

GORSUCH, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 17–494

SOUTH DAKOTA, PETITIONER *v.* WAYFAIR, INC.,
ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
SOUTH DAKOTA

[June 21, 2018]

JUSTICE GORSUCH, concurring.

Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms. *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U. S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U. S. 298 (1992), do just the opposite. For years they have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals. See *ante*, at 12–13; *Direct Marketing Assn. v. Brohl*, 814 F. 3d, 1129, 1150 (CA10 2016) (Gorsuch, J. concurring). As Justice White recognized 26 years ago, judges have no authority to construct a discriminatory “tax shelter” like this. *Quill, supra*, at 329 (opinion concurring in part and dissenting in part). The Court is right to correct the mistake and I am pleased to join its opinion.

My agreement with the Court’s discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by

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stare decisis, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day. See *Energy & Environment Legal Inst. v. Epel*, 793 F. 3d 1169, 1171 (CA10 2015); *Comptroller of Treasury of Md. v. Wynne*, 575 U. S. ___, ___–___ (2015) (Scalia, J., dissenting) (slip op., at 1–3); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564, 610–620 (1997) (THOMAS, J., dissenting). Today we put *Bellas Hess* and *Quill* to rest and rightly end the paradox of condemning interstate discrimination in the national economy while promoting it ourselves.