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# Introduction:

# Withering Stare Decisis

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We had just started our second year of law school. Our challenging Constitutional Law professor, James Marshall, told us to read and brief a recent U.S. Supreme Court decision about state tax law not yet in our case book. My buddies and I were not enamored with Constitutional Law. Plus requiring us to study a constitutional law/tax case was disconcerting.

The case was *National Bellas Hess v. Department of Revenue of Illinois*[1]. Bellas Hess was a mail-order company based in Missouri selling goods in the Midwest, including in Illinois. The consumers in Illinois would place orders by mail to the Missouri base of operations. Illinois imposed a sales tax on Bellas Hess for all of its sales delivered to Illinois consumers. Bellas Hess refused to pay, claiming it was not doing business in Illinois.

After we discussed the case in class, Professor Marshall concluded that the Court developed a very important limitation on the power of states to tax interstate sales: The Court required that a seller have a physical presence in the taxing state.[2] Bellas Hess had no employees, office, warehouse, or any other physical presence in Illinois related to its business. Thus, the Court held that Illinois could not tax Bellas Hess. To do so would be an unconstitutional interference and burden on interstate commerce.[3] The tax also adversely affected the due process protections to Bellas Hess.[4]

This made sense to me and my fellow law students. In fact, it still seems like a fair and reasonable U.S. constitutional rule of law. The Framers wanted to keep commerce flowing freely among the states.[5] To impose a tax on an out-of-state retailer who is a

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1 386 U.S. 753 (1967). The following facts are a summary of the case. *See generally id.*

2 *See id.* at 756–60.

3 *Id.*

4 *Id.*

5 *See, e.g.,* U.S. CONST. art. 1, § 8, cl. 3.

remote seller would improperly burden its ability to economically conduct business across state lines.

Now I am a Chapman University Dale E. Fowler School of Law professor teaching and researching contract and taxation laws. I heard about Justice Kennedy questioning the *Bellas Hess* and *Quill Corp. v. North Dakota*[6] physical presence requirement in his concurring opinion in *Direct Marketing Ass'n v. Brohl*.[7] I knew it would not take long for a state to be enticed to impose and enforce collecting a tax on out-of-state remote sellers without having any physical presence in the state.

Leave it to a relatively low populated state, South Dakota, to test the waters on Justice Kennedy's tease.

Captivated by all this, I recommended to our law review editors and faculty advisor to consider devoting our 2019 *Chapman Law Review* to explore the legal ramifications of a leading case up for oral arguments in spring 2018—*South Dakota v. Wayfair*.[8]

We are doing just that. The U.S. Supreme Court ruled in *Wayfair* that the physical presence requirement is wrong and overruled *Bellas Hess* and *Quill*.[9] All of the Justices believed that the technological advances brought about by the Internet caused out-of-state sellers to have too dramatic an impact on lost state tax revenue.[10] South Dakota limited its sales tax to out-of-state sellers with annual sales exceeding $100,000 or 200 individual sales.[11] Any remote sellers exceeding the thresholds would be required to collect and pay sales taxes.[12]

In a dissent authored by Chief Justice Roberts, the dissenting Justices also felt the physical presence test was no longer proper.[13] Nevertheless, the four dissenters held that they were precluded by stare decisis to overrule *Bellas Hess* and *Quill*.[14] Why change a rule of law that flourished for more than 50 years? Thus, they agreed with Wayfair, Inc. because the South Dakota tax improperly taxes a remote seller without a physical presence in the taxing state.

I am fascinated by the impact of the close 5-4 majority decision in *Wayfair* on internet sales by large marketers such as

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6 504 U.S. 298 (1992).
7 135 S. Ct. 1124 (2015).
8 138 S. Ct. 2080 (2018).
9 *Id.* at 2099.
10 *See id.* at 2085.
11 *Id.* at 2089.
12 *Id.*
13 *Id.* at 2101 (Roberts, C.J., dissenting).
14 *Id.*

eBay. Obviously, eBay meets the more than $100,000 per year sales threshold required by the majority, if its auction sales are counted. But eBay is a huge online auctioneer marketing goods on behalf of many occasional sellers.

Say an individual has a small collection of rare major league autographed baseballs. This seller has an eBay account and sells through eBay three baseballs in separate sales totaling $800 during the calendar year. The seller is not above the $100,000 or over the 200 sales requirements. Under *Wayfair* it appears that the seller should not have to charge and collect an out-of-state sales tax. But will eBay have to charge and collect the tax because eBay itself is well over the threshold? In my opinion, eBay should not collect the tax, since it is not the seller of the goods. It is really an agent for the actual occasional seller. Yet the court did not have to address this and many other issues. Litigation is expected to follow, unless Congress quickly enacts legislation detailing the power of states to tax internet sales.

My above issue and many more have brought together our guest scholars in researching and writing about a fascinating area of law. As a tax law specialist, I am pleased to have a combination U.S. constitutional and taxation related subject matter at the forefront of current legal news.

Shortly after our law school opened in 1997, I came up with the idea of devoting our annual law review issues to cutting edge topics on a distinct subject with a complementary live symposium. We were in 1998 and looked forward to entering the new millennium. Our first topic orientated law review was on federal tax policy in the new millennium. Since then we have continued the distinct topic law review approach. I was honored to author the introduction of the first such law review in 1999. I am especially honored to it do again twenty years later.

We present in this issue the Commerce Clause limitations on state interstate taxation and linked dormant Commerce Clause jurisprudence.

Mr. Louis Cholden-Brown studies the Commerce Clause from a different perspective. He explores the dormant Commerce Clause retrenchment. Mr. Cholden-Brown focuses on recent California and Massachusetts laws banning the sale of eggs, pork, and veal from animals raised in cruel conditions. He is a Senior Advisor, New York City 2019 Charter Revision Commission.

Mr. Michael T. Fatale studies the *Wayfair* decision by telling us what the U.S. Supreme Court believes is the more appropriate standard for limitations on state taxation of interstate commerce. He also explains the confusing aspects of

the opinion to states and taxpayers. Mr. Fatale is the Deputy General Counsel of the Massachusetts Department of Revenue and is an adjunct professor at Boston College of Law. He was the lead speaker at the February 14, 2019 Chapman University Dale E. Fowler School of Law live seminar exploring *Wayfair* and its impact on interstate taxation.

Professor Keigo Fuchi gives us a Japanese perspective on how *Wayfair* and our Commerce Clause limitation on state taxation is a useful doctrine. Professor Fuchi believes that Japan could use a comparable legal framework from a comparative law perspective. Professor Fuchi is a professor of law at Kobe University Graduate School of Law.

Professor F. E. Guerra-Pujol considers the impact of *Wayfair* on bitcoin transactions. He questions if technological advances justify the Court's departure from the physical presence rule. Professor Guerra-Pujol is a professor of business law at the University of Central Florida.

Professor Tania Sebastian turns to an analysis of our Commerce Clause. She studies its affect in connection with hiring practices and preferences in the Unites States compared to India. Professor Sebastian points out the basic difference between our federalism form of government compared to the combination of federal and unitary regimes in India. Professor Sebastian is an assistant professor of law at VIT Chennai Campus School of Law.

Professor Darien Shanske considers the *Wayfair* decision in the context of federalism jurisprudence. Professor Shanske argues that the Court felt compelled to restore the reality of the need for state financing through interstate taxation. Professor Shanske is a professor of law at UC Davis School of Law.

Professor Edward A. Zelinsky compares the dormant Commerce Clause law in the U.S. Supreme Court decisions in *Wayfair* and *Maryland v. Wynne*. He concludes that it is unlikely that the Court will jettison the dormant Commerce Clause. But he tells us that there are nevertheless key dormant Commerce Clause skeptics on the Court. Professor Zelinsky is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University.

We thank our authors, *Chapman Law Review* staff, and many others who have made this issue possible. I think we should also thank the U.S. Supreme Court for again making the study and practice of law so challenging.