

OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 39

SUMMER 2014

NUMBER 2

ARTICLES

TAXING ELECTRONIC COMMERCE: THE EFFORTS OF
SALES AND USE TAX TO EVOLVE WITH TECHNOLOGY

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I. INTRODUCTION

As the way individuals in the United States make and consume goods has changed, the system of imposing a tax on those transactions has struggled to keep pace. Each state government levies taxes on the purchase or consumption of goods, building incentives into tax statutes and regulations and providing other guidance to encourage consumption and maximize revenue for itself.¹ State taxing authorities, economists, retailers, and academics have considered the various systems that would be most efficient for each stakeholder in this debate: the states earning revenue,² the consumers paying the tax, and the retailers seeking competitive advantage.

Despite prolific analysis generated on this issue,³ the legal standard for whether a state has the constitutional right to impose a tax on an out-of-state retailer has not changed since 1992 when the U.S. Supreme Court decided *Quill Corp. v. North Dakota ex rel. Heitkamp*.⁴ The Court in *Quill* relied on the Commerce Clause to determine that in order for a

1. In 2008, “general sales and use taxes [generated approximately] \$237 billion, or 31 percent of total state [revenue] collections.” WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION: CASES AND MATERIALS 607 (9th ed. 2009).

2. For those states that impose sales and use taxes or similar consumption taxes, the revenue collected by retailers and consumers is a major source of income. *Id.* at 605.

3. See generally KARL FRIEDEN, CYBERTAXATION: THE TAXATION OF E-COMMERCE (Sally Adams ed., 2000); RICHARD L. DOERNBERG ET AL., ELECTRONIC COMMERCE AND MULTIJURISDICTIONAL TAXATION (2001); Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41 (2012).

4. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

state to impose a sales tax on a retailer, the state must demonstrate that the same retailer has a physical presence within that state.⁵ Even in the Court's articulation of that standard, however, the opinion implored Congress to take up the issue.⁶ The crux of the question is a matter of interstate commerce, which the U.S. Congress is best equipped to resolve.⁷ More than twenty years after the decision in *Quill*, one chamber of Congress has passed a bill, the Marketplace Fairness Act (MFA), that has the best chance of reforming the physical-presence standard—a standard that is increasingly outdated as time passes.⁸ Not coincidentally, Amazon.com, Inc. (Amazon), a giant online retailer that had previously gone to great lengths to avoid collection of sales tax in as many jurisdictions as possible, came to support an update of the physical-presence standard around the same time.⁹

This Article will focus on the implications of these two major developments: the passage of the MFA in the Senate as well as the change in position of influential retailer Amazon. Part II will briefly review the current state of the law through the lens of the ways Congress's passage of the bill may build on the Court's reasoning in *Quill*. Part III will turn to the various stakeholders in this issue: the states, electronic retailers of various sizes, brick-and-mortar retailers, and of course, the ultimate bearers of the tax—consumers. This section will focus especially on what large and predominantly electronic retailers, like Amazon, have to gain and lose from a change in standard. Finally, Part IV will conclude with a detailed analysis of the proposed solutions, both the broader legislation passed by the Senate, the MFA, and the Streamlined Sales and Use Tax Agreement (SSUTA), which is integrated into the MFA as a part of the solution. Understanding that the physical-

5. *Id.* at 314.

6. *Id.* at 318.

7. *Id.*

8. See 160 CONG. REC. S598 (daily ed. Jan. 29, 2014) (memorializing H.R. Res. 571, 197th Gen. Assemb., 2013 Sess. (Pa. 2013)).

9. As this Article is submitted, the founder and CEO of Amazon, Jeff Bezos, has personally purchased the Washington Post. Given that a major interest of Amazon has been states' rights to impose sales tax, Mr. Bezos's increased influence in Washington, D.C., via his newly owned institution of print media may be significant. Paul Farhi, *Washington Post Closes Sale to Amazon Founder Jeff Bezos*, WASH. POST (Oct. 1, 2013), http://www.washingtonpost.com/business/economy/washington-post-closes-sale-to-amazon-founder-jeff-bezos/2013/10/01/fca3b16a-2acf-11e3-97a3-ff2758228523_story.html.

presence standard is not relevant in the same way that it was in 1992, this Article will examine the opportunities, challenges, and obstacles to a new solution.

II. SALES-TAX NEXUS: THE CURRENT STANDARD AS ARTICULATED IN *QUILL*

States began imposing a sales tax in the 1930s, when other tax revenues¹⁰ were not enough to sustain state budgets.¹¹ Today, all but five states impose some form of sales and use tax, and roughly two-thirds of states have local jurisdictions that impose an additional sales tax.¹² In general, most states impose what amounts to a “retail sales tax,” a tax commonly placed on sales of tangible personal property¹³ sold at retail¹⁴ for use or consumption. The tax is a percentage set by the state¹⁵ that is collected from the purchaser by the retailer at the time of the sale.¹⁶ Though the burden of paying the tax is on the purchaser who pays a percentage of each taxable transaction to the retailer, it is the vendor that is registered with the state who must collect and remit the tax to the appropriate jurisdictions. The complementary tax to the sales tax is the often overlooked “use tax.” Described frequently as the “compensating” use tax and designed by states to compensate for the loss of revenue from purchasers traveling to non-sales-tax jurisdictions, the use tax is the functional equivalent to the sales tax in form and rate.¹⁷ The use tax applies to all purchases that have not been subjected to a sales tax but which are used or consumed in-state.¹⁸ Instead of the vendor collecting the tax, the consumer is responsible for calculating and remitting the use tax to the state.¹⁹ While the compensating-use tax together with the sales tax makes a complete system of consumption tax, the use tax is much

10. HELLERSTEIN ET AL., *supra* note 1, at 700. Income tax and property tax are considered “traditional sources of revenue.” *Id.* at 607.

11. *Id.* at 607.

12. *Id.*

13. *Id.* at 605. An increasing number of exceptions for computer software and various services are evident. *Id.* at 629–30.

14. *Id.* at 605. Retail does not include items sold for resale nor casual and isolated sales. *Id.* at 606.

15. *Id.* at 605–06. After taxes are collected, jurisdictions are allocated an appropriate percentage. *Id.* at 607–08.

16. *Id.* at 722.

17. *Id.* at 700–01.

18. *Id.*

19. *Id.*

more difficult for states to enforce because it is calculated on individuals purchasing products for their own personal use rather than registered vendors collecting sales tax on each transaction and aggregating the amounts before remitting to the state.²⁰

The Court in *Quill* was asked to rule on a corporation located wholly outside of North Dakota that sold office supplies by mail order to purchasers in-state.²¹ North Dakota sought to impose its sales-and-use-tax rules on Quill Corporation despite the fact that there were neither physical offices in the state nor any orders received or fulfilled there.²² Quill was a large mail-order business, and the question before the Court was whether such a company had sufficient “nexus” to the state that allowed the state to impose its laws—state tax statutes in this case—on the corporation.²³ This case was an appeal from a decision by the North Dakota Supreme Court that held that the economic change noted was the remarkable growth of the mail-order business “from a relatively inconsequential market niche” in 1967 “into a goliath” in 1989.²⁴ The high court in North Dakota also supported its finding that Quill could be subject to requirements regarding the collection and remission of sales tax in-state by observing that advances in computer technology greatly eased the burden of compliance with a “virtual welter of complicated

20. *Id.* For the purposes of this Article, “sales tax” will refer to the system of sales and use tax. *Quill*, though often considered the principal case articulating the current law for sales-tax nexus, actually dealt with a state encouraging the vendor to collect a use tax. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 301 (1992). *See also* *Miller Bros. v. Maryland*, 347 U.S. 340, 343 (1954) (“The use tax, not in itself a relatively significant revenue producer, usually appears as a support to the sales tax in two respects. One is protection of the state’s revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices.”).

21. *Quill*, 504 U.S. at 301–02.

22. *Id.* at 302–03.

23. *Id.* at 301–02, 304.

24. *State ex rel. Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 208–09 (N.D. 1991). Note that the growth in the mail-order industry from 1967 to 1989 is dwarfed by the growth in online sales from 1992 to present day. *Twenty Years After Quill, Resolution on Nexus Issues Eludes States, Taxpayers as More Commerce Goes Online, Tax Management Weekly State Tax Report*, BLOOMBERG BNA (Sept. 28, 2012), http://news.bna.com/msln/TMWSLN/split_display.adp?fedfid=28116275&vname=tmnot&fcn=10&wsn=500168000&fn=28116275&split [hereinafter *Twenty Years After Quill*]. The difference in lost sales-tax revenue to states is accordingly large, meaning there is more at stake in the current debate than ever. With the continued growth of online sales, states that collect sales tax will realize an increasing loss of revenue.

obligations” imposed by state and local taxing authorities.²⁵ The North Dakota Supreme Court’s holding put the U.S. Supreme Court in the position of having to choose between reversing the state’s high court or overruling its own precedent in *National Bellas Hess, Inc. v. Department of Revenue of Illinois (Bellas Hess)*.²⁶

After it carefully considered the standards and reasoning set forth in *Bellas Hess*, the U.S. Supreme Court ultimately reversed the North Dakota Supreme Court.²⁷ At the time, many, including the Court, viewed the decision in *Quill* as an update in standards to account for changing times and technology.²⁸ As stated by the North Dakota Court, advances in technology impacted both the way that customers purchased from retailers as well as the reasonableness of the burden on retailers to collect and remit the tax.²⁹ Both of these factors are relevant today as the way that consumers and businesses use and rely on technology is increasingly becoming a part of society’s fabric. Both factors will impact future standards used to determine whether a state has sufficient contacts with a retailer to impose taxes.

Limits on a state’s authority to impose taxes on out-of-state retailers generally fall under two separate sections of the Constitution: the Due Process Clause³⁰ and the Commerce Clause.³¹ Ultimately, the *Quill* Court relied on the Commerce Clause and *Bellas Hess*’s physical-presence

25. *Heitkamp*, 407 N.W.2d at 215 (quoting Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill. (Bellas Hess), 386 U.S. 754, 760 (1967)).

26. *Quill*, 504 U.S. at 301–02. National Bellas Hess, Inc. was a taxpayer incorporated in Delaware with its principal place of business in Missouri. *Bellas Hess*, 386 U.S. at 753–54. Licensed to do business only in Delaware and Missouri, its contacts with Illinois (and all other states) were exclusively through mail or common carrier. *Id.* at 754. It did not advertise by any medium in Illinois except possibly for flyers “occasionally mailed to past and potential customers,” and its only other connection with the state was sending its catalog to “active or recent customers” twice each year. *Id.* The Court held that since Bellas Hess’s only connection with customers was through mail or common carrier, the state’s imposition of sales and use tax violated both the Due Process Clause and the Commerce Clause of the U.S. Constitution. *Id.* at 756–60.

27. *Quill*, 504 U.S. 298.

28. *Id.* at 317–19.

29. *Heitkamp*, 470 N.W.2d at 207–09, 215. In *Bellas Hess* and *Quill*, the Court considered standards that apply to both sales and use taxes. *Quill*, 504 U.S. 298; *Bellas Hess*, 386 U.S. 754. The standards of nexus set forth in these cases apply to both sales and use taxes, but whether they apply to other state-level taxes, such as income tax, was not specifically stated. *Quill*, 504 U.S. 298; *Bellas Hess*, 386 U.S. 754. State income taxes are generally held to a different standard of nexus. HELLERSTEIN ET AL., *supra* note 1, at 22, 42, 51, 103.

30. U.S. CONST. amend. XIV, § 1.

31. U.S. CONST. art. I, § 8, cl. 3.

standard for sales-tax nexus to find that North Dakota could not impose its tax on Quill.³² However, in encouraging Congress to take up the issue, the *Quill* Court stated that “while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.”³³

The Due Process Clause and the Commerce Clause are concerned with two distinct principles: the Due Process Clause addresses “the fundamental fairness of governmental activity,” while the Commerce Clause gives Congress the opportunity to weigh-in on how to structure the systems of taxation in all jurisdictions in a way that is most efficient for national commerce.³⁴ The Author will briefly review each principle while considering the application of the analysis to today’s economy.

A. Due Process in Quill

Quill observed that “[t]he Due Process Clause ‘requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’”³⁵ This connection, noted the Court, required “income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State.”³⁶ In *Quill*, the Due Process question was whether Quill had “purposefully avail[ed] itself of the benefits of an economic market in the forum State.”³⁷ If so, Quill could “subject itself to the State’s *in personam* jurisdiction even if it ha[d] no physical presence in the State.”³⁸ The *Quill* Court held that the connection between Quill and North Dakota, through catalogs and merchandise sent only by mail and common carrier, was enough of a connection that state taxation would not violate Due Process.³⁹ Whether Quill would be subject to the state’s jurisdiction depended on whether Quill had “fair warning that [its] activity may subject [it] to the

32. *Quill*, 504 U.S. at 317–18.

33. *Id.* at 305 (citation omitted) (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945)).

34. *Id.* at 312 (citing THE FEDERALIST NOS. 7, 11 (Alexander Hamilton)).

35. *Id.* at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)).

36. *Id.* (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)) (internal quotation marks omitted).

37. *Id.* at 307.

38. *Id.*

39. *Id.* at 306–08.

jurisdiction of a foreign sovereign.”⁴⁰ The Court followed that reasoning by stating that “[i]n ‘modern commercial life’ it matters little that . . . solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation’s lack of physical presence in the taxing State.”⁴¹

Due Process is clearly satisfied without a physical presence, and in *Quill*, Due Process concerns were not what ultimately kept the state from imposing its tax. The time period of *Quill* was one in which the cultural shift had to do with delivering catalogs and goods to a jurisdiction, and that shift satisfied the “fairness” element and allowed courts to hold that taxpayers had “purposefully availed” themselves of the jurisdiction’s laws. Now, though online retailers also use mail and common carriers to deliver their products to various jurisdictions, many online retailers do not send catalogs or any other materials to entice consumers in any particular state to buy their products but instead showcase their products entirely online.⁴² Consequently, the question has partially to do with whether the activities of an online retailer, which has no physical presence in a particular state at all and certainly is not directing these activities at any one particular jurisdiction, will rise to the level of being directed to a particular state.⁴³ The shipment by mail or common carrier of products is certainly purposeful direction,⁴⁴ but whether the retailer or consumer initiated contact may be an open question in the modern Due Process analysis. If the Due Process analysis is unconcerned with physical presence and more focused with the intent of the retailer, the lines to be drawn by the Court in *Quill* and its predecessors may be less clear. Whether a retailer ships to one customer or one thousand customers in a state may impact the analysis of what is fundamentally fair. Drawing a strict distinction that measures sales either by dollars spent or number of transactions, like any bright-line test, would be

40. *Id.* at 308 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

41. *Id.*

42. ERIKA K. LUNDER & CAROL A. PETTIT, CONG. RESEARCH SERV., R42629, “AMAZON LAWS” AND TAXATION OF INTERNET SALES: CONSTITUTIONAL ANALYSIS 1 (2013).

43. *Id.* at 4.

44. See David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 491–92 (2012) (discussing *Quill* and the effects of a remote vendor generating sales within a given state).

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arbitrary at its edges.⁴⁵ As the Court in *Quill* demonstrated, the law has a preference for predictability and stability so that taxpayers may have accurate expectations, even if a bright-line rule treats similar circumstances differently, especially when the differential treatment applies to circumstances that would ordinarily be indistinguishable.⁴⁶

In the end, the Court confirmed the North Dakota Supreme Court's finding that state tax imposition would not violate the principles of fundamental fairness embodied in the Due Process analysis: "In this case, there is no question that *Quill* has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for Due Process purposes, and that the use tax is related to the benefits *Quill* receives from access to the State."⁴⁷ Despite the fact that the Court did not require physical presence to satisfy Due Process for state-court jurisdiction in *Quill*, whether the same would be true for an online retailer today is less clear. As this is a matter of interpreting fundamental fairness, it would be for a court, not Congress, to decide.⁴⁸

B. Commerce Clause in Quill

The Commerce Clause analysis is the more often cited portion of this case. In it, the Court ultimately read the physical-presence standard from its Commerce Clause analysis and accordingly precluded North Dakota from imposing its tax on *Quill*.⁴⁹ Unlike the Due Process analysis, however, the Court reviewed the source of Commerce Clause doctrine and called on Congress to clarify, as is its articulated duty.⁵⁰

The Constitution's Commerce Clause "expressly authorizes Congress to regulate Commerce with foreign Nations, and among the

45. See, e.g., Corey Bass, Comment, *Taxation of Internet Transactions: Developing a Clear Rule to End State Law Inconsistencies in the Aftermath of Amazon.com v. N.Y. Department of Taxation and Finance*, 44 CUMB. L. REV. 19 (2013) (discussing New York's "Amazon Law" granting jurisdiction over sellers whose gross receipts exceeded \$10,000).

46. *Quill*, 504 U.S. at 317.

47. *Id.* at 308.

48. See Earl M. Maltz, *Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 997 (1985) (explaining that judges must rely on "noninstitutional considerations" when determining legislative intent of a statute in a given case).

49. *Quill*, 504 U.S. at 317-18.

50. *Id.* at 318.

several States.”⁵¹ As the Court notes, the Commerce Clause “says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, . . . the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.”⁵² The Commerce Clause, “‘by its own force’ prohibits certain state actions that interfere with interstate commerce.”⁵³ The Supreme Court’s “interpretation of the ‘negative’ or ‘dormant’ Commerce Clause has evolved substantially over the years, particularly as that Clause concerns limitations on state taxation powers.”⁵⁴ In its evolution of the Commerce Clause doctrine, the Supreme Court has “ruled that [it] prohibits discrimination against interstate commerce . . . and bars state regulations that unduly burden interstate commerce.”⁵⁵

The Court applied a four-part test, created in *Complete Auto Transit, Inc. v. Brady*, to determine whether North Dakota’s tax could sustain a challenge under the Commerce Clause.⁵⁶ The four parts of the test are whether “tax [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.”⁵⁷ Though this test was established ten years after the decision in *Bellas Hess*, the Court held that *Bellas Hess* “stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”⁵⁸ The “substantial nexus” requirement limits the state’s taxing authority to ensure that interstate commerce is not unduly burdened.⁵⁹

Unlike the Due Process requirement for minimum contacts, which serves as a proxy for notice to the taxpayer, the substantial nexus

51. *Id.* at 309 (quoting U.S. CONST. art I, § 8, cl. 3) (internal quotation marks omitted).

52. *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 236 (1824)).

53. *Id.* (quoting *S.C. State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938)).

54. *Id.*

55. *Id.* at 312 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981)).

56. *Id.* at 310 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

57. *Id.* at 311 (quoting *Complete Auto*, 430 U.S. at 279) (internal quotation marks omitted).

58. *Id.*

59. *Id.* at 313.

requirement of the Commerce Clause is instead concerned with an analysis of the burdens on the way that businesses conduct themselves across state lines.⁶⁰ Thus, the question in *Quill* was whether Quill, or any retailer without a substantial nexus to a jurisdiction, would conduct business differently if it were subject to tax in any state in which it had minimum contacts. Realizing that using “physical presence” as the deciding factor in whether an entity has a substantial nexus to a state is a rational, but somewhat arbitrary, bright-line test, the Court recognized that the “rule appears artificial at its edges: Whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office.”⁶¹ Yet in a time during which commerce was evolving rapidly, with increasing mail orders and online merchants on the horizon, the Court recognized that “[s]uch a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes.”⁶²

The predictable boundaries and expectations of the bright-line rule requiring “physical presence” to achieve substantial nexus to the state under parts one and four of the *Complete Auto* test have more to do with just encouraging investment across state lines by businesses and individuals.⁶³ The Court reasoned that it was necessary to uphold the Commerce Clause goals of not impeding interstate businesses.⁶⁴ This had to do partly with the increasing number of sales-tax jurisdictions, both state and local, each with its own rate and rules regarding what may be taxed,⁶⁵ the sophistication required to administer a multi-state business without certainty of where sales tax may apply is more than what multi-jurisdictional retailers engaging in business across state lines should have to endure.⁶⁶ The physical-presence test is predictable and has carried out

60. *Id.*

61. *Id.* at 315.

62. *Id.*

63. *Id.* at 316 & n.9.

64. *Id.* at 317–18.

65. In addition to the 45 states that impose a general sales tax, hundreds of local jurisdictions do as well. See Stu Woo, *Amazon Battles States over Sales Tax*, WALL ST. J. (Aug. 3, 2011), available at <http://online.wsj.com/news/articles/SB10001424053111904772304576468753564916130>.

66. *Simplified Sales Tax: Not So Fast, It's Not That Simple*, NETCHOICE, <http://netchoice.org/library/simplified-sales-tax-not-so-fast-its-not-that-simple/> (last visited July 21, 2014) (“[T]he compliance costs of [the Streamlined Sales Tax Project]—especially for small firms turning to the online channel—may outweigh the new tax

its purpose well, as evidenced by the number of retailers that have intentionally minimized the jurisdictions in which they have physical presence.⁶⁷ Indeed, the attorney for Quill argued that the nexus requirement for the Commerce Clause should protect the national marketplace for retailers, which would benefit both businesses, by removing barriers to selling in states, and consumers, by making available more options for purchase.⁶⁸

As technology changes the way consumers and retailers conduct themselves, it may also ease the burden that the Court worried might be the impediment to multi-jurisdictional businesses. Since the Court's 1992 decision in *Quill*, retailers' abilities to maintain records, manage multiple jurisdictions, and calculate and report sales and use taxes owed has become so much more manageable that it may no longer be a significant impediment to interstate commerce.⁶⁹ Though the Court crafted its holding around the Commerce Clause in *Quill*, it also held that the "decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."⁷⁰ Unlike the Due Process analysis, which is in the Court's purview, in its holding, the Court stated that "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."⁷¹ Since the *Quill* decision, mail-order concerns have become more popular through the use of online websites and catalogs.⁷²

revenue taken in by states."); *Sales Tax Collection: Myth vs. Reality*, NETCHOICE, <http://netchoice.org/library/sales-tax-collection-myth-vs-reality/> (last visited July 21, 2014) (stating that Streamlined Sales and Use Tax Agreement (SSUTA) "will create an enormous increase in the complexity of doing business for interstate marketers—certainly not a move toward[] simplification").

67. See Woo, *supra* note 65. Amazon, eBay, and Overstock are the three largest retailers that have not done this. *Id.* However, many companies are willing to comply with taxes for remote retailers if the states are required to simplify their tax laws. See *Who Supports the Marketplace Fairness Act?*, MFA, <http://www.marketplacefairness.org/support/> (last visited July 21, 2014).

68. Transcript of Oral Argument at 3, 11–12, *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992) (No. 91-194).

69. *What Is the Marketplace Fairness Act of 2013?*, MFA, <http://www.marketplacefairness.org/what-is-the-marketplace-fairness-act/> (last visited July 21, 2014) ("Today, keeping track of a few thousand local tax rates is *no longer* an insurmountable technical, administrative, or financial burden . . .") (emphasis added).

70. *Quill*, 504 U.S. at 318 (footnote omitted).

71. *Id.*

72. *Amazon Laws: The Rise of "Click-Thru Nexus" for Sales Tax Collection*, CBIZ (2011), <http://www3.cbiz.com/page.asp?pid=9111>.

The growing use of the Internet has changed the relevance of the physical-presence standard, and it is more important now than ever for Congress to take up the issue. In his concurring opinion in *Quill*, Justice Scalia, joined by Justices Kennedy and Thomas, encouraged Congress to address the issue: “Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has ‘special force’ where ‘Congress remains free to alter what we have done.’”⁷³

Before turning to congressional efforts and other initiatives to resolve the quagmire of when a state can impose sales tax on out-of-state retailers, it is important to examine those groups that have benefitted or been burdened by the decision in *Quill* to understand the influence each might have on the future of this debate.

III. STAKEHOLDERS

At the time that *Quill* was decided in 1992, the economy was rapidly changing and the direct-mail business was growing.⁷⁴ In order to protect the “national marketplace” under the Commerce Clause nexus standard, the Court upheld the standard requiring physical presence to achieve a substantial nexus with the state.⁷⁵ In the more than 20 years since then, mail-order catalogs have largely been replaced by websites and online ordering.⁷⁶ While the amounts at stake are ever increasing, the incentives and motivations for stakeholders are changing rapidly. In order to

73. *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989)). Oral arguments for *Quill* cited an issue about retroactivity of sales and use taxes as a reason for why Congress is much better equipped to deal with updating the Commerce Clause nexus standard since only after fact finding and public hearings would a law-making body be able to determine all of the ramifications of a change. Transcript, *supra* note 68, at 26. Apart from Congress’s constitutional authority, there are pragmatic reasons that make the legislature the best arm of government to update the standard under the Commerce Clause. *Id.*; see also *What Is the Marketplace Fairness Act of 2013?*, *supra* note 69 (“State[s] can only enforce [taxes on remote retailers] within [their] own borders unless (or until) Congress recognizes the significant advances . . . in the last 44 years.”).

74. *Quill*, 504 U.S. at 308 (“In ‘modern commercial life’ it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers . . .”).

75. *Id.* at 317–18.

76. *Twenty Years After Quill*, *supra* note 24; ANDREW PHILLIPS, TOTAL STATE AND LOCAL BUSINESS TAXES: STATE-BY-STATE ESTIMATES FOR FISCAL YEAR 2012 (2013).

properly understand the issue's complexity before Congress and the states, we must identify the positions of various stakeholders.

A. States (Incentives vs. Revenues)

1. The Importance of Sales Tax to State Budgets

General sales and use taxes are the second largest source of revenue for states.⁷⁷ It was not long after the Internet began gaining momentum and becoming a part of the way people in the United States conducted their business that the U.S. government began to study the implications of electronic commerce.⁷⁸ Since 1994 and the birth of retailers like Amazon and eBay, remote sales have grown from 2% of retail sales in the United States to 7%.⁷⁹ More recently, in the past five years, retail sales have increased by 10% and total state and local taxes have increased by 9%, even though revenue from sales tax to the states has risen only 2%.⁸⁰ One of the themes identified is that the Internet has no physical location, so "taxing points" will be difficult to determine as online sales pay little or no attention to jurisdictional boundaries.⁸¹ For the purposes of determining whether a substantial nexus exists or whether a jurisdiction may impose its laws—including sales and use taxes—using a standard of physical presence is a great deal more difficult when the relevant "presence" of a business exists only in a virtual reality.⁸²

77. SHEILA O'SULLIVAN ET AL., STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2013 2 (2014), available at <http://www2.census.gov/govs/statetax/2013stcreport.pdf>. In aggregate, all 50 states collected approximately \$254.7 billion from their general sales and gross receipts taxes. *Id.* at 3. This is second only to individual income tax, which resulted in \$309.6 billion to states. *Id.* at 2. Each total includes all 50 state taxing jurisdictions, with zero amounts reported for states that do not collect a sales or individual income tax. *Id.* at 6.

78. OFFICE OF TAX POLICY, DEP'T OF THE TREASURY, SELECTED TAX POLICY IMPLICATIONS OF GLOBAL ELECTRONIC COMMERCE 1-3 (1996), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/internet.pdf>.

79. *Click and Pay*, ECONOMIST, Apr. 6-12, 2013, at 38, 38.

80. *Id.*

81. See William C. Taylor, *Who's Writing the Book on Web Business?*, FAST COMPANY (Oct. 31, 1996, 5:00 AM), <http://www.fastcompany.com/27309/whos-writing-book-web-business>; LUNDER & PETTIT, *supra* note 42, at 1, 3; *Twenty Years After Quill*, *supra* note 24.

82. Though the current Article is focused on sales-and-use-tax nexus, online commerce gives rise to a host of questions even if nexus is assumed. Whether the property being sold or consumed is tangible or subject to the sales tax of a jurisdiction is also an

It is difficult to calculate the amount of sales-tax revenue lost to remote sellers for lack of nexus with a state. One study published in 2009 estimated that business-to-consumer mail-order sales would account for approximately \$6.8 billion in sales-tax revenue losses in 2012.⁸³ Though these estimates are difficult for both state and federal legislatures to rely on in making policy, it is clear that in recent years, states have had lower-than-expected revenue.⁸⁴ After the bank and housing crisis in 2008, individuals presumably had less income,⁸⁵ which meant less revenue for states. In addition, with property devalued, the property-tax base necessarily witnessed a significant decrease as well. Both the stock market and housing market crashes have resulted in more capital losses than capital gains,⁸⁶ and even though capital gains are taxed at a lower rate than income tax,⁸⁷ the loss of income is difficult for states hoping to fund operating budgets.⁸⁸ Inevitably, individuals facing difficult times

increasingly difficult question and one that state taxing authorities are struggling to answer. KEITH R. GERCKEN, PILLSBURY WINTHROP, E-COMMERCE: UNITED STATES SALES AND USE TAX CONSIDERATIONS 2–5 (2001), available at <http://pmstax.com/ftp/state/bull0111.pdf>. For example, where a book was, without question, tangible personal property, the rise of e-books has called that into question. See, e.g., Sylvia F. Dion, *Tax Treaties and U.S. Sales Tax Nexus: What Foreign Sellers Need to Know*, Reply to Natalia, SALES TAX SUPPORT PUBLISHING (June 25, 2014, 12:48 PM), <http://www.salestaxsupport.com/blogs/industry/us-sales-tax-for-foreign-sellers/tax-treaties-us-sales-tax-nexus-foreign-sellers/> (“[W]hether hosting your e-books on a U.S. server will create sales tax nexus [has no] easy answer . . .”). Though certain costs to the publisher remain (including author fees, royalties, and advertising), a book that is not printed may not be considered tangible personal property and therefore not subject to sales tax in most jurisdictions. *Non Taxable Sales, Publication 109, Internet Sales*, CAL. ST. BOARD EQUALIZATION (Mar. 2014), <https://www.boe.ca.gov/formspubs/pub109/> (“The transfer of a downloadable file such as an eBook . . . without purchasing any physical storage medium is not a taxable transaction.”). Another area of complex development is computer software, where states consider both its function or the “true object” of what is being purchased, as well as the delivery method. This Article does not focus on what is being taxed but instead grapples with the preliminary question of whether a taxing jurisdiction has a constitutional right to impose a sales tax at all.

83. Donald Bruce et al., *State and Local Sales Tax Revenue Losses from E-Commerce*, 52 ST. TAX NOTES 537, 537, 540–42 (2009).

84. *Id.*

85. Heather Landy, *The Stock Slump of 2008: Wrecking Ball to Wealth*, WASH. POST, Jan. 11, 2009, at F5.

86. *Id.*; see also RUDY TELLES ET AL., STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2011 4 (2012) (“State-level receipt of property taxes were one of the few categories that decreased in 2011, down 2.3 percent to \$13.9 billion.”).

87. HELLERSTEIN ET AL., *supra* note 1, at 802–03.

88. Only recently have state budgets begun “to stabilize.” See Daniel C. Vock, *How States Make Infrastructure Budgets*, GOVERNING (May 29, 2014), <http://www.governing.com/news/headlines/gov-survey-shows-options-for-state-infrastructure-budgets.html>.

will often decrease their spending as much as possible, which only reduces the stream of sales-tax revenue.

Many states had the benefit of federal subsidies and assistance through difficult economic times, and many have tapped into so-called “rainy day” funds, both of which are non-recurring solutions.⁸⁹ Given the difficulty that states have had funding their operating budgets, an additional stream of revenue from electronic commerce and remote sellers would be welcome. A change in nexus standard would not require an overhaul in the tax laws and regulations in a state—a considerable advantage, since voters have demonstrated an aversion to new state taxes in these difficult times.

2. Affiliate Sellers: States Expand the Definition of “Vendor”

Understanding the constitutional-nexus question, some states have attempted to change their laws regarding the requirements to establish a substantial nexus in order to tax large remote sellers like Amazon.⁹⁰ These strategies, including “Affiliate Nexus” or “click-through” nexus, specifically targeted those remote sellers with associates in-state.⁹¹ For example, New York amended its tax law to include in the definition of “vendor” “[a] person who solicits business . . . by employees, independent contractors, agents or other representatives . . . and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article.”⁹² This law created a presumption that the large remote seller gained a substantial nexus through its affiliate, a presumption that could only be rebutted by demonstrating that the resident with whom the seller had an agreement did not engage in any activity that would result in the creation of a substantial nexus with the state.⁹³ In addition, the New York law created a minimum threshold requiring this provision apply only where the in-state resident referred more than \$10,000 of New York-based

89. INST. ON TAXATION & ECON. POLICY, TALKING TAXES: A PRIMER ON STATE RAINY DAY FUNDS 1 (2005), available at <http://www.itepnet.org/pdf/pb25rdf.pdf>.

90. See, e.g., *Michigan's Use Tax—Mail Order and Internet Purchases*, MICH. TAXES, DEPARTMENT TREASURY, <http://www.michigan.gov/taxes/0,1607,7-238-43529-155531--,00.html> (last visited July 22, 2014).

91. *Internet Tax*, CONVERSANT, <http://www.cj.com/internet-tax> (last visited Aug. 12, 2014) (providing a list of states' legislative activity regarding Internet retail tax with the most recent being Colorado, July 28, 2014, at the time of this Article's publication).

92. N.Y. TAX LAW § 1101(b)(8)(i) (McKinney 2012 & Supp. 2013).

93. *Id.* § 1101(b)(8)(vi).

business to the remote seller.⁹⁴ New York was not the only state that attempted to change its laws to reach remote sellers.⁹⁵ Amazon objected to New York's statute on the grounds that imposing the sales tax on Amazon, even though it had no office or semblance of physical presence in the state, was a violation of the Commerce Clause and the principles set forth in *Quill*.⁹⁶

In some states,⁹⁷ Amazon reached a settlement agreement with state taxing authorities to delay the collection of sales and use taxes for a specific period after it opened a warehouse or distribution facility. Such settlement agreements benefitted the states by ensuring a steady stream of future sales-tax revenue without any question regarding the state's right to impose the tax.⁹⁸ In other states that attempted to take similar courses of action, however, Amazon would take a "scorched earth" policy and terminate all relationships with in-state affiliate sellers.⁹⁹ The impact of this was to harm the small local affiliates doing business with remote sellers that relied on the warehouses and inventory of the large retailers to help their businesses thrive.¹⁰⁰ Consumers were still free to

94. *Id.*

95. California, Kansas, Georgia, North Carolina, Pennsylvania, and Connecticut also have such "Affiliate Nexus" laws. Stacy Mitchell, *States Where Amazon Collects Sales Tax (Map)*, INST. FOR LOCAL SELF-RELIANCE (Apr. 30, 2014), <http://www.ilsr.org/rule/states-amazon-sales-tax-map/>. Colorado has a "Required Notification" law, which requires retailers not registered in the state but selling to in-state consumers to (1) notify the consumer that "sales or use tax is due"; (2) send a year-end notice to each customer including the amount of taxes to be paid; and (3) provide an annual statement to the Colorado Department of Revenue showing revenue for the year. These requirements come with penalties for non-compliance. COLO. REV. STAT. § 39-21-112(3.5) (2013).

96. *Amazon, L.L.C. v. N.Y. State Dep't of Taxation & Fin.*, 877 N.Y.S.2d 842, 846, 848, 849 (N.Y. Sup. Ct. 2009), *aff'd* 913 N.Y.S.2d 129 (N.Y. App. Div. 2010), *aff'd sub nom.*, *Overstock.com v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013).

97. Benjamin Swasey, *Amazon to Begin Collecting Mass. Sales Tax in 2013*, 90.9 WBUR: BOSTON'S NPR NEWS STATION (Dec. 11, 2012), <http://www.wbur.org/2012/12/11/massachusetts-amazon-sales-tax>; Robert Wood, *Amazon No Longer Tax-Free: 10 Surprising Facts as Giant Loses Ground*, FORBES, (Aug. 22, 2013, 3:14 AM), <http://www.forbes.com/sites/robertwood/2013/08/22/amazon-no-longer-tax-free-10-surprising-facts-as-giant-loses-ground/>.

98. Wood, *supra* note 97.

99. Dennis Johnson, *California Passes Level-Ground Law, Amazon Responds with Scorched Earth Policy*, MELVILLE HOUSE (June 30, 2011), <http://www.mhpbooks.com/amazon-fires-california-affiliates-after-state-passes-law-requiring-it-to-collect-taxes-just-like-all-other-retailers-in-the-state/>. Cf. *Performance Mktg. Ass'n v. Hamer*, 998 N.E.2d 54 (Ill. 2013) (updated decision in favor of Affiliate Sellers in Illinois).

100. Nellie Akalp, *What the Strike Down of the Amazon Tax Law Means for Illinois Affiliates*, SMALL BUS. TRENDS (Oct. 31, 2013), <http://smallbiztrends.com/2013/10>

visit the websites of large remote sellers, so the impact of the state taxing authority's attempts to collect taxes where there were no settlements was to harm the businesses the legislation originally sought to protect.¹⁰¹

3. The Case Against Standardization

Though some states have attempted to tax large, online, remote sellers by changing their nexus standards and taxing affiliates of Amazon, other states have taken different paths. Forty-five states collect some form of retail sales and use tax, and five states do not.¹⁰² Whether it's the five non-sales and use tax states or other states wanting to attract certain types of businesses, state and local governments value their autonomous ability to offer incentives to attract certain types of taxpayers.¹⁰³ Many state and local jurisdictions tailor their tax laws to incentivize a particular industry or even a particular entity, and their freedom to do so is a protected right.¹⁰⁴

States' freedom to individualize their tax code not only helps to attract certain types of taxpayers, but the diversity of rules, regulations, and definitions across jurisdictions is an important piece of the entire system of state taxation. Taxpayers hoping to minimize their tax burden may choose a certain jurisdiction over another based on available incentives built into a particular site. As a result, certain areas are known to be friendly to some industries, and having many states with diverse tax rules and incentives for businesses and industries optimizes options for taxpayers and allows each taxpayer to make a series of choices that both lower an effective tax rate and benefit a community hoping to attract it.¹⁰⁵ Thus, in considering changes to their statutes, state legislators often

/illinois-amazon-tax-law.html.

101. Laura Mahoney et al., *States See Little Revenue from Online Sales Tax Laws, Keep Pressure on Congress*, *Daily Tax Report*, BLOOMBERG BNA (Jan. 8, 2014), <http://www.bna.com/states-little-revenue-n17179881226/>.

102. Woo, *supra* note 65.

103. Charles E. McLure, Jr., *Radical Reform of the State Sales and Use Tax: Achieving Simplicity, Economic Neutrality, and Fairness*, 13 HARV. J.L. & TECH. 567, 571 (1999–2000) (“It would be desirable if local governments could . . . exercise autonomy over tax rates.”).

104. *Twenty Years After Quill*, *supra* note 24; U.S. CONST. amend X (“[P]owers not delegated . . . are reserved to the states . . .”).

105. See, e.g., MASS. GEN. LAWS ch. 63, § 38W (2012) (establishing the Massachusetts Life Sciences Credit). Massachusetts created a series of tax benefits to offer to the life science industry and as a result attracted entities in the fields of research, pharmaceuticals, and other life sciences. *Id.*; cf. *Keller @ Large: Is Sales-Tax Holiday*

hesitate to relinquish state autonomy.¹⁰⁶ Further, constituent concern for what is best for the individuals in the district may provide some political justification for those legislators to resist any changes that appear to be standardizing the rules among multiple jurisdictions.¹⁰⁷

B. Electronic Retailers

Though there are now more online retailers than ever,¹⁰⁸ it is likely that the percentage of retail transactions taking place online will only continue to increase. Though Amazon has led the charge against online retailers paying sales tax in the past, the company has recently changed its position.¹⁰⁹ Notwithstanding Amazon's switch, there remains a large number of retailers that operate either predominantly or exclusively online and continue to oppose the idea of changing the standards for substantial nexus in a way that would require the registration for and payment of sales tax in multiple jurisdictions.¹¹⁰ After reviewing the position of those predominantly online retailers, often articulated by organizations like the Electronic Retailing Association¹¹¹ as well as individual retailers, this Article will examine the change in position of Amazon and the underlying policy.

Good for Mass. Economy, CBS BOSTON (July 31, 2014, 7:56 PM), <http://boston.cbslocal.com/2014/07/31/keller-large-is-sales-tax-holiday-good-for-mass-economy/>. Meanwhile, a jurisdiction like Texas, which has various oil and gas credits, offers incentives based on the natural resources available in that state to encourage the industry to continue investing in a way that is efficient for both taxpayer and state. See TEX. TAX CODE ANN. §§ 201.053, .057–.060, 202.0545–.063 (2012). See also *Texas Severance Tax Incentives*, SEVERANCE TAX REFUND CENTER, <http://severancetaxrefund.com/severance-tax-by-state/texas-severance-tax-incentives/> (last visited Aug. 6, 2014).

106. *About Us*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/aboutus.aspx> (last visited Aug. 31, 2014).

107. *Internet Sales Tax Fairness*, INST. FOR LOCAL SELF-RELIANCE (Jan. 8, 2013), www.ilsr.org/rule/Internet-sales-tax-fairness/; Cara Griffith, *Is the Marketplace Fairness Act Needed to Solve the "Problem" of Remote Sales?*, FORBES (Apr. 24, 2014, 10:51 AM), <http://www.forbes.com/sites/taxanalysts/2014/04/24/is-the-marketplace-fairness-act-needed-to-solve-the-problem-of-remote-sales/>.

108. Andrew Ross Sorkin, *In Tax Fight, Amazon Hands Baton to eBay*, *DealBook*, N.Y. TIMES (Apr. 22, 2013, 9:49 PM), <http://dealbook.nytimes.com/2013/04/22/in-tax-fight-amazon-hands-baton-to-ebay/>.

109. *Id.*

110. *Who Supports the Marketplace Fairness Act?*, *supra* note 67.

111. See Julie Coons, *Streamlined Sales Tax*, ELECTRONIC RETAILING ASS'N, <http://www.retailing.org/advocacy/overview/streamlined-sales-tax> (last visited Mar. 8, 2014).

1. Online Retailers with Limited Substantial Nexus

Electronic retailers are the modern version of mail-order entities like Quill Corporation. Though they enjoy the benefit of not collecting and remitting a sales tax in many of the jurisdictions to which they sell, the lack of any physical stores makes for a non-traditional relationship with customers. As consumers are increasingly comfortable with conducting their lives online via computer or smartphone, the prevalence of online retailing will only increase. The increase in online retail depends largely on the way that technology advances.¹¹²

Main-street retailers, or “brick-and-mortar stores,” have the advantage of allowing customers to see the products in person as well as being able to transfer possession of the purchase immediately to the consumer.¹¹³ Though this may have traditionally been a disadvantage for remote vendors, the retailer’s ability to charge lower prices by not collecting sales taxes is very attractive to consumers, particularly those buying higher-priced items.¹¹⁴ Sales tax is often a percentage of the price of the goods,¹¹⁵ but as legislatures that create sales-tax holidays can attest, saving any amount will motivate consumers to purchase goods.¹¹⁶ In addition, remote vendors that operate via the Internet need not undertake the expense of maintaining a store or show room for their products. Consequently, to the extent that online retailers and remote vendors can offer similar or even the exact same products as their brick-and-mortar counterparts, they enjoy a competitive advantage. Many brick-and-mortar stores report that the price advantage is so strong that customers may visit the store locally to view products in person, note the

112. Anne Flaherty, *Technology Reveals What Kind of Shopper You Are*, *The Big Story*, ASSOCIATED PRESS (Nov. 28, 2013, 9:54 AM), <http://bigstory.ap.org/article/technology-reveals-what-kind-shopper-you-are> (“[M]obile apps entice shoppers with coupon deals or ads as they move throughout the store, while in-store Wi-Fi is another way to track a consumer’s online movements.”).

113. Jonathan Weisman, *Push to Require Online Sales Tax Divides the G.O.P.*, *Politics*, N.Y. TIMES (Apr. 28, 2013), http://www.nytimes.com/2013/04/29/us/politics/bill-on-sales-tax-for-Internet-purchases-divides-republicans.html?pagewanted=all&_r=0; Floyd Norris, *Sales Tax Talk and Reality*, *Economix: Explaining the Science of Everyday Life*, N.Y. TIMES (May 13, 2013, 3:51 PM), <http://economix.blogs.nytimes.com/2013/05/13/sales-tax-rhetoric-and-reality/>.

114. Woo, *supra* note 65.

115. HELLERSTEIN ET AL., *supra* note 1, at 605.

116. Tom Keane, *Tax Break Is No Holiday for Mass.*, *Opinion*, BOSTON GLOBE (Aug. 6, 2013), <http://www.bostonglobe.com/opinion/2013/08/06/the-sales-tax-holiday-gimmick/T98q1p8kc2Az8uwQYyS1vL/story.html>.

name or model number, and then order the very same product online at considerable savings.¹¹⁷ As technology improves and individuals integrate that technology into their everyday lives, the competitive advantage of online shopping will only increase.

In general, remote vendors have enjoyed the substantial nexus standard set forth by the decision in *Bellas Hess*.¹¹⁸ Courts have held that “[t]he fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States,”¹¹⁹ and that it “acts to prevent the States from enacting unfair tax or tax collection statutes and thereby imposing ‘unreasonable clog[s] upon the mobility of commerce.’”¹²⁰ These retailers are keen to protect their competitive advantage of offering products at a lower price because sales tax is not required.¹²¹ Further, they need this advantage given the costs of shipping and the fact that they do not have foot traffic like the brick-and-mortar stores.¹²²

In addition to protecting the competitive advantage, online retailers may reasonably prefer the substantial-nexus standard set forth in *Quill* in order to avoid the complicated burden and expense of registering as vendors and reporting in multiple jurisdictions. Given that there are thousands of sales-tax jurisdictions in the United States,¹²³ the standard requiring physical presence for sales-tax nexus gives remote vendors a very predictable bright-line standard for determining where they will need to collect and remit sales tax on transactions. Minimizing the number of jurisdictions to which these vendors must report not only

117. *Borders Online, L.L.C. v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 190 (Cal. Ct. App. 2005). See also *The Emporium Strikes Back, Shopping*, ECONOMIST (July 13, 2013), available at <http://www.economist.com/news/briefing/21581755-retailers-rich-world-are-suffering-people-buy-more-things-online-they-are-finding> (discussing “people’s tendency to use . . . shops as showrooms”).

118. Brief of Tax Execs. Inst., Inc. as Amicus Curiae in Support of Petitioner at 26, *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992) (No. 91-194) [hereinafter Brief of Tax Execs. Inst., Inc.]; Matt Brownell, *The Marketplace Fairness Act: Why Amazon Wants to Be Taxed*, DAILYFINANCE (Mar. 25, 2013, 2:00 PM), <http://www.dailyfinance.com/on/the-marketplace-fairness-act-why-amazon-wants-to-be-taxed/>.

119. Brief of Tax Execs. Inst., Inc., *supra* note 118, at 3 (alteration in original) (quoting *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 335 (1977)).

120. *Id.* (alteration in original) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)).

121. Brownell, *supra* note 118.

122. Armando Roggio, *Will U.S. Online Sales Tax Mandate Hurt Small Business?*, PRACTICAL ECOMMERCE (Aug. 1, 2012), <http://www.practicalecommerce.com/articles/3681-Will-U-S-Online-Sales-Tax-Mandate-Hurt-Small-Business->

123. Sales-tax jurisdictions include state, city, and local taxes, where applicable.

reduces their overall sales-tax remittance but also eliminates the expense of keeping up with a number of quickly changing sales-tax laws and definitions in a myriad of jurisdictions.

In April of 2013, large online-retailer eBay sent a communication to those associated with the auction website to encourage contacting legislators to avoid a change in the standard.¹²⁴ The time and expense of compliance to remote vendors is regressive, eBay's chief executive argued; the sales tax and cost of compliance for an online retailer is relatively flat, regardless of the size of the business.¹²⁵ The eBay leader argues that it will harm some online businesses' ability to grow and may ultimately cost jobs.¹²⁶ The Electronic Retailing Association argues that changing the current standard will "unfairly discriminate against remote sellers" for two reasons: first, because a remote vendor "must compute, collect and remit tax for [many more] jurisdictions [than] an in-state retailer who collects [just one sales tax]"; and second, because that online vendor must bear the costs of customers who fail to remit a sales tax or make an error in calculating and pay the wrong amount, a problem not shared by vendors present for the sale.¹²⁷ In addition, the amount saved on sales tax is often canceled out by the cost to the vendor—or customer—of shipping and handling, which reduces the competitive advantage further for remote vendors.¹²⁸

Finally, remote vendors do not benefit from the same services of state and local governments that local in-state brick-and-mortar retailers enjoy.¹²⁹ In some cases, local jurisdictions offer tax incentive programs to vendors who commit to a certain location in hopes that there will be increased revenue from the business as well as jobs for residents of the districts.¹³⁰ Not only do online retailers and other remote vendors not enjoy tax incentive packages, but they are also not offered the protection of the local services, including police and trash removal, among other

124. Sorkin, *supra* note 108.

125. *Id.*

126. *Id.*; John Donahoe, *John Donahoe: The Mom & Pop Internet Sales Tax*, WALL ST. J. (Apr. 22, 2013, 7:16 PM), <http://online.wsj.com/news/articles/SB1000142412788732373560457843864372302959>.

127. Coons, *supra* note 111.

128. *Id.*

129. *Id.*

130. *E.g.*, *Tax Increment Financing (TIF), Housing and Economic Development*, MASS.GOV, <http://www.mass.gov/hed/business/incentives/tax-increment-financing-tif.html> (last visited July 29, 2014).

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services.¹³¹ Though the standard set forth in *Quill* turned on the Commerce Clause analysis, this issue of whether there is an adequate connection of the remote vendor for an imposition of tax by the jurisdiction satisfies the fairness standard in the Due Process Clause analysis.

From mail-order businesses to online retailers, the success of the industry of remote vendors has likely grown in part because of the settled expectations provided by the bright-line standard for substantial nexus established by *Quill* in 1992. Though the economy and entire landscape of consumerism has changed drastically since that time, remote vendors rely on the rules as they exist. While the idea of “physical presence” becomes less important in the way we conduct our commerce, it remains an important bedrock of the way that businesses have evolved and grown.

2. Amazon.com

Amazon’s recent departure from its previous position, opposing a change in the substantial-nexus standard, in favor of its current position, encouraging Congress to articulate a new standard, has resulted in a major shift in the tone of this debate.¹³² In August of 2012, Paul Misener, Vice President of Global Public Policy at Amazon, testified before the U.S. Senate Commerce Committee.¹³³ Because Amazon had originally been a leader in the fight to maintain the physical-presence standard, its shift to support the federal legislation has resulted in a change in the political dialogue surrounding this issue.

Prior to supporting federal legislation to clarify and change the substantial-nexus standard for remote vendors, Amazon went to great lengths to avoid having a physical presence in as many jurisdictions as possible in order to minimize its sales-tax liability to state and local governments.¹³⁴ Founded in 1994 (though it opened for business in 1995), two years after the decision in *Quill*, Amazon has, from its

131. *Id.*

132. Brownell, *supra* note 118.

133. Press Release, Paul Misener, Amazon Testifies in Support of Federal Marketplace Fairness Legislation Before the Senate Commerce Committee (Aug. 1, 2012), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1720649&highlight=>.

134. Woo, *supra* note 65.

inception, considered the impact of sales tax on its business.¹³⁵ Founder Jeff Bezos has indicated that the issue was at the forefront of his mind when he created the company, particularly when he moved it from New York to Washington.¹³⁶ He indicated that Amazon “had to be in a small state.”¹³⁷ There are even reports that Mr. Bezos considered establishing Amazon on an Indian reservation within California because he thought it might allow Amazon to avoid collecting sales tax in that state.¹³⁸

In further example of Amazon’s conscious efforts to avoid sales-tax liability, employees of Amazon anonymously reported a requirement to consult an attorney before arranging trips to certain states and were warned not to conduct certain activities, from solicitation of new customers to sending work-related e-mails while in certain states.¹³⁹ Even Amazon’s recruiting practices changed as various states developed what were known as “Amazon Laws” aimed at capturing some sales-tax revenue from online retailers.¹⁴⁰ In its 2011 exposé of Amazon’s tactics to avoid sales tax, the Wall Street Journal published a map with states color coded as “bad states,” “neutral states,” and “safe states” based on Amazon’s efforts to minimize the number of jurisdictions in which the company had a substantial nexus.¹⁴¹ From its structure to its operations, Amazon has been keenly aware of the impact of sales-tax laws on their business.

Though Amazon has changed its position regarding the substantial nexus standard, the company is no less aware of the impact of the laws and regulations of each state on its business. When Misener testified before Congress, he cited several reasons for the company’s support of the federal legislation and stated that “Amazon has steadfastly opposed state attempts to require out-of-state sellers to collect [sales tax only] *absent congressional authorization.*”¹⁴²

Misener argued that “Congress should act to protect the states’ right to make their own revenue policy choices.”¹⁴³ In doing so, he pointed to those states that have chosen not to collect an income tax and argued that

135. Taylor, *supra* note 81.

136. *Id.*

137. *Id.*

138. Woo, *supra* note 65.

139. *Id.*

140. *Id.*

141. *Id.*

142. Press Release, *supra* note 133 (emphasis added).

143. *Id.*

their policy choices should be protected by ensuring that the sales and use taxes in those states are collected in a uniform way.¹⁴⁴ In addition, he recognized that many states are facing budget shortfalls and that finding a uniform method of collection of sales and use taxes would be a way for Congress to support the states without spending federal revenue or creating additional taxes.¹⁴⁵

Next, Misener appealed to the Senate Commerce Committee on grounds of fairness and a level playing field for all retailers.¹⁴⁶ He referenced those organizations that are “exempt” from collection of sales tax on interstate sales and urged Congress to not only correct the current imbalance but also create a rule that maintains a level playing field.¹⁴⁷ Misener turned to *Quill* and pointed out that the decision was rendered before the invention of the Internet.¹⁴⁸ He suggested that the burden of reporting to a multitude of sales-tax jurisdictions is simply not the burden that it was in 1992 but that attention should be paid to the “small seller exception.”¹⁴⁹ Further, Misener urged that the threshold for small sellers should be kept low in order to protect states’ rights.¹⁵⁰ He argued that “[a]ccording to research commissioned by Amazon, only one percent of online sellers sell more than \$150,000 per year. In other words, the \$500,000 threshold in S. 1832 would exempt well over 99% of online sellers.”¹⁵¹

While Amazon has been seemingly forthcoming about its reasons for supporting this federal legislation, some online retailers, trade groups, and others are skeptical about its motives.¹⁵² Because of the various

144. *Id.*

145. *Id.* Note that the taxes “already owed” refer to use tax, the companion to the sales tax that is to be reported by the consumer on those items on which sales tax was not due. As discussed *infra*, determination of use-tax liability and collection may be costly to the states.

146. *Id.* See Kathleen McHugh & Oren Teicher, *Yes, Small Business Wants Online Giants to Collect Sales Tax*, *Small Business*, BLOOMBERG BUSINESSWEEK (Nov. 22, 2013), <http://www.businessweek.com/articles/2013-11-22/yes-small-business-wants-online-giants-to-collect-sales-tax> (referencing Misener’s testimony and calling for congressional action for “a level playing field” consistent with American “founding principles”).

147. Press Release, *supra* note 133.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* Misener’s testimony was contemporaneous with S. 1832, an earlier version of the Marketplace Fairness Act (MFA) introduced in Congress. Later discussion will revolve around S. 743, the most recent version passed by the Senate. See *infra* for more discussion regarding the small seller exemption.

152. See Jacob Goldstein, *Why Amazon Supports an Online Sales-Tax Bill*, NPR (Apr.

settlement agreements Amazon has reached with individual states, it seems inevitable that Amazon will start collecting sales tax in an increasing number of jurisdictions. Accordingly, it would not be severely harmed by federal legislation that would require such a collection. Amazon's competitors, however, will likely be more gravely impacted. In the mid-1990s, when Amazon was establishing itself in the marketplace, its main competitors did not have an online presence,¹⁵³ so the ability to avoid charging sales tax was a competitive advantage. Today, by contrast, Amazon competes in a retail space with many more online competitors, and it is better equipped to manage the collection and remittance of sales tax in multiple jurisdictions than its online peers.¹⁵⁴ If states can uniformly impose a sales tax on online sellers regardless of whether they have a physical presence in the state, the sales tax may be a greater barrier to entry into the online retail space, resulting in fewer competitors for Amazon.¹⁵⁵ In fact, being required to pay sales tax without regard to physical presence in a state may encourage Amazon to open a number of distribution centers in jurisdictions it previously avoided, allowing it a new competitive advantage of even faster delivery time to its customers.¹⁵⁶ Additionally, such a requirement could result in an increase of relationships with affiliate members from whom Amazon earns a commission simply for fulfilling orders.¹⁵⁷

Though the legal standard of substantial nexus has been clear since 1992, its commercial and political ramifications are not clear and are constantly evolving. If Congress or the U.S. Supreme Court takes up this issue again, the timing will have a major impact on the outcome.

22, 2013, 12:57 PM), <http://www.npr.org/blogs/moeny/2013/04/22/178407898/why-amazon-supports-an-online-sales-tax-bill>.

153. Taylor, *supra* note 81.

154. Brownell, *supra* note 118.

155. *Id.*

156. See, e.g., Janine Anderson, *New Facility Means Wisconsin Amazon Buyers Must Pay Sales Tax*, KENOSHA NEWS (Oct. 14, 2013), http://www.kenoshanews.com/news/new_facility_means_wisconsin_amazon_buyers_must_pay_sales_tax_473814808.html (discussing Amazon's Wisconsin distribution center and its lack of impact on citizen's payment of sales tax should Congress enact the MFA).

157. Goldstein, *supra* note 152.

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C. Brick-and-Mortar Retailers

The vast majority of retailers have historically been those with storefronts, and in general, brick-and-mortar retailers that are proponents for a change in the standard are those that compete with exclusively online retailers.¹⁵⁸ Though we classify these retailers as “brick-and-mortar” retailers by their having a physical presence or storefront, even within this category the size of these retailers varies greatly. A small family-owned shop has a different set of concerns than a larger “big-box”¹⁵⁹ store that may have, in addition to its stores, an online presence. For the purposes of this Article, traditional (and usually smaller) retailers with no online presence will be considered separately from large multi-jurisdictional stores that have an additional online presence, also known as “click-and-mortar” stores.¹⁶⁰

1. Traditional Brick-and-Mortar

Traditional retailers with brick-and-mortar storefronts have a clear substantial nexus with the state where their physical presence is easily determined. While as registered vendors they are required to charge consumers sales tax, they have the benefit of being present during the transaction. This ensures that they collect the required amount of taxes and remit it correctly to the state.¹⁶¹ Because the site of each transaction is easily determined, the list—and number—of jurisdictions to which they must remit the sales tax is also easily determined. These retailers not

158. *Id.*

159. For example, “big-box” stores would include Target, Walmart, and other large stores with some online presence. *See, e.g.,* Aimee Picchi, *Big-box Stores May See Dark Days Ahead*, CBSNEWS (July 31, 2014, 5:45 AM), <http://www.cbsnews.com/news/are-there-dark-days-ahead-for-big-box-stores/> (“Walmart is being forced to focus on ‘defensive investments’ as it seeks to counter the popularity of online retailers such as Amazon . . . as well as smaller chains such as dollar stores and drugstores.”).

160. William L. McComb, *Clicks and Mortar: Why In-Store Experience Matters (Now More Than Ever)*, FORBES (June 11, 2012, 3:47 PM) <http://www.forbes.com/sites/onmarketing/2012/06/11/clicks-and-mortar-why-in-store-experience-matters-now-more-than-ever/>; Emma Thomasson & Dominique Vidalon, *Retailers See “Click and Mortar” as Way to Beat Amazon*, REUTERS (Oct. 8, 2013, 6:40 PM), <http://www.reuters.com/article/2013/10/08/net-us-retail-ecommerce-idUSBRE9970I020131008>.

161. AKT LLP, *Navigating the Treacherous Waters of Sales Tax*, ASSOCIATED OR. INDUSTRIES (May 8, 2014), <http://www.aoi.org/news/2014/05/08/fiscal-policy/navigating-the-treacherous-waters-of-sales-taxes/>.

only have notice if a new sales tax jurisdiction is added, but they also have control over where they place additional stores.¹⁶² Thus, they may, in fact, select the jurisdiction that is optimal, taking into account business considerations like access to a customer base and sales tax.¹⁶³ However, as noted above, an increasing problem for these retailers is the growing trend of customers shopping in the store but then purchasing the item online where it is sales-tax free.

2. Click-and-Mortar Retailers

Those large retailers that are closer to a peer group for Amazon are characterized as having a large number of physical stores as well as an online presence, which results in the burdensome collection and remittance of sales tax in a multitude of jurisdictions.¹⁶⁴ Since these retailers have a physical presence in almost (if not every) state taxing jurisdiction, it is easy to predict the jurisdictions to which taxes will be owed, and the retailers are generally sophisticated enough to meet the needs of multi-jurisdictional sales-tax compliance.¹⁶⁵ In general, however, the requirement to collect sales taxes increases the price of the goods to consumers and is thus still a burden to the retailers. For that reason, many of these retailers have long supported federal legislation to change the standards for substantial nexus and level the playing field with remote vendors not required to collect sales tax.¹⁶⁶

Though these retailers largely support a change in the substantial-nexus standard, some that have a large online presence in addition to their brick-and-mortar stores have attempted to separate their online business entity from their physical-store business in order to allow their online presence to be competitive with online retailers like Amazon.¹⁶⁷ In

162. *Id.*

163. *Id.*; *cf. supra* Part B.1 (discussing online retailers).

164. Thomasson & Vidalon, *supra* note 160.

165. *How Sales and Use Tax Affects Your Business*, AVALARA, <http://www.avalara.com/learn/whitepapers/sales-tax-affects-business/> (last visited Aug. 13, 2014).

166. Currently 141 businesses are listed in support of the MFA, including Bed, Bath & Beyond, Inc.; Best Buy Co., Inc.; Foot Locker, Inc.; Gap, Inc.; The Home Depot U.S.A., Inc.; L Brands, Inc.; Lowe's Companies, Inc.; Neiman Marcus Group, Inc.; J.C. Penney Co., Inc.; PetSmart, Inc.; Sears Holdings Corp.; Staples, Inc.; Target Corp.; and The Timberland Co. *Who Supports the Marketplace Fairness Act?*, *supra* note 67.

167. *See generally* Borders Online, L.L.C. v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176, 192 (Cal. Ct. App. 2005) (finding that Borders Online, L.L.C. had a physical presence in California through Borders store locations and that both entities "were

1995, a California appellate court held that Borders Online, L.L.C. (Online) had a representative or agency relationship with Borders, Inc. (Borders) that was acting under the authority of Online for the purpose of applying the sales and use tax.¹⁶⁸ Despite the fact that Online and Borders were separate legal entities, the court upheld the state's position that Online was in fact "selling" goods through Borders, pursuant to § 6203 of California's Revenue and Taxation Code, and that taxes should have been collected from Online's California customers and remitted to the state.¹⁶⁹ This holding relied on "the fact that (1) each Borders store in the state would accept returns and provide a refund, store credit[,] or exchange of Online's merchandise; (2) Borders encouraged its store employees to refer customers to Online's website; and (3) receipts at Borders stores sometimes invited patrons to 'Visit us online at www.Borders.com.'"¹⁷⁰

After its detailed consideration of the agency relationship between the two entities, the court turned to the issue of whether the trial court's holding was consistent with the Commerce Clause and the rules set forth in *Quill*.¹⁷¹ Ultimately, the court held that Online was, indeed, engaged in "selling" through its agent Borders.¹⁷² It further analyzed the purpose of the constitutional clauses examined in *Quill*, quoting a New York case that reasoned "the *quid pro quo* for State taxation could be found in the benefits and protections the State confers in providing for a stable and secure legal-economic environment for a mail-order vendor's substantial marketing efforts aimed at the taxing State."¹⁷³

California's decision both affirmed the conclusions of *Quill* and barred large retailers that have a related online presence from escaping sales-and-use-tax liability even on those sales that closely mirror the sales of remote, entirely online vendors. Although these retailers may benefit from a large number of online sales, the need to preserve their brand and keep the brick-and-mortar stores linked to the online presence

involved in cross-promotional activities").

168. *Id.* at 178.

169. *Id.* at 185-88; CAL. REV. & TAX CODE § 6203 (West 1998). Failure of the retailer to collect the tax from customers does not relieve it of its responsibility to remit the amount due to the state. *Borders*, 29 Cal. Rptr. 3d at 182.

170. *Borders*, 29 Ca. Rptr. 3d at 182.

171. *Id.* at 188.

172. *Id.* at 185.

173. *Id.* at 190 (quoting *Orvis Co. v. Tax Appeals Tribunal of N.Y.*, 654 N.E.2d 954, 959 (N.Y. 1995)).

means that each retailer will necessarily maintain its substantial nexus and therefore be required to collect and remit tax in each jurisdiction.

D. Consumers (Taxpayers)

Though much has been said about the competitive advantage of not charging sales tax, the customer is the oft-forgotten-but-essential piece of this puzzle. Except in very rare circumstances,¹⁷⁴ the consumer pays the tax that is due to the state. It is telling that consumers are responsible for bearing this burden but have had the smallest voice in this debate.

Though the rules and definitions in each state and local jurisdiction, including which items are subject to the tax as well as the rate (sometimes combined state and local), are unique, the general principle is that the sales tax is a percentage of value of the item purchased.¹⁷⁵ The tax is paid by the consumer, collected by the seller, and remitted to the state, most often on a quarterly basis.¹⁷⁶ In framing this debate, it is important to keep in mind that the burden of actually paying the sales tax rests almost wholly on the consumer, and the debate itself revolves entirely around competitive advantage and not around actual liability for the tax.¹⁷⁷

The use tax, by contrast, is collected by the purchaser who actually uses or consumes the product in the state.¹⁷⁸ This tax is due if either (1) the product is used in state but no sales tax was paid on the purchase, or (2) a sales tax was paid but at a rate that is less than the rate in which the item is used or consumed.¹⁷⁹ When a consumer purchases an item on the

174. *Id.* at 181–82.

175. *Understanding Your Sales Tax Obligations*, BIZFILINGS, <http://www.bizfilings.com/toolkit/sbg/tax-info/sales-taxes/understanding-sales-tax-obligations.aspx> (last updated May 24, 2012).

176. *See, e.g.*, MASS. GEN. LAWS ch. 64H, § 2 (2012).

177. *See* J.D. Harrison, *Online Sales Tax Is Back—And This Time, It Might Actually Have a Shot at Passing*, WASH. POST (July 21, 2014), http://www.washingtonpost.com/business/on-small-business/online-sales-tax-is-back--and-this-time-it-might-actually-have-a-shot-at-passing/2014/07/17/ed056016-0dd0-11e4-8c9a-923ecc0c7d23_story.html; *Internet Sales Tax Fairness*, INST. FOR LOCAL SELF-RELIANCE (Jan. 8, 2013), <http://www.ilsr.org/rule/internet-sales-tax-fairness/>; Hal R. Varian, *Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 639 (2000).

178. 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, 2018–19 (2011) (citing *In re Assessment of Add'l N.C. & Orange Cnty. Use Taxes*, 322 S.E.2d 155, 158 (1984)).

179. *See, e.g.*, *A Guide to Sales and Use Tax*, DEP'T OF REVENUE, MASS.GOV, <http://www.mass.gov/dor/individuals/taxpayer-help-and-resources/tax-guides/salesuse-tax->

Internet from a vendor who does not collect sales tax, such as Amazon in many jurisdictions, or purchases an item in a jurisdiction in which there is no sales tax and consumes it in a state that does collect use taxes, the consumer must pay the use tax owed to the state.¹⁸⁰ For instance, the state-sales-tax rate in Massachusetts is 6.25%.¹⁸¹ If a consumer from Massachusetts travels to New Hampshire to purchase a \$100 item, then that consumer is obligated to report \$6.25 for that item on her annual tax return.¹⁸² This is also true for products purchased online and for which sales tax was not collected.¹⁸³ In addition, if a Massachusetts consumer travels to a state with a sales tax rate of 5% and uses that same \$100 item in Massachusetts, the difference between the two rates (1.25% or \$1.25) should be reported on that individual's return.¹⁸⁴

The use tax was created to account for the shortfalls resulting from consumers traveling to no-sales-tax jurisdictions.¹⁸⁵ Though perfect application of the use-tax rules would result in no loss of revenue from e-commerce, the nature of the rules and the cost to enforce them keeps the rules from fulfilling their original purpose. Because the use tax is self-assessed by consumers resulting in the aggregation of an entire year of online purchases, it is incredibly difficult for states to audit and assess these amounts.¹⁸⁶ In addition, to the extent that the tax is owed by individuals, the cost to the state of an audit and assessment is not likely to exceed the amount owed by the consumer. Accordingly, use-tax laws are rarely enforced, and as a result, use taxes are rarely reported by

guide.html (last visited Aug. 13, 2014); WASH. REV. CODE § 82.12.020 (2012).

180. States that have chosen not to impose a general sales tax are Alaska, Delaware, New Hampshire, Montana, and Oregon. *What States Impose Sales/Use Tax?*, SALES TAX INST., http://salestaxinstitute.com/sales_tax_faqs/what_states_impose_sales_use_tax (last visited Feb. 16, 2014).

181. MASS. GEN. LAWS ch. 64I, § 2 (2012).

182. *Id.*; see *Sales and Use Tax*, Dep't of Revenue, MASS.GOV, <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-trustee-taxes/sales-and-use-tax.html> (last visited Aug. 13, 2014).

183. *TIR 03-3: Alternative Individual Use Tax Return: New Line Item on Personal Income Tax Return*, MASS.GOV, <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2003-releases/tir-03-3-alternative-individual-use-tax.html> (last visited July 29, 2014).

184. *Sales and Use Tax*, *supra* note 182.

185. LUNDER & PETTIT, *supra* note 42, at 1.

186. Mike Maciag, *Use Tax Revenues: How Much Are States Not Collecting?*, GOVERNING (May 1, 2012), <http://www.governing.com/blogs/by-the-numbers/state-use-tax-collection-revenues.html>.

consumers.¹⁸⁷ States continue to lose sales-and-use-tax revenue from remote vendors and online sales and seek solutions.¹⁸⁸

IV. SOLUTIONS

Although various states, industries, businesses, and trade groups have proposed a number of solutions, this Article will focus on only two: the Streamlined Sales and Use Tax Agreement (SSUTA)¹⁸⁹ and the Marketplace Fairness Act of 2013 (MFA), a bill recently passed by the Senate.¹⁹⁰ The MFA references the SSUTA,¹⁹¹ and in order to fully understand the purpose and impact of the MFA, we must first appreciate the mission and impact of the SSUTA.

A. Streamlined Sales and Use Tax Agreement

The SSUTA was created by two groups attempting to simplify sales-tax collection in a new age of commerce.¹⁹² In 1999, the National Governors Association (NGA) and the National Conference of State Legislatures (NCSL) chose leaders to serve on the Advisory Commission on Electronic Commerce, which was created by the Internet Tax Freedom Act.¹⁹³ After consulting with the majority of states, many local governments, and the business community, the group created the SSUTA.¹⁹⁴ The Streamlined Sales Tax Governing Board (Board)

187. Sorkin, *supra* note 108 (“If you live in a state with a sales tax, you are supposed to submit uncollected taxes on Internet purchases at the end of the year, even if the merchant doesn’t seek it at the time of the sale. Of course, nobody does that.”); Michael S. Greve, *States Already Can Tax Out-of-State Purchases, But Rarely Enforce Those Laws*, AM. ENTERPRISE INST. (June 21, 2012), <http://www.aei.org/article/economics/fiscal-policy/taxes/states-already-can-tax-out-of-state-purchases-but-rarely-enforce-those-laws/>.

188. Michael Mazerov, *Yes: It’s Only Fair*, Debate Opinion in *Should States Require Online Retailers to Collect Sales Tax?*, WALL ST. J. (Nov. 15, 2011), <http://online.wsj.com/news/articles/SB10001424052970204528204577007511298359048>.

189. *Streamlined Sales and Use Tax Agreement*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=modules> (last visited Mar. 10, 2014).

190. Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013), *available at* <https://beta.congress.gov/113/bills/s743/BILLS-113s743rfh.pdf>.

191. *Id.* § 2.

192. *Why Was the Streamlined Sales Tax Created?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=gen_2 (last visited Mar. 10, 2014).

193. *Id.*

194. *What Is the Streamlined Sales and Use Tax Agreement?*, STREAMLINED SALES TAX

believes that the sales tax laws created in the 1930s are not relevant today, and the Board's purpose was to create an updated system of rules for states and retailers to simplify compliance while treating all vendors fairly.¹⁹⁵ Because sales-and-use-tax laws and regulations are administered at the state and local level, each jurisdiction would have to adopt the SSUTA in order for its purpose to be fulfilled. Currently, twenty-four states have passed legislation conforming to the SSUTA, and those jurisdictions represent roughly one-third of the United States' population.¹⁹⁶

From the beginning, the SSUTA underscores the intent to preserve the taxing authority of each jurisdiction.¹⁹⁷ Before even defining its terms, it states that it "shall not be construed as intending to influence a member state to impose a tax on or provide an exemption from tax for any item or service."¹⁹⁸ The section entitled "Fundamental Purpose" articulates that the purpose of the entire agreement is "to simplify and modernize sales and use tax administration . . . in order to substantially reduce the burden of tax compliance."¹⁹⁹ It aims to achieve this goal "for all sellers and for all types of commerce" with ten guiding principles:

- A. State level administration of sales and use tax collections.
- B. Uniformity in the state and local tax bases.
- C. Uniformity of major tax base definitions.
- D. Central, electronic registration system for all member states.
- E. Simplification of state and local tax rates.
- F. Uniform sourcing rules for all taxable transactions.
- G. Simplified administration of exemptions.

GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=gen_1 (last visited Mar. 10, 2014).

195. *Why Was the Streamlined Sales Tax Created?*, *supra* note 192.

196. *How Many States Have Passed Legislation Conforming to the Agreement?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=gen_3 (last visited Mar. 10, 2014).

197. STREAMLINED SALES AND USE TAX AGREEMENT § 103 (2014), *available at* http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205_15_14.pdf.

198. *Id.*

199. *Id.* § 102.

- H. Simplified tax returns.
- I. Simplification of tax remittances.
- J. Protection of consumer privacy.²⁰⁰

In accordance with the stated purpose of the SSUTA, both state taxing authorities and sellers of all types have concessions built in. For example, the SSUTA seeks to lessen the difficulties for vendors by asking states to provide notice and limit the effective dates for changes in rates or other portions of the law.²⁰¹ Congressionally enacting provisions that force state and local jurisdictions to comply with previously unregulated matters may present a challenge to those states hoping to pass a conforming agreement through a legislative body. In fact, most of the provisions, both for states and businesses, will only be helpful for the parties involved if a larger number of states conform.

When each state considers conforming legislation, it may make specific changes to the SSUTA as written and amended by the Board.²⁰² If each state tailors the legislation to its own needs, however, the conformity the legislation seeks is lost. Thus, although there is value in having some basic standardized definitions, each state may also tailor their legislation through regulation or other administrative function, rendering the goal of uniformity unattained. The SSUTA does not require any particular member state to impose liability on a certain class of goods, nor does it require any exemptions; the standardization of definitions serves only to simplify the process of streamlining reporting for multi-jurisdictional entities. States are asked to amend or add definitions that are likely substantially similar to the existing definitions.²⁰³

The SSUTA divides sellers into four types or “models” and captures their sales accordingly.²⁰⁴ In this way, it resolves the question of remote and online sellers that have evolved since *Quill* was decided. It is for this treatment of online vendors that organizations like the Electronic

200. *Id.*

201. *Id.* §§ 301–34.

202. See, Samantha L. Cowne, *The Streamlined Sales and Use Agreement: How Entrepreneurs Can Plan for the Uncertain Future of E-Commerce Sales Taxation*, 4 ENTREPRENEURIAL BUS. L.J. 129, 141 (2009) (discussing state exceptions and accommodations for small businesses).

203. *Welcome to the Streamlined Sales Tax Registration System*, STREAMLINED SALES TAX PROJECT, <https://www.sstregister.org/sellers/Entry.aspx> (last visited Aug. 5, 2014).

204. STREAMLINED SALES & USE TAX AGREEMENT §§ 205–207.1 (2014).

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Retailing Association are quick to point to the deficiencies contained in the scheme set forth.²⁰⁵ Though far from perfect, the SSUTA has garnered support from a majority of states.²⁰⁶

B. Marketplace Fairness Act of 2013

After being introduced in several sessions of Congress to no avail, the U.S. Senate passed the MFA.²⁰⁷ Though the bill has not been brought to the floor of the House of Representatives, the tone and timing in Congress is ripe for creating a dialogue about the issues raised in 1992 in *Quill*.

1. The Purpose and Impact of the Proposed Legislation

The primary purpose of the MFA is “[t]o restore States’ sovereign rights to enforce State and local sales and use tax laws”²⁰⁸ Under the MFA, states have the option of either becoming a member state of the SSUTA or conforming to certain requirements set forth in the MFA.²⁰⁹

Under the proposed law, those states that are not members of the SSUTA (Alternative States) must commit to simplifying their sales-and-use-tax laws in eight specific ways.²¹⁰ The first requirement is that the Alternative States “enact legislation to exercise the authority granted” in

205. Coons, *supra* note 111; *Resolution Urging Congress to Reject Authorization of the Streamlined Sales Tax Project (SSTP)*, AM. LEGISLATIVE EXCHANGE COUNCIL (Jan. 29, 2013), <http://www.alec.org/model-legislation/resolution-urging-congress-to-reject-authorization-of-the-streamlined-sales-tax-project-sstp/>.

206. *What Is the Streamlined Sales and Use Tax Agreement?*, *supra* note 194.

207. The Act was introduced as S. 1832 on November 9, 2011, and referred to the Senate Committee on Finance. S. 1832, 112th Cong. (2012), *available at* <https://beta.congress.gov/112/bills/s1832/BILLS-112s1832is.pdf>. Later, it was reintroduced as S. 336 on February 14, 2013, and again referred to the Committee on Finance. S. 336, 113th Cong. (2013), *available at* <https://beta.congress.gov/113/bills/s336/BILLS-113s336is.pdf>. A couple months later, it was reintroduced as amended as S. 743 and passed with 69 “yea” votes and 27 “nay” votes. S. 743, 113th Cong. (2013), *available at* <https://beta.congress.gov/113/bills/s743/BILLS-113s743rfh.pdf> (as referred to the Subcomm. on Regulatory Reform, Commercial, and Antitrust Law, June 14, 2014); *U.S. Senate Roll Call Votes 113th Congress—1st Session*, U.S. SENATE (May 6, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=113&session=1&vote=00113.

208. S. 743, 113th Cong. pmb. (2013).

209. *Id.* § 2(a)–(b).

210. *Id.* § 2(b)(2)(A)–(H).

the MFA.²¹¹ The state's legislation should identify the entity within the state responsible for sales-and-use-tax collection, enforcement, audit, and administration and collection of returns for all types of sellers, including remote sellers.²¹² This section also specifies that a state may not impose any special or extra requirements on remote sellers and that local sales-tax jurisdictions may not require any additional or different sales tax not considered by the above-mentioned state taxing authority.²¹³

In addition, Alternative States must provide a uniform sales-and-use-tax base including all local jurisdictions within the respective state.²¹⁴ In order to further simplify, states must meet uniform sourcing rules²¹⁵ for both remote and non-remote vendors. Alternative States are also required not only to promulgate information regarding the taxability of products and services and exemptions to sales tax but also to provide software, without charge, to remote sellers that will calculate the sales and use taxes due and file the associated returns.²¹⁶ The legislation requires Alternative States not to hold remote sellers and certified software providers liable (including liability for penalties and interest) in case of non-payment or incorrect payment due to error or omission caused by certified software.²¹⁷ Though the legislation requires certified software and relieves such liability for software-caused errors, remote sellers retain the right to create or use the sales-tax software of their choice.²¹⁸

The MFA contains an exemption for small remote sellers.²¹⁹ The threshold for this limitation, however, was the source of much debate among retailers—both online and brick-and-mortar—and states.²²⁰ Under

211. *Id.* § 2(b)(1).

212. *Id.* § 2(b)(2)(A).

213. *Id.*

214. *Id.* § 2(b)(2)(B).

215. *Id.* §§ 2(b)(2)(C), 4(7). Sourcing is a complicated topic that has been subject to extensive debate. States have amended their rules regarding sourcing either to attract or retain remote sellers in their jurisdiction. The sourcing scheme set forth in this legislation requires the sale to be “sourced” (or subject to sales and use tax) in the state to which the product is delivered. *Id.* § 4(7). If the product sold is not delivered or there is no delivery address, then the sale will be sourced in the jurisdiction of the customer's billing address. *Id.*

216. *Id.* § 2(b)(2)(D). In addition to software, states must provide certification procedures for approved software providers. *Id.*

217. *Id.* § 2(b)(2)(E)–(G).

218. *Id.* § 3(c).

219. *Id.* § 2(c).

220. See *Marketplace Fairness: Leveling the Playing Field for Small Businesses: Hearing Before the Comm. on Commerce, Sci. & Transp.*, 112th Cong. 12–13, 19–20 (2012), available at http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=5741ee1f-

the Senate bill's wording, "[a] State is authorized to require a remote seller to collect sales and use taxes under this Act only if the remote seller has gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding \$1,000,000."²²¹ This provision seeks to protect smaller sellers from the burden of sales-and-use-tax compliance in multiple jurisdictions, based on the sourcing rules.²²²

In addition, the MFA articulates the intent that there should be no effect on the retailer's nexus to the state and that it "shall not be construed to create any nexus or alter the standards for determining nexus between a person and a State or locality."²²³ Further, the authors were careful to articulate that the MFA is not intended to encourage any states "to impose any [additional or different] sales and use taxes on any products or services not [previously] subject to taxation."²²⁴ Despite Congress's authority under the Commerce Clause to pass this legislation, it does not seek "to preempt or limit any power exercised or to be exercised by" any sales-and-use-tax jurisdiction.²²⁵

2. The Politics of Passing the Marketplace Fairness Act of 2013

Though this bill has successfully passed the Senate, it will face greater obstacles in the House of Representatives.²²⁶ In today's political climate, the dichotomy between the two parties is more pronounced than ever. The Heritage Foundation and members of the Republican Party who are strongly opposed to any new taxes fiercely oppose the passage of the bill.²²⁷ Though the MFA explicitly does not create or impose any

5c5b-4dcf-aa5a-59488eb06e78 (statements of Paul Misener, Vice President, Global Pub. Policy for Amazon.com, and Scott Peterson, Exec. Dir., Streamlined Sales Tax Governing Bd.).

221. S. 743, 113th Cong. § 2(c) (2013).

222. *What Is the Marketplace Fairness Act of 2013?*, *supra* note 69.

223. S. 743, 113th Cong. § 3(b) (2013).

224. *Id.* § 3(e).

225. *Id.* § 6. *See also* Fatale, *supra* note 3, at 77–98 (discussing the effects on congressional preemption of taxation power).

226. J.D. Harrison, *After Easy Passage in the Senate, Online Sales Tax Bill Faces Much Tougher Road in the House*, WASH. POST (May 9, 2013) http://www.washingtonpost.com/business/on-small-business/crowdsourced/after-easy-passage-in-the-senate-online-sales-tax-bill-faces-much-tougher-road-in-the-house/2013/05/08/5e3a6ebe-b807-11e2-b94c-b684dda07add_story.html.

227. Weisman, *supra* note 113; MARKETPLACE FAIRNESS ACT: INTERNET SALES TAX IS ANYTHING BUT "FAIR" FOR ONLINE SELLERS AND CUSTOMERS (2013), *available at* http://thf_media.s3.amazonaws.com/2013/pdf/FS118.pdf.

new taxes, it could help increase tax revenue for the states. The increase in tax revenue alone is sufficient reason for groups like Americans for Tax Reform, led by Grover Norquist,²²⁸ to oppose the change.²²⁹ The Speaker of the House of Representatives and the rest of the House leadership are hesitant to add the MFA to the chamber's calendar for a vote, despite the fact that it was passed in the Senate.²³⁰

As stated above, although the legislation and its rules on sourcing may result in increased revenue to the states, no *new* amount would actually be due to the states. Though remote vendors would be required to collect and remit sales tax in more jurisdictions, the bill only captures amounts that are already owed under the use-tax statutes but have not traditionally been pursued by the states.²³¹ Some members of Congress and other opponents may also be concerned with the impact of the legislation on federal tax revenue because of the increased deductions large retailers would be entitled to based on the amount of state taxes paid.²³²

Supporters of the MFA are encouraged not only by the estimates of increased revenue for states but also by the ideas of fairness and leveling the playing field among all types of sellers.²³³ The exemption for small sellers contained in the bill is subject of much debate with sellers like eBay and other remote sellers arguing that the threshold should be much higher.²³⁴ Small sellers, as well as brick-and-mortar sellers, are largely supportive of the legislation because it will diminish the competitive advantage that their peer remote sellers have enjoyed since *Quill*.²³⁵

228. Harrison, *supra* note 177.

229. Weisman, *supra* note 113.

230. See The Editorial Bd., *Sales Tax and the Internet*, N.Y. TIMES (May 14, 2013, 7:00 AM), <http://www.nytimes.com/2013/05/18/opinion/sales-taxes-and-the-Internet.html>.

231. See S. 743, 113th Cong. pmbl. (2013) (“To *restore* . . . rights to enforce state and local sales *and use* tax laws”) (emphasis added).

232. *Id.*

233. Weisman, *supra* note 113.

234. *Click and Pay*, *supra* note 79, at 38.

235. Jay Glotz, *For Local Businesses, the Internet Threat Isn't Just the Sales Tax, You're the Boss*, N.Y. TIMES (May 14, 2013, 7:00 AM), <http://boss.blogs.nytimes.com/2013/05/14/for-local-businesses-the-internet-threat-isnt-just-the-sales-tax/>. See also Norris, *supra* note 113 (stating that the bill would “mean that local merchants . . . would find it a little easier to be competitive with Internet merchants”).

V. CONCLUSION

Though the Court's decision in *Quill* was soundly reasoned and created a much-needed bright-line test for all types of retailers, it has since become outdated. The Justices deciding *Quill* intended only to update the previously articulated standard to account for a changing retail environment. In the more than 20 years that have passed since then, the landscape of the retail environment has changed entirely. Though the Streamlined Sales and Use Tax Governing Board has made some strides in updating the standard, it is not mandatory for the states and thus may not be able to achieve the uniformity it seeks. Congress must act on the authority given to it by the Commerce Clause to create a uniform standard. Specific details, including sourcing rules and the small-seller exception, which may require consistent updating more often than the federal legislative process allows, should be fleshed out in regulations. The physical-presence standard for finding a substantial nexus is an anachronism that needs to be addressed. Like the bright-line test set forth in 1992, a new standard may be arbitrary at its edges, but having such a standard is far more preferable than congressional silence on the issue.