SLOW CONNECTIONS FOR E-TAILER NEXUS: BRINGING SALES AND USE TAXES UP TO SPEED IN AN E-COMMERCE ECONOMY

Alexandrea Rose Finch*

> *"[I]n this world nothing can be said to be certain, except death and taxes."*[1]

I. INTRODUCTION

On March 10, 2011, Apple fans lined up outside Apple stores, anxiously awaiting the release of the iPad 2.[2] The wiser consumers chose to stay at home, instead scouring the Internet for the cheapest way to get their hands on the device. Many wondered when they could buy it on Amazon to avoid paying sales tax.[3] To their dismay, the iPad 2 would not be available on Amazon until several months after the March 11, 2011 release date. In fact, Apple did not authorize any remote Internet retailers to sell the iPad 2 on opening day, and reasonably so.[4] Internet retailers like

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1. Benjamin Franklin, *To M. Le Roy*, in *The Works of Benjamin Franklin* vol. 12, 161 (John Bigelow ed., G.P. Putnam's Sons 1904).

2. MarketWatch, *Apple iPad 2 Draws Early Crowds on First Day*, http://www.marketwatch.com/story/ipad-2-anticipation-mounts-2011-03-11 (Mar. 13, 2011).

3. *See e.g.* Amazon.com, Customer Discussions, *iPad 2 Release?* http://www.amazon.com/iPad-2-Release/forum/Fx2OGSCM2GO916U/Tx274AY8EMFUU8Z/1?asin=B002C7481G (accessed Jan. 29, 2013); MacRumors.com, MacRumors Forums, *Anyone Waiting for iPad 2 on Amazon to Save on Sales Tax?* http://forums.macrumors.com/archive/index.php/.../t-1106095.html (accessed Jan. 29, 2013) (containing comments regarding availability of the iPad on Amazon).

4. *See* Apple, *iPad 2 Arrives Tomorrow*, http://www.apple.com/pr/library/2011/03/10iPad-2-Arrives-Tomorrow.html (Mar. 10, 2011) (reporting that authorized retailers included AT&T, Best Buy, Target, Verizon Wireless, Wal-Mart, and select Apple Authorized Resellers, all of which have a substantial physical presence in most states).

Amazon.com and Overstock.com that do not have a physical presence in a state are able to undersell brick-and-mortar stores like Apple and Best Buy because they are not required to collect and remit state sales and use taxes.[5] For the iPad 2, priced at $499,[6] buying online would have resulted in an average savings of nearly $50 per customer.[7]

Currently, Amazon claims that it has a physical presence only in the state of Washington, as its headquarters are in Seattle,[8] and Overstock claims a physical presence in Utah, where its headquarters are located, and Indiana, where it has a shipping center.[9] Amazon has warehouses in other states but avoids sales-tax liability in those states by creating purely online corporate subsidiaries through which the company funnels sales, a tactic dubbed "entity isolation."[10] Several states have sought to impose sales-tax collection requirements on parent companies involved in entity isolation, with mixed results.[11]

The current law on Internet sales-tax nexus has been the subject of heated opposition by two main groups: state governments and brick-and-mortar retailers. Sales tax is a vital part of

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5. *See Quill Corp. v. N.D.*, 504 U.S. 298, 317 (1992) (establishing a bright-line physical-presence rule in the area of sales and use taxes); *infra* pt. II(B).

6. Apple, *supra* n. 4.

7. Forbes reports that in 2010, the average sales-tax rate in the United States was 9.64%. Forbes.com, *Average U.S. Sales Tax Rate Hits Record High*, http://www.forbes.com/2011/02/17/average-sales-tax-rate-record-high-shopping-arizona-25-highest-sales-taxes.html (Feb. 17, 2011). This savings figure was calculated by multiplying the price of the iPad 2 by the average sales-tax rate as reported by Forbes ($499 x .096 = $47.90). *Id.*

8. Jon Talton, *Amazon.com Makes a Taxing Argument*, http://seattletimes.nwsource.com/html/jontalton/2015689390_biztaltoncol24.html (July 23, 2011).

9. Interview by Michael A. Cox, Practical eCommerce with Patrick Byrne, Overstock.com (Nov. 1, 2006) (available at http://www.practicalecommerce.com/articles/336-Overstock-CEO-Patrick-Byrne).

10. Michael R. Gordon, *Up the Amazon without a Paddle: Examining Sales Taxes, Entity Isolation, and the "Affiliate Tax"*, 11 N.C. J. L. & Tech. 299, 299 (2010). For an interesting discussion of why the tax benefits of entity isolation are outweighed by the need for a uniform business model, see Mark J. Cowan, *Tax Planning versus Business Strategy: The Rise and Fall of Entity Isolation in Sales and Use Taxes*, 44 Idaho L. Rev. 63, 64–70 (2007).

11. *See e.g. St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 580–582 (E.D. La. 2007) (finding that physical presence is not imputed to a related entity, despite close corporate relationship); *but see Borders Online, LLC v. St. Bd. of Equalization*, 129 Cal. App. 4th 1179, 1199–1201 (Cal. App. 4th Dist. 2005) (holding that subsidiary entity's physical presence was sufficient to establish a nexus for an online parent entity when merchandise purchased from the parent was returnable at subsidiary stores).

state revenue and amounts to a large percentage of state taxes.[12] With the development of e-commerce,[13] states are losing out on a substantial amount of revenue from sales tax,[14] especially considering the many big-ticket items available online.[15] With the current economic downturn and budget deficits, states are exceedingly concerned about sources of revenue.[16] Brick-and-mortar retailers argue that the current law on taxation of remote retailers gives companies like Amazon and Overstock an unfair price advantage over brick-and-mortar stores.[17] Because online retailers are exempt from the sales-tax collection requirement, they can offer products at lower prices than in-state retailers, a benefit in addition to the lower operating costs and convenience associated

12. *See* U.S. Census Bureau, *State Government Tax Collections Summary Report: 2010*, at 3 (available at http://www.census.gov/prod/2011pubs/g10-stc.pdf) (reporting that sales tax was 31.9% of total state taxes during 2010).

13. "E-commerce" refers to "electronic commerce." Electronic commerce is "any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access." Internet Tax Freedom Act, Pub. L. No. 105-277, § 1105(3), 112 Stat. 2681 (1998) (supplementing 19 U.S.C. § 2241(d) (2006)).

14. Justin Lahart, WSJ Blog, *E-commerce Surge May Hit Tax Revenue*, http://blogs.wsj.com/economics/2011/02/17/e-commerce-surge-hits-state-local-tax-revenue/ (Feb. 17, 2011). For the first quarter of 2012, e-commerce is expected to increase 15.4% from the first quarter of 2011. U.S. Dep't of Com., *Quarterly Retail E-Commerce Sales: 1st Quarter 2012*, U.S. Census Bureau News 1 (May 17, 2012) (available at http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf).

15. For example, BlueNile.com, a company that offers expensive jewelry and engagement rings, only collects sales tax in Washington and New York, states that have adopted affiliate marketing approaches to the nexus requirement, which is discussed *infra* Part III(B). BlueNile.com, *Order and Shipping Policies*, http://www.bluenile.com/order_shipping_policies.jsp#tax (accessed Jan. 29, 2013); *see also* HomeOffice Solutions, *Customer Care*, *Purchasing*, *Why Buy From Us?* http://www.homeofficesolutions.com/index/page/static/subpage/purchasing/#whybuy (accessed Jan. 29, 2013) (offering home office furniture and advertising that customers will "not be charged sales tax for any order"). Statements about tax savings like those at HomeOfficeSolutions.com are misleading—consumers still owe a use tax in the state where they use, consume, or store the item.

16. *See* Danielle Kurtzleben, *10 States with the Largest Budget Shortfalls*, http://www.usnews.com/news/articles/2011/01/14/10-states-with-the-largest-budget-shortfalls (Jan. 14, 2011) (discussing projected state budget shortfalls for 2012).

17. Miguel Bustillo & Stu Woo, *Retailers Push Amazon on Taxes: Wal-Mart, Target and Others Look to Close Loophole for Online Sellers amid State-Budget Crises*, http://online.wsj.com/article/SB10001424052748704396504576204791377862836.html#ixzz1JGb4i4tq (Mar. 17, 2011). Companies like Wal-Mart and Target that have a physical presence in many states are campaigning against Internet retailers like Amazon and Overstock to get them to start collecting state sales taxes. *Id.*

with operating an online business.[18] Another argument advanced in support of requiring e-tailers[19] to collect sales and use tax is that the current tax exemption discriminates in favor of the wealthy because wealthy individuals are more likely to have access to the Internet.[20]

Consumers and e-tailers, on the other hand, are content with the current tax laws. Unsurprisingly, consumers enjoy buying online merchandise tax-free,[21] and e-tailers enjoy being exempt from the complicated sales and use tax regimes of the various states.[22] E-tailers argue that they should not have to collect sales tax in states where they do not have a physical presence because by operating online, they derive no benefits from the taxing state and have no impact on the state's facilities and resources.[23]

Thus, the sides of the Internet sales-tax debate are clearly drawn. This Article attempts to bring them closer together. Part

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18. *See* Stephen G. Mason, *The Price Is Right: After a Long Evolution in Case Law, Minimum Resale Price Agreements Are No Longer Per Se Illegal*, 32 L.A. Law. 29, 34 (Apr. 2009) (discussing the benefits of operating a business online in the context of resale price maintenance). Arguably, however, shipping and handling charges offset any sales-tax savings. *See* James P. Angelini & Lewis Shaw, *The Relation of Electronic Commerce and Sales Tax: A Consumer Survey*, 22 J. St. Taxn. 19, 21–23 (Nov. 3, 2004) (reporting results of an empirical study suggesting that consumers do not consider the trade-off between sales-tax savings and shipping charges when purchasing online).

19. The term "e-tailer" refers to a retailer that engages in e-commerce. Eric A. Ess, *Internet Taxation without Physical Representation?: States Seek Solution to Stop E-Commerce Sales Tax Shortfall*, 50 St. Louis U. L.J. 893, 894 n. 12 (2006). See *supra* n. 13 for a definition of e-commerce.

20. Timothy Fallaw, *The Internet Tax Freedom Act: Necessary Protection or Deferral of the Problem?* 7 J. Intell. Prop. L. 161, 186–188 (1999). Because all individuals are expected to voluntarily pay a complementary use tax on items purchased online, this argument is only marginally supportive of the notion of imposing tax. See *infra* Part II(A)(2) for a discussion of the use tax.

21. *See* Austan Goolsbee, *In a World without Borders: The Impact of Taxes on Internet Commerce*, 115 Q. J. Econ. 561, 565–568 (2000) (reporting results of an empirical study finding that twenty-four percent of consumers would be less likely to purchase items online if they were required to pay sales tax).

22. *See* Andrea James, Amazon & the Online Retail Blog, *Bezos: Sales Tax Is Horrendously Complicated*, http://blog.seattlepi.com/amazon/2008/06/30/bezos-sales-tax-is-horrendously-complicated (June 30, 2008) (relaying a comment from Amazon founder and CEO Jeff Bezos at Amazon's annual shareholders' meeting that the state sales-tax systems are "horrendously complicated").

23. Michael Mazerov, Center on Budget and Policy Priorities, *Amazon's Arguments against Collecting Sales Taxes Do Not Withstand Scrutiny* 1–2, http://www.cbpp.org/files/11-16-09sfp.pdf (last modified Nov. 29, 2010). This argument has its basis in the Supreme Court's recognition that "State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman v. Hewit*, 329 U.S. 249, 253 (1946).

II of this Article discusses the history of sales and use taxes and the existing legal framework for state tax collection on Internet sales. Part III of this Article provides an overview of the various approaches that the national and state governments have employed to address the Internet sales-tax dilemma. Part IV illustrates problems with the existing approaches and explains why none have been successful to date. Part V proposes a simpler solution to the problem that incorporates features of both the existing state and national approaches.

II. THE DIAL-UP DAYS: A HISTORY OF SALES AND USE TAXES AND THE INTERNET

Sales and use taxes are tools of revenue that have undergone many variations over the years and across cultures. To understand the impact the Internet has had on the development of these taxes, it is necessary to review the history of the sales and use taxes and how they relate to the Internet. Part II(A) describes the history and development of the sales and use taxes as vital sources of state revenue and explains why the use tax is ineffective as a tool of tax collection for many items purchased online. Part II(B) discusses existing Supreme Court precedent that has impacted the collection of state taxes on Internet purchases. Part II(C) focuses on the existing legal framework for taxation of Internet retailers specifically and the pressure for a tax-free zone.

A. Sales and Use Taxes

1. The Sales Tax

The sales tax is "a tax imposed on the sale of goods and services, usu[ally] measured as a percentage of their price."[24] In the United States, sales tax has developed as a creature of state and local law.[25] Although sales-tax systems vary from state to state, all United States taxing jurisdictions impose sales tax pri-

24. *Black's Law Dictionary* 1498–1499 (Bryan A. Garner ed., 8th ed., West 2005).

25. Michael D. Carson, *Rethinking the Impact of Sales Taxes on Government Procurement Practices: Unintended Consequences or Good Policy?* 62 A.F. L. Rev. 85, 89 (2008).

marily on the sale of goods.[26] States use three different methods to collect the sales tax due from a retailer—vendor taxes, consumer taxes, and a combination of both vendor and consumer taxes.[27] Retailers pay vendor taxes, which are computed as a percentage of the retailer's gross receipts, while purchasers pay consumer taxes, which are computed as a percentage of the sales price at the point of sale.[28]

Historically, the sales tax was developed as a tool of revenue for governments in times of economic crisis.[29] The rationale is that a sales tax has less of an impact on taxpayers in economic downturns than a broader income tax or property tax because the sales tax can be "hidden" in prices and is paid in increments, rather than in a lump sum once a year.[30] The sales tax, in its American form, was born out of the Great Depression in the

26. Timothy R. Hurley, *Curing the Structural Defect in State Tax Systems: Expanding the Tax Base to Include Services*, 61 Mercer L. Rev. 491, 492 (2010). Sales tax is also imposed on certain services in some states. *See e.g.* Fla. Stat. § 212.05(1)(a), (c), (i) (2010) (applying a six-percent sales tax to security protection services and cleaning services). In the 1980s, the Florida legislature attempted to apply a blanket sales tax to services, but the tax was quickly repealed after much opposition. Jon Nordheimer, *Tax Repeal on Services in Florida Widely Felt*, http://www.nytimes.com/1987/12/25/us/tax-repeal-on-services-in-florida-widely-felt.html?pagewanted=all&src=pm (Dec. 25, 1987).

27. Carson, *supra* n. 25, at 90.

28. *Id.* Although the vendor tax is technically paid by the vendor rather than the consumer, both methods have the same practical effect because the vendor will pass the tax on to the consumer through a price increase. *Id.* Even with a consumer tax, the retailer's employees can typically be held personally liable for failure to collect the tax. *E.g.* Mo. Rev. Stat. § 144.157 (West 2009); N.Y. Tax Law § 1133(a) (McKinney 2008); Ohio Rev. Code Ann. § 5739.33 (Lexis 2008).

29. *See* Hurley, *supra* n. 26, at 498–500 (explaining the development of the sales tax throughout history and describing its use in underdeveloped and financially strained countries). During World War II, Congress discussed the possibility of imposing a federal sales tax to help pay for the war, as the federal income tax reached only about ten percent of the population. Lawrence A. Zelenak, *The Federal Retail Sales Tax That Wasn't: An Actual History and an Alternate History*, 73 L. & Contemp. Probs. 149, 150–152 (Winter 2010). But, President Franklin D. Roosevelt strongly opposed a flat sales tax because flat taxes "'place[ ] the burden of government more on those least able to pay and less on those most able to pay.'" *Id.* at 151 (quoting President Franklin D. Roosevelt, Speech, *Annual Message to Congress* (D.C. Jan. 3, 1938), in Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt* 9 (Samuel Irving Rosenman, ed., Random House 1938)). Many legal scholars continue to advocate for a federal sales tax or federal value-added tax. *E.g.* Charles E. McLure, Jr., *How to Coordinate State and Local Sales Taxes with a Federal Value Added Tax*, 63 Tax L. Rev. 639, 639 (2010); Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?* 23 J. Legis. 171, 179–182 (1997); Aaron G. Murphy, *Will Surfing the Web Subject One to Transient Tax Jurisdiction? Why We Need a Uniform Federal Sales Tax on Internet Commerce*, 22 Seattle U. L. Rev. 1187, 1222–1227 (1999).

30. Hurley, *supra* n. 26, at 498–499.

1930s.[31] In dire need of a quick source of revenue, states resorted to the sales tax because they could not afford to wait for the revenue that the annual income tax would bring.[32] In addition to the immediacy of the sales tax, it proved to be more stable in economic downturns than the income tax.[33] States initially enacted sales taxes as temporary fixes for state budget deficits, but sales taxes gained permanence as more and more states joined the sales-tax bandwagon.[34] Today, forty-five states have enacted sales-tax legislation.[35] The Supreme Court has long held that requiring remote retailers to collect sales tax on interstate sales violates the Commerce Clause,[36] which has prompted the states to find another way to tax interstate sales.

2. The Use(less) Tax

Instead of imposing a tax-collection requirement on the *sale* of goods in interstate commerce, the states sought to bypass Commerce Clause concerns by imposing a tax collection requirement on the *use* of goods within the taxing state.[37] The use tax is a complementary tax imposed on an item purchased out of state for in-state use or consumption.[38] The development of the use tax and the arguments in support of the tax closely parallel the arguments of states and brick-and-mortar retailers in the Internet sales-tax debate. Before the use tax was implemented, consumers would travel to another state to buy merchandise to avoid paying sales tax on their purchases.[39] Much like the proponents of the Internet sales tax, states and in-state retailersargued that without a complementary use tax, local sellers were at a competitive

31. *Id.* at 499.
32. *Id.*
33. *Id.* at 500.
34. *Id.* at 499–500.
35. *Id.* The five states with no state sales tax are Alaska, Delaware, Montana, New Hampshire, and Oregon. Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 12.02 (3d ed., Warren Gorham & Lamont 2011).
36. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (distinguishing between sales and use taxes and holding that a sales tax imposed on a sale that took place outside of the taxing state violated the Commerce Clause).
37. *See e.g. Gen. Trading Co. v. St. Tax Comm'n of Iowa*, 322 U.S. 335, 338–339 (1944) (sustaining the State's imposition of a use tax on a remote retailer that had salespeople within state).
38. *Black's Law Dictionary* 1499 (Bryan A. Garner ed., 8th ed., West 2005).
39. Carson, *supra* n. 25, at 91.

disadvantage because out-of-state retailers could offer merchandise at much lower prices.[40] The use tax was not a complete solution to the problem, however, because in order for the state to require use tax collection, the remote retailer must still have sufficient contacts or nexus with the taxing state.[41]

The fact that remote retailers lacking nexus are not required to collect sales or use taxes does not mean consumers are exempt from tax on their online purchases. Instead, consumers in most states are expected to pay the use tax themselves for items purchased online.[42] The problem with requiring consumers to pay the use tax to the state directly rather than at the point of sale, however, is that it renders the tax completely voluntary—enforcement of the tax is nearly impossible.[43] Consumers are expected to tally their online sales and send in a check at the end of the year, along with a form reporting their use tax.[44] Some states have sought better enforcement of the use tax by including it on their state income tax returns,[45] but this serves merely as a reminder and does not eliminate the problem that consumers have no incentive to report it. Moreover, the methods taxpayers are required to use to compute the tax are often too complicated

40. *Id.*

41. *See* Hellerstein & Hellerstein, *supra* n. 35, at ¶ 19.02[1] (explaining that although *General Trading* established the states' power to require a remote retailer to collect use taxes, the decision did not establish the extent to which the remote retailer must have a connection with the taxing state).

42. *E.g.* Fla. Stat. § 212.06(8) (West 2011); Cal. Rev. & Tax Code § 6201 (West 1998); N.Y. Tax Law § 1110 (McKinney 2008).

43. The use tax is just one example of tax evasion made easier by the Internet. A related tax problem with Internet sales is the underreporting of income from Internet sales for purposes of state and federal income tax. *See generally* Maricel P. Montano, *Can Widening the Scope of Information Reporting to Include Income Derived from Online Sales Help to Narrow the Expanding Tax Gap*? 83 S. Cal. L. Rev. 379 (2010) (discussing underreporting of online income and a new provision of the Internal Revenue Code that would require information reporting for online transactions conducted through online auction sites, such as Ebay and Amazon).

44. *See e.g.* Fla. Dep't of Revenue, *Florida Tax on Purchases*, http://dor.myflorida.com/dor/forms/2010/dr15mo.pdf (accessed Jan. 29, 2013) (form DR-15MO, Florida's out-of-state purchase return); Cal. St. Bd. of Equalization, *California Use Tax—for Purchases Made from Out-of-State Businesses*, http://www.taxsos.com/SBEpub79b2007usetax.pdf (accessed Jan. 29, 2013) (California's use tax return for out-of-state purchases).

45. *See* Nina Manzi, Minn. House of Reps. Research Dep't, *Use Tax Collection on Income Tax Returns in Other States* 2, http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf (updated June 2010) (reporting that twenty-three states collect a use tax on their individual income tax returns).

for the average taxpayer to understand.[46] Filing a use tax return at the end of the year is especially burdensome for taxpayers who buy only a few small-ticket items online each year. For states like Florida, that have no income tax, enforcement is even more difficult because taxpayers often do not even know that they are required to pay a use tax.[47]

B. Supreme Court Precedent

Before Internet shopping became as commonplace as going to the store, remote sales were conducted primarily over the phone and through mail-order catalogs. Thus, the first Supreme Court decisions to consider the constitutionality of state sales taxation of remote sales involved taxation of mail-order retailers.[48] The primary arguments advanced by retailers in the mail-order cases were that the imposition of sales tax on remote sales violates both the Due Process[49] and Commerce[50] Clauses of the United States Constitution.[51] Both clauses require some type of nexus with the taxing state, but the analysis is slightly different for each clause. The Due Process Clause requires "some definite link, some minimum connection, between a state and the person, property[,] or

46. *See e.g.* Douglas Oliver, *A New Line for an Old Tax: Ohio's Use Tax on Individuals*, 33 U. Toledo L. Rev. 621, 621 (2002) (describing the complicated instructions for Ohio's use tax). Oliver also offers an interesting discussion of potential Commerce Clause issues with the use tax imposed on taxpayers for goods purchased out of state. *Id.* at 630–634.

47. In fact, the Florida Department of Revenue webpage that describes the use tax begins with, "Most Florida citizens are not aware that this state has a 'use tax.'" Fla. Dep't of Revenue, *Use Tax on Out-of-State Purchases*, http://dor.myflorida.com/dor/taxes/consumer.html (accessed Jan. 29, 2013). Because Florida has no income tax, the State relies more heavily on sales and use taxes. To Amazon's credit, it has included a brief reminder to consumers on its website that a consumer's purchase may be subject to a use tax. Amazon.com, *Sales Tax Requirements*, http://www.amazon.com/gp/help/customer/display.html/ref=hp_468512_usetax?nodeId=468512#usetax (accessed Jan. 29, 2013). "We do not collect sales or use taxes in all states. For states imposing sales or use taxes, your purchase is subject to use tax unless it is specifically exempt from taxation. Your purchase is not exempt merely because it is made over the Internet or by other remote means." *Id.*

48. *E.g. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Miller Bros. Co. v. Md.*, 347 U.S. 340 (1954); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941).

49. U.S. Const. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

50. U.S. Const. art. I, § 8, cl. 3. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." *Id.*

51. *E.g. Nat'l Bellas Hess*, 386 U.S. at 756; *Scripto*, 362 U.S. at 208; *Miller Bros.*, 347 U.S. at 341; *Nelson*, 312 U.S. at 362.

transaction it seeks to tax,"[52] while the Commerce Clause requires that a tax be applied only to activities with a "substantial nexus" to the taxing state.[53] Since those initial decisions and the advent of the Internet, the Court has declined to consider whether the same principles would apply to the taxation of Internet sales,[54] although given the similarities between the two types of sales, the Court would almost certainly have to overrule the mail-order cases to find a basis for taxation of Internet sales.

1. National Bellas Hess, Inc. v. Department of Revenue of Illinois[55]

In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, the Illinois Department of Revenue sought to collect its use tax from National Bellas Hess, Inc., a retail apparel company making sales to Illinois customers through mail-order catalogs sent twice a year, as well as "intermediate smaller 'sales books' or 'flyers.'"[56] Bellas Hess had its principal place of business in North Kansas City, Missouri, and besides the infrequent mailings to Illinois customers, it had no contacts or connection with the state of Illinois.[57] Bellas Hess challenged the Department's imposition of the use tax, arguing that the tax violated both the Due Process and Commerce Clauses of the United States Constitution.[58] The Supreme Court agreed.[59]

The Court held that both clauses require the retailer to have some type of physical presence within the taxing state in order for

52. *Miller Bros.*, 347 U.S. at 344–345.

53. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). *Complete Auto* also requires that the tax be fairly apportioned, nondiscriminatory, and fairly related to services provided by the taxing state. *Id.*

54. Indeed, the Court has denied certiorari in a number of cases involving state attempts to collect sales tax from e-tailers. *See e.g. Lanco, Inc. v. Div. of Tax'n*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *MBNA Am. Bank v. Tax Comm'r*, 640 S.E.2d 226 (W.Va. 2006), *cert. denied*, 551 U.S. 1141 (2007). The Court's silence indicates that it sees Congress as better suited to address the Internet sales-tax problem. *See Quill*, 504 U.S. at 318 (stating that "Congress is . . . free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes").

55. 386 U.S. 753.

56. *Id.* at 760–761 (Fortas, J., dissenting).

57. *Id.* at 753–754 (majority).

58. *Id.* at 756.

59. *Id.* at 760.

the state to impose the tax.[60] Because Bellas Hess' "only connection with customers in the State is by common carrier or the United States mail," Illinois lacked the power to require collection of the use tax.[61] In arriving at its holding, the Court examined prior cases that upheld use taxes on mail-order sales and found that in all such cases, the retailer had some type of connection with the taxing state beyond mailing activities.[62] For example, the Court had upheld taxes in cases where the retailer had agents,[63] employees,[64] or tangible property[65] in the taxing state.

2. Quill Corp. v. North Dakota[66]

More than twenty years later, the Court revisited *Bellas Hess* in what would become the seminal case in the current legal framework for the Internet sales-tax debate. In *Quill Corp. v. North Dakota*, the North Dakota State Tax Commissioner sought to collect a use tax from Quill, a Delaware corporation with its principal places of business in Illinois, California, and Georgia.[67] Quill's activities within North Dakota consisted of soliciting business through catalogs, advertisements, and telephone calls, and delivering its merchandise to North Dakota customers through the mail.[68] Much like Bellas Hess, Quill challenged the tax on Due Process and Commerce Clause grounds.[69]

Unlike in *Bellas Hess*, however, the Court bifurcated the Due Process and Commerce Clause analysis.[70] In rejecting North Dakota's view that the nexus required by the Due Process and Commerce Clauses were the same, as in *Bellas Hess*, the Court emphasized the different constitutional concerns addressed by

60. *Id.* at 758.
61. *Id.*
62. *Id.*
63. *Id.* at 757 (citing *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Gen. Trading Co. v. St. Tax Comm'n*, 322 U.S. 335 (1944)).
64. *Id.* at 757–758 (citing *Scripto*, 362 U.S. 207); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941).
65. *Bellas Hess*, 386 U.S. at 757 (citing *Sears*, 312 U.S. 359).
66. 504 U.S. 298 (1992).
67. *Id.* at 302.
68. *Id.*
69. *Id.* at 301.
70. *Id.* at 305. "[A]lthough we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct." *Id.*

each clause.[71] Under the Due Process Clause, the Court reasoned, mailings and advertising solicitations within the taxing state satisfied the "minimum contacts" required by *International Shoe Co. v. Washington*[72] and its progeny.[73] By contrast, the Court concluded that Commerce Clause challenges were dictated by the four-part test of *Complete Auto Transit*,[74] rather than the Due Process "minimum contacts" test.[75] At issue in *Quill* and in the Internet sales-tax debate was the first prong of the test requiring "substantial nexus" with the taxing state.[76] By eliminating due process concerns and instead resting *Bellas Hess*' physical-presence requirement on the Commerce Clause, the Court preserved Congress' power to regulate the taxation of remote sales in the future.[77]

The more significant part of the opinion, at least from an Internet sales-tax perspective, was the Court's affirmation of *Bellas Hess*' bright-line physical-presence rule under the Commerce Clause.[78] Though there had been several Commerce Clause decisions that, like *Complete Auto*, employed a balancing test, the Court concluded that in the area of sales and use taxes, certainty was more desirable and would help "foster investment."[79] In con-

71. *Id.* at 312. The Court reasoned that while the Due Process Clause concerns notions of fairness and notice, the Commerce Clause concerns issues of federalism. *Id.*

72. 326 U.S. 310 (1945).

73. *Quill*, 504 U.S. at 306–309. *International Shoe* recognized that a state's jurisdictional reach extended beyond its territorial boundaries. *See generally* Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo. L. Rev. 753 (2003) (discussing the Supreme Court's personal-jurisdiction jurisprudence and advocating for a reconsideration of the minimum contacts test in light of its inconsistent results in both state and federal courts).

74. 430 U.S. 274, 279 (1977) (stating that a tax does not violate the Commerce Clause if it "[(1)] is applied to an activity with a substantial nexus with the taxing state, [(2)] is fairly apportioned, [(3)] does not discriminate against interstate commerce, and [(4)] is fairly related to the services provided by the State").

75. *Quill*, 504 U.S. at 311–312.

76. *Id.* at 311.

77. Hellerstein & Hellerstein, *supra* n. 35, at ¶ 19.02[3][c][v]. Congress does not have the power to regulate due process. *Id.*

78. *Quill*, 504 U.S. at 315–318. The Court's Due Process holding has no practical effect on the issue at hand because if the state cannot impose sales tax under the Commerce Clause absent a retailer's physical presence, it does not matter whether the state can do so under the Due Process Clause.

79. *Id.* at 315–316.

cluding the opinion, the Court invited Congress to intervene on the issue.[80]

C. Internet Tax Freedom Act

Much has changed in the world of interstate transactions since *Quill*. With the development of the Internet in the early 1990s,[81] legislators were confronted with a complex invention that had complicated implications for all aspects of the law.[82] One of the legislators' main concerns was the regulation and taxation of the Internet. Legislators were concerned that taxation of the Internet might inhibit growth of an entirely new form of commerce—e-commerce.[83] In response to this growing concern, Congress passed the Internet Tax Freedom Act (ITFA) in 1998, creating a three-year moratorium on "taxes on Internet access" and "multiple or discriminatory taxes on electronic commerce."[84]

Although the moratorium does not directly apply to existing state and local sales-tax legislation, its broader implications for e-commerce and sales-tax nexus are extensive.[85] The ITFA's definition of "discriminatory taxes" imposes two restrictions on sales and use taxes. First, a tax is considered discriminatory if "the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation."[86] Second, a tax is considered discriminatory if an Internet service provider

80. *Id.* at 318. Almost twenty years later, the legislature has yet to act on the Court's invitation.

81. For an overview and description of the Internet's development, see Barry M. Leiner et al., *Brief History of the Internet*, http://www.isoc.org/internet/history/brief.shtml (accessed Jan. 29, 2013).

82. *See generally* George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* (Aspen Publishers 2011) (providing a comprehensive overview of the legal ramifications of the Internet and arguing for the use of existing legal frameworks rather than major legislative and regulatory changes in coping with legal issues related to the Internet).

83. Thomas Griffith, *The History, Purpose, and Procedures of the Advisory Commission on Electronic Commerce*, 2000 BYU L. Rev. 155, 157 (2000).

84. Pub. L. No. 105-277, § 1101(a)(1)–(2), 112 Stat. 2681.

85. *See generally* Erik Fox, *The Quill Is Mightier than the Sword: The Federal Government's Stranglehold on State and Local Revenue*, 25 T. Jefferson L. Rev. 469 (2003) (describing the ITFA's effects on e-commerce and state and local budgets).

86. Pub. L. No. 105-277, § 1104(2)(B)(i), 112 Stat. 2681.

> is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of—(I) the display of a remote seller's information or content on the out-of-State computer server of [an Internet service provider]; or (II) the processing of orders through the out-of-State computer server of [an Internet service provider].[87]

Though these limitations are described as limitations on "discriminatory taxes," they are essentially limitations on nexus.[88]

The ITFA also mandated the creation of the Advisory Commission on Electronic Commerce (Commission) to "conduct a thorough study of Federal, State and local, and international taxation and tariff treatment of transactions using the Internet and Internet access and other comparable intrastate, interstate[,] or international sales activities."[89] The Commission consisted of nineteen individuals, including three representatives from the executive branch, eight representatives from state and local governments, and eight representatives from the private sector.[90] With such a wide variety of interests, it is unsurprising that the Commission was unable to muster the required supermajority of two-thirds of the members to make any official recommendations to Congress.[91] The Commission did, however, issue its unofficial findings, which recommended extending the 1998 moratorium and concluded that states should seek to simplify and unify their systems of taxation with the help of the National Conference of Commissioners on Uniform State Laws (NCCUSL).[92]

Unfortunately, the ITFA has served merely as a stall tactic and has done little to resolve any problems with regard to Internet sales.[93] Since its original expiration in 2003, the moratorium has been extended three times, with the latest extension set to

87. *Id.* at § 1104(2)(B)(ii).

88. Hellerstein & Hellerstein, *supra* n. 35, at ¶ 19.02(3)(d).

89. 47 U.S.C. § 151 n. 1102(g)(1).

90. Griffith, *supra* n. 83, at 158–160.

91. David T. Brown, *No Easy Solutions in the Sales Tax on E-Commerce Debate: Lessons from the Advisory Commission on Electronic Commerce Report to Congress*, 27 J. Corp. L. 117, 123 (2001).

92. *Id.* at 123–124. See *infra* Part III(B) for a discussion of the states' attempt at simplifying and unifying their sales-tax systems.

93. *See* Fallaw, *supra* n. 20, at 175–186 (discussing state and local governments' fears that the ITFA could become permanent and arguing that after three years of freedom from taxation, Internet business are unlikely to come to an agreement with the states to collect sales tax).

expire on November 1, 2014.[94] These repeated extensions ignore Congress' original concern that taxation of the Internet would substantially harm the development of e-commerce.[95] E-commerce is no longer an emerging industry that requires protection—on the contrary, e-commerce continues to grow.[96] Although brick-and-mortar stores still vastly outsell Internet stores, e-commerce amounts to four percent of total retail sales.[97] Thus, the moratorium is no longer warranted.

III. ROUTING INTERNET SALES THROUGH A DIFFERENT NETWORK: THE STATES RESPOND TO QUILL

A majority of the existing laws on sales and use taxes to date strongly disfavor mandatory sales-tax collection for Internet retailers.[98] Consequently, there have been several attempts at both the state and national level to tax Internet sales since the escalation of Internet use in the 1990s.[99] Part III(A) discusses the various approaches states have taken to bypass *Quill*'s physical-presence requirement and tax Internet sales within the current legal framework. Part III(B) details the states' collective attempts to change the current legal framework and respond to the Supreme Court's calling in *Quill* for some type of action at the congressional level.

A. State "Amazon" Taxes

Eager to fill state coffers with revenue from Internet sales, several state legislatures have enacted controversial laws, commonly referred to as "Amazon Laws" or "Amazon Taxes" because of their much-publicized opposition by the e-tailer giant.[100] The

94. Pub. L. No. 110-108, 121 Stat. 1024 (2007); Pub. L. No. 108-435, 118 Stat. 2615 (2004); Pub. L. No. 107-75, 115 Stat. 703 (2001). Senator John Ensign has introduced a bill that would make the moratorium permanent. Sen. 135, 112th Cong. (Jan. 25, 2011) (as introduced).

95. *Supra* n. 83 and accompanying text.

96. *See* U.S. Census Bureau, *E-Stats* 1, http://www.census.gov/econ/estats/2010/2010reportfinal.pdf (May 10, 2012) (reporting a 16.3% increase in e-commerce in 2010).

97. *Id.*; U.S. Dep't of Com., *supra* n. 14 (reporting a projected 15.4% increase in Internet sales for the first quarter of 2012).

98. *See* Leiner, *supra* n. 81 (providing a history of the Internet).

99. *Id.*

100. Zelda Ferguson, *Is the Tax Holiday Over for Online Sales?* 63 Tax Law. 1279, 1279 (2010); J. Robert Schlimgen, *Virtual World, Real Taxes: A Sales and Use Tax Adventure*

states have employed two main approaches, although there have been slight variations of each approach. Part III(A)(1) discusses an approach that relies on an e-tailer's in-state marketing affiliates to establish the physical presence required by *Quill*. Part III(A)(2) discusses a unique approach that requires the e-tailer to disclose sales information to the state but ultimately makes the state responsible for collecting the tax.

1. Marketing-Affiliate Approach

Several states have attempted to satisfy *Quill*'s physical-presence requirement by relying on an e-tailer's in-state marketing affiliates to establish a nexus with the e-tailer. Marketing affiliates are entities or individuals that use Internet marketing methods to direct online traffic to various Internet websites, usually by way of a link from a different website.[101] Typically, if the Internet user clicks on a link on the marketing affiliate's webpage and purchases merchandise from the affiliated e-tailer, the marketing affiliate responsible for the link will receive a percentage of the sale as a commission.[102] Under the marketing-affiliate approach, if an e-tailer has any marketing affiliates with a physical presence in the taxing state, the e-tailer is presumed to have a physical and taxable presence in that state.[103]

In 2008, New York became the first state to implement the marketing-affiliate approach.[104] Under the New York law, remote retailers are presumed to have a taxable presence in the state if

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through Second Life Starring Dwight Schrute, 11 Minn. J.L. Sci. & Tech. 877, 887 (2010); Kenneth Corbin, *'Amazon Tax' Lands in New York*, http://www.internetnews.com/government/article.php/3740056 (Apr. 10, 2008). In the litigation stemming from the New York law, Amazon has even claimed a violation of the Equal Protection Clause, arguing that the law is targeted at Amazon. *Amazon.com, LLC v. N.Y. St. Dep't of Tax'n & Fin.*, 877 N.Y.S.2d 842, 846 (2009) [hereinafter *Amazon 1*].

101. Roger Colaizzi, *Recent Trends in Trademark Protection: Leading Lawyers on Analyzing Recent Decisions and Adapting to Evolutions in Trademark Law: A Discussion of Internet-Related Trademark Cases and Trademark Fraud*, 2009 WL 3358961 at *6 (Oct. 2009).

102. *See e.g. Amazon.com, LLC v. N.Y. St. Dep't of Tax'n & Fin.*, 913 N.Y.S.2d 129, 134 (2010) [hereinafter *Amazon 2*] (describing how Amazon's marketing affiliates, called the "Associates," receive compensation for their marketing efforts).

103. *E.g.* N.Y. Tax Law § 1101(b)(8)(vi) (McKinney 2008); N.C. Gen. Stat. § 105-164.8(b)(3) (Lexis 2007); R.I. Gen. Laws § 44-18-15(a)(2) (Lexis 1956).

104. Saul Hansell, *Let the Tax Collection Begin*, http://bits.blogs.nytimes.com/2008/06/02/let-the-tax-collection-begin (June 2, 2008, 4:02 p.m.).

they have any agreements with in-state marketing affiliates resulting in sales of over $10,000 per year.[105] This presumption is rebuttable by proof that the affiliate "did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States [C]onstitution during the four quarterly periods in question."[106] After the passage of the New York law, North Carolina, Rhode Island, and several other states quickly followed suit.[107]

Predictably, the marketing-affiliate approach has faced heavy opposition from e-tailers like Amazon and Overstock. In New York, Amazon sought a declaratory judgment holding that the law was a violation of the Commerce, Due Process, and Equal Protection Clauses.[108] The trial court upheld the tax, and the appellate division affirmed in part and remanded in part for further discovery.[109] In granting the State's motion to dismiss, the trial court rejected Amazon's argument that the marketing affiliates were mere advertisers on behalf of Amazon and likened the marketing affiliates to independent contractors, which have been held to establish physical presence.[110] The case is slowly working its way up to the appellate courts and may even reach the Supreme Court if it is not resolved at the state level.

Amazon and Overstock have simply severed relations with their marketing affiliates in states that have adopted the marketing-affiliate approach, so that they remain free from the tax-collection obligation in those states.[111] The marketing affiliates, in turn, are unhappy about losing their business from these major retailers.[112] This problem has prompted a response from brick-and-mortar stores such as Wal-Mart and Target, that, as part of

105. N.Y. Tax Law § 1101(b)(8)(vi).

106. *Id*.

107. *See e.g.* N.C. Gen. Stat. § 105-164.8; R.I. Gen. Laws § 44-18-15.

108. *Amazon 1*, 877 N.Y.S.2d at 846. Recall that under *Quill*, the retailer need only have some minimum contacts with the taxing state to satisfy the Due Process Clause. *See supra* n. 73 and accompanying text. Amazon's due process challenge was based instead on the presumption created by the statute. *Amazon 1*, 877 N.Y.S.2d at 849–850. The trial court readily rejected Amazon's equal protection argument that the law specifically targeted Amazon. *Id.* at 851.

109. *Id.*; *Amazon 2*, 913 N.Y.S.2d at 145–146.

110. *Amazon 1*, 877 N.Y.S.2d at 847 (citing *Scripto*, 362 U.S. at 209).

111. Thad Rueter, *As Part of Tax Fight, Overstock to Reward Customers in States Where It Cut Off Affiliates*, http://www.internetretailer.com/2011/04/04/part-tax-fight-overstock-reward-top-spending-customers (Apr. 4, 2011).

112. *Id.*

their campaign against Amazon, have stepped in to assist marketing affiliates affected by these developments.[113]

2. Enforcing the Use Tax

At least one state has implemented a different approach to the Internet sales-tax problem. Instead of requiring remote retailers to collect state sales tax, the Colorado legislature has passed legislation that is intended to enforce the "voluntary" use tax already in place.[114] In other words, the Colorado Department of Revenue will collect the tax directly from the Colorado purchaser, rather than from the remote retailer at the point of sale.[115] The Colorado law requires a remote retailer to provide a notice to each of its Colorado customers that their purchase is subject to Colorado's use tax and requires the retailer to provide an annual statement to the Department of Revenue reporting its Colorado sales and customer information.[116] Because the law does not force the retailer to collect sales tax, it avoids *Quill*'s physical-presence requirement and the Commerce Clause nexus rules altogether.

Or does it? Colorado's Internet sales-tax law has not fared as well in the courts as New York's marketing-affiliate law.[117] On July 23, 2010, the Direct Marketing Association (DMA)[118] filed an amended complaint against Colorado in the United States District Court for the District of Colorado to halt enforcement of the tax, alleging violations of the Commerce, Due Process, Free

113. Stu Woo, WSJ.com: Digits, *Walmart's Pitch for Amazon Affiliates*, http://blogs.wsj.com/digits/2011/03/02/walmarts-pitch-for-amazon-affiliates (Mar. 2, 2011, 7:19 p.m.).

114. Colo. Rev. Stat. § 39-21-112 (2010).

115. *Id.*

116. *Id.* The Colorado approach parallels Congress' approach to interstate cigarette sales in the Jenkins Act. *See* 15 U.S.C. § 376 (2006) (stating, "Any person who sells, transfers, or ships for profit cigarettes or smokeless tobacco in interstate commerce . . . shall . . . file with the tobacco tax administrator of the State into which such shipment is made, a memorandum . . . includ[ing] the name and address of the person to whom the shipment was made"); *see generally* Jonathan I. Sirois, *Remote Vendor Cigarette Sales, Tribal Sovereignty, and the Jenkins Act: Can I Get a Remedy?* 42 Duq. L. Rev. 27 (2003) (outlining the history of enforcement problems of the Jenkins Act).

117. Perhaps this is because the case was filed in federal court, whereas the New York law was challenged in state court. Also, the type of tax imposed by Colorado is significantly different than the New York tax.

118. DMA "is the world's largest trade association dedicated to advancing and protecting responsible data-driven marketing." Direct Mktg. Ass'n, *What Is the Direct Marketing Association?* http://www.the-dma.org/aboutdma/whatisthedma.shtml (accessed Jan. 29, 2013).

Speech, and Privacy Clauses of the United States Constitution.[119] On January 26, 2011, the court granted DMA's motion for a preliminary injunction, finding that DMA had a substantial likelihood of success on its Commerce Clause challenges.[120] DMA's request for relief on the merits is pending.

B. Streamlined Sales and Use Tax Agreement

In addition to the individual state initiatives, there has been a more promising attempt at the national level to require sales-tax collection by remote retailers. In 1999, the National Governor's Association (NGA) and the National Conference of State Legislatures (NCSL) joined efforts to create the Streamlined Sales and Use Tax Agreement (SSUTA), a multi-state agreement designed to "simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance."[121] Although similar in purpose to the type of cooperative effort envisioned by the Advisory Commission on Electronic Commerce,[122] the SSUTA was not intended as a response to the Commission's findings and in fact was initiated several months before the Commission was created.[123] A major goal of the states in promulgating the SSUTA is to encourage remote retailers to collect state sales tax.[124] In an effort to bring the states and e-retailers like Amazon closer together in the

119. First Amend. Compl., *Direct Mktg. Ass'n v. Huber*, 2010 WL 6646489 (D. Colo. July 23, 2010) (No. 10CV01546).

120. Or. Granting Mot. for Prelim. Inj., *Direct Mktg. Ass'n v. Huber*, 2011 WL 250556 (D. Colo. Jan. 26, 2011) (Civil No. 10–cv–01546–REB–CBS). For a more detailed discussion of Colorado's enforcement scheme and the DMA case, see Stephen Kranz, CLE Presentation, *Challenging HB 1193: Colorado's Non-Collecting Retailer Tax Collection and Reporting Scheme* (ABA 2010 Jt. Fall CLE Meeting, Toronto, Ontario, Can. Sept. 23, 2010) (transcript available at WL 2010 ABATAX-CLE 0923106).

121. Streamlined Sales and Use Tax Agreement § 102 (amended Dec. 13, 2010) (available at http://www.streamlinedsalestax.org/index.php?page=modules) [hereinafter *Streamlined Agreement*]; *see generally* Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement ("SSUTA")*, 40 U.C. Davis L. Rev. 1381 (2007) (providing a comprehensive overview of the SSUTA).

122. *See supra* n. 92 and accompanying text. Several leaders of the SSUTA are also members of the Advisory Commission on Electronic Commerce that was created under the ITFA. Streamlined Sales Tax Governing Bd., Inc., *Frequently Asked Questions*, http://www.streamlinedsalestax.org/index.php?page=faqs (accessed Jan. 29, 2013) [hereinafter *Frequently Asked Questions*].

123. Brown, *supra* n. 91, at 124–125.

124. *Frequently Asked Questions*, *supra* n. 122.

Internet sales-tax debate, forty-four states have become supporters of the SSUTA, and twenty-four states have passed conforming legislation.[125]

The Main Street Fairness Act, introduced by Representative William Delahunt in July 2010[126] and by Senator Dick Durbin in July 2011,[127] would grant congressional approval of the SSUTA, which would eliminate any Commerce Clause issues.[128] In the meantime, the states that have passed conforming legislation hope that a uniform system of state sales taxation will encourage remote retailers to voluntarily collect sales tax in those states that have adopted the uniform provisions.[129] And their efforts seem to be working. Surprisingly, many e-tailers, including Amazon, are supportive of the SSUTA,[130] but other e-tailers, like eBay, want to avoid sales- and use-tax collection at all costs.[131]

The SSUTA is a solution that appeals to both state governments and remote retailers. By enforcing a uniform system of taxation, the SSUTA addresses remote retailers' concerns about complying with the wide variety of complex state sales-tax regimes. The appeal for state governments is the ability to add Internet sales taxes to their dwindling coffers. Unfortunately,

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125. *Id.*; *see also* Streamlined Sales Tax Governing Bd., Inc., Map, *Streamlined State Status 08-01-11*, http://www.streamlinedsalestax.org/uploads/images/Streamline%20Map%201_1_11.jpg (Aug. 1, 2011) (showing status of SSUTA support of states in a color-coded map).

126. H.R. 5660, 111th Cong. (July 1, 2010).

127. Sen. 1452, 112th Cong. (July 29, 2011). It is worth mentioning that there is also legislation pending in both houses of Congress called "The Fair Tax Act," which proposes to abolish the Internal Revenue Service and all current federal taxes, such as the income, employment, and estate and gift taxes, in favor of a national sales tax on the use of taxable property in the United States. Sen. 13, 112th Cong. (Jan. 25, 2011); H.R. 25, 112th Cong. (Jan. 5, 2011). Though the Fair Tax Act is related to the Internet sales-tax problem, it does not address how or whether state and local sales and use taxes would be affected by the national sales tax. *Id.*

128. *See S. Pac. Co. v. Ariz.*, 325 U.S. 761, 769 (1945) (recognizing that Congress "may . . . permit the states to regulate the commerce in a manner which would otherwise not be permissible").

129. *Frequently Asked Questions*, *supra* n. 122.

130. Karen Kroll, Big Fat Finance Blog, *Bill to Tax Internet Sales Gains Amazon's Support*, http://bigfatfinanceblog.com/2011/08/05/bill-to-tax-internet-sales-gains-amazons-support (Aug. 5, 2011).

131. *Id.* In fact, eBay is supporting House Resolution 95, entitled "Supporting the preservation of Internet entrepreneurs and small businesses." *Id.* The resolution urges that "Congress should not enact any legislation that would grant State governments the authority to impose any new burdensome or unfair tax collecting requirements on small online businesses and entrepreneurs." H.R. 95, 112th Cong. (Feb. 16, 2011).

however, the SSUTA has now been in existence for over a decade with little to show for its efforts.

IV. CONNECTIVITY ISSUES: CONSTITUTIONAL AND PRACTICAL PROBLEMS WITH "AMAZON LAWS" AND THE STREAMLINED SALES AND USE TAX AGREEMENT

A. State Initiatives: Action Is Needed at the Federal Level

Though the states' individual attempts to tax Internet sales in a tough economy have been admirable, their approaches have significant constitutional and practical problems. Both New York's marketing-affiliate approach and Colorado's use-tax-enforcement approach violate the Dormant Commerce Clause because they do not comport with *Quill*'s physical-presence requirement. Colorado's approach requiring the retailer to divulge customer information also implicates significant privacy concerns. Moreover, both approaches have practical problems that lessen their effectiveness as tax-collection tools.

The obvious problem with the individual state attempts to tax Internet sales is that they are no more constitutional under the Commerce Clause than the tax at issue in *Quill*. Under the marketing-affiliate approach, although the retailer's marketing affiliates may have a physical presence in the taxing state, such a presence is not sufficient to establish the retailer's physical presence. Though the Supreme Court has recognized a retailer's physical presence when the retailer has employees or agents within the taxing state,[132] the Court has refused to recognize a substantial nexus when the retailer's only connection with the state is through advertising.[133] Marketing affiliates whose only connection to the retailer is through a link on a webpage fall more properly in the advertising category rather than the agent or

132. *See e.g. Gen. Trading Co. v. St. Tax Comm'n of Iowa*, 322 U.S. 335, 337–338 (1944) (finding that a retail company maintained a place of business in the taxing state when property was sent there because of orders solicited by traveling salesman sent to the taxing state); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62, 64–66 (1939) (acknowledging the physical presence of an Illinois corporation in California when two general agents are assigned separate sections of the state and maintain offices there for business purposes).

133. *Miller Bros. v. Md.*, 347 U.S. 340, 346–347 (1954).

employee category.[134] This is because a link or banner on a webpage does not indicate that the marketing affiliate is actively soliciting sales on behalf of the retailer; rather, the link serves as an advertisement for the retailer's website.

Furthermore, even in cases that have sustained a state's reliance on an agent's physical presence within the taxing state to establish the remote retailer's physical presence, the agent's activities were essential to the retailer's ability to conduct business in the state.[135] Internet marketing affiliates are much less involved in the sales process than the agents held to establish physical presence in previous cases and are not essential to a retailer's ability to do business within any taxing state.[136] Amazon's severance of ties with its marketing affiliates in states like New York proves that the marketing affiliates are not essential to Amazon's ability to conduct a successful business.

Colorado's use-tax-reporting law is even less likely than the marketing-affiliate approach to withstand scrutiny under the Commerce Clause because it does not require or even purport to require the remote retailer's physical presence. Instead, the law bypasses *Quill*'s physical-presence requirement by placing the responsibility to collect the sales tax on the state. But requiring the retailer to submit detailed customer information at the end of the year and provide a notice on each item purchased from Colorado residents is no less a burden on interstate commerce than requiring actual sales-tax collection.[137]

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134. *See* Daniel Tyler Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. Rev. 1423, 1438–1440 (2010) (arguing that the passive role Amazon's marketing affiliates play in soliciting Amazon sales renders them more like advertisers than independent contractors).

135. *Id.* at 1440–1443 (discussing *Scripto*, 362 U.S. at 207–213 and *Orvis Co. v. Tax Apps. Trib. of N.Y.*, 654 N.E.2d 954, 962 (N.Y. 1995)).

136. *See id.* (arguing that the independent contractors in *Scripto* and *Orvis* are different from Amazon's marketing affiliates because they were necessary for the companies maintaining a market in the taxing state).

137. It is unclear whether the law should be analyzed under *Complete Auto*'s four-part test for state taxes, or whether it should be analyzed using the *Pike* balancing test the Court has developed for state actions that do not involve taxation and do not facially discriminate against interstate commerce. *See* Scott W. Gaylord & Andrew J. Haile, *Constitutional Threats in the E-Commerce Jungle: First Amendment and Dormant Commerce Clause Limits on Amazon Laws and Use Tax Reporting Statutes*, 89 N.C. L. Rev. 2011, 2076–2084 (2011) (arguing that in *Direct Mktg. Ass'n v. Huber* (discussed *supra* n. 120 and accompanying text), the Colorado District Court should have employed the *Pike* balancing test rather than *Quill*'s physical-presence test because the Colorado law merely

Of even greater concern with Colorado's approach, at least for consumers, is that the law would require disclosure of each Colorado consumer's personal information, including the content of the purchases he or she made.[138] Such disclosure would constitute an extreme invasion of privacy by the State and may even have Fourth Amendment unreasonable search and seizure implications.[139] Additionally, as the court recognized in Amazon's case against the North Carolina law, the First Amendment protects a buyer's purchase of materials containing expressive content, such as books and music.[140] As DMA argued in its motion for a preliminary injunction, even if such invasions of privacy were found to be constitutional, requiring customer disclosure would result in DMA and other retailers losing their online customers.[141]

In addition to constitutional problems, both approaches have practical problems. As the New York appellate court pointed out in *Amazon 2*, the marketing-affiliate approach's effect on state revenue is minimal—the taxing state can only tax the sales made using the marketing affiliate's link and for which the marketing affiliate receives a commission.[142] The marketing-affiliate approach does not give the state the ability to tax *all* of a remote retailer's sales within the state.[143] Furthermore, the presumption

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requires remote retailers to report customer information and does not impose a tax-collection obligation).

138. Many people buy embarrassing items online specifically to avoid this kind of intrusion. Marios Koufaris, *Applying the Technology Acceptance Model and Flow Theory to Online Consumer Behavior*, 13 Info. Sys. Research 205, 210 (2002) (available at http://ec.iem.cyut.edu.tw/drupal/sites/default/files/Jonghak%20Sun%20Logistic%20regression.pdf) (positing that the increased privacy of Internet purchases encourages embarrassing online shopping habits).

139. Several courts have refused to uphold an online consumer's privacy interests in purchase information and have disregarded Fourth Amendment unreasonable search and seizure claims when weighed against the state's interest in tax collection, however. *See e.g. Taylor v. United States*, 106 F.3d 833, 835–837 (8th Cir. 1997) (sustaining the IRS' disclosure of a taxpayer's financial information to the state for purposes of state income-tax collection).

140. *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1167–1169 (W.D. Wash. 2010). Recall that unlike Colorado, North Carolina adopted a marketing-affiliate approach that did not require the retailer to collect and remit customer information. *Supra* n. 107 and accompanying text. Rather, the case arose when North Carolina sought customer information in connection with an audit of Amazon to ensure compliance with its new law. *Lay*, 758 F. Supp. 2d at 1159–1160.

141. Pl.'s Mot. for Prelim. Inj. & Inc. Memo. of Law, *Direct Mktg. Ass'n v. Huber*, 2010 WL 6646490 at **4, 14, 27 (D. Colo. Aug. 13, 2010) (No. 10CV01546).

142. 913 N.Y.S.2d at 138.

143. *Id.* at 138–139.

of taxability created by the law is easily rebuttable by proof that the affiliate did not engage in any activities on behalf of the retailer other than placing a link to the retailer's website on the affiliate's website.[144] Such proof may be in the form of a contract provision that prohibits the affiliate from engaging in solicitation activities and an annual certification by the affiliate that the affiliate did not engage in solicitation activities on behalf of the retailer.[145]

Like the marketing-affiliate approach, Colorado's law has practical problems as well. Although Colorado's approach seeks to ease the administrative and financial burdens associated with collecting and remitting sales tax in a variety of jurisdictions, Colorado's approach is actually more costly for all parties involved. As previously noted, collecting customers' sales and personal information would be no less financially burdensome for retailers than collecting the sales tax.[146] In addition, the state would have to spend state resources to hunt down each individual taxpayer and seek payment of that person's tax obligations. Any money eventually received by the state from the individual taxpayer would likely go to paying the costs of this collection regime.

Another problem with both approaches, and really with any approach, whether state or federal, is enforcement—it is entirely up to the retailer to decide what information to provide to the state.[147] To find out whether retailers are complying with the

144. N.Y. Dep't of Tax'n & Fin., Off. of Tax Policy Analysis, Taxpayer Guidance Div., TSB-M-08(3)S, *New Presumption Applicable to Definition of Sales Tax Vendor* (May 8, 2008) (available at http://www.tax.ny.gov/pdf/memos/sales/m08_3s.pdf).

145. N.Y. Dep't of Tax'n & Fin., Off. of Tax Policy Analysis, Taxpayer Guidance Div., TSB-M-08(3.1)S, *Additional Information on How Sellers May Rebut the New Presumption Applicable to the Definition of Sales Tax Vendor As Described in TSB-M-08(3)S* (June 30, 2008) (available at http://www.tax.ny.gov/pdf/memos/sales/m08_3_1s.pdf).

146. Actually, collecting customers' information and providing notices to customers about their tax obligations might even be more burdensome than collecting sales tax because there is software available that can compute a retailer's sales-tax liability in a variety of jurisdictions. *See* Robert D. Plattner et al., *A New Way Forward for Remote Vendor Sales Tax Collection*, 55 State Tax Notes 187, 188–189 (2010) (available at http://www.tax.ny.gov/pdf/stats/policy_special/a_new_way_forward_for_remote_vendor_sales_tax_collection.pdf) (discussing the availability of electronic sources to determine tax rates in several states). Under Colorado's approach, retailers would have to create their own software or procedures to ensure compliance with the statute's informational requirements. *Id.*

147. This enforcement difficulty is also a major flaw of the Jenkins Act. *See* Christopher Banthin, *Cheap Smokes: State and Federal Responses to Tobacco Tax Evasion over the*

sales-tax laws, the state would have to audit each retailer to find out if it had any sales within the state. Though this would still be a problem with a federal approach, retailers would be more likely to comply voluntarily with a federal approach because the law in the Internet sales-tax area would be settled. Currently, remote retailers at least have an argument that they are not subject to the sales tax, and as long as they have an argument, they are unlikely to pay the tax voluntarily.

Although the marketing-affiliate and enforcement approaches are problematic and may very likely be found unconstitutional, they at least send the message to Congress that taxation of Internet sales is a problem that needs to be addressed and can be more properly addressed at the federal level. Until Congress acts or the Supreme Court reaches the issue again,[148] states are left to deal with Internet sales tax in their own different ways.

B. Problems with a Streamlined Approach

For a variety of reasons, the SSUTA is more likely to succeed than the individual state approaches. The SSUTA has the support of a large portion of both retailers and states and is much less likely to burden interstate commerce if approved by Congress. Support for the SSUTA can be described as lukewarm at best, however, and the SSUTA has its own constitutional and practical problems.

It is important to note at the outset that because Congress has not yet approved the SSUTA, it suffers from the same deficiencies as the individual state initiatives—it violates the Commerce Clause.[149] States cannot constitutionally require

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Internet, 14 Health Matrix 325, 340–341 (2004) (discussing a General Accountability Office report detailing the various enforcement problems of the Jenkins Act).

148. The Court seems content with its formulation of the substantial-nexus standard announced in *Quill*, as it has denied certiorari in several Internet sales-tax cases. *E.g. Lanco, Inc. v. Dir., Div. of Tax'n*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007); *MBNA Am. Bank v. Tax Comm'r, St. of W. Va.*, 640 S.E.2d 226 (W.Va. 2006), *cert. denied*, 551 U.S. 1141 (2007). Perhaps *Quill* is ripe for review, however, given the fact that its author, Justice Stevens, retired from the Court in 2010. *See* Declan McCullagh, *Justice Stevens Leaves Mark on Internet Law*, http://news.cnet.com/8301-13578_3-20002145-38.html (Apr. 9, 2010) (discussing Justice Stevens' impact on the Internet sales-tax debate).

149. *See* Gregory R. Evans, *Separate but Taxed: A Rejection of the Streamlined Sales Tax Project through a Commerce Clause and Federalist Analysis*, 56 Am. U. L. Rev. 421, 440–448 (2006) (explaining that if challenged by a remote retailer, a court would likely

remote retailers to collect sales and use taxes under the SSUTA.[150] Even if the Mainstreet Fairness Act were passed, eliminating any Commerce Clause issues, each instance of sales tax on Internet sales would still need to comport with the Due Process minimum-contacts requirement.[151] It is conceivable that a vendor who has economic nexus sufficient to satisfy the SSUTA may not have the minimum contacts required by the Due Process Clause.[152] Another potential constitutional challenge to the SSUTA is that it violates the Compact Clause because Congress has not yet granted its approval.[153]

The SSUTA may also present potential constitutional issues under several state constitutions. Under the SSUTA, only the state has the power to administer sales and use taxes.[154] This creates problems for states with local taxing jurisdictions because local governments typically receive their granted powers from

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find that the SSUTA violates the Commerce Clause under the *Complete Auto* substantial-nexus analysis).

150. Nonetheless, e-tailers like Amazon are voluntarily collecting sales tax in states that have enacted conforming legislation. *See* David Grogan, *Amazon.com Begins to Collect Sales Tax in Kansas*, http://news.bookweb.org/news/amazoncom-begins-collect-sales-tax-kansas (Feb. 11, 2004, 12:00 a.m.) (reporting that Kansas' passage of SSUTA-conforming legislation prompted Amazon to begin voluntarily collecting sales tax in the state, but warning that Amazon does not intend to collect sales tax in other states that pass conforming legislation).

151. *See* Gregory T. Armstrong, *Physical Presence vs. Virtual Presence: The Cyberspace Challenge to* Quill *and the Streamlined Sales & Use Tax Act*, 9 St. & Loc. Tax Law. 59, 81–82 (2004) (explaining that "*Quill* did not conclude that the Due Process Clause was irrelevant to nexus questions").

152. *Id.* The Court in *Quill* found that the retailer had sufficient nexus under the Due Process Clause because it had "purposefully directed its activities at North Dakota residents." 504 U.S. at 308. A mere advertisement on an Internet website may not be considered to be "purposefully directed" at Internet users. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (noting that "so far as [the court is] aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state").

153. U.S. Const. art. I, § 10, cl. 3 (stating, "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . unless actually invaded, or in such imminent Danger as will not admit of delay"). As sales- and use-tax scholar Walter Hellerstein notes, however, the Supreme Court has explained that congressional consent to a multi-state compact is only required if it "is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Hellerstein & Hellerstein, *supra* n. 35, at ¶ 19A.09[1] (quoting *Va. v. Tenn.*, 148 U.S. 503, 519 (1893)). In a more recent case, however, the Court stated that "States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests." *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

154. Streamlined Agreement, *supra* n. 121, at § 301.

their state's constitution.[155] Adopting the SSUTA would therefore require an amendment to the state's constitution.[156] Moreover, many state constitutions prohibit the state legislature from delegating the power to tax.[157] Adopting the SSUTA's conforming legislation and limiting the state's taxing ability may be considered an unconstitutional delegation of the taxing power.

In addition to its constitutional issues, the SSUTA would produce significant practical problems. In order to become a member of the SSUTA and take advantage of Internet sales tax, a state must amend its system of taxation to conform to the specific, detailed requirements of the SSUTA, a task some states are not willing to undertake.[158] The SSUTA's one-size-fits-all rules and regulations may not be well suited for every state.[159] Furthermore, the Internet-sales phenomenon has hit some states harder than others. For states, like New York, that already have high compliance rates, sales tax is not much of an issue.[160]

Additionally, as a matter of federalism, states should be able to design their taxation systems in a way that best suits their respective needs.[161] Arguably, requiring states to adopt a uniform system of taxation impedes on well-entrenched states' rights. Sales- and use-tax legislation has traditionally been an area of state law, and some states may see the SSUTA and the Main-

155. Fox, *supra* n. 85, at 488–489. The SSUTA does provide for local sales and use taxation, but ensures that the state administers such taxes. *See e.g. Streamlined Agreement*, *supra* n. 121, at §§ 301–302 (reserving authority to conduct audits for the state and requiring uniform tax bases among state and local governments).

156. Fox, *supra* n. 85, at 488–489.

157. Plattner et al., *supra* n. 146, at 192.

158. *See e.g.* Richard Thompson Ainsworth, *Automated Sales Suppression (Zappers): A Real Threat to Pennsylvania's Sales and Use Tax*, 8 Pitt. Tax Rev. 29, 32 (2010) (discussing the numerous changes Pennsylvania would have to make to its current tax system in order to become a member of the SSUTA); Plattner et al., *supra* n. 146, at 191 (discussing the reasons New York has not joined the SSUTA); *see also* Samantha L. Cowne, *The Streamlined Sales and Use Tax Agreement: How Entrepreneurs Can Plan for the Uncertain Future of E-Commerce Sales Taxation*, 4 Entrep. Bus. L.J. 129, 129 (2010) (suggesting that "'streamlining' is not so streamlined").

159. Plattner et al., *supra* n. 146, at 191. For example, New York relies more heavily on state income taxes than state sales tax, which accounts for only twenty percent of the state's revenue. *Id.* By contrast, in Florida, Tennessee, and Washington, the state sales tax accounts for more than sixty percent of the state revenue. Nat'l Conf of St. Legis., *Which States Rely on Which Tax*, http://www.ncsl.org/documents/fiscal/WhichStatesRelyonWhichTax.pdf (2007).

160. Plattner et al., *supra* n. 146, at 191.

161. *Id.* at 192.

street Fairness Act as unwarranted encroachments on this tradition.[162]

V. HIGH-SPEED ACCESS TO INTERNET SALES: FIGHTING TAX EVASION WHILE PRESERVING STATE SOVEREIGNTY WITH A SIMPLER SOLUTION

The constitutional and practical problems with the proposed solutions to the Internet sales-tax question to date suggest that a new approach to the problem is warranted. The state initiatives, though admirable, are ineffective and are not likely to withstand constitutional scrutiny. Additionally, in the SSUTA's attempt to simplify the sales- and use-tax area, its requirements have become too onerous for many states to bear. To preserve state sovereignty and overcome the constitutional issues associated with an individual-state approach, a viable solution to the Internet-sales-tax problem requires a blending of both the state approaches and the SSUTA. Specifically, the states should push for congressional consent to state autonomy in the area of Internet-sales taxation through an economic-nexus approach.

First, it is clear from *Quill*, the ITFA, the individual state attempts to tax Internet sales, and the SSUTA that any solution to the problem must come from the federal level. Although the SSUTA is attempting to satisfy this condition through congressional consent, such consent is not likely given the SSUTA's decade-long history of failure. The problem with the SSUTA is that it goes further than necessary to address the issue at hand.[163] Instead of requiring states to completely overhaul their tax systems under the SSUTA, this Article proposes that Congress enact only that part of the SSUTA that most states want—a requirement for remote retailers with an economic presence with a state to collect and remit state sales tax on all remote purchases.[164]

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162. *See supra* pt. II(A) (providing a history of the sales and uses taxes as they developed in the United States).

163. Plattner et al., *supra* n. 146, at 192.

164. This would be essentially the same economic-presence test rejected by the Court in *Quill*. 504 U.S. at 304. Of course, if Congress enacted the test it would be permissible as a regulation of interstate commerce. *S. Pac. Co.*, 325 U.S. at 769.

Under this proposal, in order to establish this economic nexus, the remote retailer would have to meet two threshold sales amounts before it would be required to collect sales tax in any state. First, the retailer would not be required to collect sales tax in any state if it did not have a total of $500,000 or more in annual gross national remote sales.[165] If the retailer meets this first threshold, it still would not be required to collect sales tax in any state where it had less than ten percent of its annual gross national remote sales.[166] Both thresholds are necessary to ensure that smaller retailers would not be burdened with the administrative costs involved in collecting sales tax.[167] The first threshold ensures that a retailer or individual that sold only a small amount of total goods would not be required to collect any state sales tax, while the second threshold establishes a retailer's economic nexus with a particular taxing state.[168]

Although under this approach larger remote retailers could potentially be subject to substantial administrative costs of compliance with the various state tax systems, the states' interest in tailoring their tax systems to their own individual needs outweighs these administrative costs.[169] For example, states that have no income tax rely more heavily on sales taxes than states

165. This $500,000 figure comes from the SSUTA's proposed threshold for its "small seller exemption" found in Section 610 of the Agreement. Streamlined Agreement, *supra* n. 121, at § 610; Streamlined Sales Tax Governing Bd., Inc., *Draft #2: Proposed Rule for Implementing Small Seller Exception*, http://www.streamlinedsalestax.org/uploads/downloads/Rule%20Amendment/2010/RP10012_Smal_%20Seller_rule.pdf (Oct. 27, 2010). Under the SSUTA rule, the $500,000 threshold would be phased down over several years to $100,000. *Id.*

166. This second threshold incorporates the provision from the New York marketing-affiliate law mandating a $10,000 threshold amount of sales in the state before the state could require sales-tax collection. *Supra* n. 105 and accompanying text.

167. Fox, *supra* n. 85, at 485.

168. The combination of thresholds avoids the problems with the individual SSUTA and New York thresholds. For example, under the SSUTA threshold, a retailer could sell only $1 worth of merchandise in the taxing state and still be required to collect sales tax on that amount if its gross remote sales reached $500,000. Likewise, the New York threshold, standing alone, would require a remote retailer that sold only one product worth $10,000 in the taxing state to collect sales tax on that one product.

169. The true magnitude of these administrative costs, however, is questionable. As e-commerce is developing, so is technology, and there are now programs available that make compliance with the various sales-tax regimes much easier. *See* Armstrong, *supra* n. 151, at 83–84 (arguing that "[a] distributed networking solution utilizing taxbots could allow vendors and tax compliance providers to monitor and update information from various tax jurisdictions routinely and automatically"); Avalara, Inc., http://www.avalara.com (accessed Jan. 29, 2013) (stating, "Making sales tax less taxing").

with an income tax and should not be required to use the same system of taxation.[170] Additionally, the costs of compliance do not unfairly burden remote retailers because the costs of compliance would be the same as those costs imposed on brick-and-mortar retailers. If anything, it would level the playing field. For example, Wal-Mart, which has a physical presence in every state,[171] must comply with the individual sales-tax systems of all of those states as a cost of doing business. By using the benefit of the Internet to access customers from all around the world, remote retailers should have the same obligation.[172]

The proposed approach would overcome both the constitutional issues implicated by the individual state initiatives and the practical problems with the SSUTA's arduous requirements, and would likely garner more support among a majority of states.[173] States would be free to continue their own individual systems of taxation, but with the added benefit of the ability to tax purchases from remote retailers like Amazon and Overstock. While the ITFA has recognized that e-commerce is a developing area of commerce that should be fostered rather than deterred, sales-tax compliance, especially in the current economy, is equally, if not more, important, and enforcement of sales and use taxes is not likely to deter online consumer spending. Studies have shown that consumers who buy online would not change their buying habits if they were required to pay sales taxes on their purchases.[174] The SSUTA and efforts to negotiate with

170. *See e.g.* William J. McKean & Richard Cunningham, *Nevada Sales and Use Tax Issues for Administrative Law Practitioners*, 19 Nev. Law. 12 (July 2011) (explaining that "[i]n the absence of a state income tax or other broad-based tax, Nevada continues to rely on the sales tax to generate about one-third of all general fund revenues").

171. For an interesting depiction of Wal-Mart's growth since its inception, see FlowingData, *Watch the Growth of Walmart and Sam's Club*, http://projects.flowingdata.com/walmart (accessed Jan. 29, 2013).

172. While this argument comes dangerously close to violating the ITFA's moratorium on taxes on Internet access, as previously argued, the arguments supporting the passage of the ITFA, namely the fear that taxing the Internet would harm e-commerce, no longer hold true today. See *supra* nn. 94–95 and accompanying text for a discussion of the ITFA's moratorium on Internet taxes.

173. This approach will garner more support among state governors and legislators, at least. It is unlikely that consumers will support a new tax (or rather, an enforced tax) on their long tax-free Internet purchases.

174. Angelini & Shaw, *supra* n. 18, at 23–24 (reporting results of an empirical study finding that although consumers know of the ITFA moratorium on Internet taxes, their online shopping habits would not change if their purchases were subject to sales tax).

retailers like Amazon in the past have ended with Amazon holding states hostage.[175] If the states unite in their efforts to gain state autonomy in the area of Internet sales and use taxes, retailers like Amazon will no longer have the option of simply closing up shop in taxing states.

VI. CONCLUSION

To be sure, there is no simple solution to the Internet sales-tax problem, but it is clear that the problem needs to be addressed, and any solution is going to require some type of action at the federal congressional level. The individual state approaches advanced thus far are constitutionally infirm, while the SSUTA presents serious practical problems. A solution that focuses on the e-tailer's economic presence and incorporates both the individual state methods and the SSUTA methods would solve any constitutional and practical problems, and would be more likely to gain support in Congress. Though any type of tax legislation is not likely to be popular with politicians or their constituents, the fact of the matter is that an Internet sales tax is not a tax hike—people already owe taxes on their Internet purchases. Passing legislation designed to enforce the laws of many states already in place would level the playing field for brick-and-mortar retailers and would help to fill dwindling state coffers.

175. For example, in California, South Carolina, and Texas, Amazon has avoided sales-tax-collection requirements by threatening to close existing warehouses or promising to open new ones in exchange for relief from the tax. David Straitfield, *California Lawmakers Give Amazon Tax Reprieve*, http://www.nytimes.com/2011/09/11/technology/california-votes-to-give-amazon-a-sales-tax-reprieve.html (Sept. 10, 2011). Also, Amazon has tried to thwart the states' marketing-affiliate efforts by severing or threatening to sever ties with its in-state marketing affiliates, leaving many state residents without a source of income. *Supra* nn. 111–113 and accompanying text.