

Blog Post

# It's Like Déjà Vu, All Over Again: *Wayfair* and the Evolution of Commerce

January 25, 2018

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The United States Supreme Court has recently agreed to hear oral argument in *South Dakota v. Wayfair, Inc.* – a case exploring the boundaries of sales and use tax nexus. The crux of the dispute in *Wayfair* relates to the defining purposes and protections of Commerce Clause of the U.S. Constitution. Much of the discussion to date focuses on the importance of the Court's decision to grant the appeal. However, there is a fascinating undercurrent yet to be addressed.

In *Quill v. North Dakota*, the United States Supreme Court made clear that before an out-of-state business could be held liable for sales and use tax it must have a physical presence in the taxing jurisdiction. The basis for this holding was the Commerce Clause. States, unhappy with the holding in *Quill*, have since crafted laws to expand tax nexus without directly confronting the Court's bright-line physical presence rule.

In 2016, the South Dakota legislature, while acknowledging the unconstitutionality of the legislation, passed a law that asserted sales and use tax nexus over out-of-state businesses based solely on economic thresholds. This validity of this law is the crucial issue in *Wayfair*. Since then, several other states have followed South Dakota's lead enacting similar laws.

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As one would expect, there are passionate advocates on both sides of the *Wayfair* case. Those in favor of physical presence nexus argue that such a rule is needed to promote certainty for out-of-state businesses. By contrast, the states argue that the nature of commerce has evolved such that physical presence is no longer needed to conduct substantial business activities in a state. Nexus defined by economic presence, the states argue, would shore up state budgets and level the playing field between large out-of-state businesses and smaller local businesses.

Whether or not true, the concerns raised by the states do not relate to the purposes and protections of the Commerce Clause. Under the Articles of Confederation, the U.S. national economy was in disarray. States freely imposed taxes and duties on out-of-state businesses to protect their own local economies. As explained by the Court in *Quill*, the Commerce Clause became part of the U.S. Constitution expressly to remove these barriers to interstate commerce and promote the free flow of goods across state borders.

Strictly speaking, the Commerce Clause is not concerned with state budget deficits or protecting local “Mom and Pop” stores. In fact, it was these very same economic considerations under the Articles of Confederation that led our founding fathers to adopt the Commerce Clause as part of the U.S. Constitution. When viewed in this light, the use of the Commerce Clause to defend economic presence nexus is an ironic perversion of everything that the Commerce Clause represents.

Rest assured, the upcoming *Wayfair* decision will provide much-needed guidance on the limits of sales and use tax nexus under the Commerce Clause. What is unclear is whether any of the Justices on the Court will channel their inner Yogi Berra and exclaim, “It’s like déjà vu, all over again!”

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