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Taxing E-Commerce in the Post-Wayfair World

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INTRODUCTION

The Supreme Court's recent decision in *South Dakota v. Wayfair* is perhaps the most important state and local tax decision in recent decades.[1] Since the 1990's, internet-based electronic commerce (or, "e-commerce") has exploded in both magnitude and importance.[2] However, state governments have faced serious obstacles in their efforts to include e-commerce transactions in the bases of their sales and use taxes. The primary source of these obstacles was the precedent from an earlier Supreme Court case decided in 1992 – *Quill Corp. v. North Dakota*.[3] By overruling the *Quill* precedent, the *Wayfair* case has begun a new era for state taxation of e-commerce.

The Court's ruling in *Wayfair* was very narrow, holding only that the physical-presence precedent from *Quill* is no longer the governing standard for purposes of determining when a taxpayer has the "substantial nexus" required under the Court's *Complete Auto* formulation.[4] That limited holding leaves many questions unanswered.

In this essay, we analyze many of the key questions that will arise from the *Wayfair* decision.[5] As part of our analysis, we offer advice to state governments about how they should reform their sales and use tax regimes in response to the *Wayfair* decision.

Specifically, we advise that state governments should consider: (1) simplifying their sales-and-use-tax systems, along with potentially joining

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1. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).
2. David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 484 (2012).
3. Quill Corp. v. North Dakota, 504 U.S. 298, 309-19 (1992).
4. *Wayfair*, 138 S. Ct. at 2099; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).
5. This essay is a revised, integrated, and elaborated version of pre-publication drafts of three prior essays. Those prior essays are: Darien Shanske, David Gamage & Adam Thimmesch, Wayfair*: Marketplaces and Foreign Vendors*, 90 STATE TAX NOTES 111 (2018); Adam Thimmesch, Darien Shanske & David Gamage, Wayfair: *Sales Tax Formalism and Income Tax Nexus*, 89 STATE TAX NOTES 975 (2018); Adam Thimmesch, Darien Shanske & David Gamage, Wayfair: *Substantial Nexus and Undue Burden*, 89 STATE TAX NOTES 447 (2018).

the Streamlined Sales and Use Tax Agreement ("SSUTA") if they have not already done so, (2) offering full and adequate reimbursement for compliance costs, especially for smaller vendors, (3) offering free compliance software and immunity for vendors who properly rely on such software, (4) either ensuring that their sales-and-use-tax statutes impose substantive tax liabilities in the same manner as does South Dakota's statute or else continuing their reliance on the historic formalism by requiring remote vendors to collect and remit use taxes rather than sales taxes, (5) ensuring that any attempts to expand corporate income tax nexus based on the *Wayfair* decision incorporate de minimis thresholds in a similar manner as with our recommendations for expanding sales-and-use tax nexus, (6) applying their new sales-and-use-tax nexus standards to the major marketplaces in addition to vendors selling directly, and (7) taking steps to alleviate possible concerns about in-state citizens shifting to purchasing from foreign vendors.

I. ANALYZING THE *WAYFAIR* DECISION

It is helpful to begin by discussing the actual decision in *Wayfair*. The majority opinion was written by Justice Anthony Kennedy, who invited the case three years earlier in his concurring opinion in *DMA v. Brohl*.[6] Kennedy started the majority opinion with a review of the development of the Supreme Court's dormant Commerce Clause doctrine since the 1800s and noted that the Court's tax-specific precedents had been animated by its approach in its regulatory cases. The opinion started with a clear statement regarding the majority's view of the merit of the physical presence rule, calling the rule "flawed on its own terms."[7] The opinion further stated that it was not a "necessary interpretation" of the substantial nexus requirement, that it created market distortions rather than preventing them, and that is was "the sort of arbitrary, formalistic [rule] that the Court's modern Commerce Clause precedents disavow."[8]

The Court recognized that the nexus requirement was akin to the Due Process minimum contacts requirement and said that, although the two

6. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring).
7. *Wayfair*, 138 S. Ct. at 2092.
8. *Id.*

"may not be identical or coterminous…there are significant parallels."[9] Incorporating the *Quill* Court's due process analysis by reference, [10] the Court then plainly stated that "[p]hysical presence is not necessary to create a substantial nexus."[11] With that, *Quill* was dead.

The remainder of the Court's opinion focused on justifying that decision. The Court discussed the distortionary impact of the physical presence rule, the Court's general move away from formalism in its dormant Commerce Clause jurisprudence, the poor fit of a physical presence rule in the modern economy, that rule's impact on states and our federal structure, and why *stare decisis* did not compel upholding *Quill*.

The Court also addressed the concern that removing the physical presence rule would result in the imposition of undue compliance burdens on vendors engaging in interstate commerce, calling those burdens "legitimate concerns."[12] The Court did not feel that those concerns merited retaining the physical-presence rule, though, pointing to the availability of software and Congressional intervention "if it deems it necessary and fit to do so."[13] The Court also noted that South Dakota's law provided a "reasonable degree of protection" for smaller vendors.[14] The Court pointed to the law's sales and transaction thresholds, its prospective application, and South Dakota's membership in the SSUTA. It also referenced other potential avenues for smaller vendors to get relief from state laws that overreach using "other theories," including the potential application of its *Pike*-balancing test[15]—something two of us have argued for in other fora.[16]

The concluding section of the majority opinion gave some insight into the future of the nexus requirement, but not much. The Court seems to

9. *Id.* at 2093.
10. *Id.* ("Quill itself recognized that '[t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State.' (citing Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992)).
11. *Id.*
12. *Id.* at 2098.
13. *Id.*
14. *Id.*
15. *Id.* at 2098-99.
16. Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, 116 *MICH. L. REV. ONLINE 101* (2018), http://michiganlawreview.org/a-unifying-approach-to-nexus-under-the-dormant-commerce-clause/; Amicus Curiae Brief of Four United States Senators Supporting Petitioner, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1202848 [hereinafter Brief of Four U.S. Senators]..

have offered a new standard for nexus—or at least a new formulation of the standard—stating that "nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[17] The Court cited *Polar Tankers, Inc. v. City of Valdez*,[18] for that proposition. However, *Polar Tankers* involved a local personal property tax that was struck down as violating the Tonnage Clause and does not provide much guidance.[19] This is especially because that case involved ships that were undeniably present in the taxing jurisdiction. Nexus would have been established even under *Quill*.[20]

The *Wayfair* Court's application of the nexus standard, whatever the formulation, was also terse and provided little additional guidance. The Court simply stated that "[h]ere, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State."[21] The Court found that South Dakota's economic thresholds ensured that impacted vendors had the requisite economic contacts, and it noted that respondents were "large, national companies that undoubtedly maintain an extensive virtual presence."[22] Those conclusions were enough for the majority to determine that the substantial nexus requirement was met on the facts presented.

The Court then again took care to point out that "some other principle in the Court's Commerce Clause doctrine might invalidate" the South Dakota law, but it declined to opine on that issue because it had "not been litigated or briefed."[23] The Court did, however, again note the fact that South Dakota's law had "several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce."[24] Those features included (1) its de minimis safe harbor, (2) its prospectivity, and (3) South Dakota's adoption of the SSUTA, which brings with it reduced administrative and compliance costs for vendors.[25]

17. *Wayfair*, 138 S. Ct. at 2099 (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1 (2009)).
18. 557 U.S. 1 (2009).
19. *Id.* at 6.
20. *Id.* at 5.
21. *Wayfair*, 138 S. Ct. at 2099.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id*.

Justice Kennedy's majority opinion was joined by Justices Thomas, Ginsburg, Alito, and Gorsuch. Both Justices Thomas and Gorsuch also penned concurring opinions. Justice Thomas repeated his standard objection to the Court's entire dormant Commerce Clause doctrine.[26] Justice Gorsuch was not far behind in his critique, but rather than casting doubt on the entire doctrine, he merely expressed reservation with it and noted that his broader concerns were "questions for another day."[27]

Chief Justice John Roberts wrote a dissent, with which Justices Breyer, Sotomayor, and Kagan joined.[28] That opinion did not defend the physical presence rule—it indeed called the Court's prior cases that had established that rule "wrongly decided"—but reasoned that any change to that rule should be done by Congress given the potentially immense economic consequences.[29] The Chief Justice argued that the principle of *stare decisis* should have applied especially forcefully in the case and that the Court should have retained *Quill* on that basis. [30]

The majority opinion in *Wayfair* did one thing very clearly—it eliminated the physical presence rule as the relevant test for determining when a taxpayer (or tax collector) has a substantial nexus within the *Complete Auto* framework. Beyond that limited holding, the Court's opinion did little else, which leaves a number of questions for states, vendors, and those interested in state tax policy. Two of the most immediate questions directly raised by the holding are: (1) what now constitutes substantial nexus, and (2) when now do state statutes unduly burden interstate commerce.

A. What Constitutes Substantial Nexus?

The first major question arising from the *Wayfair* decision, from both doctrinal and practical perspectives, is what nexus standard applies post-*Wayfair*. The Court offered two threads from which to draw guidance. The first was its citation to *Polar Tankers* and its statement that nexus is

26. *Id.* at 2100 (Thomas, J., Concurring).
27. *Id.* (Gorsuch, J., concurring).
28. *Id.* at 2101 (Roberts, C.J., dissenting).
29. *Id.* at 2101–05.
30. *Id.* at 2102.

created when one "avails [oneself] of the substantial privilege of carrying on business" in a jurisdiction.[31] That standard, though, could be construed as coterminous with the Due Process purposeful-availment standard and does not appear to require much beyond making sales to in-state customers.[32]

The second hint of a nexus standard was the Court's reference to "economic and virtual contacts." Here is the key paragraph:

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, §1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.[33]

The first sentence of this paragraph suggests that two inquiries are relevant to nexus: (1) a taxpayer's economic returns from a state and (2) its activities directed toward a state.[34] The second and third sentences of this paragraph suggest that the South Dakota thresholds require sufficient "economic contacts" for substantial nexus. The fourth sentence, emphasizing the size of respondents, focused on the so-called "virtual contacts" that large, national e-commerce vendors create through their extensive marketing and web presences.

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31. *Id.* at 2099 (majority opinion) (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009))
32. WALTER HELLERSTEIN ET AL., STATE TAXATION ¶ 19.02[3][d][ii], Westlaw (database updated August 2018) ("by emphasizing the close affinity between Due Process Clause and Commerce Clause nexus standards, the Court effectively brought an end to the view, first introduced by *Quill*, that there are significant practical differences between the two"); Richard E. Kaye, Annotation, *Internet Web site activities of nonresident person or corporation as conferring personal jurisdiction under long–arm statutes and due process clause*, 81 A.L.R.5th 41 §5 (2000).
33. *Wayfair*, 138 S. Ct. at 2099.
34. Evaluating nexus by reference to those two factors is similar to how state courts and legislatures have evaluated economic nexus for purposes of state corporate income taxes. *See* Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 176–84 (2012).

What this paragraph does not do is to address precisely when small sellers have a substantial nexus. What if a small seller has exactly 200 sales, worth $20,000? Given this uncertainty, our advice for states as to nexus at the moment would be, at a minimum, to put in place thresholds similar to South Dakota's. As noted above, the South Dakota statute imposes tax collection obligations only on vendors who deliver more than $100,000 of goods or services into South Dakota or who engage in 200 or more transactions with South Dakota customers—both determined on an annual basis.[35] Indeed, for states that want to be better insulated from challenges from small sellers, and likely at minimal revenue loss, we would suggest adopting higher thresholds (i.e., thresholds more deferential to small sellers) than South Dakota's. This goes especially for non-SSUTA states.

B. When Do State Statutes Unduly Burden Interstate Commerce?

The Court's opinion seems to leave more room for vendors to challenge state impositions as unduly burdening interstate commerce than for vendors to challenge whether they have nexus with a state. Such a challenge would presumably be evaluated based on *Pike* balancing. Several passages from the majority opinion imply this, although these passages are somewhat perplexing. After all, *Pike* balancing has been previously understood as the backup test for economic regulations—not for taxes.[36]

Pike involved a challenge to an Arizona statute regulating the labelling of cantaloupes shipped from the state.[37] That statute was challenged as violating the dormant Commerce Clause because of the costs that it imposed on businesses that shipped products out of the state.[38] In evaluating that claim, the Court stated that:

35. *See supra* text accompanying note 33.
36. *See* Mark L. Mosley, *The Path Out of a Quagmire: A Better Standard for Assesssing State and Local Taxes Under the Negative Commerce Clause*, 58 TAX LAW. 729, 739 (2005) ("The Court appears to have recognized that Pike balancing has no place in taxation cases because it has never explicitly applied Pike to such a case").
37. Pike v. Bruce Church, 397 U.S. 137, 138 (1970).
38. *Id.* at 140.

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[39]

The result of *Pike* is that the Court has generally applied a balancing test to non-discriminatory state regulations that impact interstate commerce. There is one notable exception, of course. The Court has evaluated state regulations that take the form of taxes or tax-collection obligations under *Complete Auto* instead.

This is not to say that *Pike* and *Complete Auto* do not overlap. They do. The *Quill* Court even implicitly recognized that the nexus requirement serves a *Pike*-like function.[40] The Court analyzed the physical-presence nexus rule in terms of undue burdens. The Court just expressly declined to require "case-by-case" balancing as is required under *Pike* and instead determined to protect against undue burdens by maintaining its "bright-line rule."[41]

Given this history, *Pike* balancing and the substantial-nexus requirement have been understood as being different, and many of the amici who argued for *Pike* balancing did so specifically as an alternative to the *Complete Auto* framework.[42] The *Wayfair* Court's suggestion that *both* the nexus test of *Complete Auto* and the balancing test of *Pike* could apply was therefore something a bit new.

In short, the Court could just have applied a balancing test in the context of substantial nexus. Instead, the implication of the majority's reasoning is that *Pike* balancing will be applied as an additional test. We do not know of a precedent for using *Pike* as an additional text on top of *Complete Auto*. In any event, the majority opinion clearly left open the possibility for a *Pike* balancing type of challenge. The opinion even

39. *Id.* at 142.
40. *See* Thimmesch, *supra* note 16, at 106–08.
41. *Quill*, 504 U.S. at 314–15.
42. *See Wayfair*, 138 S. Ct. at 2102; Brief of Four US Senators, *supra* note 16, at 6, 13 (arguing that the "*Complete Auto* test [] is not the correct rubric" but *Pike* balancing is.).

(helpfully) explained the features of South Dakota's law that, if duplicated by other states, would make those challenges less likely to succeed. Recall that the Court twice referred to the fact that (1) South Dakota thresholds provided a small seller safe harbor; (2) that South Dakota's imposition applied prospectively only; and (3) that South Dakota was a SSUTA state and had thus simplified its system in ways to reduce compliance costs for vendors. States that can replicate those factors should take comfort that their statutes are permissible. States that fail them might need to be more concerned.

Some discussions of the *Wayfair* decision seem to suggest that states must conform to these features of South Dakota's statute before they can require remote vendors to collect tax.[43] We think that reads far too much into the opinion. The Court certainly did not make these features into requirements. Instead, the *Wayfair* decision held that these features suffice to insulate states from judicial rebuke. Further, even in "non-conforming states," it seems highly unlikely that a state statute would be overturned on *Pike*-balancing absent low thresholds or retroactive application.[44] Nevertheless, *Pike* is difficult to apply, and we think states should be wary of pressing the issue. Better to avoid costly litigation, especially when the revenue to be gained from smaller vendors is likely small.

Therefore, as to *Pike* balancing, our advice is that non-SSUTA states should seek to reduce compliance costs for out of state vendors the best that they can. These states should find ways to simplify their sales-tax systems within local constraints, offer vendor reimbursement for compliance costs,[45] and consider offering free compliance software and immunizing vendors who rely upon it.[46] Again, we do not think that the Court's opinion *requires* these actions, just that these actions would be legally advisable and are sensible in any event from a policy perspective.

43. Joseph Bishop-Henchman, *Post*-Wayfair *Options* for States, TAX FOUNDATION (Aug. 29, 2018), https://taxfoundation.org/post-wayfair-options-for-states/ (providing an analysis of whether states are "compliant" with the *Wayfair* "checklist").
44. We have previously written that retroactively imposed liabilities could potentially violate the dormant Commerce Clause. *See* Adam Thimmesch, Darien Shanske, & David Gamage, Wayfair *and the Retroactivity of Constitutional Holdings*, 88 STATE TAX NOTES 511 (2018).
45. One of us discussed this first approach in a prior article. *See* Gamage & Heckman, *supra* note 2.
46. Two of us discussed this approach in a prior essay: Andrew J. Haile, David Gamage, & Darien Shanske, *A Potential Game Changer in E-Commerce Taxation*, 67 STATE TAX NOTES 747 (2013).

II. DOCTRINAL IMPLICATIONS OF THE *WAYFAIR* DECISION

Beyond the direct effect of replacing *Quill*'s physical-presence rule, the reasoning in the *Wayfair* decision may potentially impact doctrines related to the taxation of interstate e-commerce in at least a couple of other, potentially important, ways. Specifically, the decision's reasoning may impact (1) the formalism that had previously governed interstate sales and use taxation, and (2) the doctrines related to governing nexus for state corporate income taxes.

With regard to sales tax formalism, we advise state governments to either make sure that their statutes impose substantive tax liabilities in the same manner as does South Dakota's statute or else continue to rely on the historic formalism by requiring remote vendors to collect and remit use taxes (rather than sales taxes). With regard to income tax nexus, we advise state governments to make sure that any attempts to expand corporate income tax nexus based on the *Wayfair* decision incorporate de minimis thresholds (similar to those we recommend above in our discussion of expanding sales and use tax nexus).

A. The Implications of Wayfair *For Sales Tax Formalism*

The *Wayfair* Court's reversal of *Quill* was consistent with the Court's general trend away from formalism in its dormant Commerce Clause cases, and the Court partially justified its decision on that ground.[47] But the physical-presence rule was not the only historic formalism implicated in *Wayfair*. Since the 1940s, the Court has prevented states from imposing their sales taxes on transactions that are completed out of state. [48] Nevertheless, the Court allows states to impose economically equivalent "use taxes" on the in-state consumption of the purchased items.[49] That additional tax could result in double taxation or discrimination against interstate commerce, but states have structured their sales and use tax systems to avoid those results. States both (1) set their use tax rates at or below their sales-tax rates to avoid any discrimination; and (2) provide

47. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094–95 (2018).
48. McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).
49. Gen. Trading Co. v. Iowa, 322 U.S. 335 (1944).

their residents with credits against their use taxes for any sales taxes that they actually paid on the purchase of the taxable good or service. The latter ensures that residents pay tax at least equivalent to the tax that would be owed if they had made the purchase in state. The resulting system is economically equivalent to destination-sourcing the sales tax, but states must abide by this formal structure.

The source of this formalism is the Court's 1944 decision in *McLeod v. Dilworth*.[50] That case involved a challenge to an Arkansas sales tax that applied to transactions consummated out of state but shipped to Arkansas customers. The Court struck down that sales tax as unconstitutional because the majority felt that allowing Arkansas to tax such a transaction would be to allow the state "to project its powers beyond its boundaries and to tax an interstate transaction," which conflicted with prior conceptions of states' powers.[51] The Court did, however, recognize the broad equivalency of state sales and use taxes and it even upheld the imposition of the latter in a case that it decided on the same day.[52] The Court reasoned that its different approach under the dormant Commerce Clause was justified because sales and use taxes were "different in conception" and "assessments upon different transactions."[53]

The *Dilworth* formalism has stood since the 1940s. Yet it is now unclear whether, and to what extent, this formalism still holds post-*Wayfair*. The South Dakota statute that was challenged in *Wayfair* conflicted with both *Quill* and *Dilworth* by requiring remote vendors to collect the state's sales tax rather than its use tax.[54] The litigation, however, focused only on the *Quill* precedent. Neither the parties nor the Court addressed the *Dilworth* issue.

It is not clear to us whether the Court consciously avoided the issue or whether the Court just did not appreciate that aspect of the case. Justice Kennedy's opinion did explicitly note that the South Dakota statute imposed a sales tax collection obligation, but the reference seems to have been more colloquial than technical. Read in its entirety, the *Wayfair*

50. *Dilworth*, 322 U.S. at 327.
51. *Id.* at 330.
52. *Gen. Trading Co.*, 322 U.S. at 335.
53. *Dilworth*, 322 U.S. at 330.
54. S. 106, 2016 Leg. Assemb., 91st Sess. (S.D. 2016).

opinion suggests that the Court viewed the difference in the taxes as a difference in who remits them—sales taxes being collected and remitted by vendors and use taxes being paid directly by consumers.[55] That distinction is largely true, of course, but it is not the relevant substantive distinction between the two taxes. The *Dilworth* Court was right. The taxes are "different in conception" and "assessments upon different transactions."[56]

It may be that the Court was willing to ignore this issue because the parties did not raise it. The majority opinion did state that "[a]ll concede that taxing the sales in question here is lawful."[57] Perhaps that was the Court's way of saying that the *Dilworth* issue had been waived, but it is not clear. The Court did remand the case to the South Dakota courts to resolve other, non-*Quill*, objections. The biggest issue flagged by the Court in that regard was whether South Dakota's law would fail the balancing test of *Pike v. Bruce Church*, but it may be that the South Dakota statute remains vulnerable under *Dilworth* as well. The Court certainly did not explicitly overrule that case in *Wayfair*.

The uncertainty involving this issue leads us to conclude that the better course for states would be to continue to abide by the *Dilworth* formalism and to enact their economic-nexus standards through their use-tax systems. It seems unlikely that the Court will clarify this area of law any time soon, if ever. Nevertheless, if states want to adopt sales-tax collection obligations using the South Dakota model, they will need to ensure that their statutes actually impose the tax as a substantive matter. South Dakota law appears to do so because it is a member of the SSUTA, which sources sales to where customers take delivery of property if they use a shipping company to pick up their orders.[58] States that have adopted the SSUTA

55. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087 (2018). ("When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires the Court to determine when an out-of-state seller can be required to collect and remit that tax."); *id.* at 2088 ("South Dakota has a sales tax. …Sellers are generally required to collect and remit this tax. If for some reason the sales tax is not remitted by the seller, then in-state consumers are separately responsible for paying a use tax at the same rate."); *see also id.* ("Under this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State.").

56. *Dilworth*, 322 U.S. at 330.

57. *Wayfair*, 138 S. Ct. at 2087.

58. S.D. CODIFIED LAWS §§ 10-45-2, 10-45-108 (2010); S.D. ADMIN. R. § 64:06:01:62(1) (2015);

should therefore not have a problem with this issue, but other states might. If they are going to impose sales-tax collection obligations, they should ensure that their statutes operate similarly.

Ultimately, this is an issue that is easy to plan around. States can follow the historic *Dilworth* formalism and require remote vendors to collect their use taxes. However, if states want to follow South Dakota's lead, they should ensure that their statutes actually impose sales tax on out-of-state sales.

Though we do not think the Court meant to overrule *Dilworth* by implication, this is an issue worth watching. In our increasingly interconnected economy, we can imagine states having good reasons to tax (or regulate) transactions arguably entirely consummated out-of-state.[59] If the formalism of *Dilworth* is no more, then the states might be able to tax such transactions.

B. The Implications of Wayfair *For Income Tax Nexus*

On July 13, Wells Fargo CFO John Shrewsberry announced that the company was making a $481 million adjustment to its earnings based on the *Wayfair* decision.[60] That adjustment was not due to the company's potential sales-tax exposure, but rather was because some of its affiliated entities had been relying on *Quill* to avoid paying income taxes in some states. That position does not appear to have been unique to Wells Fargo,[61] but it was aggressive. States and taxpayers have debated whether *Quill* applies to income taxes for some time, but state courts have nearly universally held that it does not.[62] Wells Fargo apparently did not agree,

STREAMLINED SALES AND USE TAX AGREEMENT §§ 310, 311 (STREAMLINED SALES TAX GOVERNING BD., INC. 2018).

59. *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664 (4th Cir. 2018) (striking down Maryland's attempt to control certain drug prices because "it [] controls the price of transactions that occur wholly outside the state.").

60. *See* Andrea Muse, *Wells Fargo Adjusts Income Tax Reserves Following Wayfair*, TAX NOTES, July 17, 2018, https://www.taxnotes.com/editors-pick/wells-fargo-adjusts-income-tax-reserves-following-wayfair.

61. *See id.* (quoting one prominent accounting firm leader as saying that "the physical presence standard[] has long been thought to apply for determinations of substantial nexus for state income tax purposes...").

62. Thimmesch, *supra* note 34, at 173-75.

and technically the question was undecided because the Supreme Court had declined to opine on the issue. *Wayfair* left no doubt though. By reversing *Quill*, the Court settled this issue.

What the Court did not settle is the same question that it left open with respect to sales taxes—how far can states go with nexus? As we discussed above,[63] the Court referred to its *Polar Tankers* opinion in stating that "nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction."[64] The *Wayfair* Court then analyzed respondents' nexus by reference to their "economic and virtual contacts" with South Dakota.[65] Unfortunately, the Court did not expand on what those terms meant or when they were sufficient for nexus. The Court merely stated that South Dakota's threshold amounts—$100,000 in sales or 200 transactions—were sufficient to ensure that respondents had the required economic contacts and that respondents' statuses as "large, national companies" meant that they "undoubtedly maintain an extensive virtual presence."[66]

The Court's limited nexus analysis does not provide much direct guidance for states or taxpayers, but this is hardly surprising. The Court's minimal approach was entirely consistent with how state courts had decided economic-nexus cases over the last two decades.[67] It was also consistent with the Roberts Court's general approach of crafting its decisions as narrowly as possible.[68] Nevertheless, states and taxpayers can glean some guidance by looking at the origin of the physical-presence rule, the facts at issue in *Wayfair*, and the nature of the state income tax.

First, we know that the *Quill* and *National Bellas Hess* Courts imposed the physical-presence rule largely due to the perceived compliance burdens associated with sales tax collections,[69] and that those burdens are largely attributable to the large number of local jurisdictions with

63. Gamage & Heckman, *supra* note 2.
64. *Wayfair*, 138 S. Ct. at 2099.
65. *Id.* at 2099.
66. *Id.* Earlier in the Court's opinion, it discussed "virtual presences" in the context of "virtual showrooms," presumably a website. *Id*. at 2095.
67. *See* Thimmesch, *supra* note 34, at 173–81 (discussing how state courts have defined economic nexus).
68. *See* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS. L. REV. 961, 1031 (2017) (commenting on judicial minimalism under the Roberts Court).
69. *See* Gamage & Heckman, *supra* note 2, at 493–94.

consumption-tax authority and the differences in tax bases among jurisdictions. In addition, notwithstanding the continued existence of those compliance costs, the *Wayfair* Court found that South Dakota's sales thresholds were high enough to satisfy the nexus requirement in a post-*Quill* world.[70] This means that $100,001 of sales or 200 transactions is enough of an economic connection to justify the compliance costs associated with use-tax collections.

How does the compliance cost of state corporate income taxes compare? Certainly, there are far fewer jurisdictions that levy corporate income taxes and they generally resemble one another, including by piggybacking on the federal income tax for purposes of defining the tax base.[71] Of course, the corporate income tax is likely a more complicated tax for many taxpayers for other reasons.[72] We don't have a strong opinion as to how this should come out except to note that states adopting factor nexus thresholds should be confident that their tests will withstand scrutiny as long as their thresholds do not dip unreasonably low relative to the thresholds in *Wayfair*. The $500,000 threshold contained in the Multistate Tax Commission's model law seems safe.[73] So does Michigan's lower $350,000 threshold.[74] It is not difficult to see that even lower thresholds could pass constitutional muster based on *Wayfair*.

Not all states will want to adopt quantitative rules, and, notably, many

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70. *Wayfair*, 138 S.Ct. at 2099 ("Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.").

71. HELLERSTEIN ET AL., *supra* note 32, at ¶ 7.02 ("The outstanding characteristic of state corporate net income taxes is their broad conformity to the federal corporate income tax."); *see also id*. at ¶ 6.11[3] (asserting that "the burdens of complying with the income tax laws of various state and local jurisdictions are less daunting that the burden of complying with the laws of the nation's 6,000 plus sales and use tax jurisdictions").

72. *Compare Tax Comm'r of State v. MBNA America Bank*, N.A., 640 S.E.2d 226, 233-34 (W. Va. 2006) (majority justifying a less exacting nexus threshold for income taxes based on the lower compliance burdens associated with those taxes) *with id.* at 240 (Benjamin, J., dissenting) (arguing that corporate income taxes are more burdensome).

73. MULTISTATE TAX COMMISSION, FACTOR PRESENCE NEXUS STANDARD FOR BUSINESS ACTIVITY TAX, Oct. 17, 2002, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/FactorPresenceNexusStandardBusinessActTaxes.pdf.

74. *See* MICH. COMP. LAWS § 206.621(1) (2012).

states currently apply qualitative standards.[75] Opining on the constitutionality of those standards is more difficult and those standards may be more susceptible to challenge than are bright-line rules if they do not provide protections for smaller businesses. We would therefore recommend that states with nexus standards adopt de minimis protections, at least administratively, if they want to avoid challenge. States should have little economic interest in pursuing taxpayers with very low in-state income in any event, so establishing minimum protections for taxpayers seems to be advisable in order to avoid costly litigation. De minimis rules can also serve to put taxpayers on notice as to what levels of sales will draw scrutiny and help to fight against taxpayer recalcitrance.

Of course, nexus is not the only constraint on state corporate income taxes. States remain bound by P.L. 86-272, [76] and they apparently also must ensure that their statutes do not run afoul of the Court's *Pike v. Bruce Church* balancing test.[77] The constraints of P.L. 86-272 are familiar, however, and it is not likely that any corporate income tax we know of would fail *Pike* balancing.[78]

III. SALES TAX ADMINISTRATION IN THE POST-*WAYFAIR* WORLD

Above, in Parts I and II, we analyzed questions that are in a sense directly raised by the reasoning of the *Wayfair* decision. However, in addition to those sorts of questions, another set of questions arises from contemplating how sales-and-use tax administration is likely to operate in the post-*Wayfair* world.

75. *See* Thimmesch, *supra* note 34, at 181–84.
76. P.L. 86-272 imposes a modified physical-presence rule for purposes of state income-tax assessments when a business is selling tangible personal property. *See* 15 U.S.C. §§ 381–84 (2012). It forbids the state imposition of income taxes on businesses who do no more than solicit sales of that property within its boundaries, but contains some additional protections when businesses use independent contractors in the state. *See id.*; *see also* HELLERSTEIN ET AL., *supra* note 32, at ¶¶ 6.17–19.
77. *See supra* text Section I.B.
78. Furthermore there is an argument that the broad concept of nexus in *Wayfair* will narrow the interpretation of "solicitation" in PL 86-272. *See* Jaye Calhoun & William J. Kollarik II, *Implications of the Supreme Court's Historic Decision in Wayfair*, 89 STATE TAX NOTES 125, 136 (2018).

Most importantly, once states expand their sales-and-use-tax bases to encompass large out-of-state vendors, to what extent should state governments then be concerned about e-commerce transactions potentially shifting to either smaller out-of-state vendors selling through marketplaces or foreign vendors?

In this Part, we argue that state governments should apply their new nexus standards to the major marketplaces. We also argue that states should feel free to adopt more encompassing nexus standards without fears that their residents will shift their purchasing to foreign vendors.

A. The Problem of E-Commerce Marketplaces

The *Wayfair* decision is already ushering in a new regime for interstate sales-and-use tax transactions wherein state governments should be able to successfully tax most transactions between in-state citizens and out-of-state vendors. However, for this new regime to be successful, it is absolutely critical for state governments to reach sales by small out-of-state vendors conducted through the major marketplaces like Amazon and eBay.

As we have discussed, there are limits to the extent to which the *Wayfair* decision allows state governments to impose collection obligations on out-of-state vendors.[79] Importantly, the Court explained that it was upholding South Dakota's law in part because that law provided a "reasonable degree of protection" for smaller vendors by exempting out-of-state vendors that deliver less than $100,000 of goods or services into the state or engage in less than 200 separate transactions for the delivery of goods or services into the State on an annual basis.[80]

The major marketplaces (Amazon, eBay, Google, etc.) will certainly facilitate sales that, in the aggregate, exceed small-vendor thresholds of this sort. But this raises the question of whether states can require these marketplaces to collect tax on transactions between in-state consumers and small out-of-state vendors that are themselves protected from having to

79. *See supra* Part I.
80 . Wayfair, 138 S. Ct. at 2098.

collect that tax. If not, then the result would be to create a substantial tax advantage for small out-of-state vendors selling via the major marketplaces as compared to their larger competitors. Being that there are already a plethora of small vendors selling through these marketplaces, and there are many more small retail vendors that could easily set up operations to sell interstate through these marketplaces, this would likely create major gaps in the new interstate sales and use tax regime.

Although the *Wayfair* decision does not specifically address marketplaces, we see nothing in that decision that should prevent state governments from imposing sales-and-use tax obligations on the major marketplaces. We thus urge state governments to clearly apply their new nexus standards to the major marketplaces.

Of course, states will have to carefully consider how they will define the marketplaces that are subject to these new requirements. Marketplaces come in many different forms. Some are run by companies that make sales themselves, like Amazon. Those companies already have tax-collection processes in place and are already subject to state tax-collection obligations. On the other end of the spectrum are marketplaces like Craigslist or Facebook Marketplace. Those marketplaces do not sell their own goods, do not facilitate payments, and generally cater to sellers who are making casual or isolated sales that are likely exempt from tax. Somewhere in the middle of the spectrum is a marketplace like eBay, which takes a very active role in facilitating sales and payments, has a well-developed website that guides consumers to particular goods and retailers, and is a platform often used for sales by businesses.

States with marketplace facilitator laws on the books have thus far conditioned their tax-collection obligations on different factors. In Connecticut and Pennsylvania, for example, the marketplace facilitator has to participate, directly or indirectly, in the payment for the good.[81] The statutes in Washington and Alabama look at a variety of other factors that involve the marketplace facilitator in the sale to some degree, including the provision of fulfillment services, price setting, branding, and return assistance, among others.[82]

81. CONN. GEN. STAT. ANN. § P.A. 18-152, § 4 (West, Westlaw through 2018 Feb. Reg Sess.); 72 PA. CONS. STAT. § 7213(C) (2018).
82. ALA. CODE § 40-23-199.2 (Westlaw through Act 2018-579); WASH. REV. CODE ANN. §

We believe that states are well within their powers to require companies like Amazon to collect tax on sales that are made using its platform. States are also on firm footing if they want to require the collection of tax by vendors, like eBay, that take a very active role in promoting and facilitating sales, including by facilitating payments and returns and by providing money-back guarantees to those who use its platform. State power with respect to passive marketplaces like Facebook Marketplace or Craigslist is less certain, but it seems that states have less of an interest in pursuing those marketplaces given that many of the sales taking place on those platforms, though certainly not all, will likely be tax exempt under states' casual or isolated sales exemptions.[83] We suggest that states focus their efforts on the first two categories of marketplaces, but closely monitor the development and evolution of other types of marketplaces.

B. The Problem Of Foreign E-Commerce Vendors

There is broad consensus that the *Wayfair* decision about nexus also applies to remote sellers based in foreign countries.[84] That is, assuming a state nexus statute passes the newish *Wayfair* regime, a non-US vendor must collect and remit the sales or use tax on the same terms as a US vendor.[85] They have no special protection.

To be sure, imposing a use tax obligation on foreign sellers implicates both the foreign Dormant Commerce Clause and the Import-Export Clause.[86] Nevertheless, it seems hard to imagine that any state law that passes muster under *Wayfair* could offend either of these provisions. In either case, and painting in broad strokes, the state law would only likely

82.13.010(3) (West 2017).

83. HELLERSTEIN ET AL., *supra* note 32, at 13.10[4] (noting that most states have sales-tax exemptions for "sales by those who are not regularly engaged in the business of selling").

84. William Hoke, *Enforceability of Wayfair Decision on Foreign Companies Unclear*, 89 STATE TAX NOTES 73 (2018); Deloitte, *State Tax Implications of Wayfair for Non-US Companies with US 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.

85. We refer to use taxes in the remainder of this essay, but it may be that states will impose their sales taxes on foreign sales instead. As we discussed above, this may be significant, and the foreign dimension may raise issues that have not yet been considered. *See supra* Section II.A (discussing whether states will impose sales tax obligations or use tax obligations post-*Wayfair*).

86. U.S. CONST. art. I, § 10, cl. 2.

fail under these provisions if state collection efforts antagonized our trading partners in such a way that the federal government would take the side of foreign vendors in litigation, but without Congress actually passing a law preempting state collection efforts.[87]

Commentators have wisely been much more concerned about whether and how states are going to get foreign vendors to collect use tax in the first place.[88] The consensus seems to be that enforcement might turn out to be quite a problem, as a matter of both law and practice.[89] If this consensus is correct, then there is a further empirical question of whether there the result will be an uneven playing field between domestic and foreign vendors.

Let us start with the legal analysis. It is likely correct that states are not going to have much luck getting foreign governments to enforce their use tax collection obligations under current law.[90] Some analyses seem to imply that this is basically the end of the matter, but this is not so. A state can surely impose a tax lien on any property that the non-collecting vendor has in the state, for instance. For many states, such as New York with its banks and California with its ports, this will likely be a significant aid in enforcement.

But what if the foreign vendor does not have property within the state? Again, the suggestion seems to be that if there is no property within the state, then the state is out of luck, but that too is incorrect. If a state takes the trouble of getting its tax lien reduced to a judgment in its own courts and then follows the procedures of the Uniform Enforcement of Foreign Judgments Act,[91] then the state can enforce its judgments in the courts of

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87. As happened in Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979), but not Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983). *See also* Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746 (2007) (arguing that the key test involves a preemption analysis in light of non-tax cases decided after *Container*).

88. *See* Hoke, *supra* note 84. *See also* Ryan Prete, *Foreign Sellers Likely Safe from State Online Tax Frenzy Post-Wayfair*, BLOOMBERG TAX, July 12, 2018.

89. *See, e.g.*, Garry G. Fujita, *A Court Upholds* Quill*—What's Next?*, 86 STATE TAX NOTES 741 (2017); William Hoke, *supra* note 84; Brian J. Kirkell & Mo Bell-Jacobs, *E-Flight Risk?* Wayfair *and the Revenue Rule*, 89 STATE TAX NOTES 551 (2018).

90. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (AM. LAW INST. 1987); Kirkell & Jacobs, *supra* note 89. This is not to say that governments could not and should not change this state of affairs. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002).

91. *See generally* C. Joseph Lennihan, *Cross-Border Collection of State Tax Assessments: A*

another state.[92] Forms of this Act have been passed in forty-nine states.[93] In other words, Ohio can collect from a foreign vendor by enforcing its judgment against the funds it holds in a New York bank.

To be sure, this process could be burdensome and apparently states do not typically go to this much trouble, but they sometimes do,[94] and, in any event, they would have enormous incentive to do so if the feared shift to foreign vendors were to actually occur. In short, we think that states will have considerable enforcement power if the feared shift to foreign vendors is significant enough to warrant such an effort.

As an empirical matter, we don't expect there to be a need for an enormous number of cross-state enforcement actions. We say this for several reasons beyond our legal analysis as to state power. First, as discussed previously, states almost certainly can and should impose collection obligations on major marketplaces like Amazon and eBay.[95] This should greatly reduce the scope for foreign vendors to sell to in-state customers while evading collection obligations. Second, business-to-business use-tax compliance rates are rather high,[96] and so we are only concerned with direct sales to consumers. Third, the shift of sales to smaller, foreign vendors does not present any unique enforcement problem for states given the legal and administrative need for small-seller exemptions. It is just the case that it will always be difficult for states to

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Primer, 19 J. MULTISTATE TAX'N & INCENTIVES, Sept. 2009, at 8.

92. The key Supreme Court decision establishing that states must enforce each other judgments under the Full Faith and Credit Clause is Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935). Note that this very case was about a county in Wisconsin attempting to enforce a tax judgment in Illinois. *Id.* at 269.

93. *See* Lennihan *supra* note 91; *see also Enforcement of Foreign Judgments Act*, UNIFORM LAWS COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Enforcement%20of%20Foreign%20Judgme nts%20Act. (last visited Sept. 22, 2018).

94. For instance, there are a number of cases involving New York trying to enforce judgments in Florida. *See, e.g.*, N. Y. State Comm'r of Taxation & Fin. v. Hayward, 902 So. 2d 309, 310 (Fla. Dist. Ct. App. 2005). For an example of a local government successfully enforcing a judgment see City of Philadelphia v. Austin, 429 A.2d 568, 569 (N.J. 1981). For examples of businesses using the act to collect from other businesses see Sheldon H. Laskin, *The Enforcement of Foreign Judgments: A Government Service Designed to Benefit Nonresidents*, 47 STATE TAX NOTES 41 (2008).

95. *See supra* Part III.A.

96. *See, e.g.*, California State Board of Equalization, *Revenue Estimate: Electronic Commerce and Mail Order Sales*, Rev. 8/13 (2013) at 9 ("Through one means or another BOE believes that registered sales and use tax is paid on 90 percent of California taxable B-to-B electronic commerce").

collect use tax on sales made by smaller vendors, regardless of where they are located.

Fourth, the particular form of good arguably most susceptible to evasion – digital goods – does not strike us as relatively problematic for states. This is because, though growing in importance, digital goods are still only a small slice of the market.[97] Also, many common business-to-consumer digital goods are sold through major platforms that can clearly be targeted for enforcement; think of the Apple App Store, Google Play, Netflix or Amazon Prime video. And if a foreign vendor attempted to operate independently of these platforms, it would still need to establish a payment mechanism to collect revenues from US customers. Any sizeable foreign firm would likely want to access the US capital markets, creating another opportunity for states to collect.

Fifth, though the potential price advantage from not collecting the use tax is real and substantial, we think that many of the commentators concerned about "e-flight" exaggerate the cost of use tax compliance in the same way that many remote vendors did pre-Wayfair. Not only would the compliance costs for a foreign vendor with sales above the thresholds set by the states likely face a small cost relative to the value of its sales, but these compliance cost will not likely stand out relative to the compliance costs associated with other consumption taxes.

For instance, consider a Canadian vendor. At the national level, Canada has a credit-invoice Value Added Tax (VAT) that is, on its own, at least as complex as any state's retail sales tax.[98] If the Canadian vendor sells abroad it already must cope with Border Tax Adjustments (BTAs) because basically every other country on earth has a VAT, and BTAs are a standard part of VATs. Once in the new jurisdiction, the foreign vendor will again need to deal with a VAT assuming it is making sales in the

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97. U.S. CENSUS BUREAU, E-STATS 2016: MEASURING THE ELECTRONIC ECONOMY, May 24, 2018, https://www.census.gov/content/dam/Census/library/publications/2018/econ/e16-estats.pdf (reporting that e-commerce was 8% of total sales in 2016).

98. Likely more so. *See, e.g.*, Sebastian Eichfelder & François Vaillancourt, *Tax compliance costs: A review of cost burdens and cost structures* 28 (ARQUS, Working Paper No. 178, 2014) ("VAT seems to be significantly more costly than more simple sales taxes"), http://www.arqus.info/mobile/paper/arqu s_178.pdf. Note that many of the Canadian provinces also have their own consumption taxes. On the complicated system in Canada generally see Richard M. Bird & Pierre-Pascal Gendron, *Sales Taxes in Canada: The GST-HST-QST-RST "System"*, 63 TAX L. REV. 517 (2010).

foreign country itself.[99]

Furthermore, and sixth, there is a significant body of literature to the effect that businesses generally want to comply with the law. This is not just a matter of altruism, but good sense for the business and for the individual managers.[100] Simply not paying a large state tax liability will show up on financial statements, for example, and will hover over any future plans to operate in the United States.[101] It seems improbable to us that many large vendors are likely just to ignore the laws of states in which they make substantial sales. Remember that in the pre-*Wayfair* world, big businesses like Wayfair were *complying* with current law when not remitting the use tax. In the new post-*Wayfair* world, this will no longer be the case.

Finally, and perhaps most importantly, if a shift to foreign sellers ultimately ends up being a large problem, despite all our reasons to think this will not be the case, then we would expect Congress to intervene on the side of the states. After all, this would be a situation where *all* US domestic vendors would be at a disadvantage – we would not have the same issue as related to the *Quill* rule where the interests of different states diverged based on whether or not they had a sales tax.

For all of these reasons, we do not expect that foreign sellers will create any major gaps in the new post-*Wayfair* sales-and-use-tax enforcement regime. State governments should not let any fears about in-state citizens shifting to purchasing from foreign vendors stand in the way of efforts to apply more encompassing nexus standards for imposing collection obligations on out-of-state vendors.

CONCLUSION

In this essay, we have analyzed a number of key questions that arise from the *Wayfair* decision. Certainly, other questions will arise beyond those we have considered here; we make no claims to having

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99. Foreign countries generally have de minimis rules that protect smaller vendors from VAT obligations, but the threshold amounts vary considerably. Emily Ann Satterthwaite, *On the Threshold: Smallness and the Value Added Tax*, 9 COLUM. TAX L.J. 177, 194–95 (2018).

100. *See* Wei Cui, *Taxation Without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. PA. J. BUS. L. 93 (2018).

101. Kirkell and Jacobs make this point. *See* Kirkell & Jacobs, *supra* note 87.

comprehensively analyzed all aspects of the decision. Instead, we conclude by repeating our list of the specific policy suggestions we offer, that state governments should consider: (1) simplifying their sales-and-use-tax systems, along with potentially joining the Streamlined Sales and Use Tax Agreement ("SSUTA") if they have not already done so, (2) offering full and adequate reimbursement for compliance costs, especially for smaller vendors, (3) offering free compliance software and immunity for vendors who properly rely on such software, (4) either ensuring that their sales-and-use-tax statutes impose substantive tax liabilities in the same manner as does South Dakota's statute or else continuing their reliance on the historic formalism by requiring remote vendors to collect and remit use taxes rather than sales taxes, (5) ensuring that any attempts to expand corporate income tax nexus based on the *Wayfair* decision incorporate *de minimis* thresholds in a similar manner as our recommendations for expanding sales-and-use tax nexus, (6) applying their new sales-and-use-tax nexus standards to the major marketplaces in addition to vendors selling directly, and (7) taking steps to alleviate possible concerns about in-state citizens shifting to purchasing from foreign vendors.