*Wayfair, Inc. v. South Dakota*

Although the case of *Wayfair, Inc. v. South Dakota* deals with the Dormant Commerce Clause and a State’s ability to tax retailers who do not have a physical presence within their State, *Wayfair, Inc.* deals more broadly with the value of precedent and how the law must adapt to evolving technologies. *Wayfair v. South Dakota,* 901 N.W.2d 754, 755 (S.D. 2017). *Wayfair*, a case which is currently pending before the U.S. Supreme Court, began when South Dakota passed a State statute which required businesses with no in-state presence in South Dakota to remit sales taxes on revenue derived in South Dakota. S.D. Codified Laws § 10-45-27.3 (2018). This statute was passed in direct contradiction with Supreme Court precedent which has held that businesses with no physical presence within a State cannot be taxed on account of the Dormant Commerce Clause. *Quill Corp. v. N.D.,* 504 U.S. 298 (1992). South Dakota has in essence asked the Court to overrule *Quill,* along with much of its rule-making pertaining the Dormant Commerce Clause, a section of the Constitution which prevents States from interfering with interstate commerce. *Wayfair,* 901 N.W. at 760.

South Dakota’s arguments touch on more than just State taxation, but more specifically whether the Court must amend previous standards and precedent to adapt to technology and the internet. South Dakota’s law targets specifically internet retailers who have exploited a loophole in the Supreme Court’s Dormant Commerce Clause jurisprudence since those retailers have avoided any State taxation on account of the fixed standard the Court established in 1977. *See, Complete Auto Transit, Inc. v. Brad*, 430 U.S. 274 (1977). The question now before the Court is whether a standard set almost half a century ago is worth preserving, despite multiple challenges from State statutes, State cases, and the reality of an evolving commercial world that no longer plays by the Supreme Court’s rules.

**BACKGROUND**

**a. The Dormant Commerce Clause**

This case deals with two broad issues of law that are fundamental to the role of the Court in the U.S. government: (1) the Court’s interpretation and enforcement of the Constitution, and (2) the Court’s adherence to precedent when interpreting law. In order to understand the specific decision faced before the Supreme Court in *Wayfair*, it is important to discuss the Dormant Commerce Clause generally and how it applies to State tax requirements on interstate commerce. It is only following that discussion that the specific question before the Court regarding overturning precedent can be understood in the context of *Wayfair.*

The Dormant Commerce Clause is derived from the U.S. Constitution and the Federal government’s jurisdiction over interstate commerce. U.S. Const. art. I, § 8, cl. 3. Although the text of the Constitution only grants the Federal Government power to “regulate Commerce with foreign Nations, and among the several States”, subsequent Court decisions have interpreted that clause to prevent individual States from interfering with interstate commerce. *Gibbons v. Ogden*, 22 U.S. 1 (1824). This is not to say that States have an absolute bar against regulating matters that touch on interstate commerce, but that State action would be declared unconstitutional if it (1) discriminated against interstate commerce in favor of the legislating state, and (2) served as a burden on interstate commerce. *South Carolina State Hwy Dep’t v. Barnwell Bros., Inc.,* 303 U.S. 177 (1938). The policy underling this concept is that State restrictions which favor one State over another undermine the unitary national market of the United States. 15A Am Jur. 2d *Commerce* § 102 (2018).

The Court’s test for determining whether a State has violated the Dormant Commerce Clause lends insight into the types of laws that the Court considers a violation of Federal Jurisdiction. The first element, which considers whether or not a state “discriminates against interstate commerce”, seeks to prevent a State from imposing more onerous burdens upon interstate commerce than it imposes upon its own citizens. *Id.* at § 101. The prevention of these types of State laws stems from problems with the national economy before the ratification of the U.S. Constitution, where States were more interested in their own financial concerns and obstructed the commercial interests of other states by implementing unfair taxes and regulations. Joanne Banker Hames & Yvonne Ekern, *Constitutional Law: Principles and Practice* 147 (Delmar Cengage Learning 2d ed. 2013). Prevention of this type of State law is considered one of the main reasons why the Constitution reserved jurisdiction over interstate commerce for the Federal government. *Id.*

In its implementation, the Court’s role in striking down discriminatory State laws shows a tendency to ban State laws which show favoritism toward the home State without any necessary or tangible benefit aside from economic nationalism. In *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93 (1994), the Supreme Court struck down an Oregon law which imposed a higher surcharge on waste generated out-of-state compared to waste generated within the State. In evaluating the statute, the Court took considerable consideration of the fact that the State could not show any reason as to why the out-of-state waste would be charged more, and held that it is the State’s burden to identify the specific burden under which the additional tax is intended to rectify. *Id.* at 103. Additionally, the Court held that the fact that the Act was “facially neutral”, meaning that the Act did not discriminate against out-of-state commerce plainly within the text, was not determinative of whether or not the Statute was a violation of the Dormant Commerce Clause, as the Court held that the intent and the purpose of the law do not relieve an otherwise discriminatory statute of its burden on interstate commerce. *Id.* at 100.

The same rule against discrimination applies even if no outside interest is prejudiced by the State regulation, as seen in the case of *Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564 (1997). In *Camps Newfound/Owatanna,* the Supreme Court struck down a charitable property tax exception that only applied to charities that benefited local interests, even though the parties obtaining the benefit were purely domestic entities that often had no impact on interstate commerce. *Id.* at 574. The Court chose to interpret the work “commerce” broadly, stating “[e]ven when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze”. *Id.* at 573. Additionally, the Court recognized that this charitable exception posed no threat the national economy, but affirmed the need for Court intervention stating that the early history of the Commerce Clause shows that “even the smallest discrimination invites significant inroads on national solidarity”. *Id.* at 619. Overall, *Camps Newfound/Owatanna* showed the Court’s hesitancy to carve any exceptions for the Dormant Commerce Clause, fearing that any leniency in favor of the State’s would open a Pandora’s Box of federalism issues.

The only instances in which the Court permitted seemingly discriminatory statutes was when the State could show that the benefit of the Statute outweighed what appeared to be domestic favoritism. A good example of this balance was found in *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456 (1981), in which the Court held that a Minnesota statute which required that milk be packaged in plastic, and not paper, containers possessed a sufficient environmental benefit to outweigh the advantage the law gave to Minnesota business. The statute in question, Minn. Stat. § 116F.21 (1978) had two benefits recognized by the Court; (1) Minnesota’s stated goal of economic conservatism since plastic was better for the environment than paper, and (2) the plaintiff’s assertions that the law favored Minnesota’s plastic industry over the more foreign paper industry that was being used by local creameries. *Id.* at 459-460. Despite affirming their previous holdings that the intent of the Statute will not override the Statute’s practical effect, the Court held that Minn. Stat. § 116F.21 was not unconstitutional because the statute had an even-handed effect on all applicable businesses regardless of whether they were domestic or foreign. *Id.* at 472. Therefore, even though the standard for upholding a discriminatory law was high, the Court would not strike down State regulation where the benefit was only incidental to an otherwise lawful purpose.

Even if a law was found to not discriminate against foreign States, a law could still be held unconstitutional if it violated the second element of the Dormant Commerce Clause, which was whether or not the State law posed an “undue burden” on interstate commerce. This element did not just consider the negative approach to surrounding States, but instead sought to balance the positive and negative aspects of the law and would strike down any law whose burden on outside states was “clearly excessive in relation to the putative local benefits”. *Pike v. Bruce Church,* 397 U.S. 137 (1972). While the intent of the standard was to give Court’s discretion in fashioning an outcome that gave deference to State governments, the practical effect of such a subjective test was that it lent itself to contradictory interpretations depending on different Justices. Hames & Ekern, *supra*, at 150. For example, in *Minnesota,* 449 U.S. at 473, the majority of the Court held that the environmental benefits of switching to plastic significantly outweighed the minor imposition on paper milk producers who were no longer able to participate in Minnesota’s economy. Additionally, the Court held that other plastic producers who were not domesticated in Minnesota would benefit from this statute, thus once again created an even-handed effect to both Minnesota and other States. *Id.* By way of contrast, the dissenting opinion in *Minnesota* believed that the majority was inferring too much into the Statute, and that the plain language of the State was a clear violation of the Dormant Commerce Clause. *Id.* at 476. The dissent held that the balancing test applied to Dormant Commerce Clause issues should be limited solely to the text of the statute, and that the Court was adding too much of its own insight into the case at hand. *Id.*

Another good example of the inconsistency of the undue burden test was found in the case *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), where the Court struck down an Arizona law that prevented any railroad train that carried more than fourteen passenger cars, whereas the federal standard was higher. The majority decision in *Southern Pacific Co.* noted that the Arizona law created a burden on interstate commerce because the law would have required every state to comply with the Arizona standard, since it was both impractical and costly to change the number of railroad cars going in and out of Arizona. *Id.* at 773. If permitted, the Arizona statute would require trains that passed through Arizona to either (1) dissemble their railroad cars at the border of every State, or (2) comply with the lowest standard by each State. *Id.*  This in turn was a perfect example of a State law which created a burden on interstate commerce, as the State’s regulations created a contradiction with Federal law which took the control out of the Federal government’s hands. *Id.* Additionally, the Court held that the Arizona regulation served no legitimate State benefit, because even though the law had an intended goal of safety, the practical effect of shorter train lengths did not produce a tangible difference in accidents. *Id.* at 775. Therefore on balance, the lack of a recognizable benefit from the Arizona law only highlighted the effect the law was having on interstate railroad travel, and thus, the Statute was struck down as unconstitutional. *Id.* at 779.

Despite that seemingly well-reasoned conclusion, the dissent in *Southern Pacific* challenged the majority decision’s holding as usurping State authority, and questioned whether it was the Court’s job to interfere with State action on safety. *Id.* at 784. First, the dissent questioned the majority’s findings regarding both the burden and benefit, stating that there was “undoubtedly some evidence before [the Court] under which it could have reached a [different] conclusion”; and therefore, any factual finding made pursuant to this test was too subjective to permit such drastic action from the Court. *Id.* at 789. To that end, the dissent questioned whether striking down the State law was proper even assuming the findings were correct, stating “the determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy” and therefore the Court should defer to the legislature. *Id.* at 789.

The contradictory opinions regarding the undue burden element in *South Pacific Co.* evidence a significant change from the uniformity found in the first element of the Dormant Commerce Clause. Whereas the Court seemed unified behind the principle that the Court should err on the side of striking down a discriminatory law regardless of the stated goal, the undue burden test shows two different approaches to the federalism that values both Court protection of the national economy, but also the Court’s role in striking down State action. The hesitancy of the dissenting opinions in allowing Courts to substitute their own judgment in favor of States is a compelling argument that has existed since Thomas Jefferson first warned that giving the judiciary the power of judicial review would “make the judiciary a despotic branch”. Thomas Jefferson, *The Writings of Thomas Jefferson* 51 (Alberty Ellery Bergh, ed., 1907). Even though the dissenting arguments were not persuasive enough to stop the Court from invalidating the Arizona regulation in *South Pacific Co.*, the warnings issued by those judges are important to curtail the Court’s willingness to exercise its power under the Dormant Commerce Clause, and poses a compelling argument for giving States more latitude in regulating commerce within its borders.

**b. State Taxation on Out-of-State Business**

Both State and Federal governments possess the power to implement taxes on citizens; however, a State’s power to tax interstate commerce can be subject to the provisions of the Dormant Commerce Clause. Hames & Ekern, *supra,* at 152. Generally, the purpose of taxation is to apportion the cost of government among the citizens who enjoy its benefits, so that the government in turn can promote the general welfare and protection of its citizens. 71 Am. Jur. *State and Local Taxation* § 1 (2017). Although the government has wide latitude to implement taxes upon its citizens, the government must show that the tax serves a public purpose which benefits the public at large. *Id.* § 3. Additionally, the Dormant Commerce Clause serves to prevent States from imposing burdensome taxes that would restrict the flow of commerce across its borders, even if the State can show that the taxes serve the public good. *Id* § 157. This is not to say that any and all acts of interstate commerce are immune from State taxation, but only that State taxes which implicate interstate commerce must pass the same test which prevents taxes that (1) discriminate against out-of-state interests and (2) impose an undue burden on interstate commerce. *Id*

In practice, the current test balancing those factors has served to strike down any State tax upon businesses which did not have a physical presence within the taxing State. *See, Complete Auto Transit, Inc.*, 430 U.S. 274. In *Complete Auto Transit, Inc.*, the Court created a four-pronged test that sought to prevent taxes that posed an unnecessary burden on interstate commerce but still allow States to tax business that relied on State services. *Id.* at 286. This test required that a State tax (1) be based on an activity that has a substantial nexus to the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services provided by the State. 71A Am. Jur., *supra*, § 158. The first element, that the activity had a “substantial nexus” with the taxing State, sought to ensure that there was some domestic presence of the taxed entity within the forum State. Hames & Ekern, *supra,* at 153. This distinction would often focus on whether the taxed entity had some outlet, sales personnel, or property within the taxing State, and would except States which were taxed solely because they made a mail catalog available to State residents. *Id.*  This test was similar to the Court’s “minimum contacts” test for personal jurisdiction under the Due Process Clause, in that a business was permitted to have incidental contacts with the State, but those contacts were required to show a fair relation between the tax and the benefits conferred by the tax itself. 71 Am. Jur., *supra,* § 158. By way of contrast, the second element was related less to the taxed entities’ conduct within the State, and more with surrounding obligations of other States. Hames & Ekern, *supra*, at 153. The Court’s requirement that a tax be “fairly apportioned” was aimed at preventing double taxation from other surrounding States, and would seek to ensure that a similar tax from another State would not result in a person being taxed twice for the same conduct. *Id.*

The keystone case resolving these factors is *Quill Corp v. North Dakota*, 504 U.S. 298 (1992), in which the Court affirmed the requirement of a physical presence to levy taxes against an entity conducting commercial business within that State. The procedural history of *Quill Corp.* is important to note because it mirrors the case of *Wayfair*, in that a State passed a law seeking to overturn Supreme Court precedent regarding taxation and the Dormant Commerce Clause due to a substantive change in how commerce was evolving. *Id.* at 299. The law in *Quill* was a North Dakota statute which required “every person who engages in regular or systematic solicitation of a consumer market in the State” to collect tax from a consumer and remit it to the State. N.D. Cent. Code § 57.40.8-07 (1991). The law was amended in 1987 to target mail-order companies specifically, like *Quill Corp.*, who was deriving revenue from North Dakota, but not remitting any taxes because it did not have an offices, employees or property located within North Dakota. *Quill Corp.*, 504 U.S. at 302.

A key aspect about the North Dakota law was that it was not trying to comply with the Court’s precedent, but instead it was making a direct challenge to the Court to change the existing standard. The North Dakota Supreme Court, which issued the lower decision before the case came to the Supreme Court, agreed with the State’s position and held that the evolving nature of commerce and business required the legal system to overrule the physical presence requirement. *Id* at 303. In particular, the lower Court noted how mail order businesses went from a “relatively inconsequential market niche” to a “goliath with annual sales that reached the staggering figure of 183.3 billion dollars in 1989, with *Quill Corp.* being no exception. *Id.* Therefore, it was possible for companies to derive a significant amount of revenue from a State, but be exempt from taxes on account of how the economic landscape had changed. *Id.* The lower court continued to note that overruling the physical presence standard was still in line with the policy of the Dormant Commerce Clause test, since mail order companies maintained an economic presence within the State that transcended physical location. *Id.* The lower Court noted that mail order companies were still using State services, such as the mail, the roads, the court system, etc., but were avoiding paying for those services on account of the ease with which transportation and communication had adapted with the internet. *Id.* In full, the lower Court asserted that while the test was changing, the policy underlying the test would still remain the same.

Despite the lower Court’s arguments, the Supreme Court reversed the North Dakota Supreme Court’s decision and affirmed the physical location requirement. *Id.* at 311-312. Although the Court recognized that the evolution of commerce has changed the landscape under which the Court issued its previous opinions, the Court preferred a bright-line test that would reduce ambiguity and inconsistency in how taxation was implemented. *Id.* at 315. The Court recognized that taxation can be a “quagmire” and that providing simple rules to follow will encourage investment from local and foreign businesses. *Id.* Additionally, the Court noted its own hesitancy in overruling precedent, holding that unless the test was anachronistic, unfollowed, or truly unworkable, the Court would not stray from previous decisions. *Id.* at 317. Since the Court has used the physical requirement test with successful results, the Court held that it was not the time to overrule the standard, even though North Dakota presented compelling arguments in its favor. *Id.*

**THE ARGUMENTS**

**a. The Defendant (South Dakota)**

In *Wayfair,* South Dakota is presenting the same arguments presented in *Quill*, in that South Dakota is aware that S.D. Codified Laws § 10-45-27.3 is against current Supreme Court precedent; however, South Dakota asserts that the current internet market requires this Court to amend its previous rule. *Wayfair,* 901 N.W.2d at 758. Although it may be tempting to dismiss this argument out of hand, there is reason to believe that the Supreme Court is receptive to overruling the physical requirement based on the 2015 case of *Direct Mktg. Ass’n v. Brohl,* 135 S.Ct. 1124 (US 2015). In *Brohl,* the Court was asked to determine the constitutionality of a Colorado statute that did not require sellers to pay a tax, but asked the consumers who purchased products from out of state businesses to remit the taxes themselves. *Id.* at 1127. Although voluntary compliance with the law was low, consumers in Colorado challenged the law as a violation of the Dormant Commerce Clause, since the law was taxing conduct that was outside of its borders. *Id.* at 1128.

Although the Court upheld the Colorado statute, the more interesting part of the decision was in a concurring decision written by Supreme Court Justice Anthony Kennedy, who questioned whether the usefulness of the *Quill Corp.* doctrine had expired with the new economy. *Id.* at 1135. Justice Kennedy pointed out that States across the country are experiencing increasing difficulty in obtaining taxes from out-of-state businesses, referencing the fact that California was only able to collect four percent (4%) of the taxes on the total out of state business. *Id.* Justice Kennedy additionally noted that the internet has brought the physical presence of local business to the finger-tips of the everyday consumer, as businesses do not need a physical presence to have an economic impact on the States they transact in. *Id.* In conclusion, Kennedy questioned whether *Quill* *Corp.* serves more as a harm to States than it could have been anticipated and that the “legal system should find an appropriate case for this Court to re-examine *Quill*”. *Id.*

While South Dakota was most forthright with taking Kennedy’s suggestions to the legislative floor, other States have taken action to show how internet retailers could meet the “substantial nexus” test of the Dormant Commerce Clause, even if there was not a brick and mortar physical location within the State. *See,* Robin Miller, Annotation, *Validity, Construction, and Application of Sales, Use and Utility Taxes on Retail Transactions of Internet Sellers and Internet Access Providers*, 30 A.L.R.6th 341 (2018). In *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005), a California Statute which required an online book seller to remit State taxes was upheld on the basis that the online retailer had some physical locations within the State, despite there being little to no connection between the online department and the physical location. *Id.* at 184. The Court held that any agency relationship satisfied the substantial nexus test, evidencing a relaxing standard to ensure that States could collect taxes. In *State v. Dell Intern., Inc.*, 922 So. 2d 1257, 1258 (La. Ct. App. 2006), a Louisiana Court held that a substantial nexus was established with an online computer sales company, where the out-of-state business had a repair contract with a Louisiana business. The Court held that even though the Company did not maintain a physical presence within the State, the repair company served a conduit to which the business was able to maintain marketing and commerce within State borders, which once again relaxed the previous standards for a physical location but still maintaining constitutionality. *Id.* at 1263.

**b. The Plaintiffs (Wayfair, Inc.)**

Although South Dakota presents a compelling argument that the change in commerce warrants a new test, the plaintiffs possess a strong argument in the form of precedent and the Court’s adherence to stare decisis. The doctrine of stare decisis holds that all courts are instructed to adhere to principles established by previous courts when the facts are substantially the same. 20 Am. Jur. 2d *Courts* § 125 (2018). The purpose of this principle is to promote stability in the law and to ensure that “similarly situated individuals are treated alike rather than in accordance with the personal views of any particular judge”. *Id.* This standard was never more evident than in the South Dakota Supreme Court’s closing line, which stated “[w]e are mindful of the Supreme Court’s directive to follow its precedent when it has direct application in a case and to leave to that Court the prerogative of overruling its own decisions”. *Wayfair,* 901 N.W.2d at 761.

Although the Court is permitted to overrule precedent, such action should be taken sparingly and only “where there has been a significant change in circumstances since the adoption of the legal rule, or where there has been an error in legal analysis”. 20 Am. Jur. 2d., *supra*, § 125. This includes situations where current justices may disagree with older justices, as the Court values stability and efficiency over a constant change of legal rules depending on the current makeup of the Court. *Id.* In *Kimble v. Marvel Entm’t, LLC,* 135 S.Ct. 2401, 2415 (US 2015), the Court went into a deep discussion on the value of precedent, and how the negative aspects of the case must outweigh the positive, which commonly a tough burden for a plaintiff seeking to overrule previous law to meet. In referencing the subject matter of the case, which was whether a Spiderman patent should be extend past the previously established timelines, the Court quoted the Spiderman comics directly in stating “with great power there must also come great responsibility. *Id.*

**CONCLUSION**

With all these considerations in mind, it is most likely that the Court will hold that the South Dakota law is a violation of the Dormant Commerce Clause and that the existing standard for determining whether tax is a violation of the Constitution should not be overruled. To begin, it will likely be held that the South Dakota law is a violation of the long-established test for the Dormant Commerce Clause, even though the law is not facially discriminatory. As stated earlier in this paper, a law is discriminatory when it poses unfair burdens on out-of-state parties compared to in-state parties; and the South Dakota law avoids that standard by applying evenly to all parties who transact business within the State. S.D. Codified Laws § 10-45-27.3; Hames & Ekern, *supra*, at 147. This law is most similar to the law in *Cloverleaf Creamery, Inc.,* 449 U.S. at 460*,* which required that all milk containers be plastic instead of paper, as the South Dakota law does not punish out-of-state retailers, but only holds them to the same standard that in-state retailers are held to with State taxes. Additionally, South Dakota has a compelling reason to institute this tax, since South Dakota is losing out on tax revenue with the advent of internet commerce. *Wayfair,* 901 N.W.2d at 758.

South Dakota will have a more difficult time with the undue burden standard, as requiring all internet retailers to calculate South Dakota taxes will pose a significant difficulty to internet businesses who operate with an automated billing system that does not incorporate taxes. As it stands, no retailer is required to remit sales taxes for States they do not operate in; however, should the South Dakota law stand, individual businesses will be required to re-calculate their shipping and bill inventory to comply with South Dakota’s specific requirements. This is similar to the law in *South Pacific Co.*, 325 U.S. at 761, where the Arizona railroad car requirement set a minimum standard that not only affected out-of-state traffic, but also curbed traffic within the State, as the South Dakota law will likely lead retailers to avoid selling in South Dakota to skirt the reporting tax requirements. Without a clear and uniform billing system which automatically calculates sales tax through each purchase, it is likely that sellers themselves will have to foot the bill for the sales taxes at the end of the year, which will create an undue burden on the national economy that outweighs the benefit to South Dakota. This need for a uniform billing system harkens to the balances arguments about federalism in *South Pacific, Co,* where the Court argued that widespread changes to economic resources are an issue for Congress to decide, and not the individual States. *Id.* at 769.

More specifically, the South Dakota law is also an undisputed violation of the existing standard set forth in *Quill Corp.* The most notable issue with the South Dakota law is that the law does not require any substantial nexus with the State, and instead institutes a broad classification of applicable retailers that ignores all of the individual nuance of the *Quill Corp.* standard. S.D. Codified Laws § 10-45-27.3. This element of the law distinguishes cases that have found a substantial nexus with internet retailers, like *Borders Online, LLC,* 29 Cal. Rptr. 3d 176 and *Dell Intern,* 922 So. 2d 1257, because where those States took nuances approaches to tie individual businesses to the State for taxation, this law casts a wide net that ignores any individual connection between the retailers and South Dakota. The law also fails to consider any similar tax that could be imposed by surrounding States, which in turn exposes retailers to duplicative sales taxes from both South Dakota and other States.

The only argument in favor of South Dakota would be the change in the economy to an internet based system that does not require a physical location; however, it is unlikely that the Court will take the drastic action of overruling precedent due to the seriousness of that action and the limited stakes at issue in this case. Although South Dakota brings up a compelling argument in favor of changing the standard, it is not such an emergency situation for States that the Court needs to amend decade’s worth of precedent because of the current marketplace. It is worth noting that this standard existed since 1977, and States were able to fund the government through taxes through mail order changes and other developments in the market. Although State’s are experiencing difficulty garnering sales taxes, there are other ways that States can derive revenue without having to change the existing system in such drastic measures. Additionally, any change to this system should come from Congress, and not from the Supreme Court, as the Supreme Court’s standard existed long enough that changing it now would disrupt the existing commercial practices of businesses across the Country. There may be some members of the Court which rule in favor of overruling precedent, but due to the extreme nature of that remedy, it is unlikely to obtain the necessary majority to change the law.

In conclusion, *Wayfair* presents an interesting dichotomy between Constitutional law and the role of the Court in shaping the economy. South Dakota presents an interesting problem that many States must deal with in deriving taxes; however, the remedy the State has requested is too drastic for this Court to take the requested action at this time. For those reasons, the South Dakota law will be declared unconstitutional and the existing standard for the Dormant Commerce Clause will not be overruled.