BEING PRESENT: WHAT A SALES TAX CASE DEMONSTRATES ABOUT FEDERALISM, THE DORMANT COMMERCE CLAUSE, AND THE DIRECTION OF SUPREME COURT JURISPRUDENCE

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ABSTRACT

The right of the states to impose taxes on remote sellers is an issue that calls up various constitutional principles, including (but not limited to) fundamental questions about federalism, the Due Process Clause and the Commerce Clause. In *South Dakota v. Wayfair, Inc.*, the Court is asked for a third time whether a seller with no presence in a state may be subject to the tax laws of that jurisdiction. Noting that decisions sourced from the Dormant Commerce Clause have a unique place in the Court's jurisprudence, the majority examines the history of the Commerce Clause up to the precedent that is ultimately overturned. After scrutinizing the heightened standard of *stare decisis* where Congress has the power to Act, the *Wayfair* decision, though on its face deals with updating a standard to comport with technological advances in commerce, demonstrates more about the Court's ideological direction with regard to federalism.

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I. THE ROLE OF THE COURTS

With three short sections, Article III of the Constitution establishes the judicial branch.[1] Centuries of history have evolved the Courts into a body that reflects and impacts essential parts of our national identity. In *South Dakota v. Wayfair, Inc.*, the Supreme Court reviews the history of its Commerce Clause jurisprudence and in doing so examines its role as it relates to the legislature.[2] Before examining the principles that have formed the foundation of state tax cases for decades, the role of the courts – as it relates to judicial review, *stare decisis*, and the Dormant Commerce Clause – will be revisited through the lens of this case, which is fraught with Constitutional questions.

A. *Judicial Review*

Judicial review is an essential part of the three-branch system of government in the United States.[3] While the executive and legislative branches have affirmative powers of action, the judiciary, specifically the Supreme Court of the United States, determines whether those actions taken

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[1] U.S. CONST. art. III.

[2] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

[3] *See generally* Barry Friedman, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

by the federal or state governments comport with the United States Constitution.[4] In an era of sharp political divide, the role of the Court and how the Justices and public opinion respond to one another is worthy of renewed examination. Justices serve for life[5] after being appointed by the president and confirmed by the Senate[6] (both elected bodies[7]) and are therefore the government officials most insulated from the impact of politics and public opinions. Despite this political segregation, a relationship continues to exist between the Court and the electorate.[8]

Lifetime appointees, the Justices of the Supreme Court, through judicial review of the state actions that have come before them, have had an immense impact on the direction and culture of the United States. Alexander Hamilton considered this tenure and its relation to the role of the Court in Federalist Paper No. 78, which was published in 1788.[9] Hamilton had a vision for the three-branch system of government in which the role of the judiciary would be deferential to the executive and the legislature.[10] Hamilton argued that "[t]he judiciary has no influence over either the sword or the purse; no direction either of the strength or the wealth of society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment . . . ."[11] Though Hamilton stated that the "judiciary is beyond comparison the weakest of the three departments of power"[12] in his argument for lifelong tenure for Justices, he asserts that the Courts must take a power not given to them by the Constitution or the legislature as the interpreter of laws, and he emphasizes the importance of the independence and "good behavior"[13] of the Justices in carrying out their duty.[14] Hamilton considered the Justices the "bulwarks of a limited

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[4] U.S. CONST. art. III. *See also* Marbury v. Madison, 5 U.S. 137, 173 (1803) (holding the United States Supreme Court sets a foundation for defining and describing the continuously evolving role of the Judiciary).

[5] U. S. CONST. art. III, §1.

[6] U. S. CONST. art. II, §2 (stating "[The Executive] . . . by and with the Advice and Consent of the Senate . . . shall appoint . . . Judges of the Supreme Court").

[7] U. S. CONST. art. I, § 3, art. II, § 1.

[8] *See* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1258 (2003-04) ("Most scholars in the legal academy, and especially in constitutional theory, take it as their business to tell the Court what it *should* do. A positive approach is more concerned with trying to understand what the Supreme Court *does* do and why it does it.").

[9] THE FEDERALIST NO. 78 (Alexander Hamilton).

[10] *See id.*

[11] *Id.*

[12] *Id.*

[13] U.S. CONST. art. III, § 1.

[14] THE FEDERALIST NO. 78 (Alexander Hamilton) (Hamilton speaks of the dangers of the Justices relying on their own interests over the intentions of the Legislature: "if they

Constitution against legislative encroachments"[15] and helped to set the stage for the relationship between the Court and legislature, which continues to evolve to this day.

Some fifteen years after the publication of Federalist Paper No. 78, Chief Justice John Marshall built on Hamilton's ideas in the landmark case of *Marbury v. Madison*, in which the Court asserted and defined the role of the judiciary.[16] At the conclusion of the opinion, Chief Justice Marshall stated that "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[17] In a broader sense, the Court articulated its vision for its role in government, holding that "an act of the legislature repugnant to the constitution is void" and that the role of the courts is to declare it so.[18] Further, that declaration is "the very essence of judicial duty."[19]

After centuries of operation, thousands of opinions, and a handful of cultural revolutions, the Court continues to define and balance its relationship with the other branches of government and with the American people. Constitutional scholars examining the role of the judiciary have studied and described the ways in which judicial review may evolve and impact other government authorities. Scholars who analyze the concept of judicial supremacy note that:

> [I]n a federal system, the judiciary can provide vital support to the central government in suppressing outlier conduct. This "vertical" supremacy – the supremacy of the Supreme Court over state and local governments – ultimately transforms itself into "horizontal" supremacy – the binding effects of judicial pronouncements over the coordinate branches of the national government.[20]

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should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substation of their pleasure to that of the legislative body.").

[15] *Id.*

[16] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Barry Friedman & Erin Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV., 1137, 1137 (2011). Professor Friedman has also done extensive research on the connection between judicial decisions and public opinion culminating in his book, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION. *See generally* Friedman, *supra* note 4. In this work, Professor Friedman argues that the Court's decisions and public opinion are linked, if not perfectly, then when the long view of history is taken. *Id.*

In the modern case of *South Dakota v. Wayfair, Inc.*, though not explicitly the issue the decision reviews, the Justices grapple with a similar but inverse question: would the legislature's *omission* to act, being repugnant to the Constitution, also be void?[21] An examination of that question requires a brief summary of the power of judicial review as expressed through the Dormant Commerce Clause.

B. *Dormant Commerce Clause Legitimacy*

Congress is given an express and affirmative grant of power in the Constitution "to regulate Commerce . . . among the several States."[22] The Constitution does not make a similar grant of power to the judiciary – instead the Court establishes its authority by way of the Dormant or Negative Commerce Clause.[23] In the face of some skepticism from textualist Justices, even fairly modern Supreme Court opinions mount a historical defense of the Dormant Commerce Clause.[24] In 1979, Justice Brennan reflected on history and noted that:

> [A] central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that, in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.[25]

The concerns of the modern economy as they relate to the balkanization of states are obsolete, particularly given the impact technology has had on commerce; nevertheless, the Dormant Commerce Clause, which was born partially from that concern, has had a tremendous impact on the Court's jurisprudence as well as the economy and culture of the United States.[26]

Early in its history, the Court established and articulated its "dormant" power to regulate interstate commerce.[27] In a dispute about the operation of commercial steamboat lines that serviced waterways in multiple jurisdictions, Chief Justice Marshall explained that "a central function of this Court has been to adjudicate disputes that require interpretation of the

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[21] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2084 (2018). *See infra* Section II.

[22] U.S. CONST. art. I, § 8.

[23] *Wayfair*, 138 S. Ct. at 2100.

[24] *See generally id.*

[25] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979).

[26] *See, e.g.*, Nat'l Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 753 (1967); Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). *See also*, Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 453 (1959); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

[27] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018).

Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce."[28] The Chief Justice went on to coin the term "dormant" in the opinion when he wrote that the power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant."[29] In 2018, Justice Anthony Kennedy, writing the majority opinion in *South Dakota v. Wayfair, Inc. et al*, revisits the opinion in *Gibbons v. Ogden* as establishing a very broad definition of "commerce"[30] and imagines that if the Court had decided differently in 1824, that "history might have seen sweeping federal regulations at an early date that foreclosed the States from experimentation with laws and policies of their own."[31] Instead, Justice Kennedy argues that the holding in *Gibbons v. Ogden*,[32] which provides a broad definition of commerce that was upheld five years later, "indicated that the power to regulate commerce in some circumstances was held by the States and Congress concurrently."[33]

The Court's guiding principles for Dormant Commerce Clause jurisprudence in the modern era are: "first, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."[34] If a regulation falls into the first category, the regulation will be held invalid, whereas a regulation in the second category will be upheld unless the burden on interstate commerce is clearly excessive relative to the local benefits conferred or enjoyed.[35]

Yet despite these guiding principles established by the Court, some strict textualists, including former and current Justices, consider the Dormant Commerce Clause and all jurisprudence born from it to be an overreach by the judiciary.[36] The late and influential Justice Antonin Scalia said that the

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[28] *Id.* at 2090 (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).

[29] *Gibbons*, 22 U.S. at 189.

[30] *Id.* at 189, 193 (Chief Justice Marshall explaining that commerce includes both "the interchange of commodities" as well as "commercial intercourse").

[31] *Wayfair*, 138 S. Ct. at 2090.

[32] *See* Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829). In this case the Court ruled on an obstruction to an interstate waterway that had an impact on those that used the water source in a different jurisdiction. *Id.* The Court stated that, if Congress had passed a law to regulate commerce on navigable creeks, then Congress would control, but Congress had passed no such law, so the Court relied on the power to opine on state laws that impacted interstate commerce pursuant to the Dormant Commerce Clause. *Id.*

[33] *Wayfair*, 138 S. Ct. at 2090.

[34] *Id.* at 2091.

[35] *Id.* (citing Granholm v. Heald, 544 U.S. 460, 476 (2005); Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970)).

[36] Barry Friedman & Daniel Deacon, *A Course Unbroken: The Constitutional*

Clause is "on its face . . . a charter for Congress, not the Courts"[37] and further insisted that the "historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce."[38] In the most recent ruling, Justice Clarence Thomas, who joined the majority in invalidating a rule born from the Court's Dormant Commerce Clause jurisprudence, filed a concurring opinion to emphasize his position that the "Court's negative Commerce Clause jurisprudence . . . can no longer be rationally justified."[39] Justice Thomas's concise but pointed dissent is notable, as he consciously changed his position regarding the rule as he expressed it in the 1992 *Quill Corp. v. North Dakota* decision, where he joined an opinion authored by Justice Scalia, concurring in part and concurring in the judgment, stating, "I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*."[40] Accordingly, the direction of the Court's most recent Dormant Commerce Clause jurisprudence can be best examined with a brief history of precedential cases and explanation of the facts, circumstances, and climate in which the *Wayfair* case was decided.

II. BACKGROUND & SALES TAX

Though the intricacies vary by jurisdiction, in general, the sales and use taxes implemented by a state levy taxes on the sale or consumption of goods within that state.[41] In an effort to find an extra source of revenue, state legislatures began to enact sales and use tax statutes in the 1930s.[42] Currently, the vast majority of states impose a sales tax structure wherein the tax is paid by end consumers, but collected from those consumers by vendors who also remit the payments to the taxing jurisdiction.[43] In an

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Legitimacy of the Dormant Commerce Clause, 97 VA. L. REV. 1877, 1878-79 (2011).

[37] Tyler Pipe Indus. v. Wash. State Dep't. of Revenue, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part) (holding Washington's manufacturing tax to be in violation of the Commerce Clause on the grounds that it discriminated against interstate commerce).

[38] *Id.* at 263.

[39] *Wayfair*, 138 S. Ct. at 2100 (Thomas, J., concurring) (quoting Quill Corp. v. N.D., 504 U.S. 298, 333 (1992)).

[40] *See infra* Section II for historical detail about the *Quill* and *Bellas Hess* cases. *Quill Corp.*, 504 U.S. at 320.

[41] Natasha Varyani, *Taxing Electronic Commerce: The Effort of Sales and Use Tax to Evolve with Technology*, 39 OKLA. CITY U. L. REV. 151, 154 (2014).

[42] *Id.*

[43] Brief for Streamlined Sales Tax Governing Board as Amici Curiae Supporting Petitioners, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494).

effort to collect tax on consumption in an even-handed way, when a customer purchases an item from a vendor that does not collect sales tax, the use tax requires the customer to "self-assess" a tax in the jurisdiction in which the item is consumed.[44] As noted by the courts and state governments alike, the "impracticability of [this] collection from the multitude of individual purchasers is obvious" and "consumer compliance rates are notoriously low."[45] Accordingly, states are motivated to encourage vendors to collect within the jurisdiction, and large, multi-jurisdictional vendors, particularly online vendors, have manipulated the sales tax regime to create a competitive advantage for themselves.[46] This strategy was made possible by the "physical presence test" that was first articulated in *National Bellas Hess, v. Department of Revenue*[47] ("*Bellas Hess*") in 1967, affirmed 25 years later in *Quill Corp. v. North Dakota,*[48] ("*Quill*"), and overturned after another quarter century in *South Dakota v. Wayfair, Inc.*[49]

A. *The Precedent & A Call for Action: Bellas Hess, Quill, & DMA*

The first case to articulate the "physical presence" rule, requiring that a taxpayer have a physical presence in the jurisdiction by way of property or employees, was *Bellas Hess*.[50] In *Bellas Hess*, the vendor in question was a "mail order house with its principle place of business in Missouri."[51] Bellas Hess had no presence in Illinois – that is to say it had "no tangible property . . . , no sales outlets, representatives, telephone listing, or solicitors . . . and [did] not advertise there by radio, television, billboards or newspapers."[52] Its only connection to the state was that it mailed catalogues to its customers throughout the United States twice each year, supplemented with occasional flyers.[53] In its holding, the Court rested on the Commerce Clause, stating that "the Commerce Clause prohibits a State from imposing the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or

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[44] *Id.*

[45] *Wayfair*, 138 S. Ct. at 2088 (citing Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 555 (1977)).

[46] Varyani, *supra* note 42, at 169-70.

[47] Nat'l Bellas Hess v. Dep't of Revenue of Ill., 386 U.S. 753, 765-66 (1967).

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

[49] *Wayfair*, 138 S. Ct. at 2080 (2018).

[50] *Nat'l Bellas Hess*, 386 U.S. at 753.

[51] *Id.*

[52] *Id.* at 754.

[53] *Id.*

by mail."[54] In doing so, the Court noted the closeness of the Due Process analysis to the Commerce Clause analysis.[55] While the Due Process Clause analysis was concerned with the fundamental fairness of Illinois imposing a tax on an entity that lacked a "minimal connection" to the state, the Commerce Clause analysis was instead concerned with the burden on interstate commerce.[56] Despite a similar analysis, the Court's authority to rule on the Due Process Clause was clear as an interpretation of the Fourteenth Amendment, which the Court noted was concerned with the fundamental fairness of allowing a state to impose its laws on an entity with no presence in state.[57]

Twenty-five years later, a very similar set of facts was again before the Court in *Quill Corp. v. North Dakota*.[58] The state was attempting to require that Quill collect and remit tax based on sales made within the jurisdiction.[59] Quill, organized in Delaware with offices and warehouses in several states, had no connection to North Dakota in the form of employees, property or tangible property.[60] Like Bellas Hess, Quill solicited orders through catalogues, flyers, and advertisements in national periodicals, but did not "purposefully avail" itself to customers in the jurisdiction in a special or distinct way.[61] All merchandise sent from Quill to customers in North Dakota was delivered by mail or common carrier from an out of state location.[62] North Dakota imposed its tax laws on every "retailer maintaining a place of business" in the state.[63] In 1987, the North Dakota amended its law in a way that gave rise to this litigation: it changed the definition of "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in state"[64] with regulations clarifying that three or more advertisements within a 12-month period qualified as "regular and systematic."[65] In doing so, North Dakota required

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[54] *Id.* at 756-60.

[55] "National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden on interstate commerce. These two claims are closely related." *Id.* at 756.

[56] *Id.*

[57] Varyani, *supra* note 42, at 157-59. The question of fairness addressed by the Due Process Clause in this context has to do with whether it is fair and just for a state to impose their laws on an entity with a minimal connection to the jurisdiction. *Id.*

[58] Quill Corp. v. Heitkamp, 504 U.S. 298 (1992).

[59] *Quill Corp.*, 504 U.S. at 302.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] N.D. CENT. CODE Section 57-40.02-07 (Supp. 1991).

[64] N.D. CENT. CODE Section 57-40.2-01(6) (2007).

[65] N.D. ADMIN. CODE Section 81-04.

vendors such as Quill, with no property or employees in state, to collect and remit tax on sales made to customers in North Dakota.

The Supreme Court in North Dakota held that the holding in *Bellas Hess* was obsolete and inapplicable due to "wholesale changes" in the economy, particularly the exponential growth of the mail order business.[66] When the Court took up the case, it was faced with the choice to reverse the North Dakota Supreme Court's ruling and uphold their own precedent in *Bellas Hess* or to overturn their own precedent.[67] Despite being sympathetic to much of the reasoning provided by the state, in a unanimous decision[68] the Court reversed the ruling of the North Dakota Supreme Court and affirmed the ruling in *Bellas Hess*.[69] In Part IV of the *Quill* majority opinion, which only five of the nine Justices joined, the Court separates the Due Process analysis from the Commerce Clause analysis, stating that "despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical.[70] The two standards are animated by different constitutional concerns and policies."[71] The Due Process Clause "centrally concerns the fundamental fairness of governmental activity," examining whether Quill's connections to North Dakota are substantial enough that the state's imposition of power over Quill comports with notions of fairness.[72] A state statute that is held to violate the Due Process Clause in this way is squarely within the Court's power to adjudicate. The Court emphasizes the contrast between the Due Process Clause and the Commerce Clause, explaining that "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."[73] The Commerce Clause, instead of being concerned with the fairness of a state imposing its laws on an entity, works under the authority given to Congress by the Constitution to regulate interstate commerce.

While the Court in *Bellas Hess* relied on the similarity of the nexus requirements under the Due Process Clause and the Commerce Clause, the

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[66] Heitkamp v. Quill Corp., 470 N.W.2d 203, 213 (N.D. 1991).

[67] *Quill Corp.*, 504 U.S. at 302.

[68] Justice Stevens delivered the opinion of the Court that was unanimous with regard to parts I, II and III and with respect to part IV, with which Justices Rehnquist, Blackman, O'Connor and Souter joined. Justice Scalia filed an opinion that was concurring in part and concurring in the judgment in which Justices Kennedy and Thomas joined. Justice White filed an opinion concurring in part and dissenting in part. *Id.* at 300.

[69] *Id.* at 301.

[70] *Id.*

[71] *Id.* at 312.

[72] *Quill Corp.*, 504 U.S. 298, 312 (1992).

[73] *Id.*

Court in *Quill* is careful to distinguish the two.[74] In the *Quill* holding, the Court relies on the Commerce Clause while simultaneously calling on Congress to resolve the question about interstate commerce that the legislature was granted the authority to study and address.[75] Indeed, the majority goes on to say that even if the Court was convinced that *Bellas Hess* should be overturned on the grounds that it is inconsistent with the Commerce Clause jurisprudence, the power to protect and regulate interstate commerce "from intolerable or even undesirable burdens" rests with Congress.[76] The Court states that on the facts at hand "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government."[77] However, concurring Justices differ on this point, stating that they "would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*."[78] Concurring Justices articulate their position on government action in this area by reminding parties that "Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* simply by saying so. We have long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what we have done.'"[79]

In the quarter century between *Quill* and *Wayfair* (as in the preceding period between *Bellas Hess* and *Quill*), Congress has considered the issue. Legislation has been introduced but never come to law. In 2015, in a concurring opinion, Justice Kennedy gave a brief history of the Commerce Clause jurisprudence as it relates to remote sellers and the physical presence rule before stating directly that "it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*."[80] An increasing number of states began crafting creative solutions in order to seek additional sources of revenue. In pursuit of that goal, South Dakota wrote a statute designed to challenge the established rule.[81]

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[74] *Id.* at 318.

[75] *Id.* ("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.").

[76] *Id.* (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 637 (1981) (White J. concurring)).

[77] *Id.* at 318-19 (citing Commonwealth Edison Co. v. Mont., 453 U.S. 609, 637 (1981) (White, J., concurring)).

[78] *Quill Corp.*, 504 U.S. at 320. Note that three justices in *Quill* based their decision to uphold the physical presence rule on *stare decisis* alone. *Id.* at 320. Dissenting in part, Justice White argued that "there is no relationship between the physical presence / nexus rule the Court retains and Commerce Clause considerations that allegedly justify it. *Id.* at 327.

[79] *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)) (additional citations omitted).

[80] Direct Mktg. Ass'n. v. Brohl, 135 S. Ct. 1124, 1135 (2015).

[81] *See* S. 106, Leg. Assembly, 91st Sess. (S.D. 2016).

1. Concurrent Technical / Commercial Revolution

In the years that passed between the *Bellas Hess* and *Quill* decisions, the Court cites "wholesale changes" to be considered in deciding whether precedent is still relevant.[82] From 1967 to 1992, the "principal economic change noted by the court was the remarkable growth of the mail-order business 'from a relatively inconsequential market niche' in 1967 to a 'goliath' with annual sales that reached the staggering figure of $183.3 billion in 1989."[83] Unlike the period between *Bellas Hess* and *Quill,* the period following *Quill* saw not only the growth of an industry, but a complete revolution in commerce brought on by the prevalence of the internet.[84] Justice Kennedy calls for the court to revisit the *Quill* holding in his *Direct Marketing Ass'n v. Brohl* ("*DMA*") concurrence, wherein he notes that the "Internet has caused far-reaching systematic and structural changes in the economy, and, indeed, in many other societal dimensions."[85] In particular, businesses that have no presence in a state may nevertheless be a mere click away from a large number of shoppers, giving buyers "almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."[86] In 1992, at the time of *Quill*, the Internet was just beginning to develop and establish its place in commerce and culture; "by 2008, e-commerce sales alone totaled $3.16 ***trillion*** per year in the United States."[87] The seismic changes to the nature of the industry made clear to Justice Kennedy, and indeed the other Justices writing in *Wayfair* in 2018, that the rule requiring physical presence for substantial nexus is obsolete. Nevertheless, there is much to be learned about the nature of the Court's relationship with Congress. On the Court's third consideration of the states' ability to impose tax laws on remote sellers, the opinions in the *Wayfair* decision provide additional information about the nuances of the relationship between branches.[88]

2. *Wayfair* Holding & Components

The period between *Quill* and *Wayfair* is twenty-six years, almost exactly

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[82] *Quill Corp.*, 504 U.S. at 303 (quoting Heitkamp v. Quill, 470 N.W.2d 203, 213 (N.D. 1991)).

[83] *Quill Corp.*, 504 U.S. at 303 (citations to the petition for Certiorari omitted).

[84] Varyani, *supra* note 42, at 169.

[85] *Direct Mktg. Ass'n.*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

[86] *Id.*

[87] *Id.* at 1135.

[88] *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2080 (2018) (discussing the physical presence rule in an internet-based commercial market).

the same amount of time that passed between when the Court reconsidered the standard set in *Bellas Hess* in *Quill*.[89] Justices Ruth Bader Ginsburg, Samuel Alito, and Neil Gorsuch joined the majority opinion written by Justice Kennedy, which called for an additional renewed examination of the same issue.[90] Justice Thomas filed a concise concurring opinion, as did Justice Gorsuch.[91] Chief Justice John Roberts authored a dissent joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.[92]

a. *Majority Opinion*

The majority opinion is separated into five components that will be briefly examined for clues about the direction of the Court with regard to its notion of judicial review and the validity of the Dormant Commerce Clause.

i. Facts

In response to its own budget shortfalls as well as Justice Kennedy's call to action in *DMA*, South Dakota enacted "an Act to provide for the collection of sales taxes from certain remote sellers . . . ."[93] The state's legislature "found that the inability to collect sales tax from remote sellers" was "seriously eroding the sales tax base"[94] and expressed its intent to "apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines."[95] As a result of that application, "sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more transactions" will be treated "as if the seller had a physical presence in state."[96]

There are three taxpayer plaintiffs in this case: Wayfair, Inc., Overstock.com, Inc. and Newegg, Inc. Each taxpayer plaintiff is a merchant with no physical presence in the state—no employees or property in South Dakota.[97] Each plaintiff is a large seller that operates extensively online and ships its goods directly to South Dakota customers (and throughout the United States) by mail or common carrier.[98] These respondents were granted summary judgment in South Dakota's state

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[89] Quill Corp. v. Heitkamp, 504 U.S. 298 (1992); *Wayfair*, 138 S. Ct. at 2080.

[90] *Wayfair*, 138 S. Ct. at 2080.

[91] *Id.* at 2100 (Thomas, J., concurring; Gorsuch, J., concurring).

[92] *Id.* at 2101 (Roberts, J., dissenting).

[93] S. 106, Leg. Assembly, 91st Sess. (S.D. 2016).

[94] *Id.* at Sec. 7(1).

[95] *Id.* at Sec. 7(11).

[96] *Wayfair*, 138 S. Ct. at 2089 (citing S. 106, 2016 Leg. Assembly 91st Sess, Sec. 1).

[97] *Wayfair*, 138 S. Ct. at 2089.

[98] *Id.* at 2089.

courts, which conceded that the Act could not survive under the rule set forth in *Bellas Hess* and *Quill*, but strongly encouraged a review of the precedent in light of "current economic realities."[99] The Court heeded the request of the South Dakota courts by examining the physical presence test and the sources of law from which it was derived, ultimately overturning a precedent that was in place for over 50 years because it was "unsound and incorrect."[100]

ii. Commerce Clause

The second section of the majority opinion provides a concise but thorough history of the Commerce Clause and how it relates to the relevant precedent.[101] In establishing how the Court came to be the arbiter of power between the federal legislature and the states, the Court provides a history and description of the Dormant or Negative Commerce Clause.[102] The Court looked to precedent in which it "distinguished between those subjects that by their nature 'imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States,' and those that 'deman[d] th[e] diversity which can alone meet the local necessities.'"[103]

As the opinion proceeds through the history and development of the Court's Commerce Clause doctrine, it states the boundaries of the state's authority to regulate interstate commerce, and by extension, the Court's basis for judicial review: first, that discrimination against interstate commerce shall be void on its face; and second, that burdens placed on interstate commerce by the state will be reviewed to ensure that they are not excessive relative to the resulting benefits.[104] In the application of Commerce Clause jurisprudence to issues of state tax, the Court says that a state "may tax exclusively interstate commerce so long as the tax does not

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[99] *Id.* at 2089 (referencing State v. Wayfair, Inc., 901 N.W. 2d 754, 760 (S.D. 2017)) (affirmed by the United States Supreme Court).

[100] *Wayfair*, 138 S. Ct. at 2099.

[101] *See id.* at 2085-87.

[102] *Id.* at 2085-86.

[103] *Id.* at 2090 (citing Cooley v. Bd. of Wardens ex rel. Soc'y for Relief of Distressed Pilots, 53 U.S. 299, 319 (1851)). An example used in class lectures of the former "rigid rule" is the requirement that an individual be 18 years old to vote. This is easy to administer and predictable but likely unjust "around the edges" as there are individuals younger than 18 that are informed and qualified to vote, and others over the voting age who are not. Alternatively, the flexible standard articulated as "diversity" that can meet local standards would decide based on factors and nuances who can vote, and while it would likely produce a more optimal electorate, its administration would be burdensome and fraught with challenges to stay neutral. *Id.* at 2090. The "physical presence" rule established by the Court in *Bellas Hess* falls into the first category of "bright line test." *Id.* at 2095.

[104] *Wayfair*, 138 S. Ct. at 2086.

create any effect forbidden by the Commerce Clause,"[105] as even interstate commerce "may be required to pay its fair share of [state] taxes."[106]

In arriving at the *Quill* decision that is ultimately overturned, the Court notes that while *Bellas Hess*, in crafting the physical presence rule, "linked due process and the Commerce Clause together, the Court in *Quill* overruled the due process holding, but not the Commerce Clause holding; and it thus reaffirmed the physical presence rule."[107] This distinction becomes essential when considering the trending view of Justices regarding whether the Court has any authority to rule on this issue under the Dormant Commerce Clause or indeed whether the Dormant Commerce Clause (and all of the jurisprudence in its umbra) exists at all.

iii. Physical Presence Test Undone

Having set the stage for a review of the South Dakota statute's constitutionality through the history of the precedent and authority, the Court provides three main reasons for overturning the test set forth in *Bellas Hess* and affirmed in *Quill*.[108] First, the Court holds that physical presence is not necessary to satisfy the "substantial nexus" test articulated in *Complete Auto*.[109] This holding, which applies the test set forth in *Complete Auto*, requires a substantive analysis of the facts at hand and the way the market has evolved.[110] On the theme of an examination of markets, the second reason that the Court holds the *Quill* test to be flawed is that it "creates rather than resolves market distortions."[111] However, the third reason reveals the most about the Court's position on the matter: "*Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow."[112]

Based on the number of states and territories that support the rejection of

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[105] *Id.* at 2086-87 (citing Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 285 (1977)). This case sets forth the framework for nexus requirements upon which the physical presence rule is based. The four-part test articulated in *Complete Auto* requires that in order to be sustained by the Court, a state tax must (1) apply to an activity with substantial nexus in the jurisdiction; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *See Complete Auto*, 430 U.S. at 279.

[106] *Wayfair*, 138 S. Ct. at 2086 (citing D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988)).

[107] *Wayfair*, 138 S. Ct. at 2091–92 (citing Quill Corp. v. North Dakota, 504 U.S. 298, 307–08, 317–18 (1992)).

[108] *See Wayfair*, 138 S. Ct. at 2092.

[109] *Id.* (citing *Complete Auto*, 430 U.S. at 279).

[110] *See Wayfair*, 138 S. Ct. at 2092.

[111] *Id.*

[112] *Id.*

the physical presence test, the Court holds that "it is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions."[113] The Court held that the South Dakota statute is not discriminatory on interstate commerce, nor is it unduly burdensome.[114] Further, the rigid "physical presence rule intrudes on States' reasonable choices in enacting their tax systems."[115] Through this reasoning, the majority demonstrates that its precedent as applied today is an inappropriate restriction on states's rights by the judiciary, and that "in the name of federalism and free markets, *Quill* does harm to both."[116] Next, the Court considered the heightened burden as justification for overruling the established precedent.[117]

iv. *Stare Decisis*

In a common law system built on precedent, the Court does not take lightly the decision to reverse precedent. Despite the Court's "reconsideration of [its] decisions with the utmost caution, *stare decisis* is not an inexorable command."[118] In the case at hand, the Court concedes that its previous decisions "prohibit the States from exercising their lawful sovereign powers" and hold it incumbent to correct its own errors.[119] Recognizing that the Commerce Clause enumerates power to Congress and not the Courts, the opinion states that "it is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of [the] Court's own creation."[120] Despite Congress's clear authority to act in this area, the Court takes ownership of the rule and treats the lack of action on the part of the legislature as an opportunity to amend what the Court considers to be its own rule.[121]

Recognizing the value of "reliance interests" in precedents, the Court in the final section of the *Wayfair* decision discusses the issue of substantial nexus in light of the fact that the bright line rule of "physical presence" is no longer necessary to achieve compliance with the *Complete Auto* test.[122] The Court decides on the circumstances before it – the South Dakota statute requiring a threshold of $100,000 in sales or 200 transactions with in-state

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[113] *Id.* at 2095.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 2096.

[117] *Wayfair*, 138 S. Ct. at 2096.

[118] *Id.* (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

[119] *Wayfair*, 138 S. Ct. at 2096.

[120] *Id.*

[121] *See id.* (finding that the Court has a responsibility to address false precedent that it creates).

[122] *Id.* at 2099.

customers does achieve substantial nexus – , but does not provide detailed guidance for determining whether a substantial nexus exists.[123] Examples of efforts by states to determine the existence of a substantial nexus are cited,[124] but only the South Dakota statute is the subject of the ruling.[125] The Court admits that there may be other issues that are a barrier to the validity of statutes that have not been briefed or argued because of the barrier of the physical presence test, and that "the Court need not resolve them here."[126]

b. *Concurring Opinions: Justices Thomas & Gorsuch*

Two concurring opinions are filed in this case.[127] While agreeing with the holding, Justice Thomas goes a step further by saying not only is the *Quill* physical presence test unjustifiable under the Commerce Clause, but the "same is true for this Court's entire negative Commerce Clause jurisprudence."[128] Similarly, Justice Gorsuch agrees with the majority's history of the Commerce Clause analysis but asserts that his agreement "should not be mistaken for agreement with all aspects of the doctrine."[129] Justice Gorsuch argues that federal courts "may invalidate state laws that offend no congressional statute" but asserts that the extent of authority under the Dormant Commerce Clause and its consistency with other constitutional concerns such as federalism are "questions for another day."[130] While both Justices agree with the majority on the holding and reversing the physical presence rule, each has indicated an interest in asserting a more textualist approach to Dormant Commerce Clause jurisprudence.[131]

c. *Dissent*

The dissenting Justices do not disagree with the substantive holding that the physical presence test is outdated, but instead focus their analysis on the manner of the holding, emphasizing why the method of changing established rules is important.[132] In Chief Justice Roberts' dissent, he

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[123] *Id.*

[124] Massachusetts and Ohio proposed regulations that would define physical presence to include "cookies" in web browsers used in state (830 MASS. CODE REGS. sec. 64H.1.7 (2017); OHIO REV. CODE ANN. § 5741.01(1)(2)(i) (LexisNexis 2018)).

[125] *See Wayfair*, 138 S. Ct. at 2099.

[126] *Id.*

[127] *See id.* at 2100 (referring to the Thomas, J. and Gorsuch, J. concurrences).

[128] *Id.* (Thomas, J., concurring).

[129] *Id.* (Gorsuch, J., concurring).

[130] *Id.* at 2100–01.

[131] *See Wayfair*, 138 S. Ct. at 2100-01.

[132] *See id.* at 2102–05 (dissenting opinions).

presents a different take on the same concept of the technological revolution in online commerce: arguing that the physical presence rule is part of the foundation of the new order of rules.[133] He also posits that changing this new rule order may be disruptive enough to require Congressional oversight.[134] "E-Commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical presence rule. Any alteration to those rules with the potential to disrupt the development of such a crucial segment of the economy should be undertaken by Congress."[135]

In admitting that the precedent should be overturned, the dissenting Justices rely on principles of federalism.[136] In doing so, the dissent argues that Congress, with its ability to conduct research and hold hearings to determine the impact on all stakeholders instead of just the parties before it, is the body designed for such action.[137] "A good reason to leave these matters to Congress is that legislators 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."[138] Further, as has been noted by the Court and Congress many times, Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match."[139] These are the very principles that underlie the importance of the three branches of government in federalism. In addition, recognizing the rapid cultural advancement and impact on commerce that has taken place and that continues to evolve quickly, the dissent notes that "Congress can focus directly on current policy concerns rather than past legal mistakes."[140]

Like the majority, the dissent considers the standards required to overturn precedent and the importance of *stare decisis* to our system of law. In its consideration of overturning precedent, the dissent notes that "[t]he bar is even higher in fields in which Congress 'exercises primary authority' and can, if it wishes, override this Court's decisions with contrary legislation."[141] In such cases, an already great burden grows greater still,

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[133] *See id.* at 2102-05 (dissenting opinions).

[134] *See id.*

[135] *Id.*

[136] *See id.*

[137] *See id.*

[138] *Id.* at 2104.

[139] *See id.* (citing Gen. Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 356 (2008)).

[140] *Wayfair*, 138 S. Ct. at 2104 (Roberts, J., dissenting).

[141] *Id.* at 2101 (quoting Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014)).

"even where the error is a matter of serious concern."[142] The Court examines the burden to overturn rules derived by the Court under the Dormant Commerce Clause generally, and specifically the rule as affirmed in *Quill*.[143] "In *Quill,* this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was 'made easier by the fact that the underlying issue is . . . one that Congress has the ultimate power to resolve.'"[144]

Granting certiorari in *Wayfair* marks the third time that the Court has considered whether states may impose sales and use tax laws on remote sellers with no physical presence in the state.[145] The dissent argues that "if *stare decisis* applied with special force in *Quill*, it should be an even greater impediment to overruling precedent," particularly when the Court clearly indicated to Congress that it was the appropriate branch to act.[146] "Congress has in fact been considering whether to alter the rule established in *Bellas Hess* for some time" to address many of the issues presented by the changes to the economy resulting from the rise of e-commerce.[147] Congressional proposals have evolved alongside commerce, and legislators are especially impacted by the shifts toward online commerce that give large online retailers a competitive advantage.[148]

III. REVENUES, COMPETITION, & AMAZON.COM: IDENTIFYING STAKEHOLDERS AND MOTIVATIONS

The parties to *Wayfair, Inc. v. South Dakota* represent large online retailers and states, but upon closer inspection, there are various constituencies that have a variety of interests in the outcome of this debate.[149]

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[142] *Id.* at 2101 (citing Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986)).

[143] *See id.* at 2096-97.

[144] *Id.* at 2101 (citing Quill Corp. v. North Dakota., 504 U.S. 298, 318 (1992)).

[145] *Wayfair*, 138 S. Ct. at 2087.

[146] *Id.* at 2102.

[147] *See generally id.* at 2102 (noting that bills concerning a change to the *Bellas Hess* rule are pending). *See generally* Brief for Four United States Senators as Amici Curiae Supporting Petitioner, South Dakota v. Wayfair, 138 S. Ct. 2080 (2018) (No. 17-494) (collating Congressional attempts from 2001 to 2017 to pass interstate sales tax collection legislation).

[148] *See generally* Varyani, *supra* note 42, at 171-80. At one time, Amazon.com was the leader among online retailers attempting to preserve and manipulate a multi-jurisdictional regime requiring physical presence in a state in order for imposition of sales tax. When Amazon.com ceased their lobbying efforts in this area, it nevertheless maintained its competitive advantage in the growing and evolving world of e-commerce. *See id.*

[149] *See id.* at 163-82 (noting that brick and mortar retailers who are interested in the

> Interstate commerce is a rich tax base. It has, moreover, special political fascination. A state or local tax levied upon it falls largely upon people in other states. Here is a legislator's dream: a lush source of tax revenue, the burden of which falls largely on those who cannot vote him out of office.[150]

Though Article III judges are not subject to election cycles and politics, legislators are subject to periodic reelection by their constituents.[151] Amending laws pursuant to the Commerce Clause may result in a shift in revenue between retailers and states, but it is wholly the province of the federal legislature to regulate.[152] In an era of a very closely held majority in Congress, as well as a politically divided electorate, legislators seek whatever political victory possible with donors and constituents.[153] The ramifications of these dynamics vary as much as the districts that elect each legislator.

Though the parties to this case are South Dakota and large online retailers, the tension between states and remote sellers is common across jurisdictions. Upon closer inspection, there are a variety of types of online retailers, distinguished most relevantly by the size and sophistication of the entity.[154] The "behemoth" Amazon.com based its business plan upon the ramifications of the physical presence test set forth in *Bellas Hess*.[155] Amazon.com's initial strategy was to have a physical presence in as few jurisdictions as possible and distinguish itself from its competitors, including brick and mortar stores, by providing what acts like a discount to consumers in the amount of the sales tax charged by the state.[156] The existence of the physical presence test is as much a contentious issue

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competitive advantages enjoyed by online retailers are also interested in the outcome of this discussion, as are the end consumers who actually pay the sales tax potentially collected by the remote seller).

[150] Emanuel Celler, *The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce*, 36 FORDHAM L. REV. 385, 397 (1968) (citing Mendelson, *Epilogue* to F. FRANKFURTER, THE COMMERCE CLAUSE at 118 (Quadrangle Paperback, ed.1964)).

[151] U.S CONST. art. I.

[152] *See* Varyani, *supra* note 42, at 159-60. Political motivations of each legislator are as diverse as each district and individual elected to represent that district. Thus, a question that will only impact states will be decided by a wholly federal body. *See id.*

[153] *See id.* at 168-69 (analyzing stakeholders as they existed in 2014).

[154] Online retailers can be connected to large, brick and mortar stores, strictly online retailers, small private businesses, or networks of small remote sellers. Each type of online retailer will have a distinct interest in the regulation of online commerce or the requirements of state laws imposing sales and use tax. *See generally* Varyani, *supra* note 42, at 170, 177-80 (discussing different business models).

[155] *Id.* at 173.

[156] *See id.*

between different sorts of retailers as it is between retailers and states.[157] Large retailers have the sophistication to manage the tens of thousands of sales tax jurisdictions and their intricacies, but such management is a much greater challenge for medium and small online retailers.[158] After basing its business plan on an advantage originating in the physical presence test, Amazon.com ultimately decided to forego its efforts to avoid a physical presence in high tax or multiple jurisdictions, which changed the landscape of the debate considerably.[159]

As noted by the dissent in *Wayfair*, a shift in the fundamental rules underpinning e-commerce in the United States will have consequences that may not be clear on first blush.[160] Relying on Congress for a solution puts this question in the hands of a political body that is heavily influenced by political lobbyists.[161] While states are averse to online retailers in the courts, and businesses compete with one another in the marketplace, it is the end consumer who actually bears the burden of the tax, making the core of this debate about the rightful balance of authority and advantage in a new world of commerce.[162]

IV. TRENDS INDICATED BY *SOUTH DAKOTA V. WAYFAIR*

Given that all justices – majority, concurring, and dissenting – agree that the physical presence test at issue is not ideal, and at best outdated, for the contemporary and increasingly online marketplace, it is imperative to examine the underlying lessons of this decision. Further, this case was granted certiorari in a time when federalism, judicial review, and due process are in the spotlight more than in recent history.[163] Understanding the underpinnings of this case reveals something about the direction and shifting priorities of the Court as well as the state of our democracy.

In our common law system based on precedent and *stare decisis*, it is customarily those with progressive views and the desire to change cultural norms who are in the position of having to overturn established rulings. In *Wayfair*, it was instead the conservative and originalist section of the bench

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[157] *See supra* text accompanying note 151.

[158] *See generally*, Varyani, *supra* note 42.

[159] *See id.* (stating that as a fiercely competitive online retailer, Amazon.com has been private about its strategy as it relates to tax planning; it is well known that Amazon.com is diligent in its consideration and consistently seeking ways to gain an advantage (and market share) from competitors).

[160] *See Wayfair*, 138 S. Ct. at 2101 (Roberts, J., dissenting).

[161] *See* Varyani, *supra* note 42, at 153.

[162] *See id.* at 180.

[163] *See Wayfair*, 138 S. Ct. at 2080 (U.S. Supreme Court granted certiorari).

that was in the position of overruling precedent.[164] The decision in *Wayfair* is but one tile in a mosaic of decisions that overrule precedents that were, at one time, an attempt to keep up with cultural evolution.[165] In the wake of this decision, judicial review appears pointed towards returning to originalist ideological roots.[166]

When, in *Quill*, the Court separated the analyses that occurred under the Due Process Clause from those stemming from the Commerce Clause, the door was open in *Wayfair* for the originalist Justices to overturn precedent.[167] Further, as Justice Thomas indicates in his concise concurrence, it allowed originalist Justices to argue that jurisprudence derived from the Dormant Commerce Clause is in error, despite established precedent.[168] This fits with the current trend of the Court, and is compounded by the fact that the Senate is the body required to confirm Article III Justices.[169] Unlike the House of Representatives, which gives greater weight to more populous jurisdictions, the Senate is intentionally comprised of two members from each state in order to give smaller states an equal voice in that chamber.[170] Given the current political map, this is a disadvantage for the more populist, progressive electorate as it relates to the "advice and consent" of Supreme Court Justices (and all Article III judges appointed by the executive).[171] As the shift in Justices continues, there is every reason to believe that the Court will continue with the ideological trend demonstrated in *Wayfair,* in which the Court simultaneously defers to the legislature and amends its own jurisprudence by overruling established precedents originally designed to adapt to cultural evolution.

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[164] *Id.* at 2099; *see also* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2497, 2501 (2018) (Kagan, J., dissenting) ("Over four decades, this court has cited *Abood* (the established precedent) favorably many times, and has affirmed and applied its central distinction between the costs of collective bargaining (which the government can charge to all employees) and those of political activities (which it cannot). . . . The majority overthrows a decision entrenched in this Nation's law – and it's economic life – for over 40 years.").

[165] *See* Shelby County v. Holder, 570 U.S. 535 (2013).

[166] Whether or not this is in line with public opinion is a topic for very interesting scholarship. *See generally* Friedman, *supra* note 4. An update of this work would be most timely. *See also* Barry Friedman, *The Will of the People and the Process of Constitutional Change,* 78 GEO. WASH. L. REV. 1232, 1236 (2010).

[167] *See supra* Section II.a.

[168] *See supra* Section I.b.

[169] U.S. CONST. art. II, § 2. *See generally* Linda Greenhouse, *Is Clarence Thomas the Supreme Court's Future?*, N.Y. TIMES, (August 2, 2018, https://www.nytimes.com/2018/08/02/opinion/contributors/clarence-thomas-supreme-court-conservative.html).

[170] U.S. CONST. art. I, § 3.

[171] U.S. CONST. art. II, § 2.