TAXATION IN THE DIGITAL AGE:
The Demise of Quill and the Implications of the Supreme Court Decision in Wayfair

In June, the Supreme Court decided South Dakota v. Wayfair, holding that states may require collection of sales tax on purchases made from out-of-state sellers, even if the seller does not have a physical presence in the taxing state. The case has far reaching implications both domestically and internationally.

Date: Thursday, September 13, 2018  
Time: 12:30 p.m.–2:00 p.m.  
(Light lunch will be served at 12:15 p.m.)  
Location: New York Law School, Events Center, V201 185 West Broadway, New York, NY 10013  
RSVP: www.nyls.edu/taxRSVP  
CLE: 1.5 credits in Areas of Professional Practice (NY transitional and nontransitional)  
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Moderator: Ann F. Thomas, Otto L. Walter Distinguished Professor of Tax Law; Director, Graduate Tax Program, NYLS

Panelists: Alan I. Appel ’76, Distinguished Practitioner, Professor of Law; Director, International Tax Program; and Co-Director, Center for Business and Financial Law, NYLS  
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The Headline of *Wayfair* Decision

On June 21, 2018, the United States Supreme Court held that the physical presence requirement for sales and use tax nexus set forth in *Quill Corporation v. North Dakota*, was overruled.

In so doing, the Court discarded a “bright line” rule and substituted a standard that requires a case-by-case determination as to whether a State may require out-of-State persons to collect and remit sales/use taxes.

The decision undoubtedly broadens the ability of States to require out-of-State to collect and remit sales and use taxes on transactions with in-State customers.

The extent of this broadened ability is unclear and will be further defined by further litigation, potential State and Federal legislation and actions by State Departments of Revenue.
Sales/Use Tax Primer

In general, sales tax is imposed upon the transfer of tangible personal property (“TPP”) or certain services that are enumerated by State statutes.

The seller is typically legally obligated to collect the tax from the purchaser, who is economically liable for the tax.

In the context of a multi-jurisdiction transaction, the general rule is that the sale occurs where title or possession changes hands.

The use tax is a “complementary” tax that is imposed directly upon the purchaser in a transaction that is subject to sales tax upon the use of such property where no sales tax was paid.

Virtually no consumers comply with use tax requirements and States rarely audit taxpayers other than businesses for use tax liability.

As a result, States perceive that the ability of out-of-State sellers to avoid collecting sales taxes from their residents results in a large loss of tax revenue.
**Quill v. North Dakota**

In *Quill*, the Court affirmed and elaborated on its prior decision in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, that a seller must have property, people or some other physical connection to the State for the State to compel the seller to collect and remit sales tax.

The taxpayer in *Quill* sent mail order catalogues into North Dakota, from which customers ordered goods which were shipped by common carrier. On these facts, the Court held that there was no physical presence, and therefore no obligation to collect and remit sales tax.

*Quill* was decided on the basis of Congress’ Constitutional power to ability to regulate interstate commerce.

The Court explicitly noted that Congress had the power to reverse or modify its determination by legislation and invited it to do so.

Congress has thus far declined the invitation to do so.
State Nexus Expansion Schemes

Click-through nexus—If a retailer contracts with an in-state person who directly or indirectly refers potential customers to the retailer for a commission or other consideration, the retailer is treated as maintaining a physical place of business in the State.

Affiliate nexus—If an affiliated person of the retailer has physical presence, the affiliate’s physical presence is attributed to the retailer.

Marketplace nexus—Treats a marketplace facilitator as the seller of the goods of third parties using the marketplace platform.

Notice reporting—Requires out-of-State sellers to notify customers that they must pay use tax on their purchases and report all purchases to the State.

Economic nexus—Asserts nexus on a set level of sales or gross receipts activities.

None of the following schemes are directly addressed by Wayfair:

Click-through nexus
Affiliate nexus
Marketplace nexus
Notice reporting
The South Dakota Statute

In a concurrence to a case upholding an injunction against the enforcement of Colorado’s notice requirement statute in 2015, Justice Kennedy suggested that “[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.”

He further stated, “The Internet has caused far-reaching systematic and structural changes in the economy, and . . . It is unwise to delay any longer a reconsideration of the Court’s holding in Quill.”

South Dakota accepted Justice Kennedy’s invitation and enacted an economic nexus statute purporting to assert nexus on the conditions set forth in the side box:

A remote seller has sales tax nexus with South Dakota if the seller, in the current or previous calendar year:

- Has gross revenue from the sales of goods and services in the State exceeding $100,000; or
- Sold taxable goods and services for delivery in the State in 200 or more separate transactions.
The Wayfair Decision

In a 5-4 decision, the Court overruled *Quill* and held the physical presence standard was not required under the Commerce Clause.

The dissenting judges agreed that the physical presence standard was inconsistent with the Court’s other Commerce Clause jurisprudence, but would have retained the rule on the dual basis of (1) *stare decisis*; and (2) the assumption that Congress accepted the standard based upon its failure to enact a new statute.

The majority stated that the proper analytical framework is set forth in *Complete Auto Transit, Inc. v. Brady*, which provides that a state tax will be upheld if it (1) applies to an activity with substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services the state provides.

Based on the factors on the right, the Court indicated that South Dakota’s statute was constitutional.
Open Issues—States with Economic Nexus Statutes

The Court did not state whether the absence of any of the three factors from another State’s economic would cause the Court to conclude that the economic nexus statute was unconstitutional.

In particular, the Court did not address the potential for retroactive application of economic nexus. At least one State has already suggested the ability to require vendors remit sales tax for transaction taking place on January 1, 2018.

Other States have publicized effective dates as of the decision of Wayfair, dates very soon thereafter (July 1, 2018) or other dates in the near future.
Almost every State Department of Revenue has released a public statement that they are studying the decision and will release guidance in reaction to the Wayfair decision.

Given both the large dollar amounts implicated and the likelihood that States will attempt to coordinate a response, it is unlikely that much guidance will be provided in the short or intermediate term.

Open Issues—States with Other Nexus Statutes

The Court did not address the validity of the other types of statutes enacted prior to Wayfair in an attempt to broaden nexus requirements.

Nonetheless, it is likely given the tenor of the Court’s decision in Wayfair expressing concern about lost State tax revenue that States that have enacted click-through, affiliate or marketplace nexus statutes or that require notice reporting will continue to assert the validity of their nexus statutes.

A few States have proposed legislation similar to the South Dakota statute as a means of requiring out-of-State sellers to collect and remit sales tax.
Open Issues—Potential Federal Response

Although there has been one bill proposed in Congress to restore the physical presence standard in the wake of Wayfair, the likelihood of any bill passing Congress at the end of an election year is virtually zero.

Given Congress’ inability to enact Commerce Clause legislation for more than half a century, it would be unwise to expect that Congress will do so even after the mid-term elections.

At best, Congress may enact legislation addressing the potential retroactive effect of the Wayfair decision, but it is difficult to foresee a return to the physical presence standard.
Next Steps with Regard to Past Liabilities

The Wayfair decision created numerous open questions for multistate retailers that have relied upon the physical presence standard in determining whether to collect and remit sales taxes.

Retailers should group potential liabilities by State statute type (i.e., economic nexus, affiliate nexus, etc.).

Retailers should monitor State publications to determine whether potential liability States are purporting to apply Wayfair on a retroactive basis.

If currently under audit, the taxpayer should aggressively resist any attempts to apply economic nexus on a retroactive basis.

Retroactivity is likely to be the next major battlefield in the taxation of multistate retailers.

The Wayfair decision likely requires an analysis under ASC 450 for companies required to report contingent liabilities for financial accounting purposes.

At a minimum, it is likely that the likelihood of liability has increased in South Dakota and States that have similar economic nexus statutes.
SPEAKER BIOGRAPHIES
Professor Alan I. Appel

Professor Alan I. Appel specializes in international and domestic tax planning. He is on the Board of Advisors for the Journal of International Taxation and the Journal of Taxation and Regulation of Financial Institutions. He was formerly Council Director for the International Tax Committees as well as the Chair of the U.S. Activities of Foreigners and Tax Treaties Committee of the American Bar Association Section of Taxation. Professor Appel holds a J.D. from New York Law School and an L.L.M. from New York University. At New York Law School, he is the Director of the International Tax Program. He teaches courses in International Tax, Corporate Tax, and Federal Income Tax. Prior to joining New York Law School, he spent 13 years in the New York office of Bryan Cave Leighton Paisner LLP (formerly Bryan Cave LLP).
Alvan Bobrow provides counsel on state and local, federal, and international taxation to clients in the financial services, manufacturing, e-commerce, entertainment, and media sectors. Alvan's extensive experience includes New York City and New York State, multistate, civil, and criminal tax matters. He has assisted high net worth individuals and celebrities with over 150 residency audits. He counsels international companies locating operations in the United States and advises international and U.S.-based businesses on treaty permanent establishment and constitutional nexus issues. His criminal defense practice focuses on the investigations of both individuals and businesses in matters relating to tax fraud, unreported income, and tax shelter abuses.

Before entering private practice, Alvan was Vice President and General Tax Counsel for CBS, Inc. He has substantial experience working with senior government officials and legislative committees across the country to develop statutory provisions, regulations, and administrative solutions to complex business challenges. He is credited as the principal drafter of the national multistate income apportionment rules for broadcasters.

**Areas of Experience**
- Tax
- State and Local Tax Litigation and Controversy
- State and Local Tax Consulting
- Federal Tax Litigation and Controversy
- International Tax
- Akerman TaxAbility Matrix
- Taxation in the Sharing Economy

**Education**
- LL.M. in Taxation, University of Miami, 1973
- J.D., Brooklyn Law School, 1972, Brooklyn Law Review
- B.B.A., City University of New York, Accounting, 1969

**Admissions**
- New York City Bar Associations, Member
- New York University, State and local Tax Study Group
- New York State Tax Department Financial Services Modernization Task Force
- New York State Tax Department Telecommunications/E-Commerce Advisory Panel
- New York City Tax Commissioner's Advisory Committee
- International Tax Discussion Group
- American Bar Association, Member
- New York Bar Associations, Member

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**Affiliations**
- New York City Bar Associations, Member
- New York University, State and local Tax Study Group
- New York State Tax Department Financial Services Modernization Task Force
- New York State Tax Department Telecommunications/E-Commerce Advisory Panel
- New York City Tax Commissioner's Advisory Committee
- International Tax Discussion Group
- American Bar Association, Member
- New York Bar Associations, Member
- Akerman Witum Residency Series West Palm Beach, Florida, Speaker, “Beware the Pitfalls of Residency and Allocation,” February 27, 2018
- TEI Tax School - Houston Chapter, Speaker, “Multistate Sales and Use Tax Update,” May 4, 2015
- New York State Taxation Conference, Speaker, “NYS and NYC Audit and Enforcement Issues,” October 20, 2014
Derek Rose’s practice focuses primarily on federal and state tax controversy matters. With respect to federal tax controversy, he has successfully defended tax deductions in excess of $1 Billion in a transfer pricing audit as well as on issues including Subpart F income, permanent establishment, debt capacity, depreciation disputes, research tax credits, captive insurance and privilege issues. He has successfully argued in the Federal Circuit Court of Appeals and resolved numerous cases in the United States Tax Court.

With respect to state tax matters, in addition to successfully litigating cases on a variety of issues, including cost of performance, apportionment, classification of business income and the scope of legislative authority to tax, he has advised on nexus issues, property tax and unclaimed property. He also served as quasi-internal tax counsel for a Fortune 50 corporation during that client’s position vacancy supervising tax counsel and accountants on more than 100 active state tax controversies while interacting with corporate legal counsel to create issue resolutions consistent with broader corporate goals.

Mr. Rose is an adjunct professor at Washington University School of Law, where he teaches State and Local Taxation as part of the Masters in Taxation program. He has also taught at Fontbonne University and has spoken on a variety of federal and state tax issues.
In 1992, Ann F. Thomas began a second career in academic law with a fellowship year at the Bunting Institute at Radcliffe College, after 17 years (10 as partner) working in the corporate tax department at Fried Frank Harris Shriver & Jacobson, where she specialized in mergers and acquisitions. Professor Thomas spent two years as an adjunct professor at Yale Law School and joined New York Law School’s faculty in 1995.

Professor Thomas, who teaches a range of tax courses and is Director of the Graduate Tax Program, was drawn to academia because of the chance to explore and develop a subject she views as fundamental to how societies function.

We need to promote greater tax literacy among lawyers. Teaching is very rewarding from that point of view, Professor Thomas says. Some students here are already working in tax and a good number are interested in the tax field executive and corporate practice and they really add to the fruitful discussion of tax issues.

Professor Thomas says her first love in taxation research is in the corporate and business context, but she also concentrates her scholarship on income tax and urges a re-examination of the assumptions about marriage and family that underlie current policy.

Our tax subsidies should work to promote the care and nurturing of children. In modern society, families can come in many different configurations. Tax policy should support family life and not just the traditional sole-earner household, says Professor Thomas.
In 1999, Professor Thomas organized a symposium for the *New York Law School Journal of Human Rights* on the subject of Women, Equity, and Federal Tax Policy: Open Questions. More than 20 experts from across the country legal scholars, economists, and activists spent a full day examining tax policy problems that diminish the financial security of women, including the possible marriage penalty within the income tax code. With the help of the Marjorie Cook Foundation, the *Journal of Human Rights* distributed the symposium volume to every member of Congress, key Treasury and White House staff, law professors, and economists. The timing coincided with fierce debates in both houses of Congress over marriage and income tax. Although teaching tax law to future lawyers and practitioners is her primary mission, Professor Thomas uses her work in tax history to bring tax policy back to the citizens. As she sees it, tax literacy is the only way to ensure tax policies that reflect the needs of all citizens. We need to make the theory and the history of taxation more accessible so that voters can have a more informed view of our tax policy choices. Only then will they be able to set the agenda for future policy choices, she says.

Professor Thomas studies and teaches about comparative systems of corporate taxation around the world and sees a need in the increasingly global marketplace for an expansion of international cooperation on business and tax issues.

Professor Thomas is in the process of finishing a book examining the history of the U.S. tax system during the Progressive Era and the emergence of the modern income tax system in 1913.

Education:

**Fellow, Bunting Institute at Radcliffe College, 1992**

Harvard-Radcliffe, A.B. 1973

Yale, J.D. 1976