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THE SUPREME COURT HEARS *WAYFAIR*

'SUBSTANTIAL NEXUS' MEETS INTERNET

Why *Wayfair* Won't Matter

Supreme Court case raises 'substantial nexus' controversy in internet age, capturing attention of tax specialists—and the public

By Jonathan E. Maddison

The state tax community is in familiar territory before the Supreme Court of the United States.[1] We are in far less familiar territory, however, having captured the attention of nontax professionals, academics, the American public, and even the president of the United States.[2] The eyes of the nation are fixed on *South Dakota v. Wayfair*.[3] To some new followers, *Wayfair* merely raises questions about purchases made over the internet. It may also—heaven forbid—impose seemingly new taxes on purchases made on eBay and Amazon.

But we know better. We know *Wayfair*'s origin dates to (at least) 1967—and that use tax has been due on internet purchases all along. So, to the state tax community, *Wayfair* means so much more. For over fifty years, states and businesses have struggled to understand when a "substantial nexus" exists between a state and a taxpayer,[4] leading to the unavoidable debate over two words: physical presence. The debate is best understood by asking two questions: *what* creates physical presence (an employee attending a tradeshow?) and *who* must be physically present (the taxpayer itself, or only a person with whom the taxpayer has a business relationship?). The Supreme Court's final word on nexus for sales and use taxes came in 1992, leaving state judiciaries as the primary arbiters when states and businesses have disagreed for the past twenty-five years. Naturally, state judiciaries have resolved identical questions with contradictory answers, creating ambiguity, uncertainty, and unpredictability. These issues were (and continue to be) exacerbated by the evolution of technology and its impact on the national economy.

Wayfair represents the culmination of this fifty-year debate by presenting the Court with a binary choice: affirm or reject the physical presence rule. The Court's having to make that choice—regardless of the option it chooses—stirs feelings of anticipation and hope. To many, *Wayfair* is good reason to hope for clarity in a landscape riddled with uncertainty. That hope is bolstered by the prospect of the Court clarifying not only questions dating to 1967 but also questions stemming from the growth of the internet and online shopping.

But is this hope misguided? Evidence suggests that it is—that whether the Court "kills *Quill*" or gives it new life, clarity will remain elusive. No matter the Court's decision, the substantial nexus debate will revolve around the same *what* and *who* questions. If *Quill*'s physical presence is reaffirmed, state courts will continue to confront those questions through the lens of physical presence. And if *Quill*'s physical presence rule is retired, state courts will ask the same questions, but through the lens of "economic nexus."

Oliver Wendell Holmes Jr. believed that "a page of history is worth a volume of logic."[5] This article takes Holmes' wisdom to heart and, by reviewing our history and experience in the nexus arena, demonstrates that the *what* and *who* questions will continue to dominate the nexus debate, regardless of the Court's decision in *Wayfair*.

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From Bellas Hess to *Wayfair*

To the uninitiated, *Wayfair* appears to be solely a referendum on the physical presence rule affirmed by the Court in *Quill v. North Dakota*.[6] However, *Wayfair* is properly framed not by reference to a single case, but by the Court's jurisprudence dating to the nineteenth century.[7] In 1967, the Court synthesized its jurisprudence in *National Bellas Hess v. Illinois*.[8] The *Bellas Hess* Court held that a "substantial nexus" between a state and taxpayer exists when an out-of-state retailer is physically present in the state. Accordingly, without a substantial nexus, a state cannot require an out-of-state seller to collect and remit use tax for sales to in-state purchasers.[9]

In 1992, the Court was presented with an opportunity to overturn the physical presence rule in *Quill v. North Dakota*.[10] Quill Corporation, a Delaware-based corporation with offices in California, Illinois, and Georgia, sold office equipment and supplies to customers across the United States. To generate sales, Quill mailed catalogs and flyers to existing and potential customers, advertised in national periodicals, and engaged in phone solicitation. But it did so exclusively from business locations and warehouses outside North Dakota. Quill was "physically present" only in California, Illinois, and Georgia—where its employees, offices, and warehouses were located. Nevertheless, North Dakota asserted that it had the authority to impose a use tax collection obligation on Quill. Under state law, there was little question that it had that authority: the legislature amended its law to impose a use tax collection obligation if a retailer engaged in "regular or systematic solicitation of a consumer market in [North Dakota]."[11] The Department of Revenue adopted an administrative regulation interpreting "regular or systematic solicitation" to include three or more advertisements within a twelve-month period.[12] But under the Court's decision in *Bellas Hess*, North Dakota could impose on Quill an obligation to collect use tax only if Quill was physically present in the state.

In state court, North Dakota argued that its law still met the constitutional requirement for a substantial nexus, although its law did not comply with the *Bellas Hess*' physical presence rule. The North Dakota Supreme Court agreed, emphasizing that "wholesale changes in both the economy and the law made it inappropriate to follow *Bellas Hess*. . . ."[13] Specifically, the North Dakota Supreme Court noted the growth of the mail-order business from a "relatively inconsequential market niche" in 1967 to "a goliath" with annual sales reaching the "staggering figure" of $183.3 billion in 1989.[14]

The Supreme Court of the United States disagreed that these changes necessitated the death of the physical presence rule. But its disagreement lacked the vigor typical of its decisions that reject blatant state efforts to rescind precedent. In fact, the Court even acknowledged that the physical presence rule "appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." Nevertheless, the rule "firmly establishes the boundaries of legitimate state authority," "encourages settled expectations and, in doing so, fosters investment by businesses and individuals," and "reduces litigation concerning those taxes."[15] These benefits, the Court held, supported reaffirming *Bellas Hess* and the physical presence rule.

Quill spurred states to tirelessly pursue new ways to abrogate the physical presence rule. From "attributional nexus"[16] to "click-through nexus,"[17] states have asserted aggressive theories of nexus, with varying degrees of success. For the most part, those theories accepted *Quill*'s holding that the physical presence rule limits their jurisdiction to tax.

States' begrudging acceptance of *Quill* is over. Now, states enact "economic nexus" laws in direct conflict with *Bellas Hess* and *Quill*'s physical presence rule—and make no bones about their disregard for precedent. This brings us to *Wayfair*, which represents the culmination of state efforts to abrogate physical presence in favor of economic indicia to define their jurisdiction to tax. On March 22, 2016, the South Dakota legislature enacted S.B. 106, requiring a remote seller to collect and remit tax for sales made to South Dakota purchasers if its gross revenue exceeds $100,000 or, alternatively, it makes 200 or more separate transactions for delivery to South Dakota.[18] Admirably, the law prohibited the Department of Revenue from enforcing the economic nexus regime until the law was held constitutional by the Supreme Court of the United States.

To begin its journey to the Supreme Court of the United States, South Dakota filed a declaratory action against Wayfair, Newegg, Systemax, and Overstock.com. On September 13, 2017, the Supreme Court of South Dakota held that *Quill* prohibited South Dakota from enforcing its economic nexus provision. South Dakota subsequently filed a petition for a *writ of certiorari* with the Supreme Court of the United States, which was granted on January 12, 2018.

What Will the Court Do?

Predicting how nine justices will decide a case is a risky endeavor, one this article desperately avoids. Instead, this article—which was written after the oral arguments in *Wayfair* but before the Court issues a decision—undertakes a marginally less risky endeavor to predict the various ways in which the Court may decide the case.

First, the Court can choose to affirm the decision of the Supreme Court of South Dakota, effectively affirming the physical presence rule from *Bellas Hess* and *Quill*. It is easy to forget that Wayfair heads to the high court as the victor at every stage of litigation.[19] This is notable for several reasons. For one, it is not every day that we can commend state courts for correctly applying Supreme Court precedent.[20] Second, the majority of commentary since the Court granted *cert* focuses not on whether the Court will abandon *Quill*'s physical presence rule, but how it will do so. Arguably, the Court's easiest route is to uphold the South Dakota Supreme Court's decision in favor of Wayfair, reaffirm *Quill*'s physical presence rule, and punt the question back to Congress for a more comprehensive, policy-based resolution. It even has a template for doing so—consider the following excerpt from the Court's majority opinion in *Quill*:

> [Affirming the physical presence rule] is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years Congress has considered legislation that would overrule the *Bellas Hess* rule. . . . Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.[21]

Comments made by the justices at the *Wayfair* oral argument suggest that the *Wayfair* opinion could include this language without modification, as it is just as true today as it was in 1992.[22] The Court could also emphasize, as it did in *Quill*, that economic changes since 1992 do not justify abandoning the physical presence rule and forfeiting the benefits of settled expectations and predictability.

Alternatively, the Court can decide to "kill *Quill*"[23] and hold that economic nexus, not physical presence, is the touchstone of the "substantial nexus" inquiry. It is important to note that the Court's decision to "kill *Quill*" could take several forms. First, the Court may decide that South Dakota's economic indicia ($100,000+ sales or 200+ transactions) is the new bright-line rule. Such a decision seems somewhat unlikely for several reasons. Indeed, the *Wayfair* Court spent virtually no time at oral argument discussing the South Dakota law.

Perhaps the most obvious problem with using South Dakota's statute as the threshold for economic nexus is that the Court would, in effect, "legislate from the bench." A decision establishing quantitative measures to determine when "substantial nexus" exists is subject to outcries of "judicial activism"—the Court's decision, critics may argue, encroaches on the legislative responsibilities of Congress or the sovereign authority of state governments. Historically, the Court is wary of issuing decisions of this nature. A decision establishing South Dakota's law as the new bright-line standard presents unique concerns about "substantial nexus," federalism, and constitutional law generally. However, given the unlikelihood of such a decision, these concerns are not considered here.

Second, the Court could decide that physical presence is no longer the cornerstone of substantial nexus, and South Dakota's economic presence standard is sufficient to confer substantial nexus without sanctifying that law as the new bright-line rule. Such a decision would avoid the criticism of judicial activism and is arguably consistent with the Court's historic approach to affirming specific state laws as constitutional.[24] Nevertheless, a decision of this variety is unlikely to resolve the substantial nexus debate—and may even create more ambiguity and inconsistency in this arena.

Third, the Court could unwind *Quill's* distinction between substantial nexus under the Due Process and Commerce Clause, and hold that minimum contacts under the Due Process Clause suffice for the regulation of commerce given advances in software in today's economy. Though South Dakota's counsel and the U.S. solicitor general each advanced this standard during the Wayfair oral argument—such that one sale would be sufficient to permits states to force remote sellers to collect and remit sales and use tax to a state—the justices at oral argument seemed concerned with the burdens such a rule would impose on small sellers, in particular.

Finally, the Court could decide that *Quill*'s physical presence rule is no longer required but decline to affirm or reject South Dakota's law. After all, *Wayfair* is before the Court pursuant to the grant of a motion for summary judgment. A motion for summary judgment is granted if there is "no genuine dispute as to any material fact"[25]—in this case, Wayfair's motion was granted because there were no unresolved factual questions—*Quill*'s physical presence rule applied, thus forbidding South Dakota from enforcing its law against non–physically present retailers like Wayfair. The justices expressed frustration during the *Wayfair* oral argument with lack of data regarding actual costs of compliance for large and small retailers, as well as the conflicting data each side presented on this topic. If the Court takes this route, the case would likely return to state court to determine whether South Dakota's law imposes an undue burden on interstate commerce or satisfies the substantial nexus prong of *Complete Auto Transit* or *Pike v. Bruce Church, Inc.*[26]

Although speculating on how the Court will decide *Wayfair* is beyond the scope of this article, identifying possible outcomes is nevertheless helpful in framing the ensuing discussion, as we explore the "what" and "who" questions by detailing how *Quill* contributed to the current patchwork landscape of nexus interpretations across the country.

If *Wayfair* reaffirms the physical presence rule, the shortcomings of *Quill* and creativity of state legislative challenges are likely to persist. Alternately, if the Court denounces the physical presence rule, we explore whether existing questions under the *Quill* framework are resolved and consider new problems under potential economic nexus regimes, whatever that may mean. The following discussion hopes to demonstrate that *Wayfair* is properly viewed as the continuation of our century-long struggle to understand "substantial nexus." The Court's decision may require a shift in the state tax vocabulary from "physical presence" to "economic nexus." But whichever phrase we use, we are left to resolve the same two questions: *what* activities, and *whose* activities, satisfy those terms.

The "What" Debate

The "what" question is essentially one of degree. With respect to *Quill's* physical presence rule, what activities create a physical presence for remote sellers? The answer continues to be elusive. With respect to economic nexus, what activities are sufficient to satisfy this standard for remote sellers? At least in the context of sales and use taxes, state courts arguably begin with a blank slate. But fear not, cry the kill-*Quill* believers: the promise of economic nexus is the minimization of the dreaded facts-and-circumstances inquiries—in turn, creating stability, predictability, and clarity. History cautions against accepting this promise, suggesting that the "what" question is here to stay.

What Creates Physical Presence?

Recall the Court's justifications for reaffirming the physical presence rule in *Quill*, but now focus on whether our history supports those justifications:

> 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. This benefit is important . . . [because] the application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. . . . a bright-line rule in the area of sales and use taxes also encourages *settled expectations*. . . .

In sum, *Quill* promised (1) firmly established boundaries, (2) reduced litigation, (3) settled expectations, and (4) precise guidelines to the states on how to constitutionally exercise their taxing authority.

History demonstrates that none of these promises have been fulfilled. Setting aside the question of whether these promises had any basis in truth when first stated in 1992, approaches to nexus after *Quill* suggest the Court placed too much faith in the physical presence rule, states' understanding of what constitutes physical presence, and states' willingness to observe the Court's bright-line rule. Several cases shortly after the *Quill* decision illuminate the difficulties of applying the physical presence rule.

We should first consider *Orvis v. Tax Appeals Tribunal*.[27] Orvis, a Vermont-based company, manufactured and sold outdoor recreational products like camping gear, fishing rods, and similar products. Like most retailers, Orvis sold directly to customers at retail and to larger companies at wholesale. For retail sales, Orvis solicited sales from New York customers by exclusively using mail-order catalogs and delivered the purchased products via common carrier—placing them on firm constitutional ground after *Quill*. At the wholesale end, however, Orvis occasionally sent employees to visit wholesale customers in New York. New York asserted that these occasional visits constituted physical presence under *Quill*, and therefore Orvis could be required to collect and remit use tax on its New York sales.

The New York Court of Appeals ultimately agreed, holding that the presence of employees to visit customers satisfied the physical presence rule, and therefore Orvis had a substantial nexus with New York.[28] There are several important (and arguably questionable) holdings in the court's opinion, one of which was that *Quill*'s physical presence rule was satisfied by "any measurable amount of in-State people or property. . . ."[29] Orvis interpreted *Quill* differently, asserting that *Quill* required a "substantial" physical presence. That interpretation is difficult to square with *Quill*, but New York's assertion that "any measurable amount" of in-state presence satisfies *Quill* is not exempt from criticism. What does "measurable" mean? Quill owned title to software vis-à-vis floppy disk in North Dakota, and, in an often-overlooked footnote, the Court found that presence insignificant for purposes of the physical presence rule. But those floppy disks were "measurable"—after all, the Court specifically acknowledged their existence and rejected their legal significance. The New York Court of Appeals could have provided a more satisfying analysis of why Orvis' presence satisfied *Quill*, or even used a different phrase to articulate the *Quill* Court's holding. Nevertheless, and regardless of whether New York arrived at the correct conclusion, *Orvis* foreshadowed the complications of *Quill* waiting to emerge across the country through litigation.

In *Florida Department of Revenue v. Share International*, the Supreme Court of Florida addressed whether attendance at a tradeshow in Florida by an out-of-state retailer satisfied *Quill*'s physical presence rule.[30] Share International, a Texas-based company, manufactured and sold chiropractic supplies. Share International's products were sold primarily using mail-order catalogs but were also displayed at a tradeshow in Florida for three days. Even though Share International was physically present in Florida (both its products and its employees), the Supreme Court of Florida interpreted *Quill* as prohibiting the assertion of nexus with Share International.[31]

The suggestion that the use of software can satisfy the physical presence rule without distinguishing the facts in *Quill* is troubling.

Whether both (or neither) state court correctly interpreted *Quill* has no bearing on our ability to assess whether the Court's justification for the physical presence rule proved true. First and foremost, the suggestion that *Quill*'s physical presence rule would lead to reduced litigation is misguided. *Quill* was decided in 1992, *Orvis* in 1995, and *Share International* in 1996. There are countless other state cases in the immediate aftermath of *Quill*—and the tradeshow fact pattern resurfaced as recently as 2014 in Washington.[32]

If *Wayfair* reaffirms the physical presence rule, the brief history described above to ascertain what constitutes physical presence should temper any hope for clarity. This is further evinced by present-day litigation. Consider the trend to adopt "cookie nexus." Whereas some states (like South Dakota) unabashedly enact laws in direct violation of precedent, others find creative ways to undermine precedent in the guise of constitutional compliance. The latest approach is to enact legislation or administrative regulations broadly construing what creates "physical presence." In Massachusetts, for example, the Department of Revenue promulgated a regulation interpreting physical presence to include the presence of software on computers. The regulation provides that physical presence includes "property interests in and/or the use of in-state software (e.g., 'apps') and ancillary data (e.g., 'cookies') which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers."[33]

The suggestion that the existence of software can satisfy the physical presence rule without distinguishing the facts in *Quill* is troubling. Again, Massachusetts' regulation is at least in some tension with *Quill*'s treatment of software in the state. There may be a meaningful distinction between the presence of "a few floppy diskettes" in *Quill* and the persistent use of software and cookies in Massachusetts, but if the physical presence rule survives the Court's review in *Wayfair*, this question will remain unanswered. Litigation challenging Massachusetts' regulation will continue, casting further doubt on the *Quill* Court's musings that the physical presence rule would lead to less litigation.[34]

Of course, hindsight is 20/20. But if we were to predict whether *Wayfair*'s reaffirmation of the physical presence rule will provide clarity and predictability or reduce the need for litigation, history strongly suggests it will not. Technology evolves rapidly, and economies follow suit. The technological advancements between 1967 and 1992 with respect to mail-order catalogs—coupled with the evolution of e-commerce from 1992 to the present—serve as cautionary tales about expecting litigation to provide clear answers for future taxpayers.

What Creates Economic Nexus?

The failures of the physical presence rule to adequately answer the "what" question may point toward the benefits of adopting economic nexus; the goals the Court identified in *Quill* will be better served by economic nexus. Not so fast. We next explore whether adopting economic nexus can offer clarity for the "what" question in ways that *Quill*'s physical presence rule could not.

If the Court affirms South Dakota's economic nexus standard (but does not establish a new bright-line rule), how will other states respond? At a minimum, we could expect states to enact laws identical to or substantially similar to South Dakota's law. In fact, five states already have: Indiana,[35] Maine,[36] North Dakota,[37] Vermont,[38] and Wyoming.[39] If challenged in state court, we can anticipate a state defending its laws by relying on *Wayfair* along these lines: if the Supreme Court of the United States upheld South Dakota's law, and this state law is substantially similar to South Dakota's law, this law should be upheld. At a minimum, this will place a significant evidentiary burden on taxpayers to demonstrate why a law identical to South Dakota's law, applied prospectively from the date of the *Wayfair* decision, is unconstitutional.

But what about states that have not yet enacted an economic nexus law? If the Court's decision in *Wayfair* upholds South Dakota's law without establishing it as the constitutional floor, can we expect other states to enact the same $100,000+/200 transactions threshold? At the *Wayfair* oral argument, the U.S. solicitor general unabashedly indicated not: "I have no doubt that if the Court issued that ruling, many states would adopt regimes that are less hospitable to retailers, unless they were stopped from doing that by Congress." Setting aside the question of whether the U.S. solicitor general undermined South Dakota's case, states have an obvious incentive to adopt as low a threshold as possible: a lower threshold inevitably regulates a greater number of actors, in turn increasing state revenue through compliance (or enforcement against those not complying). The *Wayfair* decision may rule that one sale is enough to confer substantial nexus with the state,[40] but what meaningful guidance would that provide? What limiting principle could states rely on when enacting legislation (and taxpayers when challenging legislation) to reflect the Court's decision in *Wayfair*?

This concern is not merely theoretical. Some states have enacted a lower threshold than South Dakota has. Pennsylvania, for example, imposes a tax collection obligation on "remote sellers" with $10,000+ in sales delivered to customers in Pennsylvania.[41] Washington imposes the same.[42] In 2018, at least four states have contemplated similar legislation: Idaho,[43] Kansas,[44] Nebraska,[45] and New York.[46] To be fair, some states have adopted economic nexus standards (through administrative regulations) with a higher sales threshold than South Dakota's. Alabama[47] and Mississippi[48] adopted a $250,000 threshold, whereas Tennessee adopted a $500,000 threshold.[49]

Economic nexus benefits from its lack of experience in court. An analysis of divergent state court decisions to demonstrate the shortcomings of economic nexus is challenging—we simply have no case law to review and assess. Nevertheless, there are legitimate reasons to doubt that *Wayfair* can offer meaningful clarity if the Court abandons physical presence and constitutionalizes economic nexus without setting any standard for what that term means.

First, consider *Wayfair*'s path to the Court. Because South Dakota's economic nexus regime conflicts with Supreme Court precedent (a fact with which South Dakota agreed), Wayfair filed a motion for summary judgment—which was rightly granted and affirmed on appeal. The motion for summary judgment did precisely what it was designed to do: prevent needless litigation when there is no issue of material fact—and in the context of *Wayfair*, when the only relevant facts are (1) the *Quill* Court reaffirmed the physical presence rule, and (2) *Quill* applies to Wayfair, the case should be dismissed as a matter of existing constitutional law.

Yet South Dakota currently finds itself before the Supreme Court with a more-than-insignificant chance of success. If South Dakota prevails, we may find ourselves with an unproven theory of how to determine when constitutional protections are not infringed upon. Unquestionable value comes from states operating as laboratories of democracy, but is it prudent to abandon a bright-line rule in favor of the unknown? *Wayfair* presents the risk of turning state legislators or administrative personnel into the worst kind of scientists—those free to test new ideas on unwilling subjects, unrestrained by procedural safeguards and granted deference when forced to defend their experiment. There may be good reason to allow state experimentation with economic nexus standards, but doing so will inevitably lead to new litigation, likely resulting in nonuniform standards among the states—certainly not the hallmark of clarity.

The "Who" Debate

The "who" question explores when the in-state activities of one person can create nexus for an out-of-state taxpayer, sometimes referred to as "attributional nexus." *Wayfair* itself does not raise the "who" question—nor was it an issue directly raised in *Bellas Hess* or *Quill*. Nevertheless, in the years before and after *Bellas Hess* and *Quill*, the "who" question has been at the forefront of state efforts to find a substantial nexus over out-of-state retailers. And given the rise of platform laws (also referred to as "marketplace legislation"), it is likely to remain at the center of the substantial nexus debate in the future—unless the Court adopts a *de minimis* standard for economic nexus.

How, if at all, will *Wayfair* provide guidance on this important issue? Answering this question in the post-*Wayfair* era will require careful consideration of the Court's nexus jurisprudence predating *Bellas Hess* and *Quill*. Although this article does not embark on this important endeavor, it still highlights the issues likely requiring resolution in the near future regardless of the fate of *Quill*.

Who Can Create Nexus for Out-of-State Retailers?

Even before the physical presence rule was canonized in *Bellas Hess* and *Quill*, the Supreme Court considered whether the activities of a third party in a state were sufficient to create nexus for an out-of-state retailer. Three pre-*Quill* cases have continued to play a central role in the Court's substantial nexus jurisprudence and are worth briefly recounting here.

In 1960, the Court addressed whether the use of salesmen in a state could create nexus for an out-of-state retailer in *Scripto*, *Inc. v. Carson*.[50] Scripto, a Georgia-based corporation, sold "mechanical writing instruments" that were branded with the purchaser's logo or other advertising information. Scripto had no employees based in Florida, nor did it own or lease property in Florida. However, Scripto made sales to businesses in Florida using ten salesmen to continuously solicit sales on a commission basis while present in Florida. If a salesman secured a purchase, she would forward the resulting orders from Florida to Scripto in Georgia, at which point Scripto would process the transaction and ship the products to the Florida customers. Scripto provided the salesmen with branded samples and shipped voluminous amounts of branded marketing materials to salesmen to use when soliciting sales. Not only did those representatives make sales to customers, but they constantly telephoned customers to pursue repeat business. In essence, the in-state representatives were simply an extension of Scripto, engaged in continuous, systematic actions to increase the sales, goodwill, and name recognition of the remote seller. In fact, every sale to Florida customers at issue in the appeal was attributable to one of the ten salesmen in Florida. Put another way, without those in-state representatives, Scripto would have $0 in sales to Florida customers.[51]

Prior to *Scripto*, the Court held that having agents soliciting sales in a state created nexus for the remote seller,[52] but Scripto attempted to distinguish itself on the basis that the sales representatives were "independent contractors"—not agents or employees. The Court rejected this argument, finding that by distributing marketing materials, soliciting sales, taking payments, and ultimately being directly responsible for every company sale in Florida, the sales representatives were no different from Scripto having agents or employees performing the same tasks. Accordingly, the Court held that the physical presence of the salesmen could be attributed to Scripto, and therefore Scripto had physical presence in Florida.

The Court considered a similar question in 1987 in *Tyler Pipe Industries v. Washington*.[53] Tyler Pipe manufactured and sold cast iron, pressure and plastic pipe and fittings, and drainage products. All of Tyler Pipe's manufacturing activities occurred outside of Washington State. Like Scripto, Tyler Pipe itself did not solicit sales in Washington, but instead used independent contractors in Seattle to solicit orders for its sales. To determine whether those independent contractors established a substantial nexus for Tyler Pipe, the Washington Supreme Court examined the relationship between the two parties. It concluded that "the sales representatives acted daily on behalf of Tyler Pipe" by calling on its customers and soliciting orders.[54] Those interactions were critical to Tyler Pipe's ability to make sales in Washington, because they "maintain[ed] and improve[d] the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe."[55]

The in-state independent contractors did not merely solicit sales, but also provided critical market-specific information to Tyler Pipe. Again, the Washington Supreme Court found that "the sales representatives provide Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe's Washington market."[56] To determine whether the independent contractors created a substantial nexus for Tyler Pipe in Washington, the Washington Supreme Court held that the "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer *are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.*"[57] The Supreme Court of the United States affirmed the Washington Supreme Court's decision and, at least passively, blessed the establish-and-maintain-a-market standard articulated by the state court.[58] Taken together, *Scripto* and *Tyler Pipe* provide important guidance on how to answer the "who" question: if an out-of-state retailer uses in-state representatives to exploit the in-state market, the out-of-state retailer may have nexus with the state in which it employs the activities of in-state representatives.

Scripto and *Tyler Pipe* involved the activities of *unrelated* third parties—that is, the in-state representatives were not under the same corporate umbrella as the out-of-state retailer. But what about the in-state presence of related actors? The Court's 1977 decision in *National Geographic Society v. State Board of Equalization* provides some guidance on this question.[59] In this case, the National Geographic Society was primarily located in Washington, D.C., and engaged in solicitation activities to sell its magazine from that location. National Geographic had two offices in California—but the employees in California engaged in solicitation activities not for sales of the magazine. Rather, they solicited purchases of advertisements displayed in the magazine. National Geographic was physically present in California under nearly every interpretation of the physical presence rule. Nevertheless, it argued that because its activities were unrelated to the sale of magazines, California lacked a substantial nexus with the *transaction* the state sought to tax. The Court rejected this distinction, holding that "the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between the State and the person . . . it seeks to tax.'"[60]

Taken together, these three cases serve as the foundation for states' authority to answer the "who" question. In the context of traditional commerce (i.e., not e-commerce), state courts have frequently addressed attributional nexus involving Scholastic Book Clubs, reaching different conclusions.[61] In the context of e-commerce, states enacted "click-through nexus" to extend the Court's decisions in *Scripto* and *Tyler Pipe* to reach out-of-state retailers using in-state actors that refer customers to the out-of-state retailers.[62]

Again, the *Wayfair* case does not directly raise the "who" question. Accordingly, it is unlikely that we will receive any guidance on how to adjudicate the "who" question in the future. States have struggled to interpret the Court's nexus jurisprudence in this context, and, given the rise of platforms as actors in the national economy, they will continue to struggle. This is particularly likely given the rise of platform laws.[63]

In 2017, four states enacted legislation to impose tax collection obligations (and, in the case of Rhode Island, reporting obligations) on companies like Amazon and eBay for sales made by remote sellers through platforms. And, at the time of this writing, two states have enacted platform laws in 2018: Alabama and Oklahoma.[64] Pennsylvania, for example, imposes an obligation on platforms to collect on third-party sales if the platform facilitates the sale and is physically present in Pennsylvania or satisfies the economic nexus threshold—facilitating $10,000 in sales to Pennsylvania customers.[65] Effectively, platform laws assert the authority to impose a tax collection obligation on the platform for a third party's sales—based solely on whether the *platform* has nexus with the state, paying no mind to whether the *seller* has nexus with the state. Framed in the "who" context, platform laws are premised on the notion that the platform can create nexus for the remote seller—and the platform, not the seller, can be required to collect tax on the remote seller's sale through the platform.

If the Court reaffirms the physical presence rule in *Wayfair*, is Pennsylvania's law constitutional? *Quill* does not squarely address the issue, nor do the Court's prior decisions described above, leaving this question unresolved. Likewise, if the Court adopts economic nexus in *Wayfair*, this question remains.[66] Without any guidance from the Court in *Wayfair*, state courts will likely be forced to confront this issue soon.

But do the Commerce Clause and/or Due Process Clause allow states to impose a tax collection obligation on these platforms? On the one hand, states have nexus with the actor they seek to regulate (the platform). But does nexus with the platform allow states to reach the third-party sellers' transactions? Put another way, does the constitution require a state to have nexus with the person it seeks to regulate (platforms), the activity it seeks to regulate (third parties' sales), or both?

States will likely rely on *National Geographic* to defend their platform laws. In that case, the Court specifically rejected the assertion that the Constitution requires a connection between the state and the transaction it seeks to tax. But *National Geographic* does not squarely address the issue—after all, National Geographic had offices and employees in California. But in the context of platform laws, we are dealing with two unrelated parties, suggesting the proper analysis that begins with *Scripto* and *Tyler Pipe*. But even those cases fail to answer the "who" question with respect to platforms. Under the *Scripto* and *Tyler Pipe* framework, states can find that the out-of-state seller has nexus with the state because of the platform's nexus with the state—and in both *Scripto* and *Tyler Pipe*, the state imposed a collection obligation on the out-of-state seller, not the in-state representatives. But platform laws impose the obligation on the in-state actor (the platform) for the out-of-state actors' (third-party sellers') sales through the platform.

There is also reason to doubt the continuing validity of *National Geographic* in light of *Quill*. Recall that an important holding of *Quill* was that the Due Process Clause and Commerce Clause require separate nexus determinations. But *Scripto* (1960), *National Geographic* (1977), and *Tyler Pipe* (1987) were all decided before *Quill* (1992) and the bifurcation of the Due Process and Commerce Clause analysis. Further complicating the issue is the Court's decision in *Allied Signal* (1992), which acknowledged the importance of nexus with both the actor (platforms) and the activity (the third party's sale): "[I]n the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."[67] Moreover, *National Geographic* was discussed in South Dakota's merits brief and several amicus briefs, and raised at oral argument, perhaps suggesting that the Court must reevalutate its prior decision while deciding what to do with *Quill's* physical presence rule.

Resolving this question requires considering *Quill* alongside other cases such as *Scripto*, *Tyler Pipe*, and *National Geographic*. Reasonable minds may disagree on how to resolve this question. But as long as platforms continue to play a vital role in the national economy, resolving this question is of critical importance. But *Wayfair* is unlikely to offer such resolution, meaning states and taxpayers will pursue resolution in state court—just as they did in the wake of *Quill*.

A Third Way?

Chief Justice John Marshall reminded us to "never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[68] *Quill*'s physical presence rule may fall short of Marshall's hope for an interpretation of the constitution that endures for the ages. But we must query whether economic nexus is better suited to fulfill Marshall's vision of the Constitution. Economic nexus may very well advance the goals of the Commerce Clause, but is it likely to remain a viable means of identifying when a substantial nexus exists in twenty-five years? In 100 years? If we are to learn anything from our history, it should be that the world changes. Whether those changes arise from advances in technology or the evolution of the national economy, new circumstances may require new nexus standards. Does enacting economic nexus in response to the shortcomings of the physical presence rule offer hope for a sustainable rule for the future? The foregoing discussion should, at a minimum, cast doubt that it will.

Although *Wayfair* presents a binary choice between physical presence and economic nexus, there is a third way not yet discussed: relying not on federal and state judiciaries and state legislatures for answers, but on the United States Congress. Despite assertions made by South Dakota's counsel and the U.S. solicitor general during the *Wayfair* oral argument that one sale would be sufficient to confer substantial nexus with the state, the justices seemed concerned regarding the implications of a minimum contacts-type economic presence rule.

Thus, the holding of *Quill* most likely to survive *Wayfair* is that the Due Process Clause and Commerce Clause impose separate and distinct limitations on the states' jurisdiction to tax. The *Quill* Court reminds us that "Congress has the ultimate power to resolve" the nexus debate.[69] Courts are generally constrained to answer only the "case or controversy" presented in the dispute at hand. To at least some degree, this limitation exists to reflect the separation of powers in three equal branches of government. Congress is not only specifically authorized to intervene in the nexus debate, but also, in the words of the *Quill* Court, "it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of the Government."[70]

But again, history shows that this approach is not without drawbacks. First, enacting legislation is no easy task. Congress has attempted to enact legislation to end the nexus debate for decades, to no avail. Second, if Congress does enact legislation, and that legislation proves unworkable or ineffective, Congress—and Congress alone—has the power to repeal its legislation. This, too, is no easy task. Finally, designing legislation to address complex nexus issues is a risky endeavor. Congressmen and -women are influenced not only by their constituents, but also by businesses, trade organizations, and other parties with a vested interest (monetary or otherwise), a scenario that can elevate special interests above the common good. But if it is clarity and predictability we seek, Congress may be best suited to deliver both. As Congress moves closer to intervening in the debate by enacting legislation, it should tread carefully. Professor Walter Hellerstein, testifying before Congress on the Internet Tax Freedom Act, cautioned Congress in this way:

> Let me close with a parting word that I always give to my teenage kids as they rush out the door into their cars: "Please be careful." I would urge you, whatever you do, to please be careful. You are dealing with extremely complex issues, and

> many conflicting and legitimate concerns lie in the balance. Legislation that does not take careful account of all these concerns may do more harm than good.[71]

If Congress ultimately enacts legislation in this arena, we must hope that it proceeds with caution. Clarity and uniformity are worth pursuing. But poorly drafted legislation, however clear and uniform, may do more harm than good.

Conclusion

This article pursues an inherently pessimistic objective: to take away any hope for clarity after *Wayfair*. As this questionable endeavor was inspired by the words of Justice Holmes, it seems fitting to conclude with Holmes' more optimistic words:

> The life of the law has not been logic; it has been experience. . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[72]

To Holmes, the law is not simply about rules and logic applied neutrally to proven facts. The beauty of the law—the reason it works—is not that it provides clarity in every circumstance, but because it reflects social and political environments, constantly evolving to adapt to society and experience. Regardless of how the Court decides *Wayfair*, our community has the unique honor of shaping the development of constitutional law.

So where does this leave us? Among the inevitable ambiguity and uncertainty, one fact remains: when the dust settles and we return to state courts for our next fight—and when the new nexus enthusiasts lose interest in state tax—we will find ourselves in the territory with which we are most familiar: actively participating in the development of the law.

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Endnotes

1 *See, e.g., Comptroller of the Treasury v. Wynne,* 135 S. Ct. 1787 (2015); *Direct Marketing Ass'n v. Brohl,* 135 S. Ct. 1124 (2015); Alabama Dep't of Revenue v. *CSX Transportation, Inc.,* 135 S. Ct. 1124 (2015).

2 *@realDonaldTrump,* "The #AmazonWashingtonPost, sometimes referred to as the guardian of Amazon not paying Internet taxes (which they should) is FAKE NEWS!" (June 28, 2017).

3 138 S. Ct. 735, Case No. 17-494 (2018) (hereinafter "*Wayfair*").

4 A "substantial nexus" is required under the Court's interpretation of the Commerce Clause of the United States Constitution, Art. I, § 8, in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). The substantial nexus test is generally understood as the means through which the Court identifies whether a state has the "jurisdiction to tax" a person (broadly understood to include corporations and other business entities).

5 *New York Trust Co. v. Eisner,* 256 U.S. 345 (1921).

6 504 U.S. 298 (1992).

7 *See, e.g., Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954); *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62 (1939); *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359 (1941).

8 386 U.S. 753 (1967).

9 *Id.* at 758–59.

10 504 U.S. 298 (1992).

11 N.D. Cent. Code § 57-40.2-01(6) (1987).

12 N.D. Admin. Code § 81-04.1-01-03.1 (1988).

13 *Quill,* 504 U.S. at 303, which cites *North Dakota v. Quill Corp.,* 470 N. W. 2d 203, 213 (1991) (internal quotations omitted).

14 *Id.*

15 *Id.*

16 *See, e.g. Tyler Pipe Industries v. Wash. Dep't of Revenue,* 483 U.S. 232 (1987); *Scholastic Book Clubs, Inc. v. Michigan,* 223 Mich. App. 576, 567 NW.2d 692 (1997) (finding that the use of in-state teachers to solicits sales did not create nexus for Scholastic in Michigan).

17 *See, e.g.,* NY Tax Law § 1101(b)(8)(vi). The New York Court of Appeals (the highest state court in New York) held that New York's click-through nexus law did not violate the substantial nexus prong of *Complete Auto. Overstock.com, Inc. v. New York State Department of Taxation and Finance,* 987 NE.2d 621 (N.Y. 2013). The Supreme Court of the United States denied cert, 134 S. Ct. 682 (2013), causing other states to enact similar legislation.

18 S.B 106, § 9 2016 Leg., 91st Sess. (S.D. 2016) (hereinafter S.B. 106).

19 More precisely, Wayfair was victorious at every stage of the merits litigation—there were other jurisdictional issues on which South Dakota prevailed.

20 Even when the question before the state court is arguably squarely addressed by Supreme Court precedent, state courts have erred. *See, e.g. First Marblehead Corporation v. Massachusetts Commissioner of Revenue,* Case No. SJC-11609 (Mass. Jan. 28, 2015).

21 *Quill,* 504 U.S. at 318–19 (internal citations and quotations omitted).

22 Of course, there are persuasive arguments suggesting the Court would not have granted *cert* if it intended to affirm *Quill.* One important difference between *Wayfair* and *Quill* is that the North Dakota Supreme Court ruled against the remote seller. But in *Wayfair,* the Court could have denied *cert,* effectively reaffirming that it continued to believe Congress was better suited to decide this issue.

23 More precisely, the Court may choose to kill *Quill's* physical presence rule. *Quill's* important distinction between Due Process Clause nexus and Commerce Clause nexus is unlikely to be a casualty of the states' war on Quill, but there is a risk that the Court decides to abandon that holding of *Quill,* as well.

24 *See, e.g., Moorman v. Bair,* 437 U.S. 267 (1978).

25 Fed. Rul Civ. Proc. Rule 56.

26 397 U.S. 137 (1970).

27 654 N.E.2d 954 (1995).

28 *Id.*

29 *Id.* at 959.

30 676 So.2d 1362 (1996).

31 *Id.*

32 Determination No. 14-0062, Wash. Dep't of Revenue (App. Div., February 20, 2014). For a thorough review of these and other cases, see Hellerstein & Hellerstein, State Taxation.

33 830 CMR 64H.1.7 (1)(b)(ii)(a).

34 In its amicus brief in support of South Dakota, the United States argued that *Quill* "is limited to traditional mail-order retailers whose only contacts with the taxing State are by mail or common carrier, it does not control the question presented here. An online retailer that maintains a continuous virtual presence in South Dakota has a much more substantial nexus to that State than does a traditional mail-order business." *Brief of the United States as* Amicus Curaei *in Support of Petitioner,* Case No. 17-494 at 28.

35 Ind. Code § 6-2.5-2-1 (2017).

36 36 Me. Stat. § 1951-B (2017).

37 N.D. Cent. Code §57-40.2-02.3 (2017).

38 32 Vt. Stat. § 9701(9)(F) (2016).

39 Wyo. Stat. § 39-15-501 (2016).

40 Unless, of course, the Court overturns *Quill's* holding that Due Process Clause and Commerce Clause nexus impose different nexus standards. Setting aside concerns related to platforms, a one-dollar threshold presumably satisfies existing Due Process standards—and if Commerce Clause nexus exists with only one dollar in sales delivered to a state, the Due Process Clause and Commerce Clause impose identical restrictions on the state taxing authority.

41 H.B. 542, § 231.1(A) (2017).

42 H.B. 2163, § 202(2)(A) (2017), codified at Wash. Rev. Code § 82.08.052, 82.08.054.

43 H.B. 578, § 1 (2018), which amended Idaho Rev. Code § 63-3611 to add a new subsection (g) to reach remote sellers with $10,000+ in gross receipts from sales delivered to Idaho.

44 H.B. 2756 (2018), which added a new section to Kansas law to reach remote sellers with at least $50,000 in gross sales delivered to Kansas or 100+ transactions delivered to customers in Kansas.

45 L.B. 44, § 4, which added a new section to Nebraska law to reach remote sellers with at least $100,000 in gross revenue from taxable sales delivered to customers in Nebraska or 200+ transactions delivered to customers in Nebraska.

46 654 NE.2d 954 (1995).

47 Ala. Admin. Code 810-6-2.90.03 (2015).

48 Miss. Code R. § 35.IV.3.09 (2017).

49 Tenn. Comp. R. & Regs. 1320-05-01-.129 (2017).

50 362 U.S. 207 (1960).

51 *See* Brief for Appellees, *Scripto, Inc. v. Carson,* 1960 WL 98482, at 18 (U.S.) (Appellate Brief).

52 *See, e.g., Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954).

53 483 U.S. 232 (1987).

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 430 U.S. 551 (1977).

60 *Id.* at 561, which cites *Miller Bros. v. Maryland,* 347 U.S. 340, 344–45 (1954).

61 *See, e.g., Scholastic Book Clubs, Inc. v. State Bd. of Equalization,* 207 Cal. App. 3d 734 (1st Dist. 1989), which held that the use of in-state teachers to solicit sales created nexus for Scholastic in California, and *Scholastic Book Clubs, Inc. v. Michigan,* 223 Mich. App. 576, 567 NW2d 692 (1997), which found that the use of in-state teachers to solicits sales did not create nexus for Scholastic in Michigan.

62 These laws were upheld against challenges that they constituted an unconstitutional extension of the Court's nexus jurisprudence. *See, e.g., Overstock.com, Inc. v. New York State Department of Taxation and Finance,* 987 NE.2d 621 (2013).

63 For a more robust discussion of these laws, see Hellerstein, Swain & Maddison, *Platforms,* 86 *State Tax Notes* 1165 (December 18, 2017). Washington and Pennsylvania, relying on the distinction between collection and reporting obligations recognized in *Direct Marketing Association v. Brohl,* 814 F.3d 1129 (10th Cir. 2016), give regulated actors a choice: to collect tax or to comply with onerous reporting requirements.

64 H.B. 470 (April 6, 2018); H.B. 1019xx (April 10, 2018).

65 As described below, Pennsylvania law also imposes a collection obligation on non–physically present platforms if they facilitate $10,000+ in sales delivered to Pennsylvania. Because this section assumes the *Wayfair* Court upholds the physical presence rule, this $10,000 is ignored for present purposes.

66 Unless, as indicated earlier in the article and suggested by the U.S. solicitor general at oral argument, that one sale to a jurisdiction is sufficient to satisfy the Commerce Clause.

67 504 U.S. 768, 778 (1992).

68 *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

69 *Quill,* 504 U.S. at 318.

70 *Id.* at 319.

71 Testimony of Professor Walter Hellerstein on H.R. 1054.

72 Oliver Wendell Holmes, *Common Law* (1881).