

3-3-2020

There Must Be a Better Way: Analyzing Louisiana's Sales Tax System in the Wake of *South Dakota v. Wayfair, Inc.*

Claire E. Schnell

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There Must Be a Better Way: Analyzing Louisiana’s Sales Tax System in the Wake of *South Dakota v. Wayfair, Inc.*

Claire E. Schnell*

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* J.D./D.C.L. Candidate 2020, Paul M. Hebert Law Center, Louisiana State University. I would like to thank my parents for their unending love and support in every endeavor I undertake, including this paper. I would also like to thank Matthew Juneau for introducing me to this paper’s important topic. Finally, I would like to thank Professor John Devlin and the Volume 79 Board of Editors for their guidance throughout the writing process.

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INTRODUCTION

Consider the story of L. Dennis Kozlowski, a former chief executive of Tyco International charged with tax evasion of more than \$1 million of

art he purchased.¹ Kozlowski shipped the art out of the state to avoid paying the sales tax and did not remit a use tax.² By law, Kozlowski should have paid the equivalent use tax to make up for the sales tax that he did not pay; like many people, however, he did not do so.³ Kozlowski's story shows how much tax revenue can be lost through evasion of use taxes.⁴ Despite this loss, prosecution for evasion of sales or use tax is rare.⁵

Shipping empty boxes out of state is a common way to avoid paying sales and use taxes.⁶ This evasion, which equates to millions of dollars in revenue loss, impacts funding of many state services, including schools, public safety, and roads.⁷ Many states, however, have moved away from the expectation that consumers will pay use taxes and instead look to collect them directly from e-commerce retailers.⁸

Prior to 2018, the United States Supreme Court's physical presence requirement sharply limited states' ability to collect such taxes from e-commerce retailers.⁹ States did not require e-commerce retailers to collect sales tax from their customers unless the retailers had a physical presence in the state, such as a warehouse or store.¹⁰ A landmark Supreme Court case, *South Dakota v. Wayfair Inc.*, eliminated this physical presence requirement, providing states with a golden opportunity to gain revenue

1. David Cay Johnston, *A Tax That's Often Ignored Suddenly Attracts Attention*, N.Y. TIMES (Jun. 5, 2002), <https://www.nytimes.com/2002/06/05/business/a-tax-that-s-often-ignored-suddenly-attracts-attention.html> [<https://perma.cc/7SNH-2TCC>].

2. A use tax is a tax that is paid on a purchase where no sales tax is paid. States utilize a use tax as a means of collecting sales tax on items purchased outside of a customer's home state. *See infra* Section I.A.

3. *See infra* Section I.A.

4. *See generally* Tom Herman & Michelle Higgins, *Attention, Shoppers: Pay Your Sales Tax*, WALL ST. J. (Nov. 13, 2003), <https://www.wsj.com/articles/SB106868731195316100> [<https://perma.cc/RB6B-BDH7>] (discussing states trying to collect unpaid sales tax from certain buyers).

5. *Id.*

6. Jewelry, furs, and art purchases are particularly susceptible to this use tax evasion. Johnston, *supra* note 1.

7. Renu Zaretsky, *The Case of the Little Wrong Thing: Evading Online Sales Tax*, TAX POL'Y CTR. (Aug. 5, 2015), <https://www.taxpolicycenter.org/taxvox/case-little-wrong-thing-evading-online-sales-tax> [<https://perma.cc/32J6-MAMS>].

8. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–100 (2018); Chana Joffe-Walt, *Most People Are Supposed to Pay This Tax. Almost Nobody Actually Pays It*, NPR (Apr. 16, 2013), <https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax> [<https://perma.cc/XR7R-6J8Z>].

9. *Wayfair*, 138 S. Ct. at 2099–100.

10. *Id.*

from e-commerce retailers through sales tax.¹¹ Many states no longer attempt to collect use taxes from consumers.¹² Instead, these states are looking to collect the use taxes directly from e-commerce retailers, as evidenced by *Wayfair*.¹³ Some requirements, such as sales tax collection features designed to protect against undue burdens on interstate commerce, however, remain.¹⁴ Louisiana fails to meet these requirements because of its highly complicated sales tax system.¹⁵ If Louisiana simplifies its sales tax system to meet the requirements articulated in *Wayfair*, the state could gain upwards of \$288 million in revenue per year.¹⁶

Louisiana can take one of two alternative routes to reform its sales tax system to conform to *Wayfair*: (1) a moderate approach or (2) a total reform approach.¹⁷ Louisiana should restructure its current sales tax system through the total reform approach to collect millions of dollars in additional revenue that stem from the elimination of the physical presence requirement.¹⁸ Under this approach, Louisiana would simplify its complex state sales tax system for all retailers—not just e-commerce retailers—by eliminating the state’s wide-ranging local tax rates.¹⁹

Part I of this Comment will provide background information on the long-standing physical presence requirement and introduce *Wayfair*. Part II will examine the impact *Wayfair* will have on state tax revenues and analyze state sales tax systems in light of *Wayfair*. Part III will analyze Louisiana’s current tax system and highlight shortcomings that prevent compliance with *Wayfair*. Finally, Part IV will propose reforms to Louisiana’s tax system that will allow the state to take full advantage of *Wayfair*. This Comment concludes by advocating for Louisiana to take a total reform approach that would comply with *Wayfair* and completely standardize and streamline Louisiana’s sales tax system.

11. *Id.*; see Andre Burvant & Matt Mantle, *Why Louisiana Won’t Currently Benefit from Wayfair*, LAW360 (last visited Oct. 19, 2018), <https://www.law360.com/articles/1064019/why-louisiana-won-t-currently-benefit-from-wayfair> [<https://perma.cc/G8CA-2B4s>].

12. See *infra* Part II.

13. *Wayfair*, 138 S. Ct. at 2099–100; Joffe-Walt, *supra* note 8.

14. *Wayfair*, 138 S. Ct. at 2099–100.

15. See *infra* Part III.

16. See Matthew C. Boch, *Way(un)fair? United States Supreme Court Decision Ends State Tax Physical Presence Nexus Test*, 53 ARK. LAW. 18, 20 (2018); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-114, SALES TAX: STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS (2017); Burvant & Mantle, *supra* note 11.

17. See *infra* Part IV.

18. See Burvant & Mantle, *supra* note 11.

19. See *generally id.* (discussing Louisiana’s local tax rates).

I. ORIGINS OF THE PHYSICAL PRESENCE REQUIREMENT

Under the Commerce Clause, Congress has the power to regulate commerce among the states.²⁰ Accordingly, the states cannot discriminate against interstate commerce, nor can they place undue burdens on interstate commerce.²¹ Additionally, the Due Process Clause²² requires parties to have sufficient minimum contacts in a forum state to be subject to the state's jurisdiction.²³ Finally, a suit in the forum state cannot offend "traditional notions of fair play and substantial justice."²⁴ These principles all come into play when states attempt to collect sales taxes from out-of-state retailers, as evidenced by the line of cases leading up to *Wayfair*.²⁵ Low use tax collection compliance and the rise of online sales cause states to lose billions of dollars in tax revenue annually, which exacerbated the problem of the physical presence requirement before *Wayfair*.²⁶

A. Why "Use Taxes"?

Prior to the United States Supreme Court's recent ruling in *Wayfair*, e-commerce retailers were not required to collect sales taxes on transactions occurring in the state in which the sale occurred unless the retailer had a physical presence in that state.²⁷ Instead, buyers were supposed to remit use taxes for these purchases directly to the state.²⁸ States utilize a use tax as a means of collecting sales tax on items purchased outside of a consumer's home state.²⁹ Since the burden of remitting these use taxes is on the buyer, compliance is rare.³⁰ This lack of compliance is sometimes caused by a lack of knowledge; other times, it is caused by deliberate avoidance of such

20. U.S. CONST. art. I, § 8, cl. 3.

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

22. U.S. CONST. art. XIV, § 1.

23. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1945).

24. *Id.* at 316 (citations omitted).

25. *See Wayfair*, 138 S. Ct. at 2088, 2092.

26. *See id.*; *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

27. Juliana Frenkel, *Something's Gotta Give: Origin-Based E-Commerce Sales Tax*, 12 BROOK. J. CORP. FIN & COM. L. 133, 138 (2017).

28. Nicole Soulsby, *Strength in Numbers: South Dakota v. Wayfair, Inc. and the Ripple Effect Occurring in State Legislatures to Circumvent the Quill Corp. Physical Presence Test for Use Taxation*, 11 CHARLESTON L. REV. 583, 585 (2017).

29. *Id.* at 585–86; Herman & Higgins, *supra* note 4.

30. Soulsby, *supra* note 28, at 585–86.

taxes.³¹ For example, of the 45 states that collect use taxes, only about 1.6% of the taxpayers in those states submit use taxes to the state.³² The rarity of submission is unsurprising, given the process that taxpayers must go through to report use taxes to the state.³³ Taxpayers must first look to all of their online purchases and determine whether the purchases included sales tax.³⁴ Then, the taxpayers must calculate the sales tax on each individual purchase for which they were not charged sales tax, which often totals to trivial amounts on small purchases, and report the total on their income tax returns.³⁵ Low use tax collection compliance caused by the burdensome collection method combined with the growth of e-commerce transactions resulted in substantial tax revenue loss annually before *Wayfair*'s elimination of the physical presence requirement.³⁶

B. History of the Physical Presence Requirement

The physical presence requirement for e-commerce retailers may seem obsolete in such a highly digitalized world; the Supreme Court formulated the requirement in 1967,³⁷ prior to the existence of the internet.³⁸ When the Court devised the physical presence requirement, the major method of interstate sales was through mail.³⁹ At a time of limited transactions between states, the physical presence requirement was less problematic. Recent problems with the physical presence requirement came to light, however, with the rise of interstate transactions, especially in the digital age when the internet made interstate transactions commonplace.⁴⁰

31. *Id.*

32. Joffe-Walt, *supra* note 8.

33. See generally Joffe-Walt, *supra* note 8 (discussing the procedure for calculating use taxes on income tax returns).

34. *Id.*

35. *Id.*; see *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2088, 2092, 2100 (2018); *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967).

36. See *Wayfair*, 138 S. Ct. at 2088, 2092, 2100; *Nat'l Bellas Hess*, 386 U.S. 753.

37. *Nat'l Bellas Hess*, 386 U.S. 753.

38. See Frenkel, *supra* note 27, at 139.

39. *Nat'l Bellas Hess*, 386 U.S. at 754–55.

40. *Wayfair*, 138 S. Ct. at 2095.

I. National Bellas Hess v. Department of Revenue of Illinois: The Seminal Case on the Physical Presence Requirement

In *National Bellas Hess v. Department of Revenue of Illinois*, the flagship case for the physical presence requirement,⁴¹ National Bellas Hess was a mail order company that lacked any place of business, agents, or tangible property in Illinois—the state that sought use tax collection.⁴² The company’s only contacts with Illinois were by mail or common carrier, through which it sent catalogs, flyers, and orders to Illinois customers.⁴³ Despite this lack of physical contact, Illinois attempted to collect taxes from National Bellas Hess for products the company sold in Illinois.⁴⁴ National Bellas Hess argued that Illinois’s imposition of these use taxes violated the Fourteenth Amendment’s Due Process Clause and created an unconstitutional burden on interstate commerce.⁴⁵

The United States Supreme Court determined that the controlling inquiry for state taxes under the Due Process Clause was whether the state gave the retailer anything that allowed the state to ask for something from the retailer in return.⁴⁶ In terms of the Commerce Clause, the Court held that state taxes imposed on interstate commerce must be “designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.”⁴⁷ The *National Bellas Hess* Court held that Illinois could not impose tax collection on the company because its only connection to Illinois customers was by mail or common carrier.⁴⁸ Taxing the company unduly burdened interstate commerce, violating both Due Process and Commerce Clause principles.⁴⁹ Thus, the physical presence requirement was born out of concerns for creating undue burdens on interstate commerce.⁵⁰

41. Soulsby, *supra* note 28, at 587.

42. *Nat’l Bellas Hess*, 386 U.S. at 753–54.

43. *Id.* at 754–55.

44. *Id.* at 754.

45. *Id.* at 756.

46. *Id.*

47. *Id.* (citing *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)).

48. *Id.* at 758–59.

49. *Id.*

50. *Id.* at 759.

2. Complete Auto Transit, Inc. v. Brady: Introduction of “Substantial Nexus”

The *National Bellas Hess* Court did not resolve the issue of taxing out-of-state retailers, and the Court faced this issue again in *Complete Auto Transit, Inc. v. Brady*.⁵¹ In *Complete Auto*, the Mississippi State Tax Commission assessed sales taxes against Complete Auto Transit, a Michigan corporation that transported vehicles for General Motors to Mississippi dealers.⁵² The company argued that these taxes were unconstitutional in their application to interstate commerce.⁵³

The Court held that the Commerce Clause permits state taxation that meets four criteria.⁵⁴ Specifically, the taxation must: (1) be applied to “an activity with a substantial nexus with the taxing state;” (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services that the taxing state provides to the taxed entity.⁵⁵ Ultimately, the Court upheld the taxes assessed against Complete Auto Transit because the company satisfied all four requirements through its vehicle transportation in Mississippi.⁵⁶ The Court has continued to define and interpret the *Complete Auto* substantial nexus requirement differently through the years.⁵⁷

3. Quill Corp. v. North Dakota: *The Physical Presence Requirement Lives on in the Digital Age*

In *Quill Corp. v. North Dakota*, the Supreme Court controversially affirmed that the Commerce Clause required retailers to have physical presence in a state to meet the substantial nexus requirement articulated in *Complete Auto*.⁵⁸ *Quill* arose from similar facts to *National Bellas Hess*: a state attempted to require an out-of-state mail order company that lacked outlets or representatives in the state to collect and remit use taxes for purchases in the state.⁵⁹

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

52. *Id.* at 275–76.

53. *Id.* at 277, 279.

54. *Id.* at 279.

55. *Id.*

56. *Id.* at 288.

57. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018); Soulsby, *supra* note 28, at 590.

58. Soulsby, *supra* note 28, at 590–91.

59. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992).

The Court granted certiorari and analyzed the tax under both the Due Process and Commerce clauses.⁶⁰ The Court held that the tax at issue did not violate the Due Process Clause because Quill purposefully directed its activities toward North Dakota residents in a way that sufficiently connected the company to North Dakota.⁶¹ Furthermore, the Court found that the use tax was related to the benefits Quill received from North Dakota.⁶² In its Commerce Clause analysis, the Court, relying heavily on *stare decisis*, conflated the substantial nexus prong from the *Complete Auto* test and the physical presence requirement from *National Bellas Hess*.⁶³ Ultimately, the *Quill* Court acknowledged Congress's power to protect interstate commerce and deferred to Congress's "wisdom" on the physical presence requirement.⁶⁴

4. Congressional Inaction in the Wake of Quill

Despite the Court's deferral to congressional wisdom in *Quill*, Congress failed to resolve the issue of the physical presence requirement for out-of-state retailers.⁶⁵ In an attempt to address the taxing inequalities resulting from this failure, members of Congress introduced many proposals, including the Marketplace Fairness Act and the Remote Transaction Parity Act of 2015.⁶⁶ Both of these acts attempted to resolve the issue, but neither passed, leaving severe taxing inequalities between e-commerce retailers and physical stores.⁶⁷ This congressional inaction prompted states to take matters into their own hands: many states expanded the physical presence definition, broadening *Quill*'s narrow concept through a looser understanding of substantial nexus.⁶⁸ Some of these states⁶⁹ imposed "Click-Through-Nexus[es]," which required only a

60. *Id.* at 305.

61. *Id.* at 308.

62. *Id.*

63. *Id.* at 311; Soulsby, *supra* note 28, at 590.

64. *Quill*, 504 U.S. at 318–19.

65. Frenkel, *supra* note 27, at 140, 149.

66. These acts did not pass because of concerns over state sovereignty infringement and resistance to their imposition of many requirements of the Streamlined Sales and Use Tax Agreement (SSUTA). Additionally, the complexity of the issue meant that it was impossible to appease all involved parties, and, since seeking compromise does not help with reelection, many congressmembers were hesitant to tackle the issue, leading to congressional inaction. *See id.* at 139, 141–42.

67. *Id.* at 140–42.

68. *Id.* at 145; *see, e.g.*, GA. CODE ANN. § 48-8-113 (West 2013).

69. These states include Arkansas, California, Connecticut, Georgia, and Idaho, among others. Scott Peterson, *A Guide to Click-Through Nexus*, AVALARA

certain amount of revenue from in-state sales made by in-state agent referrals rather than traditional physical presence.⁷⁰

5. Direct Marketing Concurrence: Tides Turning on the Physical Presence Requirement

After years of congressional inaction, Justice Kennedy's concurrence in *Direct Marketing Association v. Brohl*, in which a retailer trade association sued the Executive Director of the Colorado Department of Revenue,⁷¹ called *Quill* into question.⁷² Although the *Direct Marketing Association* Court did not rule on the merits of the case,⁷³ Justice Kennedy called for the legal system to find an appropriate case in which the Court could reconsider this issue.⁷⁴ He acknowledged that the Court relied heavily on stare decisis in *Quill* and noted that the Court should have looked to the "dramatic technological and social changes" that took place during the time between *National Bellas Hess* and *Quill*.⁷⁵ In light of dramatic changes, including higher internet sales, Justice Kennedy discussed the impact of the states' inability to directly collect use taxes from out-of-state retailers.⁷⁶ Ultimately, South Dakota answered Justice Kennedy's call by filing a lawsuit against e-commerce retailers not in compliance with its sales tax legislation, forcing the Court to reconsider the physical presence requirement.⁷⁷

(Jun. 20, 2016), <https://www.avalara.com/us/en/blog/2016/06/a-guide-to-click-through-sales-tax-nexus-for-small-businesses.html> [<https://perma.cc/22NC-S49N>].

70. Frenkel, *supra* note 27, at 145–46.

71. *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1125 (2015).

72. *Id.* at 1135 (Kennedy, J., concurring).

73. The association alleged the unconstitutionality of Colorado's requirement that non-sales tax collecting retailers had to notify their Colorado customers of the state's sales and use tax requirement and report tax information to the customers and the Department of Revenue. The appellate court found a lack of jurisdiction, but the Supreme Court held that the district court had jurisdiction to hear the case and remanded without ruling on its merits. Based on those considerations, Justice Kennedy noted that this case was not the proper context to address the elimination of the physical presence requirement because it did not sufficiently raise the issue. *Id.* at 1134–35.

74. *Id.*

75. *Id.*

76. *Id.* at 1135.

77. Soulsby, *supra* note 28, at 594.

C. South Dakota v. Wayfair, Inc.: *The Answer to Justice Kennedy's Call*

In response to significant lost revenue from unremitted consumer use taxes, South Dakota enacted Senate Bill 106 (“Act”) in 2016 to collect sales taxes from certain e-commerce retailers.⁷⁸ The state asserted that it passed this Act during an emergency stemming from the erosion of the state’s tax base.⁷⁹ The Act required out-of-state sellers to collect and remit sales taxes to South Dakota as if the sellers had physical presence in the state if they met a certain level of sales, defined as either: (1) the sellers delivered more than \$100,000 of goods or services annually to South Dakota, or (2) the sellers engaged in 200 or more separate transactions for delivery of such goods and services in South Dakota.⁸⁰ Additionally, the Act forbade retroactive collection of these taxes and provided a means for the Act to be stayed pending a constitutionality determination.⁸¹

1. Procedural History: The Road to the End of the Physical Presence Requirement

To secure a quick review of the Act, South Dakota filed an action for declaratory judgment against the leading online retailers in the state that did not collect sales tax yet met the minimum sales and transaction requirements: Wayfair, Overstock, and Newegg.⁸² South Dakota recognized that the Act could not pass constitutional muster under *National Bellas Hess* and *Quill* but asked for those decisions to be reviewed in accordance with the current economic situation that growing online sales created.⁸³ The trial court granted summary judgment in favor of the e-commerce retailers, and the South Dakota Supreme Court affirmed the decision.⁸⁴ The South Dakota Supreme Court recognized the persuasiveness of South Dakota’s argument but ultimately held that the Act was not in accordance with the then-existing precedent on interstate collection of sales and use taxes under *Quill*.⁸⁵ The United States Supreme Court granted certiorari to reconsider the validity and scope of the physical presence rule requirement in the 21st century.⁸⁶

78. See South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018).

79. *Id.*

80. *Id.* at 2089.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 2088.

2. *The Physical Presence Requirement Overturned*

In assessing the constitutionality of South Dakota's Act, the United States Supreme Court recognized that modern precedent relies primarily on two principles that govern state authority for interstate commerce regulation: (1) state regulations cannot discriminate against interstate commerce; and (2) states cannot impose an undue burden on interstate commerce.⁸⁷ The *Complete Auto* test⁸⁸ applies these principles to state taxes, and state taxes that meet this test will satisfy the Commerce Clause.⁸⁹ Prior to *Wayfair*, only physical presence in a state met the first prong of the *Complete Auto* test.⁹⁰

The Court considered arguments ranging from fairness to the growth of the e-commerce market before it abolished the physical presence requirement.⁹¹ In determining that the physical presence requirement was no longer necessary to create a substantial nexus and meet the first prong of the *Complete Auto* test, the Court noted that the rule put local businesses at a disadvantage in comparison to remote sellers because states required the local businesses to collect taxes, effectively making goods sold by remote sellers a "cheaper" option for buyers.⁹² This realization led the Court to opine that the physical presence requirement served as a sanctioned tax shelter for e-commerce retailers without physical presence in states.⁹³

In addition, the Court considered the artificiality of the physical presence requirement⁹⁴ first recognized by Justice Fortas in his *National Bellas Hess* dissent.⁹⁵ In his dissent, Justice Fortas stated that excusing a company from collecting taxes burdened and penalized local retailers because the company received the same benefits from the state as those local retailers.⁹⁶ Recognizing Justice Fortas's logic, the *Wayfair* Court finally examined the arbitrariness of a substantial nexus stemming from a single employee or warehouse but not stemming from an e-commerce

87. *Id.* at 2091.

88. *See supra* Section I.B.2.

89. *Wayfair*, 138 S. Ct. at 2091.

90. *Id.* at 2092.

91. *Id.* at 2094–97.

92. *Id.* at 2094.

93. *Id.*

94. *Id.* at 2095.

95. *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 386 U.S. 753, 762–63 (1967) (Fortas, J., dissenting).

96. *Id.*

retailer's marketing and distribution in a state.⁹⁷ Next, the Court recognized that allowing e-commerce retailers to evade state taxes while benefiting from the state through services was unfair.⁹⁸ To bolster its argument, the Court discussed the increase in e-commerce, noting that e-commerce grew at four times the rate of traditional retail in 2017.⁹⁹ Based on these considerations, the Court overruled *Quill* and *National Bellas Hess*, thus abrogating the physical presence requirement.¹⁰⁰

3. *The Wayfair Guidelines: South Dakota's System*

In overruling the physical presence requirement, the Supreme Court remanded the case to the South Dakota court system to determine the constitutionality of the state's Act in accordance with the Court's holding.¹⁰¹ The Court recognized that other Commerce Clause principles may invalidate the Act but showed that the South Dakota tax system contained features designed to protect against undue burdens on interstate commerce.¹⁰² The features the Court considered included the Act's minimum annual sales and transaction requirements of \$100,000 in sales or 200 transactions, the absence of a retroactive remission requirement in the Act, and the fact that South Dakota is a member of the Streamlined Sales and Use Tax Agreement (SSUTA).¹⁰³

a. A Minimum Economic Nexus Threshold Protection for Small Businesses

South Dakota's Act provides an economic nexus threshold, which the Court noted was high enough to ensure that sellers have availed themselves of the substantial privilege of carrying on business in the state, thus satisfying the substantial nexus requirement of the *Complete Auto* test.¹⁰⁴ Under the South Dakota Act, sellers can meet the economic nexus either through \$100,000 in sales or through 200 transactions annually,

97. *Wayfair*, 138 S. Ct. at 2095.

98. *Id.* at 2096.

99. *Id.* at 2097.

100. *Id.* at 2099.

101. *Id.* at 2100.

102. *Id.* at 2089, 2099.

103. *Id.*

104. *Id.* at 2099; Joseph Bishop-Henchman et al., *Post-Wayfair Options for States*, TAX FOUND. 6 (Aug. 2018), <https://files.taxfoundation.org/20180904165435/Tax-Foundation-FF6091.pdf> [<https://perma.cc/8NZ9-DWSS>].

which excludes businesses with limited transactions in the state.¹⁰⁵ According to the Court, this level of sales or transactions sufficiently protects small businesses because the high bar of sales ensures that businesses doing a small volume of sales in a state will not have the burden of collecting sales tax, which can be a complicated process.¹⁰⁶ The Court noted protection of small businesses as a valid concern related to eliminating the physical presence requirement, but the Court deferred further addressing the problems affecting small businesses as a result of this elimination to Congress.¹⁰⁷

b. Retroactive Collection Ban: A Fairness Consideration

South Dakota's Act also bans retroactive collection of out-of-state e-commerce sales taxes.¹⁰⁸ This consideration was important to the Court as one of the features designed to protect against undue burdens on interstate commerce.¹⁰⁹ The Court provided a strong indication to the states that they should not attempt to retroactively collect sales taxes from e-commerce retailers because this strategy likely poses problems related to the creation of undue burdens on interstate commerce.¹¹⁰

c. SSUTA Membership: Preventing Undue Burdens on Interstate Commerce

The Court's final consideration was South Dakota's adoption of the SSUTA.¹¹¹ The Court noted that the over 20 member states to this agreement have systems in place that reduce compliance and administrative costs, which is a positive feature for alleviating undue burdens on interstate commerce.¹¹² To qualify as an SSUTA member, a state's system must have certain features, such as a single, state tax administration and uniform definitions and rules, which also lessen interstate commerce burdens.¹¹³ The Court further noted that the SSUTA standardizes taxes to reduce

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

106. *Id.*

107. *Id.*

108. Bishop-Henchman et al., *supra* note 104, at 6.

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

110. *See id.*

111. *Id.*

112. *Id.* at 2099–100.

113. *Id.* at 2100.

administrative and compliance costs, lessening the potential of a challenge stemming from undue burdens on interstate commerce.¹¹⁴

4. Introduction to the Streamlined Sales and Use Tax Agreement and Its Importance Post-Wayfair

The SSUTA originated as the Streamlined Sales Tax Project, which stemmed from a growth of e-commerce sales during the late 1990s and states' subsequent interest in collecting taxes on those sales.¹¹⁵ The SSUTA is an expression of states' commitment to simplify and modernize sales and use tax administration.¹¹⁶ The agreement provides a step-by-step, simplified framework that enables states to make important changes to their sales and use tax provisions, which would otherwise be a daunting task.¹¹⁷ The SSUTA contains several basic elements that help it achieve its goals and confront issues that the agreement faces.¹¹⁸ Although the SSUTA does not override state laws, states must comply with the agreement requirements to become a member state.¹¹⁹

Several of the SSUTA requirements are features the Court noted in *Wayfair* and are designed to prevent undue burdens on interstate commerce.¹²⁰ These features include a single, state-level tax administration that allows sellers to file only one sales tax return per state.¹²¹ The *Wayfair* Court also noted the SSUTA requirement for the simplified tax rate structures, which only allow each state two tax rates that apply to sales and use taxes: a general state rate and a local rate.¹²² Additionally, the *Wayfair* Court highlighted that the SSUTA provides "other uniform rules" in its consideration of undue burdens on interstate

114. *Id.*

115. John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 606 (2005).

116. *Id.* at 610–11.

117. *Id.* at 611.

118. Mary Ann Hofmann et al., *An Update on the Streamlined Sales and Use Tax Project*, 83 CPA J. 46, 48 (2013).

119. STREAMLINED SALES TAX GOVERNING BD., INC., STATE GUIDE TO THE STREAMLINED SALES TAX PROJECT 4 (2019), https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project-2019-03-01.pdf?sfvrsn=5cc921f2_4 [<https://perma.cc/9BBN-GBL6>].

120. *Id.* at 4–5; see *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–100 (2018).

121. *Wayfair*, 138 S. Ct. at 2100; Hofmann et al., *supra* note 118, at 48.

122. *Wayfair*, 138 S. Ct. at 2100; Hofmann et al., *supra* note 118, at 48.

commerce.¹²³ Finally, the Court discussed the access that sellers must have to state-funded sales tax administration software.¹²⁴

Some of the uniform rules the SSUTA provides are definitions for taxable and exempt items, sourcing rules for tax collection, exemption administration, and audit procedures.¹²⁵ Additionally, SSUTA member states must comply with SSUTA technology requirements, including using certified software and databases.¹²⁶ Overall, these SSUTA membership requirements protect against undue burdens on interstate commerce for post-*Wayfair* e-commerce sales tax collection.¹²⁷

II. *WAYFAIR*'S IMPACT ON STATE REVENUES

In the wake of *Wayfair*, many states quickly changed their laws to take full advantage of the positive financial impact resulting from eliminating the physical presence requirement.¹²⁸ This financial impact measures at an estimated \$8 to \$13 billion revenue gain for states in 2017, which breaks down to an average revenue gain of \$184 to \$291 million per state that directly stems from the *Wayfair* decision.¹²⁹

The United States Government Accountability Office predicted that Louisiana could gain \$195 to \$288 million in revenue per year.¹³⁰ Louisiana's total state sales tax collections for the next fiscal year are estimated at \$4 billion, making such revenue gains significant.¹³¹ Those revenue gains could in turn be used to alleviate Louisiana's perpetual budget crisis.¹³² Even absent budget issues, the millions of dollars Louisiana could gain from the elimination of the physical presence

123. *Wayfair*, 138 S. Ct. at 2100.

124. *Id.*

125. Hofmann et al., *supra* note 118, at 48.

126. STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 119, at 6–8.

127. *See Wayfair*, 138 S. Ct. at 2099–100.

128. Boch, *supra* note 16, at 20; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16.

129. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16.

130. *Id.*

131. *Having It Both Ways on Sales Taxes*, PUB. AFF. RES. COUNCIL LA. 4 (Jun. 27, 2018), <http://parlouisiana.org/wp-content/uploads/2018/06/Having-it-Both-Ways-on-Sales-Taxes.pdf> [<https://perma.cc/3HSE-PGA2>].

132. *Id.*; see Julia O'Donoghue, *Louisiana's Budget Is a Hot Mess: How We Got Here*, TIMES-PICAYUNE (Feb. 19, 2016), https://www.nola.com/politics/index.ssf/2016/02/louisiana_is_in_a_budget_mess.html [<https://perma.cc/WUL5-MEVH>].

requirement are impactful, and the state must analyze and reform its tax system to ensure it collects this money.¹³³

A. Tax System Requirements: How to Make Sure State Sales Tax Systems Stand Up to Challenges of Undue Burdens on Interstate Commerce

In response to the large potential increases in state revenues, the elimination of the physical presence requirement provides that states should reform their sales tax systems to comply with *Wayfair*. In the post-*Wayfair* world, courts will consider state sales taxes constitutional regardless of physical presence, provided that the taxes do not unduly burden or discriminate against interstate commerce.¹³⁴ In *Wayfair*, the Supreme Court did not declare South Dakota's Act constitutional, but it did provide insight into why the Act likely does not unconstitutionally burden interstate commerce.¹³⁵ Although the considerations the Court articulated in *Wayfair* may not be binding, the opinion suggests that the Court would uphold state sales tax systems that align with these guidelines.¹³⁶ Thus, states should err on the side of caution and take the Court's advice when analyzing and improving their sales tax systems to ensure that they are able to take full advantage of e-commerce sales tax.¹³⁷ Based on the Court's analysis of South Dakota's Act, states should look to the economic threshold set out in the Act when setting their own economic threshold standards¹³⁸ and should heed the Court's warning against attempting to retroactively collect sales tax against e-commerce retailers.¹³⁹

1. Differing Approaches Among the States

Based on these considerations, some states are in a better position to collect e-commerce sales taxes than others.¹⁴⁰ A recent Tax Foundation

133. *Having It Both Ways on Sales Taxes*, *supra* note 131.

134. Bishop-Henchman et al., *supra* note 104, at 3.

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

136. *See generally id.* at 2099–100 (discussing the factors of South Dakota's sales tax system designed to protect against undue burdens on interstate commerce).

137. *See* Bishop-Henchman et al., *supra* note 104, at 1, 5 (discussing the Court's analysis of South Dakota's Act is binding, as well as considering the suggestion of constitutionality by following "the *Wayfair* checklist").

138. *See id.* at 6.

139. *See Wayfair*, 138 S. Ct. at 2099 (discussing why the South Dakota Act's features protect against undue burdens on interstate commerce).

140. Bishop-Henchman et al., *supra* note 104, at 2.

bulletin, which grouped states based on their e-commerce sales tax collection ability and the e-commerce sales tax collection's constitutionality post-*Wayfair*, evidences that states in the best position to collect e-commerce sales taxes have similar features that facilitate easy collection of such taxes.¹⁴¹ Mirroring states in favorable collection positions can help states that are currently in unfavorable collection positions, including Louisiana.¹⁴²

a. Way to Go: Wayfair-Approved States

States in the best position to collect e-commerce sales taxes, such as Georgia,¹⁴³ share common features, particularly SSUTA membership and mirroring South Dakota's tax system.¹⁴⁴ The importance of SSUTA membership suggests that states that are not currently SSUTA members should consider joining this agreement.¹⁴⁵ Additionally, states in the best post-*Wayfair* collection position all have economic nexus thresholds in line with or higher than South Dakota's threshold.¹⁴⁶ The nexus threshold is a much simpler consideration with which states should accord when reforming their sales tax collection systems because it can be easily changed through legislation.¹⁴⁷ States in unfavorable collection positions should use the states in this group as guides when reforming their tax collection systems because these states meet all of the *Wayfair* Court's considerations and are in strong positions to stand up to challenges of placing undue burdens on interstate commerce.¹⁴⁸

141. *Id.* at 8.

142. *See id.* at 18.

143. Georgia is one of the states in the most favorable positions to collect e-commerce sales taxes post-*Wayfair*. The state meets all of the provisions set out in *Wayfair* through its SSUTA membership and legislation implementing an economic nexus and banning retroactive collection. Georgia hopes to use its additional e-commerce tax revenue to reduce individual income tax rates. Based on these features, Georgia is in a strong position to collect e-commerce sales taxes in a constitutional way under *Wayfair*. *See id.* at 7–8.

144. *Id.* at 8.

145. *See id.*

146. *Id.*

147. *See id.* at 10.

148. *See id.* at 8–9.

b. Still a Long Way to Go: States Needing Improvement

To benefit from the elimination of the physical presence requirement, the remaining states need some improvements.¹⁴⁹ SSUTA member states have less work to do than non-SSUTA member states.¹⁵⁰ Comparatively, non-SSUTA members should make a wide range of changes, depending on the current structures of their collection systems.¹⁵¹

i. States That Are Already SSUTA Members

A group of 13 states¹⁵² meet certain features that reduce compliance and administrative costs, as discussed in *Wayfair*, but still have some changes to make to avoid creating undue burdens on interstate commerce and collecting out-of-state e-commerce sales taxes.¹⁵³ These states have a relatively simple change to make—they need to enact legislation including an economic nexus provision and ensuring non-retroactive collection of e-commerce sales tax from out-of-state retailers.¹⁵⁴ Their membership in the SSUTA allows them to comply with the rest of the considerations set out in *Wayfair* to protect against challenges of undue burdens on interstate commerce.¹⁵⁵ By adding an economic nexus threshold no lower than South Dakota's threshold and ensuring that they will not pursue retroactive e-commerce sales tax collection, these current SSUTA states can easily put themselves in the best position to gain revenue from e-commerce sales tax collection.¹⁵⁶

149. *Id.* at 2.

150. *Id.*

151. *Id.*

152. These states include Arkansas, Kansas, Michigan, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, Washington, West Virginia, and Wisconsin. For example, Arkansas falls into this group because, although it is a SSUTA member, it has not passed any economic nexus legislation or banned retroactive sales tax collection from e-commerce retailers. In response to *Wayfair*, Arkansas's Tax Reform Task Force has recommended that the state adopt legislation similar to South Dakota. Additionally, the Tax Reform Task Force is developing a tax reform proposal that would allow tax reductions, which would be made possible by e-commerce sales tax revenue. The steps that Arkansas is taking will bring it into the category of states in the best position to collect e-commerce sales taxes based on *Wayfair*'s guidelines. *See id.* at 7, 10.

153. *Id.* at 10–12.

154. *Id.* at 10.

155. *Id.*

156. *Id.*

ii. States That Are Non-SSUTA Members

Conversely, a larger group of states, including Alabama and California,¹⁵⁷ are in a position that requires an increased overhaul to their tax collection systems, with some of these states in a more dire position than others.¹⁵⁸ A sub-group of these states are in a better position to collect e-commerce sales taxes because they can change the structure of their sales tax systems to conform to *Wayfair* without a total tax system overhaul.¹⁵⁹ As the states in this group are non-SSUTA members, they do not have the common definitions or simplified tax systems indicative of the SSUTA.¹⁶⁰ If they do not make changes related to these collection problems, their e-commerce sales tax collection will be shrouded in legal uncertainty, which could make their online sales tax collection unconstitutional.¹⁶¹

Additionally, some states in this group, including Arizona and Minnesota,¹⁶² plan to collect sales taxes from marketplace facilitators,

157. In addition, Arizona, Connecticut, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Mexico, New York, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington, D.C. are members of this group. For example, Alabama is a non-SSUTA member, meaning that it does not have uniform definitions on what is taxable or a simplified sales tax system. The state's non-membership in the SSUTA hints to problems with collection because the Court considered SSUTA membership as a feature that protected states from allegations of imposing undue burdens on interstate commerce. More favorably, the state has a \$250,000 threshold and no transaction minimum. The state began collecting these taxes on October 1, 2018. The state's lack of SSUTA membership, however, presents problems because it does not have common definitions and does not provide base/rate lookup software or immunity for reliance errors that lessen the burdens on e-commerce retailers. To address this problem, the state has developed a portal to pay all state and local taxes and offers the option of a flat 8% tax instead of collecting multiple state taxes, which somewhat reduces burdens on interstate commerce for online sellers. *Id.* at 13.

158. *Id.* at 13, 18.

159. *See id.* at 13.

160. *See id.*

161. *See id.*

162. Alabama has decided to collect sales taxes from marketplace facilitators that have more than \$250,000 in sales. *Simplified Sellers Use Tax FAQs*, ALA. DEP'T REVENUE, <https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/simplified-sellers-use-tax-faqs/> [<https://perma.cc/P3PR-DEM9>] (last visited Sept. 24, 2019). Additionally, Connecticut, Oklahoma, Pennsylvania, Rhode Island, and Washington fall into this group. Bishop-Henchman et al., *supra* note 104, at 19.

such as eBay and Etsy.¹⁶³ The Supreme Court in *Wayfair* did not address sales tax collection from online marketplace facilitators, leaving the question of the constitutionality of such collections open and ripe for legal action.¹⁶⁴ States should err on the side of caution and not collect e-commerce taxes from marketplace facilitators because this collection may create an undue burden on interstate commerce because of the uncertainty of the actual seller's identity in these transactions, as these websites only facilitate sales from independent sellers.¹⁶⁵

Overall, states in this group should join the SSUTA because this agreement will put them in the most favorable e-commerce tax collection position and protect them from challenges of placing undue burdens on interstate commerce.¹⁶⁶ If such states decide to defer SSUTA membership, they must change their current sales tax systems by implementing a uniform definition of what is taxable and simplifying their tax collection systems in general.¹⁶⁷ This change will not be particularly difficult for these states because their tax systems are not currently overly complex, and it will benefit them by ensuring compliance with the features set out in *Wayfair*.¹⁶⁸

iii. States with Complex, Duplicative Tax Collection Systems

Two states—Louisiana and Colorado—are in a more difficult position.¹⁶⁹ Both have “duplicative, outdated, inconsistent, and inefficient sales tax collection mechanisms” that are unlikely to survive challenges of imposing undue burdens on interstate commerce post-*Wayfair*, even if these states attempt to implement a law similar to South Dakota's law.¹⁷⁰ Louisiana and Colorado currently allow local tax jurisdictions to collect, administer, and audit their sales taxes separately, as well as define their bases separately from the state sales tax base, subjecting retailers to numerous standards in one state.¹⁷¹ This collection method is especially burdensome because each state has upwards of 300 tax jurisdictions.¹⁷²

163. Bishop-Henchman et al., *supra* note 104, at 19–20.

164. *See id.* at 19.

165. *See id.* at 19–20.

166. *See id.* at 8, 13.

167. *See id.* at 13.

168. *Id.*

169. *Id.* at 18.

170. *Id.*

171. *Id.*

172. *See id.*

Additionally, neither state is a SSUTA member, so neither state has a common definition or base/rate lookup software, nor has either state implemented such features to its tax system on its own.¹⁷³ Louisiana and Colorado must improve their sales tax systems to benefit from *Wayfair*'s elimination of the physical presence requirement for sales tax collection.¹⁷⁴ Louisiana in particular needs to make changes to its sales tax collection system so it can benefit from *Wayfair*.¹⁷⁵

III. LOUISIANA'S SALES TAX SYSTEM: NOT UP TO PAR IN A POST- *WAYFAIR* WORLD

Louisiana's tax system is distinctly complex.¹⁷⁶ Without simplification, the state may not be fully able to require out-of-state retailers—e-commerce retailers in particular—to collect sales taxes.¹⁷⁷ This impediment could lead the state to lose millions of dollars in potential sales tax revenue.¹⁷⁸ Currently, the state's complex tax system, described as “highly decentralized, non-uniform and exemption-ridden,”¹⁷⁹ deprives Louisiana of the full benefit from *Wayfair*.¹⁸⁰

A. Overarching Problems with Louisiana's Current Sales Tax System

One of the major issues with Louisiana's existing tax system is the lack of a standardized local sales tax rate among the state's 64 parishes.¹⁸¹ The general local sales tax rate in Orleans Parish is 5.00%, whereas the rate in nearby Plaquemines Parish is only 4.50%.¹⁸² This tax rate inconsistency is a glaring problem in the wake of *Wayfair*, since the Court considered simplified tax rate structures as a feature that lessened potential

173. *Id.*

174. *See generally id.* at 13, 18 (discussing necessary improvement measures to the state sales tax systems mentioned in Section II.A.1.b).

175. Burvant & Mantle, *supra* note 11.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1.

180. Burvant & Mantle, *supra* note 11.

181. *Id.*

182. *Orleans Parish*, LA. ASS'N TAX ADMIN., <http://www.laota.com/index.php/for-taxpayers/parish-info/m-r/orleans> [<https://perma.cc/Z9MR-C8SD>] (last visited Sept. 11, 2019); *Plaquemines Parish*, LA. ASS'N TAX ADMIN., https://www.laota.com/index.php?option=com_content&view=article&id=48&Itemid=160 [<https://perma.cc/B86T-KC29>] (last visited Sept. 28, 2019).

undue burdens on interstate commerce.¹⁸³ Under the current Louisiana tax rate structure, the state cannot withstand potential allegations that assert the system places undue burdens on and discriminates against interstate commerce in its attempt to collect taxes from e-commerce retailers.¹⁸⁴

Another issue with Louisiana's current sales tax system is the immense number of exclusions and exemptions, which vary from parish to parish.¹⁸⁵ Louisiana and its local governments lack uniformity as to what is taxable.¹⁸⁶ Uniform definitions of products and services was one of the specific considerations in *Wayfair*, and the fact that Louisiana does not have such uniformity could mean that the state's current sales tax system poses an undue burden on interstate commerce.¹⁸⁷

B. Louisiana's Attempt to Adapt Its Tax System to Comply with Wayfair

In response to *Wayfair* and Louisiana's tax system issues, the Louisiana Legislature created the Louisiana Sales and Use Tax Commission for Remote Sellers ("Commission")¹⁸⁸ in anticipation of possible collection of sales and use taxes from online retailers.¹⁸⁹ In an effort to comply with its purposes, the Commission held an inaugural organization meeting on June 29, 2018, and continues to convene regularly to create and implement collection procedures for remote retailers.¹⁹⁰ The Commission focuses on ensuring that the state meets Commerce Clause standards and does not place undue burdens on interstate commerce.¹⁹¹ The Commission has recently taken steps to begin e-commerce sales tax collection, including providing a general definition of a remote seller and

183. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018).

184. *See* Burvant & Mantle, *supra* note 11.

185. *Having It Both Ways on Sales Taxes*, *supra* note 131, at 3.

186. *Id.*

187. *See generally* *Wayfair*, 138 S. Ct. at 2100 (discussing the Court's considerations for why the South Dakota Act is designed to prevent undue burdens on interstate commerce).

188. The Commission is within the Department of Revenue, and its main purposes are to promote uniformity and simplicity for sales and use tax compliance, serve as the single entity for e-commerce sales tax collection from retailers, and provide minimum tax administration, payment, and collection requirements related to this collection from e-commerce retailers in accordance with federal law. LA. SALES AND USE TAX COMM'N FOR REMOTE SELLERS, LA. DEP'T OF REVENUE, BULLETIN NO. 18-001, IMPACT OF *WAYFAIR* DECISION ON REMOTE SELLERS 3 (2018) [hereinafter BULLETIN NO. 18-001].

189. BULLETIN NO. 18-001, *supra* note 188.

190. *Id.* at 4.

191. *Id.*

setting reporting, collection, and remittance requirements for these sellers.¹⁹² Despite these steps, the state was unable to meet its anticipated January 1, 2019 start date for collecting taxes from e-commerce retailers.¹⁹³ Currently, collection and remittance of e-commerce sales taxes is voluntary for those who fall under the definition of a remote seller, and the Commission will not begin to enforce these provisions until a future date.¹⁹⁴ Additionally, remote sellers will be given at least 30 days' notice before such collection becomes mandatory.¹⁹⁵ With this future collection date, the state will comply with *Wayfair*'s retroactive collection ban.¹⁹⁶

To combat challenges stemming from Louisiana's complex sales tax system, the Commission has proposed a two-track sales tax system.¹⁹⁷ This proposal would provide out-of-state e-commerce retailers a simplified, centralized process, leaving local retailers to handle the maze of the current inefficient system.¹⁹⁸ In this two-track system, the Commission would control e-commerce sales tax collection, which it is attempting to structure in compliance with *Wayfair*.¹⁹⁹ Since this Commission does not have control over all tax collection, it will not be able to change the state's overall tax system.²⁰⁰ Thus, the rest of the state's retailers will still be forced to remit taxes through Louisiana's current complicated system.²⁰¹ This two-level system places local Louisiana businesses at a disadvantage and does not encourage reform of the state's sales tax system because the

192. LA. SALES AND USE TAX COMM'N FOR REMOTE SELLERS, LA. DEP'T OF REVENUE, BULLETIN NO. 18-002, IMPACT OF *WAYFAIR* DECISION ON REMOTE SELLERS 1–2 (2018) [hereinafter BULLETIN NO. 18-002].

193. BULLETIN NO. 18-001, *supra* note 188, at 4; BULLETIN NO. 18-002, *supra* note 192, at 3; Melinda Deslatte, *Louisiana 'Months Away' From Mandatory Online Sales Tax*, SHREVEPORT TIMES (Dec. 24, 2018), <https://www.shreveporttimes.com/story/news/2018/12/24/louisiana-months-away-mandatory-online-sales-tax/2405863002/> [<https://perma.cc/9YWT-9H94>].

194. BULLETIN NO. 18-002, *supra* note 192, at 3. Louisiana's Revenue Secretary Kimberly Robinson has said that mandatory compliance is still being worked on and is "just months away." Deslatte, *supra* note 193. As of September 2019, remote sellers will have to begin collecting these taxes no later than July 1, 2020. Gail Cole, *Louisiana to Enforce Economic Nexus by July 1, 2020*, AVALARA (Jun. 18, 2019), <https://www.avalara.com/us/en/blog/2019/06/louisiana-to-tax-remote-sellers-by-july-1-2020.html> [<https://perma.cc/RS7B-ACU3>].

195. BULLETIN NO. 18-002, *supra* note 192, at 3.

196. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018).

197. *Having It Both Ways on Sales Taxes*, *supra* note 131, at 6.

198. *Id.*

199. BULLETIN NO. 18-001, *supra* note 188, at 4.

200. *Having It Both Ways on Sales Taxes*, *supra* note 131, at 6.

201. *See id.*

state could benefit from new e-commerce sales tax revenue without changing the traditional system.²⁰²

In an effort to simplify Louisiana's complex system for e-commerce retailers' benefit and to comply with *Wayfair*, the Commission is currently looking at software²⁰³—one of the features of SSUTA membership noted by the Court in *Wayfair*²⁰⁴—to simplify tax calculation.²⁰⁵ Additionally, the Commission is planning a registration process for e-commerce retailers.²⁰⁶ The Commission is aware that the Streamlined Sales Tax Governing Board is considering allowing non-SSUTA states to use their software providers and registration process.²⁰⁷ Access to this software information would assist Louisiana's e-commerce sales tax collection.²⁰⁸ It is unclear, however, if and when the Streamlined Sales Tax Governing Board will allow this access; thus, Louisiana should not rely on this option because it might lose the opportunity to collect millions of dollars in revenue while waiting on the board's decision.²⁰⁹

The Commission also decided to defer²¹⁰ a decision on collecting sales taxes from marketplace facilitators.²¹¹ Walmart.com, an online marketplace, is currently appealing a pre-*Wayfair* ruling from a Louisiana district court that required it to collect and remit sales tax for transactions within its marketplace.²¹² The Commission is awaiting the decision of this appeal

202. *See id.*

203. The Commission created a technology subcommittee to meet this goal. LA. SALES AND USE TAX COMM'N FOR REMOTE SELLERS, LA. DEP'T OF REVENUE, MINUTES OF AUGUST 9, 2018 MEETING (2018) [hereinafter MEETING MINUTES].

204. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018).

205. *Id.*; Elizabeth Crisp, *10 States Begin Collecting Online Sales Taxes—But Not Louisiana; Here's Why*, ADVOCATE (Oct 1, 2018 2:34 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_07428700-c5b1-11e8-b8fb-cbb51ff447c0.html [<https://perma.cc/7V7M-MEHM>].

206. MEETING MINUTES, *supra* note 203.

207. *Id.*

208. *Id.*

209. *Id.*

210. The Commission will consider matters related to marketplace facilitators, such as remittance, and submit them for consideration to the legislature during the 2019 Regular Session. BULLETIN NO. 18-002, *supra* note 192, at 3.

211. MEETING MINUTES, *supra* note 203.

212. *Louisiana—Online Marketplace Providers Required to Collect Sales, Use Tax for Third-Party Sales on the Marketplace*, PWC (Apr. 9, 2018), <https://www.pwc.com/us/en/state-local-tax/newsletters/salt-insights/assets/pwc-louisiana-online-marketplace-tax-decision-for-third-party-sales.pdf> [<https://perma.cc/6V54-TWBG>].

before recommending collection from marketplace facilitators,²¹³ since *Wayfair* did not consider the potential constitutional implications of marketplace facilitator collection.²¹⁴

Additionally, in an attempt to take advantage of the elimination of the physical presence requirement and begin charging sales tax to e-commerce retailers, the Louisiana Legislature passed 2018 Extraordinary Session Act 5.²¹⁵ The Act amended Louisiana Revised Statutes § 47:301(4), which defines “dealer,” to include sellers who meet the economic nexus requirement included in South Dakota’s Act.²¹⁶ The Commission’s recent definition of a remote seller clarifies that a remote seller is also considered a dealer under Louisiana Revised Statutes § 47:301(4); therefore, these sellers are subject to the Louisiana collection and remittance requirements.²¹⁷ Although Act 5 broadened Louisiana’s definition of “dealer” to implement an economic nexus, the state could not enforce Act 5 until South Dakota’s bill was found constitutional.²¹⁸

Originally, Louisiana was not able to take advantage of its economic nexus provision²¹⁹—even though the Commission appeared to believe it

213. The Walmart.com case is scheduled for oral argument before the Louisiana Supreme Court on the Court’s October 21, 2019 docket. *Official Docket*, SUP. CT. LA., <https://www.lasc.org/docket/dockets/Oct2019.pdf> [<https://perma.cc/96K3-RBJU>] (last visited September 29, 2019). Current legislation regarding e-commerce tax collection does not address marketplace facilitator collection. See 2019 La. Acts No. 360.

214. MEETING MINUTES, *supra* note 203; see Bishop-Henchman et al., *supra* note 104, at 19–20.

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

216. 2018 La. Acts No. 5 § 1.

217. BULLETIN NO. 18-002, *supra* note 192, at 1.

218. 2019 La. Acts No. 360 § 1407; Burvant & Mantle, *supra* note 11; Joseph Z. Landry, *Louisiana Remote Sellers Commission Issues First Information Bulletin Addressing Impact of Wayfair*, NAT’L L. REV. (Aug. 10, 2018), <https://www.natlawreview.com/article/louisiana-remote-seller-commission-issues-first-information-bulletin-addressing> [<https://perma.cc/3MNV-NMHC>].

219. Before the Louisiana Legislature enacted Act 360, this Comment originally proposed a minimalist approach. This approach called for the Louisiana Legislature to amend Act 5’s triggering provision to rely on the Supreme Court’s decision in *Wayfair*, as opposed to the constitutionality of South Dakota’s bill. See 2018 La. Acts No. 5 § 2. The proposed triggering provision read: “The provisions of this Act shall apply to all taxable periods beginning on or after the date of the final ruling by the United States Supreme Court in *South Dakota v. Wayfair Incorporated*.” The proposed change allowed Louisiana to benefit from the measures set out in Act 5 because it would trigger the economic nexus threshold, which would enable Louisiana to meet another *Wayfair* consideration. See *Wayfair*, 138 S. Ct. at 2099. This collection, however, may still have been

was enforceable²²⁰—because the United States Supreme Court did not rule South Dakota’s Act constitutional.²²¹ Therefore, even though Louisiana took steps to statutorize an economic nexus, its first attempt was fruitless until South Dakota’s Act was declared constitutional, which may have never occurred.²²² In turn, Act 5’s dependence on the constitutionality of South Dakota’s Act caused a problem with the state’s efforts to collect e-commerce sales tax.²²³ To address this problem, the Louisiana Legislature enacted Act 360 during the 2019 Regular Session.²²⁴ Act 360 removed the language contained in Act 5’s triggering provision that made it inapplicable until South Dakota’s Act was declared constitutional.²²⁵ The triggering provision now reads: “The provisions of this Act shall apply to all taxable periods beginning on or after July 1, 2019.”²²⁶ This change allows Louisiana to meet another *Wayfair* consideration through its triggering of the state’s economic nexus provision.²²⁷ Overall, the

subject to potential challenges of undue burdens on interstate commerce absent other changes to Louisiana’s tax system. *See generally* Landry, *supra* note 218 (explaining why Act 5 may not yet apply). Overall, the minimalist approach was not Louisiana’s strongest reform option because it did little to help ensure that the state did not face challenges of unduly burdening interstate commerce. Additionally, this approach did not even begin to address Louisiana’s complex sales tax systems for e-commerce or brick-and-mortar retailers. Although this approach did not fully address the problem alone, it was helpful when added to other approaches because it provided the triggering provision necessary to ensure applicability of Louisiana’s economic nexus provision. Through Act 360’s revision of the original Act 5 triggering provision, the Louisiana Legislature has solved the issue posed by Act 5’s triggering provision in a similar way to this Comment’s minimalist approach. *See* 2019 La. Acts No. 360 § 1407.

220. The applicability of Act 5 is still questionable because the Supreme Court did not declare the South Dakota Act constitutional in *Wayfair*. Therefore, it seems as if the Commission is confused as to the Court’s ruling in *Wayfair*, which simply eliminated the physical presence requirement while recognizing that South Dakota’s Act may still be invalidated by another Commerce Clause principle on remand. *Wayfair*, 138 S. Ct. at 2099–100; Landry, *supra* note 218; Burvant & Mantle, *supra* note 11.

221. In *Wayfair*, the Court simply overruled prior cases to eliminate the physical presence rule for charging sales tax and remanded the case to state court to decide on the constitutionality of the bill in accordance with the holding. *Wayfair*, 138 S. Ct. at 2100.

222. Landry, *supra* note 218.

223. *Id.*

224. 2019 La. Acts No. 360 § 1407.

225. *Id.*

226. *Id.*

227. *Id.*; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

Louisiana Legislature's efforts to change the triggering provision of Act 5 solved a glaring problem created by the state's post-*Wayfair* legislation.²²⁸ The necessity of this change, however, highlights that the Louisiana Legislature should scrutinize the language in all of its acts more closely, as Louisiana could have lost millions of dollars in additional revenue due to the mistake of Act 5's applicability as contingent on the constitutionality of South Dakota's Act.²²⁹

Although Louisiana has attempted to change its complicated tax system to collect sales taxes from out-of-state e-commerce retailers, it has not done nearly enough—failures in several critical areas still exist within the current tax system.²³⁰ Most prominently, Louisiana's two-track approach only solves part of the problem, leaving Louisiana with a fragmented arrangement of varying, numerous local tax rates and exemptions.²³¹ Therefore, Louisiana must make further changes to help repair its splintered, complicated tax system and prevent challenges of undue burdens on interstate commerce.²³²

IV. LOOKING TO THE FUTURE: THERE MUST BE A BETTER WAY

Ideally, Congress should implement a standardized collection solution for all states because it would ensure that states, including Louisiana, would benefit from *Wayfair*'s revenue opportunities. This solution, however, is unlikely, given the congressional history related to the physical presence requirement.²³³ Therefore, moving forward, Louisiana must make changes at the state level if it wants to reap the benefits of *Wayfair* and gain revenue from out-of-state e-commerce retailer sales tax collection.²³⁴ The state has two options that will avoid undue burdens on interstate commerce, but the Louisiana Legislature should ultimately

228. See 2019 La. Acts No. 360 § 1407; 2018 La. Acts No. 5 § 2

229. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16 (discussing Louisiana's potential revenue gains from e-commerce tax collection).

230. See Burvant & Mantle, *supra* note 11.

231. See *infra* Section IV.B.1.

232. See Burvant & Mantle, *supra* note 11.

233. See Frenkel, *supra* note 27, at 139–40. See generally Karen Pierog, *Bill Would Put Brakes on U.S. States' Rush to Tax Internet Sales*, REUTERS (Sept. 14, 2018 4:35 PM), <https://www.reuters.com/article/us-usa-internet-taxation/bill-would-put-brakes-on-u-s-states-rush-to-tax-internet-sales-idUSKCN1LU2RT> [<https://perma.cc/DQ62-ALNJ>] (discussing opposition to H.R. 6824).

234. See Burvant & Mantle, *supra* note 11.

implement a total reform approach.²³⁵ This approach is superior to Louisiana's other option because it not only guarantees all of the e-commerce sales tax collection benefits that stem from *Wayfair* but also improves the state's entire sales tax system for e-commerce retailers and brick-and-mortar retailers alike through simplification of the current complex system.²³⁶

A. The Ideal Solution: Congressional Standardization of the Nexus Requirement

To allow all states to avoid placing undue burdens on interstate commerce, Congress should standardize the taxation of e-commerce retailers. The *Wayfair* dissent stated that Congress should depart from the physical presence rule, and *Quill* deferred to Congress's "wisdom" on whether to eliminate the physical presence rule.²³⁷ Jurisprudence has eliminated the physical presence requirement.²³⁸ Therefore, Congress should play some role in the implementation of such a striking decision that enables states to charge sales tax to e-commerce retailers without a physical presence by setting concrete standards that all 50 states, including Louisiana, must follow to ensure that each state reaps the benefits provided by *Wayfair* without concerns of creating undue burdens on interstate commerce.²³⁹

Congress's best option in taxing e-commerce retailers is through a standardized economic nexus provision based on South Dakota's Act that would bar e-commerce retailers from retroactive tax collection.²⁴⁰ Congress should include simplification and standardization requirements based on South Dakota's SSUTA compliant sales tax system.²⁴¹ These standards could require states with complicated sales tax systems, like Louisiana, to simplify their systems and would ensure that all states benefit from the opportunity to collect the millions of dollars in additional revenue

235. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–100 (2018) (discussing the features of South Dakota's sales tax system that are designed to protect against undue burdens on interstate commerce).

236. See *infra* Section IV.B.3.

237. *Wayfair*, 138 S. Ct. at 2102 (Roberts, C.J., dissenting); *Quill Corp. v. North Dakota*, 504 U.S. 298, 318–19 (1992).

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

239. See *id.*

240. See *id.*

241. See *id.* at 2099–100.

made available by the elimination of the physical presence rule.²⁴² Congress should address sales tax collection in the wake of *Wayfair* because standardization based on the *Wayfair* Court's considerations is likely to overcome challenges of undue burdens on interstate commerce.²⁴³ Additionally, standardization will make it easier for these retailers to collect sales taxes because they would only need to comply with one standard, rather than navigate 50 separate systems.²⁴⁴ Such a solution could also appease the dissenting justices in *Wayfair*, who felt Congress should play a role in the elimination of the physical presence rule.²⁴⁵

Although a bill is an ideal solution,²⁴⁶ actual congressional action will likely be unsuccessful based on the history of the physical presence requirement and the already existing resistance to congressional standardization.²⁴⁷ From the time the Court deferred to Congress on the physical presence requirement until *Wayfair*, Congress passed no legislation facilitating sales tax collection from e-commerce retailers.²⁴⁸ The states were largely left to their own devices to tackle this problem, mostly because of the extreme complexity of the issue.²⁴⁹ For legislation to pass, Congress needed either the e-commerce retailers or the states to compromise.²⁵⁰ Pushing such compromise, however, was not an effective

242. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16. See generally *Wayfair*, 138 S. Ct. at 2099–100.

243. See *Wayfair*, 138 S. Ct. at 2099–100.

244. See generally H.R. 6824, 115th Cong. (2018) (demonstrating the form that such a congressional solution would take).

245. See *Wayfair*, 138 S. Ct. at 2101 (Roberts, C.J., dissenting).

246. Understanding the need for congressional standardization, a group of representatives recently introduced H.R. 6824, the Online Sales Simplicity and Small Business Relief Act of 2018, to the House of Representatives. This bill bans retroactive collection, bars states from collecting e-commerce sales taxes until January 1, 2019, and calls for states to develop an interstate compact for e-commerce sales tax collection that identifies a minimum substantial nexus and simplifies registration, collection, and compliance processes. This proposed legislation has already faced resistance from the National Conference of State Legislatures, which views the bill as limiting states' abilities to implement *Wayfair* after years of congressional inaction on the physical presence requirement. Legislators from states that have started collecting e-commerce sales tax will likely join the Conference in vehement opposition to such collection-restricting legislation. H.R. 6824, 115th Cong. (2018); Pierog, *supra* note 233.

247. See Frenkel, *supra* note 27, at 139–40. See generally Pierog, *supra* note 233.

248. Frenkel, *supra* note 27, at 139–40.

249. *Wayfair*, 138 S. Ct. at 2099–100; Frenkel, *supra* note 27, at 139–40.

250. Frenkel, *supra* note 27, at 139–40.

reelection strategy for members of Congress, so they did not pursue it.²⁵¹ Congressional action regarding standardization of e-commerce sales tax in the wake of *Wayfair* faces similar challenges—compromises will be necessary between states and e-commerce retailers.²⁵² Although a congressional standardization solution is ideal because it would reduce questions of undue burdens on interstate commerce, simplify tax collection for e-commerce retailers, and provide all states with a clear plan for their e-commerce sales tax collection, this solution is unlikely to pass based on congressional history related to the physical presence requirement because bills²⁵³ related to the physical presence requirement have been proposed but have never passed.²⁵⁴

B. Louisiana's Options for E-Commerce Sales Tax Collection

Congress is unlikely to formulate a national solution. Thus, Louisiana must change its own system to gain the additional revenue from e-commerce taxes.²⁵⁵ Louisiana has made attempts to benefit from the *Wayfair* holding; however, the state must take further steps to simplify its tax system and prevent allegations of imposing undue burdens on interstate commerce.²⁵⁶ The state can take one of two routes to ensure that it benefits from *Wayfair*: (1) a moderate approach or (2) a total reform approach. Both approaches include their respective positive and negative aspects, but the best approach for Louisiana is the total reform approach because it greatly reduces the concern of unduly burdening interstate commerce and streamlines the state's complex sales tax system. These effects will, in turn, benefit both e-commerce and brick-and-mortar retailers.²⁵⁷

1. The Moderate Approach: The Louisiana Sales and Use Tax Commission for Remote Sellers' Plan

The first option for Louisiana post-*Wayfair* is the plan on which Louisiana Sales and Use Tax Commission for Remote Sellers is currently

251. *Id.*

252. *Id.* (discussing challenges of congressional action pre-*Wayfair*).

253. *See supra* Section I.B.4.

254. *See Wayfair*, 138 S. Ct. at 2099–100. *See generally* Frenkel, *supra* note 27, at 139–40.

255. *See* Frenkel, *supra* note 27, at 139–40; Burvant & Mantle, *supra* note 11.

256. BULLETIN NO. 18-001, *supra* note 188, at 2–4; Burvant & Mantle, *supra* note 11.

257. *See infra* Section IV.B.2.

working to implement for out-of-state e-commerce sales tax collection.²⁵⁸ The Commission's plan is the path that Louisiana is most likely to take because the Louisiana Legislature created the Commission to collect e-commerce taxes, which suggests probable state approval of the plan.²⁵⁹ Under this approach, Louisiana would follow the Commission's two-track method for tax collection, which will likely include software and registration. Given that the Commission is still developing this plan and weighing the state's options, it is difficult to determine whether this option will subject Louisiana to challenges from out-of-state e-commerce retailers.²⁶⁰ Also, this option does not address Louisiana's complex sales tax system for retailers with physical presence in the state because the Commission only controls e-commerce sales tax collection.²⁶¹ Therefore, only e-commerce retailers will benefit from tax collection simplification and rate standardization under this option.²⁶²

The plan's two-track collection method is flawed because partially reforming Louisiana's extremely complex and ineffective system does not recognize the broader issue: Louisiana's current tax system could be costing the state business opportunities.²⁶³ Although the current sales tax system for in-state businesses does not raise the issue of creating undue burdens on interstate commerce because in-state businesses are not subject to such concerns, Louisiana should nonetheless consider improving its overall sales tax system to positively affect business in the state.²⁶⁴

258. BULLETIN NO. 18-001, *supra* note 188, at 4

259. *Id.* at 3.

260. *Id.* at 4; *see* Burvant & Mantle, *supra* note 11; Crisp, *supra* note 205.

261. *See* 2018 La. Acts No. 5 § 339(2); *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1.

262. *See* 2018 La. Acts No. 5 § 339(2); *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1.

263. *See generally* Stephanie Grace, *Grace Notes: High Court Nudges Louisiana Toward More Sensible Tax Collections*, *ADVOCATE* (Oct. 2, 2018 11:24 AM), https://www.theadvocate.com/baton_rouge/opinion/stephanie_grace/article_a419c300-c65f-11e8-884f-37704b95ecd2.html [<https://perma.cc/EC6T-EBLV>] (discussing Louisiana's business friendliness and Louisiana's resistance to changing its tax system).

264. *See* Jared Walczak & Scott Drenkard, *State and Local Tax Rates, Midyear 2018*, *TAX FOUND.* 6 (July 2018), <https://files.taxfoundation.org/20180713135343/Tax-Foundation-FF600.pdf> [<https://perma.cc/N6W3-CBNJ>]; John Wirt, *Louisiana Needs Tax Reform, Business, Tax Group Leaders Say*, *LA. WATCHDOG* (Jun. 19, 2018), https://www.watchdog.org/louisiana/louisiana-needs-tax-reform-business-tax-group-leaders-say/article_3de3634a-732e-11e8-98af-ebb7175d3655.html [<https://perma.cc/6LKM-R3PP>].

Currently, Louisiana's system—which has created the second highest average combined state and local sales tax rate in the country—may encourage its consumers to purchase goods in jurisdictions with lower local taxes.²⁶⁵ These consumers may even leave the state to make purchases, harming in-state businesses's profits and lessening Louisiana's tax revenue.²⁶⁶ This reality could deter businesses from opening in Louisiana or cause businesses to leave the state. This damaging consequence impacts not only Louisiana businesses overall, but also the state's employment rate because fewer Louisiana businesses equates to fewer job opportunities for Louisiana residents.²⁶⁷ The varying tax exemptions across Louisiana raise overhead expenses for companies, hurting both employment opportunities and Louisiana's ability to attract more businesses.²⁶⁸ Although Louisiana's complex sales tax system is not the only factor that deters businesses from coming to the state, it is a contributing factor that Louisiana should address, especially since following the SSUTA guidelines can solve it.²⁶⁹

The two-track method also does not take advantage of the opportunity for tax system overhaul that *Wayfair* provides Louisiana; instead, it makes more sense to fix the entire tax system while it is already being changed, rather than make piecemeal changes that only affect e-commerce retailers. The fact that Louisiana is one of only two states with such a complex tax system suggests that changes must eventually be made to its sales tax system to put it in line with the majority of other states.²⁷⁰ Louisiana should make these changes expeditiously so it can avoid future issues that will likely stem from its current sales tax system.²⁷¹ Most importantly, under this two-track approach, if e-commerce retailers challenged Louisiana's collection system because it placed undue burdens on interstate commerce, the state could lose potential revenue stemming from e-commerce sales tax collection and would have to again design an e-commerce tax collection system.

Based on these considerations, taking the moderate approach is not the state's best option because it only addresses half of Louisiana's sales tax collection problem. This approach would only streamline Louisiana's

265. Walczak & Drenkard, *supra* note 264, at 1.

266. Wirt, *supra* note 264.

267. *See id.*

268. *See id.*

269. STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 119, at 4–8; *see* Wirt, *supra* note 264.

270. *See* Bishop-Henchman et al., *supra* note 104, at 13, 18 (discussing the problems with Louisiana and Colorado's sales tax systems).

271. *See id.*

e-commerce sales tax collection instead of simplifying its entire sales tax system. Moreover, under the moderate approach, Louisiana's e-commerce tax system may still face challenges of creating undue burdens on interstate commerce, further complicating e-commerce sales tax collection and putting the state's e-commerce tax revenue gain in jeopardy.²⁷²

2. *The Total Reform Approach: Become a SSUTA Member*

A more dramatic change to Louisiana sales tax system would require the state to make additional changes to its tax collection system to become a SSUTA member. Dispute exists over whether the Court in *Wayfair* made it a requirement for all states to be members of the SSUTA.²⁷³ Regardless, South Dakota is a member of the SSUTA, and the Court recognized that the standardized features of the SSUTA were designed to prevent undue burdens on interstate commerce.²⁷⁴ To err on the side of caution and to simplify the state's complex tax system, Louisiana should become a member of the SSUTA because this membership would likely render challenges of undue burdens on interstate commerce less viable.²⁷⁵

SSUTA membership is Louisiana's best option because it allows for compliance with *Wayfair* and enables overall tax system simplification without the need for the state to attempt to reinvent the wheel by creating its own tax system simplification methods. Given that the SSUTA provides a framework and guidance to its members,²⁷⁶ Louisiana would be able to expend fewer resources on creating a plan from scratch for e-commerce sales tax collection, making interstate commerce challenges less likely.²⁷⁷ Louisiana should not ignore the Court's guidance and subject itself to such challenges simply because the legislature thinks it can create

272. See BULLETIN NO. 18-001, *supra* note 188, at 4; Wirt, *supra* note 264.

273. See Landry, *supra* note 218.

274. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–100 (2018).

275. See *id.*

276. STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 119, at 4–8.

277. The Louisiana Sales and Use Tax Commission for Remote Sellers has been working since June 2018 to craft a solution that would allow the state to comply with *Wayfair* and begin collecting e-commerce sales taxes. This hard work could still be subject to a challenge of creating an undue burden on interstate commerce, which, if found valid, would send the state back to the drawing board. SSUTA membership, however, was noted as a favorable feature of South Dakota's sales tax system. If Louisiana expended its resources on working toward SSUTA membership, it would be in a better position to stand up to challenges of undue burdens on interstate commerce and would be unlikely to have to reform its sales tax system multiple times, which is a risk under the state's current approach. See *Wayfair*, 138 S. Ct. at 2099–100; BULLETIN NO. 18-001, *supra* note 188, at 4.

and implement a better method for e-commerce sales tax collection.²⁷⁸ Louisiana's quest to implement its own method runs the risk of causing the state to lose out on valuable revenue gained through e-commerce sales tax collection, as evidenced by the fact that Louisiana already missed its proposed collection date of January 1, 2019, and collection appears to still be voluntary, with an anticipated collection date of no later than July 1, 2020.²⁷⁹ Instead, the state should pursue SSUTA membership, limiting the questions of undue burdens on interstate commerce and allowing the state to gain revenue from e-commerce retailers sooner.²⁸⁰ Finally, SSUTA membership would eliminate the need for a two-track sales tax system in which e-commerce retailers would enjoy a simplified collection process while in-state retailers would remain subject to Louisiana's notoriously complex sales tax system.²⁸¹

Louisiana must completely overhaul its current sales tax system to conform to the SSUTA's approach because SSUTA membership does not override state law.²⁸² Despite the need for overhaul, this total reform approach is superior because it would address the many flaws in the state's current collection system, and it would streamline collection for all retailers, not just e-commerce retailers.²⁸³ Additionally, total reform of the tax system would combat the issue that the moderate approach leaves unsolved with respect to Louisiana businesses.²⁸⁴ For example, Louisiana would have a uniform state and local tax base for all retailers, not just

278. See Bishop-Henchman et al., *supra* note 104, at 18 (discussing the complexity of Louisiana's current sales tax collection system).

279. See BULLETIN NO. 18-002, *supra* note 192, at 3; BULLETIN NO. 18-001, *supra* note 188, at 4; Deslatte, *supra* note 193; Melinda Deslatte, *Louisiana Collecting More Sales Taxes from Online Purchases*, SHREVEPORT TIMES (Apr. 8, 2019), <https://www.shreveporttimes.com/story/news/local/louisiana/2019/04/08/louisiana-collecting-more-sales-taxes-online-purchases/3399312002> [<https://perma.cc/4KLV-2BV7>] (discussing the voluntary collection of online sales taxes in Louisiana as of April 2019); Cole, *supra* note 194.

280. See generally *Wayfair*, 138 S. Ct. at 2099–100 (discussing SSUTA membership features designed to protect against undue burdens on interstate commerce).

281. See Bishop-Henchman et al., *supra* note 104, at 18; *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1.

282. STREAMLINED SALES TAX GOVERNING BD., INC., *supra* note 119, at 4; see Bishop-Henchman et al., *supra* note 104, at 18.

283. See generally *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1 (addressing the issue of streamlining e-commerce sales tax collection and keeping all other sales tax collection the same).

284. See BULLETIN NO. 18-001, *supra* note 188, at 4.

e-commerce retailers, as required for SSUTA membership.²⁸⁵ This simplification for all retailers is not the case under the moderate approach.²⁸⁶ If Louisiana becomes a SSUTA member, business throughout the state will improve—businesses will be more inclined to open in Louisiana with the removal of the complex sales tax system barrier, which, in turn, will have a positive impact on the state’s employment rate and sales tax revenue.²⁸⁷

Local jurisdictions, especially those with higher local tax rates, may be reluctant to join the SSUTA and cling to the current rates because they may believe that a centralized collection system may cause cash flow and error problems.²⁸⁸ Louisiana also may not be incentivized to join the SSUTA because it could collect sales taxes from e-commerce retailers without completely reforming its tax system by instead simplifying the e-commerce collection process and leaving the rest of the sales tax collection system untouched.²⁸⁹ Louisiana and its parishes, however, must recognize the broader problem—the state’s flawed sales tax system—and take steps to fix an issue that affects more than just e-commerce retailers. Piecemeal tax reform will not alleviate challenges related to Louisiana potentially placing undue burdens on interstate commerce and does not address Louisiana’s complex sales tax collection for in-state retailers.²⁹⁰ In response to concerns from Louisiana parishes over SSUTA membership, a single local tax rate should allay their worries because it will improve the state’s business climate by increasing business in the state.²⁹¹ Louisiana should fix its sales tax system now because the changes promoted in *Wayfair* provide a golden opportunity for Louisiana to scrutinize and overhaul its tax system using the SSUTA guidelines and assistance.

Therefore, although both positive and negative aspects to Louisiana joining the SSUTA exist, the total reform approach is Louisiana’s best option. Joining the SSUTA, as this approach advocates, would greatly decrease the likelihood that Louisiana will face challenges of creating undue burdens on interstate commerce and would increase the likelihood that the state will fully benefit from e-commerce sales tax collection.²⁹² Most importantly, this approach would overhaul Louisiana’s complicated tax system, improving its business climate as a result.

285. See *Wayfair*, 138 S. Ct. at 2100.

286. See *supra* Section IV.B.1.

287. See BULLETIN NO. 18-001, *supra* note 188, at 4.

288. See *Having It Both Ways on Sales Taxes*, *supra* note 131, at 6.

289. See *id.*

290. See *id.*

291. See *supra* Section IV.B.1.

292. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099–100 (2018).

CONCLUSION

Louisiana's current complex sales tax system must be reformed in the wake of *Wayfair* to ensure that the state benefits from the millions of dollars in revenue stemming from the collection of e-commerce sales taxes in a way that avoids challenges of creating undue burdens on interstate commerce.²⁹³ The best reform option among those available to Louisiana is a total reform approach, which would completely simplify the state's sales tax collection system through SSUTA membership.²⁹⁴ This option allows Louisiana to fully comply with the Supreme Court's *Wayfair* considerations and would also streamline its complex sales tax system, benefitting e-commerce and brick-and-mortar retailers alike.²⁹⁵ *Wayfair* has presented Louisiana with a perfect opportunity to finally scrutinize, simplify, and overhaul its entire sales tax collection system to put it in line with the majority of other states and improve the state's business climate.²⁹⁶

293. Boch, *supra* note 16, at 20; Burvant & Mantle, *supra* note 11.

294. See Bishop-Henchman et al., *supra* note 104, at 18.

295. See BULLETIN NO. 18-001, *supra* note 188, at 4. See generally *Having It Both Ways on Sales Taxes*, *supra* note 131, at 1.

296. See *Having It Both Ways on Sales Taxes*, *supra* note 131, at 6.