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ARTICLES

THE UNIFIED DORMANT COMMERCE CLAUSE

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ABSTRACT

The U.S. Supreme Court has long analyzed disputes under the dormant Commerce Clause differently depending on whether the Court characterized the challenged state law as imposing a tax or a different type of regulatory burden. The Court's recent decisions in a string of tax cases, however, have functionally eliminated the distance that has stood between the Court's dual dormant Commerce Clause tests. That includes the Court's recent decision in South Dakota v. Wayfair, Inc.*, which meaningfully reduced or eliminated the "nexus" requirement that the Court had imposed for purposes of authorizing the imposition of a state tax. This Article thus argues that the Court should formally eliminate its dual tests and recognize a unified dormant Commerce Clause.*

Acceptance of a unified test would resolve multiple tensions that exist under the Court's current doctrine, and the Article shows how the application of a unified test would have changed the Court's approach in several controversial cases. The Article also shows how acceptance of a unified test would help to properly situate the Court's internal consistency test, which is a test of growing importance to this body of law. The Article argues that state tax statutes can, and should, be evaluated under the same general framework as nontax statutes. The state interest in taxation can be adequately protected within that more general framework, and applying a unified dormant Commerce Clause would help to streamline the doctrine and produce more consistent adjudication between substantive areas of law.

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INTRODUCTION

The U.S. Supreme Court's dormant Commerce Clause doctrine has long been a disjointed mess.[1] One particular oddity and source of confusion in that doctrine has been the Court's application of different tests for purposes of evaluating state laws that are classified as taxes and those that are not. Fortunately, the Court has begun to merge those distinct approaches in its recent tax decisions. Unfortunately, though, the Court has not directly confronted this doctrinal convergence and even introduced further complications with its 2018 decision in *South Dakota v. Wayfair, Inc*.[2] This Article explains how *Wayfair* fits within the Court's evolving doctrine and shows how the substance of the Court's two different tests have effectively merged. The Article thus makes the case for the Court to repudiate its distinct tests formally and to adopt a unified dormant Commerce Clause.

1. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 611 nn.3–4 (1997) (Thomas, J., dissenting) (noting that both courts and scholars have criticized the Court's dormant Commerce Clause doctrine); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959) (labeling the Court's doctrine as a "tangled underbrush" and a "quagmire").

2. 138 S. Ct. 2080 (2018).

Understanding the status of the Court's doctrine starts with recalling the basic tension underlying the very existence of this area of law. The dormant Commerce Clause, of course, is not an explicit constitutional provision. Rather, that "clause" reflects the Supreme Court's efforts to respect states' reserved powers under the Tenth Amendment while still protecting the negative implications of Congress's affirmative Commerce Clause power (i.e., that states, if left alone, would subvert the common national market to their own economic interests).[3] The Court's assumption of that role necessarily results in doctrinal confusion because there is an inherent and intractable tension between state sovereignty and the pursuit of a common national market—barring volitional, complete, and unanimous coordination between the states.[4]

In the nontax context, the Court currently resolves that tension by holding that protectionist or discriminatory state laws are nearly per se invalid.[5] Nondiscriminatory state laws are not necessarily protected from judicial review though. Instead, the Court subjects those laws to a balancing test under which the state interest involved is weighed against the costs that the state law imposes on interstate commerce.[6] That balancing test, often referred to as the "*Pike* balancing" test because of its use in *Pike v. Bruce Church, Inc.*,[7] has been the subject of significant criticism, but it stands today as a check on state power.[8]

The Court analyzes state *tax* statutes using a completely different approach—the four-factor test derived from *Complete Auto Transit, Inc. v. Brady*.[9] That test requires that state taxes (1) only apply to taxpayers with a "substantial nexus" with the taxing state, (2) be fairly apportioned, (3) be nondiscriminatory, and (4) be fairly related to the

3. *See generally* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01–6.05 (2d ed. 2013); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2 (3d ed. 2000).

4. See *infra* text accompanying notes 33–38 for a discussion of the conflict between state sovereignty and the pursuit of a common national market.

5. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also* DENNING, *supra* note 3, § 6.06[A]; TRIBE, *supra* note 3, § 6-2, at 1031, 1050; *id.* § 6-6.

6. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing S. Pac. Co. v. Arizona, 325 U.S. 761 (1945)); *see also* DENNING, *supra* note 3, § 6.05; TRIBE, *supra* note 3, § 6-2, at 1050–51.

7. 397 U.S. 137 (1970).

8. *See* Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 568–69, 624–27 (2010) (questioning the ongoing validity of *Pike*'s balancing test); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 453–58 (2008) [hereinafter Denning, *Reconstructing*] (noting common critiques of *Pike*'s balancing test); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (arguing that "[d]espite what the Court has said, it has not been balancing"). Once a state statute is found to be nondiscriminatory, the Court effectively yields to the states and to Congress. Lower courts do not have the same opportunity and have applied *Pike* on a regular basis. *See* DENNING, *supra* note 3, § 6.07 (discussing lower courts' applications of *Pike* to state laws of various types).

9. 430 U.S. 274 (1977).

services provided by the state.[10] That test has stood since the 1970s, and the Court has never publicly considered rejecting that formulation.[11]

The Court's special tax test ostensibly serves the same end as its more general test (i.e., protecting the interstate marketplace in the absence of Congressional action), but the two tests operate very differently in practice. Most notably, the Court treats nondiscriminatory state laws differently depending on whether those laws are classified as "taxes" or as "nontaxes." State tax laws are almost automatically considered constitutional, even if they impose significant burdens on interstate commerce.[12] State nontax laws are subjected to the Court's *Pike* balancing test, and states are required to justify the burdens that they impose on interstate commerce.[13] The Court has never explained that difference in method or result.

This bifurcated approach means that litigation can be shaped, and the results dictated, by whether a state law is categorized as a tax or as a nontax imposition. And while differentiating between the two categories of state laws might seem like a straightforward task, that is not always the case. For example, tax *collection* obligations have been evaluated as taxes, but tax *reporting* obligations have been treated as nontax state regulations.[14] In addition, a recent case in Mississippi raised the question of whether a state statute of limitations for purposes of state tax assessments should be evaluated under *Complete Auto* as a "tax scheme" or under *Pike* as a general state regulation.[15] Current questions regarding the constitutionality of states' marketplace vendor laws could rest on the same question.[16]

Fortunately, this doctrinal tension is unnecessary. As a matter of substance, *Complete Auto* has dissolved into the Court's more general nontax framework so there is no need for courts to apply different tests to tax and nontax statutes.[17] That convergence is in part because some of the individual prongs of *Complete Auto* are duplicative of protections provided by the Due Process Clause of the Fourteenth Amendment and in part because others are of little effect as applied by the modern

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10. *Complete Auto*, 430 U.S. at 279; *see* WALTER HELLERSTEIN ET AL., STATE TAXATION ¶ 4.12, Westlaw (database updated Sept. 2019) (discussing the Court's use of that test).

11. This of course excludes Justice Thomas who would repeal the entire dormant Commerce Clause doctrine. *See infra* notes 357–358; *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring) (indicating a willingness to reconsider the Court's doctrine "another day").

12. *See infra* Section IV.

13. *See infra* notes 71–76 and accompanying text.

14. See *infra* notes 135–145 and accompanying text for a discussion of specific instances where the line between tax collection and tax reporting obligations has been drawn. That distinction proved to be dispositive in recent litigation. *See infra* Section IV.

15. *See* Kansler v. Miss. Dep't of Revenue, 263 So. 3d 641, 648 (Miss. 2018) (noting that "the *Complete Auto* test is specifically intended for evaluating the constitutionality of taxes, not state regulations in general"); Brief of Appellants Michael and Vickie Kansler at 3–4, Kansler v. Miss. Dep't of Revenue, 263 So. 3d 641 (Miss. 2018) (No. G2016-1175 T/1), 2018 WL 4776398, at *3–4. *But cf. Kansler*, 263 So. 3d at 649 (noting that on the facts presented "it makes little difference whether we formally employ the *Complete Auto* test").

16. *See infra* notes 293–297 and accompanying text.

17. Indeed, several of the Court's recent decisions involving state taxes have not even utilized the *Complete Auto* framework. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015); Dep't of Revenue v. Davis, 553 U.S. 328 (2008); Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n (ATA II), 545 U.S. 429 (2005).

Court.[18] In practice, the only real difference between the Court's two tests for at least the last few years has been the substantial nexus requirement of *Complete Auto*, its first prong.[19] And incidentally, the Court effectively gutted that requirement in *Wayfair*.[20]

The *Wayfair* Court specifically overruled longstanding precedent that required taxpayers to have a physical presence in a state before the nexus requirement would be met.[21] The Court replaced that bright-line rule with a standard under which the nexus requirement is satisfied when a taxpayer simply "'avails itself of the substantial privilege of carrying on business' in [a] jurisdiction."[22] That standard is essentially meaningless given the Due Process Clause's requirement of minimum contacts, but the *Wayfair* Court retained nexus as an independent dormant Commerce Clause requirement nevertheless.

The Court's narrow approach was consistent with the current Court's policy of judicial minimalism but left many lingering questions.[23] The Court also introduced new uncertainty by suggesting that state tax laws were subject to review under *both* the Court's tax and nontax tests.[24] That was new, and the Court did not explain how that method of analysis would work.

The doctrinal uncertainty remaining after *Wayfair* is unnecessary. Without a meaningful nexus requirement, the Court's *Complete Auto* test functionally operates the same as the Court's approach in nontax cases. The Court therefore can and should apply a unified framework for analyzing challenges to states' laws under the dormant Commerce Clause. This Article explains how the Court's current doctrine supports that conclusion and how applying a unified test would resolve many of the tensions that exist in the Court's tax doctrine.[25]

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18. See *infra* Section III for a discussion of the Court's application of the *Complete Auto* test.

19. *See* TRIBE, *supra* note 3, § 6-21, at 1140–41 (noting that the Court may be "moving toward a unified prohibition on states' overreaching without congressional authorization—regardless of whether the territorially aggressive state activity takes the form of regulation or of taxation"); Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 MINN. L. REV. HEADNOTES 103, 113–16 (2016) [hereinafter Denning, *The Dormant Commerce Clause*] (noting the "fascinating convergence of doctrinal lines governing tax and non-tax cases" that *Wynne* might represent).

20. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

21. *Id.*

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

23. *See* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 1013 (2017) (commenting on judicial minimalism under the Roberts Court); Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 835–36 (2008) (noting the Chief Justice's "plea for narrowness and his suggestion that if it is not necessary for a court to say more to decide a case, it is necessary for a court not to say more to decide a case").

24. *See Wayfair*, 138 S. Ct. at 2093 (holding that "[p]hysical presence is not necessary to create a substantial nexus" under *Complete Auto*); *id.* at 2086 (noting that tax statutes are subject to review under "other aspects of the Court's Commerce Clause doctrine"). It is not entirely novel or surprising that the Court would subject tax statutes to analysis using "other aspects" of the Court's dormant Commerce Clause doctrine. *Id.* Before the case, I argued that the Court should unify its doctrine by eliminating the substantial nexus requirement altogether and by applying *Pike* balancing instead. *See generally* Adam B. Thimmesch, *A Unifying Approach to Nexus Under the Dormant Commerce Clause*, 116 MICH. L. REV. ONLINE 101 (2018) [hereinafter Thimmesch, *A Unifying Approach*]. Others argued that the Court's doctrine already compelled that result. *See, e.g.*, Brief of Brill et al. as Amici Curiae in Support of Petitioner at 17–20, Wayfair, 138 S. Ct. 2080 (No. 17-494), 2018 WL 1203457, at *17–20.

25. This is not to say that a unified dormant Commerce Clause provides all of the answers, but it helps to narrow the issues that exist. *See infra* Part IV.D.

The Article proceeds as follows. Section I provides a brief history of the Court's dormant Commerce Clause doctrine.[26] Section II then evaluates the *Wayfair* decision and discusses how that decision obviated the need for an independent substantial nexus test—under *Wayfair*, the nexus requirement serves no function independent from *Pike* balancing. Section III expands on that conclusion and situates *Wayfair* in the context of the more general erosion of *Complete Auto* as an independent legal framework through which to evaluate state tax impositions. It shows how, post-*Wayfair*, each prong of *Complete Auto* is duplicative of protections already provided to taxpayers under the Court's more general framework for nontax state laws or under the Due Process Clause. As a result, there is no reason for the Court to maintain two dormant Commerce Clause tests, and the maintenance of those dual tests creates unneeded and costly complications in the law.

Section IV then explores the costs of the Court's dual tests and the benefits that would stem from the Court abandoning the *Complete Auto* test and recognizing a unified dormant Commerce Clause. Those multiple benefits extend beyond merely clarifying the doctrine. A unified approach would simplify litigation, assist lower courts, and help to prevent inconsistent adjudication between subject matters.[27]

In sum, this Article argues that it is time for the Court to explicitly adopt a unified dormant Commerce Clause. That action would be consistent with the Court's broader move away from formalism in this area of law and would lead to better adjudication of dormant Commerce Clause disputes.

I. THE DUAL DORMANT COMMERCE CLAUSES

Article I, Section 8, Clause 3 of the U.S. Constitution grants Congress an affirmative power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[28] That grant of authority gave Congress the power to manage the burgeoning conflict between the needs of the union as a whole and the self-interested actions of the independent American states. But despite the fact that the Commerce Clause gave Congress the power to act, Congress was not required to do so.[29] Congress could fail to regulate, even when state actions harmed the national economy.

That reality left the early Court with a dilemma. Did the Commerce Clause's grant of power to Congress deprive states of any power to regulate matters impacting interstate commerce, or did it simply grant Congress a veto right over state actions that it viewed as undesirable? If the Court took the latter view, would it be reasonable to assume that Congress would have the capacity to evaluate the laws and regulations of all states, and should the Court ever be able to protect interstate commerce in Congress's stead?

From those questions and concerns was born the so-called dormant or negative Commerce Clause—a set of judicially imposed restrictions on state autonomy for the

26. Much of that material is taken from my earlier essay. *See generally* Thimmesch, *A Unifying Approach*, *supra* note 24. A great deal of thanks is owed to the editors at the *Michigan Law Review* for their assistance.

27. *See infra* Section IV.

28. U.S. CONST. art. I, § 8, cl. 3.

29. *See id.*

purpose of protecting the national interest in a common economic market.[30] Pursuing that goal has necessarily required tradeoffs, however, and the Court has struggled with how to judge the permissibility of state actions given our complicated national economy and federal structure. This Section introduces the development of the Court's doctrine in light of that tension. Part I.A discusses the evolution of the Court's approach. Part I.B then explains the Court's current approach in cases involving state laws other than tax laws, and Part I.C explains the unique approach that the Court ostensibly takes in cases involving state taxes.

A. Historical Backdrop

As introduced above, the Court's exercise of judicial power to protect the negative implications of Congress's affirmative Commerce Clause power necessarily impacts state autonomy. The Court has thus had to confront whether and when the national interest in a common national market should prevail over the involved state interests. Historically, some Justices would have had the former prevail in all cases. The biggest champion of that approach was Justice Jackson, who wrote,

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[31]

The early Court seemed to reflect this view and imposed rigid restrictions on states, at one point prohibiting them from taxing or regulating interstate commerce at all.[32] The Court then modified its approach by focusing on whether the challenged state law involved matters that were of "local" or "national" significance and whether those laws "directly" or "indirectly" impacted interstate commerce.[33] The results were often "baffling" as the Court attempted to draw those formal lines.[34]

Of course, this type of judicial restriction on state power under the guise of protecting interstate commerce can easily conflict with states' retained powers under the Tenth Amendment.[35] For firms to experience a truly common national market, they would have to be subjected to the same legal burdens regardless of where they made sales or located their operations.[36] That would, in turn, require completely uniform

30. *See* Denning, *Reconstructing*, *supra* note 8, at 428–31.

31. H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

32. *See, e.g.*, Robbins v. Shelby Cty. Taxing Dist., 120 U.S. 489, 497 (1887) (stating that "[i]nterstate commerce cannot be taxed at all").

33. DENNING, *supra* note 3, §§ 6.03–6.04.

34. *Id.* § 6.04 ("The Court's classification of regulations as 'direct' or 'indirect' undeniably produced some baffling results . . . .").

35. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

36. Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 910 (1992) ("In a locationally neutral system, the level, kinds, and geographical distribution of all activity would

legal—and thus tax—systems.[37] Respecting state autonomy in a world where interstate commerce involves many intrastate actions and interests therefore necessarily requires the Court to sometimes subordinate the pursuit of a common national market to the states' interests.[38] The pursuit of a true common market is thus futile, barring a fundamental shift in how the Court views its power and the U.S. federal structure.[39] The Court now recognizes this reality, and it allows states to tax and regulate interstate business even if those actions increase the cost of interstate activity.[40]

The Court's shift from the Jacksonian approach to its current approach can be traced to a dissenting opinion of Justice Stone in the 1927 case *Di Santo v. Pennsylvania*.[41] In that dissent, Justice Stone directly attacked the Court's formal distinctions as "too mechanical, too uncertain in [their] application, and too remote from actualities, to be of value."[42] He favored the use of a "trustworthy formula" rather than mere labels.[43] Justice Stone prevailed in later opinions, and the Court has been in the "balancing era" ever since.[44]

B. The Court's General Approach

In nontax cases, the Court's current approach is to first evaluate whether the challenged state regulation is discriminatory or protectionist, whether on its face or in

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be the same as if the country had a uniform national taxing system, disregarding any effects that such a reallocation of taxing authority would have on the types of taxes levied or tax rates.").

37. *Id.* at 910–12 (noting that locational neutrality is "utterly unattainable other than by actually establishing a uniform national taxing system"); *see also* Ruth Mason & Michael S. Knoll, *What Is Tax Discrimination?*, 121 YALE L.J. 1014, 1046 (2012) (concluding that locational neutrality can only be obtained, in the absence of "global harmonization of tax rates and bases," if states limit their taxation to only residents or allow unlimited credits for their residents who face tax obligations in other jurisdictions); Stephen F. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO. L. REV. 281, 309 (1981) (concluding that "perfectly equal tax treatment of interstate commerce would require a uniform system of taxation throughout the states").

38. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48–50 (1940) (discussing the need to "reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed").

39. Economists and tax scholars have fully evaluated the concept of tax neutrality and have shown that its competing formulations and demands cannot be squared with one another. *See* Mason & Knoll, *supra* note 37, at 1052 (noting that it "is a simple matter of logic" that the concepts of capital import and capital export neutrality, or locational and leisure neutrality, cannot be obtained simultaneously in the absence of harmonized tax rates and bases).

40. *Berwind-White*, 309 U.S. at 46 ("Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states . . . ."); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 341 (2003) [hereinafter Swain, *State Income Tax Jurisdiction*] ("[T]he Court has not generally struck down a state statute because the laws of *all* states are in discord. Statutory variation has been accepted as a natural consequence of our federal system."); *cf.* Robbins v. Shelby Cty. Taxing Dist., 120 U.S. 489, 497 (1887) (stating that "[i]nterstate commerce cannot be taxed at all").

41. 273 U.S. 34 (1927).

42. *Di Santo*, 273 U.S. at 44 (Stone, J., dissenting).

43. *Id.*

44. *See generally* DENNING, *supra* note 3, §§ 6.05, 8.03.

purpose or effect.[45] Protectionist and facially discriminatory laws are virtually per se illegal.[46] For example, in *City of Philadelphia v. New Jersey*,[47] the Court analyzed a New Jersey law that banned the importation of waste from other states.[48] The Court struck down that law as plainly discriminatory against interstate commerce.[49] Similarly, in *Wyoming v. Oklahoma*,[50] the Court struck down an Oklahoma statute that required local coal-fired electricity plants to burn a mixture containing at least ten percent coal that was mined in Oklahoma.[51] The Court determined that Oklahoma's goal of protecting its own coal industry was "protectionist and discriminatory," and the Court held that the law was unconstitutional.[52]

The story is more complicated for statutes that are facially neutral but discriminatory in effect or purpose. In theory, such laws are nearly per se unconstitutional as well, but the Court has been inconsistent on precisely when it will find a discriminatory effect and on what standard it will apply to those laws. The lodestar example in that realm is *Hunt v. Washington Apple Advertising Commission*,[53] which involved a North Carolina statute requiring "all closed containers of apples sold, offered for sale, or shipped into the State . . . bear 'no grade other than the applicable U.S. grade or standard.'"[54] That statute was facially neutral because it applied to all apples sold in the state, whether they were grown in North Carolina or in a foreign jurisdiction.[55] Notwithstanding the facial neutrality of the law, the Court still evaluated the law's purpose and effects because it recognized that neutral state laws could still "come[] into conflict with the Commerce Clause's overriding requirement of a national 'common market.'"[56]

The Court's deeper evaluation of the North Carolina law led it to determine that the statute not only burdened interstate commerce but that it actually discriminated against interstate commerce in effect.[57] The Court made that determination in part because the state law imposed a duplicative burden on certain out-of-state apple growers.[58]

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45. *Id.* § 6.06; Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 260–64 (2017).

46. *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."); City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."). *See generally* DENNING, *supra* note 3, § 6.06 (examining the Supreme Court's recent cases confronting these types of laws).

47. 437 U.S. 617 (1978).

48. *City of Philadelphia*, 437 U.S. at 628.

49. *Id.* at 629.

50. 502 U.S. 437 (1992).

51. *Wyoming*, 502 U.S. at 461.

52. *Id.* at 455.

53. 432 U.S. 333 (1977).

54. *Hunt*, 432 U.S. at 335 (quoting N.C. GEN. STAT. § 106-189.1 (1973) (repealed 1983)).

55. *Id.* at 340, 352.

56. *Id.* at 350 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370–72 (1976)).

57. *Id.* at 350–52.

58. *See id.*

The challenger in the case represented Washington apple growers who were already displaying their products' grades using a Washington grading system that was equivalent or superior to the federal system and that was widely accepted in the industry.[59] For those businesses to not violate the North Carolina law, they would have to either abandon their use of that superior method of market differentiation, incur additional costs to also comply with the North Carolina standard, not use any grading label, or abandon the North Carolina market.[60] The Court felt that the North Carolina requirement therefore had the effects of "stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system" and of "leveling" the playing field.[61] On those facts, the Court agreed that the North Carolina statute had the effect of discriminating against interstate commerce.[62]

The identification of discrimination in effect was not determinative in the case though. The Court indicated that the statute still could have been upheld had the state "justif[ied] it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[63] North Carolina failed that burden, however, and its statute was struck down.[64]

Hunt shows that states do have the opportunity to defend facially neutral laws that are deemed to be "discriminatory in effect," but the Court's doctrine is not entirely clear beyond that. *Hunt* indicates that the burden is on states to justify their effectively discriminatory laws and that the burden is high—strict scrutiny.[65] The Court did not explain, however, what effects it would count as "discriminatory" rather than just "burdensome."

The Court has also put the burden on the challengers to state laws in other cases. For example, in *Minnesota v. Clover Leaf Creamery Co.*,[66] the Court did not apply strict scrutiny to a state law that prohibited the use of nonreturnable, nonrefillable plastic packaging for milk.[67] The Court recognized that the state law imposed on milk sellers "the inconvenience of having to conform to different packaging requirements in

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59. *Id.* at 336.

60. *Id.* at 338.

61. *Id.* at 351–52.

62. *Id.* at 350–53. It may very well be that the Court was actually concerned with the state's protectionist purpose rather than with the law's discriminatory effect but that the record in the case did not allow the Court to make its decision on the ground of protectionist purpose. Regan, *supra* note 8, at 1221–28. This uncertainty is one that would remain under a unified dormant Commerce Clause. See *infra* Part IV.D for a discussion of questions that remain under the Court's current doctrine.

63. *Hunt*, 432 U.S. at 353.

64. *Id.* North Carolina defended the law on the grounds of consumer protection. *See id.* at 352–53. It wanted an easy way to ensure that imported apples were safe. *See id.* The Court found that reasoning suspect since the law applied to crated apples, but apples were not sold in crates at retail. *Id.* at 352 ("[W]e find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers."). Regardless, the Court concluded that "the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace." *Id.* at 352–53.

65. DENNING, *supra* note 3, § 6.06[A][2][a][ii].

66. 449 U.S. 456 (1981).

67. *Clover Leaf*, 449 U.S. at 474 ("Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause.").

Minnesota and the surrounding States."[68] In that way, the case presented the same issue as in *Hunt*. Nevertheless, the Court analyzed the case differently, in part because it determined that the inconvenience "should be slight."[69] The Court also noted that the inconvenience would be felt both by in-state and out-of-state firms.[70] On those facts, the Court did not apply *Hunt* and strict scrutiny to the Minnesota law. Instead, the Court applied its balancing test from *Pike v. Bruce Church, Inc.*[71]—a standard much more deferential to states than strict scrutiny.[72]

Pike balancing refers to a balancing test that the Court applies to state regulations that the Court identifies as evenhanded.[73] That test can be traced to the Court's 1945 decision *Southern Pacific Co. v. Arizona*.[74] Modern applications of the test, however, most often refer to the Court's 1970 decision in *Pike*.[75] In that decision, the Court explained the required balancing in this way:

> 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[76]

The Court's experience with balancing has been tepid. It has not engaged in true balancing since the 1980s.[77] Instead, the Court has tended to find reasons to completely exclude state actions from its dormant Commerce Clause review. For instance, the Court does not review state actions when it determines that a state is acting as a "market participant" or that a state is promoting a state-run business.[78] These exceptions have become quite broad.[79]

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68. *Id.* at 472.

69. *Id.*

70. *See id.* at 471–72. The presence of an in-state surrogate to protect the interests of those outside the state may provide a "powerful safeguard against legislative abuse." *Id.* at 473 n.17; *see also* TRIBE, *supra* note 3, § 6-5, at 1054–55 (warning that this "logic cannot easily be contained").

71. 397 U.S. 137, 142 (1970).

72. *See Clover Leaf*, 449 U.S. at 472–74. The Court's approach in *Clover Leaf* has led one leading Commerce Clause treatise to conclude that *Clover Leaf* implicitly indicates "that the 'virtually per se' principle is inapplicable to legislation that is only modestly protectionist." DENNING, *supra* note 3, § 6.06[A][2][a][i], at 6-51. The question thus becomes how bad the discriminatory effects must be before strict scrutiny applies.

73. *Pike*, 397 U.S. at 142.

74. 325 U.S. 761 (1945).

75. *See Pike*, 397 U.S. at 137.

76. *Id.* at 142 (citation omitted).

77. DENNING, *supra* note 3, § 6.05, at 6-33 & n.100 (explaining that *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), was the last time that the Court has "clearly" used *Pike* balancing to invalidate a state statute). That does not mean that balancing is never done. Lower courts do apply *Pike* with some regularity. *Id.* § 6.05, at 6-34 (noting that "*Pike* balancing is, however, alive and well in the lower courts").

78. *Id.* §§ 7.01–7.02[A].

79. *See generally id.* at ch. 7.

C. *The Court's Approach in Tax Cases*

The Court's dormant Commerce Clause doctrine has developed differently, but along a similar track, in the context of state laws that are classified as "tax laws." The Court reviews those laws using a four-part test that strikes down taxes that (1) apply to taxpayers without a substantial nexus with the state, (2) are not fairly apportioned, (3) are discriminatory, or (4) are not fairly related to the services provided by the state.[80] The test stems back to the Court's 1977 decision in *Complete Auto*,[81] but that case simply aggregated prior law from different strands of authority.[82]

Of *Complete Auto*'s four prongs, the nondiscrimination requirement obviously corresponds with the requirement of the Court's nontax test. The substantial nexus, fair-apportionment, and fair relation requirements, however, are tax-specific tests that have no direct peers in the more general doctrine, and their existence accounts for the dual dormant Commerce Clauses as they stand today. Importantly, though, none of those requirements substantively contribute to the Court's doctrine or are necessary as independent dormant Commerce Clause requirements. The remainder of this Article shows why that is the case and how adopting a unified dormant Commerce Clause test would improve this area of law.

II. *WAYFAIR* AND THE SUBSTANTIAL NEXUS REQUIREMENT

The first prong of *Complete Auto* is the substantial nexus requirement.[83] That requirement has no direct peer in the Court's nontax test, and its existence is a bit of a mystery. As noted in Section I, the Court's early dormant Commerce Clause doctrine restricted states from taxing interstate commerce at all.[84] When the Court relented on that point, it imposed coterminous restrictions on states' taxing power under both the Due Process and dormant Commerce Clauses. That uniform approach was evident in the Court's 1967 decision in *National Bellas Hess v. Department of Revenue*,[85] and states and taxpayers have fought about tax nexus since that time. Part II.A, discusses *Bellas Hess*, the development of the physical-presence rule, and how states responded to that limitation on their power. Part II.B then discusses how states' most recent actions led to the Supreme Court reviewing the ongoing validity of the physical presence rule in 2018 in *Wayfair*.[86] Part II.C concludes this Section by discussing the Supreme Court's decision in that case.

80. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

81. *Id.* at 274.

82. *See id.* at 279; TRIBE, *supra* note 3, § 6-16, at 1106; Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 328 ("[N]one of these elements were new to the Court's state tax jurisprudence at the time *Complete Auto* was decided . . . .").

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

84. *See supra* note 32 and accompanying text.

85. 386 U.S. 753 (1967).

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

A. Bellas Hess *and the Physical Presence Rule*

Bellas Hess involved a challenge to an Illinois statute that imposed use tax collection obligations on vendors that solicited orders from in-state customers through the use of catalogues or other advertising.[87] The National Bellas Hess company challenged that requirement, arguing that the state could not compel the company to collect the state's tax under either the Due Process Clause or the dormant Commerce Clause because the company did not have any physical presence in the state.[88]

The *Bellas Hess* Court recognized both the Due Process Clause and dormant Commerce Clause challenges,[89] but it did not clearly distinguish between the two in its analysis. The Court instead discussed its prior cases generally and noted that none had ever blessed the imposition of a "duty of use tax collection and payment upon a seller whose only connection with customers in the [taxing] State [was] by common carrier or the United States mail."[90] The Court noted that those cases had made a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."[91]

One could argue that *Bellas Hess* was "merely" a due process case and that its reference to the dormant Commerce Clause was superfluous. The Court's prior decisions under the Due Process Clause would have entirely explained the "sharp distinction" recognized by the *Bellas Hess* Court,[92] which limited state jurisdiction to those individuals and firms that had physical presences in their borders.[93] That interpretation would not be quite right though. The *Bellas Hess* Court did specifically express concern that allowing states to impose tax on firms without physical presences could negatively impact interstate commerce.[94] In that vein, the Court noted:

> [I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. . . .

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87. *Nat'l Bellas Hess*, 386 U.S. at 754–55. Use taxes are taxes imposed on the in-state consumption of taxable goods or services and function as complements to state sales taxes. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 16.01. For purposes of this Article the terms "use tax" and "sales tax" can and will be used interchangeably, but the distinction between those taxes has historically been highly relevant. *See* Adam Thimmesch et al., Wayfair*: Sales Tax Formalism and Income Tax Nexus*, 89 ST. TAX NOTES 975, 975–76 (2018).

88. *Nat'l Bellas Hess*, 386 U.S. at 756.

89. *Id.*

90. *Id.* at 757–58.

91. *Id.* at 758.

92. *See* Richard D. Pomp, *Revisiting* Miller Brothers*,* Bellas Hess*, and* Quill, 65 AM. U. L. REV. 1115, 1148–49 (2016).

93. Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878). Early tax cases followed this rule of personal jurisdiction, so the Court never had to determine whether the dormant Commerce Clause would prevent the taxation of territorially absent businesses or individuals. *See* Pomp, *supra* note 92, at 1149 (recognizing that "[p]rior to *Quill*, the Court never had any reason to specify whether a nexus decision was grounded on" the Due Process Clause or Commerce Clause).

94. *Nat'l Bellas Hess*, 386 U.S. at 759.

> The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements.[95]

Based on that language, *Bellas Hess* has long been accepted as holding that both the Due Process Clause and the dormant Commerce Clause impose a physical presence standard for nexus.[96]

The Supreme Court next addressed this issue in 1992 after North Dakota adopted a statute directly challenging the physical presence requirement.[97] North Dakota argued that the Court should overrule *Bellas Hess* because of the many changes in technology, the economy, and the Court's Due Process Clause and dormant Commerce Clause doctrines since 1967.[98] The Court agreed in *Quill Corp. v. North Dakota*,[99] at least partially.

The Court offered much more analysis of the source and purpose of its nexus requirement in *Quill* than it had in *Bellas Hess*, and it decoupled its nexus standards under the Due Process and dormant Commerce Clauses.[100] The Court justified different approaches under those two constitutional provisions by reference to the different concerns animating them—the Due Process Clause being focused on fairness to individual taxpayers and the dormant Commerce Clause being focused on "the effects of state regulation on the national economy."[101] The Court recognized that its due process doctrine had indeed evolved in a way that justified a repeal of the physical presence rule, but the Court declined to remove that barrier as a dormant Commerce Clause matter.[102]

For purposes of this Article, it is important to note that the *Quill* Court did not delve into the substantive merit of the physical presence rule. The Court instead relied heavily on stare decisis and the benefits that the Court perceived stemmed from having a bright-line rule governing the field.[103] The Court felt that the physical presence rule helped to promote interstate commerce, even though that rule was admittedly inexact. As the Court stated:

> Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular

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95. *Id.* at 759–60.

96. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 19.02[2][b]; Pomp, *supra* note 92, at 1149–50.

97. *See* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 302–03 (1992).

98. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 208–13 (N.D. 1991) (outlining the "wholesale changes in the social, economic, commercial, and legal arenas" since *Bellas Hess*).

99. 504 U.S. 298 (1992).

100. *See Quill*, 504 U.S. at 313.

101. *Id.* at 305–06, 312.

102. *Id.* at 307–18. There is a legitimate question about whether the Court's doctrine had really evolved in the interim. *See* Pomp, *supra* note 92, at 1146 ("A second analytical flaw in *Quill* is its overstatement concerning the evolution of its due process jurisprudence."). Nevertheless, the Court's retention of the physical presence rule for dormant Commerce Clause purposes was important for two reasons. First, the physical presence rule would stand as a barrier to state power. *Quill*, 504 U.S. at 315. Second, it was now a barrier that the Congress could eliminate using its affirmative power to regulate matters impacting interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

103. *Quill*, 504 U.S. at 317 (holding that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law"). The Court directly admitted that it might not adopt the physical presence rule if it were being considered as a matter of first impression. *Id.* at 311.

> regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.[104]

This excerpt is critically important for understanding the true nature of the physical presence rule as a dormant Commerce Clause matter. That rule was nothing more than blunt-force *Pike* balancing (i.e., an attempt to prevent undue burdens on interstate commerce).[105] The Court did not engage in actual balancing, however, because it was not concerned with drawing a correct line or with independently justifying the nexus requirement.[106]

The Court retained the physical presence rule for three reasons unrelated to those ends.[107] First, the rule was the status quo.[108] Second, the Court was cognizant of the burdens that multistate tax obligations could impose on smaller vendors generally—including the potential burdens associated with a retroactively applied repeal of the physical presence safe harbor.[109] Third, the Court knew that Congress could change that rule now that the Court had removed the Due Process Clause impediment to the imposition of tax collection burdens on remote vendors.[110] That history means that *Quill* is best understood as about incremental change, not satisfaction with the prevailing standard.

The *Quill* Court's "apologetic"[111] retention of the physical presence requirement, along with the impact of that rule on states and vendors, led to even more litigation over the following decades. The first major post-*Quill* nexus decision occurred the very next year when the South Carolina Supreme Court held that *Quill* was applicable only to state sales and use taxes and not to other taxes like state income taxes.[112] The South Carolina court had no difficulty limiting *Quill* in that way, and it did so with a mere footnote.[113]

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104. *Id.* at 314–15 (alteration in original).

105. See *supra* text accompanying notes 73–76 for a discussion of *Pike* balancing and its factors.

106. *See Quill*, 504 U.S. at 317.

107. *See generally* Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 337–44 (discussing the "three faces of *Quill*").

108. *Id.* at 338–39.

109. *Id.* at 341–42. The early 1990s saw significant changes in the Court's views regarding the retroactive impact of its decisions. *See generally* Daniel Hemel, *There Is No Retroactivity Concern with Overruling* Quill, MEDIUM (Jan. 28, 2018), http://medium.com/whatever-source-derived/there-is-no-retroactivity-concern-with-overruling-quill-f6623da6a2d7 [https://perma.cc/E6C6-KTWS] (explaining the Court's developing doctrine during that period).

110. *Quill*, 504 U.S. at 318 ("This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." (footnote omitted)).

111. Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 333.

112. Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 18 n.4 (S.C. 1993).

113. *Id.*; *see also Quill*, 504 U.S. at 314 (noting that the Court had not "articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes" for other types of taxes).

State courts would individually address whether South Carolina was correct on the meaning of *Quill* for the better part of the next two decades.[114] Those courts nearly universally held that *Quill* applied only to states' consumption taxes and that states could impose other taxes, most notably corporate income taxes, based upon firms' economic connections rather than on their physical presences.[115] States' resulting "economic nexus" standards were never adequately defined, but they were broadly accepted.[116] The Supreme Court was repeatedly asked to weigh in on those standards, but the Court denied certiorari in each case.[117] The signal seemed clear.[118]

The other silo of nexus case law post-*Quill* involved states working within the restrictions of the physical presence rule for purposes of their sales taxes. In that regard, states worked to harmonize their statutes so as to reduce the compliance burdens for interstate sellers.[119] States also adopted various forms of statutes that applied "attributional nexus" concepts, which attributed the physical presence of agents to a principal.[120] One example was states' "click-through" nexus statutes under which vendors would have physical presence by attribution when they compensated in-state persons, groups, or companies for placing links to the remote vendors' websites on their own websites.[121] Think about your local PTO or girl scout troop directing you to shop on Amazon so that they get a percentage back from the retailer. Many states had statutes that labeled those in-state referrers as Amazon's in-state agents, which created a physical presence in the state for the online retailer.[122]

Some states went further. One of the most aggressive approaches was to base physical presence nexus on the "presence" of internet cookies on in-state users' computers.[123] That type of standard might seem to push the concept of *physical* presence much too far, but at least two state courts have held that physical presence could be

114. *See* Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 173–81 (2012) [hereinafter Thimmesch, *The Illusory Promise*] (detailing the history of these cases).

115. *Id.* at 175–76; *see also* HELLERSTEIN ET AL., *supra* note 10, ¶ 6.11 (detailing these developments).

116. Thimmesch, *The Illusory Promise*, *supra* note 114, at 176–81.

117. *Id.* at 160 n.12.

118. Of course, denials of certiorari are not decisions on the merits, and at least some firms were able to obtain opinions from counsel that the physical presence rule still applied to them—or at least that it was "more likely than not" the case. *See* Andrea Muse, *Wells Fargo Adjusts Income Tax Reserves Following* Wayfair, 89 ST. TAX NOTES 397 (2018).

119. States have worked together to create the Streamlined Sales and Use Tax Agreement, which provides for uniform definitions and administrative practices for participating states' sales and use taxes. *See generally* HELLERSTEIN ET AL., *supra* note 10, at ch. 19A; *About Us*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/about-us/about-sstgb [https://perma.cc/96HE-HKD7] (last visited Feb. 1, 2020). Twenty-four states have adopted the Streamlined Sales and Use Tax Agreement. *Id.*

120. John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419, 433–35 (2002) [hereinafter Swain, *Cybertaxation and the Commerce Clause*].

121. *See* Matthew T. Szudajski, *The Rising Trend of Sales Tax Nexus Expansion*, 70 TAX LAW. 907, 921–29 (2017) (discussing these laws and surveying states' practices).

122. *See generally id.*

123. *See* Jad Chamseddine, *Dismiss or Delay Cookie Nexus Suit, State Urges Circuit Court*, 88 ST. TAX NOTES 281, 281 (2018) (discussing litigation concerning Ohio's cookie-nexus provision); Jad Chamseddine, *More States To Mimic Massachusetts Nexus Regs, Practitioner Says*, 86 ST. TAX NOTES 977, 977 (2017) (discussing Massachusetts's cookie-nexus provision).

established through intellectual property.[124] Those courts ruled that intangible property could create the "functional equivalent" of a physical presence.[125] You might think that stretching the physical presence rule that far would get the Supreme Court's attention, but the Supreme Court denied certiorari in the one case where it was requested.[126]

Notwithstanding all of the aforementioned efforts, states were still feeling the effects of the physical presence rule, especially as Amazon and other internet retailers grew larger in both size and importance to the national economy.[127] States needed to take more drastic action, they did so.

B. *The Direct Assault on Physical Presence Nexus*

The world changed significantly in the decades that followed *Quill*. The growth of personal computing power as well as the emergence of the internet and online commerce greatly expanded the impact of the physical presence rule on states. Companies structured their operations to take advantage of *Quill*, and states began to suffer immense revenue losses as more sales occurred outside of their jurisdictional reach.[128] A 2017 report by the U.S. Government Accountability Office estimated the annual state revenue losses to be between $8 billion and $13 billion a year.[129]

As noted above, states adopted a variety of approaches to work within the physical presence rule,[130] but they were unable to keep up with the growth of online commerce. States' unrest with the physical presence rule only continued to grow, especially as their own "Main Street" vendors were being put out of business.[131] Scholars, who nearly

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124. *See* KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 324 (Iowa 2010) (finding that the use of trademarks in the state was the "functional equivalent" of a physical presence and sufficient to establish nexus under *Quill*); Kmart Props., Inc. v. Taxation & Revenue Dep't, 131 P.3d 27, 39 (N.M. Ct. App. 2001) (noting that that combination of the taxpayer's activities in the state and the "tangible presence" of its intellectual property "constitutes the functional equivalent of physical presence"), *rev'd on other grounds sub nom.* Kmart Corp. v. Taxation & Revenue Dep't, 131 P.3d 22 (N.M. 2005).

125. *See Kmart Props.*, 131 P.3d at 39.

126. KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011). The New Mexico Supreme Court reversed *Kmart Corp. v. Taxation & Revenue Department* on statutory grounds. *Kmart Corp.*, 131 P.3d at 27.

127. David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 484 (2012); *see also* Judith Crown, *Who Loses as Brick-and-Mortar Retailers Crumble*, CRAIN'S CHI. BUS. (May 10, 2017, 7:00 AM), http://www.chicagobusiness.com/article/20170510/NEWS02/170519997/e-commerce-boom-causes-pain-for-stores-and-local-governments [https://perma.cc/T4KY-BQ52].

128. *See* Swain, *Cybertaxation and the Commerce Clause*, *supra* note 120, at 419–23 (discussing some of those efforts).

129. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-114, STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 11 (2017), http://www.gao.gov/assets/690/688437.pdf [https://perma.cc/72KB-TW8R]. The revenue loss estimates have been the subject of extensive debate. *See* Respondents' Brief in Opposition to Petition for Writ of Certiorari at 28–31, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494); DONALD BRUCE ET AL., STATE AND LOCAL GOVERNMENT SALES TAX REVENUE LOSSES FROM ELECTRONIC COMMERCE (2009), http://cber.utk.edu/ecomm/ecom0409.pdf [https://perma.cc/U6CZ-NSCW].

130. *See supra* text accompanying notes 120–126.

131. The jurisdictional issue presented by *Quill* became transformed into a "Main Street fairness" issue. *See, e.g.*, *Bipartisan Group of Senators Introduce Marketplace Fairness Act of 2017 To Allow States To Close Sales Tax Loophole*, U.S. SENATOR FOR WYO. MIKE ENZI (Apr. 27, 2017), http://www.enzi.

universally felt that *Quill* got it wrong, shared that unrest.[132] They argued that it was illogical, harmful, and on an infirm doctrinal foundation.[133] By the 2000s, they also argued that the principles of stare decisis no longer counseled toward judicial restraint.[134] Nevertheless, nothing changed. The Supreme Court declined to hear a series of cases on point, and Congress refused to give states expanded authority.

In 2010, Colorado tried a different approach to the "online sales tax" issue that *Bellas Hess* and *Quill* had created.[135] The Colorado approach took advantage of the Court's dual dormant Commerce Clause tests and, instead of requiring remote vendors to collect the state's tax through some expansive definition of physical presence, imposed other regulatory burdens on those vendors.[136] Specifically, the Colorado law required remote vendors to provide (1) customers with both a transactional notice at the point of sale and an annual customer purchase summary, and (2) the state with an annual customer information report.[137] Those requirements would theoretically function to help consumers and the state handle tax collection and enforcement at the individual level, but practically seemed to be a way of convincing retailers to just collect the tax themselves.

The Colorado statute was clever in that it technically fell outside of *Complete Auto* and *Quill* because it was an information-reporting requirement and not a tax or a tax collection obligation. Nevertheless, the Direct Marketing Association (DMA) challenged it on several grounds.[138] Among the arguments the DMA offered was that the information and notice requirements should be struck down under *Quill* because they imposed the same burdens on interstate commerce as would tax collection obligations.[139] In making that argument, the DMA implicitly recognized the absurd formalism of the tax/nontax distinction in these matters. Ultimately, however, the Tenth Circuit determined that

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senate.gov/public/index.cfm/2017/4/bipartisan-group-of-senators-introduce-marketplace-fairness-act-of-2017-to-allow-states-to-close-sales-tax-loophole [https://perma.cc/8RRC-LLBC]; *Main Street Fairness Act*, ASS'N CHAMBER COM. EXECUTIVES, http://secure.acce.org/wiki/main-street-fairness-act/ [https://perma.cc/89U8-BM96] (last visited Feb. 1, 2020).

132. *See, e.g.*, Thimmesch, *A Unifying Approach*, *supra* note 24, at 102 & n.8 (listing a variety of articles making this point).

133. *Id.* at 102.

134. *See* Brief of Amici Curiae Law Professors and Economists in Support of Petitioner at 3–8, *Wayfair*, 138 S. Ct. 2080 (No. 17-494), 2017 WL 5158048, at *3–6; Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 338–39.

135. *See* COLO. REV. STAT. ANN. § 39-21-112(3.5)(c)–(d) (West 2019).

136. *See id.*

137. *Id.*; *see also* Adam B. Thimmesch, *The Fading Bright Line of Physical Presence: Did* KFC Corporation v. Iowa Department of Revenue *Give States the Secret Receipt for Repudiating* Quill*?*, 100 KY. L.J. 339, 355–58 (2011) (explaining these requirements in further detail).

138. *See* Appellee's Supplemental Response Brief at 4–8, Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016) (No. 12-1175), 2015 WL 3644581.

139. *Id.* at 53 ("The same 'structural concerns' that support the nexus requirement of *Quill* apply with equal force to the notice and reporting requirements of the Act and Regulations. The Act and Regulations involve the imposition of onerous, and potentially conflicting, reporting obligations that are directed at the same kinds of direct marketers, engaged in the same kinds of sales transactions, as were the use tax collection requirements that the Supreme Court struck down under *Quill*.").

Complete Auto and *Quill* did not apply[140] and that the statute was nondiscriminatory either on its face or in effect.[141] Quite interestingly, the Tenth Circuit refused to engage in *Pike* balancing because the parties had not raised the issue.[142] The DMA and the District Court had focused on *Quill* instead.[143]

Direct Marketing Ass'n v. Brohl[144] is particularly interesting in the context of this Article for two primary reasons. First, it shows another example of the formalism that *Quill* begat and that would put pressure on the Court's doctrine. In 2017, states could not require remote vendors to collect sales taxes because of *Quill*, but states *could* require those same vendors to comply with costly information and notice requirements. That result did not occur because the tax reporting burdens were lower than the collection burdens; it occurred because tax collection obligations were treated as taxes subject to *Complete Auto* and tax reporting obligations were treated as regulatory burdens subject to *Pike*. That formal distinction was dispositive.[145]

The second noteworthy aspect of *Direct Marketing* is that it ultimately led to the demise of the physical presence rule, though indirectly. Before the Tenth Circuit's decision, *Direct Marketing* actually went to the Supreme Court on a procedural matter—the applicability of the Tax Injunction Act.[146] Justice Thomas wrote the majority opinion, but Justice Kennedy wrote a concurring opinion that lambasted the physical presence rule substantively.[147] Justice Kennedy wrote that *Quill* was "questionable even when decided" and he called for "an appropriate case for" the Court to reexamine it.[148]

South Dakota responded to Justice Kennedy's call and enacted a statute that required vendors to collect the state's tax without regard to their physical presences.[149] The law instead required that vendors collect the state's tax if they made over $100,000 of sales to, or had engaged in 200 or more transactions with, South Dakota customers during the prior year.[150] The state obviously knew that its law conflicted with *Quill*, and it did not even defend the law in its state courts. Rather, the state focused its efforts on

140. *Direct Mktg. Ass'n*, 814 F.3d at 1136 (holding that "*Complete Auto* does not apply here because this case involves a reporting requirement and not a tax"); *id.* at 1147 ("As a result, *Quill*—confined to the sphere of sales and use tax collection—is not controlling.").

141. *Id.* at 1141–42.

142. *Id.* at 1145–46.

143. *Id.* at 1146.

144. 814 F.3d 1129 (10th Cir. 2016).

145. Justice Gorsuch, then on the Tenth Circuit, commented specifically on this point in a concurring opinion in *Direct Marketing*. *Direct Mktg. Ass'n*, 814 F.3d at 1149 (Gorsuch, J., concurring). He noted that the Colorado law imposed burdens that were "comparable in their severity to those associated with collecting the underlying taxes themselves." *Id.* He also said that the Supreme Court had "also expressly acknowledged that states can constitutionally impose tax and regulatory burdens on out-of-state firms that are more or less comparable to sales and use tax collection duties." *Id.*

146. Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015) (holding that the Tax Injunction Act, 28 U.S.C. § 1341 (2018), did not bar DMA's suit).

147. *Id.* at 1134–35 (Kennedy, J., concurring).

148. *Id.* at 1135.

149. *See* S. 106, 2016 Leg., 91st Sess. (S.D. 2016).

150. *Id.* § 1(1)–(2).

getting the case to the Supreme Court. Those efforts worked. On January 12, 2018, the Court agreed to hear the case.[151]

C. *The* Wayfair *Rejection of Formalism*

The Court's task in *Wayfair* might have seemed easy from a doctrinal perspective. The physical presence rule was subject to criticism on many grounds and it seemed ill fit for the modern economy.[152] Nevertheless, the case for retaining the physical presence rule was not frivolous. Sales-tax compliance can be costly for vendors, especially for those without economies of scale.[153]

Forty-five states and the District of Columbia currently impose state sales taxes, and many states allow local jurisdictions to impose sales taxes as well.[154] The result is that there are thousands of sales tax jurisdictions in the United States.[155] Sales tax bases are also notoriously complex and inconsistent.[156] For example, Snickers may be subject to tax while Twix bars are not.[157] For a time, Iowa taxed pumpkins purchased for use as decorations but exempted pumpkins purchased for use as food.[158] Recent questions have arisen regarding the taxation of digital purchases like photographs and, more interestingly, digital Pokéballs.[159] Quite frankly, states' sales taxes are "nutty" in their design and implementation.[160]

For vendors selling their products online, the complexities associated with state sales taxes can be of great consequence. At the extreme, the compliance costs associated with multistate tax collection could prevent some vendors from using the internet to sell their goods in interstate commerce. That result would directly undermine one of the core benefits of our union—and one of the key reasons that the Court acts to protect the

151. South Dakota v. Wayfair, Inc., 901 N.W.2d 754 (S.D. 2017), *cert. granted*, 138 S. Ct. 735 (2018).

152. See *supra* notes 132–133 and accompanying text for a discussion of the critiques of the rule in modern times.

153. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 129, at 15–24.

154. Alaska does not have a state sales tax, but it does allow local sales taxes. *See* ALASKA STAT. ANN. §§ 29.45.650, 29.45.700 (West 2019).

155. HELLERSTEIN ET AL., *supra* note 10, ¶ 19A.01[1] ("The existence of forty-six independent state-level taxing regimes, along with more than 7,500 local taxing jurisdictions, has created a patchwork of rules of substantive tax liability and tax administration that can make compliance a nightmare for the multistate vendor.").

156. *See, e.g.*, *id.* (arguing that the fundamental problem with the state sales tax system is "the distinctions that tend to create the system's complexity").

157. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103–04 (2018) (Roberts, C.J., dissenting); *see also* Austin Jenkins, *A Not-So-Sweet Tax on Candy*, NPR (May 31, 2010, 12:16 AM), http://www.npr.org/templates/story/story.php?storyId=127218749 [https://perma.cc/YV7K-X9DD].

158. *See* John A. Swain, *The Pumpkin Tax*, 46 ST. TAX NOTES 363, 363 (2007). That "pumpkin tax" was quickly repealed. *See* TF Staff, *Pumpkin Tax in Iowa Is Gone*, TAX FOUND. (Nov. 1, 2007), http://taxfoundation.org/pumpkin-tax-iowa-gone/ [https://perma.cc/72N7-M7FB].

159. *See* Adam B. Thimmesch, *Consuming the Benefits of Copyright: Multijurisdictional Sales Tax Complexity*, 107 KY. L.J. 685, 690–91 (2018) (discussing issues of applying the differing tax treatments of tangible and intangible goods to photography); Robert W. Wood, *'Pokémon Go' Taxes Are Coming—In Fact, They're Already Here*, FORBES (July 16, 2016, 9:43 AM), http://www.forbes.com/sites/robertwood/2016/07/16/pokemon-go-taxes-are-coming-in-fact-theyre-already-here/ [https://perma.cc/4P7Z-J89J].

160. Charles E. McLure Jr., *The Nuttiness of State and Local Taxes—and the Nuttiness of Responses Thereto*, 25 ST. TAX NOTES 841 (2002).

negative implications of the dormant Commerce Clause—the common national market.[161]

Wayfair thus presented the Court with one of the very basic tensions underlying its entire dormant Commerce Clause doctrine—how to balance states' autonomy with the desire to promote a robust interstate marketplace free of unnecessary economic hurdles. Unfortunately, most of the attention of academics and states pre-*Wayfair* was on getting the physical presence rule overturned. They had not paid attention to what, if anything, should replace it.

During the pendency of the case, a potential solution was offered. State tax collection obligations could be evaluated directly under *Pike* rather than evaluated under some new blunt-force, tax-specific rule as the Court had done in *Bellas Hess* and *Quill*. I made that argument in an online essay,[162] and the U.S. Solicitor General filed an amicus brief making the same point.[163] Interested legal academics and economists broadly agreed and filed as amici as well.[164] *Pike* balancing just made sense for nondiscriminatory state tax statutes. That was particularly true for the statute at issue in *Wayfair* because that law did not directly impose an obligation to pay tax. The South Dakota law imposed a tax *collection* obligation—a regulatory burden.[165]

The conclusion seemed to be evident. The Court should overrule the physical presence rule and not replace it.[166] Better yet, the Court should clearly abandon the substantial nexus prong of *Complete Auto* and instead rely directly on *Pike* balancing to protect against cumulative compliance costs that became unduly burdensome.[167] The latter was the preferred approach of academics but would require a bolder move by the Court. As discussed below, the Court did not take that bolder approach, but the Court did significantly improve its doctrine by rejecting the physical presence rule for nexus.[168] That was a win for good tax policy, but unification and simplification would have to wait.

161. See *supra* Section I for a discussion of the dormant Commerce Clause and the common national market.

162. *See* Thimmesch, *A Unifying Approach*, *supra* note 24, at 120–22.

163. Brief for the United States as Amicus Curiae Supporting Petitioner at 17–24, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494), 2018 WL 1168802, at *17–24; *see also* Amicus Curiae Brief of Four United States Senators in Support of Petitioner at 13, Wayfair, 138 S. Ct. 2080 (No. 17-494), 2018 WL 1202848, at *13 (noting that the Court could apply *Pike* if it was concerned about undue burdens in a post-*Quill* world).

164. *E.g.*, Brief of Brill et al., *supra* note 24, at 17–20.

165. Hayes R. Holderness, *Questioning* Quill, 37 VA. TAX REV. 313, 340 (2018) ("A tax collection obligation can be fairly characterized as a regulatory burden imposed on people doing business in the state—particularly the business of selling things subject to the tax—separate from the tax to be collected."); Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 341 ("Strictly speaking, *Quill* is a regulatory burdens case, not a tax case.").

166. *See* Thimmesch, *A Unifying Approach*, *supra* note 24, at 120–21 (discussing how *Wayfair* should be decided).

167. *Id.* at 120.

168. See *infra* Part II.C.1 for a discussion of the new nexus requirement.

1. The *Wayfair* Opinion and the New Nexus Requirement

Justice Kennedy wrote the majority opinion in *Wayfair* after inviting the case years earlier.[169] His opinion was lengthy and reviewed the development of the Supreme Court's dormant Commerce Clause doctrine since the 1800s.[170] The Court recognized that its precedent prevented state statutes that were discriminatory or unduly burdensome.[171] The Court also specifically noted that its tax-specific precedents had been animated by its approach in its regulatory cases.[172]

Justice Kennedy's opinion pulled no punches regarding the physical presence rule's lack of normative merit. He called that rule "flawed on its own terms" and said that it was not a "necessary interpretation" of the substantial nexus requirement, it created market distortions rather than preventing them, and it was "the sort of arbitrary, formalistic [rule] that the Court's modern Commerce Clause precedents disavow."[173] His opinion recognized that the physical presence rule "treat[ed] economically identical actors differently, and that it did so for arbitrary reasons."[174] The majority stopped short of eliminating the nexus requirement, though, and retained the substantial nexus requirement, at least in form.

The *Wayfair* Court's discussion of the nexus requirement independent of the physical presence rule seemed to retreat to an approach reminiscent of the *Bellas Hess* opinion by applying a converged Due Process Clause and dormant Commerce Clause analysis.[175] Specifically, the Court noted that nexus under the dormant Commerce Clause was akin to the due process minimum contacts requirement and said that there were "significant parallels" between the two requirements even though they "may not be identical or coterminous."[176]

The Court did not explain why or how those requirements might not be identical or coterminous, which left that question in the air. The Court further muddied the water by incorporating the *Quill* Court's due process analysis by reference, noting that "[t]he reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question [of] whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes."[177] The Court then rejected the physical presence rule by stating plainly that "[p]hysical presence is not necessary to create a substantial nexus."[178] That was a narrow holding in the context of what the Court could have done, but it cleanly marked the end of the physical presence era.

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169. *See* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1134–35 (2015) (Kennedy, J., concurring) ("The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.").

170. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089–91 (2018).

171. *Id.* at 2090–91.

172. *Id.* at 2091 (noting that the principles expressed in the Court's nontax cases "also animate the Court's Commerce Clause precedents addressing the validity of state taxes").

173. *Id.* at 2092.

174. *Id.* at 2094.

175. *See id.* at 2093–94.

176. *Id.* at 2093.

177. *Id.*

178. *Id.*

So, what is necessary to create a substantial nexus in a post-*Wayfair* world? The Court was not entirely clear, but it did state that "nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in [a] jurisdiction."[179] The nexus question, then, transforms from one of physical presence into one regarding when a person can be deemed to have availed oneself of the "'substantial privilege of carrying on business' in [a] jurisdiction."[180] The Court offered little to no help regarding when that occurs.

We can take a bit of guidance from the Court's conclusory determination that the respondent-vendors had "clearly" met that standard based on their "economic and virtual contacts" with South Dakota.[181] The Court found that the requisite *economic* connections were ensured by the respondent-vendors having exceeded the economic thresholds of South Dakota's law (i.e., $100,000 of sales or 200 transactions).[182] The Court found that the requisite *virtual* connections were ensured because respondents were "large, national companies that undoubtedly maintain an extensive virtual presence."[183] Those conclusions were enough for the majority to determine that the substantial nexus requirement was met on the facts presented.[184] We do not know at which point the threshold is crossed, but we know at least some factors that cause a vendor to go over the line.

There is another source of potential guidance on the Court's new standard, but following that trail ultimately leads toward the elimination of the nexus requirement as a dormant Commerce Clause matter. The *Wayfair* Court did not come up with its nexus standard out of whole cloth. Instead, the Court cited its earlier decision in *Polar Tankers, Inc. v. City of Valdez*[185] as the source of that language.[186] Unfortunately, that case adds little to our understanding of nexus because *Polar Tankers* did not even involve a nexus dispute. The case involved a local personal property tax that was struck down as violating the Tonnage Clause.[187] The case also involved ships that were undeniably present in the taxing jurisdiction.[188] Nexus was just not at issue in the case.

179. *Id.* at 2099 (first alteration in original) (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

180. *See id.* (quoting *Polar Tankers*, 557 U.S. at 11).

181. *Id.*

182. *Id.* (citing S. 106, 2016 Leg., 91st Sess. § 1 (S.D. 2016)).

183. *Id.*

184. *Id.* That approach, though unsatisfactory from an academic or planning perspective was not surprising. Ultimately, it is difficult to distill the nexus requirement down to quantitative factors outside of a legislative forum. *See* John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 364 (2003) (stating that the Court "is not well-equipped to make quantitative distinctions"); *see also* HELLERSTEIN ET AL., *supra* note 10, ¶ 8.09[4][b] ("Legislatures are far better equipped than courts to establish quantitative standards . . . ."). The Court merely replicated the unsatisfactory approach taken by state courts in their decisions addressing economic nexus for purposes of state corporate income taxes. *See* Thimmesch, *The Illusory Promise*, *supra* note 114, at 187–204 (evaluating the flaws in states' approaches).

185. 557 U.S. 1 (2009).

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

187. *Polar Tankers*, 557 U.S. at 4.

188. *See id.* at 5.

The language that the Court offered also did not originate with *Polar Tankers*, but with a couple of earlier cases. The first, *Wisconsin v. J.C. Penney Co.*,[189] involved the question of nexus under the Due Process Clause, not under the dormant Commerce Clause.[190] The Court also applied the same exact language in *Mobil Oil Corp. v. Commissioner of Taxes*.[191] Again, however, the Court discussed the due process minimum contacts standard.[192]

Based on the origin of the Court's stated nexus standard and the use of that standard in *Wayfair*, it seems as though there is significant merit in construing the substantial nexus requirement as very close to, if not the same as, the due process standard. The Court made an even stronger signal in this regard by referencing that "some other principle in the Court's [dormant] Commerce Clause doctrine might invalidate" the South Dakota law.[193] What other principle? That must be *Pike* balancing.

2. Nexus and *Pike* Balancing?

The Court's reference to "other principles" in its dormant Commerce Clause jurisprudence was interesting but not fully explained. The Court determined that it need not say anything further because that issue had "not yet been litigated or briefed."[194] The Court did, however, reference that South Dakota's law had "several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce."[195] Those features included (1) the law's de minimis safe harbor, (2) the law's prospectivity, and (3) South Dakota's adoption of the Streamlined Sales and Use Tax Agreement, which brings with it reduced administrative and compliance costs for vendors.[196]

Of course, looking at whether statutes discriminate against or unduly burden interstate commerce is exactly the Court's approach in nontax cases.[197] The Court's reference to "other principles," therefore, seemed to indicate that state nexus standards would be subject to further review under the Court's framework for nontax cases. That represented a big shift in how the Court would analyze tax cases—even if it reflected academics' views of where that doctrine actually stood.

Unfortunately, the Court did not go so far as to rely solely on *City of Philadelphia v. New Jersey* and *Pike*. Instead, the Court formally retained the nexus requirement by applying the *Polar Tankers* standard for determining substantial nexus.[198] The result, then, is an apparent two-step process by which state nexus provisions are subject to

189. 311 U.S. 435 (1940).

190. *See J. C. Penney Co.*, 311 U.S at 444–45.

191. 445 U.S. 425, 437 (1980).

192. *Mobil Oil Corp.*, 445 U.S. at 436–47.

193. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

194. *Id.*

195. *Id.*

196. *Id.* at 2099–2100.

197. *See supra* Section I.

198. See *supra* notes 185–188 and accompanying text for a discussion of how the Court applied the *Polar Tankers* standard in *Wayfair*.

analysis first under *Complete Auto* and then under *Pike*. That was the first time that the Court has suggested that a state law be subject to both the Court's tax and nontax tests.

The Court's decision to go that route arguably followed its policy of minimalist adjudication by only modifying the nexus test,[199] but that approach ultimately introduced more uncertainty into the law. Taking that approach also conflicted with the Court's supposed move away from formalism under the dormant Commerce Clause.[200] The nexus requirement under the *Wayfair* "two-step" is really nothing more than a due process minimum contacts analysis along with *Pike* balancing. The nexus requirement of *Complete Auto* is therefore functionally irrelevant.

III. THE DEMISE OF THE TAX-SPECIFIC DORMANT COMMERCE CLAUSE

The material above both established the basis for the Court's dormant Commerce Clause doctrine and how the Court recently addressed the issue of tax nexus within its *Complete Auto* formulation. Ostensibly the Court still imposes one legal framework to analyze state taxes—the *Complete Auto* test—and another to analyze other types of state laws—the *City of Philadelphia v. New Jersey* and *Pike* approach. As introduced above, however, that differentiation may be one of form only.

This Section shows how the Court has already merged these two approaches. Truly rejecting formalism in this area of law would therefore mean recognizing that *Complete Auto* is not an independent "test." That approach would also, incidentally, resolve many of the issues that currently exist with the Court's tax doctrine.[201]

A. *The Effective Elimination of the Balancing Tests*

The primary effect of the *Wayfair* decision was the elimination of the physical presence rule for evaluating substantial nexus, but the Court's opinion seemed to signal much more—the removal of the substantial nexus requirement altogether.[202] The Court did not discuss that broader effect in its opinion, but the demise of the nexus requirement follows directly from the Court's opinion and is not necessarily surprising. Recall that there has never been a clear source for the nexus requirement as a dormant Commerce Clause matter.[203] The *Complete Auto* Court certainly referred to the existence of that requirement, but the cases that the Court cited as support all involved due process

199. See *supra* note 23 and accompanying text for an examination of the Court's minimalist approach to adjudication.

200. *Wayfair*, 138 S. Ct. at 2094 ("The Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" (quoting West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201 (1994))).

201. *See infra* Section IV.

202. *See supra* Part II.C.1.

203. See *supra* Part II.B for a discussion of the questionable origin of the nexus requirement. *See also* DENNING, *supra* note 3, § 8.10, at 8-41 (labeling the nexus requirement's inclusion in *Complete Auto* as "puzzling" and labeling it a "Due Process requirement"); Mark L. Mosley, *The Path Out of the Quagmire: A Better Standard for Assessing State and Local Taxes Under the Negative Commerce Clause*, 58 TAX LAW. 729, 740 (2005) (noting the nexus requirement is really a due process concern); Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 340 ("Issues of nexus, fair apportionment, and benefits received are usually relegated to due process analysis.").

challenges.[204] The citing of those due process cases was not as much of an error as it was a reflection of the Court's then-existing doctrine. The Court's early tax cases were decided in an era where the Court had broadly applied a physical presence rule for purposes of evaluating personal jurisdiction under the Due Process Clause.[205] It was no surprise, then, that the Court had not expanded states' taxing jurisdiction any farther at the time. In *International Shoe Co. v. Washington*,[206] however, the Court adopted a more relaxed "minimum contacts" standard for personal jurisdiction and opened the door for expanded tax jurisdiction as well.[207]

Illinois seized on that doctrinal change in *Bellas Hess* and argued that the Court should apply its more lenient *International Shoe* test to tax cases and uphold the state's tax collection requirement.[208] The *Bellas Hess* Court did not take that invitation though. In fact, the Court did not even address that doctrinal change—or even reference *International Shoe*—in its decision.[209] Instead, the *Bellas Hess* Court retained its physical presence rule and "decline[d] to obliterate" its historic bright line in its tax cases.[210] The due process cases continued to have their effect.

That history meant that the Court had not dealt with the distinction between nexus as a due process matter and as a dormant Commerce Clause matter before it explicitly made nexus a prong of its *Complete Auto* test in 1977. And when the Court finally decoupled its nexus analyses in *Quill*, the Court did not justify the nexus requirement as much as it punted.[211] This does not mean that *Quill* told us nothing about the nexus requirement, though. Recall that the *Quill* Court did explain that the nexus requirement was intended to "limit the reach of state taxing authority so as to ensure that state taxation

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204. See *supra* notes 85–95 for a discussion of *Bellas Hess* and other cases where the Court sometimes addressed both the Due Process and Commerce Clauses in those cases without any discussion of the differences between them. See *also* Hayes Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 10–12 (2019) (discussing the Court's dormant Commerce Clause analysis in *Bellas Hess*).

205. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.").

206. 326 U.S. 310 (1945).

207. *Int'l Shoe Co.*, 326 U.S. at 316.

208. *See* Brief for Appellee at *13–15, Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967) (No. 241), 1967 WL 113902. The Court's personal jurisdiction standard contains two independent parts. The first looks to whether the defendant has "minimum contacts" with a jurisdiction, and the second then looks more broadly at whether subjecting the defendant to jurisdiction in a state would be fundamentally fair. *See* TRIBE, *supra* note 3, § 6-39, at 1282–83. It could be that the Court views the tax-nexus requirement as falling only within the latter element, but it has never clarified that point. Justice Scalia nodded to this issue in his *Quill* concurrence, noting that he did "not understand [the abandonment of *Bellas Hess*'s due process holding] to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical." Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 319–20 (1992) (Scalia, J., concurring). *See generally* Richard D. Pomp, *Are the Standards for Tax Jurisdiction and Personal Jurisdiction Identical?*, 54 TAX NOTES 333 (1992).

209. The *Bellas Hess* Court instead seemed to implicitly cabin its personal jurisdiction cases away from its tax-nexus cases, though the Court has never explained that it was doing so or why it has not connected the two concepts.

210. *Nat'l Bellas Hess*, 386 U.S. at 758. See *supra* notes 89–96 and accompanying text for a discussion of the *Bellas Hess* Court's reasoning behind this holding.

211. See *supra* text accompanying notes 102–110 for a discussion of the *Quill* Court's decision.

does not unduly burden interstate commerce."[212] And in that vein, it noted: "Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."[213]

This excerpt tells us that the physical presence rule of the dormant Commerce Clause was never anything more than an application of *Pike* balancing.[214] The rule was blunt, but it reflected the same judicial task and function—balancing the state interest against the burdens imposed on interstate commerce.

This understanding of the physical presence rule helps to explain the Court's ultimate approach in *Wayfair*. The *Wayfair* Court's rejection of the physical presence rule meant that it would have to determine what the nexus requirement would mean going forward. That put the Court in a tough spot. No firm nexus rule really made sense.[215] Further, the Court's limited discussion of the function of the nexus requirement meant that no nexus standard[216] was readily apparent.[217] Was the nexus requirement supposed to protect individual firms based on their own internal financial situations and tax efficiencies—or inefficiencies? Was it supposed to protect the *average* firm from burdensome taxes? Are individual firms relevant at all or is the focus on interstate commerce as a whole?[218] The history of the nexus requirement meant that the Court has never addressed those questions.

This combination of factors meant that the standard that made the most sense in a post-*Quill* world was *Pike* balancing. The ultimate purpose of that balancing test is to act as a judicial backstop to ensure that nondiscriminatory state statutes do not go "too far."[219] That is precisely what the Court's nexus requirement does. It does not prevent discriminatory taxes or taxes that are too high. Instead, the nexus requirement attempts to limit states from going too far regarding the parties on whom taxes are imposed. The *Quill* Court determined that states went "too far" if they imposed taxes on remote

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212. *Quill*, 504 U.S. at 313.

213. *Id.* at 314–15.

214. *See* Thimmesch, *A Unifying Approach*, *supra* note 24, at 106–08; *see also* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1145–46 (10th Cir. 2016) (categorizing *Quill*'s physical presence rule as a test for determining undue burdens).

215. *See* Thimmesch, *A Unifying Approach*, *supra* note 24, at 109–15 (evaluating the Court's options and finding them all unsatisfactory).

216. For a discussion of rules versus standards, see, for example, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

217. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018). See also Holderness, *supra* note 204, at 19–22, 24–25 for a discussion of the vague nature of the Court's new nexus test.

218. It is not hard to think of situations where state tax compliance burdens could preclude individual firms from engaging in interstate commerce without reducing interstate commerce in the aggregate. All else being equal, an online shopper would be indifferent between purchasing from a mom-and-pop dog food store, for example, or from Chewy.com. The former could be put out of business by tax compliance costs, but the same value would flow in interstate commerce.

219. *See* S. Pac. Co. v. Arizona, 325 U.S. 761, 781 (1945); *see also* Darien Shanske, *Proportionality as Hidden (but Emerging?) Touchstone of American Federalism: Reflections on the* Wayfair *Decision*, 22 CHAP. L. REV. 73, 78 (2019) (explaining that the Court's approach in *Wayfair* reflected a global judicial norm of proportionality).

vendors. The *Wayfair* Court disagreed.[220] But the Court did not have a good option for any new nexus rule or standard other than to rely on the more general *Pike* balancing.[221]

What the *Wayfair* Court should have done instead of just rejecting the physical presence rule was to eliminate the nexus requirement altogether. But it did not. The Court instead applied the *Polar Tankers* standard for substantial nexus and held that nexus exists when a person "avail[s] itself of the substantial privilege of carrying on business" in a state.[222] The question, though, is whether that standard serves any function other than keeping the substantial nexus requirement as a Potemkin prong. That does not appear to be the case.

It is difficult to know whether the *Polar Tankers* standard has any teeth, of course, because the Court has not yet opined on how to apply that standard. But the better argument, both positively and normatively, is that the nexus requirement, as a dormant Commerce Clause matter, is functionally dead.

The *Polar Tankers* standard has due process roots, and it is hard to see any distinction between the *Wayfair* approach and a basic minimum contacts analysis. Theoretically, the Court could "elevate" the nexus required under *Polar Tankers* from the nexus required to establish minimum contacts, but that is likely a fool's errand. State courts have ostensibly done that for years in their decisions upholding economic-nexus statutes for state income taxes, but they have not identified a theoretical basis for that decision—other than the Court's seeming insistence on it—or a practical way of defining the constitutional limit.[223]

Professor Hayes Holderness provides a compelling discussion of nexus and its meaning post-*Wayfair* in a recent article—*Navigating 21st Century Tax Jurisdiction.*[224] He argues that the *Polar Tankers* standard, and thus the nexus requirement, should be construed so as to ensure that the costs of complying with a state's tax laws do not prevent individual firms from engaging in interstate commerce.[225] That approach would give some meaning to the substantial nexus requirement, and that has great value if the nexus requirement continues to be respected. But it is not clear whether that standard would have any actual effect or whether it would serve a function other than propping up the nexus requirement. To start, it is difficult to make the judgments required under that type of standard. At which point do tax compliance costs become prohibitive for a particular firm? How would that be measured or proved? Would inefficient vendors be given the benefit of a higher nexus bar or would they need to reduce their other costs? Maybe more importantly, the bar for nexus would be very low in any event because access to the interstate market is highly valuable and the costs of compliance, though meaningful, scale well.[226] Under this type of approach, then, only the smallest of vendors would be protected, and those vendors likely would not fall within many states' adopted standards.

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220. See *supra* Section II for a discussion of *Quill* and *Wayfair*.

221. For an analysis of the unsatisfactory alternatives, see Thimmesch, *A Unifying Approach*, *supra* note 24, at 109–15.

222. *Wayfair*, 138 S. Ct. at 2099 (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

223. See *supra* note 116 and accompanying text for an examination of the applicable state court decisions.

224. *See generally* Holderness, *supra* note 204.

225. *See id.* at 38–44.

226. *See id.* at 43–44.

Pike balancing could certainly serve this same function without the hassle and formalism of a different test.

From a normative standpoint, then, eliminating the nexus requirement altogether seems like the proper approach. That requirement serves no function beyond the minimum contacts test of due process, and undue compliance burdens can be evaluated under *Pike*.[227] That is precisely the approach that the Court takes in its nontax cases, and one conclusion of this Article is that the Court should expressly take that approach in tax cases as well. All told, this discussion should ring as a requiem for the substantial nexus requirement. That prong of *Complete Auto* is functionally dead.

The story is the same for *Complete Auto*'s other balancing prong, the fourth prong. That requirement purportedly compels that a state's tax imposition be "fairly related to the services provided by the State,"[228] but that prong has long been dead letter law. The Court has roundly rejected that it has any special institutional competency to engage in the balancing its test requires, and it refuses to do so. The Court made that very clear in *Commonwealth Edison Co. v. Montana*,[229] where it stated:

> [I]t is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[230]

Commonwealth Edison is recognized as having effectively "emasculate[d]"[231] the fourth prong of *Complete Auto* and courts now only look to whether the measure of a state's tax has any logical relationship to the taxpayer's contact with a state.[232] For

227. *See* Brief of Brill, *supra* note 24, at 17–20.

228. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). See *supra* Part I.C for a discussion of the *Complete Auto* test.

229. 453 U.S. 609 (1981).

230. *Commonwealth Edison*, 453 U.S. at 628.

231. *Id.* at 645 (Blackmun, J., dissenting); *see also* DENNING, *supra* note 3, § 8.10, at 8-40 n.129 (stating that the Court has "virtually gutted the notion" that it can account for the benefits and burdens of taxation under the fourth prong of *Complete Auto*); HELLERSTEIN ET AL., *supra* note 10, ¶ 4.18[2][d]; TRIBE, *supra* note 3, § 6-22, at 1147 ("[T]he fair relation test has become little more than a gloss on the nexus requirement."); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 204 (noting that the fourth prong "has failed to impose any additional hurdle" to the first prong and that it has become "insignificant"); Williams, *supra* note 37, at 288 ("As the Court has built up a rich, if not internally consistent, jurisprudence on tax apportionment, it is hard to see that the 'fair relation' test, as now construed, adds anything helpful.").

232. *Commonwealth Edison*, 453 U.S. at 626; HELLERSTEIN ET AL., *supra* note 10, ¶ 4.18[2][d] ("[T]he Court in its actual decisions has not implemented in any meaningful way its rhetoric as to the required relation between the measure of a state tax imposed on interstate business and the earnings, benefits, and protection provided by the state."); TRIBE, *supra* note 3, § 6–18, at 1125 (labeling the requirement as a "fairly trivial requirement that a state provide *some* services to all who are its taxpayers").

example, a tax on income measured by a taxpayer's resting heart rate would violate the requirement. But a tax on income that simply seemed too high based on a taxpayer's limited connections with a state would not. Of course, that same result could be had under the Due Process Clause, which requires that "the taxing power exerted by [a] state bears fiscal relation to protection, opportunities and benefits given by the state."[233] According to the Court, "[t]he simple but controlling question is whether the state has given anything for which it can ask return."[234] That is what the fourth prong of *Complete Auto* does, if it does anything at all.[235] As a matter of practice and theory, then, the fourth prong of *Complete Auto* is dead letter as well. That leaves only the second and third prongs of *Complete Auto* as potentially serving a unique function in tax cases. As shown below, they do not.

B. The Discrimination and Fair-Apportionment Prongs

With the nexus and fairly related prongs effectively eliminated from *Complete Auto* as a matter of substance, only *Complete Auto*'s second and third prongs seem to serve any independent function. Those prongs require, respectively, that state tax statutes be fairly apportioned and not discriminatory. The discrimination prong obviously matches

233. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940); *see also* Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371, 383–87 (2017) (analyzing this aspect of the Court's tax due process doctrine).

234. *J. C. Penney*, 311 U.S. at 444.

235. The due process feel of the fourth prong is no surprise. That prong appears to have due process roots. *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905) ("The power of taxation . . . is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property" and that taxation in the absence of that protection would be "a taking of property without due process of law."); HELLERSTEIN ET AL., *supra* note 10, ¶ 4.18[2][c] (noting that the fourth prong "was something new in Commerce Clause jurisprudence when it was enunciated" in *Complete Auto* and that "the Court had originally articulated the position in the context of the Due Process Clause"); Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 884, 951–52 (1986) (noting the overlap of the "fairly related" prong under the Due Process and dormant Commerce Clauses). The *Complete Auto* Court cited to four different cases in its first statement regarding what would become known as its four prongs. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 n.8 (1977). Those cases—*General Motors Corp. v. Washington*, *Northwestern States Portland Cement Co. v. Minnesota*, *Memphis Natural Gas Co. v. Stone*, and *Wisconsin v. J. C. Penney Co.*—all involved analyses of state taxing statutes under the Due Process Clause, usually in addition to under the dormant Commerce Clause. General Motors Corp. v. Washington, 377 U.S. 436, 437 (1964) ("This appeal tests the constitutional validity, under the Commerce and Due Process Clauses, of Washington's tax imposed upon the privilege of engaging in business activities within the State."); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959) ("It is contended that each of the state statutes, as applied, violates both the Due Process and the Commerce Clauses of the United States Constitution."); Memphis Nat. Gas Co. v. Stone, 335 U.S. 80, 86 (1948) (addressing both Due Process and dormant Commerce Clauses considerations); *J. C. Penney Co.*, 311 U.S. at 439 ("Whether the tax imposed by § 3 of Chapter 505 of the Wisconsin Laws of 1935 may apply to a foreign corporation licensed to do business in Wisconsin without offending the Fourteenth Amendment of the Constitution is the question before us."). None imposed the "fairly related" requirement as a dormant Commerce Clause requirement, though the opinions were far from disciplined in their analyses. *But see Memphis Nat. Gas*, 335 U.S. at 86 (analyzing the "measure used to calculate the amount of the [state's] tax" specifically as a due process matter). This doctrinal sloppiness has not been uncommon or unnoticed in the Court's historic tax cases. *See* John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity*, 33 VA. TAX REV. 209, 220 (2013) ("[T]he Court has frequently invoked Due Process and Commerce Clause restraints in one breath without distinguishing between their implications . . . .").

up with the *City of Philadelphia v. New Jersey* requirement for nontax cases,[236] so that provides no independent restriction on state authority. That leaves only the fair-apportionment prong.

The Court's fair-apportionment requirement consists of two components—an external consistency requirement and an internal consistency requirement. For a tax to be externally consistent, the tax must be based on factors that "actually reflect a reasonable sense of how income is generated."[237] This requirement looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[238] Analysis under that requirement is very "practical"[239] and requires a close look at the nature of a particular tax.

In *Goldberg v. Sweet*,[240] for example, the Court addressed an Illinois provision that taxed phone calls that (1) either began or terminated in the state, and (2) were charged to an Illinois service address.[241] One of the legal challenges made to that statute was based on the fact that the state tax was imposed on the gross charge for interstate phone calls even though they occurred only partially in the state.[242] The Supreme Court rejected that challenge given the impossible nature of trying to tax calls based on precisely which route the electrical current traveled on any particular call.[243] Close was good enough.

As applied, the external consistency test is really a soft standard that functions largely to allow courts to strike down taxes that just do not feel right. The Court has seemed uncomfortable with that requirement though and ignored it completely in the 2015 decision in *Comptroller of the Treasury of Maryland v. Wynne*.[244] In addition, much like the fourth prong, its requirements replicate the due process requirement that a state not "tax value earned outside its borders."[245] Incidentally, fair-apportionment cases also developed under both the dormant Commerce and Due Process Clauses, in many cases without explanation by the Court as to which provision was being applied.[246] As the

236. See *supra* Part I.B for a discussion of the Court's approach in nontax cases.

237. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

238. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

239. Goldberg v. Sweet, 488 U.S. 252, 264 (1989).

240. 488 U.S. 252 (1989).

241. *Goldberg*, 488 U.S. at 256.

242. *Id.* at 260.

243. *Id.* at 264–65 (noting that the state's method represented a "realistic legislative solution" to the issue of how to tax the "intangible movement of electronic impulses through computerized networks").

244. 135 S. Ct. 1787 (2015); *see also* Edward A. Zelinsky, *The Enigma of* Wynne, 7 WM. & MARY BUS. L. REV. 797, 809 (2016) (stating that the *Wynne* Court's failure to analyze the external consistency prong of *Complete Auto* "may reflect judicial discomfort with that test"); *id.* at 808–10 (evaluating the potential death of external consistency).

245. Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 777 (1992); *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 164 (1983); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982).

246. *See, e.g.*, *Container Corp.*, 463 U.S. at 164 ("Under both the Due Process and the Commerce Clauses of the Constitution, a State may not, when imposing an income-based tax, 'tax value earned outside its borders.'" (citing *ASARCO*, 458 U.S. at 315)); Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317, 325 (1968) ("The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due."); *see also* HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[2] (noting that external consistency "has long been a central

leading state tax treatise states flatly, "[T]he Commerce Clause does not impose limitations on extraterritorial taxation beyond those imposed by the Due Process Clause."[247] This again suggests that the external consistency requirement merely duplicates the protections that one would find under the Due Process Clause and that external consistency really provides no independent limitation on state taxing power.

The second component of the Court's fair-apportionment prong is its internal consistency requirement. That requirement is unique to the tax sphere, and it is growing in importance following the *Wynne* decision and its promotion by prominent academics Ruth Mason and Michael Knoll.[248] Evaluating a state tax for internal consistency requires the Court to ask whether a taxpayer would face a higher tax burden if she engaged in interstate commerce than if she engaged in intrastate commerce.[249] That analysis is done with one critical assumption, though. To evaluate whether a higher tax burden on interstate commerce is due to a state's own law, rather than due to nonharmonized laws among states, the Court assumes that every state has the same law as the taxing state.[250] If interstate commerce bears a greater tax burden under that condition, then the state's statute must have some element in it that discriminates against interstate commerce. If interstate commerce does not bear a greater tax burden under that condition, then any additional tax burden that taxpayers actually feel must result because of a nonuniform subnational exercise of taxing power (i.e., federalism).

Professors Mason and Knoll support the use of this test based on their own model of tax discrimination, which they developed nearly a decade ago in their article *What is Tax Discrimination?*.[251] In that article, they reviewed tax cases from the European Union to determine how the European Court of Justice (ECJ) had defined tax discrimination.[252] They then applied economic analysis to show that scholars' conceptions of capital export

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tenet of the Court's Commerce (and Due Process) Clause jurisprudence"); *id.* ¶ 8.13[1] (analyzing fair-apportionment challenges under the Due Process and dormant Commerce Clauses as coterminous); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 139 (1988) ("The Court has long interpreted the commerce and due process clauses as requiring that taxes be fairly apportioned to the taxpayer's activities in the taxing state."); *id.* at 186 n.250 (noting that the external consistency aspect of the Court's "fair apportionment requirement is rooted in both the commerce and due process clauses"); Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 328–29 (noting that the *Complete Auto* prongs, including fair apportionment, "were often rooted in Due Process rather than dormant Commerce Clause analysis" prior to *Complete Auto*).

247. HELLERSTEIN ET AL., *supra* note 10, ¶ 8.02[1][a][iv]; *see also* Choper & Yin, *supra* note 231, at 202–04 (critiquing the external consistency test as "irrelevant" and "superfluous"); Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 154, 160 (2002) (noting that, outside of the taxation of domiciliary corporations, "fair apportionment is often . . . necessary as a matter of Due Process" and that "[a] state tax that is not fairly apportioned will generally violate" the Due Process Clause).

248. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1802 (2015) (citing to Mason and Knoll's work as support for the internal consistency test). *See generally* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017) [hereinafter Knoll & Mason, *Economic Foundation*] (discussing the importance of *Wynne* and the internal consistency test); Michael S. Knoll & Ruth Mason, Wynne*: It's Not About Double Taxation*, 75 ST. TAX NOTES 413 (2015) (arguing the Maryland tax scheme at issue in *Wynne* violated the internal consistency test).

249. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[1] (describing the internal consistency test).

250. *See Wynne*, 135 S. Ct. at 1802–03; HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[1].

251. *See generally* Mason & Knoll, *supra* note 37.

252. *Id.* at 1023–33.

neutrality[253] and capital import neutrality[254] did not explain the actions of the ECJ.[255] Instead, Mason and Knoll offered a new concept based on economists' notion of capital ownership neutrality, which they labeled competitive neutrality for tax purposes.[256]

The concept of competitive neutrality focuses on comparative advantage. Competitive neutrally requires that the ratio of a State A taxpayer's after-tax returns from investment or labor in State A and her after-tax returns from investment or labor in State B equals the ratio of a State B taxpayer's after-tax returns from investment or labor in State A to her after-tax returns from investment or labor in State B.[257] A state's tax is nondiscriminatory under this approach if that tax does not impact taxpayers' comparative returns from intra- and interstate commerce in those jurisdictions.

Mason and Knoll's concept provides the mathematical support for the internal consistency test.[258] This test also has strong support among other economists.[259] Mason and Knoll have also described how that concept serves as the economic foundation for the Court's dormant Commerce Clause doctrine.[260]

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253. Capital export neutrality refers to a taxpayer's choice of whether to invest in her home country or abroad. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1604 (2000).

254. Capital import neutrality refers to neutrality of taxation of the earnings from investments by domestic and foreign investors. *Id.* at 1605.

255. *See* Mason & Knoll, *supra* note 37, at 1052–53.

256. *Id.* at 1033–34 (explaining the origin of their theory). *See generally* Mihir A. Desai & James R. Hines Jr., *Evaluating International Tax Reform*, 56 NAT'L TAX J. 487 (2003) (introducing the concept of capital ownership neutrality).

257. *See* Mason & Knoll, *supra* note 37, at 1061 & n.154 ("[I]t is *comparative*, not absolute, tax rates that matter for competitive neutrality."); *id.* at 1081 ("[I]n order for a tax system to be competitively neutral, it is only necessary that the system not change comparative advantage.").

258. It is important to note, though, that internal consistency does not necessarily ensure competitive neutrality. As noted above, the internal consistency test is applied by assuming that states have harmonized their tax bases and rates. *See supra* note 250 and accompanying text. Achieving competitive neutrality, in contrast, requires that states *actually* apply the same tax bases and rates or that all states "adopt the same method for taxing cross-border income," which would include either providing refundable tax credits or adopting an "ideal deduction method." *See* Mason & Knoll, *supra* note 37, at 1060–75. Achieving those results may be particularly unlikely in the personal income tax context, where states conform with none of these conditions. *See, e.g.*, Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J.L. & POL'Y 467, 506–08 (2016) (discussing how the lack of full state tax credits impedes the achievement of Mason and Knoll's competitive neutrality and the authors' similar concept of "commerce neutrality"). Courts also lack the power to compel the required harmonization, which has led Professors Mason and Knoll to conclude that internal consistency "advances" or "promotes" competitive neutrality but not that it ensures competitive neutrality. Mason & Knoll, *supra* note 37, at 1074–76 ("[A]lthough courts generally lack the authority to do all that would be necessary to fully achieve any of the tax neutrality benchmarks, they can, without exceeding their institutional competence, help advance any of the alternative benchmarks by interpreting the nondiscrimination principle to require uniform taxation."); *see also id.* at 1075 (recognizing that "full implementation of any of the tax neutrality benchmarks we have discussed requires legislative harmonization"); *id.* at 1114 (noting that the Supreme Court "faces institutional constraints that prevent it from fully achieving any of the neutrality benchmarks on its own").

259. *See generally* Lirette & Viard, *supra* note 258 (introducing a concept of commerce neutrality that is largely consistent with the Mason and Knoll model).

260. *See generally* Knoll & Mason, *Economic Foundation*, *supra* note 248 (analyzing the internal consistency test's ability to assess whether a state's tax regime discriminates against cross-border commerce).

The internal consistency test thus finds itself with broad support from academics and the Court, and the test does smartly identify statutes that are inherently discriminatory. It can also produce results that do not seem intuitive, at least at first blush. By way of example, assume that Nebraska determined to tax its residents on all of their income from whatever sources derived *and* to tax nonresidents on the income that they earn within Nebraska (for example from employment in the state). Assume also that Nebraska failed to provide its residents with tax credits if they paid tax in another state.

The first step in analyzing the internal consistency of that tax structure would be to assume that every state had the same structure as Nebraska.[261] The next step would be to determine whether a person governed by that structure would face greater taxation on her income if she engaged in interstate commerce than if she engaged in intrastate commerce. The answer would be yes for the tax system just introduced.

If a taxpayer lived and worked in Nebraska (i.e., engaged in intrastate commerce), she would face a tax burden equal to the state's tax rate on all of her income. If, instead, she engaged in interstate commerce and worked in Iowa, Iowa would tax the income because its law—being the same as Nebraska's—would tax the income that a nonresident derived while working within its borders. Nebraska would *also* tax that income because a Nebraska resident earned the income, and the state would offer her no tax credit for the amount of tax that she paid to Iowa. She would therefore bear the full burden of two states' taxes.

Under these conditions, the Nebraskan's income would be subject to a greater tax burden if she engaged in the interstate sale of her labor than if she worked for a home-state employer. That greater tax burden would not occur because of a difference in states' laws—we assumed away that condition—but due to the structure of Nebraska's law. That would mean that Nebraska's statute was inherently discriminatory against interstate commerce.

Finding this type of statute inherently discriminatory may not seem particularly surprising as described, but the analysis demonstrates that the internal consistency test is focused on hypothetical tax burdens rather than on how state tax systems actually impact interstate commerce. For example, the analysis provided above would be no different if Iowa imposed no income tax, with the result that a taxpayer would actually face exactly the same tax burden if she engaged in intra- or interstate commerce. The internal consistency test is about statutes that hypothetically burden interstate commerce, it is not about actual "double taxation."[262]

As previously noted, this framing means that the internal consistency test can produce results that are surprising in the other direction as well (i.e., state statutes that result in actual double taxation are perfectly permissible). Presume now a situation where Nebraska determined to tax all of the income of businesses that manufactured products in Nebraska, regardless of where that business's products were sold. Assume further that Iowa determined to do the opposite and taxed companies based solely on where they made sales and without any consideration for where the products were manufactured. A

261. *See supra* note 250 and accompanying text.

262. *See generally* Knoll & Mason, *Economic Foundation*, *supra* note 248, at 314 ("These two notions—double taxation and tax discrimination—are not identical, and conflating them gives rise to persistent confusion that pervades dormant Commerce Clause doctrine, including the principal dissent in *Wynne*.").

manufacturer making one hundred percent of its products in Nebraska and selling them all into Iowa would be taxed by both states on all of its income. That would result in "double taxation," which can result in reactive claims that the state statute must discriminate against interstate commerce.

But despite the actual double taxation, neither state's statute would be internally inconsistent in this example. If both states adopted either Nebraska or Iowa's provision, one state and only one state would tax the income.[263] The actual double taxation that would occur under this taxing scheme would therefore result from nonharmonized laws, not discrimination by one state against interstate commerce. The statute would survive the internal consistency test.

As these examples show, the internal consistency test makes hypothetical double taxation unconstitutional and real double taxation permissible. That might seem odd, but the Court affirmed its use of that test very recently in *Wynne*. That result is also supported by economic models as noted above.[264]

Wynne is also particularly interesting in the context of this Article because the Court seemed to shift away from using *Complete Auto* and its four prongs as a formal framework for analyzing tax statutes under the dormant Commerce Clause.[265] To start, the case did not even mention *Complete Auto*. The majority opinion also folded the Court's internal consistency test into its nondiscrimination analysis rather than analyze internal consistency as part of the fair-apportionment prong.[266] Justice Alito explained that Maryland's tax structure was internally inconsistent (which it was), likened it to a tariff, and struck it down as discriminatory on that basis.[267] His opinion did not address

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263. Under Nebraska's hypothetical law, Nebraska (and only Nebraska) would tax all of the manufacturer's income because the products were manufactured in that state. Under Iowa's hypothetical law, Iowa (and only Iowa) would tax all of the manufacturer's income because the products were all sold in that state.

264. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1804 (2015) (noting that the Court's "prior decisions have already considered and rejected" the argument that state statutes are unconstitutional because they result in duplicative taxation—"and for good reason"); Lirette & Viard, *supra* note 258, at 493, 510; Mason & Knoll, *supra* note 37, at 1113–14. *Wynne* involved the structure of the personal income tax in Maryland. *Wynne*, 135 S. Ct. at 1792. Under that state's law, its residents were subject to both a state level income tax and a county income tax. *Id*. When Maryland residents earned income in other states and paid taxes on that income to those other states, they could get a credit against the Maryland state income tax but not against the county tax. *Id.* That ensured that Maryland residents, many of whom commute to work in other states or the District of Columbia, pay some income tax to support their state of residence. *See id.* Maryland also, however, required nonresidents to pay a special nonresident tax that approximated the county portion of the tax. *Id.* The Supreme Court ruled that the Maryland tax structure violated the internal consistency requirement under the same application of internal consistency as applied to the first Nebraska tax proposed above. *Id.* at 1795. Interestingly, the Maryland provision could have been saved even without giving in-state taxpayers a credit against the county portion of the tax. *See id.* at 1806. The constitutional defect could also have been cured by eliminating the state's special nonresident tax. *See* Knoll & Mason, *Economic Foundation*, *supra* note 248, at 343 (listing the different ways that Maryland could have "cured" its statute).

265. Denning, *The Dormant Commerce Clause*, *supra* note 19, at 113–16 (noting the "fascinating convergence of doctrinal lines governing tax and non-tax cases" that *Wynne* might represent).

266. The majority specifically noted that the internal consistency test helped "courts identify tax schemes that discriminate against interstate commerce." *Wynne*, 135 S. Ct. at 1802. The Court had previously used an internal consistency analysis to identify discrimination, so this doctrinal convergence was not unique to *Wynne*. *See* TRIBE, *supra* note 3, § 6-20, at 1135 (noting that "the requirement of internal consistency . . . can be (and sometimes [is]) construed instead as [an] aspect[] of the discrimination prong").

267. *Wynne*, 135 S. Ct. at 1804.

the apparent convergence of the fair-apportionment and nondiscrimination requirements nor did it look to see if any state interest justified that discrimination.

These aspects of the Court's decision in *Wynne* caused Professor Brannon Denning, in 2016, to ask whether it was "possible that the Court [was] on the verge of replacing *Complete Auto*'s four-factor test."[268] He made the following observation—at the time predicting the demise of *Quill* based on Justice Kennedy's comments in *Direct Marketing*: "The collapse of internal consistency and the anti-discrimination principle, as well as the abandonment of both the 'fairly related' factor and the physical presence requirement for substantial nexus, would roughly approximate the Court's doctrinal journey in non-tax cases."[269] Professor Denning was correct on two counts. First, the Court would reject the physical presence rule. Second, the Court's post-*Wayfair* doctrine does seem to approximate its nontax doctrine.

But is this the correct read of *Wynne*? Does it signal the demise of the fair-apportionment requirement? It certainly seems so. *Wynne* clearly relied on the internal consistency test to provide a standard for identifying discrimination, and that is where that test best finds its home.[270] The test identifies when a state's taxing structure intrinsically treats interstate commerce worse than intrastate commerce. That is an identification indication of discrimination, which is again already captured under the Court's nontax dormant Commerce Clause doctrine. The internal consistency test could therefore easily fall within the Court's nondiscrimination analysis under *City of Philadelphia v. New Jersey*. Consequently, the last remaining prong of *Complete Auto* should be put to bed with its kin.

The sum of this Section is that *Complete Auto* functionally serves no purpose other than formally guiding the constitutional analyses of state tax statutes. The *Complete Auto* requirements duplicate protections already afforded to taxpayers under the Due Process Clause, and, to the extent that those requirements serve the purpose of preventing discrimination against or undue burdens on interstate commerce, the Court's nontax cases already serve that function. Recognizing an independent tax test is a mere formality.

IV. THE UNIFIED DORMANT COMMERCE CLAUSE

The prior Section established that the maintenance of the *Complete Auto* formulation as a separate method for analyzing state tax statutes under the dormant

268. Denning, *The Dormant Commerce Clause*, *supra* note 19, at 114.

269. *Id.* at 114–15 (footnote omitted).

270. *See* Michael S. Knoll & Ruth Mason, Comptroller v. Wynne*: Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax*, 163 U. PA. L. REV. ONLINE 267, 278 (2015) (equating the internal consistency test with the "uniformity principle"); *see also* Choper & Yin, *supra* note 231, at 204; Denning, *The Dormant Commerce Clause*, *supra* note 19, at 116 ("To make discrimination against interstate and foreign commerce the focus of the [Due Process Clause doctrine] makes a good deal of sense and is likely more true to the reasons for restraining state taxing and regulatory power in that area in the first place."); Mason & Knoll, supra note 37, at 1021 (arguing that tax discrimination is best described as the failure of competitive neutrality). *But see* Edward A. Zelinsky, *Double Taxing Dual Residents: A Response to Knoll and Mason*, 86 ST. TAX NOTES 677, 685 (2017) (arguing that a broad reading of *Wynne* and its discrimination analysis "has no discernable limit"); *id.* ("I am less eager than Knoll and Mason to invoke *Wynne* and the dormant commerce clause nondiscrimination principle to combat the double state income taxation of dual residents.").

Commerce Clause is unnecessary and a mere formality. The continuation of that vestigial doctrine is thus problematic from an academic perspective, but it is also of practical consequence. To start, the maintenance of two tests results in inefficient discussions regarding both (1) whether a state regulation should be evaluated as a "tax" subject to *Complete Auto* or as a general regulation subject to *Pike*, and (2) whether and how the *Complete Auto*/*Pike* two-step of *Wayfair* should be applied to tax statutes. Neither question arises under a unified dormant Commerce Clause.

The adoption of a unified approach would also resolve questions about the role of the Court's internal consistency test. The Court has at times seemed to indicate that facially neutral and internally consistent taxes are necessarily constitutional.[271] The Court has also suggested that internally *in*consistent taxes are necessarily *un*constitutional.[272] Neither position seems quite right. Internally consistent taxes can still undermine the common national market and unduly burden interstate commerce. Likewise, taxes that fail that test are not necessarily that burdensome on interstate commerce. In sum, there is more to consider than internal consistency.

A. *Removing the* Wayfair *Two-Step*

One of the big doctrinal questions that *Wayfair* created is whether state taxes are subject to judicial review under both *Complete Auto* and *Pike*. The *Wayfair* Court indicated as much,[273] but it did not explain how to do those analyses, and it has never before required analyses under both of those tests. Of course, maybe the analyses are not any different substantively.[274] If that is the case, though, it makes no sense to adopt that approach. Requiring that doctrinal two-step would serve only to create confusion, increase costs for litigants, increase the demands on lower courts, and open the door to inconsistent adjudication. Applying a single test would be just fine.

The other uncertainty that this dual structure perpetuates is the question of when a statute is subject to *Complete Auto*—and maybe *Pike*—as a tax and when it is exclusively subject to the Court's nontax tests. Differentiating taxes from nontaxes might seem to be an easy task, but note that none of *Bellas Hess*, *Quill*, or *Wayfair* involved the imposition of a tax.[275] They all involved situations where states were requiring vendors to collect taxes *from their customers* and to remit those taxes to the state.[276]

The Court did not address why it analyzed the state impositions in those cases as taxes rather than as nontax regulations, but it seemingly did so because taxes were involved. It is fair to point out that some states do put the legal incidence of sales taxes

271. *See* Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 123 J. TAX'N 4, 10 (2015). Hellerstein also noted potential objections under the external consistency test but recognized that external consistency was also a due process requirement. *See id.* at 10 n.28.

272. *See id.* at 10.

273. Recall that the *Wayfair* Court created this question by suggesting that taxes imposed consistently with the *Polar Tankers* standard might still be struck down based on "other aspects of the Court's Commerce Clause doctrine." South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018). The Court even specifically referenced potential challenges under *Pike*. *See id.* at 2098–99.

274. See *supra* Section III for a discussion of the similarities of these tests.

275. *See Wayfair*, 138 S. Ct. at 2088–89; Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 301–03 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 753–56 (1967).

276. *Wayfair*, 138 S. Ct. at 2088–89; *Quill*, 504 U.S. at 301–03; *Nat'l Bellas Hess*, 386 U.S. at 753–56.

on the vendors making the sales, even if those vendors can pass that tax on to their customers.[277] However, tax collection obligations are also just that—collection obligations. In that way, the costs that they impose on businesses can be fairly viewed as no different than the regulatory costs associated with environmental, product safety, or business registration regulations. It is not clear whether and why they should be treated any differently.

This tension was evident in the litigation regarding Colorado's use tax reporting requirements.[278] Those requirements involved tax in much the same sense as the tax collection requirements at issue in *Bellas Hess* and *Quill*.[279] Colorado also adopted those requirements to circumvent the limitations of the physical presence rule.[280] The Direct Marketing Association seized on this similarity of purpose and effect and argued that the Colorado law unduly burdened interstate commerce under the rationale of *Quill*.[281] The DMA also specifically noted that the state's reporting requirements implicated the same "core objectives" of the dormant Commerce Clause.[282] In all, it seemed as though the Colorado tax reporting requirements could fairly be analyzed as "almost taxes" like the tax collection requirements in *Bellas Hess* and *Quill*.

Nevertheless, the Tenth Circuit applied a nontax analysis that focused on discrimination under *City of Philadelphia v. New Jersey*.[283] The court did not even engage in *Pike* balancing because the DMA had "limit[ed] its undue burden argument to *Quill*."[284] That result was unfortunate. The case should have been resolved based on the nature of the state imposition and the costs that it imposed on interstate commerce, not on a lack of argumentation stemming from the historic distinction between tax and nontax precedents. Under a unified dormant Commerce Clause, the analysis would have been clearer.

A recent case out of Mississippi shows how these disputes might arise in the context of other "near taxes." In that case, *Kansler v. Mississippi Department of Revenue*,[285] a married couple residing in Mississippi finalized an audit in New York—their prior state of residence—and paid an additional amount of tax to New York after the statute of limitations for amending their Mississippi returns had run.[286] Had that statute not been closed, the couple could have received a refund of Mississippi taxes that they had already paid on the amount of income later taxed by New York.[287] The Kanslers argued that the state's statute of limitations resulted in unconstitutional discrimination against interstate commerce and suggested that the Mississippi Supreme Court apply the *Complete Auto* formulation to the Mississippi law.[288]

277. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 12.01.
278. *See supra* notes 137–143 and accompanying text.
279. *See Quill*, 504 U.S. at 301–03; *Nat'l Bellas Hess*, 386 U.S. at 753–56.
280. See *supra* Part II.B for a discussion of this change in approach.
281. *See* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1146 (10th Cir. 2016).
282. Appellee's Supplemental Response Brief, *supra* note 138, at 52–53.
283. *See Direct Mktg. Ass'n*, 814 F.3d at 1135–36, 1139–47.
284. *Id.* at 1146.
285. 263 So. 3d 641 (Miss. 2018).
286. *Kansler*, 263 So. 3d at 644–45.
287. *See id.* at 645.
288. *Id.* at 646–48.

The Mississippi high court found difficulty with the Kanslers' framing because, as the court stated, "the *Complete Auto* test is specifically intended for evaluating the constitutionality of taxes, not state regulations."[289] The court even referenced the Tenth Circuit's decision in *Direct Marketing* to not apply *Complete Auto* to Colorado's use tax reporting requirements and framed *Wayfair* as applying a test that was "similar to, if not essentially the same as the *Pike* balancing test."[290]

The court then struggled with how to evaluate the Kanslers' claim under the internal consistency test, saying that the test was only intended to address claims of double taxation.[291] Ultimately, the court rested on an analysis of the case under a traditional nontax framework and held that the state's statute of limitations provision was nondiscriminatory and survived *Pike* balancing.[292] There was certainly no harm in that discussion, but it shows the complications that a bifurcated approach causes.

Another area where this might cause some conflict in the near term is in litigation addressing the so-called marketplace facilitator laws that many states enacted after *Wayfair*.[293] The term "marketplace facilitator" is not standardized, but generally refers to businesses that operate a website to facilitate sales by other vendors.[294] Notable examples include Amazon, eBay, and Etsy.

States have recognized that these businesses facilitate a lot of sales by vendors that might qualify as small sellers who cannot be compelled to collect states' taxes under the safe harbor implicitly recognized in *Wayfair*.[295] States also realize that collection by the marketplace facilitators would be much more efficient than collection by individual

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289. *Id.* at 648.

290. *Id.* at 648–50.

291. *See id*. at 651. The court did incorrectly indicate that no tax on interstate commerce could survive the internal consistency test under the Kanslers' reading because interstate commerce is "inevitably subject to more errors and associated costs." *Id.* Of course, a real internal consistency test would assume away the complications that arise by virtue of states having nonharmonized laws. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[1]. The court's comment was more consistent with the discussion above, which recognizes that even internally consistent laws do not create a truly common national market in the absence of harmonization. *See supra* notes 244–258.

292. *Kansler*, 263 So. 3d at 651–54.

293. *See Wayfair Implementation and Marketplace Facilitator Work Group*, MULTISTATE TAX COMMISSION, http://www.mtc.gov/getdoc/d3f9e214-6006-4f76-bca2-7287be89dd06/Wayfair-Implementation-Informational-Project.aspx [https://perma.cc/Y2RU-ZVGY] (last visited Feb. 1, 2020).

294. *See* MTC UNIFORMITY COMMITTEE, MULTISTATE TAX COMM'N, WAYFAIR IMPLEMENTATION & MARKETPLACE FACILITATOR WORK GROUP 2019 WHITE PAPER 12–15 (2019), http://www.mtc.gov/getattachment/The-Commission/News/Wayfair-Implementation-%E2%80%93-Marketplace-Facilitator-C/White-Paper-final-w-app-12-2-19.pdf.aspx?lang=en-US [https://perma.cc/J4ZB-C9VW].

295. See *supra* note 196 and accompanying text for aspects of the South Dakota law at issue in *Wayfair* that prevented discrimination against or undue burdens upon interstate commerce.

vendors.[296] Marketplace-facilitator laws are thus being considered across the nation.[297] Those laws will, of course, also be challenged.

I will not analyze the constitutionality of these laws here, but it is worth pointing out that litigation on those provisions will raise the threshold question this Part presents: Are marketplace-facilitator laws subject to analysis under *Complete Auto* and then *Pike* or should litigants and courts just go directly to *Pike*? The *Wayfair* Court did not answer this question. A unified dormant Commerce Clause would.

B. *Internally Consistent but Burdensome Laws*

The Court's current doctrine leaves further uncertainty regarding the ultimate function of the internal consistency test. Taxes that fail that test seem to be considered discriminatory and virtually per se illegal, but it is not clear whether taxes that meet the requirement are necessarily constitutional or whether they are, instead, subject to further scrutiny. In *Moorman Manufacturing Co. v. Bair*,[298] for example, the Court was unwilling to look further than internal consistency and upheld an Iowa tax law that was internally consistent but that otherwise undermined the common national market.[299] More recently, the *Wynne* Court seemed to indicate that internal consistency was the hallmark of constitutionality, in part through its reliance on the competitive neutrality rationale offered by Professors Mason and Knoll.[300]

The Court certainly could rely solely on the internal consistency test for purposes of differentiating constitutional from unconstitutional taxes going forward. Giving internal consistency that weight, however, would represent a departure from how the Court analyzes nontax statutes. Equating internal consistency with constitutionality would also extend the logic of the internal consistency test too far. On the first point, nontax regulations are not given constitutional absolution merely because they are internally consistent. Rather, they are evaluated for their potential discriminatory effects and are subjected to scrutiny even if they are deemed evenhanded.[301]

In *Hunt*, for example, the Court struck down a facially neutral North Carolina regulation regarding disclosures of apple grading.[302] That type of standard would survive an internal consistency analysis—if every state imposed the same standard, the

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296. *See States Continue to Respond to* Wayfair *for Remote Sellers*, ERNST & YOUNG: TAX NEWS UPDATE (Feb. 5, 2019), http://taxnews.ey.com/news/2019-0305-states-continue-to-respond-to-wayfair-for-remote-sellers-but-also-focus-on-collection-by-marketplace-facilitators-and-opinions-impact-on-other-tax-types [https://perma.cc/FDT4-8CG2] (identifying many states' efforts to impose collection and remittance obligations on remote sellers once a specified sales threshold is reached). Sales tax compliance costs have economies of scale, and large vendors are impacted much less than smaller vendors. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 129, at 15–23; Gamage & Heckman, *supra* note 127, at 505–06.

297. *States Continue to Respond to* Wayfair *for Remote Sellers*, *supra* note 296.

298. 437 U.S. 267 (1978).

299. See *infra* Part IV.B.2 for an analysis of *Moorman*.

300. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16 n.1251 (noting that *Wynne* suggested that internally consistent laws are necessarily constitutional); Hellerstein, *supra* note 271, at 10–12 (explaining and critiquing this position); *see also* Swain, *State Income Tax Jurisdiction*, *supra* note 40, at 340 (remarking that *Complete Auto* does not prohibit "undue, but non-discriminatory" tax laws).

301. See *supra* Part I.B for a discussion of the Court's approach to nontax laws.

302. See *supra* notes 54–64 and accompanying text for an analysis of *Hunt*.

requirement would not impose duplicative costs on those engaged in interstate commerce. Nevertheless, the North Carolina law did, in fact, impose cumulative burdens on Washington growers, and the Court struck it down on that basis.[303] As the *Hunt* Court recognized, even neutral state laws can "conflict with the Commerce Clause's overriding requirement of a national 'common market.'"[304]

Adopting a unified dormant Commerce Clause would result in taxes being subjected to this same analysis, and that seems to be the right result unless there is some reason that tax statutes deserve special treatment.[305] It is not clear that they do. The biggest reason to give preference to states in tax matters is the special state interest in raising revenue. But the *Pike* standard can certainly accommodate that state interest. Neither the internal consistency test nor the competitive neutrality model suggests otherwise.

1. What It Means To Be Internally Consistent

Subjecting nondiscriminatory tax statutes to further scrutiny might seem odd given the economic rationale underlying the internal consistency test. However, to say that a tax is internally consistent is not to say that the tax applies in a way that makes taxpayers indifferent as to intra- or interstate commerce (i.e., that it creates a common national market). Internally consistent taxes can still impose "drags on interstate commerce."[306] The internal consistency test merely identifies when those drags result from discrimination rather than from a lack of tax harmonization.[307]

This does not mean that the Mason and Knoll model does not work to identify discrimination or that internal consistency is a flawed test. We just need to recognize that those tools of analysis are suited to identifying discrimination, not burdens. State taxes, like the regulatory statutes in *Hunt* or *Clover Leaf*, can absolutely undermine the common national market even if they are internally consistent and nondiscriminatory. That should not be obscured by the recent success of the internal consistency test as a tool of analysis.

The consequence of this discussion is that a court applying a traditional dormant Commerce Clause analysis would not automatically bless an internally consistent tax as constitutional. Instead, such a court would ask whether the challenged tax was

303. *But see* Regan, *supra* note 8, at 1221–22 (arguing that the *Hunt* Court was really concerned with the state's motive rather than on cumulative burdens).

304. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977).

305. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 8.02[1][ia][ii] (concluding that "a fair reading of [the Court's doctrine] does not support the proposition that 'internal consistency' is the *exclusive* test . . . for determining the risk of the exposure to unconstitutional multiple tax burdens under the dormant Commerce Clause").

306. Mason & Knoll, *supra* note 37, at 1112–14 (evaluating the Court's internal consistency test and noting that "it does not eliminate the drags on cross-border commerce that stem from states' use of different methods of taxing cross-border income"); *see also* Lirette & Viard, *supra* note 258, at 496, 499 (recognizing that internal consistency and the authors' conception of neutrality can diverge under certain conditions). See also *supra* note 36 and accompanying text for an analysis of why only truly harmonized state laws would produce a common national market.

307. Ruth Mason, *Made in America for European Tax: The Internal Consistency Test*, 49 B.C. L. REV. 1227, 1310–13 (2008) (distinguishing between "disparities" that arise due to discrimination and those that arise only due to a lack of harmonization).

nevertheless "discriminatory in effect" as in *Hunt* or neutral and subject to *Pike*.[308] It is at *that* point that the exceptionally high state interest in taxation would come into play.[309]

The alternative approach of looking only to internal consistency for tax statutes would certainly streamline judicial analyses but would also needlessly perpetuate the Court's bifurcated approach and elevate tax statutes above other types of state laws. If the weight of the state interest in taxation deserves special deference, that interest can and will be reflected on the scales of *Pike*.

In the end, the appropriate role for the internal consistency test is to identify discrimination within the *City of Philadelphia v. New Jersey* framework. Taxes that are discriminatory under that metric will be nearly per se unconstitutional, and taxes that are nondiscriminatory under that metric could still be struck down if they nevertheless discriminate in effect or unduly burden interstate commerce under *Pike*. Again, the unified test simplifies and harmonizes the doctrine.[310]

2. Going Beyond Internal Consistency

Subjecting internally consistent state laws to further scrutiny under *Hunt* or *Pike* could make a big difference in how courts evaluate states' taxes. Consider, for example, two paradigmatic decisions involving apportionment methods that resulted in double taxation—the Supreme Court's decision in *Moorman*[311] and the New York Court of Appeals's decision in *Zelinsky v. Tax Appeals Tribunal*.[312] Both decisions resulted in the judicial blessing of internally consistent but burdensome state laws that undermined the common national market by subjecting taxpayers to duplicative income tax burdens. Both have been critiqued on that ground.[313]

In *Moorman*, the Supreme Court upheld Iowa's single sales factor corporate apportionment method even though that method absolutely resulted in the double

308. Incidentally, that approach would also be generally consistent with how the EU handles nondiscriminatory laws that nevertheless burden interstate commerce. Such laws are still evaluated for their impacts on the flow of commerce between EU member states. *See* Mason, *supra* note 307, at 1313. Thanks to Ruth Mason for highlighting this point and potential parallelism.

309. As noted above, balancing under *Pike* already requires the consideration of the state interest, and states are given considerable leeway under that test already. See *supra* Part I.B for a more comprehensive discussion of the *Pike* test.

310. None of this analysis is meant to suggest that this approach is normatively superior to all other approaches. It may very well be that the Court should never be concerned with undue burdens in the absence of discriminatory purpose or effect. But that is a more general topic. The point of this discussion is to point out that the Court currently reserves the right to strike down statutes that are not discriminatory in certain situations when their burden on interstate commerce is still too high. The approach suggested in this Part merely harmonizes that approach across legislative subject matters.

311. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978).

312. 801 N.E.2d 840 (N.Y. 2003).

313. *See, e.g.*, HELLERSTEIN ET AL., *supra* note 10, ¶ 8.14[2][b][ii] ("[T]he Moorman decision could and should have been reversed under the Commerce Clause, on the grounds that, by its nature, the single sales factor apportionment exposes the multistate business to an unconstitutional risk of multiple taxation."); *id.* ¶ 20.05[4][e][i] (critiquing the *Zelinsky* opinion); Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 48–49 (2008).

taxation of corporate income.[314] The Court had even recognized that apportionment formulae of that nature would result in double taxation in a case that it had decided on statutory grounds decades earlier.[315] When the constitutional issue had to be decided, though, the *Moorman* Court neither felt that double taxation had been shown nor that any double taxation could be attributed to Iowa.[316] The Court recognized the reality that truly equalizing the taxation of intra- and interstate commerce "would require national uniform rules for the division of income," and the Court was unwilling to determine those rules itself.[317]

The Court did briefly evaluate the potential burden that Iowa's tax would place on the taxpayer—and found it perfectly acceptable[318]—but the Court did not engage in any real balancing. It did not assess Iowa's interest in a disparate apportionment formula, and it did not assess the potential burdens on interstate commerce as a whole. The Court did not undertake any analysis like it would in a nontax case because it was stuck in a tax frame.[319] It looked only at Iowa's law and was unwilling to evaluate that law by reference to other states' actions. Internal consistency marked constitutionality.

The resulting disconnect in the doctrine was not missed by all. Justice Powell specifically pointed out that aspect of the majority's decision in a dissenting opinion.[320] He even detailed several of the Court's nontax cases in which the Court had struck down internally consistent state laws.[321] If the majority had accepted his position, the unified dormant Commerce Clause might already exist.

Consider too the *Zelinsky* case, which involved a New York apportionment method that attributed to the state all income of those employed by a New York employer *unless* the employer required that the employee work out of state.[322] The taxpayer was a law professor who lived in Connecticut but taught at a New York law school.[323] His teaching responsibilities required that he work in New York, but his writing responsibilities could be done anywhere, and he performed those writing duties in Connecticut.[324] The New York Court of Appeals nevertheless felt that the state could tax all of that income because his work was derived from New York sources given the location of his employer and his teaching responsibilities.[325]

The court did not find that result constitutionally problematic even though Connecticut taxed all of Zelinsky's income without providing him a tax credit for the

314. *See Moorman*, 437 U.S. at 273–77. The Court noted that the taxpayer's claim of double taxation had not been proven, but double taxation could not have been seriously doubted. *Id.* at 276–81; *see also* HELLERSTEIN ET AL., *supra* note 10, ¶ 8.14[2][b][ii].

315. General Motors Corp. v. District of Columbia, 380 U.S. 553, 559–60 (1965).

316. *Moorman*, 437 U.S. at 276–77.

317. *Id.* at 279.

318. *Id.* at 280–81.

319. *See id.* at 273–75 (holding the single-factor tax formula constitutional based only on previous cases involving tax laws).

320. *Id.* at 289–97 (Powell, J., dissenting).

321. *Id.*

322. Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 844–45 (N.Y. 2003).

323. *Id.* at 843.

324. *Id.*

325. *Id.* at 847–48 (detailing the nature of the taxpayer's work and income).

amount of taxes he paid to New York.[326] The resulting double taxation—and hence greater burden on those engaged in interstate commerce than on those engaged in purely intrastate commerce—did not violate any constitutional provision, including the internal consistency requirement.[327] Again, however, New York's law did burden interstate commerce and undermine the common national market (as did Connecticut's by failing to give residents a tax credit for taxes paid to other states). Evaluating that case under a unified dormant Commerce Clause would account for that fact, even if the state interest would ultimately justify the duplicative burdens imposed on interstate commerce.

The latter point is critical. Subjecting internally consistent statutes to further scrutiny would change how the Court evaluated state laws, but it might not lead to drastically different results in wide swaths of cases.[328] For example, the mere existence of different tax rates among states—along with states' refusals to grant their residents fully refundable tax credits for taxes paid to other states—results in state tax systems that often treat interstate commerce worse than intrastate commerce for particular taxpayers.[329] Nevertheless, the Court would certainly not require completely harmonized tax rates or fully refundable tax credits under any balancing test. The state interest seems insurmountable.

A case like *Moorman* might look very different, though. At the time, Iowa's single sales factor method of apportionment was relatively novel among states[330] and served primarily to preference in-state firms and in-state investments.[331] Iowa's use of a single sales factor formula also did not better reflect how firms generated income by selling into the state.[332] Rather, that formula was "inherently arbitrary"[333] and functioned to shift

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326. *Id.* at 848–49.

327. The Court did not undertake that analysis because the taxpayer conceded to the statute's internal consistency. *Id.* at 845.

328. Ruth Mason has observed that the ECJ has "shown reluctance to apply restriction reasoning in tax cases, perhaps out of deference to member state tax autonomy." Mason, *supra* note 307, at 1313.

329. For example, imagine a taxpayer who is a resident of State A—which imposes income tax at a 5% rate—and who earns $50,000 in State B—which imposes tax at an 8% rate. That taxpayer would pay tax on her State B income at the 8% rate based on source principles. Her State B tax liability would therefore be $4,000 (8% of $50,000). The same taxpayer would have to report her $50,000 of income from State B to State A, based on residency principles, and she would owe an additional $2,500 of tax to State A (5% of $50,000). Luckily, however, State A would give her a tax credit for the taxes that she paid to State B. That tax credit, however, would be limited to the 5% that State A would have imposed on that income, or $2,500. As a result, the taxpayer would pay no tax to State A on the income that she earned in State B, and she will face a total tax burden equal to the 8% paid to State B ($4,000). That amount is, of course, higher than the $2,500 tax burden that she would have faced had she engaged in intrastate commerce and earned the $50,000 by working in State A (and she may, of course, lack the requisite skill or opportunity to demand a higher wage for working in State B). The failure of internally consistent tax-credit schemes to meet neutrality principles is recognized in the academic literature. *See* Lirette & Viard, *supra* note 258, at 506–09 (demonstrating how tax credits can eliminate multiple taxation and be internally consistent without eliminating discrimination under neutrality principles).

330. *See* Shaviro, *supra* note 36, at 934 n.135 (noting that forty-four other states used the three-factor test and recognizing how Iowa benefitted from deviating from that norm).

331. Walter Hellerstein, *Commerce Clause Restraints on State Taxation: Purposeful Economic Protectionism and Beyond*, 85 MICH. L. REV. 758, 765 (1987) ("The effect [of Iowa's law] is to improve the economic position of the Iowa-based business over its foreign competitor by minimizing the state tax burden of the former and maximizing the state tax burden of the latter.").

332. *See* HELLERSTEIN ET AL., *supra* note 10, ¶ 8.14[2][b][ii].

333. *See id.*

the burden of the Iowa corporate income tax to out-of-state firms. Blessing that formula also led to "the profound disarray that now characterizes the national panorama of state apportionment formulas."[334] The Iowa tax scheme undoubtedly imposed significant costs on interstate commerce.

Could the state have justified its approach based on the state interest in determining its own apportionment formula? Or could it do so based on the state's interest in raising revenue or in promoting in-state investments? All of those interests were potentially sufficient, but it also does not seem wholly unreasonable to suggest that the case would have proceeded much differently under a uniform dormant Commerce Clause test given the unique and impactful nature of Iowa's law.[335] Iowa may have needed to put much more thought into the use of that method of apportionment and perhaps worked with other states to reduce the frictions that it imposed on interstate commerce at the time.

Zelinsky does not appear to present as compelling a case for judicial intervention, even under a balancing approach. New York adopted its convenience-of-the-employer rule as a way of addressing the difficulties presented by apportioning services income between states where taxpayers' work was not geographically dictated by the nature of the employment.[336] The New York tax base would be subverted if every worker could apportion income away from that state by performing some tasks while in another jurisdiction—perhaps by reading some documents from home on the weekend.

New York's apportionment rule served a legitimate function, and it would not have resulted in the same magnitude of double taxation of income had Connecticut offered its residents a tax credit for taxes paid to other states—the prevailing practice among states.[337] Under those conditions, New York might have been able to adopt a rule that better served the common national market,[338] but it is difficult to say that the state had a protectionist or discriminatory motivation or that its statute was not justifiable given the state interest.

The important lesson from this analysis is that the Court has not yet justified its sole reliance on the internal consistency test as the determinant of constitutionality in tax cases. That test is immensely useful, but internally consistent laws are not necessarily neutral and nondiscriminatory "in effect" as in *Hunt* or justified under *Pike*. *Wynne* obscured that fact. Of course, many burdensome state taxes would be upheld under *Pike*, but subjecting state taxes to that inquiry would harmonize the Court's treatment of tax and nontax regulations and would give the Court the doctrinal hook to address internally consistent but burdensome state taxes.

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334. *Id.* Of course, since *Moorman*, many states have adopted single sales factor methods of apportionment, so it may be that a challenge to such a formula at this time would not be as likely to succeed as if a *Pike* analysis had been done in 1978. The primary point here is that analyses of this type are not static but depend on the conditions of the day. It was not necessarily Iowa's use of a single sales factor formula that caused burdens on interstate commerce but the novelty of that method.

335. *See id.* (noting that *Moorman* should have been decided differently based on the discriminatory impact of Iowa's apportionment method).

336. Zelinksy v. Tax Appeals Tribunal, 801 N.E.2d 840, 846 (N.Y. 2003).

337. HELLERSTEIN ET AL., *supra* note 10, ¶ 20.10–20.10[1] (noting that state tax credits are widely utilized but do not always completely eliminate the double taxation of income).

338. The state could, for example, have allowed taxpayers to apportion income to other jurisdictions if they could prove that they had performed meaningful activities in another state.

C. Internally Inconsistent but not Burdensome Laws

Part IV.B showed how the internal consistency test might under-identify problematic state taxes, at least compared to nontax regulations. This Part addresses the inverse issue. The internal consistency test might also *overidentify* problematic state taxes because some internally inconsistent taxes might nevertheless not be especially burdensome and might be justifiable based on the implicated government interest.

The Court implicitly addressed this aspect of its doctrine in a 2005 decision involving a flat fee imposed on trucks in *American Trucking Ass'ns v. Michigan Public Service Commission* (*ATA II*).[339] The fee at issue in that case was a $100 charge that applied to vehicles that engaged in activity between points in Michigan (i.e., intrastate activity).[340] The American Trucking Associations (ATA) challenged that fee on the grounds that it discriminated against and imposed undue burdens on interstate commerce.[341] The ATA also specifically argued that the fee must be struck down as internally inconsistent.[342] If every state were to impose a similar fee, then interstate trucking firms that also engaged in intrastate transports would face cumulative tax burdens. Firms engaging in only intrastate shipping would have a comparative advantage over their interstate competitors by having to pay only one tax.

The *ATA II* Court recognized both (1) that the Michigan fee violated the internal consistency test, and (2) that a prior Court had struck down a similar fee years ago.[343] Indeed, the Court actually had a long history of rejecting flat fees and taxes because of the cumulative burdens that they impose on interstate commerce.[344] Given these factors, it would have seemed entirely consistent for the Court to have struck down the flat fee in *ATA II.* But the Court did not. Instead, the Court upheld that exaction by focusing on the fee's applicability only when trucks engaged in *intra*state commerce.[345] The Court did not focus on the fact that the fee, as structured, would absolutely disadvantage firms that were engaged in *inter*state commerce by exposing them to duplicative burdens.[346] The Court's reliance on that intra- versus interstate distinction got the job done, but it appears to be a tenuous and formal basis on which to judge the constitutionality of a state tax or fee.[347]

339. 545 U.S. 429 (2005).

340. *ATA II*, 545 U.S. at 431.

341. *Id.* at 431–32.

342. *Id.* at 437–38.

343. *Id.* at 436–38 ("We must concede that here, as petitioners argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars . . . .").

344. *See, e.g.*, Nippert v. City of Richmond, 327 U.S. 416, 435 (1946) (striking down a flat fee on itinerant "drummers"); HELLERSTEIN ET AL., *supra* note 10, ¶ 4.14[3][a] (detailing the Court's history with taxes on drummers).

345. *See ATA II*, 545 U.S. at 438.

346. *See id.* (noting that a firm would only face duplicative fees "because it engage[d] in *local* business").

347. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1810 (2015) (Scalia, J., dissenting) (noting the Court's inconsistent treatment of the internal consistency test in *ATA II* and *Wynne*); HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[1][a][vi] ("Although the [*ATA II*] Court may get high marks for candor, its analysis, such as it is, leaves the scope of the internal consistency doctrine in a state of considerable uncertainty.").

What happened? According to Professor Walter Hellerstein, the "Court looked at the implications of the internal consistency doctrine squarely in the eye and it blinked."[348] If internal inconsistency really marked the death knell for state charges, a wide variety of flat fees imposed by states would be constitutionally suspect. The Court's opinion avoided that result. Again, as Hellerstein put it:

> [T]he Court's opinion in *ATA II* may well insulate from successful constitutional challenge a number of fees and taxes that once might have appeared vulnerable to attack under the internal consistency principle. Among these would be (1) the initial fees and taxes that states impose on domestic corporations when first organizing or qualifying to do business in the state; (2) the annual business license taxes imposed by states and localities for carrying on particular trades or occupations, many of which are unapportioned flat taxes; and (3) professional and similar licensing fees. The hypothetical replication of these fees and taxes by every state or locality imposes a cumulative tax burden on the multistate enterprise not borne by its intrastate competitor solely because the multistate business has chosen to do business in more than one state. Nevertheless, these fees and taxes appear to fall under the umbrella of [*ATA II*'s exception]. In fact, the Court explicitly identified as presumptively unobjectionable the "numerous flat fees upon local businesses and service providers, including, for example, upon insurers, auctioneers, ambulance operators, and hosts of others."[349]

The result in *ATA II* makes perfect sense, but the Court took a roundabout approach to get there. The Court introduced a new formalism into its doctrine rather than just admit that internally inconsistent statutes were not per se unlawful. Interestingly, until the *ATA II* Court addressed the internal consistency issue, it had framed its opinion around *City of Philadelphia v. New Jersey* and *Pike*—not around *Complete Auto*.[350] The Court evaluated whether the fee was discriminatory on its face or in purpose or effect. It also specifically noted that there was no showing of any real burden on interstate commerce.[351] Indeed, the Court pointed out that ATA had conceded that the record did not contain "facts that empirically could show that the $100 fee significantly deters interstate trade."[352]

The Court got drawn into a discussion of internal consistency only because of its prior decisions addressing flat fees and taxes as problems of unfair apportionment. The Court therefore felt the need to distinguish those authorities and, in doing so, the Court had to create a new doctrinal carve out for "local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike."[353] The much simpler approach would have been to recognize that the internal consistency test is useful in identifying discrimination but that internally inconsistent taxes are not unconstitutional per se. The magnitude of the burden on interstate commerce and the

348. HELLERSTEIN ET AL., *supra* note 10, ¶ 4.16[1][a][vi].

349. *Id.* ¶ 4.16[1][e].

350. *ATA II*, 545 U.S. at 433–38.

351. *Id.* at 434 ("[T]he record contains little, if any, evidence that the $100 fee imposes any significant practical burden upon interstate trade.").

352. *Id.* at 435.

353. *Id.* at 438.

government interest matter.[354] That was the result in *ATA II*, but it would have been more directly achieved through the doctrinal simplification of a unified dormant Commerce Clause.

D. Evaluating What Remains

The sum of this discussion is that the current tax/nontax distinction in the Court's dormant Commerce Clause doctrine is formalistic, unjustifiable, and harmful. Courts should apply a unified dormant Commerce Clause in place of the dualism that exists. That legal structure would be straightforward.

Taxpayer challenges to state taxes would follow the framework used by the Court in its nontax cases and in cases like *ATA II* and *Wynne*. Tax statutes would be nearly per se unconstitutional if they were discriminatory or protectionist on their face or if they were discriminatory as evidenced by their internal inconsistency. Nondiscriminatory state taxes would be subject to *Pike* balancing if they nevertheless burdened interstate commerce. That would be it. No dualism. No formalism. No *Complete Auto*.

Recognizing a unified dormant Commerce Clause would help to address the issues noted above, but I am not so myopic as to claim that it would solve all of the tensions that exist in this area of the law. Many significant questions would remain. The biggest immediate question would be whether and when *Hunt* would apply to state taxes such that state taxing statutes would be subjected to strict scrutiny. In a way, many state taxing statutes would have "discriminatory effects" in the *Hunt* sense because they impose cumulative burdens on those engaged in interstate commerce. But *Hunt* has been limited, as recognized above.[355]

It is also difficult to imagine a plausible state tax that would have the same "leveling" effect as the regulation at issue in *Hunt*. It seems most likely that nondiscriminatory state taxes would be subject to *Pike*. Nevertheless, the line between taxes that might be subject to *Hunt* and those that are subject to *Pike* is not necessarily clear, just as the doctrine is unclear in nontax cases.[356] The unified dormant Commerce Clause does not solve that issue, but it helps to ensure that tax and nontax statutes are evaluated similarly.

More fundamentally, the unified dormant Commerce Clause does not address the validity of the entire exercise.[357] That is, it does not address whether the Court should exercise any role under the auspices of protecting the negative implications of Congress's affirmative Commerce Clause power.

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354. This sentiment is shared by Ryan Lirette and Alan Viard, who have offered their own neutrality model for analyzing tax cases under the dormant Commerce Clause. *See* Lirette & Viard, *supra* note 258, at 540 ("The Court has valid grounds for not insisting on burdensome apportionment mechanisms for small fees, in accord with the general principle that departures from neutrality are justified if the administrative concerns of achieving full neutrality are large relative to the taxes involved.").

355. *See supra* notes 67–72 and accompanying text.

356. See *supra* Section I for a discussion of the ambiguity in the applicability of these doctrines.

357. Justice Thomas would obviously scrap the whole doctrine. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring); Dep't of Revenue v. Davis, 553 U.S. 328, 361–62 (2008) (Thomas, J., concurring); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349–55 (2007) (Thomas, J., concurring). Justice Gorsuch also softly questioned the validity of the Court's doctrine in *Wayfair*. 138 S. Ct. at 2100 (Gorsuch, J., concurring).

The unified approach also does not address the reality that the Court has shown little interest in engaging in *Pike* balancing or even shown faith in its ability to do so. In a 2007 opinion, Chief Justice Roberts—writing for a plurality that included Justices Souter, Ginsburg, and Breyer—equated the required balancing to the type of judgment that the Court once exercised "under the guise of interpreting the Due Process Clause" and argued that the Court "should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause."[358] Justice Souter—in an opinion joined by Chief Justice Roberts and Justices Stevens, Ginsburg, and Breyer—showed similar skepticism in a 2008 case where he lamented "the unsuitability of the judicial process and judicial forums for making whatever predictions and reaching whatever answers are possible at all" under *Pike* balancing.[359] Justice Scalia colorfully likened the required balancing to "judging whether a particular line is longer than a particular rock is heavy"[360] and "whether three apples are better than six tangerines."[361]

The disinclination that some of the current Justices have to take action under the guise of the dormant Commerce Clause was readily apparent in *Wayfair*. The Chief Justice—in a dissent joined by Justices Breyer, Sotomayor, and Kagan—argued that *Quill* should have been upheld largely on the grounds of stare decisis, but he also detailed how Congress was better suited to "directly consider the competing interests at stake."[362] In a concurring opinion, Justice Gorsuch questioned "[w]hether and how much of [the Court's dormant Commerce Clause doctrine] can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause," but labeled those as "questions for another day."[363] It would be bold to suggest that the Court will warmly embrace the dormant Commerce Clause in the near term.

Ultimately, the question of the validity of the Court's doctrine goes well beyond the scope of this Article, but one should not be left with the impression that the unified dormant Commerce Clause fundamentally changes these core issues. Despite Justice Kennedy's reliance on *Pike* to pull some weight after *Wayfair*, it seems highly unlikely

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358. *United Haulers Ass'n*, 550 U.S. at 347 (plurality opinion). Justices Scalia and Thomas wrote separate opinions that more directly called for an end to *Pike* balancing. *See id.* at 348–49 (Scalia, J., concurring) ("I am unable to join Part II-D of the principal opinion, in which the plurality performs so-called '*Pike* balancing.' Generally speaking, the balancing of various values is left to Congress—which is precisely what the Commerce Clause (the *real* Commerce Clause) envisions."); *id.* at 349–55 (Thomas, J., concurring). Justices Alito, Stevens, and Kennedy dissented, finding that the state regulation at issue was unconstitutionally discriminatory. *Id.* at 356–57 (Alito, J., dissenting).

359. *Davis*, 553 U.S. at 355. Justices Scalia and Thomas repeated their positions in *United Haulers*. *Id.* at 360–61 (Scalia, J., concurring) ("I would abandon the *Pike* balancing enterprise altogether and leave these quintessentially legislative judgments with the branch to which the Constitution assigns them."); *id.* at 361–62 (Thomas, J., concurring) ("I would entirely 'discard the Court's negative Commerce Clause jurisprudence.'"). Justice Kennedy wrote a dissenting opinion that Justice Alito joined. *Id.* at 362. (Kennedy, J., dissenting). In that opinion, he defended *Pike* balancing but found that it was not necessary to apply it to the issue at hand. *Id.* at 365 ("[T]he undue burden rule . . . remains an essential safeguard against restrictive [state] laws," but that it "need not be addressed here.").

360. Bendix Autolite Corp. v. Midwestco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

361. *Davis*, 553 U.S. at 360 (Scalia, J. concurring).

362. *Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., dissenting).

363. *Id.* at 2100–01 (Gorsuch, J., concurring).

that the Court will change its position on its ability or desire to engage in balancing. The same fundamental tensions exist.

The uncertainty regarding the Court's interest in balancing does not mean that accepting a unified dormant Commerce Clause would be without effect or that states could tax without any meaningful judicial oversight. The Due Process Clause will always serve some role regarding nexus and fair apportionment. Further, cases like *Moorman* might certainly come out differently under a balancing test. Finally, lower courts do engage in balancing, and they might be good arbiters of these issues and serve as good forums for problematic state taxing practices to be vetted. The very existence of this judicial oversight mechanism might also act as a good check on states as they enact and modify their laws. The Supreme Court is important, but it is not everything.

We have already seen this "checking function" post-*Wayfair*, where states have largely followed the South Dakota model rather than pushing beyond that state's thresholds.[364] States could certainly adopt different thresholds or different approaches altogether, but the risk is not worth it with the looming risk of costly litigation applying *Pike* balancing. The mere existence of potential judicial oversight serves to promote uniformity, and that is a good thing from the perspective of the common national market.

In sum, eliminating *Complete Auto* would not mark the death knell for judicial oversight of state taxation. The modern Court certainly has signaled less willingness to act in this area, but it has not fully repudiated its role.[365] Preserving that oversight function might be especially wise given the recent trend of Congressional intractability and states' increased attention to regulating issues and markets with significant national importance. States are taking or considering unilateral action on national issues like the environment,[366] privacy,[367] gambling,[368] and net neutrality.[369] The question of the extent of states' power to regulate matters impacting interstate commerce is critically important in all of these areas and, yet, it is uncertain whether Congress will have the capacity or

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364. *But see* KAN. DEP'T OF REV., NOTICE 19-04, SALES TAX REQUIREMENTS FOR RETAILERS DOING BUSINESS IN KANSAS (2019), http://www.ksrevenue.org/taxnotices/notice19-04.pdf [https://perma.cc/G8QW-2PCU] (explaining that the state imposes tax collection obligations to the full extent allowed by the Constitution without any set de minimis exemption).

365. *See* Brian Galle, *Kill* Quill*, Keep the Dormant Commerce Clause*, 70 STAN. L. REV. ONLINE 158, 158 (2018) (arguing that the Court should not abandon its oversight role); *see also* Shanske, *supra* note 219, at 73–74 (arguing that the Court has simply shifted to a focus on proportionality in its doctrine).

366. *See generally* David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 507 (2008) (noting "[t]he recent wave of state laws regarding greenhouse gas emissions"); Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15 (2004) (explaining that the federal government's withdrawal from the global response to climate change has "moved the locus of the response . . . to state and local governments and the private sector").

367. Pam Greenberg, *A Higher Profile for Data Privacy*, NAT'L CONF. ST. LEGISLATURES (Feb. 4, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/a-higher-profile-for-data-privacy.aspx [https://perma.cc/QB82-8F3W].

368. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Aug. 2, 2019), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [https://perma.cc/R4S9-X8N4].

369. Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. ST. LEGISLATURES (Jan. 23, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx [https://perma.cc/PN7R-FKZD].

political will to act on these issues this term. The dormant Commerce Clause will likely continue to have a role. It is fair to question what remains of the dormant Commerce Clause as a whole, but the Court's oversight of state taxation should rise and fall with the remainder of that doctrine.

CONCLUSION

The Court's historic approach to evaluating state laws under the dormant Commerce Clause has created many issues for states and for the individuals and businesses that operate in interstate commerce. The Court's formal maintenance of separate tests for purposes of analyzing state tax laws and nontax laws is a perfect example of an unnecessary complication in the Court's doctrine.

Fortunately, the Court took an important step toward a unified dormant Commerce Clause in *Wayfair*. That decision removed an anachronistic limitation on state taxing power and helped to remove an artificial impediment to neutral taxation in the United States. Unfortunately, the Court did not go so far as to formally repudiate its bifurcated approach to dormant Commerce Clause adjudication, but this Article has shown how the Court's maintenance of separate tests is a mere formality. The Court should explicitly recognize a unified dormant Commerce Clause and clarify this area of law.

Admittedly, it seems unlikely that the Court will want to make the doctrinal unification called for in this Article in any single case. Hopefully, however, lower courts recognize the folly of a bifurcated dormant Commerce Clause and start to move the doctrine forward. A unified dormant Commerce Clause exists. Courts just need to see it.