

Overview of *South Dakota v. Wayfair*

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Holding

- “[T]he physical presence rule of *Quill* is unsound and incorrect;” *Quill* and *Bellas Hess* “should be, and now are, overruled”
- *Quill* was “wrong on its own terms when it was decided in 1992” and “since then the Internet revolution has made its earlier error all the more egregious and harmful”
- Justice Roberts dissent: “*Bellas Hess* was wrongly decided”

State sovereignty

- Court notes “the necessity of allowing the States the power to enact laws to implement the political will of their people”
- “The physical presence rule ... is not just a technical legal problem – it is an extraordinary imposition by the Judiciary on the States’ authority to collect taxes and perform critical public functions”

State sovereignty (continued)

- “If it becomes apparent that the Court’s Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error”
- Also, the fact that there could be questions about state implementation of *Wayfair* in a later case “cannot justify retaining [an] anachronistic rule that deprives States of vast revenues from major businesses”

Stare decisis/reliance

- The fact that vendors can be said to have relied upon the physical presence rule cannot justify its retention because (1) it is not a “clear or easily applied standard” and (2) “stare decisis accommodates only legitimate reliance interests”
- Notes that “constitutional right[s]” do not logically follow from “practical opportunities [to engage in] tax avoidance”

Discrimination

- The purpose of the Commerce Clause was to prevent “economic discrimination”
- Instead, *Quill* created “market distortions” and “artificial competitive advantages”
- Post-*Wayfair*, “[c]omplex state tax systems could have the effect of discriminating against interstate commerce” but, of relevance, “in-state businesses pay the taxes as well”

Substantial nexus

- Cites *Bellas Hess* for the proposition that the Commerce Clause nexus requirement is “closely related to the due process nexus requirement;” and notes also there are “significant parallels”
- Court has said “‘notice’ or ‘fair warning’ are the analytic touchstone of due process nexus analysis”
- This standard is met where a commercial actor's efforts are “purposefully directed” toward the residents of the State

Nexus on the facts

- “Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the state”
- Respondents are “large, national companies that undoubtedly maintain an extensive virtual presence”
- Court cites vendors’ (1) websites that leave “cookies saved to ... customers’ hard drives,” (2) downloaded “apps” and (3) “virtual showrooms”

Nexus on the facts (continued)

- ALSO: the South Dakota Act only applies to vendors that sell more than \$100,000 of goods/services into the state *or* that engage in 200 or more separate transactions on an annual basis
- Court notes that this is a “considerable amount of business” and notes that “this quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in [the state]”

Undue burden

- “[T]he daunting complexity and business-development obstacles of nationwide sales tax collection” will result in burdens that “may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States”
- Moreover, such concerns could “invalidate the [South Dakota] Act”

Undue burden (continued)

- But, Court notes that the South Dakota statute “has several features that appear to prevent discrimination against or undue burdens upon interstate commerce,” including:
 - First, the law only applies to vendors that do “considerable business” in the state, with an effective “safe harbor [for] those who transact only limited business;”
 - Second, the law is not retroactive;

Undue burden (continued)

- Third, South Dakota is “one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement (SSUTA)” which “standardizes taxes to reduce administrative and compliance costs,” including through “single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules.”
- ALSO: the SSUTA “provides sellers access to sales tax administration software paid for by the state”

Undue burden (continued)

- Court remands consideration of any remaining Commerce Clause claims to the South Dakota courts
- References the undue burden *test*: “[s]tate laws that ‘regulate even-handedly to effectuate a legitimate public interest will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits” (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

Congressional intervention

- In any event, “Congress may legislate to address these problems if it deems necessary and fit to do so”

Corporate income tax nexus

- Numerous state high courts have concluded there is no physical presence standard in the corporate income tax context, and many taxpayer Supreme Court certiorari petitions have been denied
- But some tax practitioners have concluded that those cases were limited to their facts or to the state of jurisdiction
- Also, some practitioners have claimed only a Supreme Court case can ultimately resolve the question
- *Wayfair* impact in the various states?