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South Dakota v. Wayfair: Analysis and State Reaction

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Introduction

In 2018, the Supreme Court (the “Court”) issued an opinion that addressed the ability of states to force out-of-state businesses to collect and remit state sales tax. The Court in *South Dakota v. Wayfair*¹ (“*Wayfair*”) reanalyzed whether the “Physical Presence Test” (the “PPT”) was the proper way to determine if the taxing state had nexus over the out of state business. The PPT, which was established in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*,² (“*Bellas Hess*”), and reaffirmed in *Quill Corp. v. North Dakota*,³ (“*Quill*”) had been the test to determine nexus for over fifty years. The Court in *Wayfair* rejected the PPT, expressly overruling *Bellas Hess* and *Quill*.⁴ The decision in *Wayfair* held that South Dakota’s tax law was not a violation of the Commerce Clause and, therefore, could require out-of-state businesses to collect sales tax.⁵

The legal issues presented in *Wayfair* contained elements of stare decisis,⁶ the Dormant Commerce Clause,⁷ and tax policy implications. Many non-tax experts were also awaiting the *Wayfair* decision because the outcome would affect large businesses, small businesses, traditional “brick and mortar businesses,” online businesses, and consumers. The interest in the

* I would like to thank Kathleen DeLaney Thomas for her helpful comments and review of this paper.

¹ 138 S. Ct. 2080, 585 U.S. ____ (2018).

² 386 U.S. 753 (1967).

³ 504 U.S. 298 (1992).

⁴ *Wayfair*, 138 S. Ct. at 10.

⁵ *Id.* at 22.

⁶ Stare decisis is a legal term meaning “to stand by things decided.” *Stare Decisis*, LEG. INFO. INST., https://www.law.cornell.edu/wex/stare_decisis#. “Simply put, it binds courts to follow legal precedents set by previous decisions. *Stare Decisis Definition*, INVESTOPEDIA (May 9, 2019), https://www.investopedia.com/terms/s/stare_decisis.asp.

⁷ The Dormant Commerce Clause is a “prohibit[ion] [on] States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval” *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

case from both experts and non-experts has brought a flurry of media reports and analysis about the impact of *Wayfair* on national commerce.⁸

This paper will proceed in three parts. Part I will address the Court's precedent pre-*Wayfair*. Part II will analyze the decision in *Wayfair*. Part III will address the implications of the new *economic activity standard* and the effects on national commerce post-*Wayfair*. This part includes the various state legislative actions in reaction to the *Wayfair* decision.

Part I: Pre-*Wayfair*

Under the widely accepted framework established in *Complete Auto Transit, Inc. v. Brady*,⁹ a state “may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause.”¹⁰ This is because the Commerce Clause, by granting power to the federal government to regulate interstate commerce, takes away or reduces that power from the states.¹¹ This limit, known as the Dormant Commerce Clause, prevents states from interfering with interstate commerce because only Congress has the power to regulate this activity.¹² In *Complete Auto*, a tax will be enforced if it “(1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services the state provides.”¹³ Whether a state can force an out-of-state company to collect and remit state sales tax turns on whether there is enough nexus between the out-of-state business and the taxing state.

The Court first answered the out-of-state company sales tax issue in *Bellas Hess*.¹⁴ In *Bellas Hess*, Illinois had passed a statute that required out-of-state retailers to collect and submit Illinois state sales tax.¹⁵ Illinois attempted to enforce this statute on National Bellas Hess, Inc., a mail order company, “whose only connection with [the] customers in [Illinois]

⁸ See e.g., Joseph Bishop-Henchman, *Supreme Court agrees to take South Dakota v. Wayfair Online Sales Tax Case*, Tax Found. (Jan. 12, 2018), <https://taxfoundation.org/supreme-court-south-dakota-wayfair-online-sales-tax/> (describing this case as “pivotal decision” on “online retail activity”); Scott Peterson, *South Dakota v. Wayfair: What the Supreme Court Decision Means for Online Retailers*, CPA PRAC. ADVISOR (Apr. 16, 2018), <https://www.cpapracticeadvisor.com/small-business/news/12408049/south-dakota-v-wayfair-what-the-supreme-court-decision-means-for-online-retailers> (describing the potential impacts of the *Wayfair* decision depending on the outcome of the case). Some academics have already begun an in-depth analysis of what this case means. See generally, Leading Cases, *Article I—Stare Decisis for Constitutional Default Rules—Dormant Commerce Clause—South Dakota v. Wayfair, Inc.*, 132 HARV. L. REV. 277 (2019) (describing the effect on the Dormant Commerce Clause).

⁹ 430 U.S. 274 (1977).

¹⁰ *Id.* at 285.

¹¹ *Quill*, 504 U.S. at 309.

¹² *Id.*

¹³ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (citing *Complete Auto*, 430 U.S. at 279).

¹⁴ It is important to note, that this was a separate issue from whether states could collect sales tax on goods sold in the state. It is undisputed that states have this ability.

¹⁵ *Bellas Hess*, 386 U.S. at 754–55.

[was] by common carrier or the United States mail.”¹⁶ *Bellas Hess* challenged the statute as a violation of the Commerce Clause.¹⁷

The Court began its analysis by stating that “the Constitution required ‘some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax.’”¹⁸ The Court stated that it is well established that, under certain circumstances, states can require out-of-state businesses to collect local taxes.¹⁹ All of the examples from past precedent, however, involved some connection within the state itself, such as having an agent in the state or having physical presence in the state.²⁰

The Court went on to state that the transaction in *Bellas Hess* was almost exclusively interstate commerce.²¹ The Court followed by stating a parade-of-horrors if Illinois were allowed to impose this liability on out-of-state businesses.²² This included the possibility of burdening interstate commerce.²³ This led the Court to conclude that the Commerce Clause was intended to prevent this type of unjustifiable local entanglement.²⁴ The dissent pointed out that *Bellas Hess*’s “large-scale, systematic, continuous solicitation and exploitation of Illinois consumer market is a sufficient ‘nexus’ to require *Bellas Hess* to collect from Illinois customers and to remit the use tax.”²⁵ Despite the dissent, the Court determined that some sort of physical presence was needed to establish nexus in order for a state to require an out-of-state business to collect its sales tax, thus creating the PPT.

In 1992, the Court decided to reexamine the PPT established in *Bellas Hess*. Despite the “tremendous social, economic, commercial, and legal innovations” since *Bellas Hess* was decided, the Court reaffirmed the PPT based on the Commerce Clause.²⁶ The Court in *Quill* held that a state’s attempt “to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the state” was a violation of the Commerce Clause.²⁷ The Court stated that similar to *Bellas*

¹⁶ *Id.* at 758.

¹⁷ *Id.* at 757. *Bellas Hess* also challenged the tax on Due Process grounds. *Id.* Though this was initially held as valid, *Id.* 758, this argument was overturned in *Quill*. *Quill*, 504 U.S. at 307–08, 317–18.

¹⁸ *Bellas Hess*, 386 U.S. at 756.

¹⁹ *Id.* at 757

²⁰ *Id.* The Court’s examples included: sales made by a local agent, mail-order business with a local retail store, and an out-of-state retailer with an in-state collections agent. *Id.*

²¹ *Id.* at 759.

²² *Id.* (“For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes.”).

²³ *Id.*

²⁴ *Id.* at 760.

²⁵ *Id.* at 761–62 (Fortas, J., dissenting)

²⁶ *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992). Previously in *Bellas Hess*, the Court had stated that minimum contracts within the state was required by both the Commerce Clause and the Due Process Clause. *Bellas Hess*, 386 U.S. at 758. *Quill* overruled the due process holding, but reaffirmed the commerce clause PPT holding. *Quill*, 504 U.S. at 307–308.

²⁷ *Quill*, 504 U.S. at 301.

Hess, here the lack of physical presence prevents the completion of the “nexus” prong of the *Complete Auto* test.²⁸ The Court did recognize that the PPT, like all bright line rules, can be “artificial it its edges . . . [but] it encourages settled expectations and, in doing so, fosters investment by business and individuals.”²⁹ Even though the Court believed its analysis was in line with the Commerce Clause, the Court also relied heavily on stare decisis in order to not overrule *Bellas Hess*.³⁰

One important note is that the part of the *Quill* opinion that discussed the Commerce Clause—which was at issue in *Wayfair*—received only five votes on the merits. Justice Scalia, joined by Justices Kennedy and Thomas, would have upheld *Bellas Hess* on stare decisis alone.³¹ Justice White, dissenting in part, argued that “there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it.”³² These two cases show that the Court created the PPT to determine nexus and reaffirmed that decision a generation later. These rulings had a substantial effect on commerce throughout the United States.

The PPT was a critical factor to the increased popularity of online commerce.³³ Unlike brick and mortar business, online businesses were not required to collect sales tax except for states in which they had a physical presence.³⁴ By lowering the cost related to the administration of collecting sales tax, online business could offer items and services at a lower cost.³⁵ This, along with the added convenience of online commerce, gave online business a

²⁸ See *id.* at 310.

²⁹ *Id.* at 315–16.

³⁰ *Id.* 318.

³¹ *Id.* at 320 (J. Scalia concurring).

³² *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) (quoting *Quill*, 504 U.S. at 327).

³³ Matthew C. Boch, *Way(un)fair? United States Supreme Court Decision Ends State Tax Physical Presence Nexus Test*, 53-SUM Ark. Law 18, 1 (2018).

³⁴ *Id.* For example, if an online company was based in North Carolina, they could be required to collect and remit North Carolina sales tax; but, they could not be required to collect and remit sales tax to any other state unless they had a physical presence in that state such as a warehouse or salesman. The Court in *Wayfair* gives the following example of the taxation of business under the *Bellas Hess* and *Quill* regime:

“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 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 of south Dakota, even though 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 though a pervasive Internet presence.”

Wayfair, 138 S. Ct. at 2094.

³⁵

“Relatively little is known about sales tax compliance costs, but some data are available from PriceWaterhouseCoopers (2007), which estimated that sales tax compliance costs were 13.5% of tax revenues for small retailers, 5.2% for medium retailers, and 2.2% for large retailers. Bruce and Fox (2013) find the vast majority of e-commerce firms are small, suggesting significant compliance costs,

distinct advantage over brick and mortar stores. Second, since businesses were rewarded for limiting their physical presence, many businesses made a purposeful business decision not to expand to brick and mortar locations.³⁶ Last, since the PPT prevented states from requiring out-of-state business from collecting the sales tax, it forced in-state-purchasers themselves to self-assess and pay a use tax.³⁷ This method of collecting sales tax is notoriously ineffective.³⁸ Many states have use tax lines on their state income tax returns for individuals but rarely do individuals actually self-assess and pay the tax,³⁹ and states have not made a serious effort to enforce the use tax.⁴⁰

Though the PPT was firmly established as the law of the land, as another generation passed and national commerce continued to evolve, calls for another re-examination of the PPT began.

Part II: Wayfair

PPT has been the target of criticism since its formulation.⁴¹ Over two decades later, as the economy continued to evolve, South Dakota decided to challenge *Bellas Hess* and *Quill*. South Dakota passed a statute (the “Act”) requiring out-of-state businesses to collect and remit sales tax if they: (1) deliver more than \$100,000 of services or goods into the state; or (2) complete 200 or more separate transactions in the state.⁴² This provision would be enforced even if a business had no physical presence in the state.

South Dakota attempted to enforce this new Act on Wayfair, Inc., Newegg, Inc. and Overstock.com, Inc., companies that had over six billion dollars of revenue last year

though firms with over \$1 million in sales account for about 57% of business-to-consumer e-commerce. PriceWaterhouseCoopers finds that local sales taxes raise costs further, with one jurisdiction increasing costs by 38.7% and two or more adding 70.7%.”

David R. Agrawal & William F. Fox, *Taxes in an E-Commerce Generation*, 24 INT. TAX. PUB. FIN. 903, 910 (2017).

³⁶ See *Wayfair*, 138 S. Ct. at 2094.

³⁷ Boch, *supra* note 33, at 1.

³⁸ *Id.* The low compliance rate with report the use tax is well documented. See e.g., Chana Joffee-Walt, *Most people Are Supposed to Pay This Tax. Almost Nobody Actually Pays It.*, NPR (Apr. 16, 2013), <https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax> (“About 1.6 percent of taxpayers . . . actually pay the use tax.”); Mike Maciag, *Use Tax Revenues: How Much Are States Not Collecting?*, *Governing* (May 1, 2012), <https://www.governing.com/blogs/by-the-numbers/state-use-tax-collection-revenues.html> (“States have grown accustomed to expecting paltry participation rates. In California, for example, only 0.3 percent of 2009 income tax returns reported use tax, with an average of \$202 per return.”);

³⁹ Boch, *supra* note 33, at 1.

⁴⁰ *Id.*

⁴¹ *Wayfair*, 138 S. Ct. at 2092 (quoting *Direct Marketing Assn. v. Brohl*, 814 F.3d 1129, 1148, 1150–51 (10th Cir. 2016)). The Court states other criticisms from tax experts in the opinion. *Id.*; see also A. LAFFER & D. ARDUIN, PRO-GROWTH TAX REFORM AND E-FAIRNESS 1, 4 (July 2013) (stating that the PPT creates an inefficient “online sales tax loophole”); Hellerstein, *Deconstructing the Debate Over State taxation of Electronic Commerce*, 13 Harv. J.L. & Tech. 549, 553 (2000) (stating that the PPT is not necessary appropriate for a twenty-first century economy); Charles A. Rothfeld, *Quill: Confusing the Commerce Clause*, 56 Tax Notes 487, 488 (1992) (stating that the PPT is “premised on assumptions that are unfounded” and “riddled with internal inconsistencies”).

⁴² S. 106, 2016 Leg., 91 Sess. (S.D. 2016).

combined.⁴³ South Dakota filed a declaratory judgment to have the new Act enforced.⁴⁴ Wayfair and Overstock.com moved for summary judgment, arguing that the Act was unconstitutional.⁴⁵ It came as no surprise that all the lower courts granted summary judgment to the out-of-state businesses since the PPT was still the law of the land.⁴⁶ The Court granted certiorari to reconsider the PPT for a third time in fifty years.⁴⁷

The Court delivered the opinion on June 21, 2018.⁴⁸ In a 5–4 decision, the Court decided to overrule *Bellas Hess* and *Quill*⁴⁹ and held that the Act allowed for substantial nexus.⁵⁰ The dissent stated that it would have reaffirmed *Quill* based on stare decisis. In this section the Court’s opinion in *Wayfair* is analyzed specifically addressing: (1) the Court’s criticism of the PPT; (2) the new standard created by the Court; and (3) the dissent’s opinion.

A: Criticisms of the Physical Presence Test

Wayfair outlined three main criticisms of the PPT: (1) the PPT is not a proper measure for whether an activity has substantial nexus with a state; (2) the test creates market distortions; and (3) the test is arbitrary and formalistic, which is in tension with modern Commerce Clause precedent.⁵¹

For a state to be able to tax an activity, the tax must apply to an activity that has a substantial nexus with the taxing state.⁵² The Court stated that modern day commerce involves a substantial amount of business that does not require physical presence within the state.⁵³ Companies now can reach purchasers in all fifty states with no physical presence with ease by setting up a simple website, where previously a business would need to have some physical presence, such as a sales person or store location, in every state to reach these same purchasers. Although companies have been selling remotely for decades—for example, by catalog—the ease of doing so has undoubtedly increased with the internet. Since physical presence is no longer a required in modern commerce, the Court concluded that, “[p]hysical presence is not necessary to create a substantial nexus.”⁵⁴

The Court’s second criticism of the PPT is it created market distortions. As noted in *Quill*, “[i]f the Commerce Clause was intended to put businesses on an even playing field, the

⁴³ *Wayfair*, 138 S. Ct. at 2089.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.* at 2087.

⁴⁹ *Id.* at 2092.

⁵⁰ *Id.* at 2099.

⁵¹ *Id.* at 2092.

⁵² *Id.* (quoting *Complete Auto Transit, Inv. v. Brady*, 430 US 274, 279 (1977)).

⁵³ *Id.* at 2093 (quoting *Quill Corp. v. North Dakota*, 505 U.S. 298, 308 (1992)) (“[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted . . . [with no] need for physical presence within a State in which business is conducted.”).

⁵⁴ *Id.*

[physical presence] rule is hardly a way to achieve that goal.”⁵⁵ Local brick and mortar business were “at a competitive disadvantage relative to remote sellers.”⁵⁶ In powerful language, the Court stated that the PPT has become “a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State’s consumers.”⁵⁷ This sentiment was also echoed by Justice Gorsuch in concurrence who quoted Justice White stating that “judges have no authority to construct a discriminatory ‘tax shelter’ like this.”⁵⁸ The Court had created a rule that incentivizes business to avoid physical presence in multiple states, causing a lack of storefronts and employment centers that otherwise would be efficient or desirable.⁵⁹

Last, the Court stated that since *Bellas Hess* and *Quill* were decided, the Court’s Commerce Clause precedent has evolved to a case-by-case analysis, using a fact heavy approach to determine the outcome of a dispute, rather than arbitrary or formal test.⁶⁰ The Court demonstrated that the PPT arbitrarily treats two economically equal companies differently solely because one has a store front and one does not, which “makes no sense.”⁶¹ The modern Commerce Clause jurisprudence is grounded in “functional, marketplace dynamics.”⁶² Since the Commerce Clause no longer follows a strict arbitrary analysis, the Court indicates that states should be allowed to consider the realities of the modern day economy when enacting and enforcing its tax laws.⁶³

These “market dynamics” are addressed throughout the opinion. The Court emphasizes that the modern economy is not tied to physical presence.⁶⁴ The internet allows retailers to be closer to customers, regardless if there is a storefront.⁶⁵ This artificial distinction has caused states to lose an estimated loss of up to thirty-three billion dollars a year in tax revenue.⁶⁶ As more customers shop online the amount of lost revenue is likely to increase. The amount of the lost revenue has already increased since *Quill* was decided, when states were losing only about three billion dollars per year.⁶⁷ Based on these three criticisms, the Court concluded that this

⁵⁵ *Quill Corp. v. North Dakota*, 505 U.S. 298, 329 (1992).

⁵⁶ *Wayfair*, 138 S. Ct. at 2094.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2100 (J. Gorsuch concurring) (quoting *Quill*, 505 U.S. at 329 (J. White concurring in part and dissenting in part)).

⁵⁹ *Id.* 2094 (majority opinion).

⁶⁰ *Id.*

⁶¹ *Id.* (“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, 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. *This distinction simply makes no sense.*” (emphasis added) (citations omitted)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 2095.

⁶⁶ *Id.* at 2088.

⁶⁷ *Id.* at 2097.

hard to apply test⁶⁸ was no longer functional.⁶⁹ The Court explicitly overruled *Quill* and *Bellas Hess* because the PPT was “unsound” and based on incorrect interpretation of the Commerce Clause.⁷⁰

B: The New Standard

With the PPT now overruled, the Court shifted its analysis to determine if the Act was a tax that applied to an activity that had a substantial nexus with the taxing state. The Court, in conclusory fashion, stated that based on economic and virtual contacts with the state, “nexus was *clearly* sufficient.”⁷¹ The Court thus created an “economy activity standard.” The Court did not give a specific test, but rather stated that the Act is sufficient to establish nexus because in order for it to apply, an out-of-state business needs to sell over \$100,000 of goods or services in South Dakota or engage in 200 or more separate transactions in South Dakota. By having this level of economic activity within South Dakota, the seller was conducting business in South Dakota, even if there was no physical presence in the state.⁷²

Last, the Court indicated that several factors helped determine that the Act was not a violation of the Commerce Clause. First, the Court indicated that the Act itself provided safe harbors for those who only have limited transactions in South Dakota, preventing an out-of-state business from being subject to the Act for a single transaction. Second, South Dakota’s sales tax structure is simple and straight forward.⁷³ The Court stated that since the South Dakota tax system would cause only a simple administrative burden, it would not be enough to negatively affect interstate commerce.⁷⁴

The dissent, written by Chief Justice Roberts,⁷⁵ did not disagree with the reasoning of the majority.⁷⁶ Despite this, the dissent argued that *Quill* should not be overruled because of stare decisis principles.⁷⁷ The dissent stated that it is Congress, not the Court, that should be regulating this area of the law.⁷⁸ However, the dissenting justices never addressed that it was the Court itself that created the PPT. Despite the dissent’s pleas, the majority replaced the PPT with a new economic activity standard.

⁶⁸ The Court discusses briefly how this test at creation was supposed to be easy to apply, but it is now unworkable. *See id.*

⁶⁹ *See id.* at 2099.

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added).

⁷² *Id.* (“This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota.”).

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ Justices Breyer, Sotomayor, and Kagan joined Chief Justice Roberts in dissent.

⁷⁶ *Wayfair*, 139 S. Ct. at 2101 (J. Roberts dissent) (“I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court.”).

⁷⁷ *Id.* at 2102–03.

⁷⁸ *Id.* at 2104.

Part III: Implications

Since *Wayfair* was decided only recently, it is hard to determine what the concrete effects will be on national commerce. There are, however, several outcomes that have either happened or probably will happen.

First, there is a likelihood that states will be able to increase their tax revenue. As indicated by the majority, states were losing up to thirty-three billion dollars every year because of the PPT.⁷⁹ By overruling the PPT, the Court intended for states to no longer be deprived of billions of dollars of tax revenue. This goal, however, may be harder to accomplish than the Court may have hoped.

While the PPT was used to determine if out-of-state businesses were required to collect and submit sales taxes, this did not mean that those transactions were never taxed. As stated above, if the out-of-state company could not be required to collect these taxes, the state could require the individual taxpayers within the state to pay a use tax. The Court noted that there are several practical issues with this collection process.⁸⁰ More importantly, the Court noted that compliance rates for this process are “notoriously low,” even as low as four percent.⁸¹

The Court does not indicate that compliance rates will be much better without the PPT. Easy to find “super online companies,” such as Amazon, were already paying state sales tax on items they sell directly because they already had a physical presence in many states.⁸² In fact, nineteen of the twenty largest online retailers already collected and submitted state sales tax.⁸³ These top ten retailers account for sixty-four percent of online sales.⁸⁴ These facts indicate that states who pass new collection laws similar to South Dakota are going to have to enforce these provisions on smaller, out-of-state companies. For large online companies like Wayfair Inc., it will be easier for states to find and enforce the new provisions. It will be difficult, however, to find and enforce these statutes on businesses that are just over the statutory threshold. Despite these challenges, the United States Government Accountability Office estimated that states will be able to gain a total of \$8–\$13 billion from the expanded authority.⁸⁵ This indicates that states are not going to be able to recover all of their lost revenue, but they will likely be able to collect at least part of it.

⁷⁹ *Id.* at 2088 (majority opinion).

⁸⁰ *National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 55 (1977).

⁸¹ *Wayfair*, 138 S. Ct. at 2088.

⁸² Eugene Kim, *Why Amazon is the Winner of the Supreme Court Sales Tax Ruling*, CNBC (June 21, 2018), <https://www.cnbc.com/2018/06/21/why-amazon-wins-with-supreme-court-sales-tax-ruling.html>.

⁸³ Katherine Thibadeau & Simon Bord, *LII Supreme Court Bulletin: South Dakota v. Wayfair, Inc. Dormant Commerce Clause Sales Tax E-commerce Stare Decisis*, Cornell Law School (last visited November 15, 2018), <https://www.law.cornell.edu/supct/cert/17-494#>.

⁸⁴ *Id.*

⁸⁵ GAO Rpt No.18-114 (Nov. 2017).

Second, both the majority and dissenting opinions discussed the effect that *Wayfair* will have on interstate commerce. The majority opinion focused on how the PPT has negatively affected several types of business. The majority indicated that the PPT placed local business and interstate businesses that maintain a physical presence in multiple states at a disadvantage compared to remote businesses.⁸⁶ This is because out-of-state businesses are not required to submit sales tax, and therefore are able to offer lower prices.⁸⁷ The majority believed that this was a “judicially created tax shelter” for online businesses.⁸⁸ Justice Gorsuch in concurrence, quoting Justice White, stated “judges have no authority to construct a discriminatory ‘tax shelter’ like this.”⁸⁹ Though tax incentives are not necessarily a bad thing, the Court implies that it should be Congress, not the Court, that create these tax incentives. The dissent seems to also agree with this point, but believes that this is the exact reason why the Court should not overrule the PPT.⁹⁰ The dissent believes that due to Congress’s ability to approach this issue through a variety of ways it is better suited to handle this question, rather than the judiciary.⁹¹

Unlike the majority, the dissent describes the negative impact that will be created for online retailers as the basis for why the Court is not the correct branch of government to get rid of the PPT. The dissent, stating that the Constitution gives Congress the power to regulate commerce among the states, should allow Congress to determine if the PPT, a test that has “governed this area for half a century,” should be disregarded.⁹² While the majority focuses on what businesses were hurt by the PPT, the dissent indicated that PPT test has allowed e-commerce to thrive and become an important factor in the national commerce. The dissent pointed out that getting rid of the PPT rule will impose severe compliance costs on online retailers.⁹³ These compliance costs would fall to small businesses who would then have to navigate several thousand tax jurisdictions.⁹⁴

The dissent stated several times the effect this decision will have on small businesses, at one-point stating that startup companies would fail if they have to navigate the tax code.⁹⁵ The dissent appears to gloss over that the majority strongly indicated that if the economic threshold required by a state’s tax law begins requiring out-of-state businesses to collect sales tax is too low, it will be a violation of the Dormant Commerce Clause. This is because there will be no

⁸⁶ *Wayfair*, 138 S. Ct. at 2093–94.

⁸⁷ *Id.* at 2094.

⁸⁸ *See id.* at 2100 (J. Gorsuch concurring).

⁸⁹ *Id.*

⁹⁰ *Id.* at 2104 (J. Roberts dissent).

⁹¹ *Id.* (“A good reason to leave these matters to Congress is that legislatures may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. As we have said in other cases, Congress ‘has the capacity to investigate and analyze facts beyond anything the Judiciary could match.’”).

⁹² *Id.*

⁹³ *Id.* at 2103.

⁹⁴ *Id.* at 2104.

⁹⁵ *Id.*

substantial nexus with the taxing state on the activity being taxed.⁹⁶ The small startup that the dissent is concerned about would not have to worry about being taxed in a foreign jurisdiction unless they have constant sales to that area.

This leads into the next implication of *Wayfair*—how have states reacted? Many states are quickly moving to implement a statutory regime that will allow them to require out-of-state retailers to collect and submit sales tax.⁹⁷ Some states are implementing the same statutes as South Dakota, while others are implementing similar statutes, but with different economic thresholds.⁹⁸ Table 1 is a summary of the states’ legislative enactment as of May 2019. Each individual state is listed in the Appendix.

Table 1
Summary of State Legislation
As of June 20, 2019

Sales \$100,000 or 200 or more transactions (Same as South Dakota in <i>Wayfair</i>)	25 States
Sales Greater than \$250,000 or 200 or more transactions	9 States
No Sales Tax	5 States
No Guidance	2 States
Other (five with Sales > \$100,000)	10 States

As of June 20, 2019, twenty-five states have enacted sales tax standards exactly like the Act—\$100,000 in Sales or over 200 transactions. That still leaves twenty-three states and Washington D.C. with a standard that differs from the Act. *Wayfair* did not give any principles for lower courts to rely on when analyzing if state statutes are only taxing activity in which an out-of-state business has substantial nexus with the taxing state. This unknown potential could create large levels of litigation for the states not conforming to the *Wayfair* standard. There are only five states that have enacted statutes with standards below the Act—\$100,000 or 200 transaction— so, as of now, it appears that most states are taking the conservative approach by following *Wayfair* to the letter.

There is also a likelihood that some states will simplify their tax code. The Court indicated that a factor for finding sufficient nexus was that South Dakota’s tax regime was a simplified structure with uniform rules.⁹⁹ Some states, however, do not have a simplified structure in place. This may require those states to simplify their tax structure for out-of-state businesses. Louisiana, for example, created the Louisiana Sales and Use Tax Commission for

⁹⁶ *Id.* at 2099 (majority opinion) (“South Dakota’s tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce.”).

⁹⁷ Boch, *supra* note 33, at 2.

⁹⁸ *Id.*

⁹⁹ *Wayfair*, 138 S. Ct. at 2100.

Remote Sellers, which administers a simplified tax system for out-of-state sellers.¹⁰⁰ Louisiana businesses, however, continue to face the state's notoriously complex state and local sales tax system.¹⁰¹

Interestingly, both the majority and dissent indicate that states will take advantage of this newly granted power by enforcing statutes under the new economic activity standard. This assumption is made despite states notoriously under enforcing its use tax provisions in the past. One reason for this belief is if states are going through the trouble to enact new statutes that mirror South Dakota's Act or are creating new tax regimes, it would indicate that states are no longer going to under enforce these provisions like they have in the past. States, however, did, at one point, also go through the trouble of enacting its current under enforced provision so the same could hold true in this case. The Court's assumption, therefore, can only be based on the belief that since there are fewer businesses that would be subject to these new statutes, it will be easier to enforce them.

While states are creating these statutes, another question arises as to whether Congress will step in and regulate interstate commerce. As stated by Justice Gorsuch, Congress can regulate interstate commerce and "Article III courts may not invalidate state laws that offend no congressional statute."¹⁰² Congress is still able to create a national rule for when states are able to force out-of-state retailers to collect and remit sales tax. A national rule created by Congress could ease the administrative burdens for small businesses that the dissent was worried about.

As noted by the Court, however, Congress has been unable to, or has chosen not to act in this area for over fifty years. The dissent gives several examples of recent pending legislation¹⁰³ and fears it will no longer be considered as a result of *Wayfair*. As noted by Justice Gorsuch, Congress is able to regulate interstate commerce. This legislation is still able to go into effect if it is the will of Congress. Overruling the judicially created PPT does not change this fact. It is true, however, that state officials are likely to focus on enacting a new tax structure that can raise state revenue from out-of-state businesses, rather than work with Congress on a national solution.¹⁰⁴ It may be an overstatement, however, to believe that Congressional

¹⁰⁰ Boch, *supra* note 33, at 2.

¹⁰¹ *Id.* Louisiana has numerous exemptions and sales tax rates for different assets sold. See generally, *Taxable Rate of Transactions for Exemptions and Exclusions*, Louisiana Dept. Rev., [http://revenue.louisiana.gov/Publications/R-1002\(07-18\).pdf](http://revenue.louisiana.gov/Publications/R-1002(07-18).pdf). For example, Nonprofit electrical co-ops are subject to a 1% tax, while purchases for electric power and energy are subject to a 2% tax. *Id.* For an extensive list of exemptions and rates, see, *id.*

¹⁰² *Wayfair*, 138 S. Ct. at 2100 (J. Gorsuch concurring).

¹⁰³ Some of these are the Marketplace Fairness Act of 2017; Remote Transactions Parity Act of 2017; and No Regulation Without Representation Act

¹⁰⁴ *Wayfair*, 138 S. Ct. at 2103 (J. Roberts dissenting).

legislation is right around the corner when Congress has failed to act, or chosen not to act, for fifty years,¹⁰⁵ though nothing, including *Wayfair*, is preventing Congress from doing so.¹⁰⁶

Last, there still remains the unanswered question about how third parties selling on an online retail platform are affected by *Wayfair*. For example, prior to this ruling, Amazon had not been required to collect sales tax from third party sellers, even though they use Amazon as a platform to sell products. Most of those sellers have not been required to collect and remit sales tax to other states. After *Wayfair*, it is unclear what the effect on these third parties will be going forward. It is not clear if the platform itself, like Amazon, could be required by states to collect and remit sales tax, even if the sale occurred through a third party. Several states including California have enacted marketplace facilitator rules that will require Amazon and similar facilitators to collect on behalf of the vendors whose products they sell.¹⁰⁷ Future litigation or federal legislation will likely be the only way to answer this question.

Conclusion

The Court decided to reexamine a fifty-year-old rule to determine if it still applicable in the modern economy. The Court determined that this archaic rule was outdated and decided to overrule the PPT. Rather than basing nexus on physical presence, the Court, looking at the economic activity required by the Act, assumed that 200 transactions or over \$100,000 of goods or services sold was clearly enough to establish nexus with South Dakota. While *Wayfair* rides the Court's precedent of an out-of-date rule, it leaves little guiding principle for lower courts, states, and businesses to use when evaluating this holding.

The effects of this holding will have implications for national commerce. This will place out-of-state retailers on a level playing field with brick and mortar businesses, as well as small in state businesses. It will add compliance costs to mid-sized or large online retailers but will not affect small businesses that are under the economic thresholds set by states. Future litigation and legislation on both the federal and state level should be expected going forward to more fully develop this new economic activity standard set by the Court in *Wayfair*.

¹⁰⁵ It should be noted that Congressional inaction may not be a sign of Congress not being able to pass legislation, but rather could be a sign of Congress agreeing with *Quill* and therefore has not needed to pass any legislation.

¹⁰⁶ One reason that may push Congress to Act is these large online retailers, along with small online retailers, may gain enough influence as the popularity of e-commerce continues to grow to lobby for a national standard to lower their compliance costs.

¹⁰⁷ See e.g., Sophia Bollag, *New California Law Requires Amazon to Collect Sales Tax for Small Online Retailers*, SACRAMENTO BEE (Apr. 25, 2019), <https://www.sacbee.com/news/politics-government/capitol-alert/article229699444.html>.

Appendix
States and Sales Tax Rules**

	Rule	Effective
Alabama	Sales>\$250,000	Oct. 1, 2018
Alaska	No State Sales Tax – State Level	n/a
Arizona	Transfer Privilege Tax Sales > \$200,000	Oct. 1, 2019
Arkansas	Sales>\$100,000 200 Transactions	July 1, 2019
California	Sales>\$500,000	April 1, 2019
Colorado	Sales>\$100,000	Dec 31, 2018 Grace Period 05/30/19
Connecticut	Sales>\$250,000 200 Transactions	Dec 1, 2018
Delaware	No State Sales Tax	n/a
District of Columbia	Sales>\$100,000 200 Transactions	Jan 1, 2019
Florida	No Guidance	No Guidance
Georgia	Sales>\$250,000 200 Transactions (\$100,000 as of Jan. 2020)	June 1, 2019
Hawaii	Sales>100,000 200 Transactions	July 1, 2018
Idaho	Sales > \$100,000	July 1, 2018
Illinois	Sales>\$100,000 200 Transactions	Oct 1, 2018
Indiana	Sales>100,000 200 Transactions	July 1, 2019
Iowa	Sales>\$100,000 200 Transactions	Jan 1, 2019
Kansas	No Guidance	No Guidance
Kentucky	Sales>\$100,000 200 Transactions	July 1, 2018
Louisiana	Sales>\$100,000 200 Transactions	Jan 1, 2019
Maine	Sales>\$100,000 200 Transactions	July 1, 2018
Maryland	Sales>\$100,000 200 Transactions	Oct. 1, 2018
Massachusetts	Preceding year sales>\$500,000 100 Transactions	Oct 1, 2017

Michigan	Sales>\$100,000 200 Transactions	Oct 1, 2018
Minnesota	>100 sales shipped to MI ≥10 sales shipped to MI totaling >\$100,000	Oct 1, 2018
Mississippi	Sales>\$250,000	Sept 1, 2018
Missouri	Sales>\$100,000 & 200 Transactions	Jan 1, 2020
Montana	No State Sales Tax	n/a
Nebraska	Sales>\$100,000 200 Transactions	Jan 1, 2019
Nevada	Sales>\$100,000 200 Transactions	Oct 1, 2018
New Hampshire	No State Sales Tax	n/a
New Jersey	Sales>\$100,000 200 Transactions	Nov 1, 2018
New Mexico	Sales > \$100,000	July 1, 2019
New York	Sales>\$300,000 100 Transactions	June 1, 2019
North Carolina	Sales>\$100,000 200 Transactions	Nov 1, 2018
North Dakota	Sales>\$100,000 200 Transactions	Oct 1, 2018
Ohio	Sales>\$500,000 was the threshold before Wayfair	Haven't offered any new guidance since Wayfair decision.
Oklahoma	Sales>\$100,000	Nov. 1, 2019
Oregon	No State Sales Tax	n/a
Pennsylvania	Sales>\$100,000	July 1, 2019
Rhode Island	Sales>\$100,000 200 Transactions	July 1, 2019
South Carolina	Sales>\$100,00	Nov 1, 2018
South Dakota	Sales>\$100,000 200 Transactions	Nov 1, 2018
Tennessee	Sales > \$500,000	Oct. 1, 2019
Texas	Sales>\$500,000	Oct 1, 2019
Utah	Sales>\$100,000 200 Transactions	Jan 1, 2019
Vermont	Sales>\$100,000 200 Transactions	July 1, 2019
Virginia	Sales>\$100,00 200 Transactions	July 1, 2019
Washington	Sales>\$100,000	Oct. 1, 2018
West Virginia	Sales>\$100,000 200 Transactions	Jan 1, 2019
Wisconsin	Sales>\$100,000	Oct 1, 2018

Wyoming	200 Transactions Sales>\$100,000 200 Transactions	Feb. 1, 2019
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** Source: Individual States' Department of Revenue website. Updated June 20, 2019.