Beware: A World Without *Quill*

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As counsel for the respondents in *South Dakota v. Wayfair Inc.*,[25] I will defer my legal arguments for the briefs in this case. I think it might be useful, however, to contemplate what a "world without *Quill*" might look like.

The petitioners, in their argument before the South Dakota Supreme Court, sought not only the abrogation of the *Quill Corp. v. North Dakota*[26] physical presence standard, but called for the complete abandonment of the dormant commerce clause doctrine. In other words, according to the state and its *amici,* the commerce clause should not be interpreted as a restriction on the territorial taxation and regulatory reach of state (and local) governments. In regard to the use tax collection obligations of remote sellers, this would mean that the business activity threshold, if any, would be at the sole discretion of each state.

South Dakota, in its *Quill* challenge legislation, set a low threshold of just 200 sales transactions by a remote seller for delivery into South Dakota. Here is an example of what that means to a small seller. I live in Maine and am an avid (if often unlucky) fly fisherman. There are a number of family-owned small businesses in the state, usually with fewer than 10 employees, that specialize in making and selling hand-tied flies. (I'm partial to the Gray Ghost streamer for brook trout.) Most of these businesses maintain simple websites and pride themselves on having loyal customers throughout the country. Flies typically sell for less than $1 apiece and are often offered at $3.50 for a half dozen. Assume the average sale is for a dozen flies, for a total cost of $7. There is fantastic fly-fishing in the Black Hills of South Dakota, and a small Maine company might easily make four sales a week to South Dakota fishermen and fisherwomen (that is, $28 of weekly sales to South Dakota purchasers), thereby meeting the 200-transaction threshold for mandatory tax collection. The total annual value of those sales would be $1,456 (52 weeks x $28). Faced with the daunting and expensive task of having to collect sales tax for 142 different South Dakota state and local tax jurisdictions (including tribal governments), the small Maine fly-tying business would likely decide to suspend delivering to South Dakota customers, and ultimately stop selling via the internet altogether because there are over 12,000 sales/use tax jurisdictions in the United States. The result: Several small Maine businesses selling hand-tied flies will shut down their websites and restrict their sales to Maine fisherfolk and tourists coming to fish Maine's beautiful lakes and rivers.

Now the reaction of some readers to this fish story may be that it is not typical because it is large sellers, and not small businesses, that dominate the internet. But let's look at some facts. Large companies do, in fact, dominate the internet, but most of them also collect sales tax. Nineteen of the top 20 internet retailers collect sales tax on their sales, and the top 10 internet sellers account for 64 percent (in terms of revenue) of all consumer goods sold on the internet. The top 20 list includes such giants as Walmart, Apple, Target, Macy's, Staples, and, of course, Amazon, which now collects tax in all 45 states and the District of Columbia that impose sales and use taxes. Indeed, Amazon's sales alone account for well over half the year-over-year growth in e-commerce sales of consumer goods.

At the other end of the spectrum, however, there are over 1 million small companies that sell goods on the internet, and it is estimated that more than 10,000 new entrants in this country begin selling on the internet each year. Put simply, reversing *Quill* would constitute a significant barrier to small and medium-size companies' ability to access the internet and sell their products to a national market. Moreover, reversing *Quill* would result in an increased concentration of large retailers dominating e-commerce. So, the promise of starting and growing a business via the internet would be an illusion for most small entrepreneurs.

An anticipated response by opponents of *Quill* to my concerns is that Congress can act to set new rules, including a small-seller exception and basic simplification requirements, following a Supreme Court reversal of *Quill*. The states, however, are openly opposed to limits on their taxation authority. Indeed, leadership of the National Conference of State Legislatures has already announced that if the Supreme Court reverses *Quill,* the states will not be interested in federal legislation. Moreover, the most recent effort to simplify state sales and use tax administration, the Streamlined Sales and Use Tax Agreement, has attracted states with only one-third of the nation's population. Almost all the heavily populated states have refused to join the SSUTA. Clearly, most states do not want constraints on their taxing power, and they will oppose any efforts by Congress to impose such limits if *Quill* is overruled.

Facts count in this debate. The impetus for overturning *Quill* has been fueled by exaggerated state government claims regarding the amount of lost tax revenue due to the physical presence nexus standard and the specter of ever-increasing losses associated with the rapid growth of e-commerce. The states' estimates have been roundly criticized for some time, and finally the Government Accountability Office — a nonpartisan, congressionally authorized research body — issued a report in December of last year showing the actual uncollected taxes to be approximately one-third of what the states have claimed and that this loss amounts to less than 1 percent of all state tax revenues. Because the internet is dominated by large tax-collecting retailers, the GAO reports that 75 to 80 percent of all remote sales that could be taxed are, in fact, subject to tax collection. Also, the so-called "problem" is largely self-correcting. As online sellers expand and become multichannel merchants that establish near-customer delivery facilities, they acquire nexus in the sales destination states and commence tax collection.

The doctrine of a dormant commerce clause is well established and dates back to early 19th-century Marshall Court decisions. The doctrine created a single national marketplace, readily accessible and unimpeded by disparate and burdensome state taxes and regulations. The result was the formation of a common market over 200 years before Europe decided to replicate this successful economic model. There is a positive role for Congress to play, because legislation can balance the interests of states, direct marketers, and the health of the national economy. Reversing over 50 years of established Supreme Court precedent, on which tens of thousands of companies have relied, would be disruptive, chaotic, and a damper on the national economy. The right approach is for congressional, rather than judicial, action.