Stanford Law Review Online

Volume 70 March 2018

ESSAY

Kill *Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation

Brian Galle*

Introduction

The world of internet commerce was shaken to its foundations in January this year, when the Supreme Court granted certiorari in *South Dakota v. Wayfair, Inc.*,[1] in effect agreeing to reconsider its landmark holding in *Quill Corp. v. North Dakota*.[2] For more than twenty-five years, *Quill* has barred states from imposing tax-collection obligations on retailers that lack "a physical presence in the taxing State."[3] As a practical matter, this has meant that internet retailers with no employees or facilities in a state can sell into the state without collecting sales taxes that in-state retailers must. In this Essay, I'll argue that original historical evidence I've collected suggests that the political economy premises on which *Quill* rests are fundamentally mistaken. But I believe that same evidence should lead the Court to keep in place the larger body of "Dormant Commerce Clause" jurisprudence from which *Quill* first sprung.

As most survivors of first-year Constitutional Law will recall, the Dormant Commerce Clause (DCC) is a kind of judge-made free-trade zone. Absent contrary instructions from Congress, courts apply the DCC to strike down state laws that tend to favor in-state exchanges over cross-border trade. In *Quill*, the Supreme Court concluded that obliging an individual retailer to comply with

* Professor of Law, Georgetown University Law Center.

1. State v. Wayfair Inc., 901 N.W.2d 754 (S.D. 2017), *cert. granted*, No. 17-494, 2018 WL 386568 (U.S. Jan. 12, 2018).
2. 504 U.S. 298 (1992). Fun (for North Dakota) fact: Current U.S. Senator Heidi Heitkamp was the named defendant in *Quill*. *See* Press Release, Heitkamp: Supreme Court Decision to Review Case She Brought While Serving as Tax Commissioner in 1992 Could Boost North Dakota Small Businesses, SENATOR HEIDI HEITKAMP (Jan. 12, 2018), https://perma.cc/XVU4-52LC.
3. *Quill*, 504 U.S. at 314-19.

the rules of what were then more than 6,000 separate possible sales-tax jurisdictions (a number that has now grown into the five figures[4]) would be so burdensome that it would be a de facto restraint on interstate trade.[5] In an important wrinkle, Justice Stevens's opinion emphasized Congress's power to overturn the Court.[6] In essence, *Quill* established a kind of penalty default, denying states an important aspect of fiscal autonomy in the hopes that they would then use their political sway with Congress to craft a more pragmatic solution.[7]

This calculation has proven wrong. Indeed, my historical examination of congressional regulation of state taxing authority suggests that Justice Stevens's gambit was never likely to succeed. Since the turn of the twentieth century, on those occasions when Congress has legislated about state taxing authority, it has usually constricted states' authority, especially when doing so has served a concentrated interest group. When there are strong interest groups on both sides, as in the case of *Quill*, Congress is often paralyzed. In short, *Quill* imposes fiscal and dignitary harms on states without any real hope that these injuries will spur legislative action.

In addition to shedding light on why *Quill* was an unsuccessful experiment, my evidence supports the larger project of the DCC. Although the DCC has been around since 1829,[8] in recent years some justices—Justice Thomas in particular—have urged the Court to discard it. They argue that regulating interstate commerce should be left to Congress. What I show is that Congress is not a trustworthy guardian of state fiscal power, making continuing judicial involvement a more appealing prospect.

I. Congressional Control of State Taxation: Political Economy Predictions

At first glance, it seems logical that Congress would be well-equipped to overcome dilemmas of interstate taxing and trading. States' decisions about trade goods entering their borders affect other trading partners, a classic externality problem.[9] Direct state-to-state bargaining, as in a deal along the

4. Joseph Bishop-Henchman, *State Sales Tax Jurisdictions Approach 10,000*, TAX FOUNDATION (Mar. 24, 2014), https://perma.cc/9MKV-NNQL.

5. John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 361-63 (2003).

6. *Quill,* 504 U.S. at 318-19.

7. Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement ("SSUTA")*, 40 U.C. DAVIS L. REV. 1381, 1392-1393 (2007); *see also* Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 N.Y.U. TAX L. REV. 425, 503-05 (1997) (arguing that Congress has the power to craft such a solution).

8. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829).

9. The classic analysis is Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

lines famously described by Ronald Coase, is fraught with coordination difficulties.[10] As a nationally representative body, Congress can in theory internalize all nationwide costs and benefits, enacting laws that account for the interests of all affected parties. While federal courts could also play this role, Congress is often said to have superior fact-finding capabilities and a democratic pedigree.[11] Some important voices, including Justice Thomas, have therefore called for the complete abandonment of the DCC—which would leave the task of regulating state taxing authority to Congress alone.[12]

The difficulty with this approach is that Congress is not necessarily a nationally representative body. Instead, its members serve a regional constituency, and its outcomes approximate some national interest only through bargaining, log-rolling, and other coordination mechanisms. As a result, basic collective-action theory suggests that issues of general importance to the States will not garner a devoted congressional following, while issues that disproportionately affect one or a few regions will have strong self-interested supporters.[13] Individual voters similarly share a generalized interest in protecting federalism values, but that interest is not typically strong enough to spur them to action.[14] Thus, Congress may sometimes enact, or at least overlook, measures that allow some states to burden the rest.[15]

To be sure, states have influence over the federal legislative process. My collective-action argument does not deny states' power to "safeguard" federalism values; rather, it points out that states do not always choose to

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10. Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 139-44 (2010).

11. An influential account is Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 435-44 (1982).

12. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("I would therefore abandon the 'balancing' approach to these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress."); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571-72; Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 29-31 (2002).

13. *See* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117-28 (2001); John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 103-04 (2004).

14. *See* Roderick M. Hills, Jr, *Federalism and Public Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 225 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

15. Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 957-59 (1992).

exercise that power. Modern regulatory structures are often vertically integrated between the states and the federal government, giving states the power to refuse to provide the information and on-the-ground enforcement that federal programs depend on.[16] But whether states employ this power depends on the incentives of state legislators and other actors.

What, then, motivates members of Congress or state officials to pay attention to state budgets? The standard answer is intensive lobbying pressure. Lobbying, in turn, creates costs or benefits for individual legislators—such as campaign contributions or adverse publicity—that are not shared with other members of the legislative body.[17] In economic lingo, constituent lobbying pressure is a "private good" for legislators, while national or widely-shared fiscal interests are a public good or common pool.[18]

All these factors are compounded in the case of federal regulation of state taxation. In that realm, members of Congress have the opportunity to hand literal bags of cash to their constituents, at no budgetary cost to themselves. Effectively, regulating the taxing authority of a subsidiary government presents another variation on the well-known "unfunded mandate" problem, in which a higher tier of government sets expensive requirements for a lower tier without appropriating money to meet those costs.[19] Further, to the extent that Congress believes (as the Supreme Court seems to have held in the Affordable Care Act decision, *NFIB v. Sebelius*[20]) that it must compete with states over the right to tax a shared pool of national wealth,[21] we should expect that Congress is not a fully trustworthy custodian of state taxing power. Congress might

16. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258-59, 1263-68 (2009); Brian Galle, *Getting Spending: How to Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 193-96, 199 (2004).

17. A classic reference here is George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11-12 (1971) (explaining the role of lobbying in legislative accountability). A useful recent overview is Steven Croley, *Interest Groups and Public Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 14, at 49, 72-73. For application to the federalism context, see Hills, *supra* note 14, at 212.

18. *See generally* Brian Knight, *Legislative Representation, Bargaining Power and the Distribution of Federal Funds: Evidence from the US Congress*, 118 ECON. J. 1785 (2008) (describing common pool theory and summarizing evidence supporting it).

19. For descriptions of "unfunded mandates" and arguments about whether they are constitutionally problematic, see Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KAN. L. REV. 1113, 1117-18 (1997). For a suggestion that regulating state tax authority is akin to an unfunded mandate, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1081 (1995). A more complete argument is Edward A. Zelinsky, *The Political Process Argument for Overruling* Quill, 82 BROOK. L. REV. 1177, 1193-99 (2017).

20. 567 U.S. 519 (2012).

21. Brian Galle, *Does Federal Spending "Coerce" States?: Evidence from State Budgets*, 108 NW. U. L. REV. 989, 997-1000 (2014).

conclude that it can use the Commerce power to control the tax base it shares with the States, helping to ensure that members of Congress, and not state officials, can earn rewards for delivering on constituent policy goals.

In short, federalism theory predicts that congressional control of state taxation will tend to follow a relatively narrow pattern. Most of the time, what will enable Congress to overcome its institutional inertia is interest group pressure, particularly pressure to grant state tax cuts. Issues of widespread budget concern to many states and many actors will rarely motivate Congress. Similarly, if there are potent concentrated interests on both sides of potential legislation, a stalemate seems likely.

II. Congress and State Taxing Power: 100 Years of Evidence

To test these predictions, I assembled by hand a dataset consisting of every statute enacted by Congress affecting state taxing power through 2007.[22] I then coded each statute for a variety of factors relating to my hypotheses, and conducted regression analysis to test those theories. I describe my methodology and results in greater detail in a book chapter in a recently published volume on the law and economics of federalism.[23]

The key piece of coding is a score estimating whether each piece of legislation expands, contracts, or holds steady state taxing power relative to its baseline immediately prior to the statute. To ensure that I coded only statutes that had the potential to either increase or reduce state authority, I omitted thirty statutes in which state power was unlimited prior to congressional action.[24] This left me with eighty-five enactments between 1900 and 2007.[25]

When Congress acts in this area, it overwhelmingly reduces the scope of state taxing authority. If we omit federal law affecting state-tribal relations, an area where several unusual factors come into play, then there are only nine

22. 2007 was the last full legislative year available when coding for the study began.

23. Brian Galle, *Congressional Control of State Taxation: Evidence and Lessons for Federalism Theory*, *in* THE LAW AND ECONOMICS OF FEDERALISM 1, 10-19 (Jonathan Klick ed., 2017).

24. *Id.* at 11. As I discuss more in the book chapter, there is a possibility that omitting some statutes could produce selection bias. *Id.* at 29. I attempt to control, however, for factors that could be correlated with the absence of prior restraint and that might drive my result.

25. A complete listing of each statute and its coding is available on the *Stanford Law Review Online* web site at Brian Galle, List of Statutes and Coding, https://perma.cc/W6UM-PWZ4.

statutes in which Congress chose to give states greater power to collect taxes.[26] In 20 of the 85 statutes, Congress merely codified existing judge-made law—neither expanding nor contracting state authority.[27] In the other 34 statutes, it gave state taxpayers a break.[28]

The traditional public choice factors I hypothesized would be determinative do in fact appear to play a strong role in legislative outcomes. Suppose we arrange statutes in a line from -1 to 1, with -1 representing a reduction in state authority; 0, no change; and 1, an increase. When there is an unopposed concentrated interest group that stands to benefit from a state tax cut, the mean change drops by a highly statistically significant .68.[29] In contrast, if there are concentrated interests on both sides, the net effect is on average zero.[30] Dueling interests seem to produce stasis, even among statutes that actually pass Congress. I should emphasize, however, that I do not observe legislative proposals that fail to pass, so my sample captures only the characteristics of successful legislation—but successful legislation is exactly what would matter if Congress were solely in control of the field now governed by the DCC.

My evidence of historical stalemate resonates with contemporary experience with the *Quill* problem. Taxation of remote sellers pits powerful internet retailers against local merchants. These two contending forces have battled to a draw over the past three decades in a series of fierce legislative skirmishes.[31] Repeatedly, after the U.S. Senate managed to pass legislation potentially authorizing states to compel remote sellers to collect tax, lobbying

26. *Id.* As described more below, Indian tribes as such are not subject to federal taxation, changing the competition dynamic between Congress and states. In addition, among other important differences, state-taxing authority over tribal land was long subject to constitutional limits, and on the occasions it was used, often served as an instrument for the oppression of Indian tribes. Scott A. Taylor, *A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders*, 2007 MICH. ST. L. REV. 841, 883-4; Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 938-39 (2008).

27. Galle, *supra* note 25.

28. *Id.*

29. Galle, *supra* note 23, at 16.

30. *Id.*

31. Swain, *supra* note 5, at 370; Adam B. Thimmesch, *The Fading Bright Line of Physical Presence: Did* KFC Corporation v. Iowa Department of Revenue *Give States the Secret Recipe for Repudiating* Quill?, 100 KY. L.J. 339, 340 (2012).

by e-commerce businesses succeeded in preventing a vote in the House of Representatives.[32]

I also find some evidence that Congress might perceive itself to be in competition with states for revenue. Congress is much more generous to states when it regulates their power to control taxation on Native American tribal territory. One possible reason for this generosity is that Congress has no tax revenue dollars of its own at stake in this area, as the Constitution strongly suggests that "Indians [are] not taxed" by the federal government, or at least that tribes as such are immune to federal taxing authority.[33]

On the other hand, I must admit that my data all derive from an era of shared authority between courts and Congress. Conceivably, Congress might take on a more principled role, resisting pressure from special interests, if it understood that it bore sole responsibility for overseeing state taxation. I am skeptical of that suggestion, but my evidence can neither confirm nor deny it.

III. Conclusion: Implications for *Quill* and the Dormant Commerce Clause

One interpretation of my results is that Justice Stevens's key error in *Quill* was in placing the "penalty" in the wrong place. Again, it seems that Stevens hoped *Quill*'s undesirable (for states) result would spur congressional action. But it seems a constituency for action never fully jelled, perhaps because the undesirable result was, among other things, a hit to every state's fiscal standing—an interest that was shared generally by all state taxpayers across the country. In 1992 there were no internet retailers, and mail order did not have the power to shutter whole industries, such as book sellers. By the time brick-and-mortar sellers saw their peril, internet sellers had enough power to parry their counterparts' legislative efforts.

What if instead the "penalty" were that remote sellers must fulfill their tax collection obligations? If it is true that nationwide compliance with 10,000 or more local regimes is an enormous burden, then this would impose on internet retailers a significant penalty over and above the tax obligations that local sellers

32. *See* Sylvia F. Dion, *The MFA v. the RTPA: Will Changes in the House and an Expiring ITFA Help Advance or Further Stall Federal Remote Seller Bills?*, BLOOMBERG BNA (Nov. 20, 2015), https://perma.cc/7LFA-8J4X; J.D. Harrison, *After Easy Passage in the Senate, Online Sales Tax Bill Faces Much Tougher Road in the House*, WASH. POST: ON SMALL BUSINESS (May 9, 2013), https://perma.cc/E7FN-X4UQ; Andrew Ross Sorkin, *In Tax Fight, Amazon Hands Baton to eBay,* N.Y. TIMES: DEALBOOK (Apr. 22, 2013, 9:49 PM), https://perma.cc/5KM5-FN9Z (noting that eBay and other online retailers oppose federal legislation).

33. U.S. Const. art. I, § 2. For more discussion, see Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 41-49 (2008) (doubting that immunity is rooted in Constitution, but acknowledging that it is longstanding and seemingly settled).

meet. Internet sellers might well respond by pressuring Congress to enact legislation that would preserve state taxing authority while streamlining and rationalizing compliance burdens. That exchange was the heart of the deal e-commerce actors killed in 2016.[34] If the Supreme Court reverses *Quill*, e-commerce sellers will have a strong incentive to return to the bargaining table.[35] If a rationalization proposal such as the "Marketplace Fairness Act,"[36] cannot fly, there are other creative solutions available as well, such as the tax-collector compensation mechanism proposed by Gamage and Heckman.[37]

Can we be sure of this prediction? Certainly not. Legislation is a complex process, and the predictions of public choice theory represent general tendencies, not ironclad rules.[38] My regression analyses, too, depict only the average results of past legislative efforts. It is certainly possible that after a *Quill* repeal, local retailers would come together to prevent any congressional deal to rationalize interstate taxation, perhaps hoping that compliance burdens will give them a leg up over their e-commerce competitors. But compliance costs are largely an obstacle for small remote retailers, not the Amazonian giants who present the true threat to brick-and-mortar establishments.[39] It seems unlikely that a coalition of brick-and-mortar merchants would form to clog legislative action if obstruction wouldn't deliver much real benefit to the coalition members.

Either way, the end of *Quill* should not be the end of the DCC. That is certainly one way that *Wayfair* might be decided, particularly if Justice Thomas has his way. The Court's commitment to the DCC has wavered in recent years, with major new exceptions carved from it, although there have also been

34. Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015); *see also* Jennifer McLoughlin, *Bill Reintroduced in Congress to Ban Digital Sales Taxes*, BLOOMBERG BNA (June 13, 2017), https://perma.cc/TD4Y-SMTU (describing efforts of e-commerce interests to block state taxation of out-of-state entities).

35. Zelinsky, *Overruling* Quill, *supra* note 19, at 1198-99.

36. *See* News Release, Bipartisan Group of Senators Introduce Marketplace Fairness Act of 2017 to Allow States to Close Sales Tax Loophole, SENATOR MIKE ENZI (Apr. 27, 2017), https://perma.cc/CEX4-WNXN. The Marketplace Fairness Act in effect grants congressional authorization to an interstate concord, known as the Streamlined Sales and Use Tax Agreement (SSUTA). For an overview of the SSUTA, *see* John A. Swain & Walter Hellerstein, *The Political Economy of the Streamlined Sales and Use Tax Agreement*, 58 NAT'L TAX J. 605, 610-613 (2005). For constructive criticism, see generally Galle, *supra* note 7, at 1386-89, 1413-20.

37. *See* David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 503-12 (2012).

38. *See* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 10-11 (1990).

39. *See* Gamage & Heckman, *supra* note 37, at 530-31.

notable affirmations.[40] And Justices Souter and Scalia, longtime opponents of the DCC, have left the Court.

Their replacements should keep the DCC in place, especially DCC doctrines that govern state taxation. Again, Justice Thomas's alternative vision, and that of some commentators, is one in which Congress alone has command of the national economy. While there is much that could be said on either side of that point, my evidence contributes a uniquely empirical consideration: Congress's performance when it regulates state taxes is shaped by self-serving and interest-group-driven considerations.[41] Yielding the stage wholly to Congress, with no judicial influence, seems unlikely to produce the best results.

40. For scholarly discussion of the trend and its occasional reversals, see Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause*, 70 OHIO ST. L.J. 1179, 1184-1207, 1214 (2009) (discussing the new "market participant" exception to DCC and the threat it poses to the doctrine as a whole); Brannon P. Denning, *The Dormant Commerce Clause ~~Wynnes Won~~ Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 MINN. L. REV. HEADNOTES 103, 108-10 (2016).

41. I should note that there may also be some instances in which interest-group politics may make judicial intervention *less* necessary. I have made that argument about judicial regulation of federal conditional spending. Galle, *supra* note 16, at 195, 198-99.