FEDERALISM — DORMANT COMMERCE CLAUSE — SOUTH DAKOTA SUPREME COURT HOLDS UNCONSTITUTIONAL STATE LAW REQUIRING INTERNET RETAILERS WITHOUT IN-STATE PHYSICAL PRESENCE TO REMIT SALES TAX. — *State v. Wayfair Inc.*, 2017 SD 56, 901 N.W.2d 754 (S.D. 2017), *cert. granted*, 138 S. Ct. 735 (2018).

The U.S. Supreme Court has long interpreted the dormant commerce clause[1] to prohibit states from imposing an obligation to collect and remit sales and use taxes[2] on vendors that lack a physical presence in the state.[3] The Court affirmed this rule in *Quill Corp. v. North Dakota*,[4] in which it found that the costs to interstate entities of complying with multiple state and local tax collection and remission systems "might unduly burden interstate commerce"[5] and therefore justified a "bright-line rule" against such state tax requirements.[6] However, in the twenty-six years that have elapsed since *Quill*, the growth of e-commerce has diverted significant business from brick-and-mortar stores to their virtual competitors,[7] reducing the sales tax revenue available to states.[8] As a consequence, thirty-two states have resisted the *Quill* rule via legislation, regulation, and litigation.[9] Recently, in *State v. Wayfair Inc.*,[10] the South Dakota Supreme Court held that a state law requiring some internet retailers with no physical presence in the state to collect and remit sales taxes at rates equivalent to in-state vendors

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[1] The dormant commerce clause is the "negative implication" derived from the Commerce Clause establishing that states may not "impos[e] discriminatory or unduly burdensome laws on interstate commerce." Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803, 1808 (2012) (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 17 (1824)).

[2] A consumer sales tax is "a levy imposed on the purchaser's use or consumption of the item sold" by the state of transaction at the point of sale. JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 12.01 (3d ed.), Westlaw (database updated Dec. 2017). The burden of paying falls on the consumer; the burden of remitting rests on the retailer. *See id*. In contrast, a use tax is a tax owed to the state in which a consumer enjoys an item purchased in another state. *Id*. ¶ 16.01. The consumer both pays and remits the revenue. *Id*.

[3] *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 759–60 (1967), *overruled in part by* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[4] 504 U.S. 298.

[5] *Id.* at 313 n.6.

[6] *Id.* at 317.

[7] U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, E15-ESTATS, E-STATS 2015: MEASURING THE ELECTRONIC ECONOMY 1 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/econ/e15-estats.pdf [https://perma.cc/3YTK-SXE7].

[8] Alana Semuels, *All the Ways Retail's Decline Could Hurt American Towns*, THE ATLANTIC (May 23, 2017), https://www.theatlantic.com/business/archive/2017/05/retail-sales-tax-revenue/527697/ [https://perma.cc/DA79-8A5F].

[9] *See* Brief of Tax Foundation as Amicus Curiae in Support of Petitioner at 5–16, South Dakota v. Wayfair, Inc., 138 S. Ct. 735 (2018) (No. 17-494) (cataloguing states' use of various tools to circumvent or openly flout the *Quill* rule).

[10] 2017 SD 56, 901 N.W.2d 754 (S.D. 2017), *cert. granted*, 138 S. Ct. 735 (2018) (mem.).

contravened *Quill*.[11] *Wayfair* illustrates the flaws that make the *Quill* rule impractical in the era of e-commerce. But when the Supreme Court revisits the doctrine this Term, the Court's limited institutional capacity to design an alternative to *Quill* indicates that it should provide only a conservative revision. The Court should leave the task of crafting a nuanced solution to the increasingly complex problem of physical-presence nexus to Congress.

In 2016, the South Dakota Legislature passed Senate Bill 106[12] (S.B. 106), a law extending the obligation to collect and remit sales taxes to sellers of "tangible personal property" without any physical presence in the state.[13] S.B. 106 expanded this duty only to remote sellers that either earned "gross revenue" of more than $100,000 per calendar year from sales to South Dakota residents or businesses, or completed over two hundred "separate transactions" in the state in the same period.[14] The text of S.B. 106 made clear that the Legislature specifically designed it to challenge the *Quill* doctrine.[15] The bill directly referenced Justice Kennedy's concurring opinion in *Direct Marketing Ass'n v. Brohl*,[16] the last occasion on which the Supreme Court discussed the rule. Justice Kennedy questioned the enduring validity of *Quill*, observing that a retailer "doing extensive business within a State" may well have a sufficient nexus "to justify imposing some minor tax-collection duty"; he called for a test case in which the Court might reconsider the rule.[17] To meet this call to action, S.B. 106 allowed the state to bring a declaratory judgment action against retailers thought to meet the law's criteria for collection and remission in its courts of appeals to facilitate a speedy review.[18]

Soon after S.B. 106 was signed into law, retailers believed to meet its criteria received written notices from the South Dakota Department of Revenue informing them of the deadline to register for state sales tax licenses.[19] Wayfair Inc., Overstock.com, Inc., and Newegg Inc. received notices but did not register for sales tax licenses.[20] Pursuant to S.B. 106, the State filed a declaratory judgment action against the retailers in South Dakota's Sixth Judicial Circuit Court.[21] The sellers filed a motion

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[11] *Id.* ¶ 1, 901 N.W.2d at 756.

[12] S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016) (codified at S.D. CODIFIED LAWS § 10-64 (2017)).

[13] *Id.* § 1.

[14] *Id.*

[15] *Id.* § 8 ("[T]he Supreme Court . . . should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax . . . .").

[16] 135 S. Ct. 1124 (2015); *see* S.B. 106 § 8.

[17] *Direct Mktg.*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

[18] S.B. 106 § 2.

[19] *Wayfair*, 2017 SD 56, ¶ 9, 901 N.W.2d at 759.

[20] *Id.*

[21] *Id.*

for summary judgment, admitting that they each met S.B. 106's economic-nexus threshold but raising the affirmative defense of S.B. 106's unconstitutionality under *Quill*.[22] The State agreed both with the sellers' presentation of the material facts and that *Quill* bound the lower court to grant the motion for summary judgment — but nonetheless pursued the case in the hope that *Quill* would be overruled.[23] In a brief order, Judge Barnett of the Sixth Judicial Circuit of South Dakota found himself "duty bound" to follow *Quill* as U.S. Supreme Court precedent and granted the retailers' motion for summary judgment.[24] He enjoined the State from enforcing S.B. 106 against remote sellers.[25]

The South Dakota Supreme Court affirmed. Writing for a unanimous court, Justice Severson[26] concluded that S.B. 106 "could not impose a valid obligation on [the retailers] to collect and remit sales tax to [the] State because," although they met the remission criteria of the law, "none of them had a physical presence in the state."[27] He recounted the history of the *Quill* doctrine, beginning with the 1967 U.S. Supreme Court decision in *National Bellas Hess, Inc. v. Department of Revenue*[28] that prohibited the state of Illinois from imposing an obligation to collect and remit use tax on a seller whose "only contacts with [the] state were by mail or common carrier."[29] The *Bellas Hess* Court reasoned that the Commerce Clause grants Congress "exclusive authority"[30] to regulate interstate commerce with the purpose of "ensur[ing] a national economy free from . . . unjustifiable local entanglements."[31] Obligating interstate retailers to comply with myriad reporting and remission requirements would unduly burden interstate commerce; the dormant commerce clause therefore committed taxation of such entities to Congress alone.[32] Justice Severson recalled the Supreme Court's affirmation in *Quill* of *Bellas Hess*'s bright-line rule against imposing state and local sales taxes on interstate retailers without physical presence.[33] He emphasized that the *Quill* Court recognized the discontinuities between the *Bellas Hess*

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[22] *Id.* ¶ 11, 901 N.W.2d at 759–60.

[23] *Id.* ¶ 11, 901 N.W.2d at 760.

[24] State v. Wayfair Inc., No. 32CIV16-000092, 2017 WL 4358293, at *1 (S.D. Cir. Ct. Mar. 6, 2017). Judge Barnett did not hold a hearing, as the parties had agreed that no hearing was necessary. *Id.*

[25] *Id.* at *2.

[26] Justice Severson was joined by Chief Justice Gilbertson, Justices Zinter and Kern, and retired Justice Wilbur.

[27] *Wayfair*, 2017 SD 56, ¶ 15, 901 N.W.2d at 760.

[28] 386 U.S. 753 (1967).

[29] *Wayfair*, 2017 SD 56, ¶ 2, 901 N.W.2d at 756.

[30] *Id.* (quoting *Nat'l Bellas Hess*, 386 U.S. at 756).

[31] *Id.* ¶ 2, 901 N.W.2d at 757 (omission in original) (quoting *Nat'l Bellas Hess*, 386 U.S. at 760).

[32] *Id.*

[33] *Id.* ¶ 3, 901 N.W.2d at 757.

rule and later dormant commerce clause cases concerning other taxes.[34] Despite these shifts, *Quill* followed *Bellas Hess* because it "encourage[d] settled expectations and . . . foster[ed] investment by businesses and individuals."[35]

Justice Severson acknowledged obstacles raised by the *Quill* doctrine in the contemporary context. He first situated the origins of both S.B. 106 and the State's contention that the litigation was intended to generate a *Quill* test case in the language of Justice Kennedy's concurrence in *Direct Marketing*.[36] He also noted that Justice Kennedy in fact "recognized many of the State's arguments supporting reconsideration" of the bright-line rule.[37] Justice Severson further bolstered the legal pedigree of the State's anti-*Quill* stance, tracing its key elements back to the dissenting opinions in *Bellas Hess* and *Quill*.[38] He hinted at the potential for future doctrinal evolution, observing that then-Judge Gorsuch had expressed similar qualms before joining the Supreme Court.[39]

However, Justice Severson remained "mindful of the Supreme Court's directive to follow its precedent when it 'has direct application in a case.'"[40] The court, cognizant of its position in the judicial hierarchy and unable to identify any distinction between the collection obligation at issue in *Quill* and that created by S.B. 106, followed the "controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes."[41] S.B. 106, a law clearly impermissible under *Quill*, could not be constitutional. The South Dakota Supreme Court consequently held that the circuit court "correctly applied the law" by granting the retailers' motion for summary judgment.[42] The U.S. Supreme Court granted certiorari.[43]

The court's injunction against S.B. 106, by deferring to clearly controlling Supreme Court precedent, necessarily could not account for the pragmatic difficulties of using physical-presence nexus to assess the extent of seller contact in light of the technological and economic transformations of recent decades. But the formalistic approach to nexus enshrined in the *Quill* rule cuts against economic reality: post-*Wayfair*, an

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[34] *Id.*; *see, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). *Complete Auto* and its successor cases employed a four-prong test to assess nexus, in contrast to the bright-line *Quill* approach. *See Complete Auto*, 430 U.S. at 279.

[35] *Wayfair*, 2017 SD 56, ¶ 3, 901 N.W.2d at 757 (alterations and omission in original) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 316 (1992)).

[36] *Id.* ¶¶ 16–17, 901 N.W.2d at 761.

[37] *Id.* ¶ 17, 901 N.W.2d at 761.

[38] *Id.*; *see also* Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 760–66 (1967) (Fortas, J., dissenting); *Quill*, 504 U.S. at 321–33 (White, J., concurring in part and dissenting in part).

[39] *Wayfair*, 2017 SD 56, ¶ 17, 901 N.W.2d at 761 (citing Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1147–51 (10th Cir. 2016) (Gorsuch, J., concurring)).

[40] *Id.* ¶ 18, 901 N.W.2d at 761 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

[41] *Id.*

[42] *Id.* ¶ 15, 901 N.W.2d at 761.

[43] South Dakota v. Wayfair, Inc., 138 S. Ct. 735 (2018) (mem.).

in-state retailer that completes a single transaction in South Dakota has sufficient nexus to be subject to the collection and remission obligation, while an out-of-state retailer that completes two hundred or more transactions does not. *Wayfair* clearly demonstrates the *Quill* rule's doctrinal and policy shortcomings, but the question of institutional capacity surrounding any refashioning of the bright-line physical-presence doctrine suggests that the Supreme Court should take an incremental approach to revising it. As it revisits *Quill* this Term, the Court should align the nexus rule for remote-sales taxation with the more flexible economic-nexus standard already used in related contexts.

In the internet economy, physical presence alone is both over- and underinclusive as a legal standard. It is overinclusive of business entities with very limited physical contact within the state and underinclusive of businesses whose models do not happen to require brick-and-mortar presence. *Wayfair* shows that even internet retailers completing hundreds of transactions generating thousands of dollars in revenue and therefore availing themselves of state infrastructure and amenities are beyond the reach of physical-presence nexus,[44] but an out-of-state entity's decision to employ even a handful of in-state individuals legitimizes local tax obligations.[45] *Quill*, a rule that is blind to this disparity, is a doctrinal outlier: the Supreme Court has developed more responsive frameworks when considering other forms of taxation, such as business and occupation taxes for out-of-state entities.[46] In this analogous context, the test for nexus is a flexible balancing model that examines "whether the activities performed in [the] state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in [the] state for the sales."[47] Nexus is bolstered if some meaningful physical presence is established,[48] but slight physical presence alone is neither necessary nor sufficient.[49] The Court grounds

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[44] *Wayfair*, 2017 SD 56, ¶¶ 14–18, 901 N.W.2d at 760–61.

[45] *See* Haile, *supra* note 1, at 1804.

[46] *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 250 (1987); Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560, 561–63 (1975). The Court also looks to economic nexus when analyzing the validity of corporate income, franchise, and capital stock taxes. *See* Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 6–10, 19–23 (2008). Nexus in the personal jurisdiction context, a constitutional due process issue, is distinct from tax nexus, a dormant commerce clause question subject to legislative revision. Though *Bellas Hess* recognized both as obstacles to remote-sales taxation, 386 U.S. 753, 756–57 (1967), *Quill* removed the due process barrier to modification of the tax-nexus standard, leaving Congress free to act, 504 U.S. 298, 308 (1992).

[47] *Tyler Pipe*, 483 U.S. at 250 (quoting Tyler Pipe Indus., Inc. v. State Dep't of Revenue, 715 P.2d 123, 126 (Wash. 1986)).

[48] *See, e.g.*, Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977) (affirming a state court's finding of nexus where a company had two in-state offices and carried out substantial advertising in the state through its employees).

[49] *See id.*

nexus in some economic activity of the entity, such as the cultivation of "market share" and "goodwill"[50] or "the realization and continuance of valuable contractual relations."[51]

Besides creating problems of over- and underinclusion, the *Quill* rule has growing consequences for states: in 2018, states' inability to tax retailers without physical presence will result in $34 billion in lost state tax revenue, a number projected to reach $52 billion annually by 2022, compared to an estimated loss of up to $3 billion per year when *Quill* was decided.[52] These projections may fall short of capturing the total revenue that would be lost to the *Quill* rule, as e-commerce is growing at a rate of "23% year-over-year," a pace expected to accelerate as the digital retail landscape continues to evolve.[53] By 2022, online sales will represent 17% of all U.S. retail sales, compared to 12.7% in 2017.[54] Yet the *Quill* rule, because it denies states the ability to impose collection responsibilities on remote sellers, approximates a constitutional requirement for states to provide an advantage to these entities. It virtually ensures that purchases made online appear to be tax-free, incentivizing consumers to prefer e-commerce.[55] A number of states attempt to mitigate their losses by imposing equivalent use taxes that consumers must pay to the state if the retailer does not remit sales taxes.[56] But use tax compliance rates are low,[57] and *Bellas Hess*, a case about a state use tax, forecloses the possibility of states placing collection and remission obligations on out-of-state vendors.[58] Consequently, many online transactions are tax-free in effect as well as appearance.

In addition to its fiscal impact, physical-presence nexus also undermines the traditional goals of dormant commerce clause limits: to curb

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[50] *Tyler Pipe*, 483 U.S. at 249 (quoting *Tyler Pipe*, 715 P.2d at 127).

[51] *Standard Pressed Steel*, 419 U.S. at 562.

[52] David J. Herzig, Opinion, *States Pay the Price when You Buy Online*, N.Y. TIMES (Jan. 1, 2018), https://nyti.ms/2DLJhbT [https://perma.cc/XZ5Z-7Q64].

[53] Tom Popomaronis, *E-Commerce in 2018: Here's What the Experts Are Predicting*, FORBES (Dec. 15, 2017, 1:40 PM), https://www.forbes.com/sites/tompopomaronis/2017/12/15/e-commerce-in-2018-heres-what-the-experts-are-predicting [https://perma.cc/923F-SV5P].

[54] Daniel Keyes, *E-Commerce Will Make Up 17% of All US Retail Sales by 2022 — And One Company Is the Main Reason*, BUS. INSIDER (Aug. 11, 2017, 11:12 AM), http://www.businessinsider.com/e-commerce-retail-sales-2022-amazon-2017-8 [https://perma.cc/K42B-8KEL].

[55] Edward A. Zelinsky, *The Political Process Argument for Overruling* Quill, 82 BROOK. L. REV. 1177, 1196 (2017); *see also* Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. MARKETING RES. 229, 236–37 (2010) (finding that online retailers not required to collect and remit sales tax in a customer's state of residence experienced a significant benefit from appearing to offer tax-free transactions).

[56] HELLERSTEIN ET AL., *supra* note 2, ¶ 16.01.

[57] John L. Mikesell, *The Future of American Sales and Use Taxation*, *in* THE FUTURE OF STATE TAXATION 15, 29 (David Brunori ed., 1998).

[58] Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 758 (1967).

protectionist impulses,[59] promote the creation of a single common market,[60] and encourage economic integration.[61] The *Quill* rule works against these objectives by encouraging interstate companies to concentrate in as few states as possible to avoid incurring additional obligations to collect sales taxes.[62] This practical consideration undercuts *Quill* on doctrinal grounds: the *Quill* Court adopted the *Bellas Hess* Court's justification of the bright-line rule that, in answering the question of when a state can burden interstate commerce, physical presence stands as a proxy for the balance of compliance burdens from tax obligations against benefits received from state protection and services.[63] *Bellas Hess* and *Quill* concluded that the proper balance weighed in favor of reducing retailers' burden in light of the minimal sales conducted by remote sellers.[64] This determination of the balancing merits loses force in "an economy that no longer connects vendors and consumers via physical contact."[65] Though *Bellas Hess* and *Quill* assume that remote sellers do not enjoy the benefits of state services, in fact, like their brick-and-mortar counterparts, remote sellers use state and local law enforcement, transportation infrastructure, and other amenities.[66]

The Supreme Court should bring its sales and use tax doctrine into alignment with its business and occupation tax model,[67] but go no further. The business and occupation tax cases' blended physical- and economic-nexus test would offer the benefits of predictability and settlement that advocates of the *Quill* rule fear will be lost in a new regime.[68] Today, when the relevant questions involve e-commerce, the reliance interests on which the *Quill* Court based its decision do not raise

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[59] *See* Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 340 (1992).

[60] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978).

[61] *See* Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). Loosening the *Quill* constraints would not implicate these goals: the unity aims have been largely achieved in the interconnected modern economy, while the concern for states acting on protectionist impulses is less salient in this context because states' motives are generally to profit from new revenue rather than to protect local businesses. *See* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2602–04 (2005); Molly Schneider, Note, Quill*'s Call to Action: Will Congress Update Commerce Clause Nexus Requirements in Light of Cloud Computing?*, 40 HASTINGS CONST. L.Q. 903, 912–13 (2013).

[62] Herzig, *supra* note 52; *see also* Super, *supra* note 61, at 2604.

[63] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 317 (1992); *Nat'l Bellas Hess*, 386 U.S. at 756–57. Notably, the burdens imposed on retailers would be only those of collection and remission; consumers would pay the tax itself.

[64] *See Quill*, 504 U.S. at 314–15; *Nat'l Bellas Hess*, 386 U.S. at 758.

[65] William F. Fox, *Can the State Sales Tax Survive a Future Like Its Past?*, *in* THE FUTURE OF STATE TAXATION, *supra* note 57, at 33, 41.

[66] *See* Herzig, *supra* note 52; *cf.* Julie Jargon et al., *For Amazon, Now Comes the Hard Part*, WALL ST. J. (June 18, 2017, 7:07 PM), http://on.wsj.com/2rM5dot [https://perma.cc/AVC8-3A7Y].

[67] A shift to the business and occupation tax model would mark a return to the Court's pre–*Bellas Hess* approach to sales and use tax cases. *See, e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960) (using the "nature and extent of the [in-state] activities" of an interstate entity to assess nexus).

[68] *See, e.g.*, David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 512 (2012).

the same concerns. E-commerce is now so embedded in the national economy that the obligation to collect and remit is unlikely to threaten the vitality of the industry.[69]

Wayfair provides an opportunity for the Supreme Court to reconsider a formalistic, bright-line rule that is increasingly in tension with economic reality and bring it in line with related areas of precedent. If the Court loosens the strictures of physical-presence nexus by moving toward the economic-nexus standard, experimentation by the states will produce myriad models of assessing nexus to inform future deliberation.[70] Should eventual developments in the economic and technological landscapes prove the economic-nexus approach unworkable, Congress can and should enact a more comprehensive national policy for state taxation of remote sellers.[71] This was the solution urged by the *Quill* Court, which chose to maintain the settled *Bellas Hess* rule in part because the problem of remote-sales taxation is one "that Congress may be better qualified" and "has the ultimate power" to settle.[72] Congress has already attempted to pass legislation modifying or overturning the *Quill* rule.[73] Though it is possible that Congress will continue to fail to pass post-*Quill* legislation,[74] the collection and remission obligations that internet and mail-order retailers would most likely face should the Court modify or abrogate the existing standard might incentivize them to support federal legislation creating national standards in order to ease their compliance burdens, marking a shift in the political landscape to this point.[75] The Court should abrogate the *Quill* rule in favor of economic nexus for remote sellers, avoiding risky innovation with the knowledge that Congress remains free, as it has been since 1992, to establish a sound national policy for remote-sales taxation.

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[69] *See* Super, *supra* note 61, at 2604.

[70] *See* Zelinsky, *supra* note 55, at 1211–13.

[71] Generally, Congress can overturn or modify the Supreme Court's dormant commerce clause decisions. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982).

[72] Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

[73] To date, these efforts have not yielded successful legislation. *See, e.g.*, Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017); Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013); Sales Tax Fairness and Simplification Act, S. 34, 110th Cong. (2007); *see also* Michael J. Payne, Comment, *Selling the Main Street Fairness Act: A Viable Solution to the Internet Sales Tax Problem*, 44 ARIZ. ST. L.J. 927, 940–43 (2012) (describing earlier efforts at legislative reform).

[74] *See* Zelinsky, *supra* note 55, at 1178–79 (describing the political advantages of internet and mail-order retailers in lobbying Congress in contrast to the barriers to effective state activism).

[75] *See id.* at 1178 (noting that, currently, e-commerce actors are "defenders of the status quo," advocating against any legislation that would abrogate the *Quill* rule).