WAYFAIR: FORMULATING A FLORIDA RESPONSE

APRIL 2019

Florida TaxWatch 40th 1979 - 2019

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i. Introduction

The United States Supreme Court decision of June 21, 2018 in *South Dakota v. Wayfair,* 138 S. Ct. 2080 (2018) removed a longstanding constitutional barrier to state imposition of a use tax collection responsibility on "remote" sellers (that is, out of state sellers making sales to in-state customers). Specifically, the Court repudiated the rule it had previously established which prohibited states from requiring such a seller to collect the use tax unless the seller had a "physical presence" in the taxing state. *Wayfair* provides states with new flexibility with respect to how they raise revenue, and with a way to address an economic disadvantage experienced by the in-state "brick and mortar" competitors of remote sellers. This report offers steps for consideration by the Florida Legislature in the wake of *Wayfair.*

The *Wayfair* decision does not automatically subject online sellers to a use tax collection responsibility in any state, or eliminate all constitutional guardrails limiting the imposition of that responsibility. Sales and use taxes are imposed under state law, and each state decides what is taxable and how far it wishes to extend the responsibility for collecting its taxes. As a result of *Wayfair,* states have the option to extend that responsibility beyond prior limitations, but they are not constitutionally required to do so. Whatever a state's decision on this policy question, there is a need for it to be articulated so that sellers and tax administrators know what is expected of them. As a result, post-*Wayfair* legislation is being considered in legislatures across the country.

The ensuing discussion traces the history of the use tax collection issue, including Florida's unique experience, and outlines the reasoning underlying options the Legislature is encouraged to consider. The first and fourth options set forth below would provide the most certainty for Florida tax administrators, remote sellers, and local businesses, and less risk of protracted constitutional litigation than the others.

These options are:

1. Enact legislation patterned after the South Dakota law that was before the Court in *Wayfair,* which featured sales thresholds, adoption of the Streamlined Sales and Use Tax Agreement (SSUTA), and a prohibition on retroactive application.
2. Enact the same legislation suggested in the first option above, but include provisions to address "marketplace" use tax collection, which was not presented in *Wayfair*.
3. Enact legislation with some combination of the elements identified in the first two options. If SSUTA is not enacted, the adoption of higher thresholds than in South Dakota would be a means of mitigating the impact on small sellers and making the law less vulnerable to challenge
4. Enact legislation that preserves the physical presence rule, with clear definitions of what constitutes physical presence.
5. Leave current law unchanged, with the result that remote sellers and the Department of Revenue will have to decide how to apply obsolete statutes in a post-*Wayfair* environment.

The list of options is not meant to be exhaustive, as the possible ways new legislation could be written are endless. However, these five options flow most directly from a review of *Wayfair* and related developments. The conclusion reached in this paper is that some type of legislation is needed to provide guidance to affected businesses and the Department of Revenue. That is, only the last option listed is inevitably problematic.

I. Use Tax Collection: Introduction and Relevant History

The sales tax and use tax are not identical. Although these terms have no universal definitions and are often used interchangeably (even by the United States Supreme Court), it is generally correct to view a sales tax as a tax levied on transactions which occur entirely within the taxing state, that is, it involves no out-of-state activity. The use tax, on the other hand, is imposed on the "use" within the taxing state of property brought into the state ("imported" is a common statutory term) from elsewhere. With limited exceptions not relevant here, this is the formulation in Chapter 212, Florida Statutes. *See,* section 212.05(1)(a)1.a., Florida Statutes (tax is due on retail sales in this state); section 212.05(1)(b) (tax is imposed on item of tangible personal property when the same is *not sold* but is used … in this state).

Regardless of the distinction, the sales tax and use tax in most states, including Florida, have in common that they place the economic burden of paying the tax on the purchaser, while the seller is required to collect and remit the tax.[1] If the seller fails to collect the tax, the purchaser still owes it and Florida law requires the purchaser to pay the tax directly to the state. This requirement is largely unknown to many Floridians. It is obviously in a state's interest to have all sellers, including remote sellers, collect the state's tax, but constitutional restrictions have prevented states from enforcing a collection responsibility against remote sellers except in narrowly defined circumstances. This has undermined the effectiveness of the use tax as a "complement" to the sales tax.

The use tax is designed to prevent loss of tax revenue and to protect in-state businesses from a competitive disadvantage that would otherwise result from purchases across state lines. If a state lacks the power to require a remote seller to collect and remit the use tax on sales to in-state purchasers, the state is left with either relying on purchasers to remit the tax voluntarily or enforcing the tax through audits of purchasers. Although the audit function can be effective with business purchasers, there is no practical way to employ it broadly with individuals, who rarely remit the tax voluntarily. Thus, a significant amount of online sales activity generates no tax revenue.[2]

For this reason, the power of a state to require a remote seller to collect the state's use tax has long been a subject of controversy. The word used to describe the conditions under which the collection responsibility can constitutionally be imposed is "nexus." That is, if a seller has "nexus" with the taxing state, the state can require the seller to collect the state's use tax on inbound sales; otherwise, it cannot. Nexus comes in two constitutional flavors, one emanating from the Commerce Clause of Article I, Section 8 of the Constitution of the United States, and the other from the Due Process Clause of the Fourteenth Amendment.

1 Florida statutes describe the sales tax as imposed on the seller for exercising the "taxable privilege" of selling, while requiring it to be charged to the purchaser as a separate line item. *See*, section 212.05, Florida Statutes (taxable privilege to engage in business of selling tangible personal property in this state); section 212.07(1), (2), Florida Statutes (tax must be collected from customer and separately stated). Thus its legal incidence is different from its economic incidence. In contrast, the California sales tax is imposed on the seller, who has the option *not* to charge the purchaser for the tax.

2 The measure of the lost tax revenue is a matter of dispute.

A. The Commerce Clause: A grant, a prohibition, and cousin of the Due Process Clause

Article I, Section 8 of the U.S. Constitution provides "The Congress shall have Power ... To regulate Commerce … among the several States…." This provision was central to replacing Articles of Confederation with the Constitution. The Articles provided a weak system under which the states established punitive tariffs against goods coming from other states. A strong central commerce power was deemed necessary.[3]

Although Article I, Section 8 is framed as a positive grant of power to Congress, it has carried with it a negative inference that the states may not regulate interstate commerce, as this would be inconsistent with the grant to Congress. Relying on this negative inference, the Supreme Court developed the "Dormant" or "Negative" Commerce Clause but has struggled to articulate a consistent and predictable doctrine that permits an understanding of what the dormant Commerce Clause permits and forbids. In some of the earliest cases, the Clause was viewed as creating an immunity of interstate commerce from taxation. This later gave way to cases holding that the protections of the Clause were not absolute and that interstate commerce must "pay its way." This is the contemporary view, and the permissiveness afforded the states has increased over time. These generalizations notwithstanding, the question whether a particular state taxing measure satisfies the Commerce Clause is often unclear and hotly contested among the justices, and the state does not always win. The Court has characterized the body of law it has created on this subject as a "quagmire."[4]

The Court has over the years considered the constitutionality of a variety of state tax measures. On the specific subject of the use tax collection responsibility, we begin with *Miller Bros. v. Maryland,* 347 U.S. 340 (1954). There, customers of a Delaware furniture store with no physical presence in Maryland crossed into Delaware to make purchases tax-free (Delaware has no sales tax). Some customers took possession at the Delaware store; some items were delivered by common carrier, and Miller Brothers delivered others to Maryland customers in its own trucks. Maryland sought to require Miller Brothers to collect the Maryland use tax on these purchases. The issue was whether Maryland had constitutional power to do so. A divided Court answered in the negative, because Miller Brothers did not "exploit" the consumer market in Maryland.

Although the *Miller Bros* fact pattern involved interstate activity and the company invoked a Commerce Clause objection, the Court decided the case on the basis of the Due Process Clause. First, it described the issue as "whether this vendor, by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability." Then the Court observed that under its prior cases, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," 347 U.S. at 344, 345. And because of the difficulty of state collection directly from purchasers, the "practical and legal effect of the Maryland statute as it has been applied to this Delaware vendor is to make the vendor liable for a use tax due from the purchaser," *Id.,* at 344. The Court ruled in favor of Miller Brothers.

3 *See, Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 571 (1997). The Commerce Clause grant of power to Congress also applies to foreign commerce and to commerce "with the Indian Tribes." The focus of this paper is interstate commerce and references to "commerce" mean interstate commerce unless otherwise noted.

4 *Northwestern States Portland Cement v. Minnesota,* 358 U.S. 450, 458 (1959).

The lesson of *Miller Bros* is that a state only has power to require use tax collection if there is a requisite link between the seller and the taxing state. The logic merits some reflection. The state is seeking to exercise power over persons beyond its borders. Once the door is open to such exercises of power it becomes necessary to determine if this power is to be limited, and if so, how. One would not, for example, expect the Court to sustain a state's attempt to impose a sales tax on transactions that occur entirely in other states. The Court's answer is the requirement of a link with the taxing state. In the use tax collection context, according to *Miller Bros.*, this would be established by the remote seller's exploitation of the consumer market in the taxing state.

The use tax collection issue arose again in *National Bellas Hess v. Illinois,* 386 U.S. 753 (1967), where the state sought to impose the collection duty on a mail order seller with no property or personnel in Illinois. The seller distributed catalogs and flyers but did not otherwise advertise in Illinois. The deliveries were made by common carrier. As in *Miller Bros.,* National Bellas Hess challenged the state's attempt to require use tax collection on both Commerce and Due Process Clause grounds. The Court observed that the requirements of the two clauses were "similar," and held in favor of Bellas Hess.[5] Because of its stark contrast with what the Court recently said in *Wayfair,* discussed subsequently, this paragraph of the *Bellas Hess* Court's reasoning is especially noteworthy:

> [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.' The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.

386 U.S. at 759, 760 (footnotes omitted).

Three justices dissented, remarking that National Bellas Hess engaged in a "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market" that created a "sufficient nexus," *Id.,* at 762. As will be seen, the *Bellas Hess* majority's idea of the purpose and operation of the Commerce Clause has been abandoned in favor of the dissent's position.

The next important case in this historical odyssey is *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). Although not a use tax collection case, it is viewed as a seminal decision as it overruled prior case law that severely restricted taxation of interstate commerce. In *Complete Auto,* the Court announced that state taxes would henceforth be evaluated based on their practical economic effect,

5 The Court clearly relied upon the Commerce Clause for its decision. Its reliance on the Due Process Clause is less explicit, but the Court in *Wayfair* viewed *Bellas Hess* as having been decided on both grounds. *See, South Dakota v. Wayfair,* 138 S. Ct. 2080 at 2091.

and would be sustained against Interstate Commerce Clause challenges if they satisfied a four-prong test:

1. The activity taxed must have "substantial nexus" with the taxing state
2. The tax must be fairly apportioned
3. The tax must not discriminate against interstate commerce, and
4. The tax must be fairly related to the services provided by taxing state

Complete Auto provided states will a new tool to seek relaxation of earlier Commerce Clause restrictions on their taxing power, and they did so.[6]

Shortly after *Complete Auto Transit,* the Court decided *National Geographic Society v. California State Board of Equalization,* 430 U.S. 551 (1977). In this case the Court held that a physical presence within the state was sufficient to impose a use tax collection responsibility even if the activities within the state were unrelated to the remote sales which the state sought to make subject to that responsibility. However, the Court rejected the state's contention that the "slightest presence" of the seller within the state would be sufficient to create nexus.

Like the Commerce Clause jurisprudence, the law under the Due Process Clause also evolved after *Bellas Hess*. In cases involving long arm jurisdiction, the Court determined that a nonresident commercial actor's efforts "purposefully directed" toward residents of another state would permit the latter state to assert jurisdiction over the nonresident. National advertising and marketing to instate residents may qualify as purposeful availing of the state's market, even absent a physical presence within the state.[7]

B. *Quill:* Use tax collection in the next generation

The Court's changing doctrines in Commerce and Due Process Clause cases were the foundations for state efforts to remove the *Bellas Hess* obstacle to requiring remote sellers to collect a state's use tax. A major vehicle for this effort was *Quill Corporation v. North Dakota,* 504 U.S. 298 (1992). Quill sold office supplies by mail and had no property or personnel in North Dakota.[8] Like National Bellas Hess, it solicited business through catalogs, flyers and national advertising. The state claimed the right to require Quill to collect the use tax on sales to in-state customers, arguing that *Complete Auto* had overruled *Bellas Hess* and that there had been "wholesale changes in both the economy and the law…." While ruling for Quill based on adherence to *Bellas Hess,* the Court:

- Created a distinction between Due Process nexus and Commerce Clause nexus. Due Process nexus is based on "the fundamental fairness of government activity," while "substantial nexus" under the Commerce Clause is a product of "structural concerns about the effects of state regulation on the national economy," 504 U.S. at 312;
- Applied this distinction to eliminate any requirement for physical presence as a Due Process Clause condition for imposing the use tax collection responsibility, and determined that Quill's

6 For example, in *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), the state persuaded the Court to overturn two prior decisions that had stricken the state's business and occupation tax as applied to stevedoring as violations of the Commerce Clause.

7 The issue in these cases is whether an out of state defendant can be required to defend a lawsuit there. *See, World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) (finding contacts with state insufficient).

8 Quill owned "a few floppy diskettes" within the state, which the Court viewed as insignificant.

"widespread solicitation of business" in North Dakota was sufficient for Due Process nexus. However, while expressing some doubt as to whether it would reach the same result if not for its prior decision in *Bellas Hess* and the mail order industry's reliance on that decision in the intervening years, the Court reaffirmed the physical presence requirement under the Commerce Clause; and

- Observed that Congress "may be better qualified" to determine the circumstances permitting the imposition of a use tax collection responsibility, and invited Congress to address the nexus issue by exercising its power under the Commerce Clause. Although there is no comparable grant of congressional power under the Due Process Clause, the Court's relaxed nexus standard under that provision established the minimum constitutional link for imposing the use tax collection responsibility. Using its Commerce Clause power, Congress could decide what more, if anything, would be required, and could eliminate the physical presence rule.

In its *Quill* opinion the Court addressed the strengths and weaknesses of the physical presence requirement:

> Like other bright-line tests, the *Bellas Hess* 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. [citations omitted] This artificiality, however, is more than offset by the benefits of a clear rule. 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, for as we have so frequently noted, our law in this area is something of a "quagmire" and 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." [citation omitted]
>
> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess.*

504 U. S. at 315-316.

The Court also reiterated the concerns expressed in *Bellas Hess*:

> Thus, absent the Bellas Hess rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000-plus taxing jurisdictions. *See National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 759-760, 87 S. Ct. 1389, 1393, 18 L.Ed.2d 505 (1967) (noting that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations")…

504 U. S. at 313.

Only Justice White dissented from adherence to the *Bellas Hess* Commerce Clause holding and would have overruled that decision entirely. Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the result. With respect to the Commerce Clause issue, the concurring opinion relied upon the doctrine of *stare decisis* (adherence to precedent) coupled with Congressional power to change the result:

> Congress has the final say over regulation of interstate commerce, and it can change the rule of Bellas Hess by simply saying so. We have long recognized that the doctrine of stare decisis has "special force" where "Congress remains free to alter what we have done." [citations omitted] Moreover, the demands of the doctrine are "at their acme ... where reliance interests are involved." [citation omitted] As the Court notes, "the Bellas Hess rule has engendered substantial reliance and has become part of the basic framework of a sizable industry." *** Finally, the "physical presence" rule established in Bellas Hess is not "unworkable," [citation omitted], to the contrary, whatever else may be the substantive pros and cons of the rule, the "bright-line" regime that it establishes *** is unqualifiedly in its favor.

504 U. S. at 320-321.

The constitutional nexus law governing imposition of a legal duty to collect a state's use tax as determined by *Quill* can be summarized as follows:

<u>Due Process Clause Nexus:</u>

- Purposeful availing of in-state market is sufficient to require collection
- No physical presence required
- Based on "fundamental fairness"
- Easier for state to win
- Congress lacks power to modify

<u>Commerce Clause Nexus:</u>

- Purposeful availing of market alone is NOT sufficient to require collection
- Physical presence required
- Based on structure of national economy
- Harder for state to win
- Congress has power to modify

Despite the Court's acknowledgment that Congress "may be better qualified" to determine the circumstances permitting the imposition of a use tax collection responsibility, Congress has not enacted any of the large number of bills that have been introduced over the years.

Although characterized in *Quill* as a "bright line rule," the physical presence requirement left uncertainty regarding the location of the line.[9] Unresolved were issues such as the temporal extent of the required physical presence; whether and under what circumstances nexus could be imputed to a remote seller based on the presence of a related entity within the state; and the extent to which contractual relationships with parties in the state could create Commerce Clause nexus. Nevertheless, for most remote sellers the locus of the line was sufficiently clear. Such a seller with no property, employees, contractors, or affiliates within a market state and who made no visits to the state could not be required to collect the state's use tax. Although the imposition of such a requirement after *Quill* was consistent with the Due Process Clause, it was forbidden by the Commerce Clause unless and until Congress ordained otherwise.

9 The characterization of *Bellas Hess* as the source of the physical presence requirement for use tax collection is consistent with the facts and reasoning of that decision, although the words "physical presence" appear nowhere in its text.

II. State Innovations after *Quill*

In the 26 years after *Quill,* numerous forces combined to keep use tax collection at the forefront of issues in the world of state and local taxation (SALT). The most significant of these was the dramatic growth of remote selling with the emergence of the Internet. Because virtually anything can be acquired on line, the adverse impact of the physical presence requirement on state treasuries grew dramatically. For "main street" sellers in market states, the requirement provided remote competitors with an advantage, which the remote sellers often touted in their marketing. Moreover, the issues that *Quill* left unresolved prompted states to seek creative ways to test the limits of the physical presence requirement, which were often challenged in litigation.

A. Physical presence broadly defined

For example, issues arose as to whether the physical presence requirement was satisfied by periodic visits to the state for quality control, trade shows of limited duration, and delivery of products in the seller's own trucks rather than by common carrier.[10] Beyond this, some states attempted to create a use tax collection responsibility if the remote seller had an affiliate within the taxing state, in some cases irrespective of whether the affiliate's activities bore any relation to the online sales.[11] Still further, states attributed nexus to remote sellers based on contractual relationships with in-state persons.[12]

10 *See, e.g., Town Crier, Inc. v. Department Of Revenue,* 315 Ill.App.3d 286, 733 N.E.2d 780 (IL 1st DCA 2000) (30 deliveries in seller's own trucks into state and five installations in two years created nexus); *Arizona Department Of Revenue v. Care Computer Systems,* 197 Ariz. 414, 4 P.3d 469 (AZ Ct. App. 2000) (annual average of one sales visit and 21 days of training in state created nexus); *Dynamic Information Systems v. Washington Department of Revenue*, 2000 WL 33267349 (WA Bd. Tax App. 2000) (95 days of sales visits over seven years created nexus; *Orvis Co., Inc. v. Tax Appeals Tribunal of State of N.Y.*, 86 N.Y.2d 165, 630 N.Y.S.2d 680 (NY 1995), *cert. denied,* 116 S. Ct. 518 (1995) (visits by sales employees created nexus; burden to show visits were limited or sporadic was on remote seller); *Vermont Information Processing, Inc. v. Commissioner, New York State Dept. of Taxation and Finance,* 86 N.Y.2d 165, 630 N.Y.S.2d 680 (NY 1995), *cert. denied,* 116 S. Ct. 518 (1995) (41 troubleshooting visits over three years, after the sales occurred, created nexus). *Pearle Health Services, Inc. v. Taylor*, 799 S.W. 2d 655 (TN 1990) (visits every six to eight weeks by product representatives and every 15 to 18 months by a quality control inspector created nexus). *Compare, In re Appeal of Intercard, Inc.*, 270 Kan. 346, 14 P. 3d 1111 (KS 2000) (11 installation visits in four years did not establish nexus); *Share International v. Department of Revenue*, 676 So.2d 1362 (FL 1996) (seminars within state for three days each year did not create nexus requiring collection on sales from outside the state).

11 *See, e.g., Current, Inc. v. State Board of Equalization*, 24 Cal.App.4th 382, 29 Cal.Rptr.2d 407 (CA Ct. App. 1994) (rejecting contention that extensive physical presence within the taxing state of out of state mail order seller's parent corporation created nexus for the out of state seller); *Borders Online, Inc. v. State Board of Equalization*, 129 Cal. App.4th 1179, 29 Cal. Rptr. 3d 176 (CA 1st DCA 2005) (online book seller had nexus, where policy allowed customer to exchange or return books for credit card credit at affiliate stores within state; instate stores were acting as agents of remote seller, and were engaged in "selling" by supporting the remote seller's sales efforts); *Bloomingdales by Mail, Ltd. v. Commonwealth of Pennsylvania,* 130 Pa. Comm. 190, 567 A.2d 773 (PA 1989), *affirmed,* 527 Pa. 347, 591 A.2d 1047 (PA 1991) (neither close relationship of instate affiliate, similarity of products, nor fact that on two occasions the instate stores accepted returns of mail order merchandise, established nexus for out of state mail order seller; *SFA Folio Collections, Inc. v. Bannon,* 217 Conn. 220, 585 A.2d 666 (CT 1991) (rejecting claim that distinct identities of mail order seller and affiliated instate retailer should be disregarded so that presence of instate retailer would create nexus for remote seller). Some states have enacted laws to challenge the reasoning in judicial decisions. *See, e.g.,* 2001 Arkansas Laws Act 922 (requiring a remote seller to collect the use tax if there is a requisite ownership relationship with an in-state retailer which sells similar products under a similar name or the instate retailer's employees or facilities are used to promote sales for the remote seller); Ky. Revised Statute Sec. 139.340 (providing that a representative within the state that receives or exchanges returned merchandise sold by the out of state seller creates a collection duty for the seller); Conn. Statute Sec. 12-407 (ownership or control of or by a retailer within the state in a similar line of business creates use tax collection duty).

12 The source of this idea is a Florida case that reached the United States Supreme Court, *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960). *See also, Amazon.com LLC v. New York Dept. of Taxation & Finance,* 913 N.Y.S.2d 129 (NY App. 2010) (rejecting claim that NY "click through nexus" statute creating rebuttable presumption of nexus for Amazon as a result of links on its associates' websites was facially unconstitutional, but remanding for consideration of as-applied challenge); *Dell Catalog Sales v. Commissioner of Revenue Services*, 48 Conn. Supp. 170, 834 A. 2d 812 (CT Super. 2003) (sales of service contracts to purchasers of computers from remote seller, and performance of service contracts within state by contractor did not create nexus for remote seller, where frequency of service calls not established); *State v. Dell International, Inc.*, 922 So. 2d 1257 (LA 1st Cir. Ct. App. 2006), *writ denied*, 930 So. 2d 979 (LA 2006) (distinguishing the Connecticut case and holding that Dell had not clearly proved lack of nexus for summary judgment purposes); *America Online, Inc. v. Johnson*, 2002 WL 1751434 (TN Ct. App. 2002) (implying that presence of leased equipment or relationships with instate telecommunications companies that facilitated dial-up connections with AOL servers outside the state might create nexus). *See also, Annox, Inc. v. Kentucky Revenue Cabinet,* 2003 WL 23011589 (KY Bd. Tax App. 2003), *affirmed,* Case No. 03-CI-1606 (Franklin County Cir. Ct. 2005) (property tax case in which court said physical presence not required, but rationale for finding nexus for reseller of telecommunications service includes interconnection agreements allowing use of local telephone company networks within state, as well as installation, repair, and other services of local telecommunications companies within the state).

These efforts reached the point of maintaining that nexus is created if a remote seller downloads software on an in-state customer's computer ("cookie nexus)."[13]

B. Information reporting

Another innovation, pioneered by Colorado, was information reporting. The Colorado law required remote sellers who did not collect the state's use tax (presumably due to the absence of Commerce Clause nexus) to notify instate customers of their obligations to pay the Colorado use tax. In addition, the remote seller was required to provide the state annually a list of its Colorado customers and the total amount each customer paid for Colorado purchases in the prior year. Other states adopted similar laws.[14] The costs of complying with these provisions provided an incentive for some sellers to begin collecting the tax.

C. Streamlined Sales and Use Tax Agreement

These efforts to narrow the scope of *Bellas Hess* and *Quill* did not address the concerns expressed by the Supreme Court regarding the compliance burdens facing remote sellers with customers in multiple state and local jurisdictions. The states thus began exploring ways to mitigate those burdens. Their initial efforts were unsuccessful, which may be traced to the voting participation of industry groups.[15]

In 1999, the states adopted a different approach to addressing these issues. They would continue to collaborate and welcome input from the business community, but business would have no vote. This model was dubbed the Streamlined Sales Tax Project, and ultimately resulted in an agreement among participating states that bears the title Streamlined Sales and Use Tax Agreement (SSUTA). Originally adopted on November 12, 2002, SSUTA has been amended several times, most recently in December 2018.

SSUTA creates categories of state "membership," depending on the nature and extent of a state's participation. States which fully adopt SSUTA have changed their laws to incorporate the simplification measures it contains and are classified as "full member" states. The 23 full member states are:

Arkansas	Nebraska	South Dakota
Georgia	Nevada	Utah
Indiana	New Jersey	Vermont
Iowa	North Carolina	Washington
Kansas	North Dakota	West Virginia
Kentucky	Ohio	Wisconsin
Michigan	Oklahoma	Wyoming
Minnesota	Rhode Island	

13 MA 830 CMR 64H.1.7.

14 As discussed subsequently, litigation over the Colorado law set in motion the events that ultimately led to the demise of the physical presence requirement in *Wayfair.*

15 The first significant effort was the National Tax Association Electronic Commerce Tax Project, launched in 1996, which included voting participation by government, industry, practitioner groups, and academia. Thereafter, Congress created the Advisory Commission on Electronic Commerce in section 1102 of the 1998 Internet Tax Freedom Act, Pub. L. 105–277, which also featured voting membership from industry and government.

Florida and other large states (California, Texas, New York, and Illinois) are “advisor” states. An advisor state has not enacted the simplification provisions of the Agreement, but participates in a nonvoting, advisory capacity.[16]

SSUTA is 255 pages in length,[17] inclusive of the Appendices and Compiler’s Notes. Section 102 of the agreement expresses its “fundamental purpose:”

> It is the purpose of this Agreement to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance. The Agreement focuses on improving sales and use tax administration systems for all sellers and for all types of commerce…

The compliance issues facing remote sellers that SSUTA addresses include the following:

- Separate administration of taxes for a state and each local jurisdiction within the state. SSUTA requires centralized state-level tax administration for each state and the local jurisdictions within it, including registration, tax returns, and remittances. In addition, a seller registering under SSUTA is automatically registered in each member state.
- Different tax rates, including multiple rates within a state and among state and local jurisdictions. SSUTA generally limits a jurisdiction to a single rate.
- Different tax bases among and within states. SSUTA requires that the tax base for local jurisdictions within a state be identical to the state’s tax base, and standardizes treatment of financing charges, installation, delivery, taxes imposed on the purchaser, discounts, and coupons.
- Variations in tax calculations (rounding conventions vs bracket systems like Florida’s). SSUTA requires a uniform rounding algorithm and prohibits bracket systems.
- Thresholds (where tax applies only above a specified sales price amount) and caps (where tax applies only below a specified sales price amount, such as Florida’s $5,000 sales cap for local sales taxes). This can also vary within a state. SSUTA generally prohibits thresholds and caps (these thresholds should not be confused with the sales thresholds associated with the economic nexus concept).
- Variations in sourcing of transactions among and within states (origin vs destination). SSUTA provides a uniform sourcing regime.
- Variations in treatment of “bundled” transactions (which may have taxable and nontaxable components). SSUTA creates a standard definition of “bundled transaction” and prescribes the treatment of such transactions.
- Variation in treatment of drop shipments. Some states do not permit a drop shipper to accept a resale certificate from its out-of-state customer unless that customer is registered in the state to which the sale is sourced. SSUTA prohibits states from imposing this restriction.
- Tax return and remittance due dates, filing frequency, volume of returns (state and local within same state). SSUTA provides that only a single return can be required by a state, for all jurisdictions

16 Tennessee is an “associate member” and the only state in this category. An associate member state is in substantial compliance with the agreement as a whole but not with specific provisions. Such a state has limited voting rights and SSUTA does not purport to require remote sellers to collect tax on sales into the state.

17 Available at: https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6

within the state; that returns can be required no earlier than the 20th day of the month following the transaction; that each state make available to all sellers a simplified electronic tax return approved by the SSUTA Governing Board; and that the state limit the number of monthly remittances and allow for payments by ACH Credit and ACH Debit.

- Changes in state and local laws affecting compliance, with no temporal regularity or uniformity. This includes changes in tax rate, tax base, and jurisdictional boundaries. SSUTA requires advance notice to sellers, requires local changes to be effective only on the first day of a calendar quarter, and requires each state to maintain databases of boundary changes and local rates.
- Exemption certificates: varying forms, conditions, timing requirements, and a practice of holding the seller liable for improper exemption claims by purchasers. SSUTA requires the states to use a standard form for claiming exemption electronically; provides for blanket exemption certificates; standardizes the mechanisms for claiming exemption after a sale; and provides a uniform good faith test for seller reliance on exemption claims.
- Subjection to multiple state and local audits and varying audit procedures. SSUTA requires audits to be conducted at the state level for the state's tax and the taxes of local jurisdictions within the state.
- Variation in product definitions for taxability and exemption. SSUTA creates a Library of Definitions for use in taxability determinations. States are free to decide whether or not to tax the sale of an item, but they must use the definitions in the library to identify what is taxable or exempt.
- Variations in tax holidays. SSUTA provides standards and requires minimum of 60 days notice in advance of the exemption period.
- Variations in basis for exemptions (character of product vs user vs intended use). SSUTA calls for the use of uniform definitions and requires that a state either tax or exempt all products and services within the same definition.
- Variations in bad debt treatment. SSUTA standardizes the rules for deduction and recovery of bad debts.
- Variations in system requirements for compliance in each individual jurisdiction. In addition to the simplification measures listed above, SSUTA provides technology solutions for sellers. Subject to the requirements in the agreement, a seller who engages a Certified Service Provider (CSP) to perform all of the seller's sales and use tax functions is relieved of liability for errors in collection due to reliance on a Certified Automated System (CAS). The agreement provides the mechanics for certifications by the Streamlined Governing Board and the states.

Notably absent from SSUTA is any mandate that member states make the same taxability decisions. A state is free to tax or exempt clothing, groceries, manufacturing equipment, or any other item. SSUTA does not dictate state tax rates, tax revenues or substantive tax policy. The focus of SSUTA is the machinery by which remote sellers are called upon to administer the tax.

The adjectives "streamlined" and "simplified" in reference to SSUTA often draw amused reactions. Although the agreement simplifies compliance for multistate remote sellers, the administrative structures established to achieve that goal are far from simple. There is a Governing Board, eight committees, and two advisory councils. The agreement includes processes for state membership applications; determinations of state compliance with the requirements of the agreement; annual recertification of compliance by member states; and withdrawal, expulsion, and sanctioning of members. Also included are mechanisms for addressing interpretive issues; appealing decisions of the Governing Board; certifying and contracting with technology service providers; audits; and rulemaking by the Governing Board.

Becoming a full member state under SSUTA requires compromises. For example, a state in which local jurisdictions are free to establish multiple tax rates, or to deviate from the state sales tax base, or to require local tax returns and remittances, must forego that local autonomy (as discussed subsequently in Part V, Florida's sales tax law does not confer this degree of local independence, so these particular concessions would not be required here). In some states, tax base thresholds and caps can be important. Moreover, the transition to standardization requires many one-time modifications which entail considerable drafting and identification of any fiscal impacts.

Three obstacles to a state's adoption of SSUTA are considered here. The first is essentially political: if collection of tax on remote sales is viewed as a tax increase, lawmakers may be reluctant to embrace a system which promotes such collections. Although the tax on consumer purchases from remote sellers is due from the consumer in almost every state (even without adoption of SSUTA), consumers generally do not pay the tax when it is not collected by the seller. With SSUTA, sellers who have not been collecting the tax are likely to do so, and the consumer's out of pocket expense will be increased by payment of a tax. On the other side of the "tax increase" argument are the facts that the only tax the consumer will pay is the tax he indisputably owes; that the tax revenue from online sales would provide new flexibility to state lawmakers (to reduce sales/use tax rates, reduce other taxes or fund state or local needs); and that the in-state retailers who have no way to avoid collecting the tax would no longer suffer a competitive disadvantage.

Second, adoption of SSUTA surrenders some of the autonomy that state and local governments enjoy. Subject only to federal constitutional limitations, a state has the sovereign right to establish its own tax system without regard for the systems of other states. This right extends from such mundane issues as choosing the date on which a tax return is due, to more substantive matters such as the way the objects of taxation and exemption are defined; whether multiple tax rates are permitted within a jurisdiction; whether the tax base at the state and local levels can vary; and whether to establish tax base thresholds. In pondering the sovereignty issue it is helpful to remember that the tax was designed during the Depression in a primarily intrastate context, when there was no obvious need for uniformity. Now, however, the tax is being asked to operate across borders to an extent not previously imagined. SSUTA's limits on a state's sovereignty to make parochial tax decisions are commensurate with the state's unprecedented exercise of sovereign power over actors outside the state.

Third are the fiscal consequences of adopting SSUTA, and the way in which a state evaluates those consequences. As the underlying purpose is to collect tax revenues that might otherwise be beyond reach, it is tempting to assume that SSUTA will always have a positive revenue impact. However, if the additional revenues cannot be estimated with comfortable reliability, they may not be counted in the process of scoring the adoption of SSUTA for fiscal purposes. And if SSUTA will impose costs that can be measured, the calculated fiscal impact may be negative.

This has been one of the reasons that the Florida Legislature has not been able to reach consensus and pass an SSUTA conforming bill, a subject discussed in Part V.

The SSUTA full member states have been able to work through these issues. Other states (including Florida) have not, at least with a constitutional cloud hovering over any attempt to require remote sellers to collect tax in the absence of a physical presence. SSUTA is an agreement among states; it is not an act of Congress and it did not eliminate a remote seller's right to rely on the physical presence requirement. However, circumstances have changed: The constitutional issue is no longer the bar that it was to imposing the collection responsibility, and as discussed subsequently, SSUTA figures prominently in the new, permissive landscape.

D. *Direct Marketing Association v. Brohl*: A Door Opens, and South Dakota Walks Through

Shortly after enactment of the Colorado information reporting law in 2010, the Direct Marketing Association ("DMA") brought suit to challenge the constitutionality of the law, contending that it discriminated against and imposed an undue burden on interstate commerce. However, a threshold issue was whether the case was properly brought in federal court rather than state court by virtue of the federal Tax Injunction Act (TIA).[18] This jurisdictional issue reached the United States Supreme Court, which held that the TIA did not apply and the lower federal courts could entertain the suit. *Direct Marketing Assn v. Brohl,* 135 S. Ct. 1124 (2015).

The Supreme Court did not address the merits of DMA's claims, which the Tenth Circuit Court of Appeals later decided in favor of Colorado.[19] However, in a concurring opinion, Justice Kennedy expressed doubt as to whether *Quill* was correctly decided. He referred to *Quill* as creating a "continuing injustice" and stated that the ensuing growth in online selling had resulted in a "startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register," 135 S. Ct. at 1135. While observing that the pending case did not present the issue, he concluded that "the legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Id.*

The legal system obliged. The result was *Wayfair.*

18 The federal law in question prohibits the federal courts from entertaining cases seeking them to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 26 U.S.C. §1341.

19 *Direct Marketing Assn. v. Brohl,* 814 F. 3rd 1129 (Tenth Cir. 2016). The court essentially held that while *Quill* remained good law, it should be narrowly construed and did not prohibit information reporting requirements such as those in the Colorado law.

III. *Wayfair*

A. The South Dakota law.

Immediately after the Supreme Court decided *Direct Marketing Assn v. Brohl*, the South Dakota legislature enacted S. B. 106, which became 2016 South Dakota Laws Ch. 70. This law recited multiple findings about the adverse impact and unfairness of the physical presence requirement; referred to Justice Kennedy's concurring opinion in *DMA*; declared there was an "urgent need for the Supreme Court of the United States to reconsider" the physical presence requirement; and announced that the enactment was necessary to address an "emergency" in South Dakota. On the basis of these recitals, the law enacted the following operative provisions:

- A seller lacking a physical presence in the state must collect tax on sales into South Dakota if in the previous or current calendar year:
    - The seller's gross revenue from sales into the state exceed $100,000 in sales, or
    - The seller has at least 200 separate sales into the state.

These two requirements are intended to create "economic nexus," that is, nexus created by economic activity with in-state customers.

- The state is authorized to bring a declaratory suit against any seller considered to meet the criteria above, and the courts are directed to expedite consideration of the suit.
- The collection requirement established is to be applied prospectively only.

Upon enactment of this law, South Dakota brought a declaratory action against Wayfair (also against Overstock and Newegg). In this action the State acknowledged that the law violated *Quill,* but asserted that *Quill* was wrongly decided and should be overruled. The case proceeded without a trial, with judgement entered against the State on the basis of *Quill.* The Supreme Court of South Dakota, considering itself bound by *Quill,* affirmed. The stage was set for U.S. Supreme Court review.

B. *Wayfair* in the Supreme Court

The Court received dozens of *amicus curiae* (friend of the court) briefs representing other states, the Executive Branch of the United States, industry groups, and academics. The case was argued orally on April 17, 2018, and on June 21 the Court rendered its decision, *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (2018). By a 5 to 4 vote, the Court overruled *Bellas Hess* and *Quill.* Justice Kennedy authored the majority opinion, in which Justices Ginsburg, Thomas, Alito, and Gorsuch joined. Its central holding is that Commerce Clause nexus exists if the seller "avails itself of the substantial privilege of carrying on business" in the state, and this requirement is satisfied by "both the economic and virtual contacts [Wayfair and the other defendants] have with the State," 138 S. Ct. at 2099. This appears to revert back to an approximation of the Due Process Clause formulation, despite the Court's having taken pains in *Quill* to distinguish it from the Commerce Clause requirement.

The Court's progression regarding the physical presence rule beginning with *Bellas Hess* can be summarized as follows:

Bellas Hess	Commerce Clause and Due Process Clause require physical presence[20]
Quill	Commerce Clause requires physical presence, Due Process Clause does not
Wayfair	Neither Commerce Clause nor Due Process Clause requires physical presence

The Court in *Quill* and *Wayfair* was presented with substantially identical facts and arguments but responded to them in dramatically different fashion. This is not a situation in which the Court overlooked something in its earlier decisions, and the decision is at best inconsistent with respect to the influence of the online economy or the increased impact on state tax revenues. On the one hand the opinion refers repeatedly to the "dramatic technological and social changes," and how, "each year the physical presence rule becomes further removed from economic reality." On the other hand, *Wayfair* held that "the physical presence rule, both *as first formulated* and as applied today, is an incorrect interpretation of the Commerce Clause," 138 S. Ct. at 2093 (emphasis added). But the rule was "first formulated" in the days of *Miller Bros* and *Bellas Hess,* and was therefore an "incorrect interpretation" long before the emergence of the online economy.

The change in the Court's evaluation of the same facts is also evident in its observations about the merits of the physical presence rule. Having viewed the rule as merely imperfect in *Quill* ("artificial at its edges" but "more than offset by the benefits of a clear rule"), the Court in *Wayfair* deemed the same rule fatally flawed with no redeeming qualities ("artificial in its entirety," promotes "marketplace distortion" and "tax evasion," and is "an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions").

The bright line rule of *Bellas Hess* and *Quill* has been replaced by a vague, case by case formulation, as is evident from this explanation of why repudiation of the physical presence rule should not be concerning to small remote sellers:

> [O]ther aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike v. Bruce Church, Inc.,* 397 U.S. 137…."

138 S. Ct. at 2098-2099.

Pike involved an Arizona attempt to prohibit shipment of cantaloupes from Arizona to California other than in crates approved by Arizona. The Court struck down the law as a burden on interstate commerce, and in the course of its opinion suggested it was "balancing" the burden on commerce against local interests advanced in support of the law. The *Wayfair* Court's attribution of this citation to the *amicus curiae* United States, rather than embracing it directly, leaves unclear whether this case by case "balancing" will even be available. If it is available, it will be expensive to pursue, a condition exacerbated by the absence of any guidance related to the required proof.

20 See footnote 5.

The Court also discarded other aspects of *Quill,* including its application of the *stare decisis* doctrine of adhering to precedent, and the idea that Congress is in the best position to decide whether to overturn *Quill.* On this latter issue the *Wayfair* majority espoused a different view:

> It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.

138 S. Ct. at 2097.

The Court did not explicitly sustain the constitutionality of the South Dakota law. However, it provided a strong indication that S. B. 106 is constitutional unless "some other principle in the Court's Commerce Clause doctrine" would invalidate it:

> 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. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. 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. S.B. 106, § 5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system 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. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability. *** Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.

138 S. Ct. at 2099-2100.

Thus, while not foreclosing the possibility of a Commerce Clause issue other than one based on physical presence, the Court left little doubt that it considers the South Dakota law responsive to the principal Commerce Clause concerns that were advanced. Upon remand to the South Dakota courts, the case was concluded in the state's favor without any further Commerce Clause objections being raised.

Chief justice Roberts authored the dissent, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters would have retained the physical presence rule based on adherence to precedent, although they agreed that the rule was wrong from its inception. But the dissent also noted the irony that the Court's prior "erroneous decision *** may well have been an unintended factor contributing to the growth of e-commerce," and voiced concern that "the Court today is compounding its past error," 138 S. Ct. at 2104.

Pointing out the high rate of use tax compliance among the largest Internet retailers, the dissent questioned the majority's "inexplicable sense of urgency" and suggested that it focused only on one side of the debate:

> The Court rests its decision to overrule *Bellas Hess* on the "present realities of the interstate marketplace." *** As the Court puts it, allowing remote sellers to escape remitting a lawful tax is "unfair and unjust." *Ante,* at 2096. "[U]nfair and unjust to ... competitors ... who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax." *** But "the present realities of the interstate marketplace" include the possibility that the marketplace itself could be affected by abandoning the physical-presence rule. The Court's focus on unfairness and injustice does not appear to embrace consideration of that current public policy concern.
>
> The Court, for example, breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. ***
>
> The burden will fall disproportionately on small businesses. *** People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale. *** And the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate. *** The Court's decision today will surely have the effect of dampening opportunities for commerce in a broad range of new markets.

138 S. Ct. 2103, 2104.

Having in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects," the dissenters would have had the Court leave it there.

As the majority view is now the law, states contemplating reliance on *Wayfair* must understand the effect of the decision. Given the Court's positive comments about the South Dakota law, a state could reasonably look to S. B. 106 as a starting point for establishing its own "economic nexus" statute. A state law that imposes the collection duty based on minimum thresholds of economic activity, that does not retroactively seek uncollected taxes for prior periods, and that conforms its sales and use tax regime to SSUTA is likely to be upheld against constitutional challenge. Conversely, a law lacking any of these three features will be vulnerable. This and other post-*Wayfair* issues are discussed below.

IV. Unresolved Issues After *Wayfair*

As a narrowly focused decision which removed an obstacle to imposing the collection responsibility rather than spelling out minimum requirements, *Wayfair* left considerable uncertainty in its wake. Some of the remaining issues are practical, in the sense that they leave states with imperfect choices as they consider changing their laws. In this category are the importance of thresholds, at what level they should be established, whether a new law must be prospective only, and whether adoption of SSUTA is essential. Other issues are more academic, such as how Commerce Clause and Due Process Clause nexus differ and the continued relevance of physical presence. A brief generic discussion of each issue is provided here. Florida specifics are addressed subsequently in Part V.

A. Thresholds.

Consider a state law that contains no sales thresholds.[21] While commenting favorably on the South Dakota thresholds, the *Wayfair* opinion does not expressly say that thresholds are required, or if they are required, how they should be evaluated. But *Wayfair* does suggest that thresholds of $100,000 in annual sales or 200 transactions are likely to be upheld, at least in the context of large sellers and the other elements of South Dakota law (prospective application and adoption of SSUTA). A conservative approach for a state would be to adopt thresholds as least as high as South Dakota's.

Nothing in *Wayfair* suggests that a state cannot adopt thresholds *higher* than South Dakota's. For example, a state could establish an annual dollar threshold of $500,000 and a transaction threshold of 1,000 sales. Or it could make the two thresholds of dollar volume and number of sales, which are alternative nexus benchmarks in South Dakota, separate requirements that must both be satisfied (see the Appendix). In short, as logic would suggest, there is no reason to think that thresholds requiring a higher degree of economic activity than South Dakota's as a condition to requiring remote sellers to collect the use tax would be vulnerable to constitutional attack.

States that adopt no thresholds, or thresholds that are lower than South Dakota's, will accept the risk that their laws may be stricken, with the magnitude of the risk linked to the extent of the divergence. Although *Wayfair* leaves open the possibility that a state law with no thresholds would be upheld, it also does not foreclose the prospect that thresholds only slightly lower than South Dakota's would be held invalid. Students of the *Wayfair* opinion will inevitably vary in their evaluation of the risk. But a state considering its options in the wake of *Wayfair* must develop its own way of measuring risk and its tolerance for it.

B. Retroactivity.

Like South Dakota, states for the most part have not been attempting to assert economic nexus retroactively in the wake of *Wayfair*.[22] Although the Court mentioned this feature of South Dakota's law favorably, it also created a theoretical basis for a state to seek retroactive recovery of uncollected

21 At oral argument in *Wayfair,* South Dakota and the United States, which appeared as a friend of the court, argued that a single sale was sufficient to create nexus. The Court did not accept or reject this contention, but instead focused on the South Dakota law before it. As shown in the Appendix, of the states enacting economic nexus laws, some have established thresholds higher, lower, and the same as South Dakota's.

22 The Florida Department of Revenue has not attempted to do so, in anticipation that the Legislature will provide guidance. However, an issue is pending in Leon County Circuit Court as to whether a Department of Business and Professional Regulation assertion of tobacco excise tax is a retroactive application of *Wayfair. Global Hookah Distributors v. Department of Business and Professional Regulation,* Case No. 2017-CA-1623.

taxes from remote sellers. By concluding that the physical presence rule was *always* an incorrect interpretation of the Commerce Clause, the Court opened the door to the contention that remote sellers have *always* had the obligation to collect, with no protection from *Quill.* If advanced by a state such a position would almost certainly be challenged.

The Supreme Court has not to date provided much guidance which would assist in evaluating the merits of such a position. Objections to retroactive application of state tax provisions are generally based on due process and *United States v. Carlton,* 512 U.S. 26 (1994). In that case the Court rejected a retroactivity challenge to a 1987 "curative" amendment to a federal estate tax law enacted in 1986. The Court characterized the period of retroactivity as "modest," and Justice O'Connor authored a concurring opinion which expressed the view that a retroactivity period of more than one year would raise "serious constitutional questions," 512 U.S. at 38.

The primary lesson of *Carlton* is that the facts and circumstances are relevant to the constitutionality of retroactive application of a tax law, and that the period of retroactivity is a relevant fact. The Court could easily conclude that the inequity of retroactively applying its *Wayfair* decision rises to the level of a federal due process violation. But this could depend upon the period of retroactivity and other facts specific to the situation. Beyond this, a state attempt at retroactive application could also conflict with protections provided by state constitutions. The best way for a state to avoid litigating over retroactive application of a law is to make the law prospective, which is almost universally what states are doing as they update their laws in the wake of *Wayfair*.

C. Importance of SSUTA.

The third salient feature of the South Dakota law that the Court noted with approval in the *Wayfair* decision is that the state is a full member of SSUTA, which means it has adopted the extensive simplification measures in the agreement. As with thresholds and prospective application, the Court did not declare that SSUTA membership is essential to imposing the use tax collection responsibility. A state could in theory adopt other approaches to simplification that fall short of SSUTA, or are entirely different, or the state could make no effort at all to simplify use tax collection. As with the other elements, the importance of SSUTA in the Court's decision is speculative.

What makes SSUTA different than thresholds and prospective application is the magnitude of required changes to a state's sales tax laws, as previously described. This highlights the conundrum created by *Wayfair.* Absent better guidance from Congress or the Court, a state must choose from options that are each less than ideal. Adoption of SSUTA provides some protection against constitutional challenge, but at the price of having to enact significant statutory revisions.

D. Relationship between Due Process and Commerce Clause Nexus.

The Court in *Wayfair* reverted to its pre-*Quill* notion that Due Process Clause and Commerce Clause nexus are essentially equivalent in this context. As the Court explained it, "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" under the Commerce Clause, 138 S. Ct at 2093. But the Court also observed that the requirements of the two clauses "may not be identical or coterminous," *Id.*

The difference may be suggested in the following passage:

> Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues are not before the Court in the instant case….

138 S. Ct. at 2099.

The size of a "small business," the nature of these "other theories," and the requirements of proof associated with them are other matters of speculation. The best insurance against this becoming a problem for a state is to refrain from attempting to impose the use tax collection responsibility on businesses with *de minimis* contacts.

E. What remains of the Dormant Commerce Clause?

The Court's opinions over time reveal an unmistakable erosion in the protection of interstate commerce that the Court at one time viewed as foundational to the nation's birth. *Wayfair* is the latest episode in this jurisprudential drama. In keeping with its Dormant Commerce Clause doctrine, the Court in both *Quill* and *Wayfair* emphasized the power and capability of Congress to address the use tax collection issue. However, in *Wayfair* the Court reversed the burden of getting Congress to act. *Quill* protected remote sellers while recognizing the power of Congress to modify that protection. *Wayfair* removes the protection, subject to Congress' power to reinstate it.[23] The following passage from the majority *Wayfair* opinion is illustrative:

> Respondents argue that "the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection." *** These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so.

138 S. Ct. at 2098.[24]

23 In some of the exchanges between the justices and lawyers at the oral argument in *Wayfair,* the justices appeared frustrated that Congress had not acted in the 25 years since *Quill* and seemed to believe that Congress might be more motivated to do so if *Quill* were overruled.

24 Compare the majority and dissenting opinions regarding the availability and cost of compliance software. For the majority, such systems at "reasonable cost" may "well become available in a short period of time." For the dissent, the development of such software "is still in its infancy, and its capabilities and expense are subject to debate." As the case was decided in the South Dakota courts without a trial, there was no process to resolve factual disputes.

Here, the Court is saying that small remote sellers do not need its protection; they should look to Congress instead. This also calls into question whether the Court's citation to *Pike v. Bruce Church, Inc.,* discussed previously, offers any real prospect that such sellers still have a judicial remedy under the Commerce Clause.

E. Marketplace nexus.

The issue here involves online businesses that function as "marketplaces" for sellers. Examples include eBay and Amazon. In *Wayfair* the Court was not presented with the question whether these businesses can be required to collect the use tax on behalf of the sellers who use their sites.

The function of a marketplace provider (aka "facilitator") is obviously different than that of a seller. In fact, the business models can vary. Some marketplace providers may also be sellers, while others are not. Functions that could classify a business as a marketplace provider are listed in the draft model legislation that appears on the website of the Multistate Tax Commission ("MTC").[25] The distinction between selling and serving as a marketplace provider or facilitator allows the argument that a state's power to require the provider to collect the tax is not controlled by *Wayfair.*

On the other hand, the *Wayfair* opinion is emphatically predicated on concerns over losses of state revenue and inequity to main street retailers. A marketplace provider that derives economic benefits from sales into a state could have difficulty convincing the Court that it should be treated differently than sellers.

F. Physical presence.

Although physical presence within the taxing state is no longer a constitutional requirement for imposing the use tax collection responsibility, it remains relevant for at least two reasons. First, if one assumes that some level of sales activity is constitutionally necessary to create "economic nexus," a seller with sales below the threshold but who has physical presence within the state can presumably be required to collect the tax. This leaves open the possibility for renewed constitutional debate over what constitutes a sufficient "physical presence" - the same issue that has been so important for the past half-century. *See,* footnotes 10-13 and related text.

Second, physical presence continues to surface even in the world of economic nexus. For example, the South Dakota sales thresholds that were before the Court in *Wayfair* only apply to a seller "who does not have a physical presence in the state." Before constitutional implications are considered, the state law question of what is meant by "physical presence" under the state statute must be answered. Still further, bills introduced at the federal level in this area rely on physical presence to delimit what the states may and may not do. *See,* H.R. 379 and S 128, now pending in the 116th Congress. S. 128 defines the term "physical presence."

G. Offshore sellers.

By its terms, *Wayfair* allows a state to impose the use tax collection duty based on the level of sales into the state. If a seller fails to do so, it can be held liable for the tax it failed to collect. States typically cooperate in the enforcement of their respective laws. Section 55.501, *et seq.,* Florida Statutes, for

25 Multistate Tax Commission ("MTC") available at http://www.mtc.gov/getattachment/Uniformity/Project-Teams/Wayfair-Implementation-Informational-Project/Post-Quill-Model-Legislation-Economic-Nexus-and-Marketplace-FINAL.pdf.aspx

example, provides that the judgment entered by the court of another state can be recorded and enforced in Florida. Thus, a state may have the tools to enforce the use tax collection duty against a remote seller in another state. Nothing in the majority *Wayfair* opinion suggests that the basis for nexus would be different for sellers located outside the United States. However, this leaves open the question of how the collection responsibility can be enforced against such a seller.

Understanding the issues that *Wayfair* resolved and those it left unresolved may be useful in crafting a state's policy. From the perspective of businesses, consumers, and state tax administrators, the most critical aspect of any option is that it be clearly expressed by those who are responsible for making such decisions.

The change in legal landscape caused by *Wayfair* has resulted in a flurry of activity in other states, and in legislation introduced in Congress. A table showing activity in other states and at the federal level is provided in the Appendix.

V. Florida Nexus Law: Experience, Challenges, Opportunities

A. Florida case law.

Two significant Florida court cases address nexus under Chapter 212, Florida Statutes. The first is *Scripto, Inc. v. Carson,* 105 So. 2d 775 (Fla. 1958), *affirmed,* 362 U.S. 207 (1960), in which the primary issue presented was whether the presence of independent jobbers within the State created nexus for a Georgia seller making sales into Florida. The U. S. Supreme Court decision in this case became the basis for the "attributional nexus" theories advanced in subsequent decades. Notwithstanding the absence of employees within the state, the jobbers created nexus, the distinction between an employee and an independent jobber being "without constitutional significance" in the eyes of the Court. With the physical presence rule abandoned, however, the relevance of *Scripto* is confined to a narrow set of circumstances, in which a state relies upon physical presence rather than economic nexus.

The second Florida case is *Department of Revenue v. Share International,* 676 So.2d 1362 (Fla. 1996), *cert denied,* 519 U. S.1056 (1997). There, a Texas manufacturer and distributor of chiropractic supplies conducted seminars in Florida for three days each year, sold products at the seminars, and collected Florida sales tax on those sales. The seminar sales constituted approximately 4.5% of its total sales, and all but 16% of the seminar sales were made to non-residents attending the events in Florida. Share also sold products to Florida customers through mail order, and collected no Florida tax on those sales. After an audit the Department of Revenue issued an assessment as a result. Share sued to contest the assessment.

The issue was whether Share was liable to the State for the tax it had failed to collect on the mail order sales. A unanimous Florida Supreme Court answered in the negative, and the U. S. Supreme Court declined to entertain the case. In reaching its conclusion the Florida court cited *Bellas Hess* and *Quill* but pointed out that neither decision was controlling because of the in-state seminar sales. The "bright line test" of those cases did not apply to "insulate" Share, and its "additional connections" to the State must be analyzed to determine if it had "substantial nexus." The trial court had found that "Share did not create a customer base in Florida during its presence at the seminars and did not exploit the consumer market in Florida." Apparently on this basis the State Supreme Court agreed that "substantial nexus" was lacking.

When considered with *Wayfair's* abandonment of the physical presence rule, the continuing vitality of *Share International* is uncertain. If Florida were to enact an economic nexus statute patterned after South Dakota's and a company like Share had sales in excess of the thresholds, the use tax collection responsibility could constitutionally be imposed irrespective of the three days of in-state seminars annually. On the other hand, if the company's remote sales were below the threshold, the issue would be whether those sales, standing alone or in combination with the in-state sales during the seminars, are sufficient to allow Florida to require collection of tax on the remote sales. This depends on how the in-state sales are characterized.

If a seller's in-state seminar sales constitute "availing itself" of the in-state market within the meaning of *Wayfair*, the distinction between seminar sales and remote sales by the same seller is arguably irrelevant. But with a trial court ruling as in *Share International* that the in-state sales do *not* constitute exploitation of the in-state market it is conceivable that a Florida court would find that the collection responsibility still cannot be imposed where the volume of remote sales is not considered significant. In short, the nature and extent of the seller's in-state activity may still have a bearing on whether the collection responsibility can be imposed with respect to a limited volume of remote sales.

B. Florida nexus statutes.

The Florida statutes relevant to the collection responsibility of remote sellers are sections 212.0596, 212.06(2), and 213.256, Florida Statutes. Section 212.0596 is Florida's "mail order nexus" statute. Originally enacted in 1987, this law sets forth the activities which would require a remote seller to collect the Florida use tax on "mail order sales" (defined as sales "by mail or other means of communication" where the order is received in another state and the property is delivered in Florida). The statute then lists the conditions which purport to require a seller (the statutory term is "dealer") to collect the tax on such sales. The list is long, including Florida domicile, a physical presence, advertising, and being a member of an affiliated group with a member that has nexus, as alternative predicates for the collection responsibility.

Section 212.06(2), Florida Statutes, which can be traced to the original enactment of the sales tax in 1949, also identifies the conditions that create "dealer" status and therefore require collection of the tax. Although not specifically targeting remote sales, this list bears similarities to the one in section 212.0596, and also includes alternatives that do not require physical presence. The differences between the criteria in sections 212.0596 and 212.06(2) are not material to this discussion.[26]

The two statutes are similar, however, in that both of them have been out of sync with the constitutional law as established in *Bellas Hess* and *Quill* because they include provisions that literally would impose the collection responsibility on sellers without a physical presence in Florida. The Department did not attempt to apply these provisions to such sellers, in recognition that under *Bellas Hess* and *Quill* it could not constitutionally do so. The physical presence criterion, although not expressed in the statutes as an essential condition for imposing the collection responsibility, was effectively treated as a "gloss" embedded within them.

Treating the physical presence rule as an implicit element of the Florida statutes imposing the collection responsibility was relatively easy because of the "bright line" nature of the rule. At its edges the "line" was less "bright" than its moniker would suggest, prompting occasional disputes over what constituted a sufficient physical presence (such as *Share International*). However, these marginal situations did not prevent the rule from providing a clear guidepost for the Department and remote sellers generally. A seller with *no* physical presence could not be required to collect the tax.

26 Some of the differences between section 212.0596 and 212.06(2): section 212.0596 imposes the collection duty if the seller has in-state agents who transact business for the seller, even if the sales subject to tax are unrelated to the activities of the agents, apparently based on *National Geographic v. California Bd. of Equalization,* 430 U.S. 551 (1977); section 212.0596 imposes the collection duty if the seller is a member of an affiliated group eligible to file a consolidated federal income tax return and any other member of the group has Florida nexus; under section 212.0596, no registration fee applies to sellers subject to the statute, and the Department can waive registration; and sellers subject to section 212.0596 are not required to collect the local option surtax.

Wayfair discarded the physical presence rule that the Department had used as its benchmark, and sustained instead an economic nexus concept based on the level of sales activity into the state. But neither section 212.0596 nor section 212.06(2) contains such an economic nexus criterion. This omission is of a different nature than physical presence and is not susceptible to being treated as a statutory gloss. Unlike the "bright line" characteristic of physical presence, economic nexus is essentially quantitative in nature and no particular measure of economic activity can be treated as implicit in the existing Florida nexus statutes. Thus, the Department and remote sellers presently have no benchmark.

It is possible to maintain that a single sale is sufficient to create nexus for the seller, as South Dakota and the United States argued in *Wayfair.* By neither accepting nor rejecting this contention, the Court arguably left open the possibility that a single sale would suffice. Thus, Florida could conceivably decide to test the limits of economic nexus and assert such a position. But the question of how far Florida will extend the use tax collection duty in the new constitutional environment can only be answered properly with legislation, a topic considered in more detail later in this paper.

Also focused on remote sales is section 213.256, Florida Statutes. This 2001 law, labeled the "Simplified Sales and Use Tax Administration Act," directed the Executive Director of the Department of Revenue to enter into the "Streamlined Sales and Use Tax Agreement as amended and adopted in January 27, 2001 by the Executive Committee of the National Conference of State Legislatures." The statute goes on to envision a process in which Florida and other states would join in the development of simplification measures for remote sellers. Despite its name, however, the agreement referenced in the statute is distinct from SSUTA, which was adopted by a different process and organization of states in November 2002. The current agreement prescribes the simplification measures in comprehensive detail. Florida cannot join as a full member without enacting those measures, petitioning the Streamlined Sales Tax Governing Board for full membership, and receiving approval for such membership.

Section 213.256 is thus obsolete and the same may be said of Florida law generally with respect to the use tax collection responsibility of remote sellers. Written in an era when "economic nexus" had not yet been formulated as a theory, Florida statutes do not now provide guidance to remote sellers as to the nature of their obligations, or instruct the Department of Revenue as to whom it should enforce the collection responsibility.

None of the Florida statutes addresses online "marketplace providers."

C. Reasons for the Florida Legislature to act.

Reasons the Florida Legislature should act in the wake of *Wayfair,* include the desirability of removing the competitive disadvantage created for Florida "brick and mortar" retailers; the State's practical inability to collect legally-owed use taxes directly from consumers; and the merits of resolving the inequity between Floridians who voluntarily pay the tax on remote sales and those who do not. These fairness issues could not adequately be addressed in the past because of the physical presence rule. *Wayfair* has now removed that obstacle.

Another compelling reason for legislative action involves a new fairness issue that ironically results from *Wayfair*. In this regard, consider the plight of remote sellers and the Department of Revenue after *Wayfair* in the absence of legislative guidance. As discussed above, none of the Florida laws touching upon the use tax collection responsibility is susceptible to a gloss based on economic nexus. One may reasonably ask how remote sellers and the Department can be expected to apply these statutes now that economic presence has replaced physical presence as the constitutional nexus criterion. The statutory status quo places them all in a difficult if not untenable position.

In one scenario, the Department could take the position that *Wayfair* and the literal text of Florida's nexus laws allow it to demand collection of the tax based on a single sale. For example, as the laws dating to 1949 are written, the collection responsibility is imposed on persons "within or outside the State" who make sales of tangible personal property for use in this State, with no sales threshold. *See, e.g.,* section 212.06(2)(c), (g), (3)(a), Florida Statutes. The Department could invoke such provisions against a remote seller with only one sale or a small number of sales, despite having refrained from doing so for decades in the absence of a physical presence.

However, the question that must first be answered is whether this is what the Legislature wants the Department to do, given the lack of clear constitutional authority to require collection based on a single sale. A reasoned answer involves consideration of the risk that such action will provoke constitutional litigation, and of the State resources required to administer and defend such an aggressive position. It is the Legislature's prerogative to weigh such factors and to decide that adoption of a low nexus standard is in the best interests of the State. But such an intention should be clearly expressed so that sellers and the Department are not required to engage in conjecture or litigation over new applications of decades-old statutes.

Another possible consequence of legislative inaction is inconsistent treatment, with different Department audit and enforcement personnel employing different ideas of what constitutes economic nexus. Remote sellers may also devise their own nexus criteria. With all these actors deciding nexus standards independently, confusion and litigation are likely, with the situation at odds with Florida's aspiration to even-handed tax administration.

There are other problems with attempting to apply existing law to enforce the use tax collection responsibility against remote sellers lacking physical presence. The Department would be abandoning a longstanding administrative position that is fairly viewed as a constitutionally based interpretation of the statutes, which the Legislature by its acquiescence effectively ratified. Even if the 1949 Legislature intended to impose the collection responsibility without a physical presence, the law has not been applied that way for the better part of a century, and its literal text is hardly evidence of what the Legislature intends to be Florida's tax policy now. The Department cannot simply decide on its own to revert to the literal text. Even rulemaking would at best be effective to declare that the existing statutes, with no sales thresholds and no physical presence requirement, would henceforth be applied literally and a single sale would trigger the obligation to collect tax. The Department could not use rulemaking to adopt economic nexus standards as it has no authority to do so. That is a policy decision for legislators and it is doubtful that any administrative attempt to adopt such standards through rulemaking or otherwise would survive a challenge.

An "economic nexus" law making clear the requirements for use tax collection would *not* be the imposition of a new tax. The tax is due on purchases from online vendors, just as it is due (and collected from consumers) on purchases at competing local retail stores. Moreover, use tax collection on remote sales can be achieved with overall revenue neutrality. For example, tax revenues from such sales could be used to reduce the sales and use tax rate, or offset other revenue sources. The Legislature has great flexibility in its design of Florida's tax system. The essential message here is that the responsibility for this design cannot be delegated, but that is the effect of legislative inaction. Only the legislative branch can decide under what circumstances Florida's policy is to extend the State's power to out of state sellers.

D. Florida legislative options.

Once inaction is rejected as an option, the question becomes what nexus criteria Florida will enact. An obvious candidate for consideration is the South Dakota law. Florida could adopt the identical criteria, as many other states have done. Of the three South Dakota criteria, the easiest to adopt would be thresholds and prospective application. With respect to thresholds, consider the following:

- The South Dakota thresholds of $100,000 in annual sales revenue or 200 sales are low and should be considered a constitutional minimum since these are the levels that obtained tacit approval in *Wayfair.*
- The number of sales as an alternative to a dollar volume is unnecessary and unlikely to be cost effective. For example, 200 sales of low dollar amounts would probably not produce sufficient tax revenues to justify the State's administrative costs associated with return processing, collection, and related functions. Other states have addressed this by eliminating the number of sales as an alternative criterion, or by requiring annual sales of a specified dollar amount *and* a minimum number of transactions.
- The Legislature may wish to consider a revenue threshold higher than South Dakota's $100,000. Florida is a substantially larger state, and others have adopted or are considering higher thresholds (e.g., $500,000 in Texas, California, Ohio).

The second easy South Dakota criterion is prospective application, discussed previously. However Florida decides to exercise its new constitutional power under *Wayfair,* if it departs from the longstanding recognition of physical presence as a predicate for imposing the collection responsibility it should not attempt to make this change retroactive. Under Florida law the statute of limitations on assessment does not begin to run if no required return is filed. Remote sellers who collected no Florida tax and filed no Florida returns in good faith reliance upon the physical presence rule and its application in Florida should not face retroactive exposure. They can no longer collect tax from customers on prior transactions and are not at fault for the Supreme Court's determination that its physical presence rule has always been wrong. Other states have overwhelmingly refrained from retroactive application of economic nexus standards.

Of the three South Dakota nexus criteria, the most challenging for Florida is the adoption of SSUTA. As previously noted, a state adopting SSUTA is inevitably required to make extensive revisions to its sales and use tax laws. In some respects the changes in Florida would be less onerous than elsewhere. Unlike other states, for example, Florida already centralizes the administration of the state sales tax and county option sales surtaxes; the number of tax rates is limited; and the state and local tax bases (with a limited exception) are the same. With respect to the requirements of SSUTA that mitigate the burdens of complying with multiple and disparate tax systems within a state, Florida is largely in compliance. Moreover, bills to adopt SSUTA in Florida have previously been introduced and could presumably be used as a starting point.[27]

An impediment to Florida's adoption of SSUTA in the past has been the difficulty of evaluating the overall fiscal impact of doing so, with the negative impacts more readily quantifiable than the positive impacts. Changing from a bracket system to a rounding system to calculate the tax due on a sale would reduce total sales tax collections, and adopting the SSUTA Library of Definitions would also have a negative impact, although it would be less substantial. Eliminating the $5,000 sales price cap for the local option sales surtax would increase local government revenues, but that increase would not directly address the reduced collections at the state level caused by elimination of the brackets and adoption of the SSUTA Library of Definitions.

The primary unknown variable in the prior fiscal analysis has been the increased revenue to be derived from collection of tax by remote sellers lacking physical presence, in an environment dominated by *Quill's* admonition that they could not be compelled to do so. The State's Revenue Estimating Conference was reluctant to attribute increased revenues from such remote sales. The REC thus viewed the adoption of SSUTA as resulting in a negative fiscal impact to the State, reducing the estimated revenue available for appropriation. [28]

After *Wayfair,* the fiscal consequences of adopting SSUTA might be evaluated differently. Previously, any legislation purporting to require collection of the Florida use tax without a physical presence would have existed under a constitutional cloud, and forecasting the extent of voluntary compliance as a result of simplification would have been highly speculative. Given that physical presence is no longer required and adoption of SSUTA having been part of a state statutory mosaic that the Supreme Court approved, it may now be possible to forecast tax revenue from remote sales.

If adoption of SSUTA is problematic, another possibility is to view thresholds and SSUTA as alternative ways of addressing the small seller issue. With higher threshold(s), small remote sellers would not be burdened by the collection requirement even without SSUTA, and larger sellers would likely be considered as having sufficient resources to comply with it.

In focusing its attention on the use tax collection issue, the Legislature can also address marketplace nexus.

Lawmakers with a preference for preserving the status quo also have a way of doing so which does not present the difficulties that will result from inaction. Florida could retain and codify a Florida-specific version of the physical presence rule. And since it is no longer a constitutional requirement, Florida

27 For example, see SB 310 (2015); SB 292 (2016), although these bills would require review to ensure current compliance with SSUTA.

28 The last official estimate of the impact of adopting SSUTA was a $41.5M loss for the State (mostly due to replacing the bracket system with rounding) and an increase of $41.1M for local governments (due the removal of the cap on the local option surtax). The estimate appears athttp://archive.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0056.cm.pdf. TaxWatch suggested at the time that the legislation would be essentially revenue neutral if the amount shared through the Local Government Half-cent Sales Tax Clearing Trust Fund were reduced by the amount of the increase to local governments resulting from adoption of SSUTA. In 2014 the Revenue Estimating Conference estimated that replacing the bracket system with rounding would alone result in a loss of $100M to the State. See https://statics3.lobbytools.com/docs/2014/3/18/67255_r_s_revenue_estimating_impact_conference_held_march_14_2014.pdf.

has the flexibility to define it as a matter of state law and eliminate much of the controversy over what "presence" is sufficient to trigger the tax collection responsibility. Preserving and refining the pre-existing, physical presence-oriented administration of nexus in Florida, if legislatively articulated, is therefore also an option. Of course, retaining a physical presence standard also retains the problems that have made it a high profile issue. The State would continue to be deprived of revenue to which it is entitled; some consumers would continue to avoid paying taxes on their online purchases; and in-state retailers would continue to experience a competitive disadvantage.

A factor in evaluating each of the options is the risk of litigation. A law that copies the South Dakota statute, or which establishes higher nexus thresholds, or which codifies physical presence would appear to entail the lowest risk. At the other end of the spectrum is legislative inaction, and codification of more aggressive nexus standards than those in the South Dakota law, either of which is likely to provoke constitutional litigation.

The factor considered most important here is clarity and certainty as to the Florida nexus standards so that affected business and the Department know what is expected of them.

VI. Conclusion

Wayfair has turned the jurisprudence related to what is arguably the most difficult state tax issue of modern times on its head. Like other states, Florida has no alternative but to adapt, and the only viable mechanism for that is legislation. Multiple options are available for consideration and enacting any one of them would be an improvement over the consequences of inaction.

Appendix A

Other State and Federal Legislation After Wayfair

A. State legislation.

Even before *Wayfair* was decided, states began adopting "economic nexus" measures for use tax collection. Some states have already enacted legislation, in others it is pending, and in still others the revenue agencies are attempting to apply *Wayfair* without new legislation. A simplified chart of activity as of the preparation of this whitepaper appears below:[29]

STATE	ACTION	THRESHOLDS	FULL MEMBER OF SSUTA?
Alabama	Admin	$250,000	No
Arizona	Legis[29]	$100,000 or 200 trx	No
Arkansas	Legis	$100,000 and 200 trx	Yes
California	Legis	$500,000	No
California	Admin	$100,000 or 200 trx	No
Colorado	Admin	$100,000 or 200 trx	No
Colorado	Legis	$100,000 or 200 trx	No
Connecticut	Legis	$250,000 and 200 trx	Legis would adopt
District of Columbia	Legis	$100,000 or 200 trx	No
Georgia	Legis	$250,000 or 200 trx	Yes, but out of compliance
Hawaii	Legis	$100,000 or 200 trx	No
Illinois	Legis	$100,000 or 200 trx	No
Indiana	Legis	$100,000 or 200 trx	Yes
Iowa	Legis	$100,000 or 200 trx	Yes
Kentucky	Legis	$100,000 or 200 trx	Yes
Louisiana	Legis	$100,000 or 200 trx	No
Maine	Legis	$100,000 or 200 trx	No
Maryland	Legis	$100,000 or 200 trx	No
Massachusetts	Admin	$500,000 and 100 trx	No
Michigan	Admin	$100,000 or 200 trx	Yes
Minnesota	Legis	10 sales totaling $100,000 or 100 trx	Yes
Mississippi	Admin	$250,000	No
Missouri	Legis	$100,000 or 200 trx	Legis would adopt
Nebraska	Legis	$100,000 or 200 trx	Yes
Nevada	Admin pending	$100,000 or 200 trx	Yes
New Jersey	Legis	$100,000 or 200 trx	Yes
New York	Admin	$300,000 and 100 trx	No
North Carolina	Admin	$100,000 or 200 trx	Yes
North Dakota	Legis	$100,000 or 200 trx	Yes

29 The primary source of information on this chart is the Council on State Taxation website. It should be viewed as a high level snapshot, as there has been no inquiry into the nuances in specific states and the information is constantly changing. Also, states that have acted in ways that are significantly different than the common framework are omitted. The reader should check the text of legislation and administrative pronouncements for definitive information. The entry "Legis" includes bills that have been introduced but not yet enacted.

Ohio	Legis	$500,000	Yes
Oklahoma	Legis	$10,000	
Pennsylvania	Admin	$100,000 or 200 trx	No
Pennsylvania	Legis	For <$10,000 in sales, option to comply with notice, reporting requirements	No
Rhode Island	Legis	$100,000 or 200 trx	Yes
South Dakota	Legis	$100,000 or 200 trx	Yes
Tennessee	Legis	$100,000 or 200 trx	No (assoc member)
Texas	Admin	$500,000	No
Utah	Legis	$100,000 or 200 trx	Yes
Vermont	Legis	$100,000 or 200 trx	Yes
Virginia	Legis	$100,000 or 200 trx	No
Virginia	Legis	$250,000	No
Washington	Legis	Must collect with $100,000 or 200 trx; with $10,000 choice of collecting or complying with notice, reporting req.	Yes
West Virginia	Admin	$100,000 or 200 trx	Yes
Wisconsin	Legis	$100,000 or 200 trx	Yes
Wyoming	Legis	$100,000 or 200 trx	Yes

B. Federal legislation.

With Congress having the power under the Commerce Clause to provide standards for the use tax collection responsibility on interstate transactions, the issue has been the subject of bills introduced in Congress since before *Quill* was decided. In the recent past some of these measures would have predicated the collection responsibility on the state's adoption of SSUTA, or upon Congressional approval of an interstate compact. However, none gained enough traction to pass.

The current crop includes H.R. 379 (Gibbs), dubbed the "Protecting Businesses from Burdensome Compliance Cost Act of 2019." This bill would allow prospective imposition of the use tax collection responsibility on remote sellers lacking a physical presence within the state, provided the state adopts a single statewide tax rate and other simplification measures. S 128, named the "Stop Taxing Our Potential Act of 2019" was introduced by senators from Montana, New Hampshire, and Oregon (Tester, Shaheen, Hassan, Wyden, Merkley). These states do not impose sales and use taxes, and the bill appears intended to prohibit other states from requiring collection of their taxes by remote sellers in Montana, New Hampshire, and Oregon that lack a physical presence in the other states.

As the 116th Congress unfolds there is little reason to doubt that measures similar to those introduced in the past will appear. Whether the prospects for a meaningful congressional solution are better than that have been previously remains to be seen.

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APRIL 2019

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All Florida TaxWatch research done under the direction of Dominic M. Calabro, President, CEO, Publisher & Editor.

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