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In the beginning there was *Quill*, then came Bezos

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On April 17 — Tax Day, as it happens — the U.S. Supreme Court heard argument in *South Dakota v. Wayfair* regarding whether online-only retailers are constitutionally immune from collecting sales tax. Because this apparent tax discount drains public coffers and cripples brick-and-mortar retailers' ability to compete, *Wayfair* has drawn a score of amicus briefs from local, state, and federal government, the retail industry, the academy, and more. The ultimate question is whether the competitive advantage given to online-only retailers — established by a case generally agreed to be wrong under current law — is a vested right that must be preserved under stare decisis, or a growing harm that merits the court's reevaluation.

Ordinarily, when a customer buys a product, the retailer calculates, announces, collects and remits any sales tax owed. But half a century ago, confronted with the unique logistical challenges of catalog-based mail order, the U.S. Supreme Court made an exception to this universal rule. It held that if a mail-order company is not physically present in a state, due process and the dormant commerce clause forbid the state from requiring the company to collect sales tax.

Twenty-five years later, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court recognized that its prior decision was wrong as to due process and probably wrong as to the dormant commerce clause given how the court's doctrine had developed in the interim. Nevertheless, the court retained the physical-presence requirement — blasted by dissenting Justice Byron White as a "tax shelter" — based on the majority's belief that the mail-order industry's expectations outweighed, as a matter of stare decisis, any harm to the public fisc and free market.

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The court did not mention the nascent internet at all and spent more words on door-to-door salesmen than on so-called "computer link-up." Internet e-commerce was so unimaginable — Newsweek sneered that "the local mall does more business in an afternoon than the entire Internet handles in a month" — that the court assumed its intervention in the free market could be confined to a "discrete realm of commercial activity." After all, how many boots could L.L. Bean *really* sell by catalog?

The Supreme Court's 1992 decision to look backward to 1967, rather than forward to the 21st century, has had profound economic significance.

Two years after *Quill*, Jeff Bezos founded Amazon, and not long thereafter, e-commerce was off to the races. While *Quill* had overlooked the possibility of absentee internet retailers, those retailers were riveted on *Quill*. Amazon went to extraordinary lengths to ensure that it would avoid any "physical presence" (and tax-collecting obligation) in its major markets. For example, rather than siting distribution centers close to customers, Amazon sited them outside populous states. Amazon employees traveling out of Washington for work had their itineraries scrutinized with an eye to tax-avoidance. The result was that, to millions of customers, Amazon's products seemed inherently cheaper because unlike brick-and-mortar stores, Amazon appeared duty-free.

Today, Amazon voluntarily collects sales taxes on its first-party sales in all 50 states. But the respondents in *Wayfair*, like other major internet-only retailers, do not. Though one respondent acknowledges that this sales tax "pricing advantage" is a factor that should not "enter the equation of free commerce and competing businesses," these companies are unwilling to forgo that advantage. Indeed, another respondent advertises that "one of the best things about buying through *Wayfair* is that we do not have to charge sales tax." In truth, this apparent tax discount does not actually exist. The customers still owe the taxes and also have the burden of calculating and remitting them to the state, rather than the retailer doing so. But many customers don't

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Jeff Bezos, chief of Amazon.com, in Times Square in May 2002.

know about — or comply with — that obligation. As Chief Justice John Roberts put it at oral argument, the competitive edge to online retailers comes primarily from "the fact that most people aren't paying use taxes."

That edge cuts deeply, not only into competitors' bottom line but also into states' tax revenue. The parties dispute exactly how much goes unpaid each year, but it's at least $8.5 billion — enough to spend almost $1,000 more on every public high school student in the country. And the loss falls particularly hard on smaller states without income tax, like petitioner South Dakota, where the shortfall exceeds the entire budget for the state judicial system. Recognizing the "extreme harm" to states' "education systems, healthcare services, and infrastructure" caused by this shortfall, Justice Anthony Kennedy called for a case to allow the Supreme Court to reconsider *Quill*. *Wayfair* is that case.

Respondents only nominally defend *Quill* on its doctrinal merits because, as then-Judge Neil Gorsuch once noted, *Quill* is not merely outside the heartland of the court's jurisprudence, but a tiny "precedential island … wash[ing] away with the tides of time." Every other form of state tax is subject to a "nexus" test, under which "it has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Oklahoma Tax Comm'n v. Jefferson Lines*. Thus, *Wayfair*'s difficult question concerns not the commerce clause of the U.S. Constitution but stare decisis. In simple terms, when may the Supreme Court say enough is enough and correct its own mistake?

Quill was explicitly a judicial intervention in the free market to protect a favored industry (mail order), on economic policy grounds, from duly enacted laws of general applicability; such an approach is the antithesis of judicial restraint.

The answer is now, according to 42 states, the U.S. solicitor general, the Multistate Tax Commission, various state and local government associations, a panoply of retail industry organizations, a host of economists, accountants, scholars, United States senators, and others. These parties argue that *Quill*'s physical-presence requirement is a doctrinally indefensible, judicially created intervention in the free market, one that by its very nature harms local business and local government in favor of absentee retailers whose tax advantage depends on not investing in the local community. South Dakota and its amici note that as long as *Quill* remains on the books, states must work around it in ways that are more burdensome to customers, retailers and governments, and also raise privacy concerns: for instance, compelling retailers to turn over customers' purchase history, and then sending dunning letters to those customers who failed to individually calculate and pay the owed taxes. Finally, they argue that modern turnkey-software solutions make sales tax compliance relatively easy and inexpensive for online retailers.

Respondents and their amici insist that *Quill* cannot be touched. They argue that the state and local governments and brick-and-mortar retailers are mistaken, and that *Quill* does not actually result in significant lost taxes or competitive advantage. (Why then, one wonders, are the parties and amici fighting so hard?) And they argue that collecting and remitting sales taxes — something done by *every* brick-and-mortar retailer, whether the sales are made online or in-store — is simply too hard for online retailers. (How then, one wonders, can online *customers* comply?) Finally, they argue that, wrongful or not, harmful or not, *Quill* is protected by stare decisis until Congress intervenes.

It is hard to predict the case's outcome from oral argument, but as a matter of law and equity, South Dakota should prevail. The customary reasons for judicial restraint — deference to the political branches and concerns about institutional competency in economic matters — favor upholding South Dakota's law and abandoning the judge-made physical-presence requirement. *Quill* was explicitly a judicial intervention in the free market to protect a favored industry (mail order), on economic policy grounds, from duly enacted laws of general applicability; such an approach is the antithesis of judicial restraint. Similarly, the customary policy rationale for the commerce clause — promoting economic integration among the states — cannot support a rule that even respondents acknowledge discourages companies from expanding beyond a single state. Finally, the reliance considerations underlying stare decisis cannot carry much weight for young e-commerce companies that pride themselves on market disruption and nimble innovation.

South Dakota has asked the Supreme Court to say what the commerce clause requires, and the court should give what it knows to be the answer, for, as Marbury teaches, "It is emphatically the province and duty of the judicial department to say what the law is."

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