree that it was formulated incorrectly. See, e.g., *Quill*, 504 U.S. at 311 (admitting that “contemporary Commerce Clause jurisprudence might not dictate the same result were it to arise for the first time today”); *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting) (similarly admitting that “*Bellas Hess* was wrongly decided”); see also Cushman, *supra* note 3, at 1089 (explaining that formalism had begun its decline in the late 1930s).

194. See *Bellas Hess*, 386 U.S. at 757–58 (citing *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960)) (detailing the holding in *Scripto*, which demonstrated nexus when ten salesmen were in the taxing state); see also *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 345 (1954) (“Thus, the Court has frequently held that domicile or residence . . . is an adequate basis for taxation . . .”).

195. See *Bellas Hess*, 386 U.S. at 758 (balancing the holding in *Miller Bros.* against *Scripto* to show that the Court had never imposed use tax collection on sellers “whose only connection with customers in the State is by common carrier or United States mail”). As mentioned below, Justice Frankfurter disagreed with the *Scripto* Court’s application of *Miller Bros.* to the case, and instead favored an application of *General Trading*. See *infra* note 196 and accompanying text (discussing Justice Frankfurter’s concurrence in *Scripto*). *General Trading* followed a similar set of facts to *Bellas Hess*, except the tax duty levied was collection of a use tax, and there was a physical presence established by traveling salesmen for General Trading. See *Gen. Trading Co.*, 322 U.S. at 336–37.

196. See *Scripto*, 362 U.S. at 213 (Frankfurter, J., concurring) (deeming *Scripto* to be “nearer to *General Trading Co. v. State Tax Commission*, 322 U.S. 335, than it is to [*Miller Bros.*]”); see also Brief for the Appellees at 7, *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (No. 80) [hereinafter *Scripto* Brief for Appellees] (describing *Miller Bros.* as “so dissimilar and so clearly distinguishable from the facts of [*Scripto*] that it can in no way be controlling”).

197. *Bellas Hess*, 386 U.S. at 765 (Fortas, J., dissenting) (citing *Miller Bros.*, 347 U.S. at 347).

198. See *id.* at 761 (“[*Bellas Hess*’s] sales in Illinois amounted to \$2,174,744 . . .”).

199. See *id.* at 758 (majority opinion) (noting that states had “generally recognized” that physical presence was a requirement and so applied it formally as judicial interpretation); see also *id.* at 758 n.11 (citing *State v. Lane Bryant, Inc.*, 277 Ala. 385 (1965)) (applying the Alabama

Instead, the Court should have recognized the economic effect of *Bellas Hess*'s actual systematic exploitation of Illinois's consumer market.²⁰⁰ The State offered more than enough in return under *Bellas Hess*, providing the business with a market of consumers who drew credit from local institutions and applied it to transactions with *Bellas Hess*.²⁰¹ *Bellas Hess* would not have been able to conduct business in that very same consumer market had those consumers been unable to rely on the several banking and credit institutions in Illinois because the consumers would not have been able to draw credit to make transactions.²⁰² The mass market of consumers furnished by Illinois, that *Bellas Hess* did business with, is a sufficient reason to justify imposing a duty on the business.²⁰³ In this scenario, local businesses do not receive any other benefits aside from closer access to customers, but that benefit is offset by the substantial sales recorded by remote sellers.²⁰⁴ This is adverse to

Supreme Court's decision that a similar tax schema would fail to pass constitutional muster).

200. See *id.* at 762 (Fortas, J., dissenting) (citing *Miller Bros.*, 347 U.S. at 347) (“[*Bellas Hess*] is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly and continuously engaged in ‘exploitation of the consumer market’”); see also David F. Shores, *State Taxation of Interstate Commerce: Quill, Allied Signal and a Proposal*, 72 NEB. L. REV. 682, 689 (1993) (describing Justice Fortas’ “vigorous dissent” in *Bellas Hess*).

201. See *Bellas Hess*, 386 U.S. at 761–62 (Fortas, J., dissenting) (explaining that the assistance in establishing lines of credit with *Bellas Hess* by Illinois banking and lending institutions should be considered sufficient); see also *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 446 (1940) (“[G]overnment is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes.”).

202. This argument does not contend that *Bellas Hess*'s transactions demonstrate nexus because the customers pay with credit, rather, it hinges on the fact that *Bellas Hess* opened lines of credit with its customers in Illinois and those customers were referenced by the various banking and lending institutions within the State which aided directly in establishing credit for the transaction. *Bellas Hess*, 386 U.S. at 761–62 (Fortas, J., dissenting); see *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (applying this distinction to the modern standard reveals that *Bellas Hess* would obviously satisfy the standard for nexus by mere solicitation of Illinois absent consideration of what the states given in return, whereas *Miller Bros.* would likely fail to qualify—furthering the distinction between them and making less sense that the Court applied the comparison here).

203. See *Bellas Hess*, 386 U.S. at 762 (“[A]bsent the solicitation of *Bellas Hess*, [residents] might buy locally and pay the sales tax to support their State.”); see also *J.C. Penney*, 311 U.S. at 444 (explaining that it would be practical to view the “benefits which [a state] has conferred by the fact of being an orderly, civilized society” could be enough for a state to ask for tax in return).

204. To tweak Justice Kennedy's example, consider the following: two businesses sell furniture by catalog, one stocks items in a small warehouse in North Sioux City, South Dakota, and the other uses a more sophisticated catalog with more options and a major warehouse just over the state line in South Sioux City, Nebraska. See *Wayfair*, 138 S. Ct. at 2094 (detailing Justice Kennedy's similar example which applies modern technology). “By reason of its physical presence, the first business must collect and remit a tax on all sales to customers from South Dakota, even those sales that have nothing to do with the warehouse.” *Id.* This example demonstrates that the physical presence of retailers in-state are actually placed at a disadvantage to mail-order houses. *Id.*; see also Shores, *supra* note 200, at 718 (“This advantage should not be lightly dismissed in an area of law which is widely recognized as intellectually impoverished.”); *Bellas Hess*, 386 U.S. at 763 (explaining that in cases where remote sellers systematically exploit a local market “the difference between the

the purpose of the dormant Commerce Clause in the first place and fails to allow for non-cumbersome state legislation where Congress is silent.²⁰⁵

Adopting the physical presence rule makes even less sense, under past or present technological and organizational constraints, when viewed against a backdrop set for practical interpretation.²⁰⁶ The only outcome of the rule that the Court ventured to address was the cost of compliance for sellers, and it did not even attempt to resolve this supposed burden.²⁰⁷ Even formalistic jurisprudence comprehends that interstate commerce is not immune from its fair share of the costs of local government,²⁰⁸ and *Bellas Hess*'s failure to explore mitigating factors or the consequences of its decision to states was a disservice to Commerce Clause jurisprudence.²⁰⁹ While it is not the Court's job to create legislation

nature of the business conducted by the mail order house and by the local enterprise is not entitled to constitutional significance").

205. See *supra* notes 34–47 and accompanying text (detailing the origins of the dormant Commerce Clause in Supreme Court jurisprudence).

206. See *supra* note 204 and accompanying text (detailing the arbitrary effect the rule has in practice); see also *Cushman*, *supra* note 3, at 1142 (citing to *Houston, E. and W. Tex. Ry. Co. v. United States* (Shreveport), 234 U.S. 342 (1914)) (describing one of the Court's most famous formal interpretations of the Commerce Clause as housing a rule that was as easy to understand as "trying to nail jelly to a wall").

207. See *Bellas Hess*, 386 U.S. at 759–60 (discussing the "welter of complicated obligations to local jurisdictions" that might arise to businesses operating in interstate commerce without the physical presence rule). *But see id.* at 766 (Fortas, J., dissenting) ("It is hardly worth remarking that appellant's expressions of consternation and alarm at the burden which the mechanics of compliance with use tax obligations would place upon it and others similarly situated should not give us pause."); see also *Shores*, *supra* note 200, at 689 (quoting *Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting)) (stating that *Bellas Hess* underestimates the capabilities of "man and his machines").

208. See *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461–62 (1959) ("[I]t is axiomatic that the founder did not intend to immunize [interstate] commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."); see also *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.").

209. Note the general lack of interest in the majority's opinion to explore mitigating factors. See generally *Bellas Hess*, 386 U.S. 753 (majority opinion); see also *Shores*, *supra* note 200, at 688 (explaining that *Bellas Hess* was "less explicit" in its holding). Similarly, note the one-sided tone of the opinion, ignoring the effect of the opinion on states. See *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting) (detailing that the advantage is only tolerable with "occasional, minor and sporadic" sales into a foreign jurisdiction to protect those incidental actors of interstate commerce, whereas the advantage "certainly should not be extended where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis"); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 329 (White, J., concurring in part and dissenting in part) (describing the physical presence rule as perpetuating an unjust "tax shelter"); *Wayfair*, 138 S. Ct. at 2094 (explaining that the physical presence rule incentivizes businesses to avoid physically engaging with States which means "that the market may . . . lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable"); *id.* at 2092 (holding that the

which will pass constitutional muster for states, expecting them to conceive of legislation which adequately addresses Commerce Clause concerns is not far-fetched.²¹⁰ The safe harbor provisions in the Act that *Wayfair* endorsed secure the concerns that *Bellas Hess* actually addressed, while also considering States' rights to collect an otherwise lawful tax.²¹¹ Modern technology has no bearing on these provisions, and both Commerce and Due Process Clause nexuses could have easily been satisfied without physical presence in *Bellas Hess*.²¹²

B. Quill Corp. v. North Dakota

Then, in *Quill*, the Court somehow managed to both reject and accept rigid formalism in dormant Commerce Clause interpretation for the sake of stare decisis.²¹³ In doing so it turned a blind eye to the meaningful origins of the *Complete Auto* substantial nexus requirement, which would have shown the common thread between the Due Process and Commerce Clauses, and justified a sound rejection of the rule under the Commerce Clause.²¹⁴ The Court argued that it established predictability in

physical presence rule is “the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow”).

210. See *Bellas Hess*, 386 U.S. at 764 (hypothesizing that the immunity to taxation the Court offered remote sellers “may well increase in size and importance”); see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (citing to *Western Live Stock* in recognition that practical trends in law required the formulation of a new rule to test the validity of State legislation in interstate commerce).

211. See *Wayfair*, 138 S. Ct. at 2099 (“[T]he Act applies a safe harbor to those who transact only limited business in South Dakota.”); see also *Bellas Hess*, 386 at 765–66 (“[I]t seems to me entirely clear that a mail order house engaged in the business of regularly, systematically, and on a large scale offering merchandise for sale in a State in competition with local retailers . . . is not excused from compliance with the State’s use tax obligations . . .”).

212. South Dakota’s standard was not expressly endorsed as the absolute limit for establishing nexus, but it established a jumping-off point for states. See *Wayfair*, 138 S. Ct. at 2099 (detailing the thresholds of the Act and holding that “nexus is clearly sufficient”). This threshold is easily satisfied here given the \$2 million that *Bellas Hess* earned in Illinois. See S.D. CODIFIED LAWS § 10-64-2 (defining the standard in South Dakota to establish nexus by a remote seller as engaging in 200 or more transactions, or any number of transactions worth more than \$100,000 in a given year).

213. See generally *Quill*, 504 U.S. 298 (acknowledging that trends in formalism and modern considerations might lead the Court to a different result, but remaining hesitant to overturn the arbitrary rule for reliance interests’ sake); see also Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1489–90 (2013) (“*Quill* provides a useful illustration of the concept of *specific* reliance on precedent . . . I have argued that it is not entirely clear why specific reliance should be worthy of judicial solicitude.”).

214. See *Quill*, 504 U.S. at 326 (White, J., concurring in part and dissenting in part) (“The cases from which the *Complete Auto* Court derived the nexus requirement in its four-part test convince me that the issue of ‘nexus’ is really a due process fairness inquiry.”); see also *Wayfair*, 138 S. Ct. at 2093 (citing to *Bellas Hess*, 386 U.S. at 756) (finding the nexus requirement in *Complete Auto* closely related to the due process requirement, and rejecting the physical presence rule as an unnecessary interpretation of nexus).

interpretation of the dormant Commerce Clause,²¹⁵ though in practical terms it only created a tax shelter for corporations to evade lawful taxation.²¹⁶ In comparison to *Bellas Hess*, it is astounding that the Court arrived at this conclusion when considering the jurisprudence that so strongly favored a rejection of the physical presence rule.²¹⁷

To start, the Court's analysis and application of practical treatment of dormant Commerce Clause interpretation was cursory at best.²¹⁸ Although it detailed an accurate history of the Court's interpretations, it underemphasized the pragmatic concerns presented by *Complete Auto* by virtue of its ultimate conclusion to uphold the physical presence rule.²¹⁹ When considering the Court's reliance on case law leaning towards practical readings, it is especially jarring that it chose to uphold a rule that it accepted as formalistic in the body of the very same opinion.²²⁰ In attempting to make an exception for holding on to the physical presence rule in the face of practical trends of interpretation, the Court distinguished its previous rejection of formal rules as different kinds of

215. See *Quill*, 504 U.S. at 317 (majority opinion) (quoting *Runyon v. McCrary*, 437 U.S. 160, 190–91 (1976) (Stevens, J., concurring)) (asserting that stare decisis interests in stability compels the Court to affirm the physical presence rule).

216. See *id.* at 329 (White, J., concurring in part and dissenting in part) (arguing that the rule perpetuates an “interstate tax shelter for one form of business”); see also SALES TAXES REPORT, *supra* note 12, at 23 (explaining that *Quill* has kept businesses from complying with states' sales tax legislation).

217. See *Quill*, 504 U.S. at 309–11 (detailing the Court's historical encounters with dormant Commerce Clause interpretations); see also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (“Over the years, the Court has applied this practical analysis in approving many types of tax . . .”).

218. See *Quill*, 504 U.S. at 314 (agreeing with the lower court's assessment that trends in Commerce Clause interpretation favor the application of flexible rules, but still affirmed a formalistic bright-line rule).

219. The Court had been making efforts towards rejecting formal rules but failed to extend the rejection here. See *Mobil Oil Corp. v. Comm'r of Tex.*, 445 U.S. 425, 443 (1980); see, e.g., *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978).

While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States.

Id. See also *Dep't of Revenue of Wash. v. Assoc. of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978) (explaining that the rejection of direct and indirect definitions of burdens on taxation demonstrates a requirement for practical application).

220. See *Quill*, 504 U.S. at 317 (“[O]ur reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes.”). *But see* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (“The Court's Commerce Clause jurisprudence has ‘eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.’”); *Quill* Brief for Respondent, *supra* note 96, at 10 (“This Court rejected that formalistic free trade interpretation of the commerce clause in 1977.”).

formalism overruled for independent reasons.²²¹ However, this analysis undermined itself by drawing an arbitrary distinction to maintain a formal rule without focusing on the practical effect the legislation would have.²²²

Specifically, the practical effect of the physical presence rule was exploitation by remote sellers at the states' expense.²²³ Remote seller practices have shown that businesses were fully aware of this tax shelter and exploited it to the detriment of states and local businesses.²²⁴ In these situations, Courts were forced to uphold shady business practices that were only adopted to assist in meaningfully penetrating foreign markets without the collection of sales taxes.²²⁵ For example, in *Bloomingtondale's By Mail v. Commonwealth*, Bloomingtondale's set up a separate entity called Bloomingtondale's By Mail (By Mail) for the express purpose of avoiding tax collection on out-of-state sales.²²⁶ The State argued that By Mail was practically acting as an agent for Bloomingtondale's, demonstrated when By Mail products were accepted as returns to Bloomingtondale's on a few

221. Compare *Quill*, 504 U.S. at 310 (“[W]e renounced the *Freeman* approach as ‘attaching constitutional significance to a semantic difference.’”), and *id.* (alterations in original) (citations omitted) (“*Spector*, as we observed in *Railway Express Agency, Inc. v. Virginia*, created a situation in which ‘magic words or labels’ could ‘disable an otherwise constitutional levy.’ *Complete Auto* emphasized the importance of looking past ‘the formal language of the tax statute [to] its practical effect’ . . .”), with *id.* at 315 (explaining the rule as “artificial at its edges”), and *id.* at 317 (“[I]n our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line [rule] . . .”).

222. See *Quill* Brief for Respondent, *supra* note 96, at 9 (noting the amount states lost from an inability to collect sales taxes from remote sellers in 1991 alone reached \$3.08 billion, with an estimate of \$3.27 billion in 1992) (citing ACIR ESTIMATES OF REVENUE POTENTIAL, *supra* note 98, at 2).

223. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623–24 (1981) (quoting *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 334–35 (1939)) (detailing that exploitation by foreign corporations of local governments through interstate commerce “offers a basis for taxation”); see also *infra* notes 225–28 (discussing *Bloomingtondale's By Mail v. Commonwealth*, 567 A.2d 773 (Pa. 1989) and other examples).

224. See Trelease, *supra* note 12, at 22 (discussing businesses which have taken blatant advantage of the physical presence rule by structuring the businesses' growth strategy explicitly to take advantage of foreign markets while avoiding tax collection requirements); see also *Wayfair*, 138 S. Ct. at 2096 (citing Brief for Petitioner at 55, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Brief for Petitioner]) (detailing *Wayfair's* practice of advertising lower sales prices because of its ability to avoid sales and use tax collection).

225. See, e.g., *Bloomingtondale's By Mail*, 567 A.2d at 778 (granting the business's motion for summary judgment against the State); *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693, 697 (Ohio 1995) (finding the State's tax on SFA Folio Collections based on Saks Fifth Avenue's retail stores exhibited insufficient nexus, even when the two companies conducted joint-venture advertising campaigns).

226. *Bloomingtondale's By Mail*, 567 A.2d at 775–76; see also Trelease, *supra* note 12, at 22 (explaining that this was a “conscious plan of co-promotion”).

occasions.²²⁷ The Court accepted the businesses' position.²²⁸ This allowed for Bloomingdale's brand to penetrate other markets, at the expense of local retailers and distributors, without collecting its fair share of local taxes for the privilege of exploiting these markets—essentially creating a tax shelter for the brand.²²⁹

The only predictable outcome to the physical presence rule was that larger corporations would be able to exploit it—yet the Court did not address this argument.²³⁰ Instead, the Court defended its position by arguing that the rule protected small businesses engaged in interstate commerce.²³¹ As *Wayfair* establishes, this position is flawed because, even accepting that to be true, it is not a necessary interpretation.²³² Even still it is not true, because the physical presence rule allows for remote businesses to take advantage of state taxes putting them on a level playing field with small businesses.²³³ *Wayfair*'s rejection of the physical

227. *Bloomingdale's By Mail*, 567 A.2d at 776. The seemingly arbitrary returns of products from By Mail to Bloomingdale's retailers were defined as "aberrations" from By Mail's business as usual. *Id.* at 778. It would seem arbitrary to subject them to tax based on only two returns contrary to the rest of its business practice—so why does meaningless, or even accidental, physical presence in a State qualify businesses for taxation when meaningful exploitation of foreign markets by remote sellers does not? See *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977) (confirming that physical presence entirely unrelated to the sale of goods into a jurisdiction will satisfy the rule).

228. *Bloomingdale's By Mail*, 567 A.2d at 778–79; see *id.* at 777 (citing to *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967)) (determining that mail or common carrier as nexus is insufficient).

229. See Trelease, *supra* note 12, at 22 ("Historically, state courts have respected the separate existence of retail and catalog merchandising units."); see also *Gen. Trading Co. v. State Tax Comm'n*, 322 U.S. 335, 338 (1944) (finding that sufficient nexus between a state and the property the state seeks to tax when physical presence is satisfied).

230. This is proven by the need itself to protect smaller businesses, but the physical presence rule's reach is far too broad. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (detailing safe harbor provisions); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 329 (1992) (White, J., dissenting) (arguing that the "unfairness of [the physical presence rule] on retailers other than direct marketers should be taken into account").

231. See *Quill*, 504 U.S. at 315 ("*Bellas Hess* . . . created a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail'"). But this argument overlooks the fact that small businesses could still stumble upon nexus by, for example, hiring an in-state contractor to install a machine it sold over state lines. See also *Quill* Brief for Respondent, *supra* note 96, at 27–28 (further explaining that a multi-state business could avoid that very same nexus even if it were to sell \$1 million worth of goods into that state).

232. In the same example offered *supra* note 231 and accompanying text, the multi-state business would avoid taxation where local business would not, in direct contradiction of the practical initiative undertaken by *Complete Auto*. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977) ("[T]he Court consistently has indicated that 'interstate commerce may be made to pay its way,' and has moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology.>").

233. See *Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part) (citing Brief for State of New Jersey as Amicus Curiae at 4, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (No. 91-194) [hereinafter *Quill* New Jersey Amicus Curiae]) ("I would think that protectionist rules

presence rule is far more workable, and far more beneficial to small businesses, as it provides them safe harbor through the passages of interstate commerce because they would likely fall short of meaningfully engaging in interstate commerce.²³⁴

The Court, albeit in good faith, carved out an exception to taking a practical reading of dormant Commerce Clause issues in favor of a historically formal assessment, but did so without considering the effects the exception would have on the two most affected parties: states and businesses.²³⁵ In the competitive marketplaces of interstate and local commerce, one should expect businesses to take every avenue they can to raise profits.²³⁶ However, cost cutting under the physical presence rule tipped the scales far in favor of businesses, leaving state marketplaces available without state inclusion.²³⁷

C. South Dakota v. Wayfair, Inc.

The *Wayfair* Court found physical presence unnecessary in establishing a substantial nexus between the transaction and the taxing state.²³⁸ It found the physical presence rule to be unworkable in the

favoring a \$180-billion-a-year industry might come within the scope of such ‘structural concerns.’”).

234. What *Quill* fails to address is that the arbitrary nature of its own rule fails to have the effect of invoking an “established bright-line” as the Court had hoped. *See supra* note 221 and accompanying text. A better assignment of a “bright-line” that actually considers economic effect and allows a degree of control for those who participate in interstate commerce could be gleaned from a de minimis standard. *See Quill* Brief for Respondent, *supra* note 96, at 28 n.5 (explaining that North Dakota invokes such a de minimis standard which allows Quill and others to understand what threshold limitations on taxation are) (citing N.D. ADMIN. CODE § 81-04.1-01-03.1(3) (2019)); *see also* Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1016 (1986) (“There are a number of possible approaches that Congress could use to reduce compliance costs: (1) a de minimis rule (exempt firms with sales below a certain threshold dollar amount) . . .”).

235. *See Quill*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part) (relenting that the rule does not put businesses on even playing fields and fails to consider the realities of the massive mail-order industry); *see also* ACIR ESTIMATES OF REVENUE POTENTIAL, *supra* note 98, at 2 (qualifying the initial estimate that mail-order sales in 1990 comprised 25 percent of all retail sales was a conservative estimate); Hartman, *supra* note 234, at 1007–08 (underestimating the actual percentage by at least 5 percent).

236. *See, e.g.,* Bloomingdale’s By Mail v. Commonwealth, 567 A.2d 773 (Pa. 1989) (creating co-promoting businesses to maximize brand recognition and profit to each); SFA Folio Collections, Inc. v. Tracy, 652 N.E.2d 693 (Ohio 1995) (detailing same); *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) (citing *Wayfair* Brief for Petitioner, *supra* note 224, at 55) (detailing Wayfair’s advertisements promoting lower sales prices than local competitors by virtue of sales tax exemption).

237. *See Wayfair*, 138 S. Ct. at 2096 (citing *Wayfair* Brief for Petitioner, *supra* note 224, at 55) (explaining that Wayfair’s advertising technique fails to consider the negative implications that it has upon the State by belittling its local storefronts and economic activity without even collecting sales taxes the State is already owed).

238. *See id.* at 2092 (explaining and showing that the physical presence rule is not a “necessary

economy, both past and present.²³⁹ The Court also determined that modern realities highlighted the pitfalls of applying such a formalistic rule to Commerce Clause concerns.²⁴⁰

The Court found that *Quill* made an unnecessary distinction between the *Complete Auto* test's substantial-nexus requirement and the Due Process Clause's similar requirement for minimum contacts.²⁴¹ There is even evidence to suggest that the substantial nexus requirement is actually founded in the Due Process Clause's requirement for minimum contacts, essentially giving the taxpayer notice that they are subject to the state's jurisdiction.²⁴²

The Court also correctly explained that the objective of the dormant Commerce Clause is only to remove burdens upon, or discrimination against, interstate commerce.²⁴³ The physical presence rule, however, extended this definition into unconstitutional territory by offering interstate commerce a meaningful competitive advantage over local markets.²⁴⁴ Rather than having a rule, admitted to be incorrectly

interpretation" to achieve substantial nexus with a taxing state); *see also, Quill*, 504 U.S. at 328 (White, J., concurring in part and dissenting in part) ("But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax.").

239. *See Wayfair*, 138 S. Ct. at 2092 ("*Quill* creates rather than resolves market distortions."); *see also Wayfair* Reply Brief, *supra* note 146, at 2–3 ("*Quill*'s erroneous bright-line rule is concededly depriving the States of tens of billions in revenue because it shelters not only hypothetically burdened small sellers, but real, billion-dollar retailers like respondents, even in States imposing no burdens at all.").

240. *See Wayfair*, 138 S. Ct. at 2092 (citing Hellerstein, *supra* note 120, at 553) (explaining the necessity of nexus, but only under modern application of jurisprudence).

241. *See supra* notes 104–07 (detailing the Court's analysis of this errant distinction); *see also Wayfair*, 138 S. Ct. at 2093 ("The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus."); *see also Quill* Brief for Respondent, *supra* note 96, at 26 (citing *Mobil Oil Corp. v. Comm'r of Tex.*, 445 U.S. 425, 437 (1980)) (alterations in original) (explaining that the Court had already articulated a standard very similar to *Wayfair*'s standard, wherein "taxing authority exists when the marketer has purposefully 'avail[ed] itself of the substantial privilege of carrying on business within the State'").

242. *See Wayfair*, 138 S. Ct. at 2093 (quoting *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 756 (1967)) (explaining that the nexus requirement is "closely related" to the minimum contacts requirement); *see also id.* ("The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus."); *see also* Section III.B, *supra* notes 222–29 and accompanying text (explaining that the rule swallows itself).

243. *See Wayfair*, 138 S. Ct. at 2091 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (detailing the *Complete Auto* test and the Court's limitations on regulation).

244. *See id.* (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)) ("After all, 'interstate commerce may be required to pay its fair share of state taxes.'"); *see also Wayfair* Reply Brief, *supra* note 146, at 11–12 (demonstrating the physical presence rule's dramatic overbreadth in testing regulation upon interstate commerce).

formulated,²⁴⁵ the Court took the suggestions of commentators and endorsed de minimis thresholds.²⁴⁶ Though not setting the threshold itself, the Court allowed South Dakota's transaction and cost minimums to provide some clarity in what the standard might be moving forward.²⁴⁷

As precedent admits, the rule existed for only the supposed benefit of having a rule.²⁴⁸ However, the forced acceptance of arbitrary results by courts and legislatures was the unintended effect of such a bright-line rule.²⁴⁹ For example, a business could sell one single product into a state they have physical presence in and be subject to taxation because that presence, though unrelated to the transaction in question, is itself sufficient.²⁵⁰ The *Quill* and *Bellas Hess* Courts were so preoccupied with concerns that small businesses might be disadvantaged that they failed to address the concern low-population states face with an already limited tax base.²⁵¹ The result sheltered businesses from state enforcement of

245. See *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting) (“I agree that *Bellas Hess* was wrongly decided.”); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992) (stating that modern jurisprudence “might not dictate the same result” were *Bellas Hess* to arise for the first time in 1992).

246. States have attempted to draft standards to combat the burden that collection might place upon interstate commerce since before *Quill*—for examples, see the following: TENN. CODE ANN. § 67-6-702(f) (West 1989); WASH. ADMIN. CODE § 458-20-221 (1989); FLA. STAT. § 212.0596(g) (West 1990); MINN. STAT. ANN. § 297A.21(4)(c) (West 1991); MO. ANN. STAT. § 144.605(14)(a) (West 1991); N.Y. TAX LAW § 1101(8)(iv) (McKinney 1991). Many observers have disagreed with the rule's tenure as well. See Hartman, *supra* note 234, at 1007 (“[R]eview and reversal of that decision seem proper.”); see also Kozel, *supra* note 213, at 1490 (understanding that the Court applied the theory of specific reliance to the decision, but concluding that specific reliance is an unsupported judicial doctrine).

247. See *Wayfair*, 138 S. Ct. at 2099 (holding that nexus was “clearly sufficient” and accounted for burdens of compliance); see also JOSEPH BISHOP-HENCHMAN ET AL., TAX FOUNDATION FISCAL FACT NO. 609: POST-WAYFAIR OPTIONS FOR STATES 6 (Rachel Shuster ed., 2018) (showing the *Wayfair* safe harbor standard as the closest to a workable threshold the Supreme Court allows with certainty).

248. See *Quill*, 504 U.S. at 315 (“This artificiality, however, is more than offset by the benefits of a clear rule.”). But see *Wayfair*, 138 S. Ct. at 2094 (explaining that the rule's artificiality is its downfall because it creates artificial competitive advantages).

249. As Justice Kennedy explained, a business with one salesman in each state could sell only one product into any state and face sales tax collection duties; while another business with five hundred salesmen in one state and sell one million products to each of the other forty-nine states and still avoid tax collection. See *Wayfair*, 138 S. Ct. at 2093 (detailing a similar example); see also SALES TAXES REPORT, *supra* note 12, at 13 (finding that in a study of over four hundred internet retailers, 31 percent of those retailers exist in only two states).

250. Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977); see *Wayfair* Reply Brief, *supra* note 146, at 5 (detailing that a “single in-state employee, traveling salesman, or three-day annual trip suffice for nexus under *Quill*”).

251. See generally Nat'l *Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967); *Quill*, 504 U.S. 298; see also SALES TAXES REPORT, *supra* note 12, at 13 (detailing the decreased likelihood that internet sellers would have a physical presence in small states, contrasting it with the rise of internet sales to show that smaller states are less likely able to collect taxes on all sales into their states).

sales tax collection on substantial and meaningful sales through interstate commerce.²⁵² Rather than allowing formalism to build any further, the Court correctly chose to embrace practical considerations, address these concerns, and do away with an unworkable rule.²⁵³

In overturning this precedent, the Court addressed a host of the Respondents' concerns and demonstrated a workable outcome founded in sound legal interpretation.²⁵⁴ The most cited arguments in support of the physical presence rule were the so-called cost of compliance and the multitude of jurisdictions that businesses would be subjected to in collecting sales taxes.²⁵⁵ These concerns are hard to seriously consider when several businesses had already complied with state tax laws in states in which they had no physical presence, regardless of their ability to avoid them under the rule.²⁵⁶ As Justice Fortas said fifty years ago, the physical presence rule "vastly underestimates the skill of contemporary man and his machines."²⁵⁷

The safe harbor provision adequately protects businesses from tracking insignificant transactions and unsubstantial amounts of business done in foreign jurisdictions.²⁵⁸ At the same time, it functions to hold businesses

252. See *Wayfair* Reply Brief, *supra* note 146, at 14 ("[T]he physical presence rule increasingly functions more like a hidden trap than a well-lit shelter."). But see SALES TAXES REPORT, *supra* note 12, at 23–24 (explaining that due to the complex nature of state obligations, businesses under the physical presence rule were at risk to subject themselves to accidental nexus, qualifying them for issuance of back-taxes and likely litigation).

253. *Wayfair*, 138 S. Ct. at 2099 (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

254. See *id.* (citing *Polar Tankers*, 557 U.S. at 11) (embracing the *Complete Auto* nexus requirement's undoubtedly Due Process Clause background by setting the rule for nexus as satisfied when a remote seller "avails" itself of the substantial privilege of doing business in a given state); see also *Quill*, 504 U.S. at 326 (White, J., concurring in part and dissenting in part) ("[T]he issue of 'nexus' is really a due process fairness inquiry.").

255. See, e.g., *Bellas Hess*, 386 U.S. at 759–60; see also *Quill*, 504 U.S. at 313 n.6 (majority opinion) (praising the rule for preventing businesses from facing six thousand-plus jurisdictions which levy sales taxes).

256. See *Wayfair* Reply Brief, *supra* note 146, at 17 ("Experience and common sense confirm that most sellers . . . can comply [with state sales tax collection] at reasonable expense and in short order."); see also Avalara, *Guide to Sales Tax Collection in Amazon*, ch. 3 (2018), <https://www.avalara.com/trustfile/en/guides/amazon/fulfillment-by-amazon.html> [<https://perma.cc/WY2L-6NY2>] (explaining that Amazon agreed to collect sales taxes for all fifty States).

257. *Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting); see also Shores, *supra* note 200, at 689 (emphasizing this argument in Justice Fortas' "vigorous dissent"); Hartman, *supra* note 234, at 1011–12 (noting that the advent of automated accounting systems, particularly their prevalence as early as the 1980s, suggests that the task of tracking sales and tax obligations might be easier than precedent suggested).

258. The provision prevents businesses with minimal sales into South Dakota from collection requirements, setting a threshold of \$100,000 or two hundred transactions. See S.D. CODIFIED LAWS § 10-64-2; see also BISHOP-HENCHMAN ET AL., *supra* note 247, at 8 (describing these safe harbor thresholds as vital to passing constitutional review).

accountable for tax collection duties to those jurisdictions with which they meaningfully engage.²⁵⁹ This could have been a sufficient offsetting principle in the first place to avoid the physical presence rule,²⁶⁰ yet it certainly carries weight over Respondents' concerns now as modern technology has made it easier to track and record transactions.²⁶¹ Sophisticated software exists to lighten the burden of compliance while still allowing States to collect what they are owed.²⁶² Regardless, the concern that businesses might face difficulty in complying with proper constitutional interpretation is no reason for the Court to create a rule, contradictory to Commerce Clause precedent, that favors interstate commerce over states' access to their own tax bases.²⁶³

The Court also addressed concerns that stare decisis might require affirmance of the rule.²⁶⁴ Respondents' argued that the rule was owed extra deference under an enhanced form of stare decisis, which was owed even more deference based on congressional silence towards the physical presence rule.²⁶⁵ They relied on *Kimble v. Marvel Entertainment, LLC*, a

259. Under this schema, businesses who rightfully qualify will be made to pay their way for exploiting interstate markets. See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 274, 281 (1977). At the same time, the added benefit to states' tax bases will assist local market growth to the benefit of local and remote sellers. See *Wayfair*, 138 S. Ct. at 2096 (citing *Quill*, 504 U.S. at 328) (explaining that "solvent state and local governments" are essential to "create the climate of consumer confidence" required for commerce to thrive in general).

260. Though not exactly the same, see N.D. ADMIN. CODE § 81-04.1-01-03.1(3) (1987), which applied a de minimis (or safe harbor) standard based upon the number of bulk-mailings a remote seller sent to the State per year. For other examples of proposed de minimis standards see *supra* note 246, which includes references to several states' efforts to establish constitutional de minimis standards under the physical presence rule. See also *Quill* Brief for Respondent, *supra* note 96, at 44 (detailing efforts of states to "lessen whatever collection burdens do exist").

261. See *Wayfair* Reply Brief, *supra* note 146, at 19 (explaining that the respondents over-exaggerated the cost of compliance and would mostly spawn from transitioning software rather than implementing it from scratch); see also Timothy H. Gillis, *Collecting the Use Tax on Mail-Order Sales*, 79 GEO. L.J. 535, 552 (1991) (detailing the availability of sophisticated computer software to track rates and requirements for as low as \$7,000).

262. See *Wayfair*, 138 S. Ct. at 2099–2100 (detailing the benefits of the Streamlined Sales and Use Tax Agreement which immunizes sellers from liability for reliance on computer programming); see also *Quill* Brief for Respondent, *supra* note 96, at 39–40 (detailing the systems of computation that existed even during *Quill*'s adjudication).

263. See *Bellas Hess*, 386 U.S. at 766 (Fortas, J., dissenting) (warning that the majority was too concerned by the cost of compliance).

264. See generally *Wayfair*, 138 S. Ct. at 2096–99 (detailing the Court's assessment of stare decisis concerns); see also Kozel, *supra* note 213, at 1489 (explaining that *Quill* reaffirmed the physical presence rule for the sake of specific reliance).

265. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)) ("We have long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what we have done.'"); see also *Wayfair* Respondents' Brief, *supra* note 92, at 27–28 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014)) (explaining that in such cases, the court needs "special justification" for departing from the decision).

case that afforded the petitioner a “super-powered stare decisis” that would have required a special justification, as well as proof that the precedent was unworkable, to overturn.²⁶⁶ Respondents are correct that stare decisis does advise the Court to maintain even flawed decisions for the sake of precedent,²⁶⁷ but the Court showed that the standards of even an enhanced form of stare decisis were not met.²⁶⁸ The Court pointed to the State’s eroding tax base and the fact that a more practical and workable rule existed in rejecting the physical presence rule’s reliance interests.²⁶⁹

Moreover, this artificial foundation proved increasingly unworkable under contemporary considerations.²⁷⁰ For example, Courts might struggle with defining physical presence under technological considerations related to e-commerce, as evidenced by states efforts to do so already.²⁷¹ The ability to meaningfully connect with consumers via the internet through storing information on their computers through electronic cookies begs the question how far physical presence actually goes.²⁷² This could lead to businesses unknowingly presenting

266. See *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2410 (2015) (“As against this superpowered form of *stare decisis*, we would need a super special justification to warrant reversing *Brulotte*.”); see also *Wayfair* Respondents’ Brief, *supra* note 92, at 59 (quoting *Kimble*, 135 S. Ct. at 2409–10) (“[L]ong congressional acquiescence’ further amplifies the effect of *stare decisis*.”).

267. Beyond enhanced stare decisis when handling Commerce Clause issues in general, Justice Scalia further opined that reliance interests strengthen the doctrine even more. See *Quill*, 504 U.S. at 321 (Scalia, J., concurring) (“Having affirmatively suggested that the ‘physical presence’ rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word.”).

268. See *Wayfair*, 138 S. Ct. at 2098 (“But even on its own terms, the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.”); see also *Wayfair* Reply Brief, *supra* note 146, at 9 (“It is ‘special justification’ enough to eliminate a wholly arbitrary constitutional rule.”).

269. See *Wayfair*, 138 S. Ct. 2097 (citing U.S. DEP’T COMMERCE, QUARTERLY RETAIL E-COMMERCE SALES: 4TH QUARTER 2017, U.S. CENSUS BUREAU NEWS (2018) [hereinafter 4TH QUARTER 2017 RETAIL E-COMMERCE SALES]) (noting that mail-order sales of \$180 billion in 1992 have more than doubled through e-commerce which recorded estimates of about \$453.5 billion); see also SALES TAXES REPORT, *supra* note 12, at 11–12 (detailing that states could be losing out on up to \$13 billion).

270. See *Wayfair*, 138 S. Ct. at 2097–98 (“States are already confronting the complexities of defining physical presence in the Cyber Age.”); see also *Wayfair* Reply Brief, *supra* note 146, at 14–15 (detailing issues that come along with technology growth in defining what is and is not sufficient to establish physical presence).

271. For example, Massachusetts and Ohio proffered legislation that would define physical presence of remote sellers if they allowed for their cell-phone apps to be downloadable in the state, or attempted to store cookies on users’ computers. See 830 MASS. CODE REGS. 64 H.1.7 (2017); OHIO REV. CODE ANN. § 5741.01(I)(1)–(2) (2018).

272. See *Wayfair*, 138 S. Ct. at 2095 (“A website may leave cookies saved to the customers’ hard drives, or customers may download the company’s app onto their phones.”); see also *Wayfair* Reply Brief, *supra* note 146, at 15 (explaining that courts who seek to find a clearer definition of physical presence “will have no useful tools to analyze those questions because the bright-line rule

themselves to state jurisdiction and subjecting them to tax.²⁷³ If businesses were unaware of their duty to collect and remit such taxes, they would become subject to retroactive liability for however long they were in violation, potentially years.²⁷⁴ The Court made sure to commend South Dakota's inclusion of a provision that prevented retroactive liability.²⁷⁵

In closing, the Court mentioned that the Streamlined Sales and Use Tax Agreement (SSUTA) is a valuable modern tool to assist in relieving the burden of compliance.²⁷⁶ The SSUTA was created as a direct response to the language of the court in *Bellas Hess* and *Quill*,²⁷⁷ which stated that subjecting retailers to so many jurisdictions for purposes of taxation was too great a burden under the Commerce Clause.²⁷⁸ Currently

is admittedly disconnected from underlying constitutional principles”).

273. See *Wayfair* Reply Brief, *supra* note 146, at 14–15 (detailing several situations such as independent contractors hired by companies, or cookies used in company software, maintaining a physical presence in a state unknown to the business subjecting it to retroactive tax liability); see also Brief for Colorado et al. as Amici Curiae Supporting Petitioner at 18, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Colorado et al. Amici Curiae] (“By any reasonable measure, the traditional physical–presence rule—first announced in 1967, two years before the moon landing—has proved unworkable in today’s interconnected market.”).

274. See, e.g., *Wayfair* Reply Brief, *supra* note 146, at 14 (“Under *Quill*’s odd rule, that unintentional, minor, and arbitrary physical presence suffices.”); see also SALES TAXES REPORT, *supra* note 12, at 24 (noting a lawyer who worked in seven cases in which an assessment for retroactive tax liability was made due to a seller’s unknown presence in a state through some unrelated extension).

275. See *Wayfair*, 138 S. Ct. at 2099 (citing S.D. CODIFIED LAWS § 10-64-5 (2019)) (defining the bar to retroactive liability as a design which will “prevent discrimination against or undue burdens upon interstate commerce”).

276. See *id.* at 2100 (“[The SSUTA] standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.”); see generally STREAMLINED SALES TAX GOVERNING BD., INC., STREAMLINED SALES AND USE TAX AGREEMENT (May 10, 2018) [hereinafter SSUTA], https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6 [<https://perma.cc/RL6Q-2QX6>].

277. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 759–60 (1967) (emphasis added) (“The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [Bellas Hess’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.’”); see also Brief for Amicus Curiae Streamlined Sales Tax Governing Board, Inc. in Support of Petitioner at 6, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494) [hereinafter *Wayfair* Streamlined Amicus Curiae] (quoting *Bellas Hess*, 386 U.S. at 759 n.14) (“[I]f just the localities which now impose the tax were to realize anything like their potential of out-of-State registrants the recordkeeping task of multistate sellers would be clearly intolerable.”); *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (“Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.”).

278. See *Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 7 (explaining that the SSUTA was created based on a recognition of the Court’s concerns with “variations in sales tax rates, allowable exemptions, and recordkeeping requirements in States and local jurisdictions”); see also

more than half of all states which authorize the collection of sales and use taxes on transactions are full members of the SSUTA (“Streamlined States”), as well as thousands of retailers.²⁷⁹ One such way the SSUTA lessens state burdens is through uniformity, enforcing Streamlined States to provide a single state sales tax rate across all internal jurisdictions for remote sellers.²⁸⁰ This provision speaks to the heart of *Bellas Hess*’s and *Quill*’s concern for subjecting remote sellers to a “welter of complicated obligations.”²⁸¹

Relieving burdens aside, the SSUTA goes above and beyond to provide access and information about sales tax requirements to remote sellers engaging in a given Streamlined State.²⁸² One such way the SSUTA offers assistance is through the assignment of Certified Service Providers (CSPs).²⁸³ The job of a CSP is to connect the taxing state to the remote seller who engages with them by implementing software, keeping records of sales and tax information, and providing general information on the taxation requirements of given States or jurisdictions to the remote seller.²⁸⁴ The CSP will even file the required tax returns, remit the sales taxes collected, and handle deficiencies and audits on behalf of the remote seller between the seller and the taxing state.²⁸⁵ Aside from the benefits of convenience in having a CSP establish the framework for taxation, the remote seller’s reliance on a CSP insulates the seller from liability for error in either the CSP’s efforts or the software which calculates taxation

State Information, STREAMLINED SALES TAX GOVERNING BD., INC. [hereinafter *Streamlined State Information*], <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail> [<https://perma.cc/G8RP-6ZH7>] (detailing same).

279. *Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 1–2; *see also State Information*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <https://www.streamlinedsalestax.org/Shared-Pages/State-Detail> [<https://perma.cc/G8RP-6ZH7>] (listing all twenty-three member states as well as the twenty-fourth associate member, Tennessee).

280. SSUTA, *supra* note 276, at § 308; *see also Wayfair*, 138 S. Ct. at 2100 (detailing the uniform rate of tax as a feature which reduces “administrative and compliance costs”).

281. *Bellas Hess*, 386 U.S. at 759–60; *Quill*, 504 U.S. at 313 n.6.

282. *See* SSUTA, *supra* note 276, at § 203 (“An agent certified under the Agreement to perform all the seller’s sales and use tax functions . . . other than the seller’s obligation to remit tax on its own purchases.”); *see generally* Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement (“SSUTA”)*, 40 U.C. DAVIS L. REV. 1381 (2007) (analyzing the effect the SSUTA has by virtue of its collaboration through the States).

283. *See* SSUTA, *supra* note 276, at § 203 (detailing the definition of a CSP); *see also Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 1412 (explaining that the SSUTA offers certified service providers at no extra charge to remote sellers).

284. *See Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 1412–13 (explaining that the SSUTA offers CSPs at no extra charge to remote sellers); *see also Streamlined State Information*, *supra* note 278 (describing the scope of CSPs).

285. *See Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 8 (explaining that the central authority of the SSUTA “is responsible for distributing any applicable local taxes to the appropriate jurisdictions”); *see also* SSUTA, *supra* note 276, at § 301 (detailing same).

and keeps records.²⁸⁶ With so many safeguards attached, remote sellers would have no concerns about unknown or retroactive liability.²⁸⁷

The most telling aspect of the SSUTA, however, is that modern technology has no bearing on its existence. True, it employs modern software to track transactions and ensure that businesses abide by the laws of various jurisdictions,²⁸⁸ but the very idea that a central-organization could catalog and collect sales taxes does not require technological sophistication. This feat could still have been accomplished if businesses cooperated with state representatives to understand what was owed to whom after consummating a transaction; essentially what the SSUTA does now.²⁸⁹ As for small businesses that transacted insignificant sales in a specific jurisdiction, de minimis thresholds could have saved them from collecting taxes on smaller sales that were few and far between. There was never any reason to overcorrect the issue at hand in *Bellas Hess*—creating a rule meant to protect businesses from tax duties in jurisdictions they rarely interacted with—when the real issue was how to impose such duties on a business that meaningfully exploited a certain jurisdiction.²⁹⁰

IV. WHERE TO GO

A. State Responses

The practical effect of the abolition of the physical presence rule most clearly manifests itself in states' responses to the holding.²⁹¹ Despite

286. See SSUTA, *supra* note 276, at § 306 (detailing relief from liability including reliance upon the CSP or software which the seller engages with). The SSUTA clearly focuses on engaging sellers by lessening the costs of compliance and making taxation as simple and accessible as possible. *Id.* at §102. Further enticing is the fact that in the event of such a calculation error which leads to a state seeking action, there is a rebuttable presumption assumed under the SSUTA that the CSP and remote seller exercised due diligence in attempting to remit the sales tax. *Id.* at § 305(F)–(H).

287. See *Wayfair* Streamlined Amicus Curiae, *supra* note 277, at 9–10 (“Thus, the Member States, and their local partners, have made every effort to relieve a retailer’s burden in this area.”).

288. See *id.* at 9 (detailing that responsibility for collecting and remitting the taxes will transfer to the SSUTA rather than to the individual businesses).

289. *Id.*

290. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 762–63 (Fortas, J., dissenting) (noting that *Bellas Hess* engaged in a regular and systematic exploitation of Illinois’s consumer market, and arguing the Court should have considered this point more seriously).

291. See BISHOP-HENCHMAN ET AL., *supra* note 247, at 3 (explaining states considering the next appropriate steps towards passing legislation in conformity with *Wayfair* while keeping interstate commerce burdens in mind); see also EY, INDIRECT TAX ALERT: STATES RESPOND TO THE US SUPREME COURT RULING IN *SOUTH DAKOTA V. WAYFAIR* 1–4 (2018) [hereinafter EY INDIRECT TAX ALERT] (detailing the immediate announcements and various legislative actions of states in the month following the *Wayfair* decision).

Respondents' concerns,²⁹² many states have followed South Dakota's lead and taken reasonable steps to clarify economic nexus,²⁹³ shield small businesses, and ensure predictable and logical compliance under the Court's ruling.²⁹⁴ It is no coincidence that SSUTA member states are on the front foot in attaining compliance with *Wayfair*.²⁹⁵

Since *Wayfair*, contrary to Respondents' beliefs, the SSUTA has offered several workable alternatives in which many Streamlined States engage.²⁹⁶ Some states even passed legislation that updated nexus post-physical presence rule that took effect as early as October 2018, while many others opted for the beginning of 2019 and beyond.²⁹⁷ To explain, SSUTA membership is not in and of itself an embodiment of all dormant Commerce Clause concerns voiced by the *Wayfair* Court—it is only a tool by which states and remote sellers can clarify nexus and lessen

292. See *Wayfair* Respondents' Brief, *supra* note 92, at 55 (warning that states cannot “be left to set the limits on their own authority” under the dormant Commerce Clause for fear of placing undue burdens on interstate commerce); *id.* (explaining that the physical presence rule prevents “perverse economic and regulatory incentives[,]” which leads states away from sensible law-making).

293. S.B. 106, *supra* note 16 (detailing thresholds to establish economic nexus on a remote seller for purpose of sales taxation at \$200,000 or two hundred separate sales transactions).

294. See H.B. 61, 365th Gen. Assemb., Reg. Sess. (Ga. 2018) (sec. 2 C.2(1)(A)) (detailing limits of \$250,000 or two hundred individual transactions to secure economic nexus); see also SF 2417, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (detailing limits of \$200,000 or at least two hundred separate sales transactions to secure economic nexus); KY. REV. STAT. ANN. § 139.340 (2019) (detailing limits of \$100,000 or at least two hundred separate sales transactions); N.J. STAT. ANN. § A4261 (2018) (detailing limits of \$100,000 or at least two hundred separate sales transactions); N.D. CENT. CODE § 57-39.2-02.2 (2019) (detailing limits of \$100,000 in the previous calendar year); S.B. 2001, 2018 Leg. 2nd Special Sess. (Utah 2018) (detailing limits of \$100,000 in sales or at least two hundred separate sales transactions to secure economic nexus); VT. STAT. ANN. Tit. 32 § 9701(9)(F)(3)(iii), (9)(J) (2018) (detailing limits of \$100,000 in sales or at least two hundred separate sales transactions to secure economic nexus); WYO. STAT. ANN. § 39-15-501 (2018) (detailing limits of \$100,000 in sales or at least two hundred separate transactions to secure economic nexus).

295. See BISHOP-HENCHMAN ET AL., *supra* note 247, at 8 (explaining that mere codification to the SSUTA establishes compliance with most requirements mentioned in the *Wayfair* decision); see generally Matthew Rocco, *Online Sales Taxes Take Effect in These States*, FOXBUSINESS: TAXES (Oct. 1, 2018), <https://www.foxbusiness.com/retail/online-sales-taxes-take-effect-in-these-states> [<https://perma.cc/HL9T-7JAJ>].

296. See BISHOP-HENCHMAN ET AL., *supra* note 247, at 8–16 (detailing the number of states which have actively engaged in passing or drafting legislation which work towards creating a sales tax standard which will comply with *Wayfair* ruling); see also Ryan Prete, *After 'Wayfair,' Which States Are Ready to Tax Online Purchases? (1)*, BLOOMBERG: BNA (June 28, 2018), <https://www.bna.com/wayfair-states-ready-n73014476940/> [<https://perma.cc/TTAD-GLSC>] (claiming twenty-one states “have an economic nexus model in place like South Dakota’s”).

297. Requiring compliance with new tax laws within only six months of the *Wayfair* decision. See Rocco, *supra* note 295 (naming twenty-two different states that plan to begin sales tax collection from remote sellers, all of which are either Streamlined States or include provisions similar to Streamlined State requirements).

burdens on interstate commerce.²⁹⁸ Specifically, two elements that the SSUTA does not address, which the Court did, are safe harbor principles and retroactive liability upon remote sellers.²⁹⁹ That being said, states that *have* passed conforming legislation have largely addressed these principles. Even if a state has not passed sales tax legislation since *Wayfair*, if it is a Streamlined State it will likely satisfy concerns that the imposition of the sales tax would be a burden on interstate commerce.³⁰⁰

Of the twenty-three full-member Streamlined States, twenty-two have updated legislation likely to pass constitutional muster, thanks in part to SSUTA membership, but also because of full adherence to the principles outlined in *Wayfair*.³⁰¹ Some of these states even drafted this legislation long before the *Wayfair* decision, anticipating a change in law that would allow them to reclaim their tax base.³⁰² For example, Vermont, a Streamlined State, effectuated its current sales tax legislation in 2016 with a provision that allowed for nexus without physical presence, but expressly provided that the provision would be without support until Congress or the Court rejected the physical presence rule.³⁰³ The provision, now in effect, sets familiar safe harbor boundaries for small

298. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (explaining that South Dakota's Act exhibited positive features lending towards acceptance without formally defining what those thresholds were); see also BISHOP-HENCHMAN ET AL., *supra* note 247, at 6 (displaying a seven-part checklist for sales tax legislation, of which five factors are already met by SSUTA compliance and two are still unmet without the appropriate legislative provisions).

299. For the Court's discussion of safe harbor principles, see *Wayfair*, 138 S. Ct. at 2099 (detailing that the Act provides "safe harbor to those who only transact limited business" and alluding to the concern that legislation that does not provide limitations on business transactions prior to sales tax collection will fail the first prong of the *Complete Auto* test); S.D. CODIFIED LAWS § 10-64-1. For the Court's discussion of retroactive liability, see *Wayfair*, 138 S. Ct. at 2099 (addressing the concern raised by Respondents that businesses would be subject to retroactive liability in collecting sales taxes under a new substantial nexus threshold); see also *Wayfair Tax Foundation Amicus Curiae*, *supra* note 165, at 11 (alleging, prior to *Wayfair's* decision, that the nexus standard in South Dakota is constitutional, citing the retroactive collection as a check on burdens upon interstate commerce).

300. See *Wayfair*, 138 S. Ct. at 2099; see generally BISHOP-HENCHMAN ET AL., *supra* note 247 (detailing the Court's holding and how states have interpreted the thresholds for nexus since the decision: "The other five items were met through other provisions in state law relating to South Dakota's adherence to SSUTA.>").

301. See *Wayfair*, 138 S. Ct. at 2099 ("First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively."); see also BISHOP-HENCHMAN ET AL., *supra* note 247, at 6 (detailing the Safe Harbor language used in *Wayfair*, as well as referencing concerns on retroactive collection).

302. See, e.g., VT. STAT. ANN. tit. 32 § 9701(9)(F) (2019); OKLA. STAT. tit. 68 § 1392 (2018).

303. See VT. STAT. ANN. tit. 32 § 9701(9)(F) ("Text of subdiv. (9)(F) effective until on the later of July 1, 2017, or the first day of the quarter after a controlling court decision or federal legislation abrogates the physical presence requirement of *Quill v. North Dakota*, 504 U.S. 298 (1992).").

businesses, establishing nexus if remote sellers made sales of at least \$100,000 or two hundred individual transactions during a preceding twelve-month period.³⁰⁴

For states who are not yet party to the SSUTA, compliance with *Wayfair* is still possible,³⁰⁵ it just requires that the state addresses all of the concerns posed by the *Complete Auto* test independently.³⁰⁶ In the process of doing away with the physical presence rule, the Court did not address whether the South Dakota Act actually met constitutional requirements, making the minimum compliance requirements for the rest of the *Complete Auto* test seemingly ambiguous.³⁰⁷ However, ambiguity has not stopped non-Streamlined States' efforts to reclaim their tax bases.³⁰⁸ For example, Alabama, though not a member of the SSUTA, adopted a revenue threshold of \$250,000.³⁰⁹ In place of the CSP framework established by the SSUTA, Alabama established the option to collect a uniform flat rate of 8 percent of use tax in lieu of multiple taxes otherwise imposed by its various jurisdictions.³¹⁰ Idaho has also adopted

304. See VT. STAT. ANN. tit. 32 § 9701(9)(F).

A person making sales of tangible personal property from outside this State to a destination within this State and not maintaining a place of business or other physical presence in this State that . . . has either made sales from outside this State to destinations within this State of at least \$100,000.00, or totaling at least 200 individual sales transactions, during any 12-month period preceding . . .

Id.

305. See BISHOP-HENCHMAN ET AL., *supra* note 247, at 13–16 (detailing states' attempts to pass legislation that seem viable based on their adherence to the Court's cited concerns); see also Rocco, *supra* note 295 (detailing several states not party to the SSUTA that have effectuated sales tax legislation implicating remote sellers).

306. *Wayfair* only addressed the first prong of the four-pronged *Complete Auto* test, which governs the constitutional limits of taxation upon interstate commerce. *Wayfair*, 138 S. Ct. at 2091–92. But see BISHOP-HENCHMAN ET AL., *supra* note 247, at 5–6 (citing *Wayfair*, 138 S. Ct. at 2099–100) (using the final portion of the *Wayfair* decision to glean a threshold for nexus requirements).

307. See *Wayfair*, 138 S. Ct. at 2099 (“The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here.”); see also BISHOP-HENCHMAN ET AL., *supra* note 247, at 6 (explaining that the checklist is not a dispositive reading of the Court's opinion in *Wayfair*, only that it “strongly suggests” that the provisions of the SSUTA would meet constitutional limitations).

308. See BISHOP-HENCHMAN ET AL., *supra* note 247, at 13–16 (detailing the number of non-SSUTA member states and what efforts they have made towards taxation); see also Prete, *supra* note 296 (detailing such initiatives of several states).

309. *Simplified Sellers Use Tax FAQs*, ALABAMA DEP'T OF REVENUE, <https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/simplified-sellers-use-tax-faqs/> [<https://perma.cc/TN6T-DL9L>]; see also Jennifer Dunn, *Sales Tax by State: Economic Nexus Laws*, TAXJAR (Jul. 9, 2018), <https://blog.taxjar.com/economic-nexus-laws/> [<https://perma.cc/JRZ3-YRRL>] (“According to state law, sellers who exceed the \$250,000 sales threshold are required to . . . collect sales tax on sales that ship to Alabama, and remit that sales tax to the State.”).

310. See ALA. CODE § 40-23-193 (2019) (detailing 8 percent option for flat use rate tax); Dunn,

a different legislative approach referred to as a “click-through nexus,” which requires remote sellers to pay a tax on gross sales of more than \$10,000 a year if that seller has any sort of agreement with Idaho sellers that refers them to Idaho consumers.³¹¹

Some states were slower to the draw than others because of independent roadblocks that required them to focus inwards on uniformity.³¹² Arizona is a prime example. With over 130 jurisdictions that levy independent sales taxes, the state only centralized the administration of transaction-based taxes in the last few years.³¹³ Arizona is one of the states that the *Bellas Hess* Court might have been worried about, as its many jurisdictions would expose remote sellers to a “welter of complicated obligations” in determining what taxes needed to be collected and where.³¹⁴ Despite this complexity, Arizona’s legislature successfully passed House Bill 2757 that would require a “transaction privilege tax” on retail sales that total more than \$100,000 for calendar year 2021 and beyond.³¹⁵ States like Arizona demonstrate that the existence of various taxable jurisdictions does not preclude the establishment of a workable alternative to physical presence nexus.³¹⁶ It

supra note 309.

311. See *Wayfair*, 138 S. Ct. at 2098 (defining click-through nexus as establishing nexus through referrals); Gail Cole, *Idaho plays hard ball with non-collecting remote sellers*, AVALARA: ECOMMERCE (Aug. 23, 2018), <https://www.avalara.com/us/en/blog/2018/08/idaho-plays-hard-ball-with-non-collecting-remote-retailers.html> [https://perma.cc/L2M2-MFD8]; see also TAX COMMISSIONER JOSEPH W. TESTA, ANNUAL REPORT: FISCAL YEAR 2017, DEP’T OF TAXATION STATE OF OHIO 32–33 (2017), https://www.tax.ohio.gov/Portals/0/communications/publications/annual_reports/2017AnnualReport/AR2017.pdf [https://perma.cc/WB5X-2WUN] (detailing similar de minimis thresholds ranging from \$150,000 through \$500,000 of gross receipts consummated in Ohio depending on other factors).

312. BISHOP-HENCHMAN ET AL., *supra* note 247, at 16–18. The very tax schema of some states lends towards multiple taxation by virtue of the many jurisdictions within them which impose sales taxes. See *id.* at 18 (detailing that Colorado has 328 taxing jurisdictions); see also *Wayfair* Colorado et al. Amici Curiae, *supra* note 273, at 15 (explaining that it took seven years of litigation post-*Quill* to attempt to apply a workable rule regarding economic nexus).

313. See *Transaction Privilege Tax*, ARIZ. DEP’T REVENUE, <https://azdor.gov/transaction-privilege-tax-tpt> [https://perma.cc/8NUK-K2Y7] (detailing the Arizona Department of Revenue’s responsibility to collect taxes from the State’s multiple jurisdictions under the Transaction Privilege Tax).

314. See *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 759–60 (1967) (describing how variations of tax rates and requirements could complicate *Bellas Hess*’s responsibility to multiple jurisdictions, but could also be a problem for other businesses).

315. See Gail Cole, *Arizona Requires Marketplace Facilitators and Remote Sellers to Collect Tax*, AVALARA (May 29, 2019), <https://www.avalara.com/us/en/blog/2019/05/arizona-requires-marketplace-facilitators-and-remote-sellers-to-collect-sales-tax.html> [https://perma.cc/BZE2-Y4UZ] (summarizing the passage of Arizona’s House Bill 2757 and its implications).

316. Compare this to a state like California, which has over three hundred taxable jurisdictions. BISHOP-HENCHMAN ET AL., *supra* note 247, at 16. However, this has not stopped California’s legislature from centralizing the state’s tax collection in order to take full advantage of post-*Wayfair* nexus ability. See *Dunn*, *supra* note 309 (describing California’s new \$500,000 de minimis

should be no surprise that the abrogation of the physical presence rule, and the possibility of reclaiming a large chunk of state-owed capital, would establish incentives for states to make tax collection run as smoothly as possible. Anything is better than nothing, after all.

B. Opposition: Last States Standing

Then, there are a group of vehement dissenters to the decision comprised of those states which choose not to collect a sales tax in the first place.³¹⁷ Few are as opposed as New Hampshire.³¹⁸ In an immediate response to *Wayfair*, New Hampshire's senate unanimously passed a bill that would impose legal barriers to other states forcing New Hampshire businesses to collect and remit sales or use taxes.³¹⁹ However, the bill was gutted entirely when it went to the house for a vote.³²⁰ In light of the *Wayfair* decision, New Hampshire's arguments against taxation on interstate commerce take on a sort of reverse-protectionism that attempts to insulate the state's local businesses from taxes evenly imposed on interstate commerce.³²¹

Under the physical presence rule, protectionism was described as a state attempting to impose burdens upon or discriminate against interstate

threshold which took effect April 26, 2019).

317. See generally Mark Faggiano, *U.S. States with No Sales Tax*, TAXJAR (May 24, 2018), <https://blog.taxjar.com/us-states-with-no-sales-tax/> [<https://perma.cc/TML7-BWHH>]; see BISHOP-HENCHMAN ET AL., *supra* note 247, at 19 (declaring Alaska, Delaware, Montana, New Hampshire, and Oregon as “NOMAD States”).

318. See Brief for State of New Hampshire as Amicus Curiae Supporting Respondents at 1, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494) (detailing the “long, proud history of frugality and limited taxation,” which persuaded them to file a brief in support of Respondents); see also Daymond Steer, *N.H. House Guts Senate Bill Opposing Wayfair Decision*, CONWAY DAILY SUN (July 25, 2018), https://www.conwaydailysun.com/news/local/n-h-house-guts-senate-bill-opposing-wayfair-decision/article_f10e5780-8ba3-11e8-8011-532c94b383ec.html [<https://perma.cc/TRF8-XAHT>] (quoting New Hampshire governor Chris Sununu stating “[o]ur goal is basically to create every possible barrier that you can imagine, so that even if we are forced to [comply with *Wayfair*], it would be really hard for any jurisdiction to try to do it”).

319. See Steer, *supra* note 318 (detailing the bill's unanimous passage through the New Hampshire senate); see also Press Release, Jeff Merkley, U.S. Senator of Oregon, Tester, Shaheen, Merkley, Hassan Introduce Bill to Protect Businesses From Collecting Sales Taxes: Senators' Bill Would Reverse Damaging Supreme Court Decision, (June 28, 2018), <https://www.merkley.senate.gov/news/press-releases/tester-shaheen-merkley-hassan-introduce-bill-to-protect-businesses-from-collecting-sales-taxes> [<https://perma.cc/WD7A-TJXU>] (detailing other non-sales tax states in support of a bill similar to New Hampshire's).

320. See generally Steer, *supra* note 318; see also BISHOP-HENCHMAN ET AL., *supra* note 247, at 19 (detailing New Hampshire's consideration of the bill which fell through due to “constitutional concerns”).

321. See generally Regan, *supra* note 6, at 1094–95 (discussing protectionism under the general definition which encompasses states enacting legislation to their own benefits but adverse to interstate commerce). *But see* Steer, *supra* note 318 (discussing New Hampshire's attempt to legislate in direct opposition to the *Wayfair* decision).

commerce in favor of local jurisdictions.³²² In the post-*Wayfair* world, without a requirement for physical presence, a state closing its borders to shelter its own businesses from a tax that all other states collect without issue is certainly a definition of state protectionism.³²³ The arguments of those in opposition to the “Kill *Quill*” movement rested on anti-protectionist rhetoric which insisted upon a collective, national marketplace that all could engage in equally.³²⁴ Now that the Supreme Court has leveled the playing field, former physical presence supporters embrace the unconstitutional protectionist ideas they once condemned.³²⁵

C. *The Rule Was Never Required in the First Place*

Ultimately, proper examination of the current legislative pushes (or lack thereof) in states scrambling to comply with the *Wayfair* Court’s decision yields a telling result: the physical presence rule was never needed.³²⁶ The safe harbor provisions and SSUTA efforts demonstrate that the Court’s reasons for pause were unfounded.³²⁷

322. See *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2089 (2018) (detailing the Commerce Clause’s central concern focusing on avoidance of “economic Balkanization” against interests of states’ engagement in interstate commerce); see also Regan, *supra* note 6, at 1092–93 (explaining that the dormant Commerce Clause assists the Court in balancing concerns between local and interstate commerce to ensure that states do not engage in “protectionism,” or in a simpler sense, state-enacted legislation which discriminates against interstate commerce in favor of local commerce and simultaneously infringes upon the Federal Government’s right to regulate commerce).

323. In short, a state putting up intentional “barriers” to circumvent constitutional practices within interstate commerce conveys legislative intent to provide benefit to that state against the interests of interstate commerce. *Wayfair*, 138 S. Ct. at 2089; see generally Regan, *supra* note 6, at 1094–95 (describing internally focused legislation as protectionist).

324. See *Wayfair* Respondents’ Brief, *supra* note 92, at 1–2 (arguing that legislation against the physical presence rule would be “burdensome” upon interstate commerce to the benefit of States); see also Steer, *supra* note 318 (discussing New Hampshire’s goal to make it “really hard for any jurisdiction” to try and enforce collection and remittance of sales taxes upon New Hampshire businesses).

325. Compare Steer, *supra* note 318 (detailing New Hampshire Governor’s statements to make compliance with constitutional interstate commerce practices as difficult as possible); with Regan, *supra* note 6, at 1092 (“In the central area of dormant commerce clause jurisprudence . . . the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism.”).

326. See *Wayfair*, 138 S. Ct. at 2092 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (“First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be ‘applied to an activity with a substantial nexus with the taxing State.’”).

327. Commentators suggested de minimis legislation as early as 1986. Hartman, *supra* note 234, at 1029. But it was not until *Wayfair* that the Supreme Court accepted this regulation as sufficient to lessen burdens upon interstate commerce. *Wayfair*, 138 S. Ct. at 2099–2100. Organization amongst states and technological ability existed well before *Quill*, providing several legitimate methods of lessening interstate commerce burdens. See Hartman, *supra* note 234, at 1011–12 (discussing automated accounting); Gillis, *supra* note 261, at 552 (explaining that low-cost technology to track sales and use taxes existed before *Quill*). See also *Nat’l Bellas Hess, Inc.*

In an overcorrection that attempted to address the supposed burden remote sellers would face absent the physical presence rule, the *Bellas Hess* Court adopted a rule that bore traces of the dying trends of formalism in Commerce Clause interpretation.³²⁸ There were other ways to address substantial nexus that did not require a bright-line rule made to assure compliance.³²⁹ In fact, the Court's ruling in *Quill*, which affirmed such a bright-line rule, is contradictory because the opinion endorsed formalistic, judicially-created protection, but in the same breath declared that only legislative action should do away with the decision.³³⁰ Congressional silence is not dispositive of Congress's support of Supreme Court jurisprudence.³³¹ State representatives attempted to pass practical legislation in the face of this burdensome formal rule to address the reality of growth in interstate commerce, but time and time again this artificially-founded judicial declaration stood in the way of progress.³³²

Not only was the rule never required, it contradicts the underpinnings of the dormant Commerce Clause as expressed in its founding opinion.³³³ In the Supreme Court's earliest murmurings of the dormant Commerce

v. Dep't of Revenue of Ill., 386 U.S. at 753, 766 (1967) (Fortas, J., dissenting) (objecting to using compliance concerns to override state concerns to collect lawful taxes); *Wayfair*, 138 S. Ct. at 2099 (overruling *Bellas Hess* and *Quill*).

328. See *Wayfair*, 138 S. Ct. at 2094 (discussing that the Supreme Court has rejected formalistic interpretation of the Commerce Clause); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (citing *Complete Auto*, 430 U.S. at 281) (detailing *Complete Auto*'s rejection of formalism).

329. See *Wayfair*, 138 S. Ct. at 2092 (citing *Complete Auto*, 430 U.S. at 279) (“[T]he physical presence rule is not a necessary interpretation of the requirement that a state tax must be applied to an activity with a substantial nexus with the taxing State.”).

330. The *Quill* Court managed to defend their acceptance of the physical presence rule by stating that “Congress may be better qualified to resolve” the issue, without acknowledging that the Court created the rule in the first place. *Quill*, 504 U.S. at 318. It even went so far as to say that if the Court disagreed with the Commerce Clause defense to the rule, the Justices might have chosen to affirm anyway on the sole basis that they should defer to Congress. *Id.* It further defended this point by stating that the longevity of the rule's practice had created a predictable environment for consumers and sellers to rely on. *Id.* at 316. But see *Wayfair*, 138 S. Ct. 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—something that has become easier and more prevalent as technology has advanced.”).

331. See *Quill*, 504 U.S. at 333 (White, J., concurring in part and dissenting in part) (“Although Congress can and should address itself to this area of law, we should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified.”); see also *Wayfair*, 138 S. Ct. at 2096 (“It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.”).

332. See, e.g., *KFC v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010) (holding that the physical presence rule was not a required interpretation of the dormant Commerce Clause as applied to a taxpayer's state income tax on transactions made from out-of-state franchisees); see also *Geoffrey, Inc. v. Comm'r of Revenue*, 453 Mass. 87, 89 (2009) (limiting the language from *Quill* and *Bellas Hess* to apply to sales and use taxes and not to royalty income in the face of an argument which invoked the physical presence rule).

333. See generally *Case of the State Freight Tax*, 82 U.S. 232 (1872).

Clause, the Court grappled with a specific idea: what are states entitled to in the realm of interstate commerce?³³⁴ *Case of the State Freight Tax* clearly and succinctly described that states are owed something, and regardless of flip-flopping between formal and pragmatic readings of the doctrine, the dormant Commerce Clause prevailed through nearly 150 years of case law.³³⁵ There is no question that if state law were to tread too far into plenary, congressional territory, then that state law would be unconstitutional.³³⁶ This and other precedent teaches that states are entitled to *something* in areas of congressional inaction.³³⁷ What that something is has never, nor can ever, be defined with total certainty—but the very existence of the dormant Commerce Clause suggests that something is owed.

Wayfair represents a return to the original idea that states cannot be unjustly shut out from passing reasonable legislation upon interstate commerce.³³⁸ While the boundaries of state power are undefined, context provides reasons to believe that a sale consummated in a state's own sovereign territory falls well within the state's ability to lay meaningful tax.³³⁹ Practical readings of economic nexus under the Commerce Clause

334. See, e.g., *id.* at 248 (“There can, therefore, be no conflict with a superior enactment, and the only question remaining is, whether the power regulating commerce vested in Congress is exclusive.”); *Gibbons v. Ogden*, 22 U.S. 1, 195–96 (1824) (“This principle is, if possible, still more clear, when applied to commerce ‘among the several States.’ They either join each other . . . or they are remote from each other. What is commerce ‘among’ them; and how is it to be conducted?”); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (“If congress had passed any act which bore upon the case . . . we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But congress has passed no such act.”).

335. The Court's very discussion in *Quill* and *Wayfair* are testament to its authority. See *Wayfair*, 238 S. Ct. at 2090 (“Thus, by implication at least, the Court indicated that the power to regulate commerce in some circumstances was held by the States and Congress concurrently.”); see also *Quill*, 504 U.S. at 309 (detailing the Court's historical interpretations of the “‘negative’ or ‘dormant’ Commerce Clause”).

336. See *State Freight Tax*, 82 U.S. at 248 (“The clause which vests in Congress the power to regulate commerce does not, ipso facto, take from the States the right to also regulate commerce, provided that the regulations of the latter do not come in conflict with those of the former. If there be any conflict, it is conceded that the State law at once falls.”)

337. See *Tyler Pipe Indus., Inc., v. Wash. State Dep't of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., concurring in part and dissenting in part) (citations omitted) (citing *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (5 How.) 504, 579 (1847)) (“However, unlike the District Clause, which empowers Congress ‘To exercise exclusive Legislation,’ the language of the Commerce Clause gives no indications of exclusivity.”).

338. See *Wayfair*, 138 S. Ct. at 2092 (first citing *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995); and then citing C. TROST & P. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* §11:1, at 471 (2d ed. 2003)) (“All agree that South Dakota has the authority to tax these transactions. . . . It has long been settled that the sale of goods or services has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State.”).

339. Use taxes are supposedly a means of filling in the gaps in the tax base that the physical presence rule left out with remote sellers, but in actual practice they were not a meaningful

expose that formalistic interpretation often creates uncertainty, arbitrariness, and illogical results in nearly identical circumstances.³⁴⁰ What is more, the formalistic rule prescribed advantages to businesses at significant disadvantage to states, further tipping the scale in favor of interstate vendors without giving states their something owed.³⁴¹

CONCLUSION

The formal underpinnings of the physical presence rule have never had a place in Supreme Court jurisprudence, not even in the half century that it controlled. The rule ignored its own practical effects only for the sake of providing a clear judicial application to the bedrock of dormant Commerce Clause interpretations. In practice, while the Court's application of the rule was clear, the results rarely were. *Wayfair* is not a departure from Commerce Clause interpretation as dissenters might suggest. Rather, it levels the playing field consistent with decisions that go as far back as the inception of the dormant Commerce Clause. While pragmatism and formalism are so steeped in the Court's Commerce Clause jurisprudence, they are merely a judicial means to this true end: an appropriate balance of state and federal power over interstate commerce. Instead of working towards this balance, former Courts that endorsed formalism fell asleep behind the complicated constitutional wheel, allowing uneven results to reign and jeopardizing the longevity of the states. *Wayfair* is not an unconstitutional overstep, it is an overdue return to practical form.

alternative as it was nearly impossible to achieve consumer compliance without the assistance of the vendors. *See supra* note 12 and accompanying text (describing sales taxes and use taxes).

340. *See Wayfair*, 138 S. Ct. at 2094–95 (detailing two examples of the physical presence rule imposing requirements upon vendors that had a physical presence in a state, despite the transaction's irrelevance to such property); *see also supra* notes 224–30 and accompanying text (describing the rule's tax protection to Bloomingdales when it created a mailing house to dodge tax duties).

341. *See Wayfair*, 138 S. Ct. at 2092 (describing the physical presence rules as an inefficient loophole “that gives out-of-state businesses an advantage” and resulting “in significant revenue losses to the states”).