Campbell Law Review

Volume 41
Issue 2 *Spring 2019*

Article 6

2019

The Amazon Argument: An Examination of South Dakota v. Wayfair and a Discussion of its Implications

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Recommended Citation
Jessica Inscore, *The Amazon Argument: An Examination of South Dakota v. Wayfair and a Discussion of its Implications*, 41 Campbell L. Rev. 531 (2019).

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The Amazon Argument: An Examination of *South Dakota v. Wayfair* and a Discussion of its Implications

ABSTRACT

The Supreme Court's 2018 decision in South Dakota v. Wayfair removed the settled physical presence requirement for state taxation of out-of-state businesses. This kept states from taxing remote—and often small—sellers who had no stores, no warehouses, and no other connection to the state other than its sales to the state's citizens. Because the Court has done away with the requirement that businesses be physically located within a state before they can be taxed, states may now impose sales and use taxes on businesses whose only link to the state are predominately online transactions. Big companies like Amazon will no longer be able to hide behind a large online presence to avoid state sales and use taxes, but the real consequence of the decision lies with the underdogs: these taxes will impact small sellers disproportionately hard, as they must now navigate the copious amounts of taxing regulations across the country.

The Wayfair decision will mean confronting new issues in the near future. Its retreat to a substantial nexus requirement remains more ambiguous than ever in an online era and will result in an erosion of the Dormant Commerce Clause. The solution now lies with our democratic process. If the Court does not overturn Wayfair and we do not amend the Constitution—solutions which, though not impossible, are improbable—the responsibility falls on state citizens to ensure that out-of-state businesses are not unduly taxed. This Comment examines the Wayfair decision in light of the Dormant Commerce Clause's history and purpose and argues that the physical presence rule was wrongly overturned, a decision only we can now correct.

INTRODUCTION 532
I. A BRIEF HISTORY OF THE COMMERCE CLAUSE AND ITS PROGENY 533
A. The Commerce Clause..534
B. Dormant Commerce Clause...538
C. Out-of-State Presence...541
II. THE *WAYFAIR* DECISION 543

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III. *WAYFAIR*'S IMPLICATIONS AND THE AMAZON ARGUMENT 548
A. Implications for Small Businesses 548
B. Implications for Commerce Clause Jurisprudence 552
C. Implications for Federalism 554
IV. WHAT WE CAN DO NOW 556
CONCLUSION 558

INTRODUCTION

Of Congress's enumerated powers, none has had more historical, political, and economic influence than its power to regulate interstate commerce. Article I of the Constitution states that Congress shall have the power "[t]o regulate Commerce . . . among the several States."[1] These few words have been the basis of countless federal statutory schemes that have regulated everything from the wheat market to racial discrimination.[2] The Constitution's Necessary and Proper Clause aids Congress in utilizing its powers under the Commerce Clause, as it grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[3] The most well-known cases in Commerce Clause jurisprudence raise the following questions: What does commerce mean? When does commerce become interstate commerce? What does it really mean to regulate that commerce?[4] The Tenth Amendment theoretically functions as a limit to Congress's Commerce power. However, reality has proven that Congress can reach essentially any aspect of American life through the Commerce Clause, simply because everything that Americans do crosses state lines at some point.

The Supreme Court has also recognized a limit on the states' power to regulate activity—a limit that is inherent in the nature of the Commerce Clause. This limit is termed the "negative" Commerce Clause, or the Dormant Commerce Clause. The Dormant Commerce Clause functions as a practical restraint: "[T]o prevent the states—in the absence of congressional action—from creating insurmountable barriers among themselves, thereby eradicating the unity that the Framers of our

1. U.S. CONST. art. I, § 8, cl. 3.

2. *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (regulating racial discrimination); Wickard v. Filburn, 317 U.S. 111 (1942) (regulating the wheat market).

3. U.S. CONST. art. I, § 8, cl. 18.

4. Of particular importance in recent Commerce Clause jurisprudence is *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), in which the Court held that Congress could not *create* commerce in order to regulate it.

Constitution strove to create."[5] Thus, the Dormant Commerce Clause mandates that, regardless of whether Congress has chosen to exercise its power through specific legislation, a state cannot regulate activity that constitutes interstate commerce. Consequently, in *Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, the Court held that for a state to be able to tax businesses that ship goods into that state, the business had to have a physical presence in that state: *e.g.*, a manufacturing plant or a store.[6] Otherwise, the state would impermissibly regulate interstate commerce, a power specifically granted to Congress by the Constitution. Today, because many people order products online rather than shop in physical stores, states' sales and use tax bases are plummeting under the *Quill* and *Bellas Hess* rule. Recently, in *South Dakota v. Wayfair*, the Court overruled those cases, holding that states are no longer prohibited under the Dormant Commerce Clause from taxing businesses which do business in that state but do not have a physical presence there.[7]

I argue that the Court's overruling of *Quill* and *Bellas Hess* was an erroneous decision, with grave implications not only for Dormant Commerce Clause jurisprudence, but also for small businesses and our Constitutional structure of federalism. Part I of this Comment will trace the history of the Commerce Clause and Dormant Commerce Clause, including the analysis under *Quill* and *Bellas Hess*. Part II will examine the *Wayfair* decision and the Court's reasoning. Part III addresses the *Wayfair* decision's implications and consequences, ultimately concluding that the Court hastily overruled *Quill* and *Bellas Hess* at the expense of several hundred years of settled Commerce Clause analysis. Part IV will offer a solution to this issue, which now primarily falls on the people and the local political process.

I. A BRIEF HISTORY OF THE COMMERCE CLAUSE AND ITS PROGENY

The Commerce Clause has provided the basis for Congress's regulation of interstate activity since the Constitution's adoption. Over the centuries, the Court has gradually expanded the scope of Congress's reach under this clause, allowing the national government to regulate private,

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5. Amy M. Petragnani, Comment, *The Dormant Commerce Clause: On Its Last Leg*, 57 ALB. L. REV. 1215, 1215 (1994).

6. Quill Corp. v. North Dakota, 504 U.S. 298, 317–19 (1992); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 760 (1967).

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

intrastate conduct on a national scale.[8] At the same time, the Court has consistently held that states may not pass legislation that will impinge Congress's power to regulate commerce across the states, even if Congress has not yet done so.[9] Analyzing the Court's winding road under the Commerce Clause is an interesting, thought-provoking experiment, but perhaps the best place to begin is with the Court's first seminal case regarding the scope of the states' power under the Commerce Clause in *Gibbons v. Ogden.*[10]

A. The Commerce Clause

In *Gibbons v. Ogden*, the Court invalidated a New York statute that allowed two men, Robert Fulton and Robert Livingston, to navigate water exclusively by steamboat between New York and New Jersey.[11] Thomas Gibbons, the owner of a ferry business, claimed he had the right to operate his business between the two states because his license came from the federal government.[12] This was the Court's first opportunity to examine the scope of Congress's power under the Commerce Clause.

The Court, in an opinion authored by Chief Justice Marshall, first concluded that "commerce" includes navigation;[13] "commerce" is "intercourse";[14] "among" means "intermingled."[15] Furthermore, this power is intrinsically expansive, tied to Congress in its role as the representative of all American people:

> What is this power?
>
> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several

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8. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (regulating private, intrastate racial discrimination).

9. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) ("Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.").

10. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

11. *Id.* at 220–21.

12. *Id.* at 25–26.

13. *Id.* at 190–91.

14. *Id.* at 190.

15. *Id.* at 194.

> States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[16]

Since the Court's decision in *Gibbons*, Commerce Clause jurisprudence has resembled a roller coaster. Until the "switch in time that saved nine" in 1937,[17] the Court's approach to the Commerce Clause became more restrictive than Chief Justice Marshall's opinion in *Gibbons* and the decisions that soon followed. For example, in *United States v. E.C. Knight Co.*, the Court held that Congress could not regulate the manufacturing of sugar through the Sherman Anti-Trust Act because manufacturing is not commerce.[18] In *Hammer v. Dagenhart*, the Court held that Congress could not prohibit interstate shipment of goods produced through child labor because that was within the states' police power.[19] In *Carter v. Carter Coal Co.*, the Court invalidated certain wage and hour regulations for coal miners because mining is not commerce.[20] The Court stated, "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the [C]ommerce [C]lause."[21]

However, in 1937, the Court returned to its expansive approach. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld a federal law allowing the National Labor Relations Board to regulate unfair labor practices.[22] In *United States v. Darby*, the Court overruled its decision in *Hammer* and held that Congress could prohibit the interstate shipment of

16. *Id.* at 196–97.

17. The "switch in time that saved nine" is a reference to President Franklin Delano Roosevelt's attempt to pack the United State Supreme Court in 1937. Justice Roberts of the Supreme Court, a conservative who had invalidated New Deal legislation, suddenly voted with the liberal justices to uphold a state law establishing a minimum wage, avoiding the need for Roosevelt's court-reform legislation; *see generally* Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994).

18. United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895).

19. Hammer v. Dagenhart, 247 U.S. 251, 273 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

20. Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936).

21. *Id.* at 301.

22. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937).

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goods produced at wages and hours below the federal standard.[23] In a seminal Commerce Clause case, *Wickard v. Filburn*, the Court held that Congress could regulate wholly intrastate activity so long as the activity, in the aggregate, substantially affected interstate commerce.[24] The Court explained that it did not matter if the intrastate activity was designated as "production," "consumption," or "marketing."[25] The activity, "whatever its nature, [can] be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is . . . 'direct' or 'indirect.'"[26] *Wickard* vastly increased Congress's Commerce power. Congress could now regulate completely intrastate activity, even noneconomic activity, so long as its aggregate effect substantially touched the realm of interstate commerce.

By the time *Wickard* was decided, the Court's Commerce Clause jurisprudence had firmly established that Congress could regulate the channels and the instrumentalities of interstate commerce.[27] Then, in 1995, the Court decided *United States v. Lopez*.[28] In *Lopez*, the Court held unconstitutional a federal law making it a crime to have a gun within one thousand feet of a school.[29] This case marked the Court's return to a more restrained approach: in *Lopez*, the relationship between guns' presence within 1,000 feet of a school and the interstate market was just too strained to constitute a substantial effect.[30] A few years later, in *United States v. Morrison*, the Court again held a federal law unconstitutional—one that allowed victims of gender-motivated violence to sue the culprit for

23. *Darby*, 312 U.S. at 117, 123.

24. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942). In *Wickard*, the Agricultural Adjustment Act of 1938 controlled the amount of wheat farmers could produce in order to regulate the national wheat market, avoiding exceptionally high or low wheat prices. *Id.* at 115–16. Filburn, a wheat farmer, sold some wheat on the market but retained a portion for personal consumption and for planting during the next season. *Id.* at 114. This activity remained within Ohio, and was therefore wholly intrastate activity. *Id.*

25. *Id.* at 124.

26. *Id.* at 125.

27. *See generally* Hous. E. & W. Tex. Ry. Co. v. United States (The Shreveport Rate Cases), 234 U.S. 342 (1914) (holding that Congress could regulate railroad rates as the railroad is an instrumentality of interstate commerce); Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (holding that Congress could prohibit the transporting of lottery tickets from state to state as the transportation is conducted through the channels of interstate commerce).

28. United States v. Lopez, 514 U.S. 549 (1995).

29. *Id.* at 551–52.

30. The Court noted that the piling on of "inference upon inference" needed to connect the legislation to the interstate market would destroy the distinction between "what is truly national and what is truly local." *Id.* at 567–68.

monetary damages.[31] The Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[32] Importantly, *Lopez* and *Morrison* involved Congressional regulation of intrastate activity that was *not* economic in nature. *Lopez* and *Morrison* therefore confirmed that Congress can regulate intrastate activity that is economic in nature and that substantially affects interstate commerce.[33] Furthermore, although these cases exemplify a recent trend back toward a restrictive approach to the Commerce Clause, Congress is assuredly granted generous authority to regulate activities through its Commerce power.

Congress's use of the Commerce Clause to regulate private conduct is often a way to achieve admirable results on a national scale. In many cases, we might consider the possibility that the ends justify the means. Still, there are some drawbacks to the Commerce Clause's expansive reach, even if the objective is commendable. For example, in *Katzenbach v. McClung*, Congress prohibited a restaurant from racially discriminating against customers.[34] The Court held that Congress was permitted to regulate this discriminatory conduct, which was noneconomic activity conducted wholly within one state, because the restaurant bought food from a local supplier who had gotten the food from another state.[35] It is easy to look back on such a decision and think that Congress's "broad and sweeping" commerce power can only be a good thing, as it allows the federal government to reach conduct that would otherwise be left to the many state governments to control.[36] However, in many ways, Congress's power to control our intrastate conduct has gone too far. The *Katzenbach* Court approved congressional regulation of purely private, noneconomic, intrastate conduct based on a very thin line—by following a chain of goods which had once-upon-a-time come from outside of the state.[37]

In recent years, the Court has shown a willingness to draw a line in the sand. Notably, the Court in *National Federation of Independent Business v. Sebelius* held the Commerce Clause could not support the Affordable Care Act's individual mandate because it "compel[led] individuals to

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31. United States v. Morrison, 529 U.S. 598, 602 (2000).

32. *Id.* at 613.

33. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity . . . where that activity is economic in nature." *Id.*

34. Katzenbach v. McClung, 379 U.S. 294, 296–97, 302 (1964).

35. *Id.* at 304–05.

36. *Id.* at 305.

37. *See id.* at 302 ("This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce.").

become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce."[38] As some conservative justices noted, "Whatever may be the conceptual limits upon the Commerce Clause . . . , they cannot be such as will enable the Federal Government to regulate all private conduct . . . ."[39] However, cases such as *Sebelius* are few and far between. What is ultimately left after the numerous cases regarding the Commerce Clause power's scope is the notion that Congress can regulate many of our activities under the Commerce Clause.

B. Dormant Commerce Clause

The Dormant Commerce Clause further complicates matters. Congress continuously retains an immense amount of power in its hands, a power on which states occasionally stomp. The division between the power of the national and state governments, therefore, creates an interesting dilemma for the regulation of activities which effect interstate commerce. Long ago, the Court in *Gibbons* recognized that there is a unique relationship between the national and state governments under the Commerce Clause, a concept which has become known as the Dormant Commerce Clause: "[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[40] As one scholar explains, *Gibbons* did not definitively decide whether Congress's power to regulate interstate commerce was for Congress alone.[41] However, the *Gibbons* Court certainly considered it, and did so by examining the power to tax.[42] Chief Justice Marshall noted that when states lay and collect taxes, "they are not doing what Congress is empowered to do."[43] Still, the *Gibbons* majority "suggested that States *may* sometimes enact laws to regulate commerce, as long as the regulation does not interfere with, or is not contrary to, an Act of Congress passed pursuant to the Constitution."[44]

Nothing in the Constitution expressly provides for the Dormant Commerce Clause; "[r]ather, the Supreme Court has inferred this from the

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38. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012).

39. *Id.* at 647 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

40. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 199–200 (1824).

41. Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 405–06 (1998).

42. *Gibbons*, 22 U.S. (9 Wheat) at 199–200.

43. *Id.* at 199.

44. Lawrence, *supra* note 41, at 409 (footnotes omitted).

grant of power to Congress in Article I, §8, to regulate commerce among the states."[45] Since *Gibbons*, the Court has developed the Dormant Commerce Clause guided by two theories: (1) to provide for an "economic blueprint for the nation's economic functioning," and, (2) "to fulfill a political vision of a federal government responsive to the needs of *all* citizens while at the same time respecting and honoring the institutional interests of the States."[46] In other words, the Dormant Commerce Clause allows for a uniform standard across the country and allows the federal government to remain responsible for the needs of every citizen, guided also by the principle that individual states should not be able to regulate the activity of those who have no power to vote in that state.

The test under the Dormant Commerce Clause can be stated simply.[47] If the state law discriminates against out-of-state citizens, then it faces "'a virtually *per se* rule of invalidity.'"[48] This presumption can only be overcome if the state has no other means to advance its purpose.[49] State laws that do not discriminate are subject to a balancing test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[50] Furthermore, discrimination means that the state treats in-state and out-of-state economic interests differently and in a way that benefits its own interests while burdening out-of-state interests.[51]

Although there are many ways that a state statute could affect interstate commerce, only a few discriminatory statutes actually survive constitutional muster under the Dormant Commerce Clause. *Maine v. Taylor* is a famous and rare exception to the general rule that a discriminatory state statute is *per se* invalid.[52] In *Taylor*, the Court upheld a Maine statute that banned the importation of certain minnow used as

45. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 444 (5th ed. 2015).

46. Lawrence, *supra* note 41, at 411 (emphasis omitted and added).

47. Admittedly, the Dormant Commerce Clause is anything but simple. However, in order to give only a simplified background, I will avoid a lengthy discussion of the many rules embodied in the Dormant Commerce Clause.

48. Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

49. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–39 (2007).

50. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

51. *United Haulers Ass'n,*, 550 U.S. at 338.

52. Maine v. Taylor, 477 U.S. 131, 151–52 (1986).

bait.[53] The operator of a bait business in Maine imported the prohibited minnow into the state, where it was intercepted.[54] Maine had banned the fish because of the parasites it could bring to the state, which would harm the state's native fish.[55] The Court upheld the statute. While the Commerce Clause "significantly limits the ability of States . . . to regulate or otherwise burden the flow of interstate commerce, [] it does not elevate free trade above all other values."[56] Because the state's ban on importing the baitfish served "legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives," this was not an "arbitrary discrimination against interstate commerce."[57]

In a more typical case, *City of Philadelphia v. New Jersey*, the Court invalided a discriminatory state statute.[58] There, a New Jersey law prohibited the importation of waste from other states.[59] The Court held this statute violated the Dormant Commerce Clause because "it impose[d] on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."[60] Significantly, "the State ha[d] overtly moved to slow or freeze the flow of commerce for protectionist reasons . . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."[61] These cases exemplify the Court's careful attempt under the Dormant Commerce Clause to preserve congressional Commerce power, while recognizing that the particular needs of various states often require state legislators to act in such a way that necessarily affects interstate commerce.

A state's imposition of sales taxes on interstate commerce is another significant way a state can violate the Dormant Commerce Clause.[62] A state sales tax is a tax that is paid to the state as a consequence of selling

53. *Id.*

54. *Id.* at 132.

55. *Id.* at 141. ("First, Maine's population of wild fish . . . would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine . . . . Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways.").

56. *Id.* at 151.

57. *Id.*

58. City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).

59. *Id.* at 628.

60. *Id.*

61. *Id.*

62. *See generally* Winkfield F. Twyman, Jr., *Losing Face But Gaining Power: State Taxation of Interstate Commerce*, 16 VA. TAX. REV. 347, 352–60 (1997).

certain goods and services. Under a sales tax, the seller is the one responsible for collecting the correct amount and turning it over to the state. If it fails to do so, it is liable to the state for failing to pay the tax.[63] The seller must collect the tax, payable to the state, even if the buyer is located outside of the state.

Because of the unique interplay between the state's power to tax the activities that go on inside its borders and Congress's virtually plenary power to regulate interstate commerce, the Court has created a special rule. In *Complete Auto Transit, Inc. v. Brady*, the Court established the modern test to determine when a state tax on out-of-state businesses is constitutional even though it burdens interstate commerce.[64] The test has four parts: (1) "[T]he tax is applied to an activity with a substantial nexus with the taxing State"; (2) the tax "is fairly apportioned"; (3) the tax "does not discriminate against interstate commerce"; and, (4) the tax "is fairly related to the services provided by the State."[65] The state tax in *Complete Auto* was a Mississippi tax collected from every person or business conducting certain transportation activities in that state, imposed for "'the privilege of doing business' within the State."[66] The Court upheld the law solely on the basis that the appellant had not challenged the nexus, the apportionment, the discriminatory nature, or the relationship of the tax to the "benefits provided the taxpayer."[67] The Court also overruled the previous test used for such state taxes, which was "a blanket prohibition against any state taxation imposed directly on an interstate transaction."[68] After *Complete Auto*, the new standard for determining the constitutionality of state taxation schemes was set into motion, and the Court soon had the opportunity to refine its newly created test.

C. *Out-of-State Presence*

In a couple significant cases, the Court attempted to define the first prong of the *Complete Auto* test: the substantial nexus requirement. The issue of whether there was a sufficient nexus between the taxed activity and the state arose in *National Bellas Hess, Inc. v. Department of Revenue*[69]

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63. *See* Lucas J. Opperman, Note, *Challenging State Sales Tax Statutes on Electronic Commerce Under the Dormant Commerce Clause*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 511 (2017) (describing the mechanics of a sales tax).

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

65. *Id.* at 279.

66. *Id.* at 274 (ellipses omitted).

67. *Id.* at 287.

68. *Id.* at 280. See Spector Motor Services, Inc. v. O'Connor, 340 U.S. 602, 609 (1951), for the Court's previous test.

69. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967).

and *Quill Corporation v. North Dakota*.[70] In *Bellas Hess*, the Court held that businesses that sent only mail orders into that state did not have a substantial nexus with that state, and the state tax on those businesses therefore violated the Dormant Commerce Clause.[71] The Court noted that it "has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."[72]

In *Quill*, North Dakota imposed a tax on "'every person who engage[d] in regular or systematic solicitation of a consumer market in th[e] state'" regarding "property purchased for storage, use, or consumption within the State."[73] Quill, a corporation and seller of office equipment and supplies, delivered its goods into North Dakota, which were sold to entities in that state through mail orders.[74] The Court held that there was not a substantial nexus, and therefore North Dakota could not constitutionally impose such a tax.[75] The Court also noted that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law."[76] Importantly, *Quill* emphasized the Court's limited role in light of Congress's commerce power:

> This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule. . . . Congress is . . . free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.
>
> . . . .

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70. Quill Corp. v. North Dakota, 504 U.S. 298, 302–03 (1992).

71. The business in this case, National Bellas Hess, sent catalogues into the state twice a year. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 754. However, the business did not have any office, warehouse, or any other property in that state, no salesmen, no telephone number, and no other advertisements. *Id.*

72. *Id.* at 758.

73. *Quill Corp.*, 504 U.S. at 302–03, 302 (second alteration in original) (citations omitted). The state defined "regular or systematic" as "three or more advertisements within a 12-month period." *Id.* at 303.

74. *Id.* at 302–03.

75. *Id.* at 315 n.8 ("We therefore conclude that Quill's licensing of software in this case does not meet the 'substantial nexus' requirement of the Commerce Clause.").

76. *Id.* at 317.

> Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.[77]

As these cases explain, a business does not have a substantial nexus with a state simply because it ships goods into that state, ordered through mail order catalogues. Rather, *Bellas Hess* and *Quill* stand for the rule that in order for a state to impose a tax on out-of-state businesses without violating the Dormant Commerce Clause, the business must have a "physical-presence" in that state.[78]

What has emerged from Commerce Clause jurisprudence is a broad and far-reaching congressional power over interstate commerce. It allows the national government to regulate many private and wholly intrastate activities, and is subject to the limited exception that states may also regulate interstate commerce if they do not discriminate against out-of-state citizens. If the state's burden on interstate commerce is a tax on out-of-state citizens, then it is subject to a special test that asks whether there is a substantial relationship between the taxed activity and the taxing state. This dichotomy between state and national powers leaves the power to set uniform standards in the hands of the representatives of citizens of all states and ensures that states have a sufficiently important reason before they can step into Congress's territory. With the outcome of the *Wayfair* decision, however, the Court abandoned the substantial nexus requirement, uprooting the existing relationship between the states and national government.

II. THE *WAYFAIR* DECISION

The national contention surrounding the *Wayfair* decision can be attributed, in large part, to the political climate. Months before the Court published its opinion in *Wayfair*, President Trump fervently criticized Amazon[79] for its role in "putting many thousands of retailers out of

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77. *Id.* at 318–19 (footnote omitted) (citations omitted) (internal quotations omitted).

78. *Id.* at 317. It should also be noted that *Quill* overruled a portion of *Bellas Hess* that "suggested that such [physical] presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary." *Id.* at 307. The Due Process discussion in both cases concerned whether the Court had personal jurisdiction over the out-of-state businesses. The relationship between the physical presence rule for Commerce Clause analysis and personal jurisdiction is an interesting, but lengthy, endeavor to undertake. In the interest of brevity, I will not address Due Process concerns.

79. AMAZON, http://www.amazon.com (last visited Apr. 28, 2019).

business[.]"[80] However, the concern over big businesses like Amazon avoiding state taxes has been around for years before President Trump was elected to office. The problem stemmed from the gradual transition from shoppers buying goods in physical stores to buying goods predominately online.[81] When shoppers buy in-person, the state has the ability to charge a sales tax.[82] However, because of the Court's decisions in *Bellas Hess* and *Quill*, businesses that sell goods into a state did not pay sales taxes for those goods unless they had a physical presence in that state, such as a store, a warehouse, or an office. This created what is known as a "tax shelter," a concept Justice White recognized in his *Quill* dissent: "[V]ery questionable is the rationality of perpetuating a rule that creates an interstate tax shelter . . . . I would think that protectionist rules favoring a $180-billion-a-year industry might come within the scope of such 'structural concerns.'"[83]

Under *Quill*, businesses with a significant online presence but no physical locations could avoid paying most state taxes. Businesses whose presence depends on a physical location, however, had to pay state taxes in all states in which they were located and in which there was an applicable tax.[84] Because the internet has given people unprecedented access to online retailers in recent years, states simply could not require businesses to pay state taxes in the same manner they could before the rise of the internet.[85] This tax shelter became a problem for states, significantly eroding their tax bases.

South Dakota, in response to its dwindling tax base and absence of state income tax, "put substantial reliance on its sales and use taxes for the

80. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 29, 2018, 4:57 AM), https://perma.cc/6ERK-2VT7; *see* Chris Isidore, *Trump vs. Amazon: Let's Set the Record Straight*, CNN (Apr. 13, 2018, 2:13 PM), https://perma.cc/57X5-B85T.

81. *See, e.g.*, Heather Kelly, *Internet Sales Tax: What You'll Pay, and When*, CNN: BUS. (May 7, 2013, 12:07 PM), https://perma.cc/L6BQ-EXV5.

82. Currently, only five states do not have a sales tax. These states include Alaska, Delaware, Montana, New Hampshire, and Oregon. Sandra Block, *5 States With No State Sales Tax*, KIPLINGER (Mar. 19, 2018), https://perma.cc/25MB-Q7X8.

83. *Quill Corp.*, 504 U.S. at 329 (White, J., dissenting) (citation omitted).

84. A business whose presence depends on a physical location would include mom-and-pop stores and stores which are commonly found in shopping malls.

85. North Carolina is one of several states to have adopted an "Amazon law," obligating out-of-state retailers to pay the North Carolina sales and use taxes if the retailer has a "click-through agreement" with an in-state retailer. *See* N.C. GEN. STAT. § 105-164.8(b)(3) (2017); Scott W. Gaylord & Andrew J. Haile, *Constitutional Threats in the E-Commerce Jungle: First Amendment and Dormant Commerce Clause Limits on Amazon Laws and Use Tax Reporting Statutes*, 89 N.C.L. REV. 2011, 2031–33 (2011).

revenue necessary to fund essential services."[86] In response, it enacted a law requiring that "any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota" pay a state tax "*as if* the seller had a physical presence in the state," provided that the seller meet certain criteria.[87] The seller satisfied the criteria if the seller's gross revenue from South Dakota exceeded $100,000 per year, or if the seller conducted more than 200 separate transactions in the previous year with South Dakota.[88]

South Dakota subsequently filed a declaratory judgment action against Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc. to have the law declared valid and enjoin the businesses so that they would have to register for a license and pay the tax.[89] These businesses are prominent online retailers that "easily me[t] the minimum sales or transactions requirements of the Act," but did not have a physical presence in South Dakota.[90] The state trial court granted summary judgment in favor of the businesses based on *Bellas Hess* and *Quill*.[91] The South Dakota Supreme Court affirmed the trial court's decision: "We see no distinction between the collection obligations invalidated in *Quill* and those imposed by [the South Dakota statute], and hold that the circuit court correctly applied the law when it granted Sellers' motion for summary judgment."[92] The United States Supreme Court granted certiorari "to reconsider the scope and validity of the physical presence rule mandated by [*Quill* and *Bellas Hess*]."[93]

The Court's majority opinion, written by the now-retired Justice Kennedy, began by noting that, in an 1829 case, "the Court indicated that the power to regulate commerce in some circumstances was held by the States and Congress concurrently."[94] After briefly summarizing the Dormant Commerce Clause's rules, the Court addressed the state taxation analysis under *Complete Auto*, *Quill*, and *Bellas Hess*.[95] The Court's

86. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018). As the majority notes, the state's sales and use taxes "account for over 60 percent of its general fund." *Id.*

87. S.D. CODIFIED LAWS § 10-64-2 (2016) (emphasis added).

88. *Id.*

89. *Wayfair*, 138 S. Ct. at 2089. The law provides that "the state may bring a declaratory judgment action under [this provision] in any circuit court against any person the state believes meets the criteria . . . to establish that the obligation . . . is applicable and valid under state and federal law." S.D. CODIFIED LAWS § 10-64-3 (2016).

90. *Wayfair*, 138 S. Ct. at 2089.

91. *Id.*

92. State v. Wayfair Inc., 901 N.W.2d 754, 761 (S.D. 2017).

93. *Wayfair*, 138 S. Ct. at 2088.

94. *Wayfair*, 138 S. Ct. at 2090 (citing Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829)).

95. *Id.* at 2091–92.

conclusion that *Quill* should be overruled can be summarized in its own terms:

> First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.[96]

The Court did not really answer why the physical presence rule is not a necessary component of "substantial nexus." It only stated that "[o]ther aspects of the Court's [Commerce Clause] doctrine can better and more accurately address any potential burdens on interstate commerce, whether or not *Quill*'s physical presence rule is satisfied."[97] The market distortion, of course, is the tax shelter created under *Quill*. As for the formalistic rule, the Court poses a hypothetical of a small business owner with a warehouse in South Dakota being economically disadvantaged by the state tax, while a big business with a major online presence in South Dakota, but no physical presence there, avoids the South Dakota tax altogether.[98] This, the majority concluded, "is artificial in its entirety."[99] The Court then expressly overruled both *Quill* and *Bellas Hess*.[100] Concluding under the *Complete Auto* "substantial nexus" test that "the economic and virtual contacts" of the businesses "clearly" satisfy the requirements under the Dormant Commerce Clause, the Court upheld the South Dakota legislation.[101]

Justice Thomas wrote a concurring opinion, in which he agreed that the physical presence rule "can no longer be rationally justified."[102] He

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96. *Id.* at 2092 (citation omitted).

97. *Id.* at 2093. In this section, the Court also addresses the overlap between the Commerce Clause and Due Process. As mentioned earlier, *supra* note 78, I will not address Due Process as it relates to the Commerce Clause. It is worth noting, however, that the majority's conclusion that physical presence is not necessary to establish a substantial nexus seems to be chiefly based on the premise that because physical presence is not required to establish personal jurisdiction over a business, it should also not be required for this analysis under the Commerce Clause. While there are "significant parallels" between Due Process and the Commerce Clause, they are concerned with two very different constitutional protections (protection for the person/entity, and protection for congressional power, respectively). *Id.* Thus, there is no reason why what is required for Due Process should necessarily mandate the requirements, or lack thereof, for the Dormant Commerce Clause. Consequently, the majority's argument to this point is precarious at best.

98. *Id.* at 2095.

99. *Id.*

100. *Id.* at 2099.

101. *Id.* at 2099–100.

102. *Id.* (Thomas, J., concurring) (citation omitted) (internal quotation marks omitted).

also noted that he would throw out the "entire negative Commerce Cause jurisprudence."[103] Justice Gorsuch wrote a separate concurrence to say that "[w]hether and how much of [the Dormant Commerce Clause] can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism . . . are questions for another day."[104]

Chief Justice Roberts wrote the dissenting opinion and was joined by Justices Breyer, Sotomayor, and Kagan. The dissent, in an echo of the *Quill* opinion, stressed the importance of Congress's role in deciding whether the physical presence rule should be discarded, stating that "[u]nder our dormant Commerce Clause precedents, when Congress has not yet legislated on a matter of interstate commerce, it is the province of 'the courts to formulate the rules.'"[105] Moreover, "because Congress 'has plenary power to regulate commerce among the States,' it may at any time replace such judicial rules with legislation of its own."[106] In fact, Chief Justice Roberts stressed, Congress has considered passing legislation which would change or remove the physical presence requirement altogether: "Three bills addressing the issue are currently pending. Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ground rules, the Court may have waylaid Congress's consideration of the issue."[107] Finally, the dissent recognized the practical effect of the majority's decision, explaining that "[t]he burden will fall disproportionately on small businesses . . . . People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country—but probably not if they have to figure out the tax due on every sale."[108]

Thus, the dissent focused on three key flaws in the majority's argument: (1) while the Court has the power to overrule past decisions, Congress is in the best position to address this issue; (2) Congress has already begun to take action addressing this issue, so this decision is unnecessarily rash; and, (3) the burden of this decision will fall largely on small businesses who cannot or will not take on the burden of calculating the sales tax for every state in which it does business.[109] Important to the

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103. *Id.*

104. *Id.* at 2100–01 (Gorsuch, J., concurring).

105. *Id.* at 2102 (Roberts, Breyer, Sotomayor, Kagan, J.J., dissenting) (quoting S. Pac. Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761, 770 (1945)).

106. *Id.* (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) (citation omitted)).

107. *Id.* at 2102–03 (citations omitted).

108. *Id.* at 2104.

109. *See supra* text accompanying notes 108–11.

dissent's reasoning was the doctrine of stare decisis—that this was the third chance the Court had to reconsider the physical presence rule, and that because the Court had upheld the rule twice before, Congress had relied on the Court's previous position so that it could consider future legislation on that issue.[110] Justice Roberts observed that "[w]hatever salience the adage 'third time's a charm' has in daily life, it is a poor guide to Supreme Court decisionmaking."[111] Ultimately, the dissenting Justices would have "let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century."[112] I argue that the dissent's deference to Congress was the right decision. Because the Court improperly concluded that the physical presence rule was "unsound and incorrect,"[113] *Bellas Hess* and *Quill* should not have been overruled.

III. *WAYFAIR*'S IMPLICATIONS AND THE AMAZON ARGUMENT

The *Wayfair* decision sticks a Band-Aid on states' dwindling tax base problem. The majority touts its decision by holding itself out as a victory for states' rights, and the concurring Justices' opinions criticize the Dormant Commerce Clause for suppressing the states' ability to legislate. However flawed the physical presence rule may be, and regardless of the tax shelter that it creates, the *Wayfair* Court improperly took it upon itself the responsibility of solving the issues of all states across the entire country. Such a dramatic change in the law has drastic effect in the practical application of commerce power and in the theoretical application of federalism. I will address just a few of these problems.

A. Implications for Small Businesses

As the public recognized before the *Wayfair* decision, and as Chief Justice Roberts recognized in the dissent, overruling *Quill* and *Bellas Hess* will leave an unjustifiably heavy burden on small businesses.[114] Steve Forbes argued that "[s]upporters of an internet sales tax argue that the *Quill* case was decided at a time when mail-order catalogues fueled remote

110. *Wayfair*, 138 S. Ct. at 2102 (Roberts, Breyer, Sotomayor, Kagan, J.J. dissenting). The Court's previous two chances to consider the physical presence rule are, of course, *Quill* and *Bellas Hess*.

111. *Id.*

112. *Id.* at 2104–05.

113. *Id.* at 2099 (majority opinion).

114. *Id.* at 2103 (Roberts, C.J., dissenting) ("The Court . . . breezily disregards the costs that its decision will impose on retailers.").

shopping and is now outdated in the Internet age."[115] However, as Forbes noted, "while the method may have changed, the concept has not, and an Internet sales tax is bad policy with far-reaching and negative ramifications. Suddenly, small businesses with just a handful of employees would have to comply with over 10,000 state and local taxing jurisdictions."[116]

The *Wayfair* majority appears to have considered this argument through its use of a hypothetical:

> Consider, for example, two businesses that sell furniture online. The first stocks a few items of inventory in a small warehouse in North Sioux City, South Dakota. The second uses a major warehouse just across the border in South Sioux City, Nebraska, and maintains a sophisticated website with a virtual showroom accessible in every State, including South Dakota. By reason of its physical presence, the first business must collect and remit a tax on all of its sales to customers from South Dakota, even those sales that have nothing to do with the warehouse . . . . But, under *Quill*, the second, hypothetical seller cannot be subject to the same tax for the sales of the same items made through a pervasive Internet presence.[117]

In this hypothetical, the small business with a warehouse in South Dakota would have to pay taxes in South Dakota, while the big business with no warehouses in the state gets off scot-free.

This proposition is what I call the "Amazon argument:" the idea that fixing the tax shelter created under the physical presence rule can only hurt the large, sophisticated businesses that are fiendishly avoiding having to pay taxes, and will heroically save the mom-and-pop shops that are being crushed by state taxes. Certainly, there is nothing inherently wrong with this hypothetical, and it appears to afford proper consideration to the realistic possibility that a large business with the means to avoid state taxes can and will do so. It is true that under *Quill*, the small businesses in South Dakota have had to pay South Dakota taxes while Wayfair and other large companies have taken advantage of a loophole in the physical presence rule by remaining out of the state. Note, however, that the large business in the majority's hypothetical remains subject to North Dakota's tax laws, pursuant to the physical presence rule, while the small business would be allowed to send mail-order catalogues to potential customers just across the North Dakota border without having to pay any North Dakota taxes. Thus, a flaw in the majority's argument is the false presumption that the physical presence rule allows large businesses to avoid state taxes completely, while

115. Steve Forbes, *Steve Forbes: Internet Sales Tax Would be Fatal for Small Businesses*, FOX NEWS (June 14, 2018), https://perma.cc/9B7J-MPGK (italics added).

116. *Id.*

117. *Wayfair*, 138 S. Ct. at 2094 (majority opinion).

small businesses almost never benefit. The real problem, however, with the majority's reliance on its hypothetical to abolish the physical presence rule, is that it ignores the flip side of the coin—that is, that many small sellers with no warehouses in South Dakota will *also* have to pay taxes to South Dakota, simply because they sell to South Dakota customers online or through mail-orders. Those small businesses may not be able to bear the brunt of the cost.

The majority also finds it important that the South Dakota tax has some safeguards in place for small businesses: the tax applies only to those who do some sort of business in South Dakota, it may not be applied retroactively, and the system which "standardizes taxes to reduce administrative and compliance costs."[118] Furthermore, "[t]he law at issue requires a merchant to collect the tax only if it does a *considerable* amount of business in the State."[119] The adequacy of the "degree of protection" afforded small businesses in the South Dakota law has been settled by the *Wayfair* Court, but it leaves much to be desired.[120] For example, the conditions in place for the South Dakota tax to apply are (1) the entity collects $100,000 in gross revenue from business conducted in South Dakota, *or*, (2) the entity conducts 200 or more separate transactions for goods or services into South Dakota within one year's time.[121] The Court concludes that this constitutes a considerable amount of business.[122] However, with the prevalence of online shopping, this premise is dubious.

Now, imagine that person X is a college student who takes pictures in his spare time and sells those pictures as wall décor on a website he created. He initially sells to friends and family, but over time he gains a little notoriety on social media (his pictures are particularly trendy). Seemingly overnight, he gets 300 orders from South Dakota alone. As a result, this college student's photography in his spare time must comply with South Dakota's individual tax requirements if he chooses to fill all 300 orders from South Dakota. Imagine now that he begins conducting transactions with people from twenty states (only a moderate amount, considering that this is not even half of the country), each with its own tax laws. South Dakota's safe harbor is that he must conduct at least 200 transactions within South Dakota, but maybe another state's law says only 100 transactions are sufficient to trigger its taxes. How long will this seller

118. *Id.* at 2100.

119. *Id.* at 2098 (emphasis added).

120. *Id.*

121. S.D. CODIFIED LAWS § 10-64-2 (2016).

122. *Wayfair*, 138 S. Ct. at 2099 ("This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.").

be able to keep up with this system? How many different tax laws will he have to consider when it comes time to pay those taxes, and how long will that take? He will almost certainly have to hire expert services to help him pay the various taxes. Will he be able to afford to pay for those services, and if he can, will it be worth his time and money? Are 100 transactions within one state still a considerable amount of business, justifying his paying that state's taxes?

The Court's hypothetical presents valid concerns, but it does not answer every question, nor solve every problem. Ann Whitley Wood, an attorney-turned-eBay-seller, describes a problem not discussed by the *Wayfair* majority—that is, the problem of a small online seller who cannot afford to keep up with the many tax regulations in every state where a buyer resides.[123] Wood explains, "I pay taxes on in-state sales, a quarterly chore that eats up a total of one business day a year. If I had to do the same for 44 other states, the task of tracking my state sales taxes would consume 45 business days a year."[124] The process is not only time-consuming, but is also complicated. Thus, Wood states, "[s]oftware may help, but given the complexity of state tax codes, I would have to spend significant time reviewing my compliance with each state's requirements . . . . No software can eliminate my need to respond personally to each and every audit."[125]

The *Wayfair* majority brushes this argument aside in a hollow assurance:

> These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems.[126]

But, as the dissent notes, "the software said to facilitate compliance is still in its infancy, and its capabilities and expense are subject to debate."[127] Thus, the Court justifies overruling the physical presence rule based on an incomplete hypothetical and a hope that software will eventually be sufficient to carry the burdens of this decision.[128] This is not a satisfactory reason to abandon established precedent and the "constitutional default

123. Ann Whitley Wood, *Please, Your Honors, Don't Put Me Out of Business*, WALL ST. J. (Apr. 16, 2018 5:55 PM ET), https://perma.cc/S6BS-SHS8.

124. *Id.*

125. *Id.*

126. *Wayfair*, 138 S. Ct. at 2098.

127. *Id.* at 2104 (Roberts, C.J., dissenting).

128. *Id.* at 2098 (majority opinion).

rule."[129] Moreover, while South Dakota provided a system in an effort to simplify compliance and minimize costs, there is no guarantee (or requirement) that any other states do the same. Thus, in an attempt to fix the tax shelter created under *Quill*, the Court resigns small businesses to a future of complex tax systems with no real assurance that they will be able to survive the associated costs. This is an unwarranted burden to place on businesses, simply because Amazon, Wayfair, and other large corporations avoided state taxes under the physical presence rule.

B. Implications for Commerce Clause Jurisprudence

Even if we concede that allowing states to require this kind of tax is the right thing to do,[130] we still must recognize that the Court's sweeping aside of established Dormant Commerce Clause jurisprudence will have a detrimental effect on the constitutional protections afforded to Congress through the Commerce Clause.

The Dormant Commerce Clause is the result of a practical assessment of the need for uniformity among the states. This is evidenced, in part, by the addition of the Commerce Clause to the Constitution; the Articles of Confederation did not afford Congress this authority.[131] Furthermore, the Court has consistently acted "as the front line of review in this limited sphere"[132] because "[t]he economy is better off if state and local laws impeding interstate commerce are invalidated."[133] In a well-stated quote, the Court explained how the Dormant Commerce Clause is embodied in the Framers' expectations:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, [and] that . . . no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[134]

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129. *Id.* at 2096.

130. Whether one supports the reasoning behind the *Wayfair* decision seems to be heavily influenced by one's political identity. *See, e.g.*, Matt Lavietes, *A Trump Attack on an Amazon 'Scam' is Dividing Wealthy Democrats and Republicans: CNBC Survey Reveals*, CNBC (June 28, 2018 9:00 AM), https://perma.cc/VV7G-L67W (explaining that when people do not have an opinion on a complex question, they will "cue" on a political party).

131. *See* ARTICLES OF CONFEDERATION OF 1781.

132. *Wayfair*, 138 S. Ct. at 2096.

133. CHEMERINSKY, *supra* note 45, at 446.

134. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

Inscore: The Amazon Argument: An Examination of South Dakota v. Wayfair an

While the Court has given state taxation a unique rule under the Dormant Commerce Clause,[135] it is still governed by the rationale which governs all Dormant Commerce Clause cases. This rationale is the theory that if states could act in such a way which would infringe on Congress's Commerce power, there would no longer be certainty in the market. In sum, the probability that, without the Dormant Commerce Clause, states would openly burden the market in order to benefit its own local market is simply too great to allow.

By overruling *Quill* and *Bellas Hess*, the Court did away with a bright-line rule which ensured that a state would not step on Congress's toes. This bright-line rule also recognized the realities of doing business in a competitive market. Thus, the rule under those cases was cognizant that "[c]ommercial interests are in the marketplace to compete and to win against their competitors. As competitors, some reasonable carrying charge or tax for conducting business within a state is quite reasonable."[136] The physical presence rule set a clear boundary, however, by not allowing "tax measures that alter the competitive playing field so that the rules benefit local residents."[137] The majority retreats to the general rule under *Complete Auto* which states that there need only be a substantial nexus.[138] However, the Court does not attempt to give any guidance regarding what would constitute a substantial nexus. Rather, all that is said is that "[s]uch a nexus is established when the taxpayer [or collector] avails itself of the substantial privilege of carrying on business in that jurisdiction."[139] If the Court is concerned that the changing times can no longer support *Quill* and *Bellas Hess*, it does little to justify today's use of the previous rule under *Complete Auto*.

What is "substantial nexus" in the era of internet and widespread online purchases? No one could plausibly deny that companies like Amazon have a prolific presence, even in states where they have no *physical* presence. But what about the person selling goods on Etsy[140] or

135. In other words, the physical presence rule, along with the other requirements from *Complete Auto*.

136. Twyman, Jr., *supra* note 62, at 399.

137. *Id.*

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

139. *Id.* (second alteration in original) (citations omitted) (internal quotation marks omitted).

140. ETSY, http://www.etsy.com (last visited May 2, 2019). Etsy is a company that allows people to sell goods through its website for a small fee. *See Etsy: About*, ETSY, https://perma.cc/U6FC-CT9D (last visited Feb. 23, 2019).

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eBay?[141] Under *Quill*, a straight-forward rule existed that allowed small sellers to conduct business with certainty, efficiency, and uniformity. Although the majority finds the rule "anachronistic,"[142] the rationale remains the same as it was in the days of mail-order catalogues. In *Quill*, the out-of-state business sent mail, made telephone calls, and sold goods into the state through the mail.[143] Today, many companies advertise via the internet, as well as mail, and ship the goods to the customer. Thus, "while the method may have changed, the concept has not."[144] The *Wayfair* decision has left many questions, and the Court is not the appropriate entity to create them.

C. *Implications for Federalism*

Finally, the *Wayfair* decision is frankly problematic for federalism. Under the Dormant Commerce Clause, the Court must decide whether a state has acted in a way which conflicts with a power Congress *could* assert. This is, admittedly, a usual task for the judiciary, whose role traditionally is "to say what the law is."[145] However, this function has proven to be key in preserving federalism.

The Constitution expressly grants Congress the authority to regulate interstate commerce.[146] Thus, when one state infringes on that power, it disrupts the uniformity that would result from national legislation affecting all states. This uniformity is essential because the national government represents people of all states; when a state imposes a burden on other states, it imposes a burden on people and businesses who do not have representation in that state, so that it alone will benefit. This is entirely inconsistent with federalism: "State protectionism is unacceptable because it is inconsistent with the very idea of political union, even a limited federal union. Protectionist legislation is the economic equivalent of war. It is hostile in its essence."[147] Moreover, while Congress has the authority to invalidate any law which it finds tramples on its own authority, "it is unrealistic to expect Congress to review the vast array of state and local

141. Similar to Etsy, eBay is a website that charges a fee for users to advertise and sell goods through its website. *See All About Selling*, EBAY INC., https://perma.cc/7L72-2DU5 (last visited Feb. 23, 2019).

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

143. Quill Corp. v. North Dakota, 504 U.S. 298, 302 (1992).

144. Forbes, *supra* note 115.

145. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Of course, saying what the law is naturally presupposes that there *is* a federal law to interpret.

146. U.S. CONST. art. I, § 8, cl. 3.

147. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986).

laws that might be challenged as burdening interstate commerce."[148] Consequently, the Dormant Commerce Clause is meant to reserve to Congress what is, at its core, a national question, and the judiciary's role in that task is to ensure that states comply with this overall scheme of federalism.

The physical presence rule preserved that notion. Under *Quill* and *Bellas Hess*, states could exercise their sovereignty by taxing the most pervasive business going on within its border, while leaving that which was wholly interstate to Congress.[149] The rule is also simple and easy to comprehend, allowing states and businesses across the country to fully understand the consequences of doing business in a particular state. The *Wayfair* decision has done away with the simplicity of the physical presence rule. Now, states can impose a world of differing taxes on out-of-state businesses who did not vote for those taxes.

It is imperative to note that Congress has considered legislation that would allow states to tax out-of-state businesses for business conducted within its borders.[150] It is important because such legislation would be representative of the nation and would conform with the Constitution. In *Wayfair*, the Court acts with a "sense of urgency," as if Congress might never answer affirmatively "yes" or "no."[151] This gives individual states the green light to act irrespective of "whether or not Congress can or will act in response."[152] However, as the dissent notes, Congress has been considering such legislation for years, and three bills have been introduced.[153] What, then, is the point of the *Wayfair* decision when Congress is in the midst of answering this very question? Whatever the point, the ultimate result is that states can now act in such a way that has been constitutionally and historically reserved for Congress. Moreover, states are free to do so without any reliable standard to guide them.

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148. CHEMERINSKY, *supra* note 45, at 448.

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

150. *See infra* note 153.

151. South Dakota v. Wayfair, 138 S. Ct. 2080, 2103 (2018) (Roberts, Breyer, Sotomayor, Kagan, J.J., dissenting).

152. *Id.* at 2097 (majority opinion).

153. *Id.* at 2102 (Roberts, Breyer, Sotomayor, Kagan, J.J., dissenting). Congress considered the Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017), No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017), and the Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017).

IV. WHAT WE CAN DO NOW

Because the Supreme Court has ruled that states may tax out-of-state businesses which do not have a physical presence in that state, nothing short of a constitutional amendment or a new ruling from the Court will overturn this decision.[154] A new Court ruling is probably the easiest route to have the *Wayfair* decision overruled, but it is unlikely. The Court adheres to the doctrine of stare decisis, "a judicial doctrine under which a court follows the principles, rules, or standards of its prior decisions."[155] The Court does not overrule prior decisions unless there is a "'special justification'— or, at least, 'strong grounds" to do so.[156] Consequently, stare decisis is a doctrine which helps the Court remain reliable, stable, and predictable.[157] In sum, while the Court is theoretically bound by stare decisis, the Court is also free to stray from old rules and standards so long as it finds sufficient justification, as the *Wayfair* decision demonstrates.[158] However, with the new makeup of the Court, the opportunity to overrule the *Wayfair* decision remains doubtful, at least for several decades. The conservative-leaning justices of the *Wayfair* Court, and Justice Ginsburg, agreed that the physical presence rule should no longer stand, while the left-leaning justices—along with Chief Justice Roberts—would have kept the *Quill* and *Bellas Hess* test.[159] The departure of Justice Kennedy, a notorious swing vote, and the addition of Justice Kavanaugh, who holds

154. For an informal but accurate discussion of judicial review and the power of the United States Supreme Court's rulings, see generally *The Court and Constitutional Interpretation*, SUPREME COURT OF THE UNITED STATES, https://perma.cc/MXH9-A2ZE (last visited May 2, 2019). As this source notes, "When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court." *Id.* Note that another available solution to the *Wayfair* decision would be Congress passing legislation requiring the physical presence rule. Indeed, Congress was already considering laws touching on this issue. *See supra* note 153. Because the legislation considered would actually do away with the physical presence rule, the likelihood of Congress actually undoing the *Wayfair* decision through legislation is doubtful. However, this does remain a possibility, and I recognize the validity of this avenue.

155. Brandon J. Murrill, *The Supreme Court's Overruling of Constitutional Precedent*, CONG. RES. SERV. 4 (Sept. 4, 2018), https://perma.cc/WX9D-5268.

156. *Id.* (footnote omitted).

157. For further discussion of stare decisis, see generally *id.*

158. South Dakota v. Wayfair, 138 S. Ct. 2080, 2096 (2018) ("Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command." (internal quotation marks omitted)).

159. *See id.* at 2080.

conservative views, means that the likelihood *Wayfair* would be reconsidered in the coming years is slim.[160]

A constitutional amendment is always a possibility. However, passing a constitutional amendment is no easy task.[161] An amendment can be passed in two ways: by two-thirds vote of both the House and the Senate, or by two-thirds of the states.[162] In practice, however, the possibility that a constitutional amendment will pass to overturn a Supreme Court decision is largely theoretical.[163] Thus, while it is possible that the Court could overrule itself and that the Constitution is amended, neither of these results is likely.

Ultimately, then, the states are now free to make the decision whether they will tax out-of-state businesses. It is undeniable that the state legislatures feel deeply the diminishing tax bases are the result of the shelter created under *Quill* and *Bellas Hess*. In response, states like South Dakota are now free to create legislation, which imposes such sales and use taxes on big and small businesses alike. However, this is not a necessary result. States have wide control over who they tax, how much they tax, and why they tax. If the state legislators feel that the state's tax base is slipping, they can adjust the taxing scheme to make up for lost revenue. However, because the *Wayfair* decision gives states an "easy" fix that will significantly affect many businesses in the country, it now falls on the people of each state to vote for representatives who will uphold the traditional and constitutional form of federalism, which is so entrenched in our history and in our lives. The Court has not mandated that states impose these taxes. Rather, the only necessary conclusion of the *Wayfair* decision is that, in the Supreme Court's eyes, Congress can no longer be trusted to

160. National concern over a more conservative Court "than at any other time in modern history" was at a high during Justice Kavanaugh's confirmation. *See, e.g.*, Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://perma.cc/XRN7-ZGWM ("The [C]ourt, in other words, will perfectly reflect the deep polarization of the American public and political system.").

161. The most recent amendment, the Twenty-seventh, was ratified in 1992. *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497 (1992). This amendment, which provides that members of Congress will not be paid until the next term of office for Representatives occurs, took over two hundred years to ratify, as it was first proposed in 1789. *Id.* at 498.

162. U.S. CONST. art. V.

163. Only five Supreme Court decisions have been overruled by constitutional amendment. Murrill, *supra* note 155, at 9. For an overview of these cases, *see id.* at 9 n.54. One such instance is the Eleventh Amendment, which overruled *Chisolm v. Georgia*. U.S. CONST. amend. XI (stating that the federal courts do not have the power to hear disputes arising when a citizen sues a state); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that the federal courts could hear disputes arising when a citizen sues a state).

determine the economic needs of the nation as a whole. Therefore, it is now our responsibility to use the democratic process to undo the damage the *Wayfair* decision has done. We must vote for representatives in our state legislatures who refuse to impose taxes on out-of-state businesses.

CONCLUSION

The *Wayfair* decision flies in the face of over two hundred years of Dormant Commerce Clause precedent and several decades of precedent regarding state taxation. This is a concerning shift in Commerce Clause jurisprudence that marks a step away from federalism and a step toward unwarranted discrimination across state lines. Even more concerning is the lasting result it will have on small businesses, who will inevitably have to absorb the cost of complying with so many differing regulations or close up shop entirely. However, of all the concerns the decision has created, most concerning is the way in which the *Wayfair* Court so hastily brushed aside the Constitution and the clear authority it grants to Congress. The physical presence rule established in *Quill* and *Bellas Hess* appropriately addressed each of these concerns, giving respect to the powers of both the states and Congress. Consequently, the Court's overruling of these cases and its reversion back to the substantial nexus requirement will only cause confusion and inconsistency for scholars, legislators, and business owners across the country.

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* J.D. Candidate 2020, Campbell University School of Law. The author would first like to thank the Campbell Law Review editors and staff members for their dedication to Campbell Law Review and for their hard work while reviewing and editing this Comment. The author would also like to thank her family and friends for their support throughout the writing of this Comment, and for graciously listening to her talk about constitutional law for hours on end. Finally, the author would like to thank her savior Jesus Christ for her love of the Constitution and for the opportunity to write this Comment.