A Procedure to Play Fair After *Wayfair*: What CivPro Can Teach Us About the Reach of State Sales Tax in the E-Commerce Era

*Richard J. Markel, CPA**

Introduction

If a tax falls on a purchase but there's no one around to collect it, is it still due? The short answer is yes. However, when it comes to use taxes, consumers who owe them rarely pay, and they usually get away with it.[1] Last year, the Supreme Court decided *South Dakota v. Wayfair, Inc.*,[2] removing a longstanding impediment to a state's ability to require a seller with no physical presence inside the state to collect and remit a tax from its customers.[3] Before *Wayfair*, internet shoppers faced a dice roll as to whether they would be taxed from one online purchase to the next. No Amazon distribution center in the state? No sales tax on the purchase. Millions of people had, at one point or another, been the beneficiaries of a "judicially created tax break," thanks to the United States Supreme Court.[4]

Now, this is not to say that these purchases were legally tax-free to consumers.[5] In actuality, most states require consumers to self-report purchases on which they do not pay sales tax (typically those made out-of-state) and remit a corresponding "use" tax.[6] Unsurprisingly, individual

---

* George Mason University, J.D. Candidate, May 2020; Washington University in St. Louis, B.S.B.A. Accounting and Economics, 2011; Certified Public Accountant (PA, VA, DC); Executive Editor, GEORGE MASON LAW REVIEW 2019–2020. I'd like to thank MJ Egan, Sam Kallman, and Aris Hart for their editorial suggestions and my parents for their support and encouragement. This Comment is dedicated to my nephew Finn and to the memory of my grandfather Donald Robinson.

1 *See* NINA MANZI, MINN. H.R. RES. DEP'T, USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES 1, 7–8 (April 2015).

2 138 S. Ct. 2080 (2018).

3 *Id.* at 2099.

4 *See id.* at 2100 (Gorsuch, J., concurring).

5 *See* WALTER NAGEL ET AL., STATE BUSINESS TAXES § 4.06 (2018).

6 *See id.*

compliance is low and enforcement costs are high.[7] *Wayfair* suggests that the tax man may be able to reach beyond a state's borders to require merchants without a physical presence to collect taxes on retail sales to in-state consumers.[8] To that end, some merchants have started collecting and remitting buyers' taxes.[9] However, while *Wayfair* opened the door to that possibility, it did not conclusively determine the extent of a state's reach.[10]

Both in *Wayfair* and the decisions that preceded it, the Supreme Court has looked at state taxes from the standpoint of the link between a company, its operations, and the state that seeks to tax them.[11] If this approach sounds familiar, it should. Developments in the case law analyzing the reach of state taxation have mirrored changes to the approach for analyzing a court's jurisdictional reach. However, evolution in the tax realm has lagged significantly behind the very same evolution in civil procedure. Nevertheless, *Wayfair* is the *International Shoe* of sales tax today.

This Comment explores the evolution of the Supreme Court's state-tax jurisprudence in the context of prior developments in civil procedure. Part I discusses how the Court's decisions dealing with jurisdiction have evolved since the nineteenth century. Part II discusses the state-tax cases leading up to *Wayfair*. Those cases illustrate the parallels between the economic and technological concerns that compelled changes in civil procedure and the similar considerations that came to a head in *Wayfair*. Part III breaks down the *Wayfair* decision and explains how its narrow holding gives rise to a new question about the permissible reach of a state's taxing authority. Finally, given the similarity between the two areas of the law discussed earlier in the Comment, Part IV examines the approach adopted in the civil procedure case *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[12] to address court jurisdiction over entities with purely

---

[7] *Wayfair*, 138 S. Ct. at 2088 (discussing findings in U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS (Nov. 2017)).

[8] "May" is the operative word here. It is important to note that the Court *did not* hold that imposing a collection requirement on out-of-state sellers is always permissible. *Id.* at 2099. All the *Wayfair* Court did was remove an obstacle that had foiled attempts to impose such a liability on sellers. *See id.* (explaining that the scope of the Court's decision only impacts "the *Quill* physical presence rule[, which] was an obvious barrier to the [South Dakota law's] validity").

[9] *In the Moment: Interview by Lori Walsh with Marty Jackley, S.D. Att'y Gen.*, S.D. PUB. RADIO (Nov. 2, 2018), https://perma.cc/7QNX-V7B3.

[10] *Wayfair*, 138 S. Ct. at 2099 ("The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the [tax collection liability].").

[11] *Id.* at 2093 (citing Miller Bros. v. Maryland, 347 U.S. 340, 344–45 (1954)).

[12] 952 F. Supp. 1119 (W.D. Pa. 1997).

electronic presences. It then proposes a modified version of the *Zippo* framework for courts to use when considering the post-*Wayfair* reach of state sales and use taxes.

I. Sheriff's Sales, Shoes, and Sirloin Sandwiches: Jurisdiction Since 1878

Jurisdiction, a court's legal authority to hear and decide a case, comes in two flavors: subject-matter and personal.[13] Subject-matter jurisdiction is the court's authority to hear a certain type of case.[14] Personal jurisdiction is the court's authority to hear a case involving the specific parties to a suit.[15] Disputes over personal jurisdiction have played a pivotal role in the development of the Supreme Court's civil-procedure jurisprudence. The question that has arisen time and again is: How far does the long arm of the law reach?[16]

As mentioned previously, the Supreme Court's state-tax decisions leading up to *Wayfair* followed the same path that its decisions about personal jurisdiction walked years before. This Part of the Comment recounts the major cases that illustrate the Court's shifting reasoning for limiting or extending jurisdiction. These decisions show that economic and technological developments have informed the changing theories of the reach of the law, even outside the context of strictly commercial cases.[17] Such change will be similarly important when considering the tax-related cases discussed later in this Comment.[18]

---

[13] 1 JAMES WM. MOORE ET AL., MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 5.01 (2019).

[14] *Id.* For example, a United States District Court has subject-matter jurisdiction over, among other things, cases arising under federal law. *See* 28 U.S.C. § 1331 (2012). Other courts, such as the United States Tax Court, are more limited in their jurisdiction. *See, e.g.*, I.R.C. § 7442 (2012). State courts likewise have "general jurisdiction" over state matters. *E.g.*, 17.1 VA. CODE ANN. § 513 (2018).

[15] MOORE, *supra* note 13, § 5.01. One point of clarification: courts must always have subject-matter jurisdiction. *Id.*; *see also* FED. R. CIV. P. 12(h)(3). However, in some instances, courts lacking personal jurisdiction can still hear a case if the party over which the court does not have jurisdiction consents. *See, e.g.*, FED. R. CIV. P. 12(h)(1). The discussion of civil procedure in this Comment focuses on cases in which one party did not consent, and thus personal jurisdiction was at issue.

[16] "Long arm" may seem to be a colloquial term, but it has been embraced by courts at all levels to describe the extent to which a court may exercise personal jurisdiction over a person. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289 (1980); Dickson Marine Inc. v. Panalpina, Inc., 179 F.3d 331, 336 (5th Cir. 1999); Green v. Wilson, 565 N.W.2d 813, 815 (Mich. 1997).

[17] As used here, "strictly commercial" means cases in which the main issue is one of contracts, sales, and the like. This Part examines cases that bear on other areas of the law, such as civil procedure. *E.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878). Nonetheless, the cases discussed here had commercial backstories on topics ranging from land sales to franchise contracts. *See infra* Sections I.B–D.

[18] *See infra* Part II.

A. *In Something-em Personal Jurisdiction*

There is one last distinction to note before delving into the history. There are three subtypes of personal jurisdiction, which affect the validity and scope of a court's judgments.[19] These are: in personam, in rem, and quasi in rem.[20] As the Latin indicates, in personam means "against a person" and refers to cases in which the rights and obligations of the parties themselves are the focus of the suit (e.g., if Tom brings a tort action against Jerry).[21] In rem means "against a thing."[22] These cases are "against" property, as exemplified by civil forfeiture actions.[23] The final subtype is a variant on (or creative use of) in rem, known as quasi in rem ("as if against a thing").[24] The requirements for, and limits on, a court's exercise of personal jurisdiction have been key to the development of civil procedure.

B. *Physical Presence*

The earliest notions of jurisdiction were based on people in places.[25] A judgment is, after all, only as good as the ability to enforce it, so a court was confined to rendering judgments over those within its control.[26] This had been the case in England, from which the United States derived its common law.[27] Said another way, courts were not empowered to hear cases involving parties beyond the long arm of the law. In America, conflicts over the abilities of state courts to reach remote defendants came to a head in *Pennoyer v. Neff*.[28]

Pennoyer concerned the validity of a judgment that resulted in a sheriff's sale of a piece of land in Oregon.[29] Neff had lived in Oregon at some point, during which time he obtained legal services.[30] He later left for California (retaining ownership of the Oregon parcel), but he had

---

19 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.2 (5th ed. 2015).

20 *Id.*

21 *In personam*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22 *In rem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

23 *E.g.*, United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976 (9th Cir. 2008). *See generally* FRIEDENTHAL, *supra* note 19, § 3.2.

24 *Quasi in rem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25 FRIEDENTHAL, *supra* note 19, § 3.2.

26 *Id.*

27 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *38 ("[J]ustices of the [court of] common pleas [were] thereupon appointed; with *jurisdiction* to hear and determine all pleas of land, and injuries merely civil, *between subject and subject*." (emphasis added)).

28 95 U.S. 714 (1878).

29 *Id.* at 719.

30 *Id.*

neglected to pay his lawyer, who obtained a judgment in Oregon state court for the amount due.[31] That judgment forced a sheriff's sale, which resulted in Pennoyer owning the land.[32] Neff, being in California, was entirely unaware of this chain of events because no service of process had ever reached him, and he lost by default when he failed to appear in court.[33] Neff learned what had happened, sued Pennoyer in federal court, and won back his land.[34]

The Supreme Court affirmed the judgment.[35] Although the decision was couched in terms of physical presence and notice, the holding at its core was about whether the state court's exercise of jurisdiction over Neff comported with due process.[36] The lawyer had filed a suit against Neff as an individual who owed a debt (i.e., in personam) instead of putting the land in the crosshairs of judgment by filing suit against the land in rem to satisfy the outstanding obligation.[37] The legal difference between those

---

31 *Id.*

32 *Id.* at 719–20. The actual mechanics of the transaction resulting in Pennoyer owning Neff's former property were slightly more complicated. Pennoyer did not actually buy the land at the sheriff's sale. *Id.* However, the details are omitted because they do not alter this analysis. Suffice it to say, Pennoyer owned Neff's land after the dust settled. *Id.* at 719.

33 *See id.* at 720, 726–27. Oregon law at the time provided for "constructive service" when a defendant could not be located. *Id.* at 720. A plaintiff could constructively serve the defendant by publishing a notice in a local newspaper for six weeks, after which he was considered to have been served, and the case proceeded accordingly. *Id.* at 718–19. Constructive service was flawed in multiple respects, the most obvious being that a non-local defendant was not going to read a local newspaper. In its holding, the Court noted how easily such "service" could be abused. *See id.* at 726 ("[W]ithout personal service, judgments . . . against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, . . . would be the constant instruments of fraud and oppression.").

34 *See Pennoyer*, 95 U.S. at 721–22.

35 *Id.* at 736. It is important to note that while the Supreme Court decision was an appeal from a suit in federal court in which plaintiff-respondent Neff tried to reclaim his land from defendant-appellant Pennoyer, the decision itself pertains to the validity of the state court case in which the unpaid lawyer obtained a judgment against absent Neff. *See id.* at 734, 736.

36 State sovereignty also factored heavily into the outcome of the case; however, the Court appeared to have taken for granted the underlying tenets compelling its decision in *Pennoyer*. It noted:

> [There are] two well-established principles of public law respecting the jurisdiction of an independent State .... [The first is] that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.... [The second is] that no State can exercise direct jurisdiction . . . over persons or property without its territory.

Id. at 722.

37 In its discussion of in personam and in rem jurisdiction, the Court strongly suggested that the procedural defects that doomed Pennoyer's title to the land could have been avoided had the suit been brought in rem against Neff's land to satisfy the debt. *See id.* at 727, 733 ("[S]ervice of process by publication, . . . is effectual only where, in connection with process against the person for commencing

two options is party notice. Property is legally considered to be in its owner's possession at all times.[38] It follows that when the property is seized from its owner, he is aware of what has transpired.[39] There is no corresponding rule for in personam suits. Allowing for constructive service, which the Court noted likely would not reach the target in most instances, deprives defendants of the ability to defend themselves.[40]

At the time *Pennoyer* was decided, the Fourteenth Amendment's Due Process Clause was still a relatively new feature of the United States Constitution, having been ratified only a decade earlier.[41] Consequently, there had not been many occasions to suss out its meaning. The Supreme Court first stepped up to the plate in the *Slaughter-House Cases*,[42] where it remarked that the Due Process Clause of the Fourteenth Amendment "*may* place the restraining power over the States . . . in the hands of the Federal government."[43] Apparently it did. That single line of dictum—inconsequential to those cases—was nonetheless prescient of the holding in *Pennoyer* that in light of the Fourteenth Amendment, federal courts were not required to enforce judgments made by state courts that lacked jurisdiction over the defendant.[44]

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law," which undoubtedly includes depriving a defendant of knowledge and participation in court proceedings against him.[45] Without actual notice through personal service (or notice by virtue of the defendant's actual

---

the action, property in the State is brought under the control of the court . . . ."). Note that while the Court uses the term "in rem" to describe that alternative, the suit would be described as "quasi in rem" in modern parlance. *Compare* United States v. One Tyrannosaurus Bataar Skeleton, No. 12 Civ. 4760 PKC, 2013 WL 628549 (S.D.N.Y. Feb. 13, 2013) (an action in rem to stop the auctioning of smuggled dinosaur bones), *with* Shaffer v. Heitner, 433 U.S. 186 (1977) (an action against out-of-state corporate directors using seizure of their in-state stock certificates to compel their appearances).

38 *Pennoyer*, 95 U.S. at 727.

39 *Id.* As applied to real property, this principle does not always comport with reality. Neff, for instance, did not know his property had been seized until he returned from California. *See id.* at 717. Nevertheless, the principle is firmly established in property law. *Cf., e.g.*, Nielsen v. Gibson, 178 Cal. App. 4th 318, 327 (Cal. Ct. App. 2009) (explaining that a California landowner was "presumed to have notice" that an adverse possessor had built a go-kart track on her land despite the landowner having resided in Ireland for the entire five-year adverse-possession period).

40 *Pennoyer*, 95 U.S. at 726.

41 *See* Anderson v. Conboy, 156 F.3d 167, 173 (2d Cir. 1998) (discussing ratification).

42 83 U.S. (16 Wall.) 36 (1873).

43 *Id.* at 80 (emphasis added).

44 *Pennoyer*, 95 U.S. at 732–33.

45 U.S. CONST. amend. XIV, § 1; *see also Slaughter-House Cases*, 83 U.S. at 127 (Swayne, J., dissenting) ("'Due process of law' is the application of the law as it exists in the fair and regular course of administrative procedure.").

appearance), a court cannot establish jurisdiction in personam, so it cannot lawfully adjudicate the case.[46] Consequently, without service on Neff, the Oregon court could not have authorized the sheriff's sale of his land, so Pennoyer did not lawfully own it.[47]

Up until *Wayfair*, the Court adhered to *Pennoyer*-like reasoning when deciding challenges to the reach of states' sales and use taxes, drawing bright-line rules at geographic boundaries.[48] *Pennoyer*, however, is no longer good law as it relates to jurisdiction.[49] Its rigid holding was overturned in favor of more flexible considerations for purposes of civil procedure.[50] Nevertheless, the Court continued to use state borders to draw bright-line rules in its tax decisions for far longer.

C. *Minimum Contacts In Personam*

At the time, the *Pennoyer* decision was likely viewed as logical and uncontroversial.[51] However, by 1945 its strict rule had become untenable and unrealistic, prompting the Court in *International Shoe Co. v. Washington*[52] to reconsider the soundness of *Pennoyer*'s holding as applied to an in personam suit. *International Shoe* involved a Missouri-based company whose traveling salesmen showed shoes and solicited orders in Washington state.[53] The salesmen did not sell the shoes themselves.[54] Customers sent their orders to the company in St. Louis, where they were either accepted and invoiced or rejected.[55] Washington sued to collect employer contributions to the state's unemployment fund.[56]

---

[46] *Pennoyer*, 95 U.S. at 733–34 (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (1868)).

[47] *Id.* at 734.

[48] *See infra* Sections II.A–C, E.

[49] *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977). Modern jurisdictional analyses may nonetheless lead to the same result as what the Court in *Pennoyer* expressly said was permissible: jurisdiction over two *in-state* litigants. This is particularly true in real-property cases, as property law is largely a function of state law. *See id.*

[50] *See id.* at 212; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[51] This is not to say the decision was without criticism or disagreement. *See Pennoyer*, 95 U.S. at 736 (Hunt, J., dissenting). However, even Justice Hunt's dissent took little issue with the majority's principles and instead focused on whether the Court's adherence to the rigid enforcement of the procedural defect discussed in note 37 should have given way for the sake of practicality. *See id.* at 738.

[52] 326 U.S. 310 (1945).

[53] *Id.* at 313.

[54] *Id.* at 314.

[55] *Id.*

[56] *Id.* at 321.

The company cried foul, invoking the Fourteenth Amendment.[57] It argued that a defendant must be present in the state before its courts may exercise jurisdiction in personam, and that to do otherwise squarely violated the company's right to due process of law.[58] The Court acknowledged that this argument was consistent with its prior holdings.[59] However, it recognized that the requirement was outmoded.[60] Instead,

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[61]

Despite its sales occurring out-of-state, the shoe company was "present" because it had "exercise[d] the privilege of conducting activities within [Washington]."[62] That privilege entailed certain obligations, including being subject to personal jurisdiction in the state.[63] In other words, by conducting ongoing business in the state, the company had created the minimum contacts required by the Due Process Clause.[64] Washington courts could thus exercise jurisdiction over the company despite its lack of physical presence.[65]

The Court in *International Shoe* adopted the minimum contacts standard and distanced itself from *Pennoyer*'s rigid, presence-centric rule for reasons of "fair play."[66] At a fundamental level, the embrace of minimum contacts stemmed from structural changes in the American

---

[57] *Id.* at 313.

[58] *Int'l Shoe*, 326 U.S. at 316.

[59] *See id.* at 316 (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1878), as holding that physical presence is a necessary prerequisite to jurisdiction).

[60] *See id.* ("[T]he *capias ad respondendum* has given way . . . ."). *Capias ad respondendum* ("capture him for him to respond") was a common-law writ instructing law enforcement to take a defendant into custody and bring him before a court to answer in a suit. *See Capias ad respondendum*, BLACK'S LAW DICTIONARY (10th ed. 2014). This is clearly not how modern civil cases operate procedurally. *See* FED. R. CIV. P. 4(a)–(c). The Author of this Comment suspects that notice was seldom at issue when that writ was commonplace.

[61] *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[62] *Id.* at 319. Take note of this "privilege" language, as it becomes a sticking point for the Court that cuts in the opposite direction for purposes of commercial taxes. *See infra* Section II.A.

[63] *Int'l Shoe*, 326 U.S. at 319.

[64] *See id.*

[65] *Id.* at 319–20 ("[S]o far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.").

[66] *See id.* at 320; *see also* McGee v. Int'l Life Ins., 355 U.S. 220, 223–24 (1957) (explaining that states have an interest in protecting their residents who "would be at a severe disadvantage if they were forced to follow [a corporate defendant] to a distant State in order to hold it legally accountable").

economy and technological progress. As the Court in *McGee v. International Life Insurance*[67] later explained:

> Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[68]

The *Pennoyer* rule had grown more and more detached from reality, so the Court finally jettisoned it for purposes of jurisdiction in personam. Jurisdiction in rem was another story and would remain subject to the outmoded *Pennoyer* holding for twenty-two more years.[69]

D. *Have It Our Way*

In 1985, the Supreme Court clarified how its minimum contacts standard applied to a business for purposes of a court's long-arm jurisdiction. *Burger King Corp. v. Rudzewicz*[70] was a dispute between a Florida fast-food company and its franchisee in Michigan.[71] The company sued in Florida for breach of the franchise agreement.[72] The franchisee, operating entirely in Michigan, contested the court's jurisdiction.[73] The issue thus became whether the franchisee had established minimum

---

67 355 U.S. 220 (1957).

68 *Id.* at 222–23 (1957); *see also* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958), noting:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*.

357 U.S. at 250–51 (citations omitted).

69 *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977); *infra* Section II.D. Having discussed the breakoff of in personam jurisdiction from its in rem cousin, there is no need to dive into the latter type's subsequent development. What is important to understand for purposes of this Comment is that procedural law had completely jettisoned the rigid, borders-based rule for purposes of state-court jurisdictional inquiries in 1977. *See Shaffer*, 433 U.S. at 212 ("[A]ll assertions of state-court jurisdiction must [now] be evaluated according to the [minimum contacts standard] . . . ."). As this Comment's analysis shows, limits on a state's power to impose sales and use taxes walked a parallel, albeit delayed, developmental path away from similarly formalistic rules. *See infra* Parts II–III.

70 471 U.S. 462 (1985).

71 *Id.* at 464.

72 *Id.*

73 *Id.* at 482–83.

contacts with Florida.[74] The answer depended on his "purposeful availment" of the forum.[75]

Synthesizing various prior holdings, the Court held that a defendant who targets the forum and deliberately engages in significant or continuous activity there has purposefully availed himself of its benefits.[76] And with those benefits come costs, including submission to the jurisdiction of the forum's courts.[77] The Court explained:

> Where individuals "purposefully derive benefit" from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.[78]

Thus, the franchisee made himself amenable to suit when he "reached out beyond Michigan" and entered into a twenty-year business arrangement with a Florida-based company.[79]

Burger King represented a continuation of the Court's embrace of flexibility and the realities of a growing, modern economy. The jurisdictional analysis had moved from the bright-line *Pennoyer* rule over a century earlier to minimum contacts, which considered the nature of the litigant's relationships with the forum as evidenced by his systematic and continuous availment of its benefits. In a procedural context, the Court recognized that its rule had become too removed from reality as technology and the economy changed, so it adapted the rule accordingly. Another area of the law likewise had to adapt to meet these same economic changes. With civil procedure as its compass, changes to the reach of state sales- and use-tax statutes followed a similar evolutionary trajectory, despite a significant time lag.

II. The Way to *Wayfair*

Civil procedure had long since evolved from the rigid *Pennoyer* rule in 1878 to the minimum contacts standard of *International Shoe* in 1945, which *Burger King* in 1985 clarified depended on systematic targeting of the forum.[80] The Supreme Court acknowledged that this evolution was the

---

74 *Id.* at 474.

75 *Id.* at 475–76.

76 *Burger King*, 471 U.S. at 475–76.

77 *Id.* at 476.

78 *Id.* at 474 (citation omitted) (quoting Kulko v. Super. Ct. of Cal., 436 U.S. 84, 96 (1978)).

79 *Id.* at 479 (internal quotation marks omitted).

80 *See id.* at 475–76; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. 714, 732–33 (1878).

result of economic expansion and technological change.[81] In the tax realm, older, more formalistic rules for assessing state tax statutes likewise were replaced with a seemingly flexible standard. Yet until *Wayfair* in 2018, the Court firmly enforced geographic borders as a constraint on the power of states to implement sales- or use-tax laws. In other words, physical presence remained nonetheless determinative, despite the new tax standard.[82]

The Supreme Court initially rooted its holdings in both the Due Process Clause and the Commerce Clause.[83] Due process stuck around as a justification for requiring physical presence in interstate tax cases until the Supreme Court removed that obstacle in *Quill Corp. v. North Dakota*[84] in 1992.[85] This was despite the fact that forty-five years earlier, the Due Process Clause had clearly yielded to the need for flexibility in the context of civil procedure.[86] The Commerce Clause, which had been invoked in tandem with the Due Process Clause, trudged on alone following *Quill* until *Wayfair* took it out of the picture.[87]

A. *Bright-Line Formalism*

Mirroring the older jurisdictional considerations in the procedure realm, the Court's early cases addressing the permissibility of taxing an out-of-state entity's commercial activities yielded rigid, rules-based decisions. Two of the earliest cases, decided in the 1880s, dealt with state taxes on telegraphs. The taxes challenged in *Telegraph Co. v. Texas*[88] and *Leloup v. Port of Mobile*[89] each impacted the Western Union Telegraph Company's operations. In *Telegraph Co.*, Texas charged a mix of half- and one-cent taxes on all outgoing telegraph messages, regardless of their destination.[90] The Supreme Court struck down that tax, explaining that the Commerce Clause prevented the state from taxing messages moving beyond its borders.[91] *Leloup* involved a challenge to a license tax on the telegraph company's operations, which the Court described as "a tax on

---

81 *See Burger King*, 471 U.S. at 474.

82 *See infra* Section II.E.

83 *See, e.g.*, Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967).

84 504 U.S. 298 (1992).

85 *Id.* at 308.

86 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

87 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

88 105 U.S. 460 (1882).

89 127 U.S. 640 (1888).

90 *Tel. Co.*, 105 U.S. at 465–66.

91 *Id.* at 466.

the privilege of doing . . . business."[92] Despite its different character from the Texas tax, the tax in *Leloup* was similarly doomed because it impacted a company engaged in interstate commerce.[93] The Court struck down taxes impacting businesses engaged in interstate commerce on many occasions in the 1870s and 1880s.[94]

For decades, the formalistic approach to the reach of state commercial taxes mirrored the rigid, extraterritorial approach to jurisdiction exemplified in *Pennoyer*. But even after the Court in *International Shoe* embraced the flexible minimum contacts standard, it continued to rely on formalistic rules when assessing the reach of state taxes. For example, the Court in *Spector Motor Service, Inc. v. O'Connor*[95] considered whether a state's franchise tax may reach an out-of-state trucking company.[96] The Connecticut Supreme Court had earlier explained that the tax was on companies "for the privilege of carrying on or doing business in the state."[97] Doubling down on a formalistic approach, the United States Supreme Court held that such "privilege" taxes burdened companies engaged in interstate commerce and could not stand.[98]

B. *Minimum Contradictions?*

The Court's perpetuation of rigid rules in *Spector Motor Service* seems anomalous, considering that *International Shoe* had exemplified a willingness to be flexible in construing jurisdiction only six years prior. As "traditional" as those notions of fair play may have been, they were also extremely narrow in their application and did not reach beyond civil procedure into other areas of the law. In the decades that followed, something particularly strange happened. The Court developed a standard for analyzing the permissible reach of a state's commercial taxes, which closely resembled *International Shoe*'s minimum contacts but resulted in opposite outcomes. Enter: "minimum connections," minimum contacts' Bizarro World counterpart.[99]

---

92 *Leloup*, 127 U.S. at 644. Although the *Leloup* Court focused on the fact that the company was engaged in interstate operations, the Court in later cases would shift its formalistic approach to a purposive assessment of whether the tax was on "the privilege of doing interstate business." *See* Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992) (quoting Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 609 (1951)).

93 *Leloup*, 127 U.S. at 647–48.

94 *See id.* at 648 (listing cases).

95 340 U.S. 602 (1951).

96 *Id.* at 606.

97 *Id.* (quoting Spector Motor Serv., Inc. v. Walsh, 61 A.2d 89, 98–99 (Conn. 1948)).

98 *Id.* at 607–10.

99 *See generally* Otto Binder et al., *The Superman Bizarro!*, ACTION COMICS 264 (DC Comics 1960).

As has been the case in the comparative history of civil procedure and interstate commercial taxation, one stepped into that brave new world while the other remained stuck in the past. Fittingly, the shoes stepped into the light while the furniture remained bolted down. At least, in terms of holdings they did.

1. Formalism in Furniture

The fact pattern in *Miller Bros. v. Maryland*[100] typifies the sales- and use-tax cases that the Supreme Court would address over the next few decades. *Miller Bros.* was a challenge by a Delaware furniture store to a Maryland use-tax collection requirement.[101] The company only made sales at its Delaware store.[102] Although it did not target Maryland with advertising, the company was keenly aware of the fact that its marketing efforts reached the state.[103] In addition, it sent its delivery trucks into Maryland to drop off customers' purchases.[104] The store contended that Maryland's use-tax collection requirement violated both the Due Process Clause and the Commerce Clause.[105] After analyzing the particulars of the tax, the Court distilled the problem to a single issue: whether Miller Bros. "ha[d] subjected itself to the taxing power of Maryland."[106]

The Court began its analysis by exploring the commonalities among its prior holdings. It explained that the Due Process Clause mandated there be a "minimum connection" between the state and the target of its tax.[107] What exactly constituted that minimum connection was ambiguous at best, and the Court admitted that its decisions did little to clarify its reasoning.[108] The Court simply noted it had in numerous circumstances held that a state tax did not violate the Due Process Clause.[109] However, for reasons not well explained, Maryland's law did.[110]

---

100 347 U.S. 340 (1954).

101 *Id.* at 341.

102 *Id.*

103 *Id.* app. at 349–50 n.4.

104 *Id.* at 341. Interestingly, Maryland sued only after seizing one of the delivery trucks, the attachment of which created jurisdiction per *Pennoyer*. *Id.* at 358 (Douglas, J., dissenting).

105 *Id.* at 341 (majority opinion).

106 *Miller Bros.*, 347 U.S. at 344.

107 *Id.* at 344–45 ("[D]ue process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.").

108 *Id.* at 344 ("Our decisions are not always clear as to the grounds on which a tax is supported, . . . nor are all of our pronouncements . . . consistent or reconcilable.").

109 *See id.* at 345. The Court cited a whopping 186 cases to illustrate the broad range of situations in which it had held a tax comported with the Fourteenth Amendment. *See id.* app. at 353–57 nn.8–18.

110 *See id.* at 344–47.

What was clear, however, was that minimum connections and its procedural counterpart, minimum contacts, were not the same thing. *International Shoe* involved sales made outside of Washington, albeit at the prompting of the company's traveling salesmen within the state.[111] The shoe company had "exercise[d] the privilege of conducting activities within [the] state" by having its agents travel there.[112] That activity established minimum contacts even though the sales occurred in Missouri.[113] In *Miller Bros.*, the store made all of its sales in Delaware and sent its agents into Maryland to deliver them.[114] Although not identical to *International Shoe*, these cases are more similar than they are different.[115]

The entire point of the minimum contacts standard was to unfetter jurisdiction from the rigid boundary limitations set forth decades earlier in *Pennoyer*. Minimum contacts existed to level the playing field in an ever-growing, ever-evolving economy in which parties could move around and conduct activities in different states.[116] However, under the simultaneously new and anachronistic minimum connections standard and its formalistic progenitors, a tax on companies "for the privilege of carrying on or doing business in the state" violated the Due Process Clause.[117] Despite the inherently commercial nature of such a tax and the

---

111 Int'l Shoe Co. v. Washington, 326 U.S. 310, 313–14 (1945).

112 *Id.* at 319–20.

113 *Id.* at 320.

114 *Miller Bros.*, 347 U.S. at 341.

115 To quote the Court's summation of its reasoning in *International Shoe*,

> [Appellant's activities] in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state . . . . The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state . . . to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations . . . .

Int'l Shoe, 326 U.S. at 320. Swap out "Washington" for "Maryland" in the first sentence, and it fits the facts of *Miller Bros.* very well indeed.

116 *See supra* Section I.C. The shoe company had set up operations around the country using traveling salesmen out of its Missouri headquarters. *Int'l Shoe*, 326 U.S. at 313. Consider this: until the transcontinental railroad was completed—only a few years before *Pennoyer*—making the trip from Missouri to Washington entailed traveling the whole Oregon Trail and then some. *See* Barahona v. Union Pac. R.R., 881 F.3d 1122, 1125 (9th Cir. 2018) (discussing the construction of the railroad in the 1860s). Times had obviously changed by 1945, and the Court recognized that the law had to change with it lest it be unreasonable and unfair.

117 *See* Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 606 (1951) (quoting Spector Motor Serv., Inc. v. Walsh, 61 A.2d 89, 98–99 (Conn. 1948)). Although the Commerce Clause issue was raised before the Court, it was not reached because of the Due Process Clause analysis. *See Miller Bros.*, 347 U.S. at 347.

economic justifications that necessitated the flexibility of minimum contacts in civil procedure,[118] the Court adhered to a rigid application of minimum connections.

2. Fashion-Formalist, Not Forward

A decade after *Miller Bros.*, and more than two decades after *International Shoe* dispensed with rules based on state borders, the Court doubled down on its state-borders-based approach to commercial taxes. Before *Wayfair* and *Quill*, *National Bellas Hess, Inc. v. Department of Revenue of Illinois*[119] was the purest example of a state seeking to impose a use-tax collection liability on a nonresident company. It was also the first case to strike down a collection requirement based on an analysis of both the Due Process Clause and the Commerce Clause.[120]

Bellas Hess was a catalog-based clothing retailer that had no operations in Illinois, whatsoever.[121] It did, however, sell millions of dollars of goods to Illinois residents.[122] Continuing to eschew the economic and technological changes that had led to the relaxation of the rigid standards in the procedural sphere, the Court analyzed the case similarly to how it had examined *Miller Bros.*, except it added the Commerce Clause into the calculus.[123]

The Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."[124] The Court explained

---

118 *See supra* Section I.C.

119 386 U.S. 753 (1967).

120 *Compare id.* at 756, 758–59 (holding that the state statute violated both the Due Process Clause and the Commerce Clause), *with Miller Bros.*, 347 U.S. at 347 (declining to undertake a Commerce Clause analysis because the Due Process Clause precluded the act's enforcement).

121 *Nat'l Bellas Hess*, 386 U.S. at 754 ("[The company] does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois." (quoting the Illinois Court at 214 N.E.2d 755, 757 (Ill. 1966))). Astoundingly, the Illinois law still classified it as a "[r]etailer maintaining a place of business in [the] State." *Id.* at 755 (first alteration in original).

122 *Id.* at 761 (Fortas, J., dissenting).

123 *See id.* at 759–60 (majority opinion).

124 U.S. CONST. art. I, § 8, cl. 3. The Court in *Bellas Hess* noted that the law at issue impermissibly burdened interstate commerce. 386 U.S. at 759. This is a common thread in all the interstate tax cases discussed in this Comment. *See also, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 314–15 (1992). However, to be more precise, the concerns in the tax cases were with what is referred to as the "dormant" (or "negative") Commerce Clause. *Id.* The Commerce Clause is an explicit grant of power to Congress. *See* U.S. CONST. art. I, § 8, cl. 3. The other side of the proposition, which has developed

that the catalog sales targeted by the Illinois statute were "exclusively interstate in character."[125] Allowing the state to interfere with the transactions would undermine "[t]he very purpose of the Commerce Clause," which the Court explained was "to ensure a national economy free from such unjustifiable local entanglements."[126]

Whereas *Miller Bros.* had been decided solely as a matter of due process (or a lack thereof) based on the minimum connections standard, the Court in *National Bellas Hess* added that there was not a sufficient link between the merchant's commercial activity and the state that sought to impose an obligation on it.[127] Both required a "nexus," established through minimum connections for the Due Process Clause and a commercial link for the Commerce Clause.[128]

At its core, a nexus is simply a legal connection.[129] The concept of a "nexus" is not unique to tax, nor to civil procedure.[130] It nonetheless crops up in both contexts, as both are inherently questions of linkage.[131] The dual conceptions of a nexus invoked in *National Bellas Hess*—one for

---

over hundreds of years, is that states may not place burdens on interstate commerce. *Dormant Commerce Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

The distinction is important here only to the extent that it was state laws that were challenged. Without the "dormant" side of the Commerce Clause, states could much more freely pass laws directly affecting interstate commerce (assuming there was not some other constitutional hurdle). *See id.* For a much more thorough explanation and analysis, see Michael A. Lawrence, *Toward A More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998), particularly Parts I, II, and III. Interestingly, Professor Lawrence notes that, compared to the federal power grant, "James Madison actually regarded the 'negative' aspect of the Commerce Clause . . . as the more important." *Id.* at 407 n.56.

125 *Nat'l Bellas Hess*, 386 U.S. at 759; *see also supra* note 121 (discussing the company's complete lack of connections to the state).

126 *Nat'l Bellas Hess*, 386 U.S. at 760. The Court feared the slippery slope of allowing these "entanglements" to interfere with the national economy. *Id.* at 759 ("[I]f 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.").

127 *Id.* at 758–60.

128 Only Justice Fortas' dissent actually used the word "nexus." *Id.* at 761 (Fortas, J., dissenting). However, the whole Court later adopted it when considering the supposedly different constitutional connections that satisfied the Due Process and Commerce Clauses, respectively. *See, e.g.*, *Quill Corp.*, 504 U.S. at 304. This lingo is introduced here in the Comment alongside the case that invoked the concept in connection to the Commerce Clause, but the Court had previously used the word when holding that a connection existed in the *Scripto II* case discussed *infra* note 132.

129 *See Nexus*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A connection or link, often a causal one . . . .").

130 *See, e.g.*, State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408, 422 (2003) (discussing the "nexus" requisite to connect tortious conduct and a specific harm in the context of an insurance suit).

131 *See, e.g.*, *Quill Corp.*, 504 U.S. at 304 (tax); Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 252, 271–72 (1972) (civil procedure).

analyzing due process and the other for assessing a burden on interstate commerce—would drive the Court's considerations of interstate imposition of sales and use taxes up until *Wayfair*.[132]

C. *Cars and Cartographs: New Directions to an Old Outcome*

In 1977, the Court was afforded two opportunities to reexamine its rulings on interstate taxation. Unlike in *Miller Bros.* and *National Bellas Hess*, the Court sustained the taxes challenged in both *Complete Auto Transit, Inc. v. Brady*[133] and *National Geographic Society v. California Board of Equalization*.[134] Backing away from its earlier formalism, the Court in *Complete Auto* recognized that a flexible standard—not a rigid rule—was needed to analyze the extent to which a state's taxes may reach beyond its borders, so it fashioned a test accordingly.[135]

Complete Auto involved a company that provided last-mile delivery services for General Motors cars.[136] GM would send the vehicles by train from Michigan to Jacksonville, Mississippi, where the company would

---

[132] Before proceeding, it must be acknowledged that the Court's opinions have not always been clear on the details of its prior case, *Scripto, Inc. v. Carson* (*Scripto II*), 362 U.S. 207 (1960), thus making it appear at odds with the analysis in this Comment. *Compare Quill Corp.*, 504 U.S. at 306 ("The furthest extension of [a state's taxing] power was recognized in *Scripto [II]* . . . in which the Court upheld a use tax despite the fact that all of the seller's in-state solicitation was performed by independent contractors."), *with* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018) (citing *Scripto II* for the proposition that "[a business that] stocks a few items of inventory in a small [in-state] warehouse . . . [b]y reason of its physical presence, . . . must collect and remit a tax on all of its sales to [in-state] customers"). This apparent—but false—discrepancy is easily addressed.

In actuality, *Scripto II* is entirely consistent with the analysis in this Comment. The Georgia-headquartered company in the case had "wholesalers, jobbers, or 'salesmen'" making sales in Florida. *Scripto II*, 362 U.S. at 211, 213. The Court did not describe the operations well, but the Florida Supreme Court's opinion sheds light on their extent. Scripto contracted to install and stock display racks containing its products within stores. Scripto, Inc. v. Carson (*Scripto I*), 105 So. 2d 775, 777 (Fla. 1958), *aff'd*, 362 U.S. 207 (1960). *See generally New Self-Service Drug Outlet Opens in City*, KINGSPORT NEWS, May 31, 1966, at 6 (giving another example of what "rack jobbing" entailed). It also had a fully owned subsidiary that sold goods directly to consumers, which was the subject of the Supreme Court appeal. *See Scripto II*, 362 U.S. at 211–12; *Scripto I*, 105 So. 2d at 777–78. That subsidiary had been forced to register as a Florida business. *Scripto I*, 105 So. 2d at 783. The Court held that the company had "more than sufficient" connections and noted that the fact that the Florida operations were performed through contractors was an irrelevant distinction. *Scripto II*, 362 U.S. at 211, 213. Sales operations of two corporate divisions, one with a direct, on-the-ground presence and the other a registered dealer, is very different from the cases addressed in this Comment, namely *National Bellas Hess* and *Quill*.

[133] 430 U.S. 274 (1977).

[134] 430 U.S. 551 (1977).

[135] The *Complete Auto* test remains good law, and the *Wayfair* decision specifically invokes the test's first prong. *See Wayfair*, 138 S. Ct. at 2099.

[136] *Complete Auto*, 430 U.S. at 276.

unload them onto its trucks and deliver them to dealerships.[137] Mississippi sought to collect "taxes for the privilege of . . . doing business within [the] state."[138] The Mississippi statute thus framed the tax identically to the Connecticut tax overturned in *Spector Motor Service*.[139] The company argued that Mississippi was precluded from imposing its tax because of *Spector*'s formalistic holding that "privilege" taxes impermissibly burdened interstate commerce.[140] The Court, which had previously expressed skepticism about the *Spector* holding,[141] opted to overrule it.[142]

In reaching its holding, the Court traced the development of its tax jurisprudence over the preceding decades.[143] Synthesizing its prior holdings, it explained that four factors guided an analysis of the permissibility of a state commercial tax.[144] Such a tax could survive a Commerce Clause challenge if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."[145] Of these four factors, the second (fair apportionment) and fourth (relation to state services) have not received significant analysis in recent cases. The first factor was squarely at issue in *Wayfair*.[146] The third factor, whether the tax scheme discriminates against interstate commerce, has been used time and again as the basis for attacking the Court's pre-*Wayfair* decisions. Critics of the holdings in those cases have pointed out that excusing the out-of-state company from

---

137 *Id.*

138 *Id.* at 275.

139 *Compare id.*, *with* Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 603–04 n.1 (1951) (quoting the statute that taxed "the privilege of carrying on or doing business within [Connecticut]").

140 *See Complete Auto*, 430 U.S. at 278.

141 *See* Ry. Express Agency v. Virginia, 358 U.S. 434, 441 (1959). Writing for the Court, Justice Clark noted that "magic words [may sometimes be used] . . . to disable an otherwise constitutional levy." *Id.* The Court in *Complete Auto* recognized how untenable that holding was. *See Complete Auto*, 430 U.S. at 279. It explained that "the *Spector* rule . . . has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman." *Id.*

142 *Complete Auto*, 430 U.S. at 289. The Court pointed out that Complete Auto Transit was not contesting the degree to which the activity was interstate versus intrastate. *Id.* at 287. Since the challenge was so narrow and the Court overruled *Spector*, it did not need to analyze the degree to which the tax impacted interstate commerce. However, even setting aside the "magic words," the tax only applied to "the transportation of persons or property for compensation or hire between points *within [the] State*." *Id.* at 275 (emphasis added) (quoting MISS. CODE ANN., 1942 § 10109(2) (1972 Supp.)). So, by its own terms, the tax only reached intrastate activity. *Id.* The company's challenge thus seemed doomed to fail anyway, a point that Mississippi had emphasized in its brief. *Id.* at 276 n.4.

143 *See id.* at 279–87.

144 *See id.* at 279.

145 *Id.* (numbering added in Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992)).

146 *See infra* Part III.

a tax-collection obligation disadvantages in-state retailers, which are just as involved in interstate commerce.[147]

While the test in *Complete Auto* appeared to embrace some semblance of flexibility, the Court failed to take advantage of it to reconsider the existing bright-line rule. Only four weeks after deciding *Complete Auto*, the Court again invoked physical presence as the determinative factor in assessing a tax collection liability. *National Geographic* involved a challenge to a California law that required out-of-state sellers to collect a use tax on sales made into the state, which were not subject to sales tax.[148] National Geographic's D.C. office sold maps, atlases, and other items by mail into California, and the state wanted National Geographic to collect a use tax from buyers.[149]

The Court upheld the tax but seemed to be in denial about the tenuous reason for its decision. The decisive factor was that National Geographic had two small offices in California that sold advertising space in its magazine.[150] The California court's interpretations of *Miller Bros.* and *National Bellas Hess* had led it to conclude that "the 'slightest presence' of the seller in California established [a] sufficient nexus" for upholding the tax.[151] The Supreme Court explicitly disavowed California's "slightest presence" analysis, yet it still upheld the law because of the "presence" of National Geographic's advertising offices.[152] Justice Blackmun concurred in the result without explanation, but he admitted that the case was "another instance where [the] Court's past decisions in the tax area are not fully consistent."[153]

The Supreme Court needed to let go of the past, and its opinion in *Complete Auto* seemed to recognize as much. It nevertheless declined the opportunity to use *National Geographic* to overrule its bright-line presence test. A nexus is a connection, and the Supreme Court took for granted that

---

147 *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Gorsuch, J., concurring) ("For years [*National Bellas Hess* and *Quill*] have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals."); *Quill Corp.*, 504 U.S. at 329 (White, J., concurring in part and dissenting in part) ("Also very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business—mail-order sellers—but no countervailing advantage for its competitors."); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 763 (1967) (Fortas, J., dissenting) ("To excuse [an out-of-state seller] from this [tax] obligation is to burden and penalize retailers located in Illinois who must collect the sales tax from their customers.").

148 Nat'l Geo. Soc. v. Cal. Bd. of Equalization, 430 U.S. 551, 553 (1977).

149 *Id.* at 552.

150 *Id.*

151 *Id.* at 555 (quoting Nat'l Geo. Soc. v. State Bd. of Equalization, 547 P.2d 458, 462 (Cal. 1976)).

152 *Id.* at 556.

153 *Id.* at 563 (Blackmun, J., concurring in the result).

one existed between National Geographic and the state despite the taxable sales having no relation to the advertising. The *National Geographic* holding would have been more sound if it had been based on an analysis of National Geographic's sales activity instead of using presence as a shortcut and advertising as a pretense.

An analysis using the more flexible framework from *Complete Auto* could have looked something like this: The tens of thousands of dollars of sales[154] to California indicate a continuous stream of commerce into the state, all of which gives rise to a use-tax liability on the part of the buyer. That activity is sufficiently connected to the state to constitute a substantial nexus. The tax applies only to California-bound sales, and, further, National Geographic does not collect a sales tax based on its D.C. presence. This negates any risk of double taxation and evidences that the tax is fairly apportioned. Further, requiring National Geographic to collect a use tax does not discriminate against interstate commerce; it simply puts National Geographic on equal footing with every other seller. Finally, like the corresponding sales tax that in-state merchants must collect, the revenue generated from the use tax supports basic state functions and infrastructure that keep the state open for business. The Court, however, declined to perform that analysis and instead invoked presence.[155]

D. *Meanwhile, in CivPro. . .*

Returning to the realm of civil procedure, only weeks after the Court decided *National Geographic*, it reiterated the importance of using a flexible standard to analyze personal jurisdiction. In *Shaffer v. Heitner*,[156] the Court held that all jurisdictional analyses must be evaluated in accordance with *International Shoe*, including quasi in rem cases that had still been governed by the rigid *Pennoyer* rule.[157] In doing so, the Court reiterated that an "inquiry into [a] State's jurisdiction over a foreign corporation appropriately focus[es] *not on whether the corporation was 'present.'*"[158] Instead of a "mechanical" evaluation, it must consider the "contacts of the corporation with the state."[159]

Needless to say, that logic about how a nexus is defined and analyzed did not carry over to the tax realm. Even more oddly, the Court in *National*

---

154 *Nat'l Geo.*, 430 U.S. at 552.

155 *Id.* at 562.

156 433 U.S. 186 (1977).

157 *Id.* at 212.

158 *Id.* at 203 (emphasis added). The differences in these holdings are especially puzzling because *Shaffer* was argued the day before *National Geographic*. *Compare id.* at 186 (argued February 22, 1977), *with Nat'l Geo.*, 430 U.S. at 551 (1977) (argued February 23, 1977).

159 *Shaffer*, 433 U.S. at 203–04 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

Geographic did not analyze the factors for assessing the reach of a state tax that it had laid out only weeks earlier in *Complete Auto*. Instead, the rule endured that a nexus existed for tax purposes where there was a physical presence. Despite the parallel considerations, it would be years before the minimum connections standard from *Miller Bros.* started to catch up with its procedural counterpart, minimum contacts, when assessing whether a state could reach across borders without violating due process.

E. *Office Supplies Over Borders: Catching Up with Procedure*

The last stop in this rules-based, pre-*Wayfair* history of state borders and commercial taxes occurs in 1992. Forty-seven years after *International Shoe* embraced the economic and technological need to decouple personal jurisdiction from physical presence in civil procedure, *Quill Corp. v. North Dakota* presented an opportunity for the Court to do likewise in the state-tax realm by reexamining *National Bellas Hess*.

The company challenging the use-tax collection law in *Quill* sold mail-order office supplies into North Dakota but itself had no property within the state.[160] The North Dakota Supreme Court held that the company was nevertheless an in-state retailer for tax purposes.[161] The court analyzed developments in the US Supreme Court's procedural case law and recognized the obvious similarities between jurisdictional due process and the due process required for a state to impose tax obligations on a nonresident entity.[162] Quoting *Burger King*, it explained that the "inescapable fact of modern commercial life [is] that a substantial amount of business is transacted . . . across state lines, thus obviating the need for physical presence within a State."[163] It thus held that the Commerce Clause likewise did not bar enforcement of the North Dakota tax statute against the company for its mail-order sales.[164] Instead, the state court "note[d] the irony in [the company's] reliance upon the Due Process Clause and the Commerce Clause in seeking to maintain a tax-free mail order haven and thereby retain an economic advantage over its local competitors."[165] This echoed a common criticism of *National Bellas Hess*, which would go on to apply to *Quill* after its reversal by the Supreme Court. The North Dakota court got it right; however, its decision was short-lived.

---

160 *Id.* at 301–02.

161 State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 219 (N.D. 1991), *rev'd sub nom.* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

162 *See id.* at 212–14.

163 *Id.* at 213 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

164 *Id.* at 214–15.

165 *Id.* at 214. Variations on the tax-shelter argument are common in the line of cases that culminated in *Wayfair*. *See supra* note 147.

In *Quill*, the Supreme Court drew a strange dichotomy between the Due Process Clause and the Commerce Clause, holding that the nexus requirement of the former was not the same as the nexus requirement of the latter.[166] The Court was receptive to the North Dakota court's conclusion, largely predicated on *Burger King*, that the Due Process Clause did not bar the tax statute.[167] However, the Court then explained that the Commerce Clause addressed "structural concerns about the effects of state regulation on the national economy," and thus it protected an out-of-state seller from a requirement to collect a use tax.[168] Other than saying generically that the Commerce Clause prevents states from discriminating against or unduly burdening interstate commerce, the Court failed to explain how the North Dakota law did either.[169] Instead, it picked apart the state court's analysis and repeated that *National Bellas Hess* had not been reversed.[170] The Court invoked stare decisis, noted there were benefits to having a bright-line rule, even one it candidly described as "artificial at its edges,"[171] and then reaffirmed the need for a physical presence.[172]

Justice White concurred in part, agreeing that the Due Process Clause did not require a physical presence.[173] However, he strongly disagreed with the contention that the Commerce Clause necessitated a physical presence.[174] He was likewise unconvinced by the majority's stare decisis argument and argued that the doctrine should not protect "settled expectations" when those expectations are unreasonable.[175] Finally, he pointed out that a bright-line rule is multiplicative because it leads to

---

166 *Quill Corp.*, 504 U.S. at 312. This distinction is particularly inexplicable given that only a year earlier the Court had said: "The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the due process requirement that there be 'a "minimal connection" between the interstate activities and the taxing State.'" Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 373 (1991) (quoting Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 436–37 (1980)).

167 *Quill Corp.*, 504 U.S. at 308.

168 *Id.* at 312, 318.

169 *See id.* at 312.

170 *See id.* at 314–15.

171 *Id.* at 315, 317. Although bright-line rules in general are inherently clearer (hence "bright") and easier to implement, as Justice White's partial dissent shows, when invoking stare decisis, one's mileage may vary. *See id.* at 328–30 (White, J., concurring in part and dissenting in part) ("The majority clings to the physical-presence rule not because of any logical relation to fairness or any economic rationale . . . , but simply out of the supposed convenience of having a bright-line rule.").

172 *Id.* at 318 (majority opinion).

173 *Quill Corp.*, 504 U.S. at 321–22 (White, J., concurring in part and dissenting in part).

174 *See id.* at 323 ("The Court compounds its misreading [of *Complete Auto*] by attempting to show that *Bellas Hess* 'is not inconsistent with [that decision].' This will be news to commentators . . . ." (citation omitted)).

175 *See id.* at 331 (noting that it was "unreasonable for companies such as Quill to invoke a 'settled expectation' in conducting affairs without being taxed").

different outcomes depending on whether a company has a presence in a given buyer's location.[176] Although Justice White had catalogued the flaws in the majority's holding, *Quill* would stand for twenty-six years until *Wayfair*.

III. Reversing a Way [Un]fair Rule

Wayfair was born out of the 2015 case *Direct Marketing Ass'n v. Brohl*,[177] which was a challenge to a Colorado statute that required a noncollecting seller to inform buyers of the state's use tax and to send its customer list to the state.[178] The question before the Court was procedural and did not address the statute itself.[179] Justice Kennedy wrote a separate concurrence noting the "serious, continuing injustice faced by Colorado."[180] The injustice he was referring to was the inability of states to compel out-of-state merchants to collect taxes from in-state buyers, and he ascribed that harm to *Quill*.[181] He explained that as urgent as the need had been in 1992 to overturn the rule, it was even more pressing in 2015 due to the rapid growth of e-commerce.[182] Justice Kennedy then explicitly invited a fresh challenge to *Quill* and *National Bellas Hess*.[183] One year later, South Dakota RSVP'd.

In 2016, the South Dakota legislature passed a law requiring out-of-state sellers that met certain sales thresholds to collect and remit taxes on sales "as if the seller had a physical presence in the state."[184] The law further provided for expeditious review of a declaratory judgment action in state court and enjoined its own imposition while that action was pending.[185] The legislature explicitly tailored this statute for a challenge.[186] The South

---

176 *Id.* at 330.

177 135 S. Ct. 1124 (2015).

178 *Id.* at 1128.

179 *See id.* at 1127.

180 *Id.* at 1134 (Kennedy, J., concurring).

181 *Id.*

182 *See id.* at 1135.

183 *Direct Marketing Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring) ("The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.").

184 S.D. CODIFIED LAWS § 10-64-2 (2018).

185 *Id.* §§ 10-64-3 to -5.

186 In case it was unclear that this statute was designed to challenge *National Bellas Hess* and *Quill*, the legislative findings section of the law explicitly invoked the *Direct Marketing* concurrence. *See id.* § 10-64-1(7) ("As Justice Kennedy recently recognized in his concurrence in [*Direct Marketing*], the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax . . . .").

Dakota Supreme Court ruled that the law was unconstitutional, and the State petitioned the Supreme Court for review.[187]

The Court decided *Wayfair* in June 2018, overruling *Quill*'s Commerce Clause holding and the remaining half of *National Bellas Hess* along with it.[188] Writing for the majority, Justice Kennedy described the requirement of a physical presence as "artificial" and "anachronistic" and explained that the Court could no longer uphold a rule that had become "[e]ach year, . . . further removed from economic reality."[189] As the result of *Wayfair*, out-of-state sellers can meet the "substantial nexus" prong of the *Complete Auto* test.[190] The decision thus removed the Commerce Clause barrier to states imposing sales- or use-tax collection liabilities on nonresident sellers.[191]

The Court had long been reticent to apply a flexible conception of a nexus to its analyses of state tax laws, and its pre-*Wayfair*, borders-based tax decisions had only served to perpetuate the anomalous dichotomy between two legal realms. It was not until seventy-three years after embracing a flexible approach to personal jurisdiction that the Court—compelled by identical factors—finally freed the *Complete Auto* test's first prong from the formalistic presence requirement.

Previously, the not-so-long arm of the tax man could not reach outside the state. Now it can, but how far? The post-*Wayfair* limits on a state's authority to impose a collection liability have not been defined, and the door remains wide open for companies to challenge future laws as violating the Commerce Clause on some other ground.[192] This raises a difficult question: How can a court assess whether a "substantial nexus" exists when a state seeks to tax sales occurring beyond its borders?

---

187 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018) (explaining the case's procedural history).

188 *Id.* at 2099.

189 *Id.* at 2092, 2099.

190 *Id.* at 2099. News reports about *Wayfair* have been unclear about the exact holding, but that is the extent of the decision. *Compare* Joseph O'Sullivan & Benjamin Romano, *Impact of High Court's Online Sales-Tax Ruling Might Be Modest in Washington State*, SEATTLE TIMES (June 21, 2018), https://perma.cc/GH6B-462Y ("[S]tates can now collect sales taxes directly from sellers outside their borders . . . ."), *with Supreme Court Sales-Tax Ruling Could Mean $200M for Illinois*, U.S. NEWS & WORLD REP. (June 21, 2018), https://perma.cc/LY4Y-9DSA ("[The Court ruled] that retailers must collect sales tax from buyers in other states . . . ."). The former describes *Wayfair*'s implication, although it would be more accurate to say that sellers may now be compelled to collect the taxes on a state's behalf. *See Wayfair*, 138 S. Ct. at 2099. The latter article is inaccurate.

191 *See Wayfair*, 138 S. Ct. at 2099.

192 *Id.* ("The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the [South Dakota law].").

IV. *Zippo*: Civil Procedure's Answer to *Wayfair*'s Open Question

In the same way that courts must now address the interplay between e-commerce and state taxes, courts in the 1990s were forced to examine the extent to which they could exercise jurisdiction over out-of-state litigants as the internet permeated society and the economy.[193] The case *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[194] created a framework for assessing minimum contacts based on the extent of an electronically "present" defendant's interactions with a forum's residents.[195] *Zippo* was an early application of the principles laid out in *Burger King* to an online entity.[196] Almost all Circuit Courts of Appeals and many state courts have considered and embraced the *Zippo* analysis.[197] Because of the developmental parallels between the reach of personal jurisdiction and the reach of state taxes, courts can use a modified version of *Zippo*'s framework to examine a post-*Wayfair* substantial nexus.

A. *The* Zippo *Analysis*

The *Zippo* analysis arose out of an internet domain and trademark dispute between Zippo Manufacturing, maker of the iconic cigarette lighters, and Zippo Dot Com, Inc., an online news subscription service out of California.[198] Zippo Manufacturing sued Dot Com in the Western

---

193 *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 162 (D. Conn. 1996). *See generally* Jason H. Eaton, Annotation, *Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or Venue of, Federal Court Case*, 155 A.L.R. Fed. 535 §§ 2.5, 4 (1999).

194 952 F. Supp. 1119 (W.D. Pa. 1997).

195 *See id.* at 1124.

196 *See id.*

197 *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 470 (5th Cir. 2002) ("This circuit has drawn upon the approach of *Zippo* . . . in determining whether the operation of an internet site can support the minimum contacts necessary . . . ."); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) ("[W]e adopt today the model developed in *Zippo* . . . ."); Snowney v. Harrah's Entm't, Inc., 112 P.3d 28, 33 (Cal. 2005) ("To determine whether a Web site is sufficient to establish purposeful availment, we first look to the sliding scale analysis described in *Zippo* . . . ."). *But see* Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1355 n.10 (11th Cir. 2013) ("We conclude the traditional, three-prong test works just fine in this Internet case where the website was commercial and fully interactive."). Although the Eleventh Circuit declined in that instance to adopt the *Zippo* test, the case dealt with a "commercial and fully interactive" website. *Id.* This precluded the need for a test focused on those attributes. *Zippo Mfg.*, 952 F. Supp. at 1124. The Circuit has not expressly disavowed *Zippo* in the context it was designed for and has mentioned it only one other time. *See* Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1219 n.26 (11th Cir. 2009). In *Oldfield*, a panel "express[ed] no opinion as to [*Zippo*'s] applicability" but admitted that many other Circuits embraced it. *Id.* (listing cases).

198 *Zippo Mfg.*, 952 F. Supp. at 1120–21.

District of Pennsylvania, even though the online service had no offices or employees in the state.[199] Dot Com's only connections to the state were the three thousand Pennsylvanians who subscribed to its service and the seven internet providers it contracted with to facilitate access.[200] Dot Com moved to dismiss for lack of personal jurisdiction and improper venue.[201]

In denying the motion, the court synthesized the existing case law into a framework for analyzing forum contacts. It asserted that "[d]ifferent results should not be reached simply because the business is conducted over the internet."[202] It also noted that a court may properly exercise jurisdiction over an entity that "intentionally reaches beyond its boundaries to conduct business with foreign residents."[203] Translating this requirement from *Burger King*, the court explained that the key to the analysis is the extent to which a nonresident defendant electronically targets and interacts with the forum state's residents.[204]

The *Zippo* court explained that all electronic sites fall along an interactivity continuum for purposes of jurisdiction in personam over a defendant.[205] On one side are sites via which the defendant "clearly does business over the internet," as evidenced by a fully interactive, commercial electronic platform for transacting with residents of a forum state.[206] The court analogized this to "purposeful availment of doing business in [a state]," a presence that strongly supports jurisdiction.[207] On the opposite

---

199 *Id.* at 1121.

200 *Id.*

201 *Id.* (noting invocation of FED. R. CIV. P. 12(b)(2)–(3)).

202 *Id.* at 1124. The court did not cite an authority for this proposition, but the statement seems reasonable given that jurisdiction cases have emphasized "fair play." *E.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The same fairness principle has acted as a North Star, guiding the analyses of state commercial taxes even though the results had been questionable until *Wayfair*. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (noting it is "not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden" (quoting W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938))). The *Zippo* court's statement reinforces the similarities between civil procedure and state commercial taxes.

203 *Zippo Mfg.*, 952 F. Supp. at 1124 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

204 *Id.*

205 *Id.*

206 *Id.* at 1124–25.

207 *Id.* at 1125–26. The court used the "purposeful availment" language to emphasize how Dot Com's actions were an online corollary to choosing where to establish brick-and-mortar operations. *See id.* Purposeful availment, whether physically or electronically, is an important factor in determining personal jurisdiction that "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475 (first quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); then quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980)).

side of the continuum are "passive" websites.[208] If a defendant "does little more than make information available to those who are interested in it," that level of presence would not confer jurisdiction.[209] In the middle are companies with "interactive" online presences that allow a user to exchange information with the company.[210] Asserting jurisdiction over these companies requires "examining the level of interactivity and commercial nature of the exchange of information."[211]

The court found that Dot Com's site was on the interactive, commercial end of the spectrum because it was used to interface with customers in the state, collect their information, and sell thousands of subscriptions.[212] Dot Com's connection to the forum thus was not fortuitous—it had "[made] a conscious choice to conduct business with [Pennsylvania] residents."[213]

Having determined that Dot Com had sufficient contacts with the forum, the court then addressed the secondary question of whether the cause of action was the product of those contacts.[214] The court found that it was.[215] Zippo Manufacturing had sued Dot Com for trademark infringement and dilution in connection with its subscription service.[216] Thus the alleged harm occurred wherever there were subscribers, which included Pennsylvania.[217] In sum, Dot Com's forum contacts gave rise to the suit, so the court's exercise of personal jurisdiction was proper.[218]

B. *Adapting* Zippo *for Sales and Use Taxes*

The *Zippo* analysis resulted from a jurisdictional challenge,[219] so it requires some fine-tuning to adapt it to a sales- or use-tax context. However, with only slight changes it can be used to determine whether a "substantial nexus" exists for purposes of the *Complete Auto* test in cases dealing with the reach of tax collection liabilities. The "Tax *Zippo*" analysis

---

208 *Zippo Mfg.*, 952 F. Supp. at 1124.

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at 1126–27.

213 *Id.*

214 *Zippo Mfg.*, 952 F. Supp. at 1122–23; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (explaining that the cause of action must "arise out of or [be] connected with" the forum contacts).

215 *Zippo Mfg.*, 952 F. Supp. at 1127.

216 *Id.*

217 *Id.*

218 *Id.* at 1126–27.

219 *Id.* at 1121.

explained below reframes the original *Zippo* jurisdictional inquiry as a test to help courts decide whether a state may require a nonresident seller to collect taxes resulting from its sales into that state.

The most significant change concerns the degrees of interactivity in *Zippo*, which originally ranged from "passive" to "clearly do[ing] business."[220] Instead of focusing on "the level of interactivity and commercial nature of the exchange of information" happening via a website,[221] a court should analyze the extent to which a seller's online, commercial presence rises to a level of interactivity such that it "repeatedly and consciously" chooses to do business with the residents of a taxing state.[222] As with the traditional *Zippo* analysis, this is a sliding scale that depends on the level of commercial targeting and interaction with the forum.

The other change from the original framework is that the second step will usually require far less consideration in a Tax *Zippo* analysis. In *Zippo*, the court had to address whether Dot Com's electronic interactions caused a harm in Pennsylvania that gave rise to the suit.[223] This inquiry is less difficult in a tax context because the sale triggers the tax liability.[224] Another implication for the second step is that, when asking whether a company's actions give rise to a tax collection liability within the state, a court must be cognizant of which party actually bears the financial liability.[225] This is a change from *Zippo*, where Dot Com was the only party that could have been held accountable for the consequences of its own activities.[226]

The following subsections illustrate how a Tax *Zippo* analysis would work in various circumstances, first on the extreme ends of the spectrum and then in the middle.

---

220 *Id.* at 1124.

221 *Zippo Mfg.*, 952 F. Supp. at 1124.

222 *Id.* at 1126.

223 *Id.* at 1127. This framing was another instance of the court adapting the *Burger King* analysis to electronic commerce in the digital age. *See also supra* note 207.

224 Although the second factor is less likely to be at issue, it is not entirely vestigial in a Tax *Zippo* analysis. It may come into play in an instance where a state explicitly exempts a specific transaction from sales tax without specifying whether it is also exempt from use tax. This is a very real possibility because use tax statutes are often worded as broadly as possible to apply to sales escaping sales tax. *See, e.g.*, S.D. CODIFIED LAWS §§ 10-46-1(16) to (17), -2, -6 (2018) (imposing a use tax on the "exercise of right or power over" any "personal property that can be seen, weighed, measured, felt, or touched" that was not subject to sales tax). This would result in a statutory interpretation showdown between textualist and purposive construction.

225 This depends on how a state's statute is worded and on whether the state wants to extend its sales-tax collection liability or impose one for its use tax. *Compare id.* § 10-45-2 (sales tax is owed by merchant), *with id.* § 10-46-4 (use tax is owed by user of property, typically the buyer).

226 *See Zippo Mfg.*, 952 F. Supp. at 1127.

1. Pole to Pole

At one end of the spectrum are transactions in which the nonresident seller clearly and directly interacts with resident purchasers in commercial exchanges. One relevant example would be that of Wayfair itself, which has sizeable sales to South Dakotans.[227] This is an easy case under the Tax *Zippo* framework. The remote company is repeatedly and consciously interacting with the state's residents. This was what happened in the original *Zippo* case, and the court held that personal jurisdiction was proper.[228] Likewise, a Tax *Zippo* analysis of a large company's mass sales into a state evidences a "substantial nexus" between the nonresident seller and the state for purposes of the *Complete Auto* test's first prong.

On the opposite end of the Tax *Zippo* spectrum are sellers with infrequent sales to residents of the taxing state. One illustrative scenario is a single, untargeted transaction similar to the one in *Boschetto v. Hansing*.[229] In *Boschetto*, a Wisconsin car dealer listed a vintage automobile on eBay, and a California resident won the auction.[230] The vehicle was not as described, and the buyer filed suit in California.[231] The Wisconsin dealer moved to dismiss for lack of personal jurisdiction.[232] Using a *Zippo* analysis, the Ninth Circuit explained that any "contact" with the forum was transient and not part of a wider pattern of commercial activity.[233] Unlike the newsletter service in *Zippo*, which used its web presence to conduct ongoing business, the car dealer's only connection to California was that the purchaser happened to live there.[234] The connection was thus entirely fortuitous, meaning the lower court lacked jurisdiction.[235]

---

227 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018). The South Dakota statute would not apply until a company either made $100 thousand of sales or had at least 200 transactions within the state. *Id.* The opinion does not specify the company's total sales into the state, but it said that the company "easily meets the minimum sales or transactions." *Id.*

228 *Zippo Mfg.*, 952 F. Supp. at 1126, 1128.

229 539 F.3d 1011 (9th Cir. 2008).

230 *Id.* at 1014.

231 *Id.* at 1015.

232 *Id.*

233 *Id.* at 1018. The panel noted that the eBay post was a temporary advertisement that "closed once the item was sold, thereby extinguishing the Internet contact . . . within the forum." *Id.* This is a far cry from a company using its website to sell goods into a state repeatedly.

234 *Id.* at 1019.

235 *Boschetto*, 539 F.3d at 1020; *see also id.* at 1022 (Rymer, J., concurring) (characterizing as a "fortuity" the fact that "a Californian ultimately made the highest of fifty bids"); *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (holding that an Oklahoma court did not have jurisdiction over a nonresident car dealer solely from "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma").

Now consider a court having to determine whether California may require a nonresident seller to collect and remit a California buyer's use tax on an isolated eBay sale. The court can use the Tax *Zippo* approach to determine whether the requisite nexus exists by analyzing the level of interaction between the nonresident seller and a resident who owes use tax. In the same way that the *Zippo* analysis showed that an isolated eBay sale did not subject a Wisconsin seller to jurisdiction in California, a Tax *Zippo* analysis shows that there is not a "sufficient nexus" to justify a tax collection requirement for two reasons: First, the one-time sale was not part of a "repeated and conscious" course of sales conduct. A single sale transpired, after which all connection between the seller and a resident of the taxing state ended. Second, the seller had not targeted the buyer's state by simply posting an item on eBay for all the world to see and thus did not have clear notice that it would be subjecting itself to a that state's taxing regime.[236] The only connection between the remote seller and the resulting use tax owed by the buyer is the fact that the buyer happens to live in the state. In the same way that it was unreasonable to hale a Wisconsin seller into a California court because of a single transaction, it would be likewise unreasonable to impose a collection liability in the absence of ongoing sales activity.

2. Navigating the Middle Ground and Drawing the Line

As with any other analysis that classifies objects across a spectrum, drawing a line somewhere in the space between the two poles is not an exact science. In *Zippo*, the court explained that the area between the two extremes was inhabited by "interactive" websites that do not explicitly reach out and target the forum state's residents.[237] Those necessitate a case-by-case analysis of the nature of the interaction to determine whether personal jurisdiction would comport with due process.[238] A similar analysis is needed in cases where a state seeks to impose a collection liability on a seller that does not repeatedly or consciously target that state. The typical inhabitant of the Tax *Zippo* spectrum's middle ground is a small business. Whether or not a state may impose a tax collection liability on that business depends on the extent of its sales into the state.

---

[236] *Cf.* Interactive Life Forms, LLC v. Weng, No. A-12-CA-1182-SS, 2013 WL 12116148, at *4 (W.D. Tex. Apr. 8, 2013) ("To hold general jurisdiction exists [merely because a website could be accessed from within the forum] would be to sacrifice the entire doctrine at the altar of the World Wide Web.").

[237] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[238] *See id.*

The analysis requires determining when the interactions of a nonresident merchant with its customers residing in a state become "repeated and conscious." This is just as much a question of public policy and economics as it is a question of law. The Commerce Clause and its "dormant" counterpart[239] both remain very much in effect: Congress controls the domain of interstate commerce, which states may not impermissibly burden.[240] So to the extent that states may impact interstate commerce, they do so in the context of their own internal affairs.[241]

States have always had to weigh the costs and benefits of use-tax enforcement, and they likely figured out long ago that compliance is low while enforcement costs are high.[242] Common sense says that the minimum dollar amount worth chasing after is different in South Dakota than in New York.[243] As explained in *Wayfair*, South Dakota requires nonresident sellers to collect sales tax if they generate over $100 thousand of revenue from, or make 200 or more sales to, South Dakota buyers.[244] The state thus views the tax on those sales to be worth their administrative cost to impose.[245] The factors that supported drawing the line in the sand where it was drawn were (and are) best left to the value judgments of South Dakotans and their elected lawmakers.

The law challenged in *Wayfair* contained legislative findings detailing the reasons why the state sought to reach beyond its borders.[246] It noted that the inability to compel sellers to collect sales tax was "seriously eroding [South Dakota's] sales tax base" and causing "imminent harm to th[e] state through the loss of critical funding for state and local

---

239 *See generally supra* note 124.

240 Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996); *see also* Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) ("It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce.").

241 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

242 *See* MANZI, *supra* note 1, at 4; U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-114, SALES TAXES: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 5 (2017).

243 There are many region-specific reasons why this is the case. One factor that will almost always play into the calculus is population density. Consider this: the population density of New York County (i.e., Manhattan) is over 150 thousand times that of Harding County, SD. *Compare New York Population 2020*, WORLD POPULATION REV., https://perma.cc/XYK9-WSH7 (71,888.85 people per square kilometer), *with South Dakota Population 2020*, WORLD POPULATION REV., https://perma.cc/MZ3A-SUCN (0.47 people per square kilometer). From a tax-collection standpoint, just getting from one person to the next entails a completely different level of effort.

244 S.D. CODIFIED LAWS § 10-64-2 (2018); *see also Wayfair*, 138 S. Ct. at 2089.

245 This equals $4,500, based on the revenue minimum ($100 thousand) and the state's sales tax (4.5%). *See* S.D. CODIFIED LAWS §§ 10-45-2, -64-2 (2018).

246 *See id.* § 10-64-1.

services."[247] The damage was exacerbated by the fact that the state had no income tax.[248] There are any number of reasons why a state may choose to impose a personal income tax with no sales tax,[249] a sales tax with no personal income tax,[250] or any other combination of taxes and exemptions. The particular combination chosen depends on what that state's legislature desires and how it goes about achieving those ends. States, therefore, need to make their own decisions about the point where a handful of sales transforms into ongoing commercial activity. This does not mean that any amount that a state picks is necessarily allowable under the Commerce Clause. The threshold chosen will inform the first prong of the *Complete Auto* analysis, but it must still pass muster with the second (fair apportionment), third (nondiscriminatory), and fourth (fair relation to state services) prongs of the analysis.[251]

C. *The Limits of Tax* Zippo

As this Comment has said numerous times, Tax *Zippo* is a framework. In holding that the South Dakota statute did not violate the Commerce Clause for want of a physical presence, *Wayfair* removed the second of the two roadblocks created by *National Bellas Hess* in the same way that *Quill* had removed the first obstacle twenty-six years earlier. *Wayfair* suggests that a state in some instances may require nonresident sellers to collect sales or use taxes on sales made to residents.[252] However, the Court made clear that the *Complete Auto* standard remains good law, so its four factors still constrain any state that imposes a collection liability on nonresident sellers.[253]

States are going to extend collection liabilities for sales and use taxes as far beyond their borders as they are constitutionally permitted. This is simple economics; the states have everything to gain and nothing to lose. The Tax *Zippo* framework is a useful tool to help courts gauge whether or not a "substantial nexus" exists between a nonresident seller and a state. Analyzing cases within the framework will result in courts upholding collection liabilities where public policy suggests they are warranted. The situation in *Wayfair* was one such example. The company had happily

---

247 *Id.* § 10-64-1(1).

248 *Id.* § 10-64-1(2).

249 *E.g.*, DEL. CODE ANN. tit. 30, § 1105 (2018).

250 *E.g.*, FLA. STAT. § 212.05 (2018).

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

252 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

253 *See id.*

exploited[254] a "judicially created tax break"[255] to the detriment of South Dakota.[256] On the other side of the spectrum, a Tax *Zippo* analysis will rein in an overzealous taxing authority. Allowing a state's reach to go too far carries its own set of risks, and a person should not have to fear fifty possible tax schemes simply because he wants to sell his Pet Rock on eBay.

As argued above, Tax *Zippo* shows its utility when applied to a specific state. It borrows a widely accepted test from a familiar area of law and uses it to answer the logical next question after *Wayfair*. The analysis will work well in the microcosm of state tax law. That said, the framework does have its limits. It cannot resolve the yet-to-be-discovered consequences of the *Wayfair* decision. What will be the legal and economic ramifications of every state and locality with its own sales tax piling onto the collection fray? Many established small-to-medium-sized businesses with enough sales to trigger collection liabilities in multiple states have nowhere near the legal or accounting resources needed to navigate the thousands of state and local tax regimes they may qualify under each year.[257]

Learned minds certainly differ in their predictions about whether this will be a big problem or much ado about nothing.[258] What is nonetheless true, as explained in *National Bellas Hess*, is that "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements."[259] Tax *Zippo* is a tool judges can use to address individual instances of state tax regimes imposed on specific vendors. The legal and economic guidance that may soon be needed by businesses, trade organizations, administrative agencies, and legislators alike must come from elsewhere.

---

254 *See id.* at 2096 ("Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that '[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'" (alteration in original) (quoting Brief for Petitioner at 55, *Wayfair*, 138 S. Ct. 2080 (No. 17-494))).

255 *Id.* at 2100 (Gorsuch, J., concurring).

256 *See* S.D. CODIFIED LAWS § 10-64-1 (2018).

257 *See* Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992) (noting that there are thousands of discrete taxing jurisdictions in the United States).

258 *Compare Wayfair*, 138 S. Ct. at 2103 (Roberts, C.J., dissenting) ("The Court . . . breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers."), *with* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 766 (1967) (Fortas, J., dissenting) ("[T]he Court's response that these administrative and record keeping requirements could 'entangle' appellant's interstate business in a welter of complicated obligations vastly underestimates the skill of contemporary man and his machines.").

259 *Nat'l Bellas Hess*, 386 U.S. at 760.

Conclusion

At first blush, personal jurisdiction and state sales taxes may seem to be unrelated, but they are actually much more alike than not. In the same way that a state's long-arm statute is bounded by the Due Process Clause and requires minimum contacts, a state's taxing authority can only reach as far as minimum connections and the Commerce Clause allow. The considerations that drove the evolution of the former applied just the same to the latter. The tax realm may have taken decades longer to develop, but it nonetheless followed the same path as civil procedure. At the end of the day, both areas of the law hinge on whether there is a nexus connecting a party, a place, and an obligation.

The rule requiring a physical presence was accurately described in *Quill* as "artificial at its edges."[260] As *National Geographic* demonstrated, courts construed the presence requirement in ways that made little sense. In holding that the Commerce Clause does not require a physical presence to establish a tax nexus, *Wayfair* broke through the remaining barrier that had prevented states from holding remote merchants to the same standards as local ones. However, *Wayfair* alone is not a panacea that negates every legal sticking point when applying a tax-collection statute to nonresident sellers. The Court opened the door to future challenges under the Commerce Clause without providing guidance on how to resolve them.[261] The four-pronged test from *Complete Auto* remains intact after *Wayfair*, that much is clear.[262] But what constitutes a "substantial nexus" for purposes of a *Complete Auto* analysis has yet to be determined.

In the 1990s, courts had to wrangle with questions about how to apply personal jurisdiction rules to internet-based defendants. *Zippo* laid out a framework that has been widely embraced across the country. Given the similarities in personal jurisdiction and the reach of state sales taxes, it is only natural for the latter to continue to follow in the former's footsteps. Now, twenty-one years after *Zippo* brought *International Shoe* and *Burger King* into the digital age, it can do the same for *Complete Auto*. Tax *Zippo* gives courts a familiar framework to use when assessing whether the long arm of the tax man has reached too far.

---

260 *Quill Corp.*, 504 U.S. at 315.

261 *See Wayfair*, 138 S. Ct. at 2099.

262 *See id.*