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The Slow-Me State: The Emergence of Internet Sales Taxation and Missouri's Anomalous Response

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NOTE

The Slow-Me State: The Emergence of Internet Sales Taxation and Missouri’s Anomalous Response

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

Claire Hawley*

I. INTRODUCTION

In *South Dakota v. Wayfair, Inc.*, the United States Supreme Court fundamentally reshaped more than a century of precedent on the Dormant Commerce Clause. While this decision carries far-reaching implications, this Note is primarily concerned with its impact on state sales taxation and Missouri’s anomalous – and extremely costly – response. The authority of states to levy taxes on interstate commerce has traditionally been limited to retailers with a physical in-state presence.¹ Founded on Due Process and Commerce Clause considerations, this rule was originally articulated in response to attempts by state governments to tax the sales of mail-order retailers.² Over time, largely due to the explosive growth of e-commerce, this rule became grossly misaligned with the realities of the modern economy and unduly burdensome on state taxation authorities.³ Large online retailers like Amazon and eBay were legally able to avoid paying state sales and use tax on goods shipped to state residents.⁴ Amidst growing opposition from the states, the physical presence rule was recently abrogated by the Supreme Court in *Wayfair*.⁵ Now, states can collect sales and use tax from out-of-state sellers as long as those sellers have a “substantial nexus” within the state.⁶ In the

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1. *Nat’l Bellas Hess Inc., v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 758 (1967), *overruled by* *Quill Corp. v. N. Dakota*, 504 U.S. 298 (1992), *overruled by* *S. Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

2. *Id.*

3. *S. Dakota v. Wayfair*, 138 S. Ct. 2080, 2097 (2018).

4. *Id.*

5. *Id.* at 2099.

6. *Id.*

wake of *Wayfair*, almost all of the states with an existing sales tax regime have enacted legislation to implement an Internet sales tax.⁷ Missouri is one of two states that has yet to do so.⁸ What is causing this anomalous delay and, most importantly, what is it costing Missouri residents? This Note ultimately concludes Missouri's delay – which is caused by the complexity of its existing sales tax regime and the Republican-controlled state legislature's gridlock – is costing its residents an estimated \$165 million every year.

II. LEGAL BACKGROUND

The Constitution, which authorizes Congress to “regulate Commerce with foreign Nations, and among the several States,” is silent on the states' authority to levy taxes on interstate commerce.⁹ As a result, courts have wrestled with the Dormant Commerce Clause since the early nineteenth century.¹⁰ Two primary principles have emerged: First, states may not discriminate against interstate commerce.¹¹ Second, states may not impose undue burdens on interstate commerce.¹² While the Dormant Commerce Clause has traditionally been used to prohibit state taxation of commercial interests that are foreign or purely interstate, judicial interpretations of the Commerce Clause have evolved over time.¹³

A. State Taxation of Interstate Commerce

In *Leloup v. Port of Mobile*, the Supreme Court held that “no State has the right to lay a tax on interstate commerce in any form.”¹⁴ This broad prohibition was later narrowed, as the Court began to distinguish between direct and indirect burdens on interstate commerce. Direct burdens were

7. Kaitlyn Schallhorn, *Next Steps: 'Wayfair' Internet Sales Tax*, THE MO. TIMES (June 25, 2019), <https://themoisouritimes.com/next-steps-wayfair-internet-sales-tax/> [perma.cc/84HM-J5KA].

8. Jared Walczak & Janelle Cammenga, *State Sales Tax in the Post Wayfair Era*, TAX FOUNDATION (Dec 12, 2019), <https://taxfoundation.org/state-remote-sales-tax-collection-wayfair/> [perma.cc/8EH5-BCSG].

9. U.S. CONST. art. I, §8.

10. *See generally*, *Brown v. Maryland*, 25 U.S. 419 (1827).

11. *See Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994).

12. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008).

13. *See P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* §§ 2:9–2:17 (1981).

14. 127 U.S. 640, 648 (1888). This case involved a Mobile, Alabama, municipal ordinance that levied a \$225 annual license tax on all telegraph companies transmitting messages to and from the state. *Id.* at 641. Leloup, the employee of a national telegraph company that refused to pay, was indicted and convicted of failing to pay the license tax. *Id.*

unconstitutional, while indirect burdens were not.¹⁵ In *Western Live Stock v. Bureau of Revenue* and subsequent decisions, the Court rejected this formal, categorical analysis and adopted a “multiple-taxation doctrine” that focused not on whether a tax was “direct” or “indirect” but rather on whether a tax subjected interstate commerce to a risk of multiple taxation.¹⁶ The Supreme Court briefly revived the direct/indirect distinction in *Freeman v. Hewit*, which invalidated Indiana’s imposition of a gross receipts tax on a particular transaction because that application would “impos[e] a direct tax on interstate sales.”¹⁷

Finally, in *Complete Auto Transit, Inc. v. Brady*, the Court announced the rule that has governed state taxation ever since.¹⁸ *Complete Auto* characterized the direct/indirect distinction as “attaching constitutional significance to a semantic difference.”¹⁹ The Court then went on to emphasize the importance of looking past “the formal language of the tax statute [to] its practical effect” and set forth a four-part test that governs the validity of state taxes under the Commerce Clause.²⁰ The Court will sustain a tax so long as it: (1) applies 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.²¹

B. Application of the Complete Auto Test

Against this backdrop, the Supreme Court began to rule on several cases in which states were attempting to tax retailers without a physical in-state presence. In *National Bellas Hess, Inc. v. Department of Revenue of State of Illinois*, the plaintiff was a national mail order retailer with its principal place of business in Missouri.²² The State of Illinois attempted to collect a use tax

15. See, e.g., *Sanford v. Poe*, 69 F. 546 (6th Cir. 1895), *aff’d sub nom. Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194 (1897).

16. 303 U.S. 250, 256–58 (1938). This case arose after a trade journal challenged New Mexico’s statewide “privilege” tax aimed at publishing businesses. *Id.* at 551–52. The trade journal in question was published in New Mexico but had significant intrastate circulation. *Id.* at 251–52. Nevertheless, under this tax, the trade journal was required to pay taxes of 2% gross revenue from advertising sales. *Id.* at 552. The New Mexico tax on the trade magazine published in its state differed from previously invalidated local taxes measured by gross receipts from interstate commerce because “the tax is not one which in form or substance can be repeated by other states in such a manner as to lay an added burden on the interstate distribution of the magazine.” *Id.* at 550–51.

17. 329 U.S. 249, 256 (1946).

18. 430 U.S. 274, 279 (1977).

19. *Id.* at 285.

20. *Id.* at 279.

21. *Id.*

22. 386 U.S. 753, 756 (1967), *overruled by* *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 (1992), *overruled by* *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

from the plaintiff-retailer on goods shipped to Illinois residents.²³ The Supreme Court held that the plaintiff lacked the requisite minimum contacts with the forum state required by the Due Process Clause and the Commerce Clause.²⁴ In what has since become known as the physical presence rule, the Court in *Bellas Hess* effectively limited state taxation powers to retailers with a physical presence, such as “retail outlets, solicitors, or property within a State.”²⁵

In 1992, the Court reexamined the physical presence rule in *Quill Corp. v. North Dakota By & Through Heitkamp*.²⁶ The facts of the case closely resemble those of *Bellas Hess*: North Dakota was attempting to require an out-of-state mail-order seller to pay use tax on goods purchased for use within the state.²⁷ As in *Bellas Hess*, the Court ruled in favor of the plaintiff-retailer.²⁸ However, the *Quill* Court overruled the due process holding in *Bellas Hess*²⁹ and instead reaffirmed the physical presence rule under the Commerce Clause alone.³⁰ The Court reasoned that this was necessary to prevent undue burdens on interstate commerce by, for example, subjecting retailers to tax collection in thousands of different taxing jurisdictions.³¹ *Quill* grounded the physical presence rule in *Complete Auto*’s requirement that taxes have a “substantial nexus” with the activity being taxed.³² The precedent established by *Quill* was dutifully followed for more than two decades, meaning out-of-state companies that shipped goods ordered via catalog into the consumer’s state were beyond the reach of state taxation.

III. RECENT DEVELOPMENTS

While the physical presence rule has always had its critics,³³ opposition increased exponentially with the dawn of the Cyber Age and, more

23. *Id.* at 754.

24. *Id.* at 758.

25. *Id.*

26. *Id.* at 308.

27. *Id.* at 301.

28. *Id.* at 301–02.

29. *Id.* at 307–08 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

30. *Id.* at 317–318.

31. *Id.* at 313 n.6.

32. *Id.* at 311.

33. *See, e.g.*, *Quill Corp. v. N. Dakota*, 504 U.S. 298, 322–23 (1992) (White, J., concurring in part and dissenting in part) (“The Court stops short, however, of giving *Bellas Hess* the complete burial it justly deserves. . . . What we disavowed in *Complete Auto* was not just the formal distinction between ‘direct’ and ‘indirect’ taxes on interstate commerce . . . but also the whole notion underlying the *Bellas Hess* physical-presence rule – that interstate commerce is immune from state taxation.”); *see also* P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10.8 (1981); Paul Hartman, *Collection of Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1006–15 (1986); Jerome Hellerstein, *Significant*

specifically, e-commerce. The criticism coalesced around a single argument: Physical presence is not necessary to create a substantial nexus.³⁴ At the time of *Quill* and *Bellas Hess*, the Internet was still an unknown concept to a majority of the public, and it seemed fair to assume that, for the foreseeable future, most major retailers in a state market would need some degree of physical presence to be successful. Thus, the physical presence rule was interpreted in the context of the mail-order catalog industry. Until recently, the thriving online retail industry was afforded the very same protection from state taxation.³⁵ Critics argued this gave online retailers a competitive advantage over in-state retailers and allowed them to unfairly deprive states of tax revenue.³⁶ The purpose of the Commerce Clause is not “to relieve those engaged in interstate commerce from their just share of state tax burden.”³⁷

This problem was not entirely unforeseen by the *Bellas Hess* and *Quill* Courts. The dissent in *Bellas Hess* argued, “There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient ‘nexus’ to require *Bellas Hess* to collect from Illinois customers and to remit the use tax.”³⁸ In *Quill*, three Justices based their decision to uphold the physical presence rule on *stare decisis* alone.³⁹ In his dissent, Justice White went so far as to argue that “there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it.”⁴⁰ Since then, the Court’s criticism of the rule has only intensified. Justice Kennedy voted for the result in *Quill* but recently urged “[t]he legal system” to “find an appropriate case for this Court to reexamine” it because it would be “unwise to delay any longer.”⁴¹ Justice Thomas, also a member of the *Quill* majority, similarly advocates for its abandonment.⁴² Justice Gorsuch joined in as well,

Sales and Use Tax Developments During the Past Half Century, 39 VAND. L. REV. 961, 984–85 (1986); Sandra B. McCray, *Overturing Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 288–90 (1985); Charles Rothfeld, *Mail Order Sales and State Jurisdiction to Tax*, 53 TAX NOTES 1405, 1414–1418 (1991).

34. *S. Dakota v. Wayfair*, 138 S. Ct. 2080, 2092 (2018).

35. Matthew Hector, *Amazon, Tax Collector*, 103 ILL. B. J. 17 (2015).

36. Michael Bardwell, *Supreme Court May Overturn Quill*, 65 LA. B. J. 431 (2018).

37. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (internal quotation marks omitted).

38. *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of State of Ill.*, 386 U.S. 753, 761–62 (Fortas, J., dissenting).

39. *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 320 (1992) (Scalia, J., concurring in part and concurring in judgment).

40. *Id.* at 327 (Scalia, J., concurring in part and dissenting in part).

41. *See Direct Mktg. Ass’n v. Brohl*, 575 U.S. 1, 18–19 (2015) (Kennedy, J., concurring).

42. *See, e.g., Comptroller v. Wynne*, 135 S. Ct. 1787, 1809 (2015) (Thomas, J., dissenting).

commenting that *Quill* gave its own rule an “expiration date,” setting it up to “wash away with the tides of time.”⁴³

A. *The Cost of Bellas Hess and Quill*

“It is estimated that *Bellas Hess* and *Quill* cause the States to lose between \$8 and \$33 billion” in sales and use tax revenue every year.⁴⁴ Unsurprisingly, state legislatures have tried to address this issue in several ways. For example, Massachusetts proposed a regulation that defined physical presence to include apps available for download by in-state residents and cookies placed on in-state residents’ web browsers.⁴⁵ Ohio adopted a similar standard.⁴⁶ Other states have enacted “click through” nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation.⁴⁷ Colorado and other states have imposed notice and reporting requirements on out-of-state retailers that do not remit sales tax.⁴⁸ The Alabama Department of Revenue issued a regulation, effective January 1, 2016, that applied its state sales tax to an “out-of-state seller” with more than \$250,000 in “tangible personal property sold into the state” during the previous year.⁴⁹ As discussed below, one state went so far as to pass a law in direct contravention of *Quill* and *Bellas Hess*.

B. *South Dakota Goes Rogue*

In 2016, the South Dakota State Legislature passed Senate Bill 106 (“SB 106”), which authorized the collection of sales tax on goods purchased by residents from out-of-state sellers.⁵⁰ SB 106 applied only to sellers that deliver more than \$100,000 of goods or services into the state or engage in 200 or more separate transactions for the delivery of goods and services into the state on an annual basis.⁵¹ Prior to SB 106 taking effect, South Dakota

43. See *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

44. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088 (2018).

45. See 830 MASS. CODE REGS. 64H.1.7 (2017).

46. See OHIO REV. CODE ANN. §5741.01(I)(2)(i) (LexisNexis 2018).

47. See, e.g., N. Y. TAX LAW §1101(b)(8)(vi) (McKinney 2017); Brief of Tax Foundation as *Amicus Curiae* at 20–22, *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) (listing 21 States with similar statutes).

48. See *Direct Mktg. Ass’n*, 814 F.3d at 1133 (discussing COLO. REV. STAT. §39–21–112(3.5)); Brief of Tax Foundation as *Amicus Curiae* at 20–22, *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (No. 17-494) (listing nine States with similar statutes).

49. ALA. ADMIN. CODE R. 810-6-2-.90.03 (2018).

50. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).

51. *Id.*

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is

sent direct notice of the new law to many out-of-state retailers it believed would meet the statutory thresholds.⁵² The State then brought suit in state court against four companies that failed to comply, seeking a declaratory judgment affirming the law's validity and applicability to them.⁵³ One company elected not to assert a *Quill* defense, leaving three respondents: Wayfair, Overstock, and Newegg.com.⁵⁴ The state trial court granted respondents' motion for summary judgment, reasoning that *Quill* invalidated SB 106 as a matter of law.⁵⁵ Because it was "duty bound to follow applicable precedent of the United States Supreme Court," the court had to rule for respondents, "even when changing times and events clearly suggest a different outcome."⁵⁶ The South Dakota Supreme Court affirmed the lower court's ruling.⁵⁷

By 2017, many other states had already enacted similar legislation designed to challenge *Quill*, including Alabama, Indiana, Tennessee, and Wyoming.⁵⁸ Amidst widespread opposition to the physical presence rule, the Supreme Court granted certiorari in *South Dakota v. Wayfair, Inc.*⁵⁹ In a five-

subject to chapters 10–45 and 10–52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year: (1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Id.

52. *State v. Wayfair Inc.*, 901 N.W.2d 754, 759, *cert. granted sub nom.* S. Dakota v. *Wayfair, Inc.*, 138 S. Ct. 735 (2018), and *vacated and remanded sub nom.* S. Dakota v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

53. *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1029 (D.S.D. 2017).

54. *Id.*

55. *State v. Wayfair, Inc.*, 2017 WL 4358293, at *1 (S.D. Cir. Mar. 6, 2017).

56. *Id.*

57. *S. Dakota v. Wayfair*, 138 S. Ct. 2080, 2089 (2018).

58. Ryan Prete, *First Digital Sales Tax Dispute Reaches U.S. Supreme Court*, BLOOMBERG (Oct. 3, 2017), <https://web.archive.org/web/20180113093441/https://www.bna.com/first-digital-sales-n73014470458/> [perma.cc/L4F4-U9TD]. *Simplified Sellers Use Tax (SSUT)*, ALA. DEP'T OF REVENUE, <https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/> [perma.cc/B8CG-JRG8]; *Indiana Enacts Economic Nexus Legislation*, SALES TAX INSTITUTE (July 20, 2018), <https://www.salestaxinstitute.com/resources/indiana-enacts-economic-nexus-legislation> [perma.cc/DAM9-F6MV]; *Tennessee Enacts Economic Nexus Regulation*, SALES TAX INSTITUTE (Mar. 27, 2018), <https://www.salestaxinstitute.com/resources/tennessee-enacts-economic-nexus-regulation> [perma.cc/7ADF-CM5S]; *Wyoming Enacts Economic Nexus Legislation*, SALES TAX INSTITUTE (Jun. 28, 2018), <https://www.salestaxinstitute.com/resources/wyoming-enacts-economic-nexus-legislation> [perma.cc/G35E-TJRQ].

59. 138 S. Ct. at 2088.

to-four opinion, the Supreme Court vacated the judgment of the Supreme Court of South Dakota, overturned *Quill* and *Bellas Hess*, and abrogated the physical presence rule.⁶⁰ The issue in the case was whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the state. Forty-one states, two territories, and the District of Columbia filed an amicus brief urging the Supreme Court to reject the physical presence rule.⁶¹

C. *The Economic Nexus Rule*

With *Quill* and *Bellas Hess* overturned, the Court announced a new standard under which no physical presence within the taxing state is required.⁶² Grounding its analysis in the first prong of the *Complete Auto* test, which asks whether the tax applies “to an activity with a substantial nexus with the taxing state,”⁶³ the Court articulated the economic nexus rule: “[S]uch a nexus is established when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”⁶⁴ Based on the facts in *Wayfair*, the Court concluded the substantial nexus requirement, as applied to the defendants, was satisfied by SB 106.⁶⁵ The Court then provided several reasons for its decision to adopt the economic nexus rule.⁶⁶ First and foremost, the physical presence rule was an incorrect interpretation of the Commerce Clause insofar as it was misaligned with the modern economy.⁶⁷

In the majority opinion, Justice Kennedy stated, “Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States.”⁶⁸ The Court concluded that “The basic principles of the Court’s Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.”⁶⁹ Here, the Court’s reasoning was grounded in the exponential growth of e-commerce since *Quill* and *Bellas Hess*.⁷⁰ The vast majority of Americans use the Internet today.⁷¹ The Internet’s prevalence and power have unquestionably changed the

60. *Id.* at 2100.

61. *Id.* at 2093.

62. *Id.*

63. *Complete Auto*, 430 U.S. at 279.

64. *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009).

65. *Wayfair*, 138 S. Ct. at 2099.

66. *Id.*

67. “Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.” *Id.* at 2095.

68. *Id.* at 2092.

69. *Id.* at 2095.

70. *Id.* at 2097.

71. *Id.* “In 1992, less than two percent of Americans had Internet access. Today, that number is about eighty-nine percent.” *Id.*

dynamics of the national economy. In less than twenty years, online retail sales grew from 0.8% to 8.9% of total retail sales in the United States.⁷² In 2015, for the first time, a remote seller became the largest retailer in the world.⁷³ As a whole, online retailers saw an estimated \$453.5 billion in sales in 2017⁷⁴ – far outpacing the sales of national mail-order retailers at the height of their popularity.⁷⁵

The expansion of online retailers, especially compared to mail-order retailers, led the Court to become increasingly concerned with the burden placed on states, specifically the ever-increasing loss of revenue caused by the physical presence requirement. “In 1992, it was estimated that the states were losing between \$694 million and \$3 billion per year in sales tax revenues as a result of the physical presence rule.”⁷⁶ When *Wayfair* was decided in 2018, the estimates ranged from \$8 to \$33 billion.⁷⁷ The states’ interest was particularly strong here, insofar as the ability to collect this revenue is crucial. Unlike the federal government, states must balance their budgets each year, making lost revenue a fundamental concern. Thus, the Court overruled *Quill* and *Bellas Hess* because the physical presence rule embodied “the sort of arbitrary, formalistic distinction that the Court’s modern Commerce Clause precedents disavow.”⁷⁸ The Court’s Commerce Clause jurisprudence has “eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.”⁷⁹ *Quill*, by contrast, “treat[ed] economically identical actors differently” and “for arbitrary reasons.”⁸⁰ *Quill* puts both local businesses and many interstate businesses with a physical presence at a competitive disadvantage relative to remote sellers. Remote sellers were able to avoid the regulatory burdens of tax collection and could offer *de facto* lower prices.⁸¹ In this sense, *Quill* had become an intolerable burden on interstate commerce. The Court concluded “[s]tare decisis can no longer support the Court’s prohibition of a valid exercise of the States’ sovereign power.”⁸²

72. *Id.*

73. Shan Li, *Amazon Overtakes Wal-Mart as Biggest Retailer*, L.A. TIMES (July 24, 2015) <https://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html> [perma.cc/S9WZ-WD92].

74. 504 U.S. at 329 (White, J., concurring in part and dissenting in part) (citations omitted). A contemporaneous study by the U.S. Advisory Commission on Intergovernmental Relations, an independent, bipartisan federal agency, found that “states could generate almost \$3.3 billion in 1992 if out-of-state retailers were required to collect state sales taxes.” Henry A. Coleman, *Taxation of Interstate Mail-Order Sales*, INTERGOVERNMENTAL PERSPECTIVE, at 9, 12 (Winter 1992).

75. *Wayfair*, 138 S. Ct. at 2097. “In 1992, mail-order sales in the United States totaled \$180 billion.” *Id.*

76. *Id.*

77. *Id.* at 2088.

78. *Id.* at 2085.

79. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

80. *Wayfair*, 138 S. Ct. at 2085.

81. *Id.* at 1094.

82. *Id.* at 2086.

The second reason the Supreme Court struck down the physical presence rule was because it created market distortions.⁸³ In addition to incentivizing businesses not to establish an in-state physical presence, *Quill* created an inefficient “online sales tax loophole” that gave out-of-state businesses an advantage.⁸⁴ In *Wayfair*, Justice Kennedy criticized *Quill* as a “judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State’s consumers – something that has become easier and more prevalent as technology has advanced.”⁸⁵ The majority worried the physical presence rule would unduly burden small businesses with diverse physical presence, while benefitting large online retailers with very few physical locations.⁸⁶ As evidence of the unfair advantages to online retailers, the Court pointed to an advertisement on Wayfair’s website which read, “One of the best things about buying through Wayfair is that we do not have to charge sales tax.”⁸⁷

Finally, the Supreme Court pointed to several features of South Dakota’s sales tax system that would minimize the burden on interstate commerce and the potential for discrimination against online retailers.⁸⁸ First, SB 106 includes a safe harbor provision for online retailers who engaged in limited transactions within the state.⁸⁹ South Dakota cannot impose sales tax on an out-of-state seller unless they have at least \$100,000 in sales or at least 200 transactions in the state in the current or previous calendar year.⁹⁰ Second, the provisions of SB 106 became effective on May 1, 2016⁹¹ and “may not be applied retroactively.”⁹² Third, South Dakota adopted the Streamlined Sales and Use Tax Agreement (“the SSUTA”), a standardized tax system that reduces administrative and compliance costs for sellers by establishing interstate uniformity.⁹³ Twenty-four states have adopted the SSUTA.⁹⁴ Finally, South Dakota provides sellers with access to a sales tax administration software, which they may use for free.⁹⁵ “Sellers who choose to use this software are immune from audit liability.”⁹⁶ From the Court’s perspective, these features of SB 106 were sufficient to address any concerns about its application of the Commerce Clause in *Wayfair*.⁹⁷

83. *Id.* at 2085.

84. *Id.* at 2092.

85. *Id.* at 2094.

86. *Id.* at 2085–86.

87. *Id.* at 2096 (citations omitted).

88. *Id.* at 2099.

89. *Id.*

90. S.B. 106, 2016 Legis. Assemb., 91st Sess. § 1 (S.D. 2016).

91. *Id.* at § 9.

92. *Id.* at § 5.

93. *Wayfair*, 138 S. Ct. at 2099.

94. *Id.*

95. *Id.* at 2100.

96. *Id.*

97. *Id.*

IV. DISCUSSION

Forty-six of the states with a general sales tax have enacted some form of economic nexus legislation.⁹⁸ Many states have followed the general framework provided by South Dakota's SB 106.⁹⁹ For example, "[A]ll state economic nexus laws grant safe harbor to small sellers,"¹⁰⁰ and "[m]ore than twenty states use the \$100,000 sales and/or 200 transactions threshold, although the sales that comprise the threshold vary from state to state."¹⁰¹ Under most state statutes, collection of sales tax is required. Some states, in apparent anticipation of potential legal challenges, loosened the requirement to "collection or reporting."¹⁰² States also took slightly different approaches regarding the type of property covered by the new tax legislation. At least three states – Alabama, Georgia, and Illinois – opted for a simple, straightforward definition: "[T]angible personal property" sold to customers within the state.¹⁰³ Ohio and Rhode Island enlarge the definition to include "services,"¹⁰⁴ while Wyoming goes even further ("tangible personal property, admissions, or services").¹⁰⁵ Meanwhile, North Dakota's statute took a catch-all approach: "[T]angible personal property (or other taxable sales) or sales

98. Gail Cole, *Happy Birthday, Wayfair: What A Year It's Been*, AVALARA (June 21, 2019), <https://www.avalara.com/us/en/blog/2019/06/wayfair-ruling-turns-1-what-does-it-mean.html> [perma.cc/NY9M-S8KD].

99. *Id.*

100. *Id.*

101. There is significant variation in the threshold at which a remote seller would become subject to state sales tax. Three states – Oklahoma, Washington, and Pennsylvania – set this threshold very low: \$10,000 in annual sales. *Id.* The most common threshold was \$100,000 in annual sales or 200 or more annual sales transactions with persons in the state. *See, e.g.*, IND. CODE § 6-2.5-2-1 (2019); WYO. STAT. § 39-15-501 (2019); R.I. GEN. LAWS § 44-18.2 (2019); N.D. CENT. CODE § 57-40.2-02.3 (2019); 35 ILCS 105/2 (2019); ME. STAT. tit. 36, § 1951-B (2019); KY. REV. STAT. § 139.340(2)(g) (2019); IOWA CODE § 423.14A(2)-(3) (2019); VT. STAT. tit. 32, § 9701(9)(F) (2019) (effective "on the later of July 1, 2017 or beginning on the first day of the first quarter after a controlling court decision or federal legislation abrogates the physical presence requirement of Quill"); HAW. REV. STAT. c. 237 (2019) (effective July 1, 2018, and applicable to tax years beginning after Dec. 31, 2017). Alabama, Mississippi, and Georgia raised the threshold to \$250,000 (although the Georgia and Connecticut thresholds are also satisfied by 200 or more retail sales). *See, e.g.*, ALA. ADMIN. CODE 810-6-2-.90.03 (2019); GA. CODE § 48-8-2(8)(M.1)-(M.2) (2019).

102. Four states opted for this language: Rhode Island (R.I. GEN. LAWS § 44-18.2 (2019)); Oklahoma (OKLA. STAT. tit.68, § 1392 (2019)); Washington (H.B. 2163, 65th Leg., 3d Sess. (Wash. 2017)); Pennsylvania (Act 43, H.B. 542, 2017 Sess. (Pa. 2017)).

103. ALA. ADMIN. CODE 810-6-2-.90.03 (2019); GA. CODE ANN. § 48-8-2(8)(M.1)-(M.2) (2020); 35 ILL. COMP. STAT. 103/25 (2020).

104. OHIO REV. CODE ANN. § 5741.01(I)(2) (West 2019); R.I. GEN. LAWS § 44-18.2 (2019).

105. WYO. STAT. ANN. § 39-15-501 (2019).

transactions delivered in North Dakota.”¹⁰⁶ Some states add language that speaks to the legislation’s underlying purpose. For example, the Massachusetts regulation covers “tangible personal property or telecommunications services.”¹⁰⁷ The Kentucky statute covers “tangible personal property or digital products delivered or transferred electronically to a customer in Kentucky.”¹⁰⁸

Despite this general uniformity, many of the approaches taken by states following *Wayfair* are diverse and interesting. For example, the New York Department of Taxation and Finance was very quick to act, announcing in January 2019 that the *Wayfair* decision allowed it to tax remote sales effective “immediately.”¹⁰⁹ In April 2019, the California state legislature amended the state’s economic nexus threshold from \$100,000 to \$500,000 almost a month after the economic nexus rule took effect.¹¹⁰ Most states have acknowledged that while enforcement is on the horizon, the more present concern is allowing their state legislature to finalize the details of the legislation.¹¹¹ Still, there are some states that have not even reached this critical step: As previously mentioned, Missouri and Florida are the only states with a general sales tax that have not enacted any form of economic nexus legislation. The following Sections addresses the following questions: What is its effect on Missouri’s state revenue collection? What is driving Missouri’s anomalous response?

A. *The Cost of Missouri’s Delay*

Current estimates anticipate Missouri could collect at least \$165 million in yearly revenue if it enacted economic nexus legislation.¹¹² While such estimates are helpful in appreciating potential revenue growth, tax analysts point out the loss of revenue compounds at an ever-increasing rate with the ever-accelerating growth of e-commerce.¹¹³ The prospect of a new source of

106. N.D. CENT. CODE § 57-40.2-02.3 (2019).

107. 830 CODE MASS. REGS. 64H.1.7 (2020).

108. KY. REV. STAT. ANN. § 139.340(2)(g) (West 2019).

109. *Notice Regarding Sales Tax Registration Requirement for Businesses with No Physical Presence in New York State*, N.Y. STATE DEP’T OF TAXATION & FINANCE (Jan. 2019), <https://www.tax.ny.gov/pdf/notices/n19-1.pdf> [perma.cc/C5X2-W7SL].

110. A.B. 147, 2019–2020 Sess. (Cal. 2019).

111. *See, e.g., Remote Sales Tax Collection*, NAT’L CONF. OF S. LEGISLATURES (Oct. 1, 2019), <http://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx> [perma.cc/H9CX-JHKJ]; *Remote Seller Nexus Chart*, SALES TAX INST., <https://www.salestaxinstitute.com/resources/remote-seller-nexus-chart> [perma.cc/7UR7-NTWU] (last visited Dec. 16, 2019).

112. Kurt Erickson, *In Debate over Online Sales Taxes, Some in Missouri GOP Want to Give It Back*, ST. LOUIS POST-DISPATCH (Apr. 2, 2019), https://www.stltoday.com/news/local/govt-and-politics/in-debate-over-online-sales-taxes-some-in-missouri-gop/article_2f1b62f5-90ab-5799-aaf8-5a29e4093f1f.html [perma.cc/ECW6-ZNPR].

113. *See, e.g., Richard D. Pomp, Wayfair: Its Implications and Missed Opportunities*, 58 WASH. U. J.L. & POL’Y 1 (2019).

revenue is all the more important because of Missouri's lackluster financial situation.¹¹⁴ The revenue collected by the state is significantly below projections for this fiscal year, potentially forcing Missouri Governor Mike Parson to withhold money from various programs to keep Missouri's budget balanced.¹¹⁵ Although the problems caused by lack of revenue could abate as Missourians pay their state income tax bills, the reality is that revenue collections are down by at least 4.3% (\$286.7 million) from the previous fiscal year.¹¹⁶

B. Missouri Legislature Attempts to Act

Missouri's inaction in the wake of *Wayfair* is not for lack of trying. State legislators have proposed a variety of economic nexus bills, but the General Assembly failed to agree on which to enact. Senate Bill 50 ("SB 50"), sponsored by Missouri Senator William Eigel, proposes collecting a single tax of 6.5% on out-of-state internet sellers.¹¹⁷ Missouri Senator Andrew Koenig, Chairperson of the Ways and Means Committee, has proposed Senate Bill 46 ("SB 46"), which is similar to SB 50, except it includes a provision whereby Missouri would join the SSTUA.¹¹⁸ Under the SSTUA, Missouri would be required to use single, standardized definitions of products and services and adopt a simplified rate structure for both state and local taxes.¹¹⁹ Proponents of the SSTUA point out its uniformity and easy applicability to out-of-state sellers. Importantly, both SB 50 and SB 46 would use the revenue generated from taxing online sales to cut the state income tax rate.¹²⁰

On February 12, 2019, SB 50 and 46 were combined (the "Combined Act").¹²¹ Senator Koenig added a provision that would lower the individual income tax rate by the amount of increased use tax collected by this legislation in calendar year 2021.¹²² Under the Combined Act, which would become effective January 1, 2021, this power would be given to the Director of

114. Kathryn Palmer, *State Tax Error Drove \$536 Million Revenue Deficit, 'April Surprise'*, COLUMBIA MISSOURIAN (Jan. 23, 2019), https://www.columbiainmissourian.com/news/state_news/state-tax-error-drove-million-revenue-deficit-april-surprise/article_b7e63204-1f62-11e9-b6db-cfdb2e8c117d.html.

115. Hunter Woodall & Jason Hancock, *Voters Rejected Gov. Parson's Gas Tax. Now He's Hoping to Borrow Millions Instead*, K.C. STAR (Jan. 16, 2019, 7:24 PM), <https://www.kansascity.com/news/politics-government/article224618695.html>.

116. Erickson, *supra* note 112.

117. Mackenzie Totten, *Senators Pitch Two Plans for Internet Sales Tax*, MO. BUS. ALERT (Feb. 7, 2019), <http://www.missouribusinessalert.com/industries/102631/2019/02/07/senators-pitch-two-plans-for-internet-sales-tax> [perma.cc/LL22-MAZD].

118. *Id.*

119. *Id.*

120. *Id.*; see also Erickson, *supra* note 112.

121. S.B. 50, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

122. *Id.*

Revenue in 2022.¹²³ Ultimately, the Missouri General Assembly did not vote on the Combined Act before the end of the legislative session.¹²⁴

Meanwhile, in the House of Representatives, Representative Jay Eggleston filed House Bill 548 (“HB 548”).¹²⁵ HB 548 narrowly passed out of Committee by a five-to-four vote but is unlikely to find support from the general legislative body.¹²⁶ In a dramatically different approach than the Combined Act, HB 548 would collect only the 4.225% rate of state sales tax currently collected for other sales or use transactions and would not impose local sales or use taxes on the affected internet sales transactions.¹²⁷ The failure to collect local sales taxes was instrumental in a number of Republican members’ opposition to the bill.¹²⁸ Further problematizing HB 548 is its assumption that the entire 4.225% current state sales/use tax revenue can be used to lower income tax rates. This has been met with skepticism because part of the 4.225% rate is constitutionally required to be used for parks and soils (1%) and for conservation (0.125%).¹²⁹ Advocates for those programs are likely to fight to protect these allotments. Representative Chrissy Sommer, Chairperson of the House Ways and Means Committee, said a decision on how to proceed had not been made.¹³⁰ During the last session, the Committee held hearings on economic nexus bills that would use the revenue for things other than income tax cuts.¹³¹

Governor Parson has also weighed in on the prospect of taxing online sales. In December 2018, Governor Parson said he wanted to see a tax enacted in order to level the playing field for in-state companies and their out-of-state competitors.¹³² Many have assumed Governor Parson hopes for the

123. *Id.*

124. *Id.* Gail Cole, *Missouri Moves to Tax Remote Sales Via Economic Nexus*, AVALARA (Dec. 17, 2018), <https://www.avalara.com/us/en/blog/2018/12/missouri-moves-to-tax-remote-sales-via-economic-nexus.html> [perma.cc/Z96H-WWLU]. “The Missouri Legislature has adjourned without adopting economic nexus.” *Id.*

125. H.B. 548, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

126. *Id.*

127. Ian Nickens, *House Narrowly Gives Initial OK to Online Sales Tax, Income Tax Cut for Wealthy*, COLUMBIA MISSOURIAN (Apr. 10, 2019), https://www.columbia-missourian.com/news/state_news/house-narrowly-gives-initial-ok-to-online-sales-tax-income/article_cf1ba8dc-5b26-11e9-bee4-abfc47dd9a8f.html [perma.cc/U3Z3-HFC9].

128. Editorial Board, *Missouri Should Tax Online Sales to Serve Everyone, Not Just the Rich*, ST. LOUIS POST DISPATCH (Feb. 18, 2020), https://www.stltoday.com/opinion/editorial/editorial-missouri-should-tax-online-sales-to-serve-everyone-not/article_bb50ceb7-8154-5672-933d-6f4947f1cbb0.html [perma.cc/QWF8-7J6E].

129. MO. CONST. art. IV, § 47 (authorizing the Parks, Soil, and Water Sales and Use Tax);

130. Erickson, *supra* note 112.

131. *Id.*

132. David A. Lieb, *Missouri Governor Wants Law for Online Sales Tax Collections*, ASSOCIATED PRESS (Dec. 18, 2018), <https://www.apnews.com/7c310b72>

revenue to be used to further his agenda of infrastructure investment and workforce development.¹³³ In April 2019, however, Governor Parson explicitly expressed his desire to stay out of the debate over the use of the anticipated revenue. A spokesperson for Governor Parson said, “We’re going to continue working with the Legislature. It is an issue that deserves serious debate.”¹³⁴

C. *The Causes of Missouri’s Delay*

What forces are preventing Missouri from enacting economic nexus legislation, despite the revenue windfall it would create for the state? Two main issues are driving the Missouri General Assembly’s failure to enact economic nexus legislation. First, the Republican-controlled legislature is unable to come to a consensus about how the revenue should be used. As outlined above, many of the legislative proposals would use the revenue to lower the state’s income tax rates.¹³⁵ Others, however, would prefer to use at least some of the revenue for investments in infrastructure, employment initiatives, and education.¹³⁶ While the vast majority of state legislators agree with Governor Parson that an economic nexus law should be enacted, they were unable to overcome the competing interests and formulate a feasible compromise. Media coverage of the issue has been relatively sparse, which has limited the degree of political pressure felt by state legislators.

The second obstacle to the implementation of economic nexus legislation is the fundamentally complex nature of Missouri’s existing sales and use tax regime, which presents logistical challenges for devising *any* new sales and use tax.¹³⁷ As it currently stands, Missouri citizens are required to file a use tax return if the combined total of their annual out-of-state purchases exceeds \$2000.¹³⁸ This seemingly straightforward approach is complicated by the fact that counties, cities, fire and ambulance districts, and other local jurisdictions can tack on their own sales taxes and fix their own rates. According to the Missouri Department of Revenue (“MODOR”), there are about 2350 different sales tax rates in Missouri.¹³⁹ The average sales tax rate is 7.68%, but the rates range from 4.73% to 11.68%.¹⁴⁰ In Fiscal Year 2018, state sales and use tax accounted for 21.8% (\$3.7 billion) of Missouri’s overall revenue collections, while local sales and use tax accounted for 20.7% (\$3.3

d33e426eabfd42d41b033bee [perma.cc/8CVT-W8YD].

133. *Id.*

134. Erickson, *supra* note 112.

135. *See supra* Part III.A.

136. *See supra* Part IV.C.

137. *Sales and Use Change*, MO. DEP’T OF REVENUE (Dec. 9, 2019), <https://dor.mo.gov/business/sales/taxcards/multiletter.pdf> [perma.cc/VM6F-LQU6].

138. Totten, *supra* note 117.

139. *Sales and Use Tax Rates Tables*, MO. DEP’T OF REVENUE (Sept. 10, 2019), <https://dor.mo.gov/pdf/rates/2019/oct2019.pdf> [perma.cc/UP8A-HDFW].

140. Totten, *supra* note 117.

billion).¹⁴¹ Additional complications include the fact that local sales tax rates do not always match local use tax rates, even within the same taxing jurisdictions.¹⁴² There are special rates for utilities, food, and other goods and services.¹⁴³ Many of the taxing jurisdictions also overlap with transportation improvement districts, fire protection districts, ambulance districts, and port districts.¹⁴⁴

The complexity of the sales tax system is so vexing that the Missouri General Assembly stepped in and passed House Bill 1858, which requires MODOR to make it easier to find local sales and use tax rates.¹⁴⁵ As a result, MODOR has convened a team of state tax experts to create a searchable online database, which has sales tax information for every taxing body in Missouri.¹⁴⁶ The online database was supposed to be operational by July 1, 2019.¹⁴⁷ However, MODOR's efforts have been frustrated by unresponsiveness from local taxing authorities. As of March 4, 2019, 38.5% of the state's nearly 1500 taxing bodies have not responded to a request for information from the agency that would allow workers to complete the map.¹⁴⁸ Approximately 41.2% of municipalities and 43.9% of counties failed to provide their sales and use tax information.¹⁴⁹ Almost 67% of transportation districts have been similarly unresponsive.¹⁵⁰

141. *Financial and Statistical Report: Fiscal Year Ended June 30, 2018*, MO. DEP'T OF REVENUE 4, <https://dor.mo.gov/cafr/documents/financialstatreport18.pdf> [perma.cc/TA5D-L5Q3] (last visited Feb. 19, 2020).

142. *Sales and Use Tax Rate Tables*, MO. DEP'T OF REVENUE (Mar. 18, 2020), <https://dor.mo.gov/pdf/rates/2020/apr2020.pdf> [perma.cc/U5P7-ULTR]. For example, Adair County has a sales tax rate of 5.6% and a use tax rate of 5.2250%. *Id.*

143. *Id.* Andrew County has the same sales and use tax rate (5.9250%) and overlaps with Andrew County Ambulance District, which has a sales tax rate of 6.4250% and a use tax rate of 5.9250%. *Id.* Further examples include Boone County, which overlaps with Boone County Fairground Regional Recreation District, where sales and use tax rates differ; Cass County overlaps with multiple Fire Protection Districts; and Clay County (which overlaps with a Zoological District, *inter alia*). *Id.*

144. Kurt Erikson, *Who's Charging Us Sales Taxes? Attempt to Make a Missouri Tax Map Meets Confusion, Resistance*, ST. LOUIS POST-DISPATCH (Mar. 4, 2019), https://www.stltoday.com/news/local/govt-and-politics/who-s-charging-us-sales-taxes-attempt-to-make-a/article_7252afa6-79c5-5396-9b9d-badafb6fff5a.html [perma.cc/MA9L-3J6F].

145. H.R. 1858, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018).

146. Gail Cole, *The Missouri Sales Tax Map, a Cartographer's Dream (or Nightmare) – Wacky Tax Wednesday*, AVALARA (July 11, 2018), <https://www.avalara.com/us/en/blog/2018/07/missouri-sales-tax-map-cartographers-dream-nightmare-wacky-tax-wednesday.html> [perma.cc/FMQ8-ZWVC].

147. *Id.*

148. Erikson, *supra* note 112.

149. *Id.*

150. *Id.*

D. Policy Recommendations

By failing to act before the end of the legislative session, the Missouri General Assembly denied its own government the use of tens, if not hundreds, of millions of dollars in revenue. While the legislature's concern about making a rash decision is understandable, it is bad policy to sacrifice a good solution in search of a perfect one. As evidenced by many other state legislatures, it is possible to tweak the economic nexus legislation after it has been enacted.

First, the political debate about how to use the anticipated revenue could, at the very least, be solved by a temporary stopgap measure that reflects a compromise between the competing Republican factions. That is, a temporary economic nexus statute could be enacted, and the funds generated during Fiscal Year 2019 could be divided equally between income tax cuts and government spending on infrastructure and education. The legislature could resume debate and potentially resolve the issue during the next session.

Before the state can require remote sellers to collect and remit sales and use tax, Missouri will likely need to address the complexity of the current tax system. While information-gathering is a crucial first step, it is not the only option available. Texas, for example, allows out-of-state retailers to elect to pay a single local use tax rate for all transactions.¹⁵¹ Mississippi and Alabama enacted simplified tax systems with a flat 8% tax on all vendors with more than \$250,000 in annual sales.¹⁵² The Combined Act includes a similar provision, which would create a "Simplified Remote Sales Tax Remittance Program" that would allow eligible remote sellers to collect and remit a simplified remote sales tax rate of 6.5% (3.5% for food sold or delivered into the state).¹⁵³ "The proceeds will be distributed to the localities in a manner determined by the Department of Revenue, but such determination has not yet been made."¹⁵⁴ The approaches taken by other states, including Alabama and Texas, are instructive. The modernization and simplification of Missouri's sales tax regime is long overdue. The sheer magnitude of the problem should not be a reason for deferring its resolution.

151. Gail Cole, *Where Do Florida and Missouri Currently Stand with Remote Sales Tax?*, AVALARA (Aug. 22, 2019), <https://www.avalara.com/us/en/blog/2019/08/where-do-florida-and-missouri-stand-with-remote-sales-tax.html> [perma.cc/VEP5-UBRY].

152. ALA. ADMIN. CODE R. 810-6-2.90.03 (2019); 35-09 CODE MISS. R. § 100 (LexisNexis 2019).

153. S.B. 50, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

154. *Remote Sales Tax Collection*, NAT'L CONF. OF S. LEGISLATURES (Jan. 10, 2020), <https://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx> [perma.cc/8W3U-WZPX].

V. CONCLUSION

In *South Dakota v. Wayfair*, the Supreme Court announced its departure from decades-old precedent established by *Bellas Hess* and *Quill*.¹⁵⁵ The abandonment of the physical presence rule in favor of the economic nexus rule signified a marked shift in the Court's interpretation of the Commerce Clause and Due Process requirements as applied to economic entities with no physical presence in a state. Underlying this shift was the changed reality of the modern economy, specifically the growth of e-commerce and the online retail industry. In the wake of *Wayfair*, only two states have failed to enact economic nexus legislation, which is widely viewed as a puzzling contradiction with their apparent self-interest. Missouri, for example, could have generated an estimated \$165 million in revenue in Fiscal Year 2019 alone. Missouri's failure to act following *Wayfair* can be traced to two major causes. First, the Republican majority in the General Assembly failed to agree on what to do with the revenue generated from the taxation of remote sellers. Some wanted to use the revenue to lower income tax rates, while others wanted to use it to fund public programs, such as infrastructure and education. Second, Missouri's sales and use tax regime is incredibly fractured and complicated.

However, there are a number of solutions to these problems, many of which can be found by looking to other states. In fact, workable solutions are included in the legislation proposed and considered by the Missouri Senate. At the very least, the legislature should enact a temporary stopgap measure, which embodies a compromise as to how to spend the revenue and includes a simplified remote sales tax rate that could be applied uniformly to all out-of-state retailers. Because of its failure to do so, Missouri citizens will lose an estimated \$165 million in revenue over the course of a single year at a time when the state's financial situation is suboptimal. It remains to be seen whether this misguided approach will be rectified in the next legislative session.

155. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018).