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# Quibbling with *Quill*: Are States Powerless in Enforcing Sales and Use Tax-Related Obligations on Out-of-State Retailers?

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## I. INTRODUCTION

Under the financial strain caused by the recent economic recession, many states have struggled to raise enough revenue to cover costs.<sup>1</sup> Accordingly, many states have begun to pass so-called “Amazon” tax laws (“Amazon laws”).<sup>2</sup> The purpose of these laws is to impose sales and use tax collection or reporting obligations on out-of-state online companies, such as Amazon.com (Amazon), on purchases by in-state buyers. However, in *Quill v. North Dakota*,<sup>3</sup> the United States Supreme Court placed significant limitations on the ability of states to impose tax collection obligations on out-of-state vendors.<sup>4</sup> Under *Quill*, the seller must have a “nexus” with the taxing state that does not violate either the Due Process Clause of the Fourteenth Amendment<sup>5</sup> or the Commerce Clause<sup>6</sup> of the United States Constitution.<sup>7</sup>

The challenge of applying traditional concepts of sales tax collection obligations in the age of e-commerce is that most online companies do not have a significant physical presence in every state.<sup>8</sup> Companies like Amazon use somewhat extreme tactics to avoid the burden and expense of collecting sales taxes in numerous jurisdictions by engaging in “entity isolation.”<sup>9</sup> Entity isolation means that the parent corporation establishes a number of subsidiary companies to perform specific functions in a state.<sup>10</sup> Because these subsidiaries are legally distinct from the parent company, the parent company never establishes a physical presence in-state and is thus not obligated to collect sales tax.<sup>11</sup>

Although entity isolation may have been taken to its extreme limit by e-retailers, the difficulty of requiring out-of-state companies to collect

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1. See Jeanine Poggi, *Amazon Sales Tax: The Battle, State by State*, THE STREET (Oct. 24, 2011), <http://bit.ly/i3fvwq>.

2. See Saul Hansell, *Amazon Sues Over State Law on Collection of Sales Tax*, N.Y. TIMES (May 2, 2008), <http://nyti.ms/JdsJrs>. These laws are known as “Amazon” laws because they largely are targeted at Amazon.com, one of the largest e-retailers. *Id.*

3. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. *Id.* at 298.

5. U.S. CONST. amend. XIV.

6. U.S. CONST. art. I, § 8, cl. 3.

7. *Quill*, 504 U.S. at 305.

8. 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, 1428 (2010).

9. See generally 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, 306-08 (2010) (using the model of Amazon.com to explain basic principles of entity isolation).

10. *Id.*

11. *Id.*

sales taxes is not unique to online vendors. Historically, states have been unable to impose sales or use tax collection obligations on out-of-state companies such as catalog or mail-order companies.<sup>12</sup> The states' increased interest in collecting sales taxes from e-retailers is largely due to the explosion in e-commerce, which has grown tremendously in recent years.<sup>13</sup> This explosion has caused states to lose potentially millions of dollars every year in sales tax revenue.<sup>14</sup> States are not alone in their desire to have e-retailers collect sales taxes, as local brick-and-mortar stores have complained that online companies have an unfair competitive advantage because e-retailers are able to offer goods at lower prices by not collecting sales taxes.<sup>15</sup> Therefore, as states have scrambled to raise additional revenue due to the "Great Recession" and to help local businesses become more competitive, many state legislatures have passed Amazon laws.<sup>16</sup>

In general, the Amazon laws are designed to require e-retailers to collect sales taxes.<sup>17</sup> States have typically followed two models.<sup>18</sup> The first is the New York model, which broadens the definition of what constitutes physical presence, or nexus, in the state to include the "affiliates" of e-retailers.<sup>19</sup> Most states passing Amazon laws follow this

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12. *E.g.*, Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 758 (1967); *see infra* Part III.A (discussing due process requirements).

13. U.S. CENSUS BUREAU NEWS, Quarterly Retail E-Commerce Sales; 4th Quarter 2011, at 1, available at <http://1.usa.gov/KnvYkd>. Total e-commerce sales in 2011 was estimated to be \$194.3 billion, increasing approximately 16.1% from 2010. *Id.* Overall, e-commerce sales accounted for 4.6% of total retail sales. *Id.*

14. Donald Bruce et al., *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, ii, (May 18, 2009), <http://bit.ly/8P2VUa>.

15. *See* Gordon, *supra* note 9, at 300.

16. *See* Poggi, *supra* note 1.

17. *E.g.*, N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2011 through L.2011).

18. There is a third model for states to collect sales taxes from out-of-state retailers known as the "affiliate nexus" theory, which essentially ignores entity isolation and examines the subsidiary and parent companies to see if there is a common ownership and a unitary business enterprise. Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803, 1805-06, 1813 (2012). The "affiliate nexus" theory is beyond the scope of this Comment. For more information on this theory, see David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 520-22 (2012); *see also* N. R. Kleinfeld, *Amazon to Build New Jersey Warehouses and Collect State Tax*, N.Y. TIMES (May 31, 2012), <http://nyti.ms/Me7etf>.

19. N.Y. TAX LAW § 1101(b)(8)(vi). Amazon's Associate's program, for example, allows participants, known as "Associates," to maintain links to merchandise on Amazon.com, and Amazon compensates these Associates with a percentage of the proceeds of sales that result from users clicking these links and making purchases. Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin., 877 N.Y.S.2d 842, 845 (N.Y. Sup. Ct. 2009), *aff'd as modified* 913 N.Y.S.2d 129 (N.Y. App. Div. 2010); *see also* Amazon.com, Associates Program Operating Agreement (Jul. 1, 2012), <http://bit.ly/LkEpdI> [hereinafter Operating Agreement].

approach.<sup>20</sup> The second is the Colorado model, which requires out-of-state e-retailers to notify customers of the obligation to pay use taxes and, in some cases, provide information to the state's department of revenue concerning remote sales made to customers living in the state.<sup>21</sup> Remote sellers have fiercely criticized both models and have challenged the laws' constitutionality.<sup>22</sup> Ultimately, congressional action will be required to determine whether states can impose sales tax collection obligations on out-of-state retailers.<sup>23</sup>

Part II of this Comment will discuss the history of sales and use taxes in the United States and will include a brief introduction to the "dormant" Commerce Clause. Part III will examine the relevant jurisprudence concerning the imposition of tax collection obligations on out-of-state companies, including the requirements of nexus under both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution. Part IV will introduce the various Amazon laws and focus particularly on the recent laws passed in Illinois, Connecticut, Colorado, Oklahoma, and South Dakota, and discuss the related legal challenges. Part V will explore the effectiveness of the Amazon laws and the possibility that Congress will step in to resolve whether out-of-state retailers must collect and remit sales taxes to the states. Part VI will provide a conclusion to the issues presented in this Comment.

## II. AN OVERVIEW OF SALES AND USE TAXES AND THE DORMANT COMMERCE CLAUSE

There are two main methods for a state to raise money from the consumption of personal items: the sales tax and the use tax. Mississippi implemented the first modern-day sales tax in 1932 to increase state revenue during the Great Depression.<sup>24</sup> Today, 45 states, the District of Columbia, and more than 7,500 local taxing jurisdictions impose a sales

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20. *E.g.*, N.Y. TAX § 1101(b)(8)(vi); CAL. REV. & TAX. CODE § 6203(c)(5) (West 2011) (effective June 29, 2011, temporarily repealed on September 23, 2011 until September 15, 2012 or January 1, 2013, depending on enactment of federal law); CONN. GEN. STAT. ANN. § 12-407(a)(12)(L) (West 2011); 35 ILL. COMP. STAT. § 105/2(1.1) (2011); N.C. GEN. STAT. § 105-164.8(b)(3) (2011); R.I. GEN. LAWS § 44-18-15(a)(2) (2011).

21. COLO. REV. STAT. § 39-21-112(3.5) (2011); OKLA. STAT. tit. 68, § 1406.1 (2011).

22. *E.g.*, *Amazon.com*, 877 N.Y.S.2d at 846; *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012); *Performance Mktg. Ass'n, Inc. v. Hamer*, No. 2011-CH-26333, 2012 WL 1986181 (Ill. Cir. May 11, 2012).

23. *See infra* Part V.B.2 (discussing Congressional action).

24. M. DAVID GEFLAND ET AL., *STATE AND LOCAL TAXATION AND FINANCE IN A NUTSHELL* 62 (3d ed. 2007). The situation during the Great Depression is in some ways similar to today where states have seen their revenues decrease significantly due to the current economic recession.

tax on the purchase of goods within the state.<sup>25</sup> In 2009, sales tax revenue alone comprised roughly 30 percent of total nationwide state tax revenue, with some states' reliance being even higher, typically when they have not levied an income tax.<sup>26</sup> The ability of states to collect sales taxes, however, is somewhat limited by the Commerce Clause of the United States Constitution.<sup>27</sup>

#### A. *Sales Tax*

A sales tax is broadly defined as “any tax which includes within its scope all business, sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage, with the exceptions noted in the taxing law.”<sup>28</sup> Most commonly, a “sales tax” is equated with the “retail sales tax,” in which the consumer pays the tax and the retailer remits the tax to the state on a per-item basis.<sup>29</sup> The retailer thus bears the burden of collecting and remitting the tax, even though the consumer is responsible for paying the tax.<sup>30</sup> Generally, the power of a state to collect sales taxes is limited to transactions occurring within that state, and states cannot collect a sales tax on purchases made outside the state, such as those made through mail orders.<sup>31</sup>

#### B. *Use Tax*

To “fill the gap” caused by residents purchasing goods in non-taxing states, most states requiring a sales tax have imposed an accompanying “compensating use tax,” commonly referred to as a “use tax.”<sup>32</sup> A use tax is defined as a “tax imposed upon the privilege of using, storing, or consuming tangible personal property within the state or local government boundaries”<sup>33</sup> that has avoided being subject to a

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25. *Id.*; JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION: SALES AND USE TAXES* ¶¶ 19A.01[1], 12.02 (3d ed. 2011).

26. Gordon, *supra* note 9, at 299. Some state's reliance on the sales tax is as high as 63% of total revenue. *Id.*

27. U.S. CONST. art. I, § 8, cl. 3; *see* GEFLAND, *supra* note 24, at 27-40; *see also infra* Part II.C (discussing the dormant Commerce Clause).

28. *See* R. HAIG & C. SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 3 (1934).

29. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 12.01. Some states require the vendor to pay the tax as payment for the privilege of engaging in in-state business. *Id.*

30. GEFLAND, *supra* note 24, at 66.

31. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 16.01[2]. This limit is imposed by the Commerce Clause. *See infra* Part II.C (discussing the dormant Commerce Clause); *see also* *McLeod v. JE Dilworth Co.* 322 U.S. 327 (1944).

32. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 16.01[2]. States feared the loss of revenue caused by consumers going to nontax states, and also the loss of business to local merchants caused by such behavior. *Id.*

33. GEFLAND, *supra* note 24, at 80.

sales tax.<sup>34</sup> Essentially, the use tax is the complement of the sales tax, imposing the burden of self-assessing and remitting the tax on the purchaser of the good or service.<sup>35</sup> Most consumers, however, are either unaware of their obligations to pay the use tax or consciously ignore it.<sup>36</sup> Additionally, states have trouble collecting the use tax because the transaction occurs beyond state boundaries.<sup>37</sup> In theory, the combination of sales and use taxes creates a seamless web of tax collection that is easy to administer; in reality, however, states lose much of the revenue they are due because the use tax is notoriously difficult to collect.<sup>38</sup>

### C. *Dormant Commerce Clause*

Under the Commerce Clause of the United States Constitution, Congress possesses the express and ultimate power to regulate interstate commerce.<sup>39</sup> In addition to this affirmative grant of power, the Commerce Clause also prohibits states from regulating interstate commerce, even in the absence of congressional action.<sup>40</sup> This negative sweep is known as the “dormant” Commerce Clause.<sup>41</sup> The crucial question in determining whether a state law violates the dormant Commerce Clause is to ask if the law either facially discriminates or has a discriminatory impact on interstate commerce.<sup>42</sup> If the law discriminates against interstate commerce, the burden is on the state to demonstrate a legitimate local purpose that cannot be achieved through reasonable nondiscriminatory alternatives.<sup>43</sup> If the law does not

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34. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 16.01[2]. Typically the use tax rate is the same as the sales tax rate. *Id.* ¶ 16.01[4].

35. GEFLAND, *supra* note 24, at 80-81. The state is able to avoid the impermissible burden on interstate commerce because the obligation to pay the tax is on the resident of the state, not on the out-of-state seller. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶16.01[2]. Compare *McLeod v. JE Dilworth Co.* 322 U.S. 327 (1944) (declaring the Commerce Clause prevented state from imposing *sales* tax obligation on out-of-state company), with *General Trading Co. v. State Tax Comm’n*, 322 U.S. 335 (1944) (upholding *use* tax collection obligations on out-of-state company).

36. Katherine R. Conroy & Ralph B. Tower, *A Study in Use Tax Design*, 53 ST. TAX NOTES 747, 748 (Sept. 14, 2009).

37. *Id.*

38. *Id.*; see also 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, 893-94, 897-99 (2006).

39. U.S. CONST. art. I, § 8, cl. 3; *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 760 (1967).

40. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

41. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

42. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

43. *Id.* This is the dormant Commerce Clause’s “strict scrutiny” test, which is virtually always fatal. 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, 2067-68 (2011).

discriminate, the state must show only that the burden is not “clearly excessive” in relation to the local benefit.<sup>44</sup> However, once Congress acts and authorizes the states to burden interstate commerce, such as by requiring out-of-state companies to collect sales taxes, then no dormant Commerce Clause issue exists.<sup>45</sup>

### III. JUDICIAL REQUIREMENTS FOR STATES TO IMPOSE TAXING OBLIGATIONS ON OUT-OF-STATE COMPANIES

In general, the out-of-state vendor must have a sufficient nexus with the taxing state that complies with both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution before the state can impose tax collection obligations on the remote seller.<sup>46</sup> The requirements are analytically distinct, though similar.<sup>47</sup> Despite the efforts by the United States Supreme Court in *Quill v. North Dakota* to clarify its sales tax obligation jurisprudence, *Quill* has arguably caused even greater confusion.<sup>48</sup>

#### A. *Due Process Requirements*

The focus of the due process nexus requirement has shifted from a company’s physical presence in the state to a more flexible inquiry regarding the company’s “minimum contacts” with the state.<sup>49</sup> This change resulted from the Supreme Court’s shift in personal jurisdiction analysis from *Pennoyer*’s physical presence test to the more flexible “minimum contacts” test announced in *International Shoe Co. v. Washington*<sup>50</sup> and its progeny.<sup>51</sup>

The original rule regarding due process focused on the company’s physical presence within the forum state. In *Scripto Inc. v. Carson*,<sup>52</sup> the Court stated that there must be “some definite link, some minimum

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44. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (noting that “[i]f a legitimate local purpose is found, then the question becomes one of degree,” depending on the interests at stake).

45. *See* U.S. CONST. art. I, § 8, cl. 3.

46. *Quill*, 504 U.S. at 305.

47. *Id.*

48. *See* H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of Quill’s Two Nexus Tests*, 29 SEATTLE U. L. REV. 581, 582, 606 (2006); *see also infra* Part II.B (discussing the disagreement among state courts concerning the meaning of physical presence).

49. *Quill*, 504 U.S. at 307, 312.

50. *Int’l Shoe v. Washington*, 326 U.S. 310 (1945).

51. Baez, *supra* note 48, at 583.

52. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

connection” between the company and the state taxing jurisdiction.<sup>53</sup> The Court held that the actions of Scripto’s independent contractors within the forum state were sufficient to meet this test, as the distinction between independent contractors and full-time employees was “without constitutional significance.”<sup>54</sup> Yet just seven years later, the Court held in *National Bellas Hess v. Department of Revenue*<sup>55</sup> that the Due Process Clause did not support a state imposing a tax on a company whose only connection to the state was through the U.S. mail.<sup>56</sup> The “definite link” between the forum state and the remote vendor did not exist in such a case, placing an important restriction on the ability of states to collect sales taxes on out-of-state purchases.

Although mailing packages to a state is not sufficient to satisfy the requirements of the Due Process Clause, the Supreme Court held in *National Geographic Society v. California Board of Equalization*<sup>57</sup> that any activity by employees within the state was sufficient to create a nexus.<sup>58</sup> In this case, National Geographic Magazine had two offices in California that solicited advertisements for the magazine, but those offices were not involved with the Society’s selling of maps, atlases, globes, and books from Washington D.C.<sup>59</sup> This presence, nevertheless, was sufficient for California to require National Geographic to collect sales taxes in the state on all transactions.<sup>60</sup> In dicta, the Court stated that having the “slightest presence” in the state would not satisfy the requirements of the Due Process Clause, but the Court did not further elaborate.<sup>61</sup>

Finally, in *Quill v. North Dakota*, the Court rejected the physical presence requirement under the Due Process Clause and turned the focus to the idea of “fundamental fairness.”<sup>62</sup> In *Quill*, the Court held that the Due Process Clause requires the out-of-state company to purposefully

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53. *Id.* at 210-11 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

54. *Id.* at 211. The Court on several later occasions stated that *Scripto* represented the “furthest constitutional reach of a State’s power to deputize an out-of-state retailer as its collection agent for a use tax.” *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 757 (1967).

55. *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753 (1967).

56. *Id.* at 758. This has been referred to as the “safe harbor” for out-of-state vendors. *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

57. *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977).

58. *Id.* at 552, 561 (stating it was irrelevant whether the connections with the state were related to the activity which gave rise to the tax collection obligation).

59. *Id.* at 552.

60. *Id.* at 556.

61. *Id.* The Court rejected the logic of the California Supreme Court, which relied on the “slightest presence” test, and instead held that the presence of the two offices was enough to create a “substantial” presence. *Id.*

62. *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992).



direct its business towards the forum state.<sup>63</sup> Consequently, the out-of-state company does not have to physically enter the forum state to be subject to taxing obligations in terms of due process.<sup>64</sup> Previous cases relying on physical presence under the Due Process Clause were thus overturned.<sup>65</sup> The Court instead shifted the physical presence requirement to the Commerce Clause.<sup>66</sup>

Proving an out-of-state company purposefully directed its business towards the state is a lower burden than proving the company has a physical presence in the state. Accordingly, states can more easily satisfy the nexus requirement of the Due Process Clause compared to the more stringent nexus requirement of the Commerce Clause.<sup>67</sup>

### B. *Commerce Clause Requirements*

Unlike the Due Process Clause, the Commerce Clause's focus is on physical presence in the state.<sup>68</sup> Generally, most courts interpreting the United States Supreme Court's Commerce Clause jurisprudence regarding tax obligations have focused on whether the remote vendor's contacts meet the bright-line nexus requirements of the Commerce Clause.<sup>69</sup>

Though the Court had previously mentioned the Commerce Clause in out-of-state tax collection obligations in *Bellas Hess*, the first in-depth examination of the issue occurred in *Complete Auto Transit, Inc. v. Brady*.<sup>70</sup> There, the Court developed a four-part test to analyze whether a state tax law is valid under the Commerce Clause.<sup>71</sup> Under the test, the law must be: (1) applied to an activity with a substantial nexus with the taxing state; (2) fairly apportioned; (3) nondiscriminatory toward interstate commerce; and (4) fairly related to the services provided by the

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63. *Id.* at 306-08.

64. *Id.* at 308 (holding that if a company engaged in "continuous and widespread solicitation of business within a State," it had fair warning that it might be subject to tax collection obligations, citing *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) and *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

65. *Id.* ("Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.")

66. *See id.* at 305.

67. *See Cowan, supra* note 8, at 1433.

68. *Quill*, 504 U.S. at 312-13 (stating that the "touchstone" of the Commerce Clause was an interest in maintaining the structure of government by prohibiting states from unduly burdening interstate commerce).

69. *Id.* at 313; *Baez, supra* note 48, at 608.

70. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

71. *Id.* at 279.

state.<sup>72</sup> The Supreme Court retained this test in *Quill*, while seeking to clarify what establishes a “substantial nexus” in a state.<sup>73</sup> The Court introduced a bright-line test for determining whether a “substantial nexus” existed: if a company has contacts that fall within the state’s borders, there is a “substantial nexus,” but if the company does not cross the border, there is not a “substantial nexus.”<sup>74</sup>

Consequently, the Court in *Quill* stated that it was possible for a corporation to have “minimum contacts” as required by the Due Process Clause, but lack the “substantial nexus” as required by the Commerce Clause.<sup>75</sup> The Court admitted that the bright-line test regarding the Commerce Clause “appears artificial at its edges,” but maintained that such a rule made tax obligations clear and “encouraged settled expectations.”<sup>76</sup> The Court concluded by reminding Congress that the federal legislature has plenary power over interstate commerce; therefore Congress is free to overturn *Quill* and pass a law allowing states to burden interstate commerce by imposing a duty to collect sales tax on out-of-state companies.<sup>77</sup>

Though the Supreme Court’s apparent purpose in *Quill* was to clarify the meaning of “substantial nexus,” the decision has in fact created greater confusion and has been criticized.<sup>78</sup> Many state courts have struggled to understand and apply the Supreme Court’s “substantial nexus” rule.<sup>79</sup> Because *Quill* applies to all out-of-state retailers, most e-retailers who lack a physical presence in the state fall under *Bellas Hess*’s safe harbor and do not have an obligation to collect sales or use taxes.<sup>80</sup> Some state courts have minimized the concept of substantial physical presence, while others have done the opposite.<sup>81</sup>

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72. *Id.* The first and fourth prongs limit the reach of state taxing authority to ensure that state taxation does not unduly burden interstate commerce. *Quill*, 504 U.S. at 313. The second and third prongs prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. *Id.*

73. *Quill*, 504 U.S. at 315.

74. *Id.* at 313; Baez, *supra* note 48, at 597.

75. *Quill*, 504 U.S. at 313.

76. *Id.* at 315-16.

77. *Id.* at 320. The Court admitted that Congress “may be better qualified to resolve” the problem. *Id.* “Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.” *Id.*

78. Baez, *supra* note 48, at 582; Gamage & Heckman, *supra* note 18, at 485-86 (stating that a “near scholarly consensus has developed against the *Quill* framework”).

79. *E.g.*, *Orvis Co., Inc. v. Tax Appeals Tribunal of New York*, 654 N.E.2d 954 (N.Y. 1995); *see also In re Appeal of Intercard Inc.*, 14 P.3d 1111 (Kan. 2000).

80. *Nat’l Bellas Hess v. Dep’t of Revenue*, 386 U.S. 753, 758 (1967).

81. *Compare Orvis*, 654 N.E.2d 954, *with Intercard*, 14 P.3d 1111.

For example, in *Orvis Company Inc. v. Tax Appeals Tribunal of the State of New York*,<sup>82</sup> the New York Court of Appeals held that the “substantial nexus” test from *Quill* did not require a *substantial* physical presence in the state. In so holding, the court reasoned that (1) the physical presence standard created a bright-line rule, and (2) companies have substantially relied on the physical presence rule in conducting business.<sup>83</sup> Requiring a substantial presence would “destroy” the bright-line rule by requiring a case-by-case analysis.<sup>84</sup> Instead, the *Orvis* court stated that there must be “demonstrably more” than the “slightest presence” to satisfy the “substantial nexus” test from *Quill*.<sup>85</sup> The court determined that the companies involved in *Orvis* had “demonstrably more” than the “slightest presence” in New York through employees’ infrequent visits to the state.<sup>86</sup>

Conversely, in *In re Appeal of Intercard, Inc.*,<sup>87</sup> the Kansas Supreme Court stated that the *Orvis* court “missed the point” that the United States Supreme Court was attempting to make in *Quill*.<sup>88</sup> The *Intercard* court interpreted the *Quill* decision as requiring *sufficient* physical presence in the state for the imposition of a use tax collection duty, and economic presence alone was insufficient to meet this requirement.<sup>89</sup> Therefore, the court held that there was no requirement for Intercard to collect sales and use taxes, even with Intercard’s 11 “incursions” to install card readers in the state.<sup>90</sup> Despite the United States Supreme Court’s best efforts to create a bright-line test in *Quill*, the answer as to the required level of physical presence remains unsettled.

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82. *Orvis Co., Inc. v. Tax Appeals Tribunal of New York*, 654 N.E.2d 954 (N.Y. 1995).

83. *Id.* at 959. *Orvis* was a consolidated case involving two out-of-state companies: Orvis Company Inc. and Vermont Information Processing, Inc. *Id.* at 955.

84. *Id.* at 960.

85. *Id.* at 960-61. The court relied heavily on the United States Supreme Court’s decision in *National Geographic Society*, focusing on the Court’s discussion of the “slightest presence” test. *Id.*; but see *supra* note 61 (discussing the United States Supreme Court’s rejection of “slightest presence” as the correct test for the due process nexus).

86. *Orvis*, 654 N.E.2d at 961-62. The *Orvis* employees visited New York 12 times during the audit period and not for the purposes of making sales but rather concerning shipping and how products were displayed. Similarly, the Vermont Information Processing employees visited the state to perform free software installations. *Id.*

87. *In re Appeal of Intercard Inc.*, 14 P.3d 1111 (Kan. 2000).

88. *Id.* at 1119.

89. *Id.* The Kansas Supreme Court also cited to decisions in Florida and Rhode Island requiring substantial physical presence. *Id.* at 1120-21.

90. *Id.* at 1122. The court appeared to believe that a permanent sales force, not just temporary visits in the state, would be required to satisfy the Commerce Clause’s nexus requirements. *Id.*

### C. *Attributional Nexus Requirements*

In several cases, the United States Supreme Court has indirectly referenced the idea of an “attributional” nexus. This concept is closely tied to that of “substantial nexus” in the Commerce Clause analysis, but focuses on whether the presence of independent contractors in the state is sufficient to establish a nexus.<sup>91</sup> Essentially, if the efforts of an independent contractor are significant for a company to maintain the company’s market in the state, then the state is free to impose a tax collection obligation on the out-of-state company.<sup>92</sup> The rationale underlying this taxing freedom is that the distinction between independent contractors and full-time employees is “without constitutional significance.”<sup>93</sup> The attributional nexus is the key concept upon which many states rely in imposing sales tax collection obligations on remote retailers.<sup>94</sup>

## IV. STATE DESPERATION: THE ADVENT OF THE AMAZON LAWS

As evidenced by the above cases, the issue of states collecting sales tax from out-of-state companies is neither a new issue nor one unique to e-retailers. However, due to declining revenue during the current economic recession, many states have sought to enact legislation that forces e-retailers to collect sales taxes.<sup>95</sup> The states argue that they are being unreasonably deprived of revenue they are entitled to receive.<sup>96</sup> Many states, therefore, have passed various forms of Amazon laws in an attempt to collect sales taxes they feel e-retailers owe to the state.

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91. See generally Sam Zaprzalka, *New York’s Amazon Tax Not Out of the Forest Yet: The Battle Over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 539-40 (2010).

92. *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960) (holding that ten independent contractors working in Florida were sufficient for the state to require Scripto to collect sales taxes); see also *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 483 U.S. 232, 249-50 (1987) (holding that the activities performed by contractors in the state on behalf of the taxpayer can be enough for tax collecting obligations if the activities are “significantly associated with the taxpayer’s ability to establish and maintain a market in th[e] state for the sales”).

93. *Scripto*, 362 U.S. at 211.

94. See *infra* Part IV.A (discussing New York’s Amazon law).

95. E.g., N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2011 through L.2011).

96. Declan McCullagh, *Republican Senators Push for Internet Sales Taxes*, CNET (Nov. 2, 2011), <http://cnet.co/rNRB7i>.

A. *New York: The First of the Amazon Laws*

On April 23, 2008, New York became the first state to pass a law imposing sales-tax collection obligations on an out-of-state e-retailer.<sup>97</sup> New York's law has since become the model for many states.<sup>98</sup> In order to forge a nexus between e-retailers like Amazon and the state, the New York legislature broadened the definition of "physical presence" by relying on the attributional nexus mentioned by the United States Supreme Court.<sup>99</sup> The law provides that "[i]f the seller enters into an agreement with a resident of [New York] under which the resident, for a commission or other consideration, directly or indirectly refers potential customers . . . to the seller," and the sales generated by the referred business exceeds \$10,000 annually, the seller is presumed to be soliciting business in the state, and thus is required to collect New York sales taxes.<sup>100</sup> The presumption may be rebutted "by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution [sic]."<sup>101</sup> Just two days after the bill was signed, Amazon challenged the law in New York state court.<sup>102</sup>

Amazon contested the constitutionality of the law as violating the Commerce Clause of the United States Constitution and the Due Process Clause, both facially and as-applied to Amazon.<sup>103</sup> The trial court held that Amazon's facial and as-applied challenges under both the Commerce Clause and Due Process Clause lacked merit.<sup>104</sup> Although Amazon did not own any property, have offices, or employ workers in the state, the court held that because Amazon's Associates program<sup>105</sup> had thousands of New York residents, there was a sufficient nexus to satisfy the presumption that Amazon had a physical presence in the

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97. N.Y. TAX LAW § 1101(b)(8)(vi); *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, 877 N.Y.S.2d 842, 846 (N.Y. Sup. Ct. 2009), *aff'd as modified*, 913 N.Y.S.2d 129 (N.Y. App. Div. 2010).

98. *E.g.*, CAL. REV. & TAX. CODE § 6203(c)(5) (West 2011) (effective June 29, 2011, temporarily repealed on September 23, 2011, *see supra* note 20 for explanation); CONN. GEN. STAT. ANN. § 12-407(a)(12)(L) (West 2011); N.C. GEN. STAT. § 105-164.8(b)(3) (2011); R.I. GEN. LAWS § 44-18-15(a)(2) (2011).

99. *See supra* Part III.C; *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

100. N.Y. TAX § 1101(b)(8)(vi).

101. *Id.*

102. *Amazon.com*, 877 N.Y.S.2d at 846. The lawsuit was filed on April 25, 2008. *Id.*

103. Verified Complaint ¶¶ 3(a), 3(b), *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009) (No. 601247/08), 2008 WL 5592584. Amazon also alleged an Equal Protection Clause violation, but this claim is not relevant for this Comment. *Id.* ¶ 3(c).

104. *Amazon.com*, 877 N.Y.S.2d at 847-48.

105. *See supra* note 19 (discussing Amazon's Associates program).

state.<sup>106</sup> On appeal, the New York Supreme Court, Appellate Division, affirmed the lower court's ruling on Amazon's facial challenges to the law under the Commerce and Due Process Clauses, but reversed and remanded the case for more fact-finding concerning Amazon's as-applied challenges under both clauses.<sup>107</sup> In February 2012, Amazon agreed to discontinue its as-applied challenge to the New York Amazon law in order to seek an appeal of the Appellate Division's decision with regard to Amazon's facial challenge.<sup>108</sup>

*B. Other States Follow New York's Lead*

Due to their eagerness for revenue and the success of New York in passing and defending its law, other states have followed suit in passing their own Amazon laws, largely copying the language from the New York law.<sup>109</sup> In fact, many Amazon laws rely upon the presence of independent contractors or affiliates who are residents of the state to forge a nexus with the out-of-state e-retailer.<sup>110</sup> In response, Amazon has cancelled its Associates program in Arkansas, Colorado, Illinois, North Carolina, Rhode Island, and Connecticut.<sup>111</sup> In California, Amazon sought to overturn the law by a popular referendum but has since stopped such efforts. Instead, Amazon has reached an agreement with the state to delay implementation of the sales tax law while Amazon seeks federal legislation concerning the e-retailer sales tax collection issue, though this delay expired on September 15, 2012.<sup>112</sup>

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106. *Amazon.com*, 877 N.Y.S.2d at 844-45, 848-50.

107. *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, 913 N.Y.S.2d 129, 145-46 (N.Y. App. Div. 2010).

108. Stipulation of Discontinuance, *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, No. 601247/08 (N.Y. Sup. Ct. Feb. 8 2012); Notice of Appeal, *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, No. 601247/08 (N.Y. Sup. Ct. Feb. 22 2012). For more information on the Amazon case in New York, see generally Zaprzalka, *supra* note 91 and Gordon, *supra* note 9.

109. *E.g.*, N.C. GEN. STAT. § 105-164.8(b)(3) (2009); see also ARK. CODE ANN. § 26-52-117 (2011); CAL. REV. & TAX. CODE § 6203(c)(5) (West 2011) (effective June 29, 2011, temporarily repealed on September 23, see *supra* note 20 for explanation); R.I. GEN. LAWS § 44-18-15(a)(2) (2011). Other states such as Michigan have proposed Amazon laws that are currently being considered, *e.g.*, H.B. 5004, 96th Legis. Reg. Sess. (Mich. 2011).

110. *E.g.*, N.C. GEN. STAT. § 105-164.8(b)(3); see also ARK. CODE ANN. § 26-52-117; CAL. REV. & TAX. CODE § 6203(c)(5); R.I. GEN. LAWS § 44-18-15(a)(2).

111. Operating Agreement, *supra* note 19, § 2.

112. Wendy Kaufman, Amazon Agrees to Collect State Tax in California, NPR (Sept. 9, 2011), <http://n.pr/KDM6Od>.

C. *Colorado, Oklahoma, and South Dakota: Variations on a Theme of the Amazon Law*

Compared to the model Amazon law as passed by New York, Colorado has adopted a unique approach in its attempt to collect sales and use taxes on out-of-state purchases made by state residents. Instead of trying to forge a nexus and make the out-of-state companies collect and remit sales tax, Colorado requires only those companies not collecting sales tax to submit reports to the Department of Revenue in order to enable the state to better collect the use tax from residents.<sup>113</sup> The retailers who do not collect sales taxes are required to: (1) notify their Colorado customers that the retailer does not collect sales tax and that the purchaser is obligated to self-report and pay the tax to the state (Transactional Notice), (2) provide customers with an annual report that details purchases on which customers are obligated to pay use tax (Annual Purchase Summary), and (3) provide the Colorado Department of Revenue with an annual report specifying the customers who purchased goods and did not pay sales tax (Customer Information Report).<sup>114</sup> The law exempts retailers with less than \$100,000 in gross annual sales in Colorado.<sup>115</sup> The Direct Marketing Association (DMA) challenged the law, and a federal district court granted the DMA's motion for summary judgment and ordered a permanent injunction against enforcement of the law.<sup>116</sup>

The approach taken by Oklahoma and South Dakota is similar to that of Colorado but is not as expansive. Oklahoma's law requires only out-of-state retailers who are not obligated to collect use taxes to provide notification on their websites and on invoices sent to customers explaining that customers are required to pay use taxes to the state.<sup>117</sup> Furthermore, retailers are forbidden from advertising on their websites that there is no tax due on purchases made from the retailer for use in the

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113. COLO. REV. STAT. § 39-21-112(3.5)(a) (2011); COLO. CODE REGS. § 39-21-112.3.5(1)(a) (2011).

114. COLO. REV. STAT. §§ 39-21-112(3.5)(c)(I), (d)(I)(A), (d)(II)(A); COLO. CODE REGS. § 39-21-112.3.5(2). The Annual Purchase Summary is only required for customers who spend more than \$500 a year with a particular retailer. COLO. CODE REGS. § 39-21-112.3.5(3)(c)(i). The Customer Information Report requires the company to report the customer's name, billing address, shipping address, and total amount of purchases. *Id.* § 39-21-112.3.5(4).

115. COLO. REV. STAT. § 39-21-112(3.5)(d)(II)(B); COLO. CODE REGS. § 39-21-112.3.5(1)(a)(iii); *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175, at \*2 (D. Colo. Mar. 30, 2012).

116. *Huber*, 2012 WL 1079175, at \*10-11; *see infra* Part V.A.2 (providing an overview of the legal challenge and the reasoning of the court in its ruling).

117. OKLA. STAT. tit. 68, § 1406.1 (2011).

state.<sup>118</sup> South Dakota's law similarly requires non-collecting retailers to post notice that use tax is to be paid by the in-state purchaser and forbids retailers from saying that there is no tax due.<sup>119</sup> The effect of these laws is questionable and will be explored later in this Comment.<sup>120</sup>

## V. WHAT IS THE ENDGAME?

The states' interest in imposing sales tax collection obligations on e-retailers has become an increasingly important concern, and it is unlikely that the states will abandon efforts to implement Amazon laws or similar measures.<sup>121</sup> The question nevertheless remains whether the options thus far pursued by the states are constitutional, and, if not, if it is possible for a state to impose tax collection obligations on an out-of-state e-retailer under current jurisprudence. It is therefore necessary to examine the constitutionality of the attempts by states to impose tax obligations on out-of-state e-retailers like Amazon and proposed Congressional legislation to determine the appropriate solution.

### A. *Amazon Laws: Are They Constitutional?*

#### 1. New York, et al.'s Amazon Law v. Illinois's and Connecticut's: The Problem of Presumption

Currently, the New York Amazon law has been found constitutional, but the New York Supreme Court, Appellate Division, has remanded the case for further proceedings to determine if the law is unconstitutional as-applied to Amazon.<sup>122</sup> The court rejected Amazon's argument that the law created an irrebuttable presumption that Amazon's Associates solicited business in the state. The court found the presumption can be rebutted by proof that the affiliate did not solicit any business in the state on behalf of the seller.<sup>123</sup> This rebuttable

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118. *Id.*

119. S.D. CODIFIED LAWS §§ 10-63-1 to 10-63-9 (2011).

120. *See infra* Part V.A.2 (concerning the constitutionality of the Colorado and Oklahoma laws).

121. *See* Edward A. Zelinsky, *Lobbying Congress: 'Amazon' Laws in the Lands of Lincoln and Mt. Rushmore*, 21-24 (Benjamin N. Cardozo Sch. of Law: Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 338, 2011), *available at* <http://bit.ly/JqbaJu>.

122. *Amazon.com, LLC v. N.Y. Dep't of Taxation and Fin.*, 913 N.Y.S.2d 129, 145-46 (N.Y. App. Div. 2010) (affirming the dismissal of the facial challenges by Amazon under both the dormant Commerce and Due Process Clauses, but remanding the related as-applied challenges). *See also supra* note 108 and accompanying text (discussing Amazon's appeal of the Appellate Division's decision).

123. *Amazon.com*, 913 N.Y.S.2d at 139-40 (indicating the existence of a "safe-harbor" for e-retailers to prove that its affiliates were not soliciting business in the state on behalf of the seller, such as a certification from the in-state representative that it did



presumption, however, does not exist in the Amazon laws passed by Connecticut and Illinois.<sup>124</sup> The laws in these states in fact create a *per se* rule that the seller is presumably obligated to collect sales taxes, with no chance to rebut the presumption.<sup>125</sup> This difference is likely fatal to the Illinois and Connecticut laws.

The United States Supreme Court has stated that “[s]tatutes creating permanent *irrebuttable* presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.”<sup>126</sup> With respect to the Illinois and Connecticut laws, the retailer does not have a “safe harbor” that would allow it to prove that its affiliates have not solicited business in the state.<sup>127</sup> The presumption is irrebuttably established once solicitation by the in-state resident results in cumulative gross receipts for the retailer in excess of a set amount.<sup>128</sup> In Illinois, the set amount is \$10,000, whereas in Connecticut the amount is only \$2,000.<sup>129</sup>

Both the Illinois and Connecticut laws fail to meet the Due Process and Commerce Clause requirements enumerated in *Quill* because they lack the rebuttable presumption included in other states’ Amazon laws. Under the Due Process Clause, the laws do not meet the requirements because they impose tax collection obligations by presuming the out-of-state retailer is purposefully directing its business towards the state.<sup>130</sup> The laws rest on the idea that it is the providing of the link that creates the nexus with the state, not the affiliates’ or retailers’ activities in attempting to target the in-state market.<sup>131</sup> Placing a link on a website, however, does not target a specific market but rather the entire world.<sup>132</sup> If like New York, the laws presumed that such targeting existed but simultaneously allowed the presumption to be rebutted, then these laws would satisfy the due process nexus requirement. This is not the case in

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not engage in solicitation); see N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2011 through L.2011); see also sources cited *infra* note 138.

124. CONN. GEN. STAT. ANN. § 12-407(a)(12)(L) (West 2011); 35 ILL. COMP. STAT. § 105/2(1.1) (2011).

125. CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1).

126. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (emphasis added).

127. Compare N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2011 through L.2011), with CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1).

128. CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1).

129. CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1).  
130. *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992); see *infra* Part III.A (concerning the due process analysis); CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1).

131. Thomas Donohoe et al., *Illinois Bill Would Expand Attributional Nexus Concept to Untested Lengths*, 59 ST. TAX NOTES 371, 372 (Jan. 31, 2011), available at <http://bit.ly/JuMLvN>.

132. *Id.* at 373.

Illinois and Connecticut as these states' laws do not allow the e-retailer to demonstrate that its affiliates are not targeting the in-state market, thus violating the *Quill* due process nexus requirement.

Additionally, the Illinois and Connecticut laws do not meet the dormant Commerce Clause requirements from *Quill* because the retailer does not necessarily have a physical presence in the state.<sup>133</sup> These states attempt to use the in-state affiliates of the e-retailers to forge an attributional nexus.<sup>134</sup> Again, the problem is that the irrebuttable presumption makes the law overbroad. There are situations where the affiliates are not "significantly associated" with the retailer's "ability to establish and maintain a market" in the state as required by *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*.<sup>135</sup> Typically, the affiliates only provide links to merchandise on the retailer's website.<sup>136</sup> In such a case, there is no solicitation of business because the associate merely provides a "click-through" link that connects the in-state buyer to the retailer.<sup>137</sup> The business generated by these links therefore can hardly be seen as "significantly associated" with the retailer's ability to "establish and maintain" a market in the state.

Recognizing this distinction, states like New York allow companies to rebut the presumption of a nexus by providing evidence that the in-state resident affiliates' only activity was to provide links to the e-retailer's website and that the affiliates did not advertise or solicit customers by using "flyers, newsletters, telephone calls, or emails."<sup>138</sup> This rebuttable presumption was critical to the New York court's determination that the law did not facially violate the dormant Commerce

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133. *Id.* at 372-73; *Quill*, 504 U.S. at 313.

134. CONN. GEN. STAT. ANN. § 12-407(a)(12)(L); 35 ILL. COMP. STAT. § 105/2(1.1); *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-11 (1960); *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 483 U.S. 232, 249-50 (1987); *see supra* Part III.C (providing an overview of the attributional nexus requirement).

135. *Tyler Pipe*, 483 U.S. at 250.

136. *See supra* note 19 (concerning Amazon's Associates program); *see generally* Operating Agreement, *supra* note 19.

137. Cowan, *supra* note 8, at 1434-36; Donohoe, *supra* note 131, at 372.

138. N.Y. DEP'T OF TAXATION & FIN., New Presumption Applicable to Definition of Sales Tax Vendor, TSB-M-08(3)S, 2008 WL 2032988 (N.Y. Dept. Tax. Fin., May 8, 2008); Zaprzalka, *supra* note 91, at 542. The evidence required is contractual language in the agreement that (1) prohibits solicitation and (2) includes signed certifications from all the affiliates in the state stating that affiliate did not engage in solicitation. If the seller does not acquire certification from *all* its affiliates, the New York Tax Department will determine whether the presumption is rebutted by weighing the seller's reliance on certification in light of the *Quill* nexus standard. N.Y. DEP'T OF TAXATION & FIN., 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, TSB-M-08(3.1)S, 2008 WL 2620914 (N.Y. Dep't Tax. Fin., June 30, 2008); Zaprzalka, *supra* note 91, at 543.

Clause.<sup>139</sup> By failing to include a rebuttable presumption, the Illinois and Connecticut laws fail to satisfy the Commerce Clause nexus requirement from *Quill*.

Another issue with the laws in Illinois and Connecticut is that they violate the federal Internet Tax Freedom Act (ITFA), which prohibits a state or political subdivision from imposing “discriminatory taxes on electronic commerce.”<sup>140</sup> A discriminatory tax is defined as any state tax on electronic commerce that “imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.”<sup>141</sup> The Illinois and Connecticut laws “invite a challenge under the [ITFA]” because they impose an obligation to collect use taxes on out-of-state retailers who have in-state affiliates who refer business via internet sales transactions but *not* on out-of-state retailers whose in-state affiliates refer *non*-internet related business.<sup>142</sup> Consequently, the Illinois and Connecticut laws both likely violate the ITFA.<sup>143</sup>

In fact, a court recently declared the Illinois law unconstitutional because it violates both the dormant Commerce Clause and the ITFA.<sup>144</sup> Because the opinion contains no significant analysis, it is impossible to analyze this decision any further.<sup>145</sup> Nevertheless, the decision does suggest that the irrebuttable presumption of the Illinois and Connecticut laws is a key difference rendering these versions of the Amazon law nonviable alternatives for imposing a sales tax collection obligation on remote e-retailers.

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139. *Amazon.com, LLC v. N.Y. Dep’t of Taxation and Fin.*, 913 N.Y.S.2d 129, 139 (N.Y. App. Div. 2010); *see Zelinsky, supra* note 121, at 13-15 (explaining the different roles affiliates play and the impact on the legal analysis); *see* discussion and sources *supra* note 123 and 138.

140. Internet Tax Freedom Act of 1998, Pub. L. No. 105-277, div. C, Tit. XI, §§ 1100-1109, as amended (codified at 47 U.S.C. section 151 note).

141. *Id.* § 1105(a)(2)(iii).

142. *Donohoe, supra* note 131, at 373; Complaint for Declaratory Judgment and Permanent Injunction ¶¶ 61, 62, *Performance Mktg. Ass’n, Inc. v. Hamer*, 2012 WL 1986181 (Ill. Cir. 2012) (No. 2011-CH-26333).

143. The Connecticut law has not been challenged in a lawsuit, but Amazon has terminated its Associates’ program in the state. *See Operating Agreement, supra* note 19, § 2. *See infra* note 144 and related text (discussing the fate of the Illinois law).

144. In a brief written order filed on April 25, 2012, the Illinois Circuit Court for Cook County declared the Illinois law unconstitutional. *Performance Mktg. Ass’n, Inc. v. Hamer*, No. 2011-CH-26333, 2012 WL 1986181 (Ill. Cir. May 11, 2012) (order granting summary judgment to plaintiff); Matt Schaefer, *Court Rules that the Illinois Internet Affiliate Nexus Law is Unconstitutional and Violates the Internet Tax Freedom Act*, EYES ON ECOM L. (Apr. 26, 2012, 6:12 PM), <http://bit.ly/OQ7aB3>.

145. *See Hamer*, 2012 WL 1986181. Instead, the above analysis has been retained.

## 2. Colorado, Oklahoma, and North Dakota: The Solution?

As mentioned above,<sup>146</sup> Colorado took a different approach than other states in drafting its Amazon law. Instead of imposing tax *collection* obligations, Colorado imposes a *notice and reporting* obligation on remote sellers.<sup>147</sup> Soon after the law went into effect, the Direct Marketing Association (DMA)<sup>148</sup> challenged the law in federal court<sup>149</sup> seeking a permanent injunction based only on its Commerce Clause claims.<sup>150</sup> On March 30, 2012, the District Court in *Direct Mktg. Ass'n v. Huber*<sup>151</sup> granted the DMA's motion for summary judgment and issued a permanent injunction barring state enforcement of the Colorado Amazon law.<sup>152</sup>

In granting the injunction, the District Court's opinion focused on two issues: (1) whether Colorado's Amazon law discriminated against interstate commerce, and (2) whether the law placed an undue burden on interstate commerce.<sup>153</sup> The court held that the law was both discriminatory and unduly burdensome with regard to interstate commerce.<sup>154</sup>

The court divided its discrimination analysis into two sections.<sup>155</sup> The first "tier" of the analysis focused on whether the law differentiates, or discriminates, between in-state and out-of-state retailers.<sup>156</sup> Colorado argued that there was no discrimination because the law's plain language

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146. See *supra* Part IV.C (discussing Colorado's version of the Amazon law).

147. COLO. REV. STAT. § 39-21-112(3.5)(d) (2011); COLO. CODE REGS. § 39-21-112.3.5(2)(a) (2011).

148. The DMA is an "association of businesses and organizations that market products directly to consumers via catalogs, magazine and newspaper advertisements, broadcast media, and the internet." *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 at \*2 (D. Colo. Mar. 30, 2012).

149. See First Amended Complaint, *Direct Mktg. Ass'n v. Huber*, 2012 WL 1079175 (D. Colo. 2012) (No. 10-cv-01546-REB-CBS), 2010 WL 6646489.

150. *Huber*, 2012 WL 1079175, at \*2.

151. *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012).

152. *Id.* at \*10-11. The court had previously issued a preliminary injunction order against the law. *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2011 WL 250556 (D. Colo. Jan. 26, 2011).

153. *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 at \*3-9 (D. Colo. Mar. 30, 2012). In addition to issues surrounding the dormant Commerce Clause, notice and reporting statutes like Colorado's may have First Amendment implications, such as privacy, which go beyond the scope of this Comment. For a detailed analysis, see Gaylord & Haile, *supra* note 43, at 2084-91.

154. *Huber*, 2012 WL 1079175, at \*10.

155. See *supra* Part II.C (discussing the differing analysis under the dormant Commerce Clause depending on whether the law is discriminatory).

156. *Huber*, 2012 WL 1079175, at \*3.

indicates uniform application to all retailers.<sup>157</sup> However, the court concluded that this language was merely a “veil” and, therefore, was “too thin” to be non-discriminatory.<sup>158</sup> The fact that the notice and reporting obligations were imposed only on out-of-state retailers supported this conclusion.<sup>159</sup> The court also rejected Colorado’s argument that an out-of-state retailer has two options: comply with the Amazon law or voluntarily collect and remit sales taxes to the state.<sup>160</sup> The court reasoned that, without the Amazon law, no such choice would exist.<sup>161</sup> Consequently, the court held that the law discriminated against interstate commerce and would uphold the law only if the second “tier” requirements were met.<sup>162</sup>

The second “tier” of analysis examined whether the law advanced a legitimate local purpose that could not be served by nondiscriminatory alternatives.<sup>163</sup> Colorado argued three interests: (1) enhancing the state’s ability to recover sales and use tax revenue, (2) promoting the fair distribution of the cost of government, and (3) promoting respect for and compliance with tax laws.<sup>164</sup> The court agreed that these were legitimate state interests but noted that reasonable nondiscriminatory alternatives existed.<sup>165</sup> Because these alternatives exist, the court found that Colorado did not meet its burden, and therefore held the law to unconstitutionally discriminate against interstate commerce.<sup>166</sup>

The *Huber* court also analyzed whether the Colorado law placed an undue burden on interstate commerce.<sup>167</sup> After a brief overview of the *Quill* decision, the court held that the requirements imposed by Colorado on out-of-state retailers “are inextricably related in kind and purpose to the burdens condemned in *Quill*.”<sup>168</sup> The court did however acknowledge that the burden of notice and reporting “is somewhat

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157. Defendant’s Motion for Partial Summary Judgment at 14, *Direct Mktg. Ass’n v. Huber*, 2012 WL 1079175 (D. Colo. 2012) (No. 10-cv-01546-REB-CBS), available at <http://bit.ly/M5jfgz>.

158. *Huber*, 2012 WL 1079175, at \*4.

159. *Id.* at \*4-5. The court reasoned that in-state retailers are already required to collect and remit sales taxes. *Id.*

160. Defendant’s Motion for Partial Summary Judgment, *supra* note 157, at 14-15.

161. *Huber*, 2012 WL 1079175, at \*5.

162. *Id.* at \*6.

163. *Id.*

164. Defendant’s Motion for Partial Summary Judgment, *supra* note 157, at 22-23.

165. *Huber*, 2012 WL 1079175, at \*6. Examples suggested by the DMA include adding a line on income tax returns for residents to self-report use tax obligations, increasing the number of audits of business consumers, and conducting consumer education and notification programs. *Id.*

166. *Id.* at \*6-7 (noting that the law is virtually *per se* invalid because it discriminates against interstate commerce).

167. *Id.* at \*7.

168. *Id.* at \*8.

different than the burden of collecting and remitting sales and use taxes.”<sup>169</sup> Nevertheless, the court held that the Colorado law placed an undue burden on interstate commerce because the burdens are imposed solely on out-of-state retailers.<sup>170</sup> Thus, the court permanently enjoined enforcement of the law.<sup>171</sup>

The *Huber* decision represents a victory for remote sellers, but the rationale of the decision has been criticized.<sup>172</sup> In regard to the discrimination analysis, the court appears to suggest that *any* differential treatment between in- and out-of-state retailers is constitutionally impermissible.<sup>173</sup> However, recent United States Supreme Court decisions have indicated that unconstitutional discrimination under the Commerce Clause requires more than differential treatment; it also requires courts to consider whether the state law is a “protectionist enactment.”<sup>174</sup> If there is a non-protectionist basis for the law, then a lower standard of review is appropriate.<sup>175</sup>

Colorado has a legitimate, non-protectionist interest in collecting the sales and use taxes owed to the state that go uncollected because the retailer is out-of-state.<sup>176</sup> Therefore, the strict scrutiny analysis employed by the Colorado District Court was incorrect. Rather, the court should have applied the *Pike* balancing test, which is a lower standard.<sup>177</sup> That is, the court should have weighed the benefit of the state collecting sales and use tax revenue against the burden of out-of-state retailers preparing and sending the required notices to both consumers and the state Department of Revenue.<sup>178</sup> Comparing these factors, the benefit to the state would likely outweigh the burden on companies; but the *Pike* balancing test is somewhat unpredictable because the outcome “depends largely on the ‘weights’ a court gives to the perceived benefits and burdens of the challenged statute.”<sup>179</sup>

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169. *Id.*

170. *Id.* at \*8-9.

171. *Id.* at \*10-11.

172. *See, e.g.*, HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19.02[7][b]; Gaylord & Haile, *supra* note 43, at 2061. Note that both of these sources discuss the original preliminary injunction decision, but the court’s rationale was similar in both opinions.

173. *Huber*, 2012 WL 1079175, at \*3 (citing *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93 (1994)); HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19.02[7][b].

174. *New Energy Co. of Ind. v. Limback*, 486 U.S. 269, 278 (1988); *see also* Gaylord & Haile, *supra* note 43, at 2070-71.

175. Gaylord & Haile, *supra* note 43, at 2070-71.

176. *See id.* at 2073-76 (arguing that the state has such an interest).

177. *See supra* note 44 and accompanying text (discussing the *Pike* balancing test).

178. For a more in-depth analysis, *see* Gaylord & Haile, *supra* note 43, at 2076-84.

179. *Id.* at 2080-81.

The undue burden analysis by the *Huber* court is also problematic. The court likened the administrative burden of having the retailer collect the sales tax, which was struck down in *Quill*, with the notice and reporting burden, which assists the state in collecting use taxes owed by in-state customers.<sup>180</sup> Although these burdens may be similar, the notice and reporting burden seems to be less burdensome on e-retailers.<sup>181</sup> However, it is possible that the values represented in *Quill* could be implicated if no uniform reporting means existed, imposing substantial burdens on the out-of-state retailer.<sup>182</sup> While Colorado's inventive approach appears to solve the problems associated with New York's Amazon law, it creates other problems that have proven fatal.

The Amazon laws passed by Oklahoma and South Dakota attempt to avoid controversy by not imposing a significant burden on out-of-state retailers, but the laws are largely an exercise in futility and apply too broadly. Unlike Colorado's Amazon law, the Oklahoma and South Dakota laws only require a retailer to notify the purchaser that a use tax must be paid if the retailer is out-of-state.<sup>183</sup> With no reporting requirement by the remote retailers, the laws will likely have a minimal impact because most consumers will ignore the obligation to self-report purchases subject to the use tax.<sup>184</sup>

Paradoxically, while these laws may have a weak effect, they reach much further than either the Colorado or New York versions of the Amazon law. The Oklahoma and South Dakota laws apply to *all* out-of-state sellers, regardless of whether the seller actually engaged in a transaction with an in-state purchaser.<sup>185</sup> These laws also violate the due process requirements set forth in *Quill* because, without a transaction,

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180. Direct Mktg. Ass'n v. Huber, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 at \*8 (D. Colo. Mar. 30, 2012). The court did acknowledge that the burdens are "somewhat different." *Id.*

181. See Edward A. Zelinsky, *The Siren Song of State Amazon Laws: The Colorado Example*, 7 (Benjamin N. Cardozo Sch. of Law: Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 323, 2011), available at <http://bit.ly/L9ruci>. The United States Supreme Court was most concerned with the thousands of taxing jurisdictions and the burden on the retailer to keep track of all the related rates. *E.g.*, Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 759-60 (1967).

182. HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19.02[7][b]; Zelinsky, *supra* note 181, at 6-7.

183. OKLA. STAT. tit. 68, § 1406.1 (2011); S.D. CODIFIED LAWS §§ 10-63-1 to 10-63-9 (2011).

184. Edward A. Zelinsky, *The Paradoxes of Oklahoma's Amazon Statute: Weak Duties, Expansive Coverage, Often Superfluous, Constitutionally Infirm*, 2, 22-23 (Benjamin N. Cardozo Sch. of Law: Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 315, 2010), available at <http://bit.ly/LjDU0C> (stating the best way to collect tax revenue is to either have a third party, such as Amazon, collect the tax and remit it to the state, or have the third party report the sale to the state).

185. *Id.* at 2.

there is no purposeful direction by the remote retailer to the state.<sup>186</sup> Finally, without physical presence, the Oklahoma and North Dakota laws violate the physical presence standard from *Quill*.<sup>187</sup> As a result, these laws are a “paradox,”<sup>188</sup> and states should avoid passing similar laws.

As illustrated by the models of New York, Colorado, and Oklahoma, states have sought inventive ways to get around the barrier created by *Quill* and so far have followed the letter, but not necessarily the spirit, of *Quill*.<sup>189</sup> Some Amazon laws have been upheld,<sup>190</sup> some have been struck down or likely will be struck down,<sup>191</sup> and some are ineffective.<sup>192</sup> Even the New York version of the Amazon law stands on questionable constitutional grounds and depends heavily on the e-commerce website continuing its affiliates program in the state to be effective.<sup>193</sup> Though states will likely continue the trend of passing Amazon laws, these laws are not the solution to the problem of collecting sales tax from out-of-state purchases.

### B. Congressional Response and Potential Solutions

The solution to the out-of-state e-retailer sales tax collection problem must come from Congress.<sup>194</sup> As the *Quill* Court stated, “Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.”<sup>195</sup> Some scholars have argued that the aggressive approach taken by the states in passing Amazon laws is an effort to get the United

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186. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992); see also *supra* Part III.A.

187. See *Quill*, 504 U.S. 298; Zelinsky, *supra* note 184, at 3; see also *supra* Part III.B.

188. See generally Zelinsky, *supra* note 184.

189. See *supra* Parts III, IV.

190. The Amazon law in New York. See *Amazon.com, LLC v. N.Y. Dep’t of Taxation and Fin.*, 913 N.Y.S.2d 129, 145-46 (N.Y. App. Div. 2010).

191. The Amazon laws in Colorado, Connecticut, and Illinois. See *Direct Mktg. Ass’n v. Huber*, No. 10-cv-01546-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012); *Performance Mktg. Ass’n, Inc. v. Hamer*, No. 2011-CH-26333 2012 WL 1986181 (Ill. Cir. May 11, 2012) (order granting summary judgment to Performance Marketing Association).

192. The Amazon laws in Oklahoma and South Dakota. See Zelinsky, *supra* note 184, at 2, 22-23.

193. Gamage & Heckman, *supra* note 18, at 485.

194. Recently, David Gamage and Devin Heckman proposed a solution involving states compensating out-of-state retailers for the cost of collecting and remitting sales taxes, with no Congressional action required. *Id.* at 486-488, 532. This novel argument is worthy of further discussion but will not be examined by this Comment.

195. *Quill*, 504 U.S. at 320. This is because Congress has plenary power over interstate commerce. See U.S. CONST. art. I, § 8, cl. 3.



States Supreme Court to overturn *Quill*<sup>196</sup> or to “lobby” Congress to act.<sup>197</sup> Regardless, Congress clearly has the power to act, and the only remaining question is how to allow the states to collect sales taxes from out-of-state retailers.

1. The Streamlined Sales and Use Tax Agreement: What is it and is it Necessary?

The Streamlined Sales and Use Tax Agreement (SSUTA)<sup>198</sup> is a multistate agreement whose purpose is to “simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance,” which was a primary concern voiced by the *Quill* Court.<sup>199</sup> To achieve this goal, the SSUTA “focuses on improving sales and use tax administration for all sellers and for all types of commerce.”<sup>200</sup> Currently, 44 states and the District of Columbia have participated in creating this agreement, with 24 of those states having passed laws to comply with the agreement.<sup>201</sup> The SSUTA is voluntary and has no authority standing alone, as states must pass laws to bring their sales and use tax laws into compliance with the SSUTA, and sellers are not currently required to register under the SSUTA.<sup>202</sup> In

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196. Zelinsky, *supra* note 181, at 9-11 (stating that the Supreme Court is unlikely to overturn *Quill* because (1) of procedural problems, (2) no decisions post-*Quill* have indicated that the Court is likely to overturn *Quill*, and (3) *Quill* explicitly told the states to look to Congress for the solution).

197. Zelinsky, *supra* note 121, at 2-3, 21-24 (arguing that Amazon laws signal to Congress the need for federal legislation and provide political cover to lawmakers who do not wish to appear to be “raising” taxes).

198. For a more in-depth summary of the SSUTA, see HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19A. This Comment only focuses on the basic aspects of the SSUTA.

199. STREAMLINED SALES TAX PROJECT, STREAMLINED SALES AND USE TAX AGREEMENT § 102 (adopted Nov. 12, 2002, amended May 19, 2011), *available at* <http://bit.ly/JgWVfX> [hereinafter SSUTA]. See HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶¶ 19A.01-19A.02 for the historical background surrounding the SSUTA. See Gamage & Heckman, *supra* note 18, at 500 (discussing the *Quill* Court’s concern with the burdens on out-of-state retailers).

200. SSUTA, *supra* note 199, § 102. The SSUTA focuses on the following areas for simplification: (1) state level administration of sales and use tax collections; (2) uniformity in the state and local tax bases; (3) uniformity of major tax base definitions; (4) central, electronic registration system for all member states; (5) simplification of state and local tax rates; (6) uniform sourcing rules for all taxable transactions; (7) simplified administration of exemptions; (8) simplified tax returns; (9) simplification of tax remittances; and (10) protection of consumer privacy. *Id.*

201. *Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://bit.ly/dfuJEG> (last visited Sept. 1, 2012).

202. SSUTA, *supra* note 199, § 303; HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19A.03[1]. Once a seller registers under the SSUTA, it will be relieved of certain liabilities, receive amnesty for uncollected or unpaid taxes, and become entitled to collect higher compensation for tax collection obligations. SSUTA, *supra* note 199, §§ 303, 402, 601, 603.

order for states to require remote vendors to comply with the SSUTA, Congress must approve the compact.<sup>203</sup>

Despite the overall successes of the SSUTA in simplifying state sales tax laws and easing administrative burdens, it has not been without criticism. Many out-of-state retailers, not surprisingly, do not approve of the SSUTA because they will lose the price advantage they currently enjoy by not collecting sales taxes.<sup>204</sup> States also argue that technology has greatly reduced the collection burden and, consequently, the need for tax simplification and the SSUTA because software can be used to track and compute the various tax rates in the thousands of taxing jurisdictions.<sup>205</sup> E-retailers counter by claiming that developing and paying for such software imposes significant burdens.<sup>206</sup>

Ultimately, the SSUTA has achieved a great deal of success, but has not achieved the results many hoped it would. The SSUTA's biggest problem is that retailers are not required to register under the SSUTA.<sup>207</sup> Congress has attempted several times to pass laws that grant approval to the SSUTA, but none have been successful.<sup>208</sup> However, Congress is currently considering several bills that either consent to the SSUTA or require states to meet minimum simplification requirements before imposing sales tax collection obligations on remote vendors.

## 2. Will Congress Finally Act?

Three proposed bills have been introduced in Congress during the 112th session: the Main Street Fairness Act,<sup>209</sup> the Marketplace Equity Act,<sup>210</sup> and the Marketplace Fairness Act.<sup>211</sup> Each bill, if passed, would authorize states to collect from out-of-state vendors; however, each bill would impose different requirements that states must satisfy before becoming authorized to collect from out-of-state vendors.

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203. See *infra* Part V.B.2 (discussing the current bills that Congress is considering).

204. Ess, *supra* note 38 at 914-15.

205. *Id.* at 917; Zelinsky, *supra* note 121, at 23 (noting that “hybrid” vendors like Staples or Walmart, which both run websites and brick-and-mortar stores, are able to charge sales taxes without problem on online purchases).

206. See *Constitutional Limitations on States' Authority to Collect Sales Taxes in E-Commerce: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 55-56 (2011) (statement of Dr. Patrick M. Byrne, Chairman and CEO, Overstock.com, Inc.), available at <http://1.usa.gov/MIUHj3>.

207. SSUTA, *supra* note 199, § 303; HELLERSTEIN & HELLERSTEIN, *supra* note 25, ¶ 19A.03[1].

208. Gaylord & Haile, *supra* note 43, at 2030. Consent from Congress is required in order for the SSUTA to require remote vendors to register. *Id.*

209. Main Street Fairness Act, S. 1452, 112th Cong. (2011).

210. Marketplace Equity Act, H.R. 3179, 112th Cong. (2011).

211. Marketplace Fairness Act, S. 1832, 112th Cong. (2011).

Under the Main Street Fairness Act of 2011, only states that are fully compliant member states of the SSUTA would be able to collect sales taxes from out-of-state retailers.<sup>212</sup> Additionally, the bill enumerates numerous “Minimum Simplification Requirements” that the states must meet.<sup>213</sup> This bill is not a preferable solution, however, because it prevents states that are not fully compliant with the SSUTA from collecting sales taxes from out-of-state retailers.<sup>214</sup> While encouraging states to simplify their sales tax laws is a good idea, preventing those states that choose not to completely comply with the SSUTA from collecting sales taxes from out-of-state retailers is unfair to those states. Consequently, the Main Street Fairness Act is an imperfect solution.

The Marketplace Equity Act of 2011 takes almost the opposite approach of the Main Street Fairness Act and attempts to allow all states to collect sales taxes from out-of-state retailers. Instead of consenting to the SSUTA, the bill would require states wishing to collect sales taxes from out-of-state sellers to implement “a simplified system for administration of sales and use tax collection.”<sup>215</sup> These requirements are different from those enumerated under the SSUTA and include the following: a small seller exception, a tax return provided by the state to be sent to a single state authority, clear definitions by the state of what products are taxable, and the ability to charge out-of-state retailers one of three different tax rates.<sup>216</sup> Once the state implements the above changes and publishes a public notice as required by the bill, the state would be allowed to collect sales taxes from out-of-state retailers.<sup>217</sup> The bill is an improvement over the Main Street Fairness Act because it allows non-SSUTA compliant states to collect sales taxes from remote vendors.<sup>218</sup> However, the simplification requirements under the Marketplace Equity Act are not as stringent as those under the SSUTA and, notably, the bill would not necessarily allow fully compliant states under the SSUTA to collect sales taxes without further changes.<sup>219</sup> Accordingly, while the

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212. S. 1452 § 4.

213. *Id.* § 6. These requirements are largely the same as required by the SSUTA. *See supra* note 200 (listing the SSUTA simplification requirements); *see generally* SSUTA, *supra* note 199.

214. S. 1452 § 4.

215. Marketplace Equity Act, H.R. 3179, 112th Cong. § 2(b) (2011).

216. *Id.* § 2(b). The three rates are: (1) a single state-wide blended rate, (2) the maximum state rate, or (3) the applicable destination rate. *Id.* § 2(b)(4)(A). The state cannot charge a rate under (1) or (2) higher than that charged to local sellers. *Id.* § 2(b)(4)(C).

217. *Id.* § 2(c).

218. *Id.* § 2(a).

219. Sylvia F. Dion, *The Marketplace Equity Act: The New Competition on the Block*, SALES TAX SUPPORT (Oct. 25, 2011), <http://bit.ly/JqblEC> (pointing out that states

Marketplace Equity Act currently has greater bipartisan support,<sup>220</sup> it too is an imperfect solution.

Finally, the Marketplace Fairness Act of 2011 represents a compromise between the two previous bills. The bill authorizes fully compliant states under the SSUTA to require remote vendors who do not qualify for the small seller exception to collect and remit sales taxes.<sup>221</sup> An alternative provision allows those states that have not fully complied with the SSUTA to also be able to collect sales taxes from remote sellers.<sup>222</sup> This alternate provision is similar to the Marketplace Equity Act because it contains several simplification provisions that a state must enact before the state can require a remote vendor to collect sales taxes.<sup>223</sup> By requiring non-SSUTA compliant states to implement minimum simplification requirements before collecting taxes from e-retailers, this approach seems to be the “Goldilocks” bill. The bill provides the “just right” balance in allowing states to collect sales taxes from remote vendors without imposing too great a burden on those sellers.

All three of the above bills have been referred to committee, signifying that they are in the early stages of the legislative process and that the bills’ future is uncertain.<sup>224</sup> This is not the first time that bills have been introduced in Congress to give states the power to collect sales taxes from remote sellers.<sup>225</sup> However, Congress seems more determined to act this time, as indicated by the House Judiciary, Senate Finance, and Senate Commerce Committees’ decisions to hold hearings on November 30, 2011,<sup>226</sup> April 25, 2012,<sup>227</sup> July 24, 2012,<sup>228</sup> and August 1, 2012<sup>229</sup> to

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who could collect under the Main Street Fairness Act would not necessarily be the same as those under the Marketplace Equity Act because the simplification requirements are different).

220. *Id.*

221. Marketplace Fairness Act, S. 1832, 112th Cong. § 3(a) (2011).

222. *Id.* § 3(b).

223. *Id.*

224. Sylvia F. Dion, *Sales Tax Act—Main Street or Marketplace. Is SST Issue Key?*, SALES TAX SUPPORT (Dec. 22, 2011), <http://bit.ly/rtRkdH> (noting “[m]ost bills never receive any committee consideration and are never reported out”).

225. Similar bills in the past have failed to pass Congress. *See, e.g.*, Main Street Fairness Act, H.R. 5660, 111th Cong. (2010).

226. *Constitutional Limitations on States’ Authority to Collect Sales Taxes in E-Commerce: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (2011), available at <http://1.usa.gov/MIUHj3>.

227. *Tax Reform: What It Means for State and Local Tax and Fiscal Policy: Hearing Before the S. Comm. on Fin.*, 112th Cong. (2012), available at <http://bit.ly/KFa6SO> (discussing state tax law reform in general).

228. *H.R. 3179, the “Marketplace Equity Act of 2011”*: *Hearing Before the H. Comm. on the Judiciary*, 112th Cong. (2012), available at <http://1.usa.gov/MSbpZU>.

discuss the currently proposed bills. Despite some disagreements,<sup>230</sup> the consensus of Congress appears to be towards action, though Representative John Conyers, a sponsor of the Main Street Fairness Act, admitted that his bill “isn’t perfect” and “can be improved.”<sup>231</sup> Nevertheless, based on this increased committee activity, the likelihood of Congressional action seems greater than in the past.<sup>232</sup>

## VI. CONCLUSION: WHAT IS THE ULTIMATE ANSWER?

Despite being 20 years old, the *Quill* decision remains the law of the land and is still applicable to the world of e-commerce. That does not mean the result is always fair, as “pure” e-retailers like Amazon have stretched *Quill* to its extreme limits. Although states are looking for any means through which to collect sales taxes from out-of-state retailers, passing Amazon laws to force remote e-retailers to collect and remit sales taxes is not the proper solution.

Even if Amazon’s challenge to the New York Amazon law reaches the United States Supreme Court, and even if the Court decides to uphold the law as constitutional, most states would still be unable to collect sales taxes from pure e-retailers like Amazon. Amazon has shown that it is willing to cancel its Associates program to avoid collecting sales taxes, and, without that program, the state will be again unable to collect sales taxes from the e-retailer.<sup>233</sup> Colorado’s approach is unique and more effective in some ways, but raises a host of other issues that place this version of the Amazon law on shaky constitutional ground. Arguably Oklahoma’s approach is the least controversial, but is conversely the least effective.<sup>234</sup> Despite these problems and issues, states will likely continue to pass Amazon laws.

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229. *Marketplace Fairness: Leveling the Playing Field for Small Businesses: Hearing Before the S. Comm. on Commerce*, 112th Cong. (2012), available at <http://1.usa.gov/Plecyn>.

230. Generally, opponents to the three bills claim that imposing sales tax collection obligations will stifle e-commerce by imposing high burdens on small start-up businesses and therefore argue for a high small business exception. Bernie Becker, *Reid: I'll Do Everything I Can' for Online Sales Tax*, THE HILL (Jul. 24, 2012, 8:04 AM), <http://bit.ly/STNmy9>. Opponents also argue that the bills will impose a new tax on consumers and that the technology does not exist to calculate the appropriate sales tax in the 9,600 taxing jurisdictions. Grant Gross, *Supporters of Online Sales Tax Say It's Good for Consumers*, PC WORLD (Jul. 24, 2012, 2:40 PM), <http://bit.ly/MGURHP>. See also *supra* Part V.B.1 (discussing arguments against the SSUTA).

231. Becker, *supra* note 227.

232. At the July 24, 2012 House Judiciary Committee hearing, Representative Bob Goodlatte stated “[i]t may not be the beginning of the end but it may be the end of the beginning.” Siobhan Hughes, *Online Sales Tax Effort Gains Traction at US House Hearing*, WALL ST. J. (July 24, 2012, 3:07 PM), <http://on.wsj.com/MHVZsI>.

233. Gamage & Heckman, *supra* note 18, at 485.

234. See *supra* Part V.A.2.

While states may keep trying to force remote vendors to collect sales taxes, resolution of this issue has and always will be an area on which Congress has the ultimate authority to decide. The United States Supreme Court *could* also overturn *Quill*, but it is unlikely that the Court will do so based on the Court's language that Congress should resolve the issue and the Court's unwillingness to take action over the last 20 years. Congress seems motivated to act at this time, with increased pressure from states demanding the power to collect the sales taxes that pure e-retailers owe the states. Ultimately, the best answer to this problem is to authorize states who have complied with the SSUTA to require remote vendors to collect and remit sales taxes, while also allowing states who comply with some level of minimum simplification standards to do the same. Although e-retailers will continue resisting the Amazon laws, it seems inevitable that out-of-state e-retailers will be required to collect and remit sales taxes to states in the near future. The only remaining questions are when and under what circumstances.