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Online Taxation Post Wayfair

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ONLINE TAXATION POST WAYFAIR

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ABSTRACT

The United States Supreme Court saved the states' sales tax base in the landmark case of South Dakota v. Wayfair in 2018. This revolutionary decision ended the long ban on states imposing sales tax collection duties on out-of-state retailers without a physical presence in the state, as established in Bellas Hess v. Department of Revenue of Illinois in 1967 and Quill Corp. v. North Dakota in 1992. Wayfair now allows states to impose sales taxation on out-of-state retailers in the era of digitalization. In this article, I provide valuable guidelines and suggestions to aid states on this critical journey toward taxing remote online transactions fairly and efficiently.

Specifically, this article strongly supports the state-by-state approach to taxing remote vendors. I emphasize that the first step for each state is to make appropriate policy decisions that fit the interests of that state and to structure its legal frameworks accordingly. At the same time, a multistate layer of harmonization, coordination, and cooperation is essential to the long-term success of online taxation. Therefore, this article argues that states should develop and improve the current framework of the Streamlined Sales and Use Tax Agreement by implementing insights from the European Union's value-added tax system, which is a result of far greater experience taxing online transactions.

Toward that end, this article contributes significant proposals, including the proposal to allow vendors to account for the sales tax in one state, the state of registration, and the proposal to establish a multistate clearinghouse for handling the balances between the states efficiently. This article also contains proposals to increase the use of tax compliance technologies, especially cloud computing, block-chain, and big data. These technologies automate the process of calculating and collecting sales tax in the most efficient manner. Next, this article suggests facilitating tax

* Associate Professor of Law, the Harry Radzyner Law School, IDC Herzliya. I dedicate this article in memory of my parents, Nawal and Hasan Azam, who devoted their life to family and education, and left us recently with great memories of giving and caring and educating along their full and rich life. I would like to thank Orly Mazur, David Gamage, Adam Thimesch and Holderness Hayess for their wonderful comments to earlier drafts. I appreciate the helpful comments of my great friends and colleagues so much.

data sharing and tax collection through payment intermediaries, entities which already have the data and stand at the critical juncture of online transactions. Finally, this article recommends that Congress participate in the states' efforts to tax online transactions by applying these proposals to international transactions. As the digital transformation of the economy accelerates, each one of these proposals and measures would enhance sales taxation in the era of e-commerce and digitalization post Wayfair.

INTRODUCTION

On June 21st, 2018, the U.S. Supreme Court made a revolutionary decision in *South Dakota v. Wayfair, Inc.*, opening the door for states to impose sales tax collection duties on out-of-state sellers.[1] This landmark case overruled a long constitutional ban preventing states from imposing such duties without the seller's physical presence in the state, as established by *National Bellas Hess, Inc. v. Department of Revenue of Illinois* in 1967 and *Quill Corp. v. North Dakota* in 1992.[2] Based on interpretations of Commerce Clause jurisprudence, and the modern realities of e-commerce and digitalization, the *Wayfair* Court recognized that economic and virtual contacts could constitute a substantial nexus with a state. In doing so, *Wayfair* saved the states' sales tax base for the 21st century.

Given this era of digitalization and e-commerce, the consequences and implications of *Wayfair* are tremendous on all remote sellers, especially online remote sellers. *Wayfair* opens the door to a better way of collecting sales tax. If states want to do so, based on individual policy, they should join the Streamlined Sales and Use Tax Agreement (SSUTA) as well as enhance compliance and efficiency by looking toward the European Union (E.U.) and emerging technologies. This article makes four key contributions to the current and significant debate in academia, governments, and markets, regarding online sales taxation post *Wayfair*. [3]

First, this article suggests that a state-by-state approach, rather than a federal approach, is the right approach for the future of online sales tax. The states govern sales taxation. Each state sets, and should continue to set, its own rules of taxation in the best way that fits that state's circumstances and serves its residents and local economy. There is no one rule that fits all. Under the state-by-state approach, each state should first make a policy decision whether to impose the collection duty on out-of-state sellers or not, along with what the appropriate threshold is based on considerations of tax revenues, compliance burdens, economic effects, growth, fairness, and many others. Once that policy decision is made, each state should structure and design an appropriate legal framework. This article strongly supports the economic nexus model, as reflected in South Dakota's law in *Wayfair*, and calls for each state to follow it in a harmonized way and to eliminate or limit other models,

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

2. *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967); *see also* Quill Corp. v. North Dakota*,* 504 U.S. 298 (1992).

3. *See, e.g.*, Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331 (2020); Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1 (2019).

such as the affiliate model or click through model. However, copying South Dakota's law exactly, which many states did after *Wayfair*, is highly discouraged. The need for each state to structure its laws and tax thresholds carefully and wisely to achieve the specific state's policy goals is of utmost importance. Although this approach might cause interstate tax competition, the incentives for multistate coordination and cooperation are stronger. Multistate coordination is essential and beneficial for post-*Wayfair* sales taxation, as proven by the SSUTA, which simplified and harmonized sales taxation among its member states. This article builds upon the SSUTA platform, which is the starting point on the long journey toward improving the system of collecting sales taxes from remote online businesses and transactions.

Second, in building the essential multistate layer of coordination and cooperation, this article suggests learning from Europe's long experience coping with the challenges of value-added taxes (VAT), as consumption tax, in a multi-jurisdictional setting in the era of digitalization, e-commerce, and cloud computing.[4] Accordingly, this article calls to intensify and deepen the processes of harmonization and simplification that started with the SSUTA. Gaps in the base *between* states should be reduced through multi-state agreement on a core base. Gaps in the base *within* a state should be reduced through some type of state limitation on local jurisdictions. Additionally, this article suggests introducing new common definitions for the digital economy. Moreover, burdens of multistate compliance should be limited by having a seller register in one state, then accounting for sales tax collection duties in this state for all states, like the E.U.'s mini one-stop shop (MOSS) regime, based on the destination principle. Furthermore, the states could, and should, go further than the E.U. in their coordination and cooperation. Such coordination could be accomplished by establishing a multistate clearinghouse to handle the accounts between states and offset the balance in an efficient and technology-based system.

Third, this article argues for enhancing the role of technology to ensure accurate and efficient sales tax collection. To match increasing digitization, the role of tax compliance technologies is rising in the SSUTA, the E.U.'s VAT system, and worldwide taxation. For example, the SSUTA advances the Certified Automated System (CAS) by Certified Service Providers (CSP) and the Simplified Electronic Return (SER). These systems facilitate automatic determination of tax jurisdiction and tax calculations, followed by filing the returns electronically. The E.U.'s VAT system enhances electronic registration through the MOSS system to counter evasions and reduce compliance costs, in addition to electronic invoicing and filing. Recently, the Gulf Cooperation Council Member States (GCC) introduced a new system that utilizes blockchain technology to transmit information to multijurisdictional tax authorities on a real-time basis. Based on these trends, this article proposes that states adopt and adapt these worldwide tax compliance technologies for collecting sales taxes efficiently on cross-jurisdictional transactions. The focus should be on real-time technologies, including blockchain and cloud computing, to collect the data and the sales tax on transactions immediately. Data recording technology could minimize sales suppression by immediately recording transactions, and blockchain technology could ensure the authenticity of those transactions. Once the system is functioning and gathering data on a real-time basis,

4. *See* Rifat Azam & Orly Mazur, *Cloudy with a Chance of Taxation*, 22 FLA. TAX REV. 500 (2019).

states should apply technologies of big data and machine learning to optimize the system of taxation. However, the collection and use of transaction data implicates privacy rights, so states must balance appropriately between privacy and tax compliance.

Finally, this article suggests assigning data sharing and sales tax collection roles to payment intermediaries to facilitate accurate and efficient collection of sales taxes. These intermediaries play a critical role in online transactions and collect accurate data in real time, which enables them to achieve accurate collection of sales taxes, as well as VAT—a suggestion proposed in a previous co-authored paper with Orly Mazur.[5] Since most online retail transactions occur while consumers are at their residency jurisdiction, payment intermediaries can collect data to accurately determine a consumer's residency. If the consumption occurs while traveling, retailers and payment intermediaries would then have enough data points to collect an accurate tax. It is true that this approach raises some privacy concerns, but the infringement of privacy is extremely limited, and the tax benefits outweigh the privacy costs significantly. This is because private companies already collect location data and sharing the data with state tax authorities would be limited to only the information necessary to enable collection of substantial amounts of tax revenue. Some opponents argue that this approach requires substantial investments from payment intermediaries. However, they do not provide valid and accurate data about the costs. Even if the costs were accurate, in the long run, these costs are manageable, and the states could alleviate them to some extent. Moreover, assigning tax compliance roles to payment intermediaries has been implemented in other contexts, such as in the Foreign Account Tax Compliance Act (FATCA) and Internal Revenue Code Section 6050W, and it is showing effectiveness and efficiency in tax collection.[6] Further, Congress could, and should, contribute to tax compliance efforts by implementing these measures in international transactions.

Following this introduction, Part I analyzes the historical development in jurisprudence from *Bellas Hess v. Department of Revenue of Illinois* to *Wayfair*. Part II argues for adopting the state-by-state approach in developing the future of online taxation post *Wayfair*. It analyzes in detail the milestones of each state on the post-

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5. *See id.*

6. *See, e.g.*, Richard J. Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 57 VILL. L. REV. 471 (2012); Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1753-56 (2010); Jeffrey H. Kahn & Gregg D. Polsky, *The End of Cash, the Income Tax, and the Next 100 years*, 41 FLA. ST. U. L. REV. 159 (2013); JOEL SLEMROD ET AL., DOES CREDIT-CARD INFORMATION REPORTING IMPROVE SMALL-BUSINESS TAX COMPLIANCE? (Nat'l Bureau of Econ. Res., 2015), http://www.nber.org/papers/w21412 [https://perma.cc/ELQ5-F6VN]; EUROPEAN COMM'N , ANALYSIS OF THE IMPACT OF THE SPLIT PAYMENT MECHANISM AS AN ALTERNATIVE VAT COLLECTION METHOD (Deloitte 2017), https://ec.europa.eu/taxation_customs/sites/taxation/files/split_payment_report_execsummary_2017_en.pdf [https://perma.cc/5Q2J-V27D]; HM REV. & CUSTOMS, ALTERNATIVE METHOD OF VAT COLLECTION—SPLIT PAYMENT CONSULTATION DOCUMENT, (Mar. 13, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687783/Alternative_method_of_VAT_collection___split_payment.pdf [https://perma.cc/TD4B-485B]; HM REV. & CUSTOMS, ALTERNATIVE METHOD OF VAT COLLECTION—SPLIT PAYMENT SUMMARY OF RESPONSES, (Nov. 7, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/754209/Alternative_method_of_VAT_collection_summary_of_responses.pdf [https://perma.cc/WGZ7-H73J].

Wayfair journey, starting with their policy decisions, then moving forward to how they designed and structured their legal frameworks and collaborated with other states in multistate transactions. Finally, Part III sets the basis and framework for multistate coordination and cooperation and presents the proposals to establish a multistate clearinghouse. The part elaborates on the rise of tax compliance technologies and presents the suggestion to use cloud computing and blockchain technologies, as well as data analysis from payment intermediaries, to enhance sales tax collection in the digital economy in an accurate, efficient, and constitutional manner.

I. FROM BELLAS HESS TO WAYFAIR

The Due Process Clause in the Fourteenth Amendment of the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[7] Accordingly, the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[8] The Commerce Clause in Article I of the Constitution states, "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."[9] From this positive grant of power to Congress, the U.S. Supreme Court developed a negative, or dormant, Commerce Clause doctrine, which limits the powers of states to regulate interstate commerce.[10] As Professor Laurence Tribe put it, "For at least 140 years, the Supreme Court has construed the Commerce Clause as incorporating an implicit restraint on state power even in the absence of congressional action—hence the notion of a 'dormant' Commerce Clause."[11] The Dormant Commerce Clause jurisprudence concerns the fairness and efficiency of the interstate economy. It aims to ban discriminatory and unjustified burdens on interstate commerce. It tries to ensure the fair apportioning of the tax pie on interstate commerce.[12] Based on these constitutional norms, the Supreme Court's jurisprudence has defined the states' power to tax interstate commerce. This section analyzes the landmark cases from that jurisprudence: *Bellas Hess*[13] to *Wayfair*.[14]

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7. U.S. CONST. amend. XIV, § 1. *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1332 (Foundation Press, 3rd ed. 2000); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 353-57 (Thomson/West, 8th ed., 2005).

8. Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345 (1954).

9. U.S. CONST., art. I, § 8, cl. 3.

10. *See* Cooley v. Bd. of Wardens of Phila., 53 U.S. 299, 321 (1851); Dennis v. Higgins, 498 U.S. 439, 447 (1991) ("The Commerce Clause does more than confer power on the Federal Government; it is also a substantive 'restriction on permissible state regulation' of interstate commerce.").

11. TRIBE, *supra* note 7, at 1030.

12. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) ("The Clause's 'negative' aspect, directly limiting the States' power to discriminate against interstate commerce, prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.").

13. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967).

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

A. Bellas Hess: Due Process and the Commerce Clause's Physical Presence Rule

In *Bellas Hess v. Department of Revenue of Illinois*, the remote mail order seller National Bellas Hess challenged the constitutionality of Illinois imposing sales and use tax collection duties on its sales to Illinois consumers. The U.S. Supreme Court ruled that the Due Process Clause and the Commerce Clause prohibit a state from imposing the duty of collecting sales and use tax upon a seller whose only connection with customers in the state is by common carrier or by mail without any physical presence in the state. According to the Court, the two clauses share similar tests and they both require physical presence in the state.[15]

The majority opinion reasoned that imposing multi-jurisdictional duties of tax collection would create a substantial burden on interstate commerce, which violates "the very purpose of the Commerce Clause [which] was to ensure a national economy free from such unjustifiable local entanglements."[16] According to the Court:

> Indeed, it 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.[17]

The dissent, on the other hand, focused on the fact that Bellas Hess exploited the state consumer market on a systematic, continuous, and large-scale level which created a sufficient nexus.[18] The dissent asserted the following:

> To excuse Bellas Hess from [the obligation to collect sales and use taxes] is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers. . . . While this advantage to out-of-state sellers is tolerable and a necessary constitutional consequence where the sales are occasional . . . it certainly should not be extended to instances where the out-of-state company is engaged in exploiting the local market on a regular, systematic, large-scale basis.[19]

The dissent's reasoning and concerns in *Bellas Hess* are actually similar to the majority's reasoning and concerns in *Wayfair* later on. But the decision in *Wayfair* had to wait a few years while the Court first grappled with issues raised in *Complete Auto Transit, Inc. v. Brady* and *Quill Corp. v. North Dakota*.

15. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756.
16. *Id.* at 760.
17. *Id.* at 759.
18. *Id*. at 761–62.
19. *Id.* at 763.

B. Complete Auto: The Four Prongs Test

Ten years after *Bellas Hess*, the Supreme Court held in *Complete Auto Transit, Inc. v. Brady* that states may tax out-of-state retailors as long as their tax meets the four prongs test as follows: "[1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."[20] Complete Auto was an auto transporter involved in moving General Motors vehicles from the railhead at Jackson, Mississippi, to dealerships in Mississippi. The Mississippi State Tax Commission levied a tax upon Complete Auto "for the privilege of engaging or continuing in business or doing business" in the state of Mississippi. Complete Auto argued against the constitutionality of the tax, stating that it was part of an interstate operation involved in transporting vehicles from the factories in Michigan to the dealers in Mississippi. According to Complete Auto, taxation on interstate operations not only discourages interstate commerce but also is a violation of the Commerce Clause. But the Supreme Court rejected these arguments based on the four prongs test.

The four prongs test marks a paradigmatic shift from the previous formalistic approach in cases such as *Freeman v. Hewit*[21] and *Spector Motor Serv., Inc. v. O'Connor*.[22] There, state taxes on interstate commerce were struck down simply because the Dormant Commerce Clause "created an area of trade free from interference by the States."[23] The Supreme Court in *Complete Auto* clearly and explicitly overruled *Freeman* and *Spector*.[24] As the Supreme Court stated repeatedly, the new approach to Commerce Clause adjudication in the state tax field has "moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology."[25] The Supreme Court in later cases emphasized that Commerce Clause challenges to state taxation should be resolved according to the "practical or economic effect of the tax."[26]

Post-*Complete Auto* jurisprudence refined and detailed the four prongs test.[27] For example, in *Tyler Pipe Indus. v. Washington State Dep't. of Revenue*, Washington State imposed a tax on an out-of-state seller who solicited business in Washington through an independent contractor located in Seattle.[28] The Washington Supreme Court upheld the tax and ruled that using an active representative in a state, even an independent one, establishes a substantial nexus as per the first prong. To use the words of the Washington Supreme Court, "the crucial factor governing nexus

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20. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
21. Freeman v. Hewit, 329 U.S. 249 (1946).
22. Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951).
23. *Freeman*, 329 U.S. at 252.
24. *See* William B. Lockhart, *A Revolution in State Taxation of Commerce*, 65 MINN. L. REV. 1025, 1026 (1980).
25. Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 295 (1987).
26. Goldberg v. Sweet, 488 U.S. 252, 262 (1989).
27. For detailed analysis, see HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 192–326; Walter Hellerstein, Michael J. McIntyre, & Richard D. Pomp, *Commerce Clause Restraints on State Taxation after Jefferson Lines*, 51 TAX L. REV. 47 (1995); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193 (1998).
28. Tyler Pipe Indus. v. Washington State, Dep't of Revenue, 483 U.S. 232 (1987).

is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[29]

The second prong, fair apportionment, consists of two components.[30] First, it requires that a state tax be "externally consistent," which means that the tax is based on factors that "actually reflect a reasonable sense of how income is generated."[31] The Supreme Court reaffirmed in *Goldberg v. Sweet* that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."[32] The second component of the Court's fair-apportionment prong is its "internal consistency" requirement. Evaluating a state tax for internal consistency requires a court to ask whether a taxpayer would face a higher tax burden if they engaged in interstate commerce than if they engaged in intrastate commerce.[33]

As the name implies, the third prong, non-discrimination, requires nondiscrimination between taxing intrastate transactions and interstate transactions. For example, based on this prong, the Supreme Court invalidated discriminatory taxes that were expressly limited to merchants or products of other states.[34] Finally, the fourth prong, that the tax be fairly related to the services provided by the state, is very much related to the substantial nexus prong, but it adds the "limitation that the *measure* of the tax must be reasonably related to the extent of the contact."[35]

In sum, *Complete Auto* sets the full legal framework on states' tax jurisdiction over out-of-state retailers and requires a substantial nexus, among additional prongs. Substantial nexus was interpreted in *Bellas Hess* to mean physical presence in the taxing state. *Quill Corp. v. North Dakota* later confirmed this rule.

C. Quill: Commerce Clause and the Physical Presence Rule

The Supreme Court in *Quill Corp. v. North Dakota* banned states from imposing sales tax collection duties on out-of-state businesses that do not have a physical presence in the state because doing so would violate the Commerce Clause, but not the Due Process Clause.[36] The *Quill* rule reaffirmed *Bellas Hess*'s strict physical presence requirement.

The facts of *Quill* are extremely similar to those in *Bella Hess.* Quill was a Delaware corporation without a physical presence in North Dakota. It solicited business through catalogues, flyers, telephone calls and advertisements in national periodicals. Its mail-ordered sales in North Dakota amounted to almost one million

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29. Tyler Pipe Indus. v. State, Dep't of Revenue, 715 P.2d 123, 126 (1986).

30. Thimmesch, *supra* note 3.

31. Container Corp. of Am. v. Franchise Tax Bd., 103 S.Ct. 2933, 2942 (1983).

32. Goldberg v. Sweet, 488 U.S. 252, 260–61 (1998).

33. *See* Comptroller of Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1802 (2015); *see also* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 312 (2017).

34. *See* Cook v. Pennsylvania, 97 U.S. 566 (1878); *see also* Webber v. Virginia, 103 U.S. 344, 351 (1880).

35. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981).

36. Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

dollars from about three hundred customers. Quill challenged state law requiring it to collect sales tax from North Dakota customers as an undue burden. The North Dakota Supreme Court ruled that "wholesale changes" in both the economy and the law, such as the remarkable growth of the mail order industry and the formal approach in Commerce Clause analysis being replaced by the flexible economic effects approach in *Complete Auto*, made it inappropriate to follow *Bellas Hess* any longer.[37] Accordingly, the North Dakota Supreme Court concluded that Quill's economic involvement in North Dakota established a sufficient nexus to justify the collection burden and pass the constitutional challenge. However, the U.S. Supreme Court reversed.

The U.S. Supreme Court's decision in *Quill* opened the landmark case by making a clear distinction between the Due Process Clause and the Commerce Clause: "The two constitutional requirements differ fundamentally in several ways . . . [and] reflect different constitutional concerns."[38] As to the Due Process Clause, the Court ruled that it required some minimum connection between the state and the person, property, or transaction it seeks to tax. The Court emphasized that the jurisprudence evolved substantially since *Bellas Hess* and abandoned formalistic tests, favoring a flexible economic inquiry into the contacts with the state and their economic effects.[39] Accordingly, the Court concluded that North Dakota's law did not violate the Due Process Clause because Quill was engaged in continuous and widespread solicitation of business within North Dakota.[40]

As to the Commerce Clause, the Court emphasized that *Complete Auto* looked at the practical economic effects of the tax rather than examining formal language of the tax. However, the Court made clear that *Complete Auto* had not "rendered *Bellas Hess* 'obsolete.'"[41] The Court explained:

> While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases. . . . *Bellas Hess* concerns the first of these [four prong] tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.[42]

The Court referred to the continuous validity and confirmation of this proposition in the field of sales and use taxation, while carefully noting, "we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes."[43] This bright line rule was justified, according to the Court, because it drew the boundaries clearly,

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37. State v. Quill Corp., 470 N.W.2d 203, 213 (N.D. 1991).

38. *Quill Corp.*, 504 U.S. at 305 (alteration in original).

39. *Id.* at 307.

40. *Id.* at 308; *see also* Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371 (2017).

41. *Quill Corp.*, 504 U.S. at 310.

42. *Id.* at 311 (alteration in original).

43. *Id.* at 314 (alteration in original).

"reduce[d] litigation," and "foster[ed] investment[s]."[44] Finally, the Court relied on the doctrine and principle of *stare decisis* to support its opinion, adding that "Congress has the ultimate power to resolve" the issue.[45]

The critique of *Quill* was so intense that a movement to "kill *Quill*" emerged.[46] Most notably, in March 2015, Justice Anthony Kennedy wrote a concurring opinion in *Direct Marketing Association v. Brohl* that urged the Court to revisit *Quill*'s legal underpinnings.[47] The brief by Amici Curiae Law Professors and Economists in Support of Petitioner in *South Dakota v. Wayfair* summarized some of the main arguments against *Quill*.[48] *First*, the physical presence rule posed a far greater threat to the fiscal stability of states and local governments than the *Quill* Court anticipated. Since *Quill*, revenue losses from interstate transactions across all fifty states increased from an estimated $3.27 billion in 1992 to an estimated $33.9 billion in 2018.[49] *Second*, as economic research has demonstrated, *Quill*'s physical presence rule distorts consumption decisions of online shoppers, encouraging them to evade state and local sales and use taxes, which has negative consequences on economic efficiency.[50] *Third*, the physical presence rule discouraged vendors from expanding across state lines, which undermined the Dormant Commerce Clause's objective of promoting economic union and free interstate commerce.[51] *Fourth*, the physical presence rule shifted the burden of compliance from vendors to consumers

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44. *Id.* at 315–316 (alteration in original).

45. *Id.* at 317–318.

46. *See eg.,* Hayes R. Holderness, *Questioning Quill*, 37 VA. TAX REV. 313, 317 (2018) ("[T]he *Quill* Court failed to fully consider: (1) the basis for requiring a connection between the taxing state and the taxpayer under the Commerce Clause, (2) all of the burdens a state tax action might place on a taxpayer and the relationship of the taxpayer's physical presence to those burdens, (3) the nature, regulatory or tax, of the use tax collection obligations, (4) the substance of those obligations if they are characterized as taxes, and (5) the full scope of use taxes, particularly in relation to sales taxes."); Brian Galle, *Kill* Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 158–159 (2017–2018) (arguing that "original historical evidence . . . suggests that the political economy premises on which *Quill* rests," namely that Congress is well equipped to regulate the issue, "are fundamentally mistaken" because one hundred years of experience proved that "When there are strong interest groups on both sides, as in the case of Quill, Congress is often paralyzed." Nevertheless, the "same evidence should lead the Court to keep in place the larger body of 'Dormant Commerce Clause' jurisprudence."); Edward A. Zelinsky, *The Political Process Argument for Overruling* Quill, 82 BROOK. L. REV. 1177, 1180 (2017) ("[T]he Court should overturn *Quill* in the Court's role as guardian of the states against federal commandeering in light of the combination of the relevant factors: the tactical advantage *Quill* bestows in the political process upon the Internet and mail-order industries, the importance of the states in the structure of federalism, the centrality of sales taxes to the financing of state government, the severe impediment *Quill* and its physical presence test impose upon the collection of these taxes, and the unique disadvantages of the states in the federal legislative process."); Richard D. Pomp, *Revisiting* Miller Brothers, Bellas Hess, *and* Quill, 65 AM. U. L. REV. 1115, 1116, 1145 (2016) (arguing that *Quill* is "based on [the] shaky precedent" of *Bellas Hess*, and that "One fundamental problem with Quill is that the Court never explained what physical presence in a state has to do with limiting state burdens on interstate commerce, retreating into bromides about the value of bright lines and how they can be rough around the edges.").

47. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

48. Brief of Amici Curiae Law Professors and Economists in Support of Petitioner, South Dakota v. Wayfair, 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1203458.

49. *Id.* at *8–9.

50. *Id.* at *12–13.

51. *Id.* at *14–16.

who must pay use tax. This means that consumers must track all their purchases over the course of a year in order to calculate the tax owed, which increases compliance costs dramatically and led to noncompliance and tax revenue losses.[52]

D. Wayfair: Overruling Quill—Economic and Virtual Contacts

After 25 years, the Supreme Court in *South Dakota v. Wayfair* overruled *Quill* and its physical presence rule.[53] *Wayfair* allows states to impose sales tax collection duties on out-of-state sellers without a physical presence in the state as long as they still have a substantial nexus and meet the other prongs of *Complete Auto*.

In *Wayfair,* South Dakota challenged *Quill* directly by passing an Act that required out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state."[54] The Act was limited to sellers who delivered annually more than $100,000 of goods or services into the state, or engaged in 200 or more separate transactions for the delivery of goods or services into the state. Pursuant to this Act, South Dakota required Wayfair and other online retailers without any physical presence, employees, or agents in the state to collect and remit sales tax because each fulfilled the Act's threshold requirements. Wayfair challenged the Act, and as a result, the Supreme Court examined its constitutionality.

Justice Kennedy opened the Court's opinion by explaining the now-accepted framework for state taxation under *Complete Auto*. The Court reaffirmed that there must be a substantial nexus with the taxing state, but held that "physical presence is not necessary to create a substantial nexus."[55] The Court concluded that *Quill* was flawed on its own terms. According to the Court, the same reasoning given in *Quill* for rejecting the physical presence rule for Due Process purposes apply equally for Commerce Clause purposes.[56] The Court acknowledged that the Commerce Clause was designed to prevent discrimination and unjustified burdens on interstate commerce.[57] However, "the physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States."[58] Furthermore, the Court noted that *Quill*'s physical presence rule had become an anachronism:

> Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents . . . . When the day-to-day functions of marketing and distribution in the modern economy are considered, it is all the more evident that the physical presence rule is artificial in its

52. *Id.* at *17–19.
53. *See generally* South Dakota v. Wayfair, 138 S. Ct. 2080 (2018).
54. S.B. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).
55. *Wayfair*, 138 S. Ct. at 2095.
56. *Id.*
57. *Id.*
58. *Id.*

> entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.[59]

The Court added that the physical presence rule from *Quill* and *Bellas Hess* "is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions" and it harmed public trust, principles of federalism, and free markets.[60] The harm was especially obvious after the internet revolution, leading to estimated tax losses as high as $33 billion.[61] Under these circumstances, with due consideration for reliance interests favoring adherence to precedent, the Court overruled *Quill*'s physical presence requirement.[62]

The Court's position on precedent differed from the dissenting opinion, which declined to overrule *Bellas Hess* and *Quill* because of the strong policy reasons for adhering to precedent.[63] The dissenting opinion emphasized that the internet revolution changed the national economy. For that very reason, the dissent argued, overturning the physical presence rule became a matter of national economic policy that should be undertaken by Congress, because Congress is better situated to consider the competing interests at stake. The dissenting opinion added that Congress was in fact considering the issue, and three bills were pending, but "by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue."

Once the Court overruled the physical presence rule, it clarified that the substantial nexus requirement, per the first prong of *Complete Auto*, is still required. The Court concluded that the nexus requirement was fulfilled in this case because Wayfair had sufficient economic and virtual contacts with the State.[64] In doing so, the Court recognized economic and virtual contacts as constituting a substantial nexus as required by the Commerce Clause.

The Court validated South Dakota's Act, but it could not examine all aspects of its validity since the parties did not litigate all those issues. Nevertheless, the Court mentioned a few features of the Act that reduce burdens, such as safe harbor for limited transactions in South Dakota; prospective application of the remittance obligations; and membership and adoption of the Streamlined Sales and Use Tax Agreement. Consequently, while the Court concluded that South Dakota's sales tax law is constitutional, it is likely that other state sales tax laws would be constitutional as well, so long as they follow the reasonings and guidelines set forth in *Wayfair*. Accordingly, states should use the foundation laid in this revolutionary decision to continue building their sales tax systems.

In its decision, the *Wayfair* Court referred to *Pike v. Bruce Church, Inc.*,[65] which held that state regulation of commerce would be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local

59. *Id.* at 2096–2097.
60. *Id.* at 2098.
61. *Id.* at 2100.
62. *Id.* at 2102.
63. *Id.* at 2104 (Roberts, C.J. with Breyer, Sotomayor, and Kagan JJ. dissenting).
64. *Id.* at 2099 (majority opinion).
65. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

benefits.[66] The Court noted that this principle animates its Commerce Clause cases which address the validity of state taxes. However, the Court also referred to *Complete Auto* and the four prongs test. Ultimately, the *Wayfair* Court did not make a clear decision on the applicability of *Pike* but at the same time, the Court discussed the *Pike* principle as an added protection against undue burdens on interstate commerce.[67]

In his fascinating article, Professor Adam Thimmesch analyzed *Wayfair* from a doctrinal perspective and called for adopting a unified Dormant Commerce Clause doctrine in tax and non-tax issues.[68] Based on the origin of the Court's nexus standard, Professor Thimmesch construed *Complete Auto*'s substantial nexus requirement as very close to, if not the same as, that required by the Due Process Clause. From the Court's references to other Commerce Clause cases in *Wayfair*, he concluded that there "is an apparent two-step process by which state nexus provisions are subject to analysis first under *Complete Auto* and then under *Pike*," and that "the Court has suggested that a state law be subject to both the Court's tax and nontax tests."[69] Professor Thimmesch argued further, from a normative perspective, for eliminating the nexus requirement because it does not serve any function beyond the minimum contacts test of the Due Process Clause. Ultimately, Professor Thimmesch called for eliminating the Court's "bifurcated approach to dormant Commerce Clause adjudication."[70]

Alternatively, Professor Walter Hellerstein distinguished between substantive jurisdiction, which relates to the power of a state to tax the subject matter of the tax, and enforcement jurisdiction, which relates to the power of a state to compel collection of the tax.[71] He argued that while *Wayfair* rejected relational requirement between the two types of jurisdictions as part of the nexus requirement, the Court "did allude to a constitutional mechanism for requiring such a relationship, at least in some circumstances—namely, the Commerce Clause balancing framework of *Pike*."[72] But Professor Hellerstein concluded that "Despite the *Wayfair* Court's tantalizing suggestion that *Pike* could potentially protect remote sellers from

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66. *Wayfair*, 138 S. Ct. 2080 at 2091.

67. *Id.* at 2098–99.

68. *See* Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 366–78 (2020).

69. *Id.* at pp. 354–55.

70. *Id.* at 381. *See also* Adam Thimmesch, Darien Shanske & David Gamage, Wayfair*: Substantial Nexus and Undue Burden*, 89 ST. TAX NOTES 447 (2018); Ruth Mason, *Implications of* Wayfair, 46 INTERTAX 810, 816 (2018) ("[C]laims about the sufficiency of nexus and whether the state imposes undue burdens on interstate commerce should be subject to the balancing test established by the Supreme Court in *Pike v. Bruce Church*.").

71. *See* Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1 (2003). *See also* Walter Hellerstein, *Jurisdiction to Impose and Enforce Income and Consumption Taxes: Towards a Unified Conception of Tax Nexus*, *in* VALUE ADDED TAX AND DIRECT TAXATION: SIMILARITIES AND DIFFERENCES 545 (Michael Lang, Peter Melz & Eleanor Kristoffersson eds., 2009).

72. Walter Hellerstein & Andrew Appleby, *Substantive and Enforcement Jurisdiction in a Post-*Wayfair *World*, 2018 ST. TAX NOTES 283.

overreaching sales and use tax collection obligations, *Pike* is unlikely to be the panacea that some have envisaged."[73]

I suggest a simple reading of *Wayfair* that continues the distinction between Commerce Clause jurisprudence in tax issues and non-tax issues. *Wayfair* did not directly confront the doctrinal convergence that applies different tests for purposes of evaluating state laws that are classified as taxes and those that are not. Accordingly, in tax issues, the four prongs test of *Complete Auto* applies, including the ban on undue burdens. In non-tax issues, the balancing test of *Pike* applies. In my opinion, any state tax act that imposes sales and use tax collection duties on out-of-state sellers must fulfill the substantial nexus requirement and all tests of *Complete Auto*. *Wayfair* acknowledged that economic and virtual contacts could establish substantial nexus. Given this understanding of *Wayfair*, the remainder of this article focuses on implementing and improving the collection of sales and use taxes from interstate online transactions in the post-*Wayfair* era. I propose to follow a state-by-state approach in building the systems of remote taxation, but, at the same time to coordinate and cooperate with other states through the Streamlined Sales and Use Tax Agreement while learning from the European Union's experience, and implementing new technologies of online taxation.

II. THE FUTURE OF ONLINE TAXATION: STATE-BY-STATE APPROACH

The sales tax is a tax governed by the states, and it should, and probably will, continue to be so for the basic reason that states are unlikely to give up their power of taxation. Moreover, each state has different tax needs, so there is no one tax that fits all states. The evidence since *Wayfair* supports this argument clearly because most states responded independently by enacting legislation to implement *Wayfair* and rejected any imposition of federal restrictions or regulations. Furthermore, federal bills from the past reveal the disadvantages states faced in the process and the shortcomings of federal imposition in this context.

However, the state-by-state approach increases compliance costs and interstate conflicts. To reduce these costs and alleviate conflicts, a second layer of multistate cooperation and coordination is needed, in addition to the first layer of state-by-state taxation. The Streamlined Sales and Use Tax Agreement (SSUTA), if developed further, is a framework states can use to satisfy that need. This second layer of multistate cooperation does not contradict or undermine the state-by-state approach, but instead completes it to produce a comprehensive system of independence and cooperation. A similar system exists in many fields already, where municipalities, states, countries, or other jurisdictions, set their own rules independently, but cooperate to reduce costs and conflicts. An example of this model is the Multistate Tax Compact, an agreement between and among states with the facially conflicting goals of promoting uniformity and state autonomy.[74] The

73. *Id.* at 292. *See also* Edward A. Zelinsky, *Comparing* Wayfair *to* Wynne*: Lessons for the Future of the Dormant Commerce Clause*, 22 CHAP. L. REV. 55 (2019); Thimmesch et al., *supra* note 70; Richard Pomp, Wayfair*: Its Implications and Missed Opportunities*, 58 WASH. U. J. L. & POL'Y 1 (2019).

74. *See* Natasha N. Varyani, *States Unbound: Examining the Authority of the Multistate Tax Compact in a Modern, Multijurisdictional Economy*, 1 WAYNE ST. U. J. BUS. L. 21 (2018).

Compact created the Model Apportionment Formula, which allocates the tax pie between the states to multistate taxpayers, and the Multistate Tax Commission, which administers the system of coordination.[75]

The International Fuel Tax Agreement (IFTA) is another example of interstate tax coordination. Under the IFTA, states have flexibility in their coordination measures, as long as three core provisions are met: A base jurisdiction concept, which allows motor carriers to report and pay fuel use taxes to a single jurisdiction; a uniform definition of a taxpayer for purposes of the fuel tax agreement; and the state's retention of its taxing sovereignty to determine tax rates, exemptions, and to exercise other substantive tax authority. By most measures, the IFTA has been a successful model in interstate coordination[76] International taxation is another example of interjurisdictional coordination and cooperation, where each country sets its own international tax rules but cooperates in bilateral tax treaties to reduce conflicts created by double taxation (by exchanging tax information automatically, for example) and reduce tax evasion.

Despite independent state needs, the multistate coordination and cooperation within the second layer of state-by-state taxation necessitates some tax consistency, to some extent, to reduce costs and conflicts. However, a multistate agreement is preferred over federal imposition because it is based on consent, and each state could decide whether to join the second layer or not. In addition, any level of required consistency is balanced out by the wide range of discretion each State can have under an agreement, while federal imposition is unlikely to allow for such discretion. Under the preferred regime, the systems of taxation are streamlined, rather than unified. The issue of uniformity in state taxation is extremely sensitive and complex. Throughout the history of state taxation, in many contexts the basic concern has been to balance states' sovereignty and power to tax against compliance burdens and multistate conflicts.[77] Federal imposition does not achieve this delicate balance, but state-by-state taxation along with a multistate agreement such as the SSUTA could do so. On this hybrid regime of state and multistate layers, I will elaborate in this chapter.

A. States' Policy Decisions

Once *Wayfair* removed the constitutional ban on state tax collection without physical presence, it opened the door for collecting taxes on out-of-state online transactions. However, it is important to understand that each state should first make a policy decision that such tax collection is appropriate for that state in terms of

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75. *See* Walter Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on* Mobil*,* Exxon*, and H.R. 5076*, 79 MICH. L. REV. 113 (1980); W. BARTLEY HILDRETH, MATTHEW N. MURRAY & DAVID L. SJOQUIST, COOPERATION OR COMPETITION: THE MULTISTATE TAX COMMISSION AND STATE CORPORATE TAX UNIFORMITY (2005).

76. *See* Dwight Denison & Rex L. Facer II, *Interstate Tax Coordination: Lessons from the International Fuel Tax Agreement*, 58 NAT'L TAX J. 591 (2005).

77. *See* W. Bartley Hildreth, Matthew N. Murray & David L. Sjoquist, *Interstate Tax Uniformity and the Multistate Tax Commission*, 58 NAT'L TAX J. 575 (2005); Jerry Sharpe, *State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity*, 11 COLUM. J.L. & SOC. PROBS. 231 (1975).

revenue, economics, and fairness. Since *Wayfair*, most states already decided to impose sales tax on out-of-state online transactions.[78]

In terms of revenue, obviously e-commerce retail is growing and along with it the potential for greater sales tax revenue. In 2016, sales from e-commerce for U.S. retailers "were $389.1 billion, up 14.4 percent from a revised $340.2 billion in 2015. . . . E-commerce sales were 8.0 percent of total sales in 2016, up from a revised 7.2 percent in 2015."[79] "In 2017, e-commerce sales accounted for 9.0 percent of all retail sales in the United States, which is expected to reach 12.4% in 2020."[80] "In 2019, U.S. online retail sales of physical goods amounted to [$]343.15 billion . . . and are projected to reach close to [$]476.5 billion . . . in 2024."[81]

> The Census Bureau of the Department of Commerce announced recently that the estimate of U.S. retail e-commerce sales for the third quarter of 2019, adjusted for seasonal variation, but not for price changes, was $154.5 billion, an increase of 5.0 percent (±0.4%) from the second quarter of 2019. Total retail sales for the third quarter of 2019 were estimated at $1,380.5 billion, an increase of 1.4 percent (±0.2%) from the second quarter of 2019. The third quarter of 2019 e-commerce estimate increased 16.9 percent (±1.4%) from the third quarter of 2018 while total retail sales increased 4.0 percent (±0.4%) in the same period. E-commerce sales in the third quarter of 2019 accounted for 11.2 percent of total sales.[82]

However, it is not clear which share of e-commerce is already taxed and which share would be taxed post *Wayfair*. In addition, the allocation of tax revenue between the states is complex.[83] Despite the challenges of measuring and estimating

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78. *See* Jared Walczak & Janelle Cammenga, *State Sales Taxes in the Post-*Wayfair *Era*, TAX FOUND. (Dec. 12, 2019), https://taxfoundation.org/state-remote-sales-tax-collection-wayfair/ [https://perma.cc/9N74-DF7U].

79. U.S. CENSUS BUREAU, E-STATS 2016: MEASURING THE ELECTRONIC ECONOMY 2 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/econ/e16-estats.pdf [https://perma.cc/24KK-4K3V].

80. J. Clement, *E-commerce share of total retail sales in United States from 2013 to 2021*, STATISTA (July 23, 2019), https://www.statista.com/statistics/379112/e-commerce-share-of-retail-sales-in-us/ [https://perma.cc/8GRP-Z3KB].

81. J. Clement, *Retail e-commerce sales in the United States from 2017 to 2024*, STATISTA (Aug. 10, 2020), https://www.statista.com/statistics/272391/us-retail-e-commerce-sales-forecast/ [https://perma.cc/ULU7-NQY7].

82. U.S. Dep't of Commerce, CB19-170, *Quarterly Retail E-Commerce Sales: 3rd Quarter 2019*, U.S. CENSUS BUREAU NEWS, Nov. 2019 at 1, https://www2.census.gov/retail/releases/historical/ecomm/19q3.pdf [https://perma.cc/B6NC-U6YB].

83. *See* GEORGE V. VOINOVICH & BOB GRAHAM, U.S. GEN. ACCOUNTING OFF., SALES TAXES: ELECTRONIC COMMERCE GROWTH PRESENTS CHALLENGES; REVENUE LOSSES ARE UNCERTAIN 3–4 (2000), https://www.gao.gov/assets/240/230474.pdf [https://perma.cc/6M7S-VLRT] (describing that the year 2000 internet sales tax loss, evaluated with little data of unknown certainty, is less than two percent of general sales tax revenues and, even with better data, the rapidly changing e-commerce climate will result in a future policymaking "environment of significant uncertainty"); Donald Bruce et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, STATE TAX NOTES (May 19, 2009), https://www.taxnotes.com/tax-notes-today-state/sales-and-use-taxation/state-and-local-sales-tax-revenue-losses-e-commerce/2009/05/19/3cd6?highlight=volume%2052

potential revenue upon tax collection, it is fair to conclude that tax collection post *Wayfair* would increase states' revenue, but each state should make its own in-depth calculations.[84]

The economic effects of *Quill*'s non-collection and post-*Wayfair* collection are complex. On one hand, *Quill*'s disparity in tax treatment causes distortions in consumer behavior as they might choose online purchases for tax reasons. The disparity also distorts seller behavior in locating headquarters, plants, and employees to avoid nexus with a state.[85] State sales taxes with fewer loopholes and lower rates are more neutral and efficient because decisions and behaviors are made based on economic considerations rather than tax considerations. The additional revenue from retail sales tax on e-commerce would reduce the rates of far more burdensome taxes, such as states' income taxation. This more efficient system, in turn, would increase Gross State Product (GSP), employment rates, and overall state prosperity.[86] According to a study conducted by Arthur Laffer and Donna Arduin, this wiser usage of additional revenue would, for example, add $34.9 billion to Florida's GSP and 107,474 jobs by 2022, and add $9.8 billion to Virginia's GSP and 23,582 jobs by 2022.[87]

On the other hand, scholars have argued that criticisms of *Quill* rely on flawed arguments because online retail is not to blame for any decline in local retail. In their view, a tax on online retailers would actually have very little effect on overall state revenues because online retail constitutes such a low share of total retail, and almost 80 percent of it is already being taxed in other ways.[88] Ike Brannon and others argued that post-*Wayfair* tax collection would be a discriminatory tariff that would harm small and micro enterprises, along with the U.S. economy.[89] In their deep analysis, Brannon et al. opened by describing the reality as "brick-and-click." Namely, "large, technology-enabled retailers with local presence and capabilities in numerous locations dominate the market combined with an 'omnichannel' strategy

[https://perma.cc/P893-VF6A] (noting that the lost state tax revenue estimates relate to e-commerce only, while the losses associated with all remote commerce is beyond the scope of the study).

84. *See* William Fox, Enda Hargaden, & LeAnn Luna, Statutory Incidence and Sales Tax Compliance: Evidence from *Wayfair* 1 (2019) (unpublished article) https://ntanet.org/wp-content/uploads/2020/02/William-Fox-Session1477_Paper3088_FullPaper_1.pdf [https://perma.cc/28QQ-FJ76] ("Initial estimates using a difference-in-differences identification strategy with a novel, hand-collected dataset of monthly tax revenues at the state-level show shifting the statutory burdens to firms increases tax revenue by 5.4%."); JOHN MIKESELL & JUSTIN ROSS, AFTER *WAYFAIR*: WHAT ARE STATE USE TAXES WORTH? (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397342 [https://perma.cc/5LVA-KH3F] ("We . . . present a unique monthly series of remote vendor use tax collections for Indiana before and after *Wayfair* ruling and using the synthetic control method to derive a treatment effect of the policy change. While remote vendor registrations have tripled, there has been relatively modest impact on state revenue.").

85. *See* Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 AM. ECON. REV. 1, 25 (2014).

86. *See* ARTHUR B. LAFFER & DONNA ARDUIN, PRO-GROWTH TAX REFORM AND E-FAIRNESS 1 (2013), http://media.mlive.com/businessreview/western_impact/other/ArtLafferStudy.pdf [https://perma.cc/7KZ5-ZPWR].

87. *Id.* at 1–2 tbl.1.

88. *See* IKE BRANNON ET AL., INTERNET SALES TAXES AND THE DISCRIMINATORY BURDEN ON REMOTE RETAILERS – AN ECONOMIC ANALYSIS 31–32 (2018), https://capitalpolicyanalytics.com/wp-content/uploads/2019/09/SSRN-id3140948.pdf [https://perma.cc/9LQH-RT89].

89. *Id.* at 3–4.

that combines online, mobile, and physical sales channels,"[90] which leaves small, remote retailers at a disadvantage from the stiff competition. Hence, the author's argued, "The imposition of a sales tax on online sales would further harm these small retailers, preventing them from effectively competing against the large local mega-retailers that dominate the retail industry today."[91] They concluded that post-*Wayfair* taxation would harm the U.S. economy because small businesses would exit the market, which would reduce competition, employment, innovation, and consumer choice.[92] The authors referred to national estimates of remote sales tax revenues that showed only an $8.5 billion gain, while risking 355,000 new e-commerce jobs created between 2007–2016, and more than 710,000 small and micro e-commerce retailers who might stop doing business as a result of remote taxation.

The fairness argument for post-*Wayfair* tax collection is straightforward.[93] Fairness requires leveling the playing field so that all sellers, online and offline, out of state and in state, collect the retail sales tax that is due according to the law. It is unfair to grant a de facto exemption from the duty to collect to any group of sellers. Accordingly, the National Governors Association praised the *Wayfair* decision.[94] As the National Conference of State Legislators president, Senator Deb Peters, who authored South Dakota's remote sales tax legislation, put it:

> Today's decision by the U.S. Supreme Court is a victory for Main Street America. Brick and mortar stores will no longer be penalized for collecting the tax revenues that fund our schools, infrastructure, and the vital public services that state and local governments provide. For states, today is just the beginning. We've waited 26 years. Good tax administration is good public policy and state officials look forward to working with all stakeholders in the coming months as we move forward to level the playing field for all of our nation's retailers.[95]

It might be that the collection duties would be unfair in terms of comparison between different sizes of businesses. But I suggest that tax thresholds would alleviate this to some extent, and the main fairness argument in support of tax collection would prevail.

In my opinion, states should collect sales tax from online retailers, but they should design the thresholds and scope of the duty to collect appropriately. For these reasons, and because the economic effects on each state will be different, it is

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90. *Id.* at 6.

91. *Id.* at 15.

92. *Id.* at 36.

93. *See* Nat'l Conf. of State Legislatures, *Collecting E-commerce Taxes: E-Fairness Legislation*, NCSL (Nov. 14, 2014), http://www.ncsl.org/research/fiscal-policy/collecting-ecommerce-taxes-an-interactive-map.aspx [https://perma.cc/8B65-KCXD]; Nat'l Retail Fed'n, *Sales Tax Fairness*, NRF, https://nrf.com/on-the-hill/policy-issues/sales-tax-fairness [https://perma.cc/Z77H-6AEM].

94. Nat'l Governors Ass'n, *NGA Statement on Supreme Court Ruling in* South Dakota v. Wayfair, NGA (June 21, 2018), https://www.nga.org/news/press-releases/nga-statement-on-supreme-court-ruling-in-south-dakota-v-wayfair/ [https://perma.cc/B35H-EDNP].

95. Nat'l Conf. of State Legislatures, *NCSL Applauds Ruling in Remote Sales Tax Case*, NCSL (June 21, 2018), http://www.ncsl.org/press-room/ncsl-statement-on-wayfair-v-south-dakota-ruling.aspx [https://perma.cc/3SE8-SN57].

important for each state to conduct an in-depth analysis to design the most appropriate collection regime. States' retail associations have done such studies in the past.[96] However, I recommend that states and their revenue departments conduct new studies and consider new circumstances and data. In addition, I recommend studying the costs of compliance for different sizes of sellers in order to design the most appropriate tax threshold while alleviating burdens on smaller retailers. Finally, and most importantly, states should work together to develop a multistate layer of cooperation and coordination.

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96. *See* Dave Grogan, *Massachusetts Study Finds Online Loophole Costs Jobs, Sales, and Revenue*, ABA (Nov. 14, 2012), http://archivenews.bookweb.org/news/massachusetts-study-finds-online-loophole-costs-jobs-sales-and-revenue.html [https://perma.cc/2TVW-8QE7] (estimating that Massachusetts would have collected in 2011 additional US$387 million sales taxes from e-commerce and mail order sellers, while US$155 Million from business to business (B2B) sales, US$132 million from business to customers (B2C) sales, and US$100 million from non e-commerce mail order sales. In 2020 the additional RST revenues would rise to US$783 million, with US$262 million of that total due to B2B sales, US$374 million from B2C sales and US$148 million from mail order sales. The study assumes that 10.1 percent of online and ecommerce purchases for which no Massachusetts sales tax is currently collected will shift to New Hampshire – which has no sales tax – if online internet and other vendors that do not collect the tax are required to do so. The study estimates that sales of traditional brick and mortar retailers would have in aggregate increased by US$279 million if the disparity had been eliminated in 2011, and expected increase of US$587 million in 2020. Using IMPLAN, a well-regarded economic impact modeling system, the study argues that the impact of additional brick and mortar sales would be 1,534 new retail jobs and another 478 added jobs across the State economy in 2011. These figures are expected to rise in 2020 to 3,232 new retail jobs and 521 new jobs across the State economy.). *See also* Robert A. Robicheaux, *Estimates of Alabama Losses Due to E-commerce,* ALABAMA RETAIL (2012), https://alabamaretail.org/wp-content/uploads/EstimatesofAlabamaLossesDuetoE-Commerce.pdf [https://perma.cc/Q6FG-SHG9]_(noting that in 2011 online sales by remote sellers to customers in Alabama exceeded US$34 billion. Most of those sales ($32 Billion) are B2B, which is mostly exempted (87%) and the taxable (13%) is highly compliant (75–80%). But, most of the retail online sales ($2.3 billion, about 5% of total retail) is mostly taxable, however the tax compliance rate is only about 50% according to one estimate and about 55% according to a second estimate. Consequently, Alabama is losing in online sales about $165 million retail sales tax revenues in 2011 which were expected to rise to $186 million in 2016 with conservative growth rate of only 2-2.5% in both B2B and B2C e-commerce and reach the amount of $232 million with a sustained B2C growth forecast. "Alabamians purchases from out of state sellers are benefiting other states including California, Florida, New York, Texas, Illinois, Colorado, Pennsylvania and Washington, where a disproportionate number of e-commerce sellers operate" (more than 52%), and are hurting Alabama economy by reducing Alabama GSP, employment, household income, and tax revenues.); *see also Economic Analysis of Tax Revenue from E-commerce in Ohio,* ECON. CTR (2011), https://drive.google.com/file/d/0ByXZnu2dn5HaMWRhZmQ0MzctMWJjNi00ZThiLWJmZmYtZmQwNzc0NmVlYmYw/view [https://perma.cc/7QJV-5VDD]; *Michigan Sales Tax Collection and the Internet: A Need for Fairness,* PUBLIC SECTOR CONSULTANTS (2011), https://publicsectorconsultants.com/wp-content/uploads/2016/12/Final-report-Internet-sales-tax.pdf [https://perma.cc/WKT5-EAS5]; Nancy Mantell, Joseph J. Seneca, Michael L. Lahr, & Will Irving, *Estimates of New Jersey Sales and Use Tax Losses Resulting From E-commerce* (2011), http://www.efairness.org/pdf/New-Jersey-Sales.pdf [https://perma.cc/9RRT-BZRQ]; Ying Huang, John Kosash & Andrew Wesemann, (2012), *Internet Sales and Use Tax Issues in Missouri*, MISSOURI LEGISLATIVE ACADEMY (2012) https://truman.missouri.edu/sites/default/files/publication/internet-sales-and-use%20tax-issues-in-missouri.pdf [https://perma.cc/YK8D-HDGA] .

B. States' Legal Frameworks

Once a state decides to collect sales taxes from out-of-state online sellers, it should design legal frameworks to govern those collection burdens and boundaries. Before *Wayfair*, states had already tried several models of taxation, such as the affiliate nexus model and the reporting model.[97] Following the decision in *Wayfair*, states have rushed to copy South Dakota's law, which adopted the economic nexus model.[98] Since *Wayfair*, 43 of 45 states with statewide sales taxes have adopted collection and remittance obligations for remote sellers, and 38 have implemented marketplace facilitator regimes.[99] In this section, I argue that both as a constitutional matter and as a policy matter, states should follow the economic nexus model. I call states to enact new legal frameworks to implement the model, simplify the tax regime, and minimize compliance costs in the state and among the states.

There are numerous examples of new state legislation that imposes collection duties on remote sellers which meet certain thresholds. Upon the

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97. According to the affiliate model, an out of state retailer would be considered to have a substantial nexus in the state if he conducts business in the state through an affiliate. The reporting model imposes reporting duties on out of state sellers to enable the collection of the tax from the consumers. *See* Nat'l Conf. of State Legislatures, *State Activity for Remote Sales Tax Collection*, NCSL (June 6, 2018), http://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx [https://perma.cc/4EP2-EK6S]; *see also* Sales Tax Inst., *Remote Sellers Nexus Chart,* SALES TAX INST. (July 1, 2020), https://www.salestaxinstitute.com/resources/remote-seller-nexus-chart [https://perma.cc/J3QY-ZKQH]; Joseph Bishop Henchman, *31 States Tax Internet Sellers Without Physical Presence; Congress Considers Action Before Wayfair Expands it to All,* TAX FOUNDATION (Mar. 2018), https://files.taxfoundation.org/20180412152356/Tax-Foundation-FF579.pdf [https://perma.cc/M4JF-R7E4]; Andrew J. Haile, *Affiliate Nexus in E-commerce*, 33 CARDOZO L. REV. 1803 (2012). Other States have enacted affiliate nexus laws, including, for example, New Jersey, Virginia, Missouri, and New York. *See* N.J. STAT. ANN. §54:32B-2(i)(1) (West, Westlaw through L. 2020, c.67); *see also* N.J. DEP'T OF THE TREASURY, NEXUS FOR SALES AND USE TAX, (Aug. 2015), https://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb78r.pdf [https://perma.cc/5ENJ-ZAXS]. *See also* VA. CODE ANN. § 58.1-612 (2020); *see also*, MO. REV. STAT. § 144.605 (West, Westlaw through West ID No. 25 of the 2020 Second Reg. Sess.); N.Y. TAX LAW §1101(b)(8)(vi) (McKinney 2019); N.Y. STATE DEP'T OF TAX'N & FIN. OFF. OF TAX POLY' ANALYSIS, SUMMARY OF TAX PROVISIONS IN SFY 2008–09 BUDGET, (Apr. 2008), https://www.tax.ny.gov/pdf/stats/sumprovisions/summary_of_2008_09_tax_provisions.pdf [https://perma.cc/23XU-3BXY]; N.Y. STATE DEP'T OF TAX'N & FIN. OFF. OF TAX POL'Y ANALYSIS TAXPAYER GUIDANCE DIV., TSB-M-08(3)S, NEW PRESUMPTION APPLICABLE TO DEFINITION OF SALES TAX VENDOR (2008), https://www.tax.ny.gov/pdf/memos/sales/m08_3s.pdf [https://perma.cc/DHS3-2T8R].

98. *See* Ryan Prete, *State Group Advises Lengthy Pause Before Collecting Online Sales Tax,* BLOOMBERG LAW (July 2, 2018) https://news.bloombergtax.com/daily-tax-report-state/state-group-advises-lengthy-pause-before-collecting-online-sales-tax [https://perma.cc/2DQB-E5RP].

99. *See* Jared Walczak & Janelle Cammenga, *States Sales Taxes in the Post-Wayfair Era, TAX FOUNDATION* (Dec. 2019), https://files.taxfoundation.org/20191212152919/State-Sales-Taxes-in-the-Post-Wayfair-Era-PDF..pdf [https://perma.cc/MTE8-VL3X]; *see also* Nat'l Conf. of State Legislatures, *Remote Sales Tax Collection,* NCSL (June 6, 2018) http://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx [https://perma.cc/7V2A-C4PU]; AVALARA, *WHAT THE SOUTH DAKOTA V. WAYFAIR, INC. DECISION MAY MEAN FOR YOUR BUSINESS,* https://www.avalara.com/dam/avalara/public/documents/pdf/Understanding-Economic-Nexus.pdf [https://perma.cc/MEG9-SQES]; *Wayfair Chart 2018-09-10 Draft*, STREAMLINED SALES TAX GOVERNING BOARD (2018), https://www.streamlinedsalestax.org/docs/default-source/comm-slac-documents/slac-2018/wayfair-chart-2018-9-10--draftc1248dfe52484bd38d59c03919a36b5d.pdf?sfvrsn=cd6bf737_4 [https://perma.cc/5MZR-G5UJ].

publication of *Wayfair*, North Dakota's nexus law from 2017, which is very similar to South Dakota's law, became effective.[100] Virginia has enacted economic nexus provisions for remote sellers and marketplace facilitators, effective July 1st, 2019, with the threshold of $100,000 in total sales, or 200 or more separate retail sales transactions.[101] California began enforcing its economic nexus provisions in 2019 with the threshold set at $500,000.[102] Remote sellers that exceed Texas's $500,000 threshold will be required to collect and remit sales tax, effective January 1st, 2019, and enforced starting October 1st, 2019.[103] Arkansas has also enacted economic and marketplace nexus legislation, effective July 1st, 2019. Remote sellers and marketplace facilitators that sell or facilitate the sale of tangible personal property, taxable services, digital codes, or specified digital products into Arkansas are required to collect and remit sales and use tax if, in the previous or current calendar year, the remote seller or marketplace facilitator had $100,000 in aggregate sales, or at least 200 transactions.[104]

Marketplace facilitator legislation is springing up in state after state in the post-*Wayfair* era.[105] For instance, Indiana's legislation, effective July 1st, 2019, is informative. Per the legislation, a "marketplace facilitator" is a person, or affiliate of a person, who owns, operates, or otherwise controls a marketplace and facilitates retail transactions. It does not include a payment processor business that is appointed by a merchant to handle payment transactions from various channels and whose sole activity with respect to marketplace sales is to handle payment transactions between two parties. A marketplace facilitator is required to collect Indiana sales tax if the facilitator meets Indiana's economic nexus threshold of $100,000 or at least 200 transactions, even if the retailer does not meet that threshold.[106] New York imposed collection obligations on marketplace facilitators if they have total gross receipts of

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100. *S.B. 2298*, 65th Leg. Assemb. (N.D. 2017). *See generally* H.B. 487, 2018 Reg Sess. (Ky. 2018); Ky. Dep't of Revenue, *Kentucky Sales and Use Tax Collections by Remote Retailers – U.S. Supreme Court Ruling* (July 2018), https://revenue.ky.gov/News/Pages/Kentucky-Sales-and-Use-Tax-Collections-by-Remote-Retailers-U.S.-Supreme-Court-Ruling.aspx [https://perma.cc/H97U-X2RS]. Very similar laws with similar thresholds were enacted by several states including Wyoming and Kentucky. *See*, *e.g.*, H.B. 19, 64th Leg. Reg. Sess. (Wyo. 2017).

101. Sales Tax Institute, *Virginia Enacts Economic Nexus Provision for Remote Sellers,* SALES TAX INSTITUTE (Mar. 28, 2019) https://www.salestaxinstitute.com/resources/virginia-enacts-economic-nexus-provisions-for-remote-sellers [https://perma.cc/TL5K-6S22].

102. Sales Tax Inst., *California to Enforce Remote Seller Tax Collection Requirements*, SALES TAX INSTITUTE (Dec. 12, 2018), https://www.salestaxinstitute.com/resources/california-to-enforce-remote-seller-tax-collection-requirements [https://perma.cc/3KDP-9BZZ].

103. Sales Tax Inst., *Texas Amends Rules for Remote Sellers to Establish Economic* NEXUS, SALES TAX INSTITUTE (Mar. 11, 2020), https://www.salestaxinstitute.com/resources/texas-amends-rules-for-remote-sellers-to-establish-economic-nexus [https://perma.cc/7P7Q-EMSV].

104. Sales Tax Inst., *Arkansas Enacts Economic and Marketplace Nexus Legislation*, SALES TAX INSTITUTE (Oct. 16, 2019), https://www.salestaxinstitute.com/resources/arkansas-enacts-economic-and-marketplace-nexus-legislation [https://perma.cc/F3ZZ-T32E].

105. *Cf.* S.B. 126, 2020 Leg., (Fla. 2020). Florida is one of the few, and the most populous of states that have not passed legislation yet, but Senator Jow Gruters pre-filed S.B. 126 for the 2020 session, which would require collection by out-of-state sellers with annual sales of more than $100,000 or at least 200 separate transactions into Florida. *Id.*

106. Sales Tax Inst., *Indiana Enacts Marketplace Nexus Legislation*, SALES TAX INSTITUTE (May 16, 2019), https://www.salestaxinstitute.com/resources/indiana-enacts-marketplace-nexus-legislation [https://perma.cc/Q9C7-G9HH].

sales made, or facilitated, exceeding $500,000, or if they have made or facilitated more than 100 sales of property delivered in New York.[107] In California, effective October 1st, 2019, a marketplace facilitator is considered both the seller and retailer for each sale facilitated through its marketplace, and it must collect sales tax if it meets the threshold of $500,000.[108] The marketplace facilitator threshold in Colorado is $100,000 and the facilitator must include all sales made by marketplace sellers in, and through, its marketplace towards the threshold. A marketplace seller shall not include any sales made in or through a marketplace facilitator's marketplace towards the seller's individual threshold[109] In Alabama, marketplace facilitators who meet its threshold must collect sales taxes, or report such retail sales, and provide customer notifications.[110]

In making these laws, states must account for at least two different sets of considerations: Constitutional limitations, and policy considerations. *First*, as to the constitutional limitations, it is true that *Wayfair* removed the total ban on states imposing collection duties on out-of-state sellers. But it did not remove constitutional limitations on those collection duties. Any state legislation must fulfill both the Due Process Clause and Dormant Commerce Clause. In my understanding of *Wayfair*, discussed in Part I.D, to satisfy the Due Process Clause a seller must have minimum contacts with the state. And to satisfy the Dormant Commerce Clause a state's legislation must meet *Complete Auto*'s four prongs test. Obviously, from the language of *Wayfair*, the Supreme Court did not define positively what constitutes "substantial nexus," but it acknowledged that economic and virtual contacts can be sufficient to establish a substantial nexus, confirming that South Dakota's legislation fulfilled this new interpretation of the Commerce Clause. In my opinion, these are strong guidelines for any future state legislation, despite some uncertainty.[111] In fact, since *Wayfair*, most states have indeed followed these guidelines in legislating new sales tax laws.

Professor Hayes Holderness wrote about the Dormant Commerce Clause post *Wayfair* and derived standards and boundaries for the doctrine based on his analysis. He developed the "compliance burden" theory, which emphasizes that the main purpose of substantial nexus is to protect interstate commerce from undue burdens, and therefore, states must consider all tax compliance burdens resulting from tax rates, tax bases, and other compliance burdens. Based on that, he concluded,

107. Sales Tax Inst., *New York Enacts Marketplace Nexus Provisions,* SALES TAX INSTITUTE (Apr. 30, 2019), https://www.salestaxinstitute.com/resources/new-york-enacts-marketplace-nexus-provisions [https://perma.cc/NB3V-9CZQ].

108. Sales Tax Inst., *California Enacts Marketplace Nexus Provisions, Changes Economic Nexus Threshold,* SALES TAX INSTITUTE (Apr. 30, 2019) https://www.salestaxinstitute.com/resources/california-enacts-marketplace-nexus-provisions-changes-economic-nexus-threshold [https://perma.cc/3UHG-GBSP].

109. Sales Tax Inst., *Colorado Codifies Economic Nexus Rule and Enacts Marketplace Nexus Legislation,* SALES TAX INSTITUTE (June 17, 2019), https://www.salestaxinstitute.com /resources/colorado-codifies-economic-nexus-rule-and-enacts-marketplace-nexus-legislation [https://perma.cc/62ML-QEJL].

110. Sales Tax Inst., *Alabama Enacts Marketplace Nexus Provisions*, SALES TAX INSTITUTE (May 13, 2018), https://www.salestaxinstitute.com/resources/alabama-enacts-marketplace-nexus-provisions [https:// perma.cc/2DHR-A8LJ].

111. *See* Thimmesch et al., *supra* note 70, at 447.

"Properly understood, the dormant Commerce Clause nexus requirement simply carves out an amount of interstate activity that may cross a state's line and not be subject to the state's taxing power: that amount of interstate activity that would not continue if the taxpayer were made to bear the costs of tax compliance."[112] This standard—compelling someone to avoid doing interstate business with the state—is a very narrow standard which most legislation would meet.

Accordingly, it seems that most economic nexus legislation since *Wayfair* meets Due Process Clause and Commerce Clause requirements. However, legislation mandating that marketplace facilitators collect sales tax presents a different, harder constitutional question. I observe two main difficulties in the marketplace nexus legislation: *First*, the legislation examines the threshold according to the sales of the marketplace, rather than the sales of individual remote sellers. This is very different from *Wayfair* and it might lead to collecting the taxes from small remote sellers just because they sell through a popular marketplace that meets a state's thresholds. *Second*, in most marketplace legislation, the threshold is similar to the economic nexus threshold for individual remote sellers, which means that the collection burdens would apply for small marketplaces that do not really have a substantial presence in the state, but a cumulative presence from many small remote sellers.

My colleague, Professor Hayes, believes that, "Given the loosening of the personal nexus standard in *Wayfair*, these marketplace collection laws may pass constitutional muster, but they should not be guaranteed success given the compliance costs they will place on the marketplaces."[113] In my opinion, to strengthen the constitutionality of marketplace nexus legislation, these laws must define a different threshold for marketplace facilitators which is significantly higher than the individual remote seller threshold. In addition, it might be helpful to provide an exemption for vendors who have small out-of-state sales, as long as they notify the marketplace and provide it with reliable evidence that their out-of-state sales are below the exemption threshold ($30,000, for example).

Second, as to the policy considerations, economic efficiency is likely to influence the boundaries of compliance burdens and justify simplification measures.[114] The burdens of compliance are an important consideration that would influence the states' legal frameworks regarding both constitutional limits and economic policy considerations. It is not efficient to impose high burdens to collect small amounts of revenue. It is not wise, or fair, to unduly burden small remote sellers. For these reasons, states should (and most of them already have after *Wayfair*) define appropriate thresholds which subject remote sellers to collection burdens only when those thresholds are met.

112. Holderness, *supra* note 3, at 44.

113. *Id.* at 47. *See also* Adam B. Thimmesch, Darien Shanske, & David Gamage,Wayfair*: Marketplaces and Foreign Vendors*, STATE TAX NOTES, Oct. 8, 2018, at 18; Jaye Calhoun & William J. Kolarik II, *Implications of the Supreme Court's Historic Decision in* Wayfair, STATE TAX NOTES, July 9, 2018, at 125.

114. *See* Nat'l Conf. of State Legislatures, *Principles of State Implementation after* South Dakota v. Wayfair, NCSL (June 29, 2018), http://www.ncsl.org/documents/taskforces/SALT_SD_vs_ Wayfair.pdf [https://perma.cc/6YRW-XNFD].

South Dakota's threshold was annual sales of at least $100,000 or 200 transactions into the state. The South Dakota threshold is constitutional, but it may not be appropriate for another state in terms of policy. Obviously, the Supreme Court's confirmation of South Dakota's threshold does not mean that all states must follow exactly the same threshold, as several states did in a "copy/paste" process. Instead, each state should deeply consider their threshold, define that threshold in its new legislation, and minimize compliance burdens—something a few states have done recently. South Dakota's law minimized compliance burdens by requiring uniformity between state and local sales tax bases, minimizing the number of sales tax rates, and limiting exemptions and special rates. I do not think that these specific minimization measures in South Dakota's law are a mandatory check list. The important point is minimizing burdens, so each state should, and could, design its minimization measures while learning from South Dakota's measures.[115] Marketplace facilitator legislation, enacted in several states post *Wayfair* either as collecting duties or reporting duties, is part of these simplification measures because one central place accounts for the tax instead of several retailers. This regime also enhances tax collection effectively. However, it also adds complexity because it is an additional nexus requirement to the economic nexus. Nevertheless, considering its efficiency, marketplace nexus is recommended to collect sales taxes on a level playing field from all businesses.

In sum, enacting an economic nexus law and defining appropriate thresholds for a state is the first layer of designing appropriate legal frameworks to address the issue of collecting sales taxes post *Wayfair*. This layer should also include marketplace nexus legislation so long as it meets constitutional requirements. Since *Wayfair*, most states completed the first layer using that case's guidelines and recommendations. However, states should enact a second layer of norms to simplify the regime, reduce costs, enhance compliance, and advance multistate cooperation. Multistate cooperation in the Streamlined Sales and Use Tax Agreement and technologies of tax compliance are the foundations of the second layer. In designing the second layer, the European Union's value added tax system can, and should, be used as a valuable model.

C. Multistate Cooperation & Coordination

Multistate cooperation and coordination are required to minimize conflicts and costs. States have already made substantial progress in coordination and cooperation through the Streamlined Sales and Use Tax Agreement (SSUTA). This platform is a worthy starting point and it is appropriate to continue to use, and improve, for the future of online taxation post *Wayfair*.

1. The Streamlined Sales and Use Tax Agreement

The SSUTA is a remarkable reform of sales taxation that has created a mechanism for multistate coordination. The SSUTA was adopted in November,

115. *See* Joseph Bishop Henchman et al., *Post* Wayfair *Options for States*, TAX FOUNDATION (August 29, 2018), https://files.taxfoundation.org/20180904165435/Tax-Foundation-FF6091.pdf [https://perma.cc/4U78-93W6] /.

2002, and amended through December, 2018. It is a multi-state agreement that laid a groundwork for unification and simplification of sales and use tax laws among the states[116] The Governing Board of the Streamlined Sales Tax Organization consists of representatives from each of the member states and it governs the administration and operation of the SSUTA, regulating states' compliance with the agreement.[117] The rise of e-commerce contributed to the formation and development of the SSUTA. Technology and other factors influenced states' decisions to join the SSUTA.[118]

The historical development of the SSUTA supports the preference for multistate coordination over federal imposition to cope with the challenges of remote sales in an era of internet sales and digitalization.[119] The Streamlined Sales Tax Governing Board is following this strategy by not advocating for federal e-fairness legislation and letting the states implement *Wayfair* individually. At the same time, the Governing Board is monitoring Congress's activities related to remote sales tax collection, pushing back on any activities that might jeopardize implementation of *Wayfair*.[120]

The Agreement preserves the states' taxing authority, allowing them to decide on the taxation or exemption of any item or service. However, member states must adhere to the definitions of the Agreement and other provisions of unification and simplification.[121] The Agreement includes a detailed library of definitions that contributed substantially to the unification and simplification among member states' taxing systems. This library, together with administration practices, must be included in the tax framework of each member state. [122] In addition, the SSUTA unified state and local tax bases by requiring that states provide state-level administration, instead of several sub-state administrations.[123] The Agreement simplifies the tax rates by requiring that the same tax rates be applied across a state's tax jurisdictions.

The SSUTA unified sourcing rules, but the rules themselves are still complex. The source of a retail sale of a product from a physical location is the location of the business itself, while the source of remote sales is the location where

116. *See generally* STREAMLINED SALES AND USE TAX AGREEMENT, STREAMLINED SALES TAX GOVERNING BD., INC. (2018), https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6 [https://perma.cc/8VFL-ESEU].

117. *But see* Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement*, 40 U.C. DAVIS L. REV. 1381, 1388 (2007) (analyzing and criticizing the SSUTA institutional design for its flaws and suggesting conditioning the federal deductibility of corporate state and local taxes on a finding by a federal agency, which issues certificates that the state collecting the taxes in fact is substantially compliant with the SSUTA).

118. *See* Kathleen Hale & Ramona McNeal, *Technology, Politics, and E-Commerce: Internet Sales Tax and Interstate Cooperation*, 28 GOV'T INFO. Q. 262 (2011).

119. *See* John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605 (2005).

120. *Schedule of Meetings*, STREAMLINED SALES TAX GOVERNING BD., INC. 12 (Dec. 14, 2018), https://www.streamlinedsalestax.org/docs/default-source/governing-board-meetings/gb-meeting-book/gb-meeting-publication-2018-05-providence.pdf?sfvrsn=6496fb0d_6 [https://perma.cc/R8ND-E9AW].

121. STREAMLINED SALES AND USE AGREEMENT, *supra* note 116, § 103.

122. *Id.* §§ 327–328.

123. *Id.* §§ 301–302.

the purchaser receives the product. When neither applies, the source of the sale is the address of the purchaser. The address is determined based on the business's records or as reported during the sale. When none of the above applies, "then the location will be determined by the address from which tangible personal property was shipped, from which the digital good or the computer software delivered electronically was first available for transmission by the seller, or from which the service was provided."[124] However, in lieu of these provisions, a state "may elect to source the retail sale of tangible personal property and digital goods" to the location where the seller receives the order, as long as some conditions are met.[125]

The complexity of sourcing rules is further compounded by special rules that apply to sales of "advertising and promotional direct mail," and "telecommunication and related services."[126] It is also important to add that the Agreement provides explicit restrictions on state changes:

> A member state shall not include any product transferred electronically in its definition of "tangible personal property." "Ancillary services," "computer software," and "telecommunication services" shall be excluded from the term "products transferred electronically." For purposes of this section, the term "transferred electronically" means obtained by the purchaser by means other than tangible storage media.[127]

The SSUTA further requires each member state to make uniform its tax return and remittance procedures so that sellers submit only a single tax return or remittance to all tax jurisdictions within the state. The SSUTA regulates registration and enhances the use of technology to comply with the law through Certified Automated Systems (CAS) and Certified Service Providers (CSP).[128] The SSUTA distinguishes between four models of sellers,[129] and requires member states to make available online registration and submission of a Simplified Electronic Return (SER) and electronic remittance.[130]

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124. *Id.* § 310(A)(5).

125. *Id.* § 310.1.

126. *Id.* §§ 313–314.

127. *Id.* § 333.

128. The CAS is an approved software that determines the applicable state and local sales and use tax for a transaction based on databases of boundaries and rates; generates reports and returns and calculates tax amounts and remittance amounts; and maintains records of the transactions. *Id.* § 202. The CSP is a certified agent to perform the seller's sales and use tax functions. *Id.* § 203.

129. The four models are as follows: Model 1 Seller is a seller registered under the agreement that has selected a Certified Service Provider to perform his functions in collecting the tax; Model 2 Seller is a seller registered "under the [a]greement that has selected a CAS to perform part of its . . . functions"; Model 3 Seller is a registered seller

that has sales in at least five member states, has total annual sales revenue of at least five hundred million dollars, has a proprietary system that calculates the amount of tax due each jurisdiction, and has entered into a performance agreement with the member states that establishes a tax performance standard for the seller;

Model 4 seller is registered under the agreement but does not fall under any other model of sellers. *Id.* §§ 205–207.1.

130. *Id.* §§ 318(C)–(D), 319.

The SSUTA enhanced compliance with sales taxation, but states could, and should, develop the Agreement further to meet new tax challenges in an era of digital commerce post *Wayfair*. The SSUTA proved that multistate coordination and cooperation is the right way. This platform is the starting point in the long journey toward improving the system of collecting sales taxes from remote online businesses and transactions.

2. The Failure of Federal Legislation

The *Quill* Court called upon Congress to address the issue of collecting sales and use taxes from remote sellers, however, Congress failed in passing any legislation. The first bill introduced in Congress was the Streamlined Sales and Use Tax Act of 2003, which expressed the sense of Congress that the SSUTA provided enough simplification and uniformity to warrant federal authorization to states that are parties to the Agreement to impose collection duties on remote sellers. The tax empowerment according to this bill required the inclusion of small business exceptions and implementations of reasonable seller compensation. However, the bill never received consideration.[131] Similarly, the Marketplace Fairness Act (MFA)[132] and the Remote Transactions Parity Act (RTPA) [133] both failed. These proposals authorized states to impose collection duties on remote sellers not qualifying for a small remote seller exception, if the state is a member of the SSUTA or if the state adopted and implemented the minimum simplification requirements of the Acts.

The principles and guidelines of *Wayfair* acknowledged the necessity and appropriateness of simplification and burdens minimization, but *Wayfair* achieved these values in a flexible and cooperative manner rather than federal imposition. Both the MFA and RTPA failed to address issues of interstate cooperation and interstate conflicts. These issues are very important to address, but Congress is still in the mode of limiting the powers of the states, which is unjustified in this field. Simplification and burdens minimization are important but there are several better ways to achieve those goals. The purpose of the U.S. Constitution is not to limit the tax powers of the states but to limit undue burdens on interstate commerce.

Two other failed congressional attempts at legislation support the argument against federal imposition, which tries to limit the tax powers of the states instead of focusing on the most appropriate way to limit undue burdens on interstate commerce. The first one, the No Regulation Without Representation Act, prohibited a state from taxing remote sellers without a physical presence in the State.[134] The constitutionality

131. S. 1736, 108th Cong. (2003).

132. First introduced in the 112th Congress, S. 1832, 112th Cong. (2011), and in the next three Congresses. Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013) (passed by Senate); Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017). On March 13, 2018, a Senate resolution was introduced "expressing the sense of the Senate that the Marketplace Fairness Act of 2017 would harm the economy of the United States and place an undue burden on small businesses and multiple States across the United States." S. Res. 433, 115th Cong. (2018).

133. Introduced in the 114th and 115th Congress. Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015); Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017).

134. H.R. 5893, 114th Cong. (2016); H.R. 2887, 115th Cong. (2017).

of such federal legislation is questionable, but the main point is that Congress focuses on limiting state powers rather than supporting the states and minimizing burdens on interstate commerce. Legislation like the No Regulation Without Representation Act only serve to undermine the rights of states and their interests.[135] The second failed attempt was the Online Sales Simplification Act (OSSA), which altered the tax jurisdiction to the location of the retailer. This alteration contradicts the well-established and justified destination principle and unfairly privileges states with stronger retailers over states with more consumers.[136]

These proposals presented a clear anti-state mindset in Congress, which justifies the point against federal legislation and supports a framework of multistate coordination and cooperation. It is not surprising that the National Conference of State Legislatures wrote, on September 18, 2018, a letter opposing federal legislation to the leaders of the Senate and House of Representatives.[137]

One probable explanation for Congress's failure is that the competing group interests at Congress paralyzed it on this issue.[138] If true, this competition of interests at Congress presents risks to the states if lobbying powers succeed in their self-interest-based efforts. The risk is serious because the states are disadvantaged in the legislative process.[139] Furthermore, the damage from federal imposition that limits *Wayfair* implementation is tremendous. It risks the states' fiscal base, budget

135. The sharp response of the NCSL expresses the concerns clearly. *See NCSL Opposes Congressional Legislation to Stop Implementation of the Wayfair Decision*, NCSL (Sept. 14, 2018), https://www.mwe.com/~/media/files/thought-leadership/blogs/online-sales-simplification-act-of-2016.pdf?la=en [https://perma.cc/QE5G-DX5P].

136. *See* MULTISTATE TAX COMM'N, ANALYSIS OF ONLINE SIMPLIFICATION SALES SIMPLIFICATION ACT OF 2016, at 2, 9–10 (2016), http://www.mtc.gov/getattachment/2016-10-04-MTC-OSSA-Analysis.pdf.aspx [https://perma.cc/53XB-ZQXP].

137. *See* Letter from Nat'l Conf. of State Legislatures to Majority Leader Mitch McConnell, Minority Leader Chuck Schumer, Speaker Paul D. Ryan, and Minority Leader Nancy Pelosi (Sept. 18, 2018), http://www.ncsl.org/Portals/1/Documents/statefed/Wayfair_Decision091818.pdf [https://perma.cc/97VM-K8BM]. The NCSL wrote in this letter:

> Now, less than three months after the ruling, proposals have emerged in Congress that would hinder state implementation efforts, preempt state authority, and create more problems than solutions. A false narrative is being painted by opponents of the *Wayfair* ruling who have used fear mongering tactics to circulate rumors of chaos and uncertainty at the state level. This narrative could not be further from the truth. The states have heeded SCOTUS' guidance and have ensured that their newfound authority is implemented correctly and fairly.
>
> Some members of Congress who stalled action on this issue in the past, are now hastily pushing legislation that would limit or pre-empt state authority to collect remote sales taxes, thereby forestalling states efforts to use the revenues to reduce other states taxes or to reinvest in crucial state services like education or infrastructure. States have proven that they are working diligently and thoughtfully to create a fair and simplified collection system that will minimize compliance burdens and create sales tax parity for all sellers.
>
> As the states continue to ensure that remote sales tax implementation is done properly, we strongly urge you to respect these states' efforts and not let legislation advance that would seek to hinder or halt implementation of the *Wayfair* decision by imposing federal requirements on remote sales tax collection.

Id.

138. Galle, *supra* note 46, at 159.

139. Zelinsky, *supra* note 46 at 1178.

stability, and their ability to provide their residents with appropriate services and protection of rights.

In sum, Congress's failed efforts revealed the states' disadvantage in the legislative process, along with the risks of legislation that only limits the states' powers rather than minimizing undue burdens and ensuring free interstate commerce as required by the U.S. Constitution. In *Wayfair*, the Supreme Court ensured, and will likely continue to guarantee, the fulfillment of constitutional requirements. States should lead on these matters independently according to the guidelines of the Supreme Court, and they should further develop their multistate framework and tools.[140] In my view, Congress should, and could, limit itself to assisting in alleviating the collection of sales taxes from foreign online sellers.

III. IMPROVING THE SSUTA: MULTISTATE CLEARINGHOUSE & TECHNOLOGIES OF COMPLIANCE

States should add additional measures to the current system of tax collection to collect sales tax appropriately in the era of digitalization and e-commerce. *First*, in further developing the SSUTA multi-state framework, I suggest learning from the experiences of the European Union (E.U.). The E.U. has a long and rich experience in collecting another type of consumption tax, the value added tax (VAT), from remote online sales in a multi-country setting. States can learn and implement the E.U.'s one-stop shop scheme, which enables VAT compliance in one jurisdiction for all E.U. member states. I suggest developing the scheme further by creating one clearinghouse for the multiple jurisdictions of sales taxation in the United States. *Second*, states should enhance developing technologies of compliance. Technology could, and should, play an important role in the new world of online taxation. New technologies are likely to reduce costs of compliance and enhance automation of tax collection. Further, the industry has markets and incentives to develop such technologies. States should facilitate this development by granting access to data systems and encouraging cooperation through other means.

A. Insights from the European VAT

1. Multistate Framework of Harmonization, Coordination, and Cooperation

The E.U.'s VAT system is one of the leading models of VAT in the world.[141] The E.U. VAT directive aims to harmonize a common system of VAT among E.U. member states that "does not distort the conditions of competition or hinder the free movement of goods and services."[142] The directive establishes one

140. *See* Stop Taxing Our Potential Act of 2019, S. 128, 116th Cong. § 1 (2019); Protecting Businesses from Burdensome Compliance Cost Act of 2019, H.R. 379, 116th Cong. § 1 (2019); Online Sales Simplicity and Small Business Relief Act of 2019, H.R.1933, 116th Cong. § 1 (2019); Digital Goods and Services Tax Fairness Act of 2019, S. 765, 116th Cong. §1(2019).

141. *See* ALAN SCHENK ET AL., VALUE ADDED TAX: A COMPARATIVE APPROACH 47–48 (2d ed. 2015) ("The EU's credit-invoice VAT is the most prevalent form of VAT in use today.").

142. *See* Council Directive 2006/112 of 28 November 2006 on the Common System of Value Added Tax, 2006 O.J. (L 347) 1, 1 (EC).

common system of VAT, sets the main framework and principles of VAT, harmonizes the base, and allocates the VAT jurisdiction through detailed "place of supply" rules based on the destination principle.[143] The E.U.'s VAT base includes the "supply of goods," which is defined as the transfer of tangible property, and the "supply of services," which is defined residually as "any transaction that does not constitute a supply of goods."[144] A supply of services includes, among others, the assignment of intangible property, the provision of "electronically supplied services," and the supply of "telecommunications services."[145]

Beyond the harmonization of the base, each member state sets its rates and exemptions in its national VAT law while ensuring neutrality between intra-community trade, and trade within the member state, by the application of similar rates to both.[146] According to Article 96 of the directive: "Member States shall apply a standard rate of VAT, which shall be fixed by each Member State as a percentage of the taxable amount and which shall be the same for the supply of goods and for the supply of services."[147]

The VAT directive relies on registration of businesses as the main instrument of collection. Once registered, the business receives a VAT identification number according to a standardized system that identifies the business's member state.[148] The business is obliged to issue invoices and collect the VAT on its transactions. The directive enhances electronic invoices and requires member states to accept e-invoices as long as the system guarantees authentication.[149] Further , the directive provides a special scheme that enables suppliers outside of the E.U. to register with one Member State of Identification (MSI), which in turn allocates an individual VAT identification number to the supplier.[150] The supplier would then submit to the MSI, by electronic means, a VAT return for each calendar quarter[151] regarding all its transactions with customers in all member states, and pay the VAT to a bank account designated by the MSI.[152]

The level and intensity of harmonization in the E.U. VAT directive is significantly higher than the SSUTA. Obviously, the political and fiscal unions in the E.U. and the United States are very different. The E.U. VAT directive is a supranational law of the E.U. that binds each member state. The SSUTA, on the other hand, is a multilateral agreement between the states to coordinate and cooperate at the levels agreed upon. The directive sets a common system of VAT with a common base of taxation, while the SSUTA does not set any common systems. Instead, the SSUTA respects existing separate systems of each state and sets agreed norms to reduce conflicts between those systems, such as the library of definitions. Under the SSUTA, each state would retain the choice of whether an item is taxable and at what

143. *See id.* tit. V.
144. *Id.* arts. 14, 24.
145. *Id.* arts. 25, 56(i), (k).
146. *See id.* art. 94.
147. *Id.* art. 96.
148. *Id.* arts. 214–215.
149. *Id.* art. 233.
150. *Id.* art. 362.
151. *Id.* art. 364.
152. *Id.* arts. 365, 367.

rate. The directive, in contrast, sets VAT exemptions, rules regarding the place of taxation, and other rules that draw boundaries and allocate the tax pie. Under the SSUTA, each state sets its own exemptions, and rules governing the place of taxation are coordinated to reduce conflicts as much as possible. There are fundamental differences between the E.U. directive and the SSUTA, but there are similarities in the general direction of harmonization to reduce cross-jurisdictional conflicts.

Given the E.U's lengthy history of regulating cross-jurisdictional taxes, states can gain insights from the E.U. VAT directive: In the era of online sales, states should intensify the harmonization processes of their sales tax. With the increase of cross-jurisdictional online transactions, it is essential and wise to reduce costs of compliance through harmonization. The SSUTA contributed substantially in this regard, and states should build upon it in enhancing a multi-state framework of harmonization, coordination, and cooperation. So far, 23 states are full members of the SSUTA.[153] More states should simplify and harmonize their sales tax systems to comply with the requirements of the SSUTA. The member states should then update the SSUTA itself to intensify harmonization to increase coordination and cooperation.

I suggest, for example, the following amendments: *First*, member states should agree to a common core base and common exemptions to reduce the differences in bases between states. The SSUTA harmonized the base within the state; however, each state is free to set its own base and exemptions. The base usually distinguishes between several categories of products and has numerous exemptions. As a result, base gaps exist between the states and even within the state. As to the rates, it is true that there is only one rate for each tax jurisdiction, but because there are so many sub-jurisdictions within each state, the number of rates and jurisdictions is extremely high. The states and their local jurisdictions should work together to reduce the variety of rates within their state to a minimum.

For example, general clothing is taxable in Georgia while it is exempted in New Jersey. Newspapers are taxable in Georgia but exempted in New Jersey.[154] Kentucky taxes clothing, newspapers and even medicines while Vermont exempts all these products.[155] These and many other differences in the base between the SSUTA's member states complicate the system, so states should reduce the gaps to a minimum in the process of harmonizing their base. Similarly, the tax rates within a state differ. For instance, there are 159 sub-tax jurisdictions and rates within Georgia itself.[156] This complexity of rates increases compliance burdens, so each of the SSUTA's member states should work to reduce its sub-tax jurisdictions and the complexity of their rates.

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153. *State Detail,* STREAMLINED SALES TAX GOVERNING BD., https://www.streamlinedsalestax.org/Shared-Pages/State-Detail [https://perma.cc/XG6Z-S7C5].

154. *New Jersey: Sales Tax Handbook*, https://www.salestaxhandbook.com/new-jersey/sales-tax-taxability#taxability [https://perma.cc/9PCB-KHLR].

155. *Vermont: Sales Tax Handbook*, https://www.salestaxhandbook.com/vermont/sales-tax-taxability#taxability [https://perma.cc/W5UJ-LXUF].

156. Dep't of Revenue, *Georgia Sales and Use Tax Rate Chart*, SALES TAX RATES – GEN., https://dor.georgia.gov/document/document/january-2020-rate-chart/download [https://perma.cc/PY6M-25F5].

Second, member states should agree on, and introduce new, definitions that relate to digital products and transactions. These definitions would clarify the scope and boundaries of the tax base in the era of digital economy. The basic principle should continue to be that the substance of the product matters, rather than its form or method of delivery.

For example, books could be purchased in a bookstore in hardcopy format, downloaded online in electronic format, or used online in the cloud. Similarly, software could be purchased in the store on physical storage devices, downloaded online, or used in the cloud. According to the principle of substance rather than form, the same tax rule should apply to books, e-books, and cloud-books despite the difference in format. Similarly, the same tax should apply to software whether it is stored on physical devices, downloaded, or used in the cloud. However, currently these issues are not fully settled or harmonized in an efficient manner. Some states share a standard definition, some states use their own definition, and some states do not use any definition at all. The current state of sales taxation on digital products is very complex between member states, and generally.[157] North Carolina, for instance, exempts "Custom Software" but taxes "Canned Software" and certain digital products.[158] In North Carolina, if any of the following items are delivered or accessed electronically, and not considered tangible personal property, it is subject to taxation: "An audio work; An audiovisual work; A book, a magazine, a newspaper, a newsletter, a report, or another publication; A photograph or a greeting card."[159] Similar taxability exists in Washington but the definitions of digital products differs. Washington provides a six-part structural approach for defining digital products and their tax liability.[160] There is no doubt that the rules and structures are complex and should be harmonized and simplified.

The SSUTA started to handle the issue. According to the Agreement, member states shall not include "specified digital products" within the definition of tangible personal property. In its detailed definitions of "specified digital products," the Agreement includes digital audio-visual works, digital audio works, and digital books. The Agreement provides that digital products "delivered electronically," include, but are not limited to, software, music, video, reading materials, or ring tones. It adds that a member state may exempt "prewritten computer software" that is "delivered electronically" or by "load and leave." As a result, member states have

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157. *See* JOYCE BEEBE, THE CURRENT STATE OF SALES TAX ON DIGITAL PRODUCTS 3 (2019), https://www.bakerinstitute.org/media/files/files/ff22e639/bi-report-080719-cpf-salestaxdigital.pdf [https://perma.cc/A5WZ-W8FJ].

158. *North Carolina: Sales Tax Handbook*, https://www.salestaxhandbook.com/north-carolina/sales-tax-taxability#taxability [https://perma.cc/HW43-EW8W].

159. N.C. Dep't of Revenue, *Certain Digital Property*, SALES & USE TAX (Jan. 8, 2020), https://www.ncdor.gov/taxes-forms/sales-and-use-tax/certain-digital-property [https://perma.cc/ZH5J-9EJM].

160. WASH. ADMIN. CODE § 458-20-15503 (2013) ("Part 1: Are the products or services transferred electronically? If yes, go to Part 2. Part 2: Does the product or service meet the general definitions of digital product or digital code? If yes, go to Part 3. Part 3: Are there applicable exclusions from the general definitions of the digital product or digital code? If no, go to Part 4. Part 4: Are the sales of the digital product or digital code sourced to Washington? If yes, go to Part 5. Part 5: Are there applicable retail sales or use tax exemptions for the purchase or use of the digital product or digital code? If no, the transaction is likely taxable in Washington. Part 6: Miscellaneous provisions.").

legislated specific provisions for digital products, electronically delivered digital products, and software. Consequently, states vary in their definitions and scope of taxation. To reduce complexity, the SSUTA should include a harmonized definition of digital products and electronically delivered digital products as a tax base. States could then decide whether to impose the tax on this digital base or not, but they could not complicate the digital base through a variety of definitions and/or exemptions.

2. *Destination Jurisdiction, Mini One-Stop Shop, and Clearinghouse*

As of January 1st, 2015, the E.U. VAT directive provides that electronically supplied services and all telecommunications, radio, and television broadcasting supplied to a non-taxable person (B2C) are to be taxed in the member state in which the customer is established, has his permanent address, or usually resides, regardless of where the taxable person supplying those services is established.[161] This destination principle is well-established worldwide as the leading jurisdictional principle in consumption tax.[162] The adoption and implementation of the principle on electronically supplied services and telecommunication services contributed substantially to the collection of the E.U.'s VAT on remote online transactions.[163]

States should follow the E.U.'s model when imposing sales taxes on online transactions by providing clear rules for tax jurisdiction based on the destination principle, which taxes these transactions at the final destination of consumption. This is a very important substantive point that states should consider when updating the SSUTA and legislating sales tax collection from online sales post *Wayfair*. States should strengthen the destination rule according to section 310 of the SSUTA and limit, or eliminate if possible, the origin sourcing rule in section 310.1. An amendment to the SSUTA could elaborate and develop rules to determine the tax jurisdiction for online sales in an accurate and efficient manner. The current sourcing rules are costly because they are complex and rely on several principles. The SSUTA could instead introduce rules that are more efficient by looking toward the E.U.'s experience in adopting the destination principle as its only sourcing rule. In applying the destination principle, the zip code of the credit card used in the transaction is an accurate and efficient proxy of the tax jurisdiction in most cases, and, therefore, should be used as the first criteria. As a second criterion, I suggest relying on the delivery address, which is also a good proxy of destination.

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161. Council Directive 2006/112 of 28 November 2006 on the Common System of Value Added Tax, *supra* note 142, at art. 56.

162. *See* ALAN SCHENK, VICTOR THURONYI & WEI CUI, VALUE ADDED TAX: A COMPARATIVE APPROACH 196 (2d. 2015); EUR. UNIVS. COOPERATING ON TAXES, VALUE ADDED TAX AND THE DIGITAL ECONOMY: THE 2015 EU RULES AND BROADER ISSUES 73 (Marie Lamensch, Edoardo Traversa, Servaas van Thiel eds., 2015). According to the destination principle, VAT is imposed at the country of the consumers where consumption is assumed to occur.

163. *See* SCHENK ET AL., *supra* note 162; ORG. FOR ECON. COOP. AND DEV., *International VAT/GST Guidelines* 40 (2017), https://read.oecd-ilibrary.org/taxation/international-vat-gst-guidelines_9789264271401-en#page1 [https://perma.cc/WGQ4-JN2G]; Walter Hellerstein, *Consumption Taxation of Cross-Border Trade in Services in an Age of Globalization*, *in* GLOBALIZATION AND ITS TAX DISCONTENTS: TAX POLICY AND INTERNATIONAL INVESTMENTS 305 (Arthur J. Cockfield ed., 2010); Marie Lamensch, *Tax Assessment in a Digital Context: A Critical Analysis of the 2015 EU Rules*, *in* VALUE ADDED TAX AND THE DIGITAL ECONOMY, *supra* note 162, at 39.

The E.U. Mini One-Stop Shop (MOSS) regime is an optional simplification measure to enhance compliance with the VAT. It allows taxable persons supplying B2C services to non-taxable persons in member states in which the supplier does not have an establishment to account for the VAT due on those supplies via a web portal in the member state in which the supplier is identified.[164] The VAT return is sent to the MSI and details the transactions in all member states of consumption, along with the VAT due to each. The member state of identification then remits the VAT to all member states of consumption according to the E.U.'s place-of-supply rules and rates.[165]

According to the European Commission's assessment report, the MOSS scheme contributed substantially to enhancing compliance with the E.U.'s VAT:

> The general feedback from business is that the MOSS was a necessary tool to mitigate the increased administrative burden on businesses following the new place of supply rules introduced in 2015. This is confirmed by the measurements of the administrative burden. The average business active in B2C cross-border TBE-services [telecom, broadcasting and electronically supplied services] . . . incurs a substantially lower administrative burden.[166]

The SSUTA moved some steps in this direction when it provided a Streamlined Sales Tax Registration System (SSTRS).[167] However, the SSTRS only

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164. *See generally* DIRECTORATE-GENERAL FOR TAX'N & CUSTOMS UNION (EUR. COMM'N), GUIDE TO THE VAT MINI ONE STOP SHOP (2013), https://ec.europa.eu/taxation_customs/business/vat/telecommunications-broadcasting-electronic-services/sites/mossportal/files/mini-one-stop-shop-guidelines_en_1.pdf [https://perma.cc/B9PC-4N23].

165. *See* Council Implementing Regulation 1042/2013 of 7 October 2013 Amending Implementing Regulation (EU) No 282/2011 as Regards the Place of Supply of Services, 2013 O.J. (L 284) 1; Commission Implementing Regulation 815/2012 of 13 September 2012, Laying Down Detailed Rules for the Application of Council Regulation 904/2010, 2012 O.J. (L 249) 3, art. 5; Council Regulation 904/2010 of 7 October 2010 on Administrative Cooperation and Combating Fraud in the Field of Value Added Tax, 2010 O.J. (L 268) 1, art. 41. However, in cases where suppliers have a business establishment in a Member State, the MOSS scheme is unavailable for supplies made in that Member State. These suppliers must account for VAT in that Member State using the local VAT registration system. *See* Council Regulation (EU) No 967/2012 of 9 October 2012 amending Implementing Regulation (EU) No 282/2011 as Regards the Special Schemes for Non-Established Taxable Persons Supplying Telecommunications Services, Broadcasting Services or Electronic Services to Non-Taxable Persons, 2012 O.J. (L 290) 1.

166. European Comm'n, VAT Aspects of Cross-Border E-Commerce—Options for Modernisation; Final Report—Lot 3: Assessment of the Implementation of the 2015 Place of Supply Rules and the Mini-One Stop Shop 103 (2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/vat_aspects_cross-border_e-commerce_final_report_lot3.pdf [https://perma.cc/2BJD-9RQX][hereinafter *VAT Aspects of Cross Border E-Commerce*]; Dóra Krinis, VAT Challenges of the Digital Economy-An EU Perspective 5 (Apr. 2016) (unpublished dissertation, Univ. do Minho), https://repositorium.sdum.uminho.pt/bitstream/1822/42303/1/D%C3%B3ra%20Krinis.pdf [https://perma.cc/N6V6-538E]. However, the EU has identified the following as issues to be addressed in the future: "(1) the lack of a threshold for micro-enterprises, (2) the lack of awareness of the changes in some [Member States], (3) difficulties in identifying customers for some businesses (4) record keeping/B2C invoicing requirements, and (5) home country audits." *Id.* at 66; *see also Commission Staff Working Document Impact Assessment Accompanying the Document Proposals for a Council Directive, a Council Implementing Regulation and a Council Regulation on Modernising VAT for Cross-border B2C E-Commerce*, COM (2016).

167. Streamlined Member States, *Streamlined Sales Tax Registration System* https://www.sstregister.org/ [https://perma.cc/64HG-WNS8].

allowed registering in all member states by completing a single application online. It is just a single application, but the SSTRS requires multiple registrations. There are also multiple filings, albeit with the possibility to use a Certified Service Provider (CSP) and a Certified Automated System (CAS).[168] But, with the fast rise of online sales, a single registration is essential and would contribute to reducing costs of compliance, as the E.U. learned from using the MOSS. Accordingly, the states should consider moving the SSTRS toward a one-stop shop system for compliance with all states' sales tax collection duties. Furthermore, in my opinion, in the U.S. context of multistate sales taxation on online transactions, the development of a multistate clearinghouse would contribute substantially to tax collection and cost reduction. In the United States, interstate commerce is very intensive, so a clearinghouse would be essential to reduce compliance and administration costs.

To that end, states should develop their registration systems similar to the MOSS, so that registration in one state is enough to account for sales tax in all states, instead of registering in multiple states through one centralized system of registration. The state of registration could collect the taxes of all states based on the destination principle and then remit those taxes to the destination states. I add that states should develop their remittance systems as well. The intensive commerce between the states likewise justifies the establishment of a clearinghouse to run the system of remittance between the states. In a clearinghouse, states' accounts would offset each other so that states would remit only final balances at the end of each month, or maybe quarter, to reduce the costs of the system.

B. The Role of Technology

Technology is playing an important role in enhancing tax compliance and reducing costs of compliance in the era of digitalization. Following *Wayfair*, the role of technology probably will, and should, rise.

Technology is already used intensively and efficiently in the Streamlined Sales Tax Registration System (SSTRS) to enable one online application for all selected States. Similarly, the Simplified Electronic Return (SER) uses technology to simplify returns and reduce costs through electronic filings. According to the SSUTA, each state must adopt web services as the standard transmission process. An advanced technology is already used in the Certified Automated System (CAS), which automates the calculation and collection of sales tax. This system uses boundary and tax rate databases, according to standardized formats, in order to calculate sales tax liability according to the destination principle and rules. So far,

168. A Certified Service Provider (CSP) is an agent certified under the Streamlined Sales and Use Tax Agreement to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases. A Certified Automated System (CAS) is software certified under the Streamlined Sales and Use Tax Agreement that is designed for a seller who wants to use certified tax calculation software but keep the responsibility for filing returns and remitting the tax in-house. The software system of a CAS interfaces with the seller's accounting system to: (1) identify which products and services are taxable, (2) apply the appropriate tax rate, (3) maintain a record of the transaction, and (4) determine the amount of tax to report and pay to the Streamlined member states. A seller who uses a CAS is responsible for filing the tax returns, paying the taxes dues to each of the Streamlined states, and resolving any notices or audits by any of the Streamlined member states.

the Streamlined Sales Tax Governing Board has approved five Certified Service Providers (CSP) to provide the CAS.[169]

In discussing technology and the Streamlined Sales Tax Project (SSTP), William Fox and others wrote the following:

> Technology will play a vital role in making the SSTP a success. . . . [A] factor that makes the long term SSTP success a possibility is the ability to reduce those agreements into a technological solution that is accessible to both large and small retailers and allows them the ability to cost-effectively apply agreed-upon rules to hundreds of thousands of unique products. . . . Presumably technology makes it easier for firms to exploit states' economies remotely but also easier to administer and comply with the tax.[170]

Today, it is clear that the use of technology in the SSTP reduced costs and enhanced compliance. However, I argue that the current situation does not achieve its full potential in using technologies and their benefits. The SSTP utilizes technology, but the E.U. VAT directive uses technology to a far greater extent and

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169. These providers are: Accurate Tax, Avalara, Intuit, Sovos, and Tax Cloud. *Certified Service Provider's List*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/certified-service-providers/certified-service-providers-list [https://perma.cc/526Q-HRQD]. The Streamlined Sales Tax Governing Board describes each CSP as follows: *Accurate Tax*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/accurate-tax [https://perma.cc/R5J7-EF65] ("The AccurateTax.com TaxTools suite brings SSTP-certified rules and transactions to the online point of sale for retailers of all market sizes and makes it easy for you, as a retailer to ensure you are calculating, collecting, reporting and remitting the most accurate tax information possible."); *Avalara*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/avalara [https://perma.cc/ARR8-4GPT] ("Avalara's compliance services are designed to work seamlessly inside your ecommerce, ERP, accounting, POS, or other financial system, delivering sales and use tax calculation in real time, cross-checking thousands of rates, rules, and jurisdictional boundaries, for more accurate results than manual tax compliance. Avalara's solutions also handle other core tasks of the tax compliance process, from state by state registration to preparing and filing returns, remitting taxes, and maintaining tax records."); *Exactor (a subsidiary of Intuit)*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/exactor [https://perma.cc/G7N5-2DMC] ("Intuit's service gives business owners the ability to automate their sales tax efforts with an ease of use unparalleled in the industry. Intuit provides an end-to-end solution inside of QuickBooks Online that seamlessly and automatically bridges all elements of a transaction, starting from the point of transaction, such as the shopping cart, through the final e-filing and remittance of taxes owing."); *Sovos*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/sovos [https://perma.cc/5YRP-4D7R] ("The Sovos Intelligent Compliance Cloud combines world-class regulatory analysis with its secure, scalable and reliable S1 cloud software platform to create a global solution for tax determination, e-invoicing compliance and tax reporting."); *and TaxCloud*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/taxcloud [https://perma.cc/DV9E-EY5K] ("TaxCloud is a free, easy-to-use sales tax management service. It handles every aspect of sales tax, from calculation to collection to filing - and it's completely free. TaxCloud can be easily integrated into most accounting, order management, and shopping cart systems."). Taxcloud is a state paid option into 24 member states of the SSUTA. *TaxCloud*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/csp-details/taxcloud [https://perma.cc/5YQS-K2RN].

170. William F. Fox, LeAnn Luna & Matthew N. Murray, *The SSTP and Technology*, 61 NAT'L TAX J. 823, 835-37 (2008).

has a longer history of doing so. Hence, the SSTP could, and should, learn from this and other experiences.

I suggest, as detailed in Part III.A.2, that states establish a one-stop shop for registration and compliance in the state of registration through which compliance will occur for all states, and to establish a clearinghouse for offsetting the balances and accounts between the states. In this system, I suggest registering, filing, and clearing through advanced web-based technologies and blockchain-based technologies. This process of automation will likely progress, and should progress, in the post-*Wayfair* era, which in turn would also advance interstate cooperation.[171]

In developing post-*Wayfair* sales tax technologies, states and private entrepreneurs could, and should, learn from the long experience of the E.U. and the Organization for Economic Cooperation and Development (OECD).[172] The private sector in the E.U., with cooperation from the member states, developed, and continues to develop, technologies of tax compliance to meet the challenges of digitalization and e-commerce.[173] The MOSS system relies on and uses technology substantially. Electronic VAT payments, filing, and recently invoicing, are becoming standard.[174] E.U. countries and the European Commission decided to introduce a European standard for electronic invoicing in response to the many e-invoice formats used across the E.U. While all contracting authorities will have to accept electronic invoices that comply with the European norm, country-specific rules will remain valid. E.U. countries must transpose the E-invoicing Directive 2014/55/EU into their national laws and comply with the European standard on electronic invoicing. Public authorities across the E.U. should now be able to process e-invoices respecting the European standard.[175]

E.U. member states are progressing in implementing electronic invoicing and filing. For example, Spain's electronic invoicing system, the Immediate Submission of Information, enables taxpayers to electronically transmit billing records from VAT Books by using web services based on exchanging Extensible Markup Language (XML) messages or, if applicable, by filling out a web form.[176] In

171. *See* Kathleen Hale & Ramona McNeal, *Technology, Politics, and e-commerce: Internet Sales Tax and Interstate Cooperation*, 28 GOV'T INFO. Q. 262 (2011).

172. *See* European Comm'n, Tax and Customs Union, *VAT Reports Published*, https://ec.europa.eu/taxation_customs/business/vat/vat-reports-published_en [https://perma.cc/GS4G-TUNS]; ORG. FOR ECON. COOP. DEV., TECHNOLOGY TOOLS TO TACKLE TAX EVASION AND TAX FRAUD, at 6–7 (2017).

173. *See* Nicholas Hallam, *The Rise of VAT Technology*, BLOOMBERG TAX (Mar. 21, 2019), https://news.bloombergtax.com/daily-tax-report-international/insight-the-rise-of-vat-technology [https://perma.cc/5CYB-TTJG].

174. *See* PWC, *VAT Compliance: The Impact on Business and How Technology Can Help* (2017), https://www.pwc.com/gx/en/tax/pdf/pwc-vat-compliance-paying-taxes-2017.pdf [https://perma.cc/XHK7-DF2C] [hereinafter *VAT Compliance*].

175. European Comm'n, Int'l Mkt., Indus., Entrepreneurship, and SMEs, *eInvoicing*, https://ec.europa.eu/growth/single-market/public-procurement/digital/einvoicing_en [https://perma.cc/S92M-XB2E].

176. *New VAT Management System Based on Immediate Supply of Information*, AGENCIA TRIBUTARIA, https://www.agenciatributaria.es/AEAT.internet/en_gb/Inicio/Ayuda/Modelos__Procedimientos_y_Servicios/Ayuda_P_G417____IVA__Llevanza_de_libros_registro__SII_/Informacion_general/Nuevo_sistema_de_gestion_del_IVA_basado_en_el_Suministro_Inmediato_de_Informacion.shtml

Portugal, certified invoice software enables companies to transfer invoice data to the Portuguese tax authorities online on a monthly basis in a standardized format.[177] As of April 2019, the U.K. Making Tax Digital for VAT requires each VAT registered business with over £85,000 to keep digital VAT records and submit VAT returns digitally, which led the industry to develop software and technology for this purpose.[178] Poland replaced the current VAT return with a "standard audit file for tax" (SAF-T) format pursuant to recommendations from the OECD.[179] This would be an expansion of the SAF-T system already used in Poland since 2016. A growing number of tax authorities worldwide have implemented these types of systems and have seen positive results.[180]

Recently, real-time technologies of tax compliance have seen greater usage. For example, Hungary introduced real-time electronic reporting of domestic

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[https://perma.cc/J959-TUBB]. In other words, this new system essentially requires taxpayers to keep their VAT Books online, rather than internally, and through a standardized method. *See id.* Taxpayers that use this system are relieved of filing certain VAT returns and are likely to experience less information requests from the tax agency. *See id.*

177. Marta Andrade Póvoa, *Collaboration with Tax Service Providers in the E-Invoice System*, IOTA PAPERS AT 3 (Jan. 2018), https://www.iota-tax.org/sites/default/files/documents/iota-papers-_collaboration_with_the_tsp_portugal_final_updated.pdf [https://perma.cc/8NAU-R5VH].

178. *Overview of Making Tax* Digital, HM REVENUE & CUSTOMS, https://www.gov.uk/government/publications/making-tax-digital/overview-of-making-tax-digital [https://perma.cc/28ZA-SGVW].

179. *See* OECD, *Guidance Note: Guidance for the Standard Audit File—Tax*, GUIDANCE NOTE-GUIDANCE FOR DEVELOPERS OF BUSINESS AND ACCOUNTING SOFTWARE CONCERNING TAX AUDIT REQUIREMENTS (May 2005), http://www.oecd.org/tax/administration/34910263.pdf [https://perma.cc/LCZ3-87RM].

180. *See* European Comm'n, Directorate-General for Taxation and Customs Union*, Study on the evaluation of invoicing rules of directive 2006/112/EC* (Jan. 2019), https://ec.europa.eu/taxation_customs/sites/taxation/files/report_evaluation_invoicing_rules_vol1_en.pf [https://perma.cc/J9BF-YPSC]; *The Mandate Is Growing for E-Invoicing Adoption*, KPMG INSIGHTS (2017), https://assets.kpmg.com/content/dam/kpmg/us/pdf/2017/10/mandate-for-e-invoicing-adoption-kpmg.pdf [https://perma.cc/6LWK-B7GZ] (noting that "[c]urrently more than 55 countries have adopted, or are considering, e-invoicing mandates"). *See also*, *e.g.*, Karen Lynch, *Brave New World,* TAX INSIGHTS FOR BUS. LEADERS, Feb. 2018, at 44, 45 (illustrating Brazil is one of the earliest adopters of an electronic invoice system); Leandra Lederman & Joseph C. Dugan, *Information Matters in Tax Enforcement* 145 B.Y.U. L.R. 26–29 (2020) (describing numerous countries that have implemented these types of systems or that have taken steps in that direction); *Brazil: Corporate—Tax Administration*, PWC: WORLDWIDE TAX SUMMARIES, http://taxsummaries.pwc.com/ID/Brazil-Corporate-Tax-administration [https://perma.cc/LM4R-RXZL] (noting that Brazil's system, known as the Public System of Digital Accounting, "unifies the activities of reception, validation, storage and legalization of records and documents that are part of the commercial and tax bookkeeping of companies, through a single computerized flow of data."); Eva Ghirmai, Sarah Logan & Sally Murray, *The Incidence and Impact of Electronic Billing Machines for VAT in Rwanda*, INT'L GROWTH CENTRE: BLOG (Apr. 15, 2016), https://www.theigc.org/blog/the-incidence-and-impact-of-electronic-billing-machines-for-vat-in-rwanda/ [https://perma.cc/2JK2-9KAS] (describing Rwanda's implementation of an Electronic Billing Machine that provides customers with certified receipts and automatically transmits transaction data to the tax authorities on a real-time basis); *Mexican E-Invoicing: CFDI*, EDICOM, https://www.edicomgroup.com/en_US/solutions/einvoicing/LATAM_einvoicing/mexican_einvoicing.html [https://perma.cc/PT8U-7MH4] (describing Mexico's "Comprobantes Fiscal Digital por Internet" (CFDI) system, which requires businesses to issue electronic invoices in a standardized format with appropriate certification and authorized digital signatures); *New VAT Management System*, *supra* note 178 (describing Spain's recently implemented online invoicing system).

Business to Business (B2B) sales invoice data as of July 1st, 2018.[181] The Unified VAT Agreement for The Cooperation Council for the Arab States of the Gulf (the GCC VAT Agreement), which became effective in January, 2018, established a multijurisdictional single-market regime, in which each member state imposes the VAT in its domestic tax law according to the GCC VAT Agreement's framework.[182] This VAT system is similar to the E.U. VAT directive in many regards, but it also introduced a mechanism based on blockchain technology for real-time and electronic reporting of transaction-level tax data, and a real-time exchange of this data among GCC tax authorities that does not yet exist in the E.U. VAT system.[183] In particular, Article 71 of the GCC VAT Agreement requires each GCC member state to create an electronic services system that ultimately is responsible for digitally collecting transaction-level invoice data from both buyers and sellers at the time of the transaction. The system immediately transmits that information to a central electronic tax information center that compiles, confirms, and exchanges the transaction-level data collected from the separate GCC member states' databases.[184] The GCC VAT Agreement also goes further by requiring the buyer and seller's documentation to match digitally before it issues a confirmation number to the parties to the transaction.[185] This is an improvement over the E.U. system in that the GCC requires real-time electronic invoicing, provides secure and accurately matched transaction-level data, and allows member states immediate, on-demand access to this intra-community transaction-level data.[186]

I recommend learning from the E.U.'s experience and the OECD's recommendations on tax technologies by adopting and adapting these aforementioned technologies to collect sales taxes efficiently, especially in the post-*Wayfair* era. I think that the focus should be on real-time technologies that collect data and sales taxes on transactions. Cloud computing and blockchain technologies have a great potential of improving states' existing systems. Once a business is registered in one state of registration, that business can account for sales taxes in all states with his state of registration through a cloud-based system which registers each transaction, determines tax jurisdiction, and calculates the taxes due automatically. Data recording technology can minimize sales suppression by immediately recording

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181. *Hungary Real-Time Invoicing Reports*, AVALARA: VATLIVE, https://www.avalara.com/vatlive/en/country-guides/europe/hungary/hungary-real-time-invoice-reporting.html [https://perma.cc/LR3R-QGL9].

182. *See* Cooperation Council for the Arab Gulf States, *The Unified VAT Agreement for The Cooperation Council for the Arab States of the Gulf*, art. 2, DELOITTE (Jan. 1, 2018), https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/tax/me_Deloitte-english-GCC-VAT-Treaty-translation-May-7.pdf [https://perma.cc/9NGL-ZWZH] [hereinafter *Unified VAT Agreement.*] Although the GCC VAT Agreement appears to contemplate the use of blockchain technology, the specific elements depend on GCC member state laws, none of which has yet been released. *See id. See also* Richard Ainsworth & Musaad Alwohaibi, *The First Real-Time Blockchain VAT—GCC Solves MTIC Fraud*, 86 TAX NOTES INT'L 695, 697 (May 22, 2017).

183. *See* Ainsworth & Alwohaibi, *supra* note 182, at 695; *Unified VAT Agreement*, *supra* note 182.

184. *See* Ainsworth & Alwohaibi, *supra* note 182, at 703; *Unified VAT Agreement, supra* note 182, at art. 71.

185. *See* Ainsworth & Alwohaibi, *supra* note182, at 704; *Unified VAT Agreement*, *supra* note 184.

186. *See* Ainsworth & Alwohaibi, *supra* note 182, at 704, 707.

transactions.[187] Similarly, electronic invoicing and automatic data reporting to the relevant tax authority can help reduce tax avoidance and evasion. Blockchain technologies could, and should, be used to ensure authentication of transactions and authentic transaction records. Calculations at the clearinghouse could then be done on a real-time bases daily, and the states could agree on several methods of tax transfers.

Moreover, with this huge body of transaction data, states could, and should, develop technologies of big data and machine learning to improve their collection of sales taxes, their structure of sales taxation, and their budget planning systems. For example, the data, when analyzed, could teach about major products in the online market, which could then help simplify and automate the taxation of these products. The data could indicate trends of sales and volumes of major online retailers which could be used to enforce the tax collection efficiently and reduce risks of noncompliance. The data would indicate trade balances between the states which could be used for bilateral negotiation and cooperation between the states to reduce compliance costs and increase enforcement. Audit selection is one of the most important tasks for every tax administration agency. In order to maximize collections, it is critical to utilize audit selection strategies that identify the taxpayers who are most likely under-reporting. Data mining can be used to create predictive models that, learning from past audits, help audit selectors identify the best audit candidates. Outlier-based detection can be used in audit selection applications. Data mining techniques such as clustering can be used to automatically generate natural peer groups based on a possibly large number of metrics and detect the outliers to be audited.[188] Data analytics would help tax administrations in allocating resources of tax compliance efficiently and would assist taxpayers by narrowing the gap in legal interpretation.[189] Tax administrators could enhance the use of data analytics to manage debts by applying a mix of predictive modelling and experimental techniques to identify which cases should be subject to intervention, and which specific interventions should be carried out.[190]

Experience shows that many tax authorities are already using some form of data analytics to sample taxpayer data quickly and effectively, to develop risk profiles, and to flag potential audit issues.[191] Data analytics and machine learning are

187. *See* ORG. OF ECON. CO-OPERATION & DEV., TECHNOLOGY TOOLS TO TACKLE TAX EVASION AND TAX FRAUD 6–7 (2017), https://www.oecd.org/tax/crime/technology-tools-to-tackle-tax-evasion-and-tax-fraud.pdf [https://perma.cc/P4CU-53WN].

188. "Clustering" is a Machine Learning technique that involves the grouping of data points. *See generally* T. Soni Madhulatha, *An Overview on Clustering Methods*, 2 IOSR J. ENGINEERING 719 (2012). Given a set of data points, we can use a clustering algorithm to classify each data point into a specific group. *Id.*

189. *See* Benjamin Alarie, Anthony Niblett, & Albert Yoon, Data Analytics and Tax Law 3 (May 23, 2019) (unpublished manuscript), https://ssrn.com/abstract=3406784 [https://perma.cc/CU78-JHVF].

190. *See* ORG. OF ECON. CO-OPERATION & DEV, ADVANCED ANALYTICS FOR BETTER TAX ADMINISTRATION: PUTTING DATA TO WORK 11 (2016), https://www.oecd.org/publications/advanced-analytics-for-better-tax-administration-9789264256453-en.htm [https://perma.cc/E7WX-P8Q8].

191. *See* Tim Gillis, Adrienne McStocker & Alec Percival*, Indirect Tax Compliance in an Era of Big Data*, 13 TAX PLAN. INT'L INDIRECT TAXES 3 (2015); Niall Campbell, *Tax Policy and Administration in an Era of Big Data*, 12 TAX PLAN. INT'L 2 (2014).

used to detect suspicious dealers using certain sensitive parameters of data.[192] Businesses themselves are discovering and using the potential of data analytics to reduce their costs of compliance. Some businesses are using an automated set of rules that determines and controls tax decisions based on the transactional and master data available.[193] Policy makers are using big data as well.[194] The OECD's Changing Tax Compliance Report of 2007 highlights how advanced analytics use predictive and prescriptive approaches that incorporate statistical and machine learning techniques to better inform decisions about resource deployment, intervention and policy design.[195] These trends of tax compliance technologies are rising worldwide,[196] and raising questions of privacy as well.[197] Accordingly, it is likely that tax compliance technologies will eventually affect the states' sales tax systems substantially, not just for remote sellers, but for local sellers as well.

Similar to the recommendations in a previous co-authored paper on VAT, with my colleague Professor Orly Mazur, I think that payment intermediaries could, and should, play an important role in collecting sales taxes in the post-*Wayfair* era.[198] Payment intermediaries' data, including the zip codes of credit cards, could, and should, be used to determine the sales tax jurisdiction. Although the OECD explored and rejected this type of approach in a study conducted by the Technology Technical Advisory Group (TAG) in 2000, I disagree with the report's conclusions and find its reasoning unpersuasive. Specifically, the TAG Report explored whether credit cards provide the necessary information to verify the place of consumption, concluding

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192. *See* Priya Mehta, Jithin Mathews, Sandeep Kumar, K. Suryamukhi, Ch. Sobhan Babu, S.V. Visweswara Rao, Vishal Shivapujimath, & Dikshant Bisht. *Big Data Analytics for Tax Administration*, *in* ELECTRONIC GOVERNMENT AND THE INFORMATION SYSTEMS PERSPECTIVE 47, 47 (July 2019).

193. *See* Chris Downing, Leo Van Loo, Alexander Zegers & Roger Haenen, *Technology, Data and Innovation – Essentials for Indirect Tax Management,* 13 TAX PLAN.
INT'L INDIRECT TAXES 3 (2015).

194. *See* Christian Baker, Jeremy Bejarano, Richard W. Evans, Kenneth L. Judd, & Kerk L. Phillips, *A Big Data Approach to Optimal Sales Taxation* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 20130, 2014).

195. *See* ORG. OF ECON. CO-OPERATION & DEV, THE CHANGING TAX COMPLIANCE ENVIRONMENT AND THE ROLE OF AUDIT 44-45 (2017), https://read.oecd-ilibrary.org/taxation/the-changing-tax-compliance-environment-and-the-role-of-audit_9789264282186-en [https://perma.cc/L5PP-3FQQ].

196. Thailand Revenue Department announced plans to track tax payments using blockchain and machine learning. Anna Berman, *Thai Revenue Department to Track Tax Payments Using Blockchain,* COINTELEGRAPH (November 6, 2018, 1:43 PM), https://cointelegraph.com/news/thai-revenue-department-to-track-tax-payments-using-blockchain [https://perma.cc/GRK3-HRH6]. The city of Shenzhen in China announced a partnership with Tencent to use blockchain to create digital invoices and eliminate the black market for counterfeit receipts. Sujha Sundararajan, *Chinese City to Use Blockchain in Fight Against Tax Evasion,* COINDESK (May 25, 2018, 11:01 AM), https://www.coindesk.com/tencent-partners-with-city-authority-to-combat-tax-evasion-with-blockchain [https://perma.cc/H78Q-BJST]. The Minister of the Economy in Germany announced he sought to use blockchain to prevent future dividend-stripping frauds. *Ministry of Economy Wants to Block Tax Fraud with Blockchain Technology,* HANDELSBLATT (November 22, 2018, 2:08 PM), https://tinyurl.com/yxnnjrc9 [https://perma.cc/U8UC-M8XU].

197. *See* Eugenia Politou, Efthimios Alepis & Constantinos Patsakis, *Profiling Tax and Financial Behavior with Big Data Under the GDPR*, 35 COMPUT. L. & SEC. REV. 306, 307 (2019); Brendan Walker-Munro, *Use of Big Data Analytics by Tax Authorities, in* LEGAL REGULATIONS, IMPLICATIONS, AND ISSUES SURROUNDING DIGITAL DATA (2020).

198. *See* Azam & Mazur, *supra* note 4.

that severe commercial limitations make credit cards not viable for this purpose.[199] According to the TAG's analysis, a credit card's billing address does not always represent the place of consumption because online consumption could take place while travelling.[200] This assertion is true, but in most cases the majority of consumption generally occurs at the jurisdiction of residency. Once the delivery address is different from the billing address, and once there are indications of a different place of consumption, additional parameters could be used.

I acknowledge that using credit cards to verify the address and sharing that information with suppliers for tax purposes "raises privacy and confidentiality concerns"[201] to some extent. Thus, it is necessary to balance individuals' privacy concerns against the tax collection concerns in a proportional manner.[202] My proposal seeks to achieve this balance by limiting the transfer of data. In particular, instead of providing the full billing address to the merchant, I suggest that credit card companies only share the zip code with the supplier. This amount of information would limit the infringement of privacy while also providing the supplier with sufficient information with which to verify the customer's place of consumption and apply the appropriate jurisdiction's sales tax rate.[203] This approach has seen success in countries that have adopted it recently.[204]

In recent years, the role of financial institutions in enhancing tax compliance has risen.[205] For example, the Foreign Account Tax Compliance Act (FATCA) imposed obligations and costs on financial institutions worldwide to enhance tax compliance.[206] Similarly, section 6050W of the Internal Revenue Code required banks, third party settlement organizations, and others to send annual reports to the IRS that contain information on payments made to merchants via debit or credit cards, or certain electronic means, to enable comparison between this data

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199. ORG. OF ECON. CO-OPERATION & DEV., REPORT BY THE TECHNOLOGY TECHNICAL ADVISORY GROUP (TAG) (2000), http://www.oecd.org/tax/consumption/1923248.pdf [https://perma.cc/J7VM-57YX].

200. *Id.* at 41.

201. *Id.* at 42.

202. *See* Andrew Leahey, *Tax, Technology and Privacy: The Coming Collision*, SSRN (July 2, 2019), https://ssrn.com/abstract=3431476 [https://perma.cc/6YM8-HSTF].

203. *See* Adam Thimmesch, *Tax Privacy*, 90 TEMP. L. REV. 375 (2018) (describing the meaning and scope of tax privacy).

204. *See* Sony Kassman, *E-Commerce Tax Avoidance Leads Banks Being Tapped as Collectors*, BLOOMBERG L. NEWS: DAILY TAX REP. (Sept. 4, 2019), https://news.bloombergtax.com/daily-tax-report-international/e-commerce-tax-avoidance-leads-to-banks-being-tapped-as-collectors [https://perma.cc/CLN6-MCQX].

205. *See* RONEN PALAN, RICHARD MURPHY & CHRISTIAN CHAVAGNEUX, *Institutional Attacks on Tax Havens, in* TAX HAVENS: HOW GLOBALIZATION REALLY WORKS, 203 (2010); Mark Hampton & John Christensen, *Offshore Pariahs? Small Island Economies, Tax Havens, and the Re-Configuration of Global Finance*, 30 WORLD DEV. 1657 (2002); Niels Johannsen & Gabriel Zucman, *The End of Bank Secrecy? – An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J.: ECON. POL'Y 65 (2014).

206. *See Foreign Account Tax Compliance*, IRS, https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca [https://perma.cc/VFD2-H8AW] (last updated May 20, 2020); Harvey, Jr., *supra* note 6; Itai Grinberg, Beyond FATCA: An Evolutionary Moment for the International Tax System (Jan. 27, 2012) (Working Draft) (on file with Georgetown L.: The Scholarly Commons), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1162&context=fwps_papers [https://perma.cc/69BN-7GCA].

and the reported data on their tax returns.[207] These and other measures use financial institutions to enhance tax compliance, reduce tax fraud and evasion, and close the tax gap. The same idea holds for sales tax purposes, and I expect it to be even more effective. As the economic literature suggests, imposing, reporting, and withholding obligations on payment intermediaries increases the probability of detection, which increases the deterrence effect and reduces tax evasion.[208]

In the end, I argue that payment intermediaries could, and should, collect state sales taxes at least on online transactions. These intermediaries play a critical role in almost every digital transaction. Moreover, these payment intermediaries already collect, store, and update information related to their customers for regulatory reasons and for payment processing purposes.[209] Thus, these entities already have the information necessary to assess the sales tax on online transactions appropriately. Even in cases where further data concerning the goods may be necessary, these entities could receive more information automatically and electronically from the vendor involved in the transaction. Given these features and the rapid development and expansion of the digital economy, I recommend that intermediaries collect sales tax on digital transactions in real time during the payment processing. In other words, payment intermediaries should split payments into price and tax components, then remit the tax to the appropriate state or clearinghouse. This approach has seen increased use recently and is showing effectiveness and efficiency in tax collection.[210]

C. Foreign Online Sellers

Following *Wayfair*, foreign online sellers are obliged to collect sales taxes from their sales to customers in the states as long as they meet the relevant nexus and threshold requirements.[211] This obligation is also justified from a policy perspective

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207. Lederman, *supra* note 6, at 1750; *E.g.* Kahn & Polsky, *supra* note 6, at 165; *see also* T.D. 9496, 2010–43 I.R.B. 484 (providing another prominent example of reporting obligations requiring reporting entities, at the end of each calendar year, to file an information return with the IRS that reports the gross amount of that merchant's transactions for the year and provides a corresponding Form 1099-K to the merchant).

208. *See* Joel B. Slemrod, *Tax Compliance and Enforcement: An Overview of New Research and Its Policy Implications* (Ross Sch. of Bus., Working Paper No. 1302, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726077 [https://perma.cc/6GH4-A6DF]; Joel Slemrod, Brett Collins, Jeffery L. Hoopes, Daniel Reck & Michael Sebastiani, *Does Credit-Card Information Reporting Improve Small-Business Tax Compliance?*, 149 J. PUB. ECON. 1 (2017).

209. *See* Lamensch, *supra* note 163.

210. *See* European Comm'n, *supra* note 6; HM REVENUE & CUSTOMS, U.K., ALTERNATIVE METHOD OF VAT COLLECTION – SPLIT PAYMENT: CONSULTATION DOCUMENT, *supra* note 6; HM REVENUE & CUSTOMS, U.K., ALTERNATIVE METHOD OF VAT COLLECTION SUMMARY OF RESPONSES, *supra* note 6.

211. *See* Adam Thimmesch, Darien Shanske & David Gamage, Wayfair*: Marketplaces and Foreign Vendors*, ST. TAX NOTES, October 8, 2018, at 18; William Hoke, *Enforceability of* Wayfair *Decision on Foreign Companies Unclear*, ST. TAX NOTES, July 2, 2018, at 73; *State Tax Implications of* Wayfair *for Non-U.S. Companies with U.S. Customers: External Multistate Tax Alert*, DELOITTE (June 28, 2018), https://www2.deloitte.com/us/en/pages/tax/articles/state-tax-implications-wayfair-for-non-us-companies-with-us-customers.html# [https://perma.cc/47YJ-854Y]; Wayfair *Ruling for Non-US multinational companies: A roundtable discussion*, EY (2018), https://www.ey.com/Publication/vwLUAssets/ey-implications-of-the-wayfair-ruling-for-non-us-multinational-companies/$File/ey-

to ensure a level playing field between American businesses and foreign businesses.[212] So far, several themes have emerged since *Wayfair* which suggest that most overseas sellers are likely to comply.[213] Foreign sellers' awareness of their tax liability is rising, as well as states' enforcement capabilities through marketplace facilitators. E-retailers in Europe tend to understand the rationale behind *Wayfair* based on their familiarity with the E.U.'s VAT system. Overseas retailers that rely on marketplace platforms to sell their products—a rapidly growing segment within e-commerce—will be hustled into tax compliance whether they like it or not. States have enforcement abilities on foreign sellers through the banks, borders, and marketplace platforms.[214]

It is true that this obligation implicates Congress's power over foreign commerce under the dormant foreign commerce clause, as well as the import-export clause, but it seems that the obligation will pass judicial scrutiny as long as it passes the tests under *Wayfair* and the principles of fair international trade. The dormant foreign commerce clause forbids states from discriminating against international commerce, just as the dormant interstate commerce clause forbids states from discriminating against interstate commerce.[215] Accordingly, *Wayfair*'s rationale likely applies to foreign sellers, as imposing collection duties does not discriminate against international commerce. To the contrary, it levels playing fields between local, interstate, and international retailers. Under the dormant foreign commerce clause, the constitutionality of any state tax would necessitate an examination of whether the tax "creates a substantial risk of international multiple taxation,"[216] and whether the state tax impairs federal uniformity.[217] Both tests are likely met so long as states follow the rest of the world's well-established destination principle. The destination principle reduces the risks of international multiple taxation since the sales tax is imposed in one jurisdiction: the state of destination. As to federal uniformity, there is no risk since there is no federal sales tax, only state and local sales taxes.

The import-export clause is limited to prohibiting states from imposing "Imposts or Duties on Imports or Exports,"[218] but *Wayfair* imposes sales tax collection duties on sales to customers in the jurisdiction, whether the seller is from

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implications-of-the-wayfair-ruling-for-non-us-multinational-companies.pdf [https://perma.cc/C99Y-FCW7].

212. *See* Robert Goulder, *Parlez-Vous* Wayfair*? Foreign Lessons on Taxing Remote Sales*, TAX NOTES TODAY INT'L, July 16, 2018; *cf. Remote Seller Resources*, SALES TAX INST., https://www.salestaxinstitute.com/resources/remote-seller-resources [https://perma.cc/AUT3-T7CK].

213. *See* Michael Bologna, *Foreign Sellers likely to comply with 'Wayfair'-Inspired Tax Laws*, BLOOMBERG TAX (June 21, 2019, 8:01 AM), https://news.bloombergtax.com/daily-tax-report-state/foreign-sellers-likely-to-comply-with-wayfair-inspired-tax-laws [https://perma.cc/JF72-33Y2].

214. *See* Richard D. Pomp, *Foreign Remote Vendors and the Possibility of Non-Compliance: Is the Only Thing We Have to Fear is the Fear Itself?*, 37 J. ST. TAX'N 39 (2019).

215. *See* Michel S. Knoll & Ruth Mason, *The Dormant Foreign Commerce Clause After* Wynne, FAC. SCHOLARSHIP PENN L., 2159, 2020, https://scholarship.law.upenn.edu/faculty_scholarship/2159 [https://perma.cc/XWU9-NY7N].

216. Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 319 n.18 (1994) (quoting Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979)).

217. *Japan Line*, 441 U.S. at 448.

218. Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 MISS. L.J. 521, 521 (1998).

the state, out-of-state, or foreign. Further, applying *Wayfair* to foreign sellers does not contradict the three-part test[219] corresponding with the three goals of the import-export clause: It does not contradict any one federal voice; it does not infringe on any major source of revenue of the federal government; and it does not contradict harmony among the states since one state is collecting sales taxes according to the destination principle.

However, the burdens of compliance with such duties are enormous when 45 states and the District of Columbia impose a general sales tax and thousands of local jurisdictions add to that their local sales taxes. Hence, a foreign online seller who has substantial sales in a few states will be obligated to register with several jurisdictions and account for their sales taxes. This obligation will include collecting, filling, and remitting taxes, which requires knowledge of local tax law and transactional handling of the tax through banks and financial institutions. In addition, states could face challenges in enforcing collection duties on foreign vendors.[220]

The measures I have suggested in this article would simplify compliance, reduce costs, and enhance collection of sales taxes for all remote sellers, American or foreign. However, I think that further unique measures for foreign remote sellers would enhance compliance effectively and efficiently. Among these measures, I suggest seriously considering the following: (1) Allowing foreign remote sellers to register with the U.S. Customs and Border Protection agency and allow them to account for sales taxes in all states through a cloud-based, centralized, automated gateway. This option should be open in addition to the possibility of registration with one state of registration and accounting for sales taxes in all states through the state of registration in a cloud-based centralized automated system, as I suggested for American remote sellers in Part III.B. (2) Assigning a bank account designed for collecting and withholding sales taxes on international transactions in real time. During the payment process, the customer would transfer and deposit sales taxes to this designated account with a clearinghouse. This collection method would ensure compliance and remittance of the sales taxes. It would reduce the need for opening multiple bank accounts and transferring funds to remit the taxes. (3) Developing international cooperation regimes, including exchange of information and mutual assistance, either within existing frameworks or in new frameworks, to ensure compliance and enforcement on international transactions.

Regarding enforcement on foreign vendors, there are good reasons to believe that they would comply, but at the same time, compliance is not easy for them.[221] States should conduct further research to collect data on the issue and measure the tax gap on foreign vendors so that they can enact further measures of enforcement. I believe that publicizing the duties worldwide and cooperating with foreign countries, as well as using tax compliance technologies, would enhance foreign compliance. Just as the E.U. reduced the VAT gap, I believe that the states could similarly reduce their sales tax gap through analogous measures. E.U. data

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219. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

220. *See* Ryan Prete, *Foreign Sellers Likely Safe from State Online Tax Frenzy Post-*Wayfair, BLOOMBERG TAX (July 12, 2018, 1:01 PM), https://news.bloombergtax.com/daily-tax-report/foreign-sellers-likely-safe-from-state-online-tax-frenzy-post-wayfair?context=search&index=0 [https://perma.cc/24UC-FHF2].

221. *See* Thimmesch, Shanske & Gamage, *supra* note 211.

revealed that the VAT gap had been closing constantly, although slowly.[222] For example, the VAT gap fell from €145.4 billion in 2016 to €137.5 billion in 2017. In relative terms, the E.U.-wide gap dropped to 11.2 percent, down from 12.2 percent in 2016. Fast estimates indicate that the VAT gap will likely continue its downward trend and fall below €130 billion and 10 percent of the VAT Total Tax Liability in 2018.[223]

Congress could contribute to improving sales tax collection on international transactions by foreign remote sellers. In this context, federal legislation would be an appropriate legal tool to accommodate simple and efficient taxation of foreign sellers. However, there is a complex dilemma because congressional legislation would have substantial implications on general issues of international taxation of the digital economy, including on the issues of digital permanent establishment and digital services tax, which significantly affects the international interests of the United States.[224]

CONCLUSION

The United States Supreme Court in *South Dakota v. Wayfair* saved the states' sales tax base and stopped waiting for Congress to resolve *Quill Corp. v. North Dakota*'s ban on taxing remote sales without a seller's physical presence in the state. South Dakota's legislation in *Wayfair*, together with the Supreme Court's confirmation of its constitutionality, started a revolution in the field of online taxation. This revolution must continue on the same path—the state-by-state path—as South Dakota's success proves. Therefore, Congress should not impose restrictions, or stop the states from implementing *Wayfair* and their taxation rights according to the U.S. Constitution. This article traces the main milestones along the path of this just and long journey of the states. However, that journey is not over. The first suggestion is that states make appropriate policy decisions followed by appropriate legal frameworks. The next proposal is extremely important and it necessitates a multi-state framework of coordination and cooperation. Building upon the Streamlines Sales and Use Tax Agreement, states should intensify the process of harmonization and simplification by looking toward the E.U. VAT directive. I call for establishing a one-stop shop that would account for sales taxation in all states with one state of registration. Additionally, I suggest that states establish a clearinghouse to account for the balances between the states. I strongly support the

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222. *See* Ctr. for Soc. and Econ. Rsch., *Study and Reports on the VAT Gap in the EU-28 Member States: 2019 Final Report*, 16 fig.2.1 (2019), https://ec.europa.eu/taxation_customs/sites /taxation/files/vat-gap-full-report-2019_en.pdf [https://perma.cc/Q2K6-DSVX] (showing the evolution of the VAT gap in the EU from 2013 to 2018).

223. *Id.* at 16.

224. *See* Reuven S. Avi-Yonah, *Designing a 21st Century Taxing Threshold: Some International Implications of South* Dakota vs. Wayfair (U of Michigan Public Law Research Paper, No. 611, 2018), https://ssrn.com/abstract=3201418 [https://perma.cc/5AXQ-JUF2]; Ruth Mason, *Case Law Note: Implications of Wayfair*, 46 INTERTAX 810 (2018); Ryan Finely, Wayfair *Decision Echoes Case for Digital PE Standard*, TAX NOTES (Jun. 25, 2018), https://www.taxnotes.com/document-list/contributors-authors/finley-. ryan?esq%3DWayfair%2BDecision%2B%26from%3D0%26size%3D20%26orderby%3Dsearchdate%26order%3Ddesc%26filterterm%3Dfulltext%26menu_type%3Dauthors%26tid%3D91756%26search_type%3Dtopic_page [https://perma.cc/KMH5-SDB9].

use of technologies of compliance, especially cloud computing, blockchain, big data, and machine learning, to enhance collecting sales taxation on a real-time basis. To complete the journey, Congress could, and should, assist in applying these measures to international transactions. I argue that this full package of measures would enhance sales taxation in the era of digitalization and e-commerce post *Wayfair*.