Virginia Legislative Issue Brief

Death of a Sales Tax Rule: *Wayfair*'s Implications for Virginia

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Introduction

On June 21, 2018, the Supreme Court of the United States reversed 50 years of Supreme Court precedent when it decided *South Dakota v. Wayfair, Inc*.[1] Its ruling overturned the physical-presence rule that had applied to collecting sales tax on interstate sales. Under the old rule, if an out-of-state seller lacked physical presence in-state, a state could not require it to collect sales tax from the purchaser. In most states, including Virginia, buyers already are obligated to report purchases from these sellers on their state income tax return and pay a use tax,[2] but in practice, few do.

After *Wayfair*, a state may require an out-of-state seller—even one with no physical presence—to collect sales tax, so long as the state can demonstrate a connection based on something else, such as volume of in-state sales. The ruling will make it easier for states to collect sales tax from out-of-state sellers. However, because of the structure of current state law, it likely will not increase Virginia's revenues immediately.

This issue brief covers the old physical-presence rule, its roots in the Commerce Clause, and criticism of the rule; describes the South Dakota statute challenging the rule and the *Wayfair* decision overturning the rule; and explains *Wayfair*'s implications for Virginia, including *Wayfair*'s interaction with the 2013 transportation funding bill's enactment clauses, as well as possible future congressional action. The brief identifies the likely need for authorizing state legislation for Virginia to begin collecting revenues from remote sellers, options for the future, and potential revenue gains.

1: Physical-presence rule

Previously, as stated in the 1992 case *Quill Corp. v. North Dakota*, a seller without an in-state physical presence lacked sufficient "nexus" for the state to require it to collect sales tax.[3] Under *Quill*, requiring collection from this kind of seller would impose an "undue burden" on interstate commerce and thus violate the Dormant Commerce Clause (DCC).

Dormant Commerce Clause

The DCC is a judicial doctrine, derived from the federal Constitution's Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States."[4] Since 1824, the Supreme Court has interpreted this clause to imply a further "dormant" aspect: States may not enact laws that interfere with interstate commerce.[5] Generally, the DCC prohibits states from (i) discriminating against interstate commerce or (ii) imposing an undue burden on interstate commerce.

At first, the Court interpreted the DCC to impose an absolute bar on state

taxation of interstate commerce. In the 1888 case *Leloup v. Port of Mobile*, it said, "[N]o state has the right to lay a tax on interstate commerce *in any form*."[6]

Gradually, the Court relaxed this rule and allowed some state taxation of interstate commerce. However, it struggled to establish a consistent rule. It held that a state tax on a multistate business was permissible so long as the state did not tax interstate commerce "directly."[7] Later, the Court rephrased the rule as prohibiting a tax on "the privilege of doing interstate business."[8]

But states easily circumvented these arbitrary, formalist distinctions. In 1959, Virginia convinced the Court to uphold a tax that it had struck down five years earlier simply by renaming it from a tax on the "privilege of doing business in Virginia" to a "franchise tax" measured by Virginia gross receipts.[9]

Bellas Hess and *Quill*

In 1967, the Court attempted to bring some order to its chaotic DCC doctrine. It considered the case of an out-of-state seller in *National Bellas Hess v. Department of Revenue*.[10] Bellas Hess was a retailer headquartered in Missouri that sold clothes through the mail to customers in other states.

The general law that applied to a brick-and-mortar retailer in Illinois was that, when the brick-and-mortar retailer sold clothes to an Illinois person, it had to collect sales tax from the purchaser and remit it to the Illinois Department of Revenue. Bellas Hess, however, was selling from Missouri tax-free.

When the Illinois Department of Revenue directed Bellas Hess to collect, the company sued Illinois. The Court held that Bellas Hess did not have sufficient connection with Illinois for the state to impose the collection obligation, because the company's sole connection to Illinois was through the mail. It had no property or solicitors in the state.

The Court reasoned that allowing Illinois and other states to impose a collection obligation would impede interstate commerce and thus violate the DCC. According to the Court, interstate sellers would be put at a disadvantage compared with in-state sellers. Unlike a store in Illinois, which only had to deal with state and local taxes, interstate sellers would face different requirements in every state—different rates, different exempt products, and different recordkeeping requirements.

The Court's holding was narrow and confined to the case facts; it did not actually use the phrase "physical presence" that later appeared in *Quill*.

Twenty-five years later, the Court considered a fact pattern similar to *Bellas Hess*. Quill, an office supply company, had physical locations in Illinois, California, and Georgia. It was the sixth-largest office supply seller in North Dakota, but it did not have any in-state property or salespeople. Like Bellas Hess, Quill made all of its deliveries into the state by mail.

North Dakota's statute asserted nexus based on advertising activity; the statute required a business to collect sales tax if it advertised in North Dakota at least three times in a year. Despite the fact that Quill had no physical presence, North Dakota asked the Court to overrule *Bellas Hess*.

The Court refused, reiterating its position from *Bellas Hess*: Out-of-state sellers without physical presence did not have nexus with a state, so requiring them to collect sales tax would impose an undue burden under the DCC.[11] The Court observed that there were more than 6,000 taxing jurisdictions nationally and that if an interstate business had to collect in every

one, the burden would crush any hope of interstate businesses competing with in-state businesses.[12]

The Court acknowledged the artificiality of the physical-presence rule, but said the benefits were worth it because the rule provided clear guidelines for businesses and states to follow.[13] The Court also cited stare decisis, or the weight of precedent, as another reason for upholding the physical-presence rule.[14] The rule might not be the best rule, the Court said, but businesses relied on it.[15]

2: Criticism of the physical-presence rule

The *Quill* Court anticipated criticism: it acknowledged that it might have decided differently if not for precedent.[16] And the criticism was immediate. Justice Byron White dissented, calling for the Court to give the physical-presence rule "the complete burial it justly deserves."[17] Legal academics, too, strongly criticized the decision.[18]

In the more recent past, Justice Anthony Kennedy explicitly invited a challenge to *Quill*,[19] and Justice Neil Gorsuch, then a circuit court judge, called it "wrong" and hoped it would "wash away with the tides of time."[20] In recent years, Congress also attempted to address the issue. Congressmen have introduced four bills that would allow states to tax e-retailers, but none have passed.[21]

Commentators argued that the physical-presence rule created an unfair playing field. It allowed e-retailers to charge lower prices than brick-and-mortar stores because Internet customers could escape paying sales tax.[22]

Others have argued the advantage would grow even more imbalanced over time. To make up revenue lost on online purchases, states likely would need to raise sales tax rates, thus giving customers an even bigger incentive to avoid taxes by buying online.[23]

The *Quill* rule also encouraged e-retailers not to invest in in-state capital such as employees or property because to do so would establish physical presence and trigger the sales tax collection obligation.[24] For instance, before Amazon agreed to collect sales tax, it carefully avoided activities that would establish physical presence. It gave color-coded maps to its employees containing detailed travel routes that avoided certain states.[25]

The disincentive to establish physical presence exacerbated the negative effect on states. Not only did they lose sales tax revenue, but they also lost potential investments that remote sellers might otherwise make in local jobs.

3: South Dakota's statute

Heeding Justice Kennedy's public disapproval of *Quill*, states again sought to challenge the physical-presence rule. A task force from the National Conference of State Legislatures sent state legislators a draft of a law designed to challenge *Quill*, which South Dakota ultimately enacted.[26] Under South Dakota's law:

- Remote sellers are required to collect sales tax if they have at least $100,000 in sales or more than 200 transactions in South Dakota;
- The obligation does not apply retroactively;
- South Dakota conforms to multistate standards on sales tax collection;
- South Dakota provides remote sellers free access to sales tax collection software; and
- Sellers that use that software are immune from audit.[27]

Wayfair, an e-commerce company that sells home décor, challenged the law. South Dakota conceded that the law was unconstitutional under the physical-presence rule; instead, it argued that the Court should overturn *Quill*. The case raced through the South Dakota courts, as both the trial and appellate courts reaffirmed *Quill*. Less than two years after South Dakota enacted the law, the Court granted certiorari.

4: The *Wayfair* decision

The majority opinion

The Court's *Wayfair* decision abolished *Quill*'s physical-presence requirement. Justice Kennedy, writing for the majority, stated that nexus may be established through non-physical connections between the state and the remote seller, such as economic presence (sales volume) or virtual presence (apps and Internet advertising).[28] So even though Wayfair lacked in-state physical presence, the Court determined that the company's economic activity was sufficient to establish nexus.

The Court's reasoning echoed the criticism that had sounded for years. It said the rule gave an unfair advantage to e-retailers, significantly undermined state revenues, and created an incentive for e-retailers not to invest in job-creating physical capital.[29] Kennedy saw the rule as a judicial intrusion on state power.[30]

Most of all, Kennedy emphasized *Quill*'s unfairness to brick-and-mortar retailers. He sprinkled the opinion with pejorative descriptions of the physical-presence rule, calling it a "judicially created tax shelter" for remote sellers that was "removed from economic reality" and created "serious inequity."[31] As he caustically observed, not only do remote sellers charge lower prices than brick-and-mortar stores under *Quill*, but they also advertise their products as tax-free. Since state law requires buyers to report tax from purchases from remote sellers, Kennedy chided companies like Wayfair for their "subtle offer to assist in tax evasion."[32]

On the basis of these reasons, the Court overturned *Quill*'s physical-presence rule. After *Wayfair*, states will be free to require non-physically-present sellers to collect sales tax, so long as the requirement does not otherwise impose an undue burden on interstate commerce.

Justice Roberts's dissent

The *Wayfair* opinion attracted only a bare majority of justices who agreed to overturn *Quill*. Chief Justice John Roberts dissented, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Roberts agreed with the majority that the physical-presence rule was unfair. Nevertheless, in his view, the weight of precedent was strong enough to overcome the *Quill* rule's deficiencies.[33]

When the Court considers whether to overturn precedent, it follows the rule of stare decisis ("it stands decided"). This analysis involves consideration of five factors:

- quality of the precedent's reasoning;
- workability of the precedent's rule;
- consistency with other related decisions;
- developments since the case was handed down; and
- reliance by affected people and businesses.[34]

In his dissent, Roberts focused on workability and reliance interests. He contested the argument that the precedent was unworkable, noting that despite the physical-presence rule, states already collected 80 percent of the revenue that

would be available without it.[35] He also noted that since most large retailers already voluntarily collect sales tax, it is mostly *small* retailers that rely on the safe harbor provided by the physical-presence rule. He argued that the costs imposed on small retailers could be high enough to drive them out of the marketplace.[36]

In addition to the five factors, the Court usually applies a lower standard of stare decisis to its constitutional decisions and a heightened standard to its statutory decisions. The reason for the two standards is this: Most constitutional rules can be modified only by constitutional amendment,[37] but Congress can change statutes at any time. The Court is reluctant to overturn its statutory interpretation when Congress has the power to do so.[38]

Yet, as Roberts pointed out, DCC doctrine is different. Here, Congress has plenary power to regulate interstate commerce (so long as its regulation does not violate some other constitutional provision).[39] It could institute uniform federal requirements that all states would have to follow. Therefore, Roberts argued, because Congress could act to modify the physical-presence rule, the Court should have given *more* weight to precedent, not less.[40]

Despite Roberts's argument based on precedent, the Court held that *Quill*'s reasoning was bad enough to warrant overturning the rule.[41]

5: Transportation funding bill

Background

In 2013, the General Assembly enacted legislation dedicating new revenues to transportation. Chapter 766 of the Acts of Assembly of 2013 (HB 2313) had several major revenue-raising features, including:

• converting the tax on gasoline from cents-per-gallon to a percentage of the average wholesale cost of a gallon of gasoline;

• levying new regional transient occupancy and recordation taxes in the Northern Virginia region dedicated to transportation funding;

• levying additional regional gasoline and sales taxes in the Hampton Roads and Northern Virginia regions dedicated to transportation funding; and

• dedicating a portion of sales and use tax collections to the Highway Maintenance and Operating Fund.[42]

Of particular note in light of *Wayfair* are HB 2313's contingent provisions that would allow Virginia to compel remote sellers to collect sales tax if authorized by Congress. One of the contingent sections, § 58.1-638.2 of the Code of Virginia, would provide a revenue distribution formula for any state and local revenue generated from such remote sellers.[43] An amount equal to an approximate 2.25 percent sales tax would be returned to counties and cities (with a portion of that earmarked specifically for transportation needs), and the remainder of the revenues would be transferred to the Transportation Trust Fund.

Marketplace Fairness Act

At the time the General Assembly was considering HB 2313, the federal Marketplace Fairness Act was pending in Congress.[44] The bill would have enabled state governments to require retailers without physical presence in the state to collect and remit sales tax on sales made into the state—essentially, the bill would have eliminated the judicially created physical-presence rule established in *Bellas Hess* and *Quill*.

Similar federal legislation had been unsuccessfully introduced two years

earlier,[45] and in 2013 it seemed like the Marketplace Fairness Act might have the momentum to become law. Yet the General Assembly was unwilling to risk the stability of HB 2313's funding in light of the uncertainty.

Instead of hinging transportation funding on uncertain revenue from remote sellers, the General Assembly included a contingency in HB 2313. As the bill was to become effective, the new rate of tax on the sale of gasoline would be 3.5 percent for a gallon of regular gasoline and six percent for a gallon of diesel fuel.[46] If Congress failed to adopt remote collection legislation by 2015, the rate of tax on the sale of gasoline would rise to 5.1 percent.[47] Additionally, after fiscal year 2015, no additional general funds would be transferred to the Highway Maintenance and Operating Fund pursuant to the provisions of HB 2313.[48] Because federal legislation was not adopted by this deadline, these contingencies became effective.

Possible future congressional action

It is possible that the Court's decision in *Wayfair* could prompt Congress to act. Congress could respond by establishing standards for states that require remote sellers to collect sales tax.[49] For example, it could authorize states to tax only remote sellers with more than $500,000 in in-state sales, it could require all states to follow uniform standards for which products are tax-exempt, or it could even reinstitute a statutory physical-presence requirement.

HB 2313's provisions related to the remote collection of sales tax remain potentially in play. Enactment 7 of the bill provides that the statutory changes authorizing remote collection of sales tax will become effective 30 days after the adoption by Congress of authorizing legislation.[50] Additionally, if remote collection is initiated pursuant to enactment 7, enactment 15 of the bill provides that the rate of tax on the sale of a gallon of gasoline will revert to 3.5 percent[51]—the rate put in place with the initial passage of HB 2313, as the higher rate of tax will no longer be needed to offset the lack of additional sales tax revenues.

However, even if remote collection of sales tax is initiated at some future date as a result of federal legislation, no provision of HB 2313 provides for the continued increase of general funds to the Highway Maintenance and Operating Fund.

Contingencies

Because *Wayfair* appears to authorize states to begin to collect sales tax from sellers without physical presence, an obvious question arises as to whether the decision triggers HB 2313's open contingencies. If it triggered enactments 7 and 15, additional revenues would flow into the treasury (and then be set aside largely for transportation purposes as set forth in HB 2313), and the gas tax would revert to a rate of 3.5 percent.

Ultimately, the *Wayfair* decision alone does not trigger HB 2313's contingencies. All of the language in HB 2313 was drafted with specific reference to the federal government's enacting *legislation*,[52] and a judicial decision—no matter of what import—is not federal legislation. However, these contingencies and enactments will remain law until they are affirmatively repealed by the General Assembly. Unless that happens, Congress still could adopt some sort of remote collection legislation, thus triggering the provisions of HB 2313 in the future.

6: Nexus statute

Although *Wayfair* appears to open the door to a Virginia requirement that

remote sellers collect sales tax, affirmative action by the General Assembly likely would be necessary for the Department of Taxation to start collecting revenue. Secretary of Finance Aubrey Lane has stated publicly that the Department of Taxation will not initiate collection without the General Assembly's authorization,[53] so the General Assembly would have to enact a statute to initiate collection.

Section 58.1-612 of the Code of Virginia sets the state's requirements for the Department to assert nexus. Most of the factors rely on physical presence,[54] and the Department never has interpreted them to require collection by remote sellers.

On the other hand, the Code allows the Department to assert nexus to the maximum extent allowed under the Constitution of Virginia and federal law.[55] Some provisions, if interpreted broadly, could be expanded to cover non-physically-present sellers, now that *Wayfair* allows it. For instance, the Code could be read to authorize nexus over a business that advertises in Virginia[56] or is affiliated with a Virginia business.[57]

But if Virginia collected sales tax from remote sellers on the basis of the existing statute, it is unknown whether doing so would be valid under *Wayfair*. South Dakota's law ensured that the tax collection obligation fell only on businesses with a threshold amount of economic activity; in contrast, Virginia's law provides no such safe harbor. Without a safe harbor provision, a collection requirement might be considered an undue burden.

Collecting from remote sellers under the existing nexus statute would raise other issues. Remote sellers likely would protest the administrative difficulty of determining when they became subject to the collection requirement, even if the Department promulgated regulations with processes for notification and compliance.[58]

Recent changes

Virginia adopted a change to its economic nexus sales tax provisions during the 2012 General Assembly Session, in direct response to online behemoth Amazon. The online retailer built a pair of one-million-square-foot fulfillment centers—one in Chesterfield and the other in Dinwiddie—that opened in late 2012. While on the surface it would appear that the location of these facilities would be enough to establish physical presence to require Amazon to begin to collect sales tax on purchases made in Virginia, in reality the unique corporate structure of Amazon and its affiliates meant that the fulfillment centers were owned by Amazon’s corporate parent company, and not Amazon itself.

Chapter 590 of the Acts of Assembly of 2012 amended § 58.1-612 of the Code of Virginia by adding a subsection D that provided that a dealer is presumed to have sufficient activity in Virginia to require the collection of sales tax if a commonly controlled person maintains a distribution or fulfillment center in Virginia to facilitate the dealer's sales.[59] After negotiating with Amazon, it was agreed that collection requirements of the 2012 legislation would not go into effect until September 1, 2013 (or earlier if the federal government adopted legislation authorizing states to require collection of sales tax by remote sellers).

7: Options for the future

Virginia can respond to *Wayfair* in two ways: Do nothing (and thus not collect any new sales tax revenues from remote sellers) or enact legislation requiring sales tax collection by remote sellers.

The law at issue in *Wayfair* is an example of one way to require remote

sellers to collect sales tax.[60] The Court considered the economic activity thresholds, non-retroactivity provisions, and provisions facilitating compliance noteworthy in holding that the law did not create an undue burden.[61] Without these provisions, a remote collection law would present a new question to the courts on the undue burden issue.

The General Assembly could enact a law establishing Virginia-specific thresholds for which remote sellers would be covered. While it would not necessarily have to adopt a law identical to South Dakota's, proposed legislation would have to be evaluated in light of *Wayfair*.

8: Revenue estimates

Estimates of how much revenue Virginia would gain if it collected sales tax from remote sellers range from $190 to 300 million annually, according to a 2017 report by the federal Government Accountability Office.[62] In the fiscal impact statement for the 2013 transportation funding bill, the Department of Taxation projected that Virginia would gain $210 million annually ($180 million state and $30 million local).[63]

The accuracy of these estimates is uncertain. It is possible that they overestimate. Nineteen of the 20 largest e-retailers—including Amazon, Walmart, and Apple—already collect sales tax voluntarily.[64] In fact, according to the Government Accountability Office, states already collect 80 percent of the revenue available from remote sellers.[65] On the other hand, the studies might underestimate potential revenue gains because e-commerce has been growing seven times faster than overall retail sales.[66]

Conclusion

With *Wayfair*, the Court reversed a precedent that states, legal academics, economists, and judges had criticized for decades. By eliminating the physical-presence rule, the decision makes it possible for states to require remote sellers to collect sales tax, leveling the playing field between online sellers and brick-and-mortar sellers. States still will have to establish nexus through other means—like economic or digital presence—but the Court no longer requires a physical presence.

Wayfair does not trigger the HB 2313 contingencies related to remote collection and transportation funding. Nevertheless, if Virginia chooses to impose a collection requirement on remote sellers, it will require a decision about the contingencies.

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Endnotes

[1] South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 22 (June 21, 2018).
[2] VA. CODE § 58.1-604.
[3] Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992).
[4] U.S. CONST., art. I, § 8.
[5] *See* Gibbons v. Ogden, 22 U.S. 1, 189 (1824) (stating that the power to regulate interstate commerce resides "in the hands of agents selected for that purpose [Congress], which power can never be exercised by the people themselves, but must be placed in the hands of agents or lie dormant").
[6] Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) (emphasis added).
[7] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 260 (1938).
[8] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 609 (1951).
[9] *See* Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 440-42 (1959).
[10] National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967).
[11] Quill Corp. v. North Dakota, 504 U.S. 298, 313 (1992).
[12] *Id.* at 313 n. 7.
[13] *Id.* at 315.
[14] *See infra* Section 4 for an explanation of stare decisis.
[15] *Quill* at 317 ("[W]e have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound.").
[16] *Id.* at 311 ("[C]ontemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today.").
[17] *Id.* at 322 (White, J., concurring in part and dissenting in part). *See also* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150 (10th Cir. 2016) (concurring opinion) (then-Judge Gorsuch describing the physical-presence rule as a "judicially sponsored arbitrage opportunity"); National Bellas Hess v. Department of Revenue, 386 U.S. 753, 763 (1967) (Fortas, J., dissenting) ("To excuse Bellas Hess from this obligation [to collect and remit sales tax] is to burden and penalize retailers located in Illinois.").
[18] *See, e.g.*, Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000). Even before *Quill*, academics had complained that the physical-presence rule was unfair. *See Quill* at 323 n. 1 (White, J., concurring in part and dissenting in part).
[19] Direct Mktg. Ass'n v. Brohl, No. 13-1032, slip op. at 3 (March 3, 2015) (Kennedy, J., concurring) ("[I]t is unwise to delay any longer a reconsideration of the Court's holding in *Quill*.")
[20] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1149, 1151 (10th Cir. 2016) (concurring opinion).
[21] Brief of Amici Curiae Representative Robert W. Goodlatte et al. at 16 n. 18, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.supremecourt.gov/DocketPDF/17/17-494/23093/20171207163707949_Main%20Document-Amicus%20Brief-17-494.pdf (citing the Online Sales Simplification Act, Remote Transactions Parity Act, Marketplace Fairness Act, and No Regulation Without Representation Act).
[22] State law requires people to pay use tax if they purchase a product tax-free and bring it into Virginia. VA. CODE § 58.1-604. However, few people actually take the time to track their purchases and report them on their state income tax return.
[23] Petition for Writ of Certiorari at 14, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.scotusblog.com/wp-content/uploads/2017/10/17-494-petition.pdf.
[24] *Wayfair* at 13 (June 21, 2018) ("Worse still, the rule produces an incentive to avoid physical presence in multiple States.").
[25] Brief of Amici Curiae Law Professors and Economists in Support of Petitioner at 17, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.supremecourt.gov/DocketPDF/17/17-494/37603/20180305141434827_Brief%20of%20Amici%20Curiae%20Law%20Professors%20and%20Economists%20iso%20Petitioner.PDF.
[26] Max Behlke, "A Question of Fairness," at 12, STATE LEGISLATURES MAGAZINE (Apr. 2018), http://www.ncsl.org/Portals/1/Documents/magazine/articles/2018/SL_0418-SalesTax.pdf.
[27] *Wayfair* at 23. Apart from the thresholds and non-retroactivity, the other provisions derive from South Dakota's participation in the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA is a multistate agreement establishing uniform laws on which products are taxable or exempt. Virginia is not a member of the agreement.
[28] *Id.* at 15.
[29] *Id.* at 10–17.
[30] *Id.* at 16 (describing the physical-presence rule as an "extraordinary imposition by the Judiciary on States' authority").
[31] *Id.* at 3, 10, 13.
[32] *Id.* at 16.
[33] *See id.* at 1 (Roberts, C. J., dissenting) (agreeing that "*Bellas Hess* was wrongly decided" but nevertheless opposing a decision overturning it).

[34] Janus v. American Federation of State, County, and Municipal Employees, No. 16-1466, slip op. at 34–35 (June 27, 2018).
[35] *Wayfair* at 5 (Roberts, C. J., dissenting) (citing a November 2017 report by the Government Accountability Office).
[36] *Id.* at 5–6 (Roberts, C. J., dissenting).
[37] *See* Dickerson v. United States, 530 U.S. 428 (2000) (striking down a federal statute that purported to overrule the Court's *Miranda* doctrine).
[38] *Wayfair* at 2 (Roberts, C. J., dissenting).
[39] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) ("Congress has the final say over regulation of interstate commerce, and it can change the rule . . . by simply saying so.").
[40] *Wayfair* at 2 (Roberts, C. J., dissenting) (advocating for a "heightened form of stare decisis in the dormant Commerce Clause context"). *But see Wayfair* at 18 (Kennedy, J.) (acknowledging that "Congress has the authority to change the physical presence rule, [but] Congress cannot change the constitutional default rule").
[41] *Id.* at 17 ("[S]tare decisis can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.").
[42] *See* Chapter 766 of the 2013 Acts of Assembly.
[43] Enactment 1, Chapter 766 of the 2013 Acts of Assembly, § 58.1-638.2 (2013); *id.*, Enactment 7 (providing that § 58.1-638.2 shall not become effective unless Congress enacts authorizing legislation).
[44] Marketplace Fairness Act of 2013, S. 336, 113th Cong. (2013); Marketplace Fairness Act of 2013, H.R. 684, 113th Cong. (2013).
[45] Marketplace Fairness Act, S. 1832, 112th Cong. (2011).
[46] Enactment 1, Chapter 766 of the 2013 Acts of Assembly, § 58.1-2217(A) (2013).
[47] Enactment 2, Chapter 766 of the 2013 Acts of Assembly, § 58.1-2217(A) (2013).
[48] Enactment 3, Chapter 766 of the 2013 Acts of Assembly (2013).
[49] In fact, Senators and Congressmen urged the Court not to overrule *Quill* for this very reason, claiming they were close to a legislative solution. Brief of Amici Curiae Representative Robert W. Goodlatte et al. at 25-26, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.supremecourt.gov/DocketPDF/17/17-494/23093/20171207163707949_Main%20Document-Amicus%20Brief-17-494.pdf; Brief of Amici Curiae United States Senators Ted Cruz et al. at 10-11, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), https://www.supremecourt.gov/DocketPDF/17/17-494/42397/20180404175941156_Wayfair%20Amicus-US%20Senators.pdf.
[50] Enactment 7, Chapter 766 of the 2013 Acts of Assembly (2013).
[51] Enactment 15, Chapter 766 of the 2013 Acts of Assembly (2013).
[52] Enactments 7 and 15, Chapter 766 of the 2013 Acts of Assembly (2013) (specifying that the enactments "shall not become effective unless the federal government enacts *legislation* that grants states . . . the authority to compel remote retailers to collect sales and use tax") (emphasis added).
[53] Michael Martz & Tammie Smith, *Supreme Court Decision Could Boost Virginia Sales Tax Collections by $300 Million a Year*, RICHMOND TIMES-DISPATCH (June 22, 2018), http://www.richmond.com/news/plus/supreme-court-decision-could-boost-virginia-sales-tax-collections-by/article_7c81adaf-c0fa-59d5-a5f8-a7b0d528ef3a.html (referring to an interview with Secretary of Finance Aubrey Lane).
[54] *See* VA. CODE § 58.1-612(C)(1)-(4) (establishing nexus through in-state salesmen, warehouses, advertisements, or deliveries).
[55] *Id.* § 58.1-612(F) ("[N]othing contained herein . . . shall limit any authority which this Commonwealth may enjoy under the provisions of federal law or an opinion of the United States Supreme Court to require the collection of sales and use taxes by any dealer who regularly or systematically solicits sales within this Commonwealth.").
[56] *Id.* § 58.1-612(C)(3) (asserting nexus with a business that "[a]dvertises . . . through materials distributed in this Commonwealth by means other than the United States mail"); *id.* § 58.1-612(C)(5) (asserting nexus with a business that "[s]olicits business in this Commonwealth . . . by means of advertising that is broadcast or relayed from a transmitter within this Commonwealth").
[57] *Id.* § 58.1-612(C)(7).
[58] A remote seller could argue that a sales tax collection requirement, without safe harbor, violates the Due Process Clause. But the Due Process Clause requires only minimum contacts between a remote seller and a taxing state; it does not require physical presence. Quill Corp. v. North Dakota, 504 U.S. 298, 307-08 (1992).
[59] VA. CODE § 58.1-612(D).
[60] *Wayfair* was not an unqualified approval of South Dakota's law. It remanded the case, ordering the South Dakota court to consider whether the law violated some other aspect of DCC doctrine. South Dakota v. Wayfair, Inc., No. 17-494, slip op. at 23-24 (June 21, 2018). Nevertheless, the Court likely will find South Dakota's law constitutional for two reasons. First, courts generally are reluctant to strike

down state statutes under the DCC, so most laws survive. Second, *Wayfair* observed that South Dakota's law has "several features that appear designed to prevent discrimination against or undue burdens on interstate commerce." *Id.* at 23. With this sentence, the Court suggested that it thought the statute was valid.

[61] One commentator opined that even if a state law omitted just one benefit for remote sellers—for example, by not providing free collection software—the Court might strike down the law as imposing an undue burden. *See* Darien Shanske, *State Options After Wayfair*, MEDIUM (June 22, 2018), https://medium.com/whatever-source-derived/state-options-after-wayfair-3bfe9c87eef5.

[62] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *Sales Taxes: States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* at 49 (2017), https://www.gao.gov/assets/690/688437.pdf.

[63] Department of Planning and Budget, Fiscal Impact Statement: HB 2313 As Enacted (2013), http://lis.virginia.gov/cgi-bin/legp604.exe?131+oth+HB2313FCHP122+PDF. Earlier estimates were more variable. In 2009, a University of Tennessee study calculated that Virginia lost $210 million per year due to the old *Quill* rule. Donald Bruce et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 (2009), http://cber.utk.edu/ecomm/ecom0409.pdf. A 2010 study, which used thresholds for small businesses (like the South Dakota law), put the figure much lower, at $60 million per year. Jeffrey Eisenach & Robert Litan, *Uncollected Sales Taxes on Electronic Commerce: A Reality Check* 33 (2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf.

[64] Respondents' Brief in Opposition to Petition for Writ of Certiorari at 31, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.supremecourt.gov/DocketPDF/17/17-494/23025/20171207150426999_2017-12-07%20Brief%20in%20Opposition%20to%20Petition%20for%20Cert.PDF.

[65] *Wayfair* at 5 (June 21, 2018) (Roberts, C. J., dissenting) (citing a Government Accountability Office report).

[66] Petition for Writ of Certiorari at 14, South Dakota v. Wayfair, Inc., No. 17-494 (June 21, 2018), http://www.scotusblog.com/wp-content/uploads/2017/10/17-494-petition.pdf.