
Online Retailers Battle with Sales Tax: A Physical Rule Living in a Digital World

*“In addition to 24/7 accessibility, doorstep delivery, immensely wider choices, and the ability to compare both availability and price in an instant, another perk of e-commerce—at least for some—has been the lack of any sales tax added to purchases. But hang on to your wallet, because that’s about to change.”*¹

I. INTRODUCTION

Next time you go shopping, look at the sales price of an item you want to buy. Compare that price with the somewhat higher price you actually end up paying. That difference is what we all know as a sales tax.² Now, sign on to amazon.com (Amazon) and look up the exact same item.³ You will likely notice that the online price is lower than it would otherwise be in a brick-and-mortar store.⁴ You will also notice that unless you are in one of the nine states in which Amazon must charge a sales tax, the final sale price is the same as the ticket price.⁵

1. Gail Buckner, *Look Out for the Amazon-ian Sales Tax*, FOX BUSINESS, Oct. 17, 2011, <http://www.foxbusiness.com/personal-finance/2011/10/17/look-out-for-amazon-ian-sales-tax/>.

2. See *infra* Part II.C (describing history of sales tax). A sales tax is imposed on the sale or lease of a good or service. Christina T. Le, *The Honeymoon’s Over: States Crack Down on the Virtual World’s Tax-Free Love Affair with E-Commerce*, 7 HOUS. BUS. & TAX L.J. 395, 399 (2007). A use tax, which is complementary to a sales tax, is imposed on the use or consumption of a good or service purchased outside of the taxing jurisdiction for use within the taxing jurisdiction. See *id.* When consumers purchase an item from an out-of-state vendor that does not charge a sales tax, those consumers are responsible for reporting the purchase to their state and remitting the tax directly to that state. See *id.* This rarely happens, however, causing a problem for states. See *id.*

3. See AMAZON, <http://www.amazon.com> (last visited Mar. 10, 2013); see also *infra* Part II.B (summarizing Amazon’s history).

4. Compare *The Great Gatsby*, AMAZON, http://www.amazon.com/The-Great-Gatsby-Scott-Fitzgerald/dp/0743273567/ref=zg_bs_books_3 (last visited Apr. 21, 2013) (listing price of \$8.49 plus shipping and handling for novel *The Great Gatsby*), with *The Great Gatsby*, BARNES & NOBLE, www.barnesandnoble.com/w/great-gatsby-f-scott-fitzgerald/1100093285?ean=9780743273565 (last visited Apr. 21, 2013) (listing price of \$13.05 plus shipping and handling for novel *The Great Gatsby*). This difference, less than five dollars, may seem insignificant, but “[i]f you can go online and get free shipping, free wrapping and no sales tax, you’re going to do it,” and ultimately at the expense of brick-and-mortar stores. See Andy Metzger, *Despite State’s Fiscal Woes, Grossman Sees Path to Lower Sales Tax Rate*, ST. HOUSE NEWS SERV. (Dec. 19, 2012) (quoting Massachusetts’s Treasurer Steven Grossman).

5. See *infra* Part II.C (discussing sales-tax jurisdiction). Amazon is currently only required to charge sales tax to its customers in nine states—Arizona, California, Kansas, Kentucky, New York, North Dakota, Pennsylvania, Texas, and Washington. See *About Sales Tax on Items Sold by Amazon.com*, AMAZON,

Although seemingly unfair, this difference in price between the local brick-and-mortar store and the pure-play online retailer is consistent with the 1992 Supreme Court holding in *Quill Corp. v. North Dakota*.⁶ In *Quill Corp.*, the Court held that a state has taxing authority over an out-of-state retailer only when that retailer has a “physical presence” within the taxing state.⁷ Despite the immense expansion of both the Internet and electronic commerce (e-commerce), the 1992 case continues to control today.⁸ Consequently, cash-strapped states have become more invested in seeking alternatives that would require out-of-state retailers to charge their in-state consumers a sales tax at the time of purchase.⁹

In 2008, New York passed state legislation (Amazon Law) requiring all out-of-state retailers making over \$10,000 in revenue who employed affiliates within the state to collect and remit sales tax.¹⁰ Despite a number of states attempting to follow New York’s lead, to date New York is the only state that has successfully passed legislation and yet continues to house Amazon affiliates.¹¹ Other states that have attempted similar legislation either succeeded in legislation but drove Amazon to withdraw its affiliate program in the state, or postponed legislation in exchange for a deal with Amazon.¹²

The issue of sales tax as it pertains to out-of-state retailers is not a new one.¹³ Not surprisingly, it has come to the forefront in recent years as states

<http://www.amazon.com/gp/help/customer/display.html?nodeId=468512> (last visited Mar. 16, 2013). Currently, New York is the only state in which Amazon charges a sales tax to its customers as a result of state legislation. See *infra* Part II.D (providing overview of New York’s Amazon Law). Although Amazon was technically supposed to start collecting sales tax from customers in Georgia on January 1, 2013, due to a statutory amendment, Amazon has yet to do so. See Arielle Kass, *Amazon Fails to Collect New Georgia Tax*, ATLANTA J.-CONST., Jan. 23, 2013, <http://www.ajc.com/news/amazon-fails-to-collect-new-georgia-tax/nT4wm/> (noting Amazon’s unresponsiveness to Georgia law); see also *About Sales Tax on Items Sold by Amazon.com, supra* (omitting Georgia as state wherein Amazon must charge sales tax). Amazon is required to charge a sales tax in the remaining four states—Kansas, Kentucky, North Dakota, and Washington—as a result of the physical presence test enunciated in *Quill Corp. v. North Dakota*. See 504 U.S. 298, 315 (1992) (outlining application of physical presence test); *infra* notes 73-86 and accompanying text (summarizing case).

6. See 504 U.S. at 315 (articulating physical presence test); see also *infra* notes 73-86 and accompanying text.

7. See *Quill Corp.*, 504 U.S. at 315; see also *infra* notes 73-86 and accompanying text (describing factual circumstances in *Quill Corp.*)

8. See *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129, 138 n.4, 139 (App. Div. 2010) (citing *Quill Corp.*), *aff’d sub nom. Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013). The court explicitly deferred to the Supreme Court to determine whether the economy has changed significantly enough to require a decision expanding on the physical-presence requirement established in *Quill*. See *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013). See generally *Quill Corp.*, 504 U.S. 298 (demonstrating continued validity of Court’s holding).

9. See *infra* Part II.D (noting states’ attempts to pass sales-tax legislation).

10. See N.Y. TAX LAW § 1131(1) (McKinney 2011); *Amazon.com, LLC*, 913 N.Y.S.2d at 132; see also *infra* notes 107-20 and accompanying text (explaining New York’s Amazon Law).

11. See *infra* Part II.D (discussing New York’s Amazon Law).

12. See *infra* Part II.D (describing lack of success in passing legislation in states other than New York).

13. See *infra* Part II.C.1 (discussing history of sales-tax case law).

cope with the economic downturn and a drastic reduction in state revenues.¹⁴ While individual state legislation appears to be the only response, it is at best a partial solution.¹⁵

In Part II.A, this Note discusses the evolution of e-commerce, from its inception in 1994 to the present day.¹⁶ Part II.B examines the history of Amazon—from its modest beginning in a Seattle garage to its current and consistent position as one of the world’s top online retailers.¹⁷ Part II.C discusses states’ sales-tax jurisdiction, focusing on relevant case law and how Amazon currently charges sales tax to its customers.¹⁸ Next, Part II.D discusses the states’ responses to large online retailers’ avoidance of sales tax.¹⁹ Part II.E then discusses proposed federal legislation, focusing on the Streamlined Sales and Use Tax Agreement (SSUTA).²⁰ Finally, in Part III, this Note analyzes the state and federal responses and argues that neither approach is well-suited to fix the problem; rather, Congress should pass more narrowly tailored federal legislation that is similar to that of New York’s Amazon Law.²¹

II. HISTORY

A. *The History of E-Commerce in the United States*

While the Internet has an extensive and complicated history, the history of e-commerce is much more condensed, but equally as innovative and fascinating.²² It was not until 1992 that the U.S. Congress first allowed people other than academics, government, or military personnel to use the Internet.²³

14. See *infra* Part II.C.2 (providing overview of sales-tax requirements pertaining to Amazon); *infra* Part II.D (summarizing states’ responses to current sales-tax laws relating to online retailers).

15. See *infra* Part III (articulating problems with current approaches).

16. See *infra* Part II.A (describing evolution of e-commerce).

17. See *infra* Part II.B (detailing history of Amazon).

18. See *infra* Part II.C (summarizing Supreme Court cases regarding state sales-tax jurisdiction and Amazon’s current policies).

19. See *infra* Part II.D (discussing states’ approaches to collecting sales tax).

20. See *infra* Part II.E (highlighting relevant sections of SSUTA).

21. See *infra* Part III (analyzing current approaches and advocating for more straightforward federal legislation).

22. See generally Shane Greenstein, *Innovation and the Evolution of Market Structure for Internet Access in the United States*, in *THE INTERNET AND AMERICAN BUSINESS* 47 (William Aspray & Paul E. Ceruzzi eds., 2008) (providing basic summary of commercialization of Internet). The United States was the first country to commercialize the Internet. See *id.* at 47. In 1996, the Telecommunications Act both altered regulatory limits and shaped business decisions in the virtual world. See *id.* As a result, individuals nationwide were able to use the Internet at a low cost. See *id.* Consequently, within a decade more than half of U.S. households were using the Internet, which was, at the time, nearly the entire population of households that owned a computer. See *id.* at 47-48 & fig.3.1 (providing graphical representation). In 2004, access to the Internet alone generated \$23.4 billion in revenue, especially impressive because it did not account for revenues generated from online retail establishments. See *id.* at 47.

23. See William Aspray & Paul E. Ceruzzi, *Introduction* to *THE INTERNET AND AMERICAN BUSINESS*, *supra* note 22, at 3, 4 (denoting 1992 as beginning of individual usage of Internet).

Thus, when individuals started using the Internet as a means of business in 1994, they were building on a preexisting social and scientific phenomenon that had developed over decades.²⁴ Likewise, e-commerce created an extension of the catalog model, allowing for more convenient ordering, larger selections, and broader reach at a lower cost, ultimately expanding the retail giants in unprecedented ways.²⁵

Retail “is a large, diverse, and complicated sector of the economy,” including everything from basic necessities to high-fashion luxuries.²⁶ On one end of the spectrum, retailers focus their efforts on a single product—such as gas stations selling gasoline; on the other end, retailers carry thousands of diverse products—such as grocery stores.²⁷ Likewise, some retailers operate one local store, while others run a global network of chains.²⁸ Physical retail stores, otherwise known as brick-and-mortar retailers, operate over one million establishments in the United States and account for about forty-two percent of U.S. personal-consumption expenditures.²⁹ The brick-and-mortar retailers were slow to adopt e-commerce, despite their preexisting presence among consumers and their inherent advantages in terms of “existing vendor networks, category familiarity, retailing experience, and a local presence.”³⁰ Rather, venture-backed dot-coms and small companies already versed in e-commerce led the online-retailing era.³¹

Today, online shopping has surpassed catalog shopping and accounts for about five percent of American retail spending.³² Despite difficult economic times, online shopping continues to rise.³³ More people than ever before are using the Internet as a medium not only for web surfing, but also for

24. *See id.*

25. *See* CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 47 (2006) (commenting on extension of catalog model to Internet venue).

26. Ward Hanson, *Discovering a Role Online: Brick-and-Mortar Retailers and the Internet*, in *THE INTERNET AND AMERICAN BUSINESS*, *supra* note 22, at 233, 235 (discussing retail sector of economy). The early twentieth century experienced the rise of retail through the department store, mail-order house, and chain store, whereas the twenty-first century saw preexisting retailers add their presence on the Internet. *See id.* at 233.

27. *See id.* (acknowledging variety of retail establishments).

28. *See id.* (noting diversity among retailers).

29. *See id.* at 235 (reaching \$3.7 trillion in 2005).

30. Hanson, *supra* note 26, at 233 (discussing brick-and-mortar retailers’ apprehension to opening online stores).

31. *See id.* (describing roots of e-commerce). Amazon was among these venture-backed dot-coms. *See id.*; *see also infra* notes 39-44 and accompanying text (summarizing history of Amazon).

32. *See* ANDERSON, *supra* note 25, at 49 (observing current online retail statistics); *Online Retail Sales as a Share of Total Retail and Food Sales, 2008–2010*, NAT’L RETAIL FED’N, http://www.nrf.com/modules.php?name=pages&sp_id=1240#share (last visited Mar. 20, 2013) (showing trends and projections in online retail as percentage of total retail). Between 2002 and 2009, online retail sales increased annually at an average rate of 18.1%. *See E-Stats*, U.S. CENSUS BUREAU 3 (May 26, 2011), <http://www.census.gov/econ/estats/2009/2009reportfinal.pdf> (analyzing economic trends in online retail sector).

33. *See* ANDERSON, *supra* note 25, at 49 (highlighting consistent rise in e-commerce sales); *E-Stats*, *supra* note 32 (articulating rise in e-commerce sales from 2008 to 2009).

shopping.³⁴ As a result of the Internet, the taxation of e-commerce and electronic transactions quickly became controversial, raising considerable debate over, *inter alia*, the issue of sales tax.³⁵

B. *The Evolution of Amazon*

The 1990s were a booming time for bookstores in the United States.³⁶ Building on the preexisting abundance of discount stores, Barnes & Noble and Borders took it to the next step, introducing massive superstores.³⁷ Opened in former warehouses or movie theaters, these superstores stocked around 100,000 titles, an inventory five times greater than that of the average local bookstore.³⁸ As books became cheaper and easier to access, Jeffrey Bezos, founder and Chief Executive Officer of Amazon, saw an opportunity to utilize the Internet in order to take this phenomenon yet another step: to put these megastores online where the inventory could be greater and the prices could be cheaper.³⁹

34. See Pamela Swidler, Note, *The Beginning of the End to a Tax-Free Internet: Developing an E-Commerce Clause*, 28 CARDOZO L. REV. 541, 543 (2006) (noting how changes in Internet affect e-commerce).

35. See Hanson, *supra* note 26, at 233 (noting consequences of Internet and e-commerce); Swidler, *supra* note 34, at 543 (acknowledging difficulties Internet and e-commerce present).

36. See ANDERSON, *supra* note 25, at 47 (noting popularity of book industry during early nineties). At the same time the book industry was flourishing, the prevalence of e-commerce was rising. See *id.* In the early nineties, the catalog model expanded to the Internet, creating a more convenient medium for ordering while providing larger selections and lower costs. See *id.*

37. See *id.* (acknowledging rise of book superstores).

38. See *id.* at 47-48 (discussing experiences of Barnes & Noble and Borders). Based on the inventory count alone, these superstores presented the consumer with greater selection and availability. See *id.* Although these superstores contained a more expansive selection than traditional local bookstores—with a few carrying as many as 175,000 titles—there were at least 1.5 million English-language books in print at that time, an assortment of titles no superstore could offer in its entirety. See *id.* at 49. “Amazon has almost forty times as many books as a Borders superstore.” *Id.* at 169.

39. See *id.* at 48-49 (describing Jeffrey Bezos’s vision for Amazon).

If you used the Web in 1994, with the primitive browsers and the technology that was available at the time, it was a pain. The browser was always crashing and things didn’t work right and your bandwidth was tiny, even if you had the best modem available at the time.

I concluded that given the technology at the time if you could do something any other way, that other way would be preferable to doing it on the Web. You didn’t want to do apparel on the Web, even though it was the best category, because apparel you could do very effectively through catalogs and through stores. This was my criteria: picking a category where you could substantially improve the customer experience along a dimension that could only be done on the Web.

Id. at 48 (quoting Jeffrey Bezos). The importance of selection when searching for a book, along with the difficulty and impracticability of selling books through a catalog, made an online bookstore the perfect fit for Jeffrey Bezos’s criteria. See *id.* The idea became, “let Amazon.com be the first place where you can easily find and buy a million different books.” *Id.* (quoting Jeffrey Bezos). Because there were at least 1.5 million English-language books in print at the time Jeffrey Bezos opined about starting Amazon, it was impossible for the superstores such as Borders and Barnes & Noble to carry a fraction of those books in their physical stores. See *id.* at 49. The brick-and-mortar stores were also limited—from confinements such as their shelves, store space, and number of locations—such that they faced an unsurpassable barrier to presenting customers with an unlimited selection. See *id.* Amazon and the Internet overcame these barriers and effectively eliminated them.

In 1994, Jeffrey Bezos, a then thirty-year-old Princeton graduate, incorporated the online company Amazon in Seattle, Washington.⁴⁰ When Amazon first opened for business in July 1995, it consisted merely of a few people working out of a two-car garage.⁴¹ Beginning solely as a bookstore, in July 1995 Jeffrey Bezos shipped the first book ever sold by Amazon.⁴² Although the existence of an online bookstore initially raised curiosity among consumers, it quickly became recognized as an easily accessible and convenient alternative to the local bookstore that could not afford to stock such a wide variety of titles.⁴³ Within the first thirty days of business, Amazon sold books to online shoppers in all fifty states and forty-five countries; the company has been growing ever since.⁴⁴

In 1996, Amazon introduced an affiliate marketing program known as Amazon Associates.⁴⁵ Through this program, Amazon invites all website

See id. The unlimited shelf space allowed Amazon to move quickly into a market with which no other brick-and-mortar store could compete. *See id.* Because of its practicality and success, many brick-and-mortar stores soon followed Amazon's lead and opened their online counterparts (such as BN.com for Barnes & Noble). *See id.*

40. *See* David A. Kirsch & Brent Goldfarb, *Small Ideas, Big Ideas, Bad Ideas, Good Ideas: "Get Big Fast" and Dot-Com Venture Creation*, in *THE INTERNET AND AMERICAN BUSINESS*, *supra* note 22, at 259, 260 (describing inception of Amazon); *see also* Kayla Webley, *A Brief History of Online Shopping*, *TIME*, July 16, 2010, <http://www.time.com/time/business/article/0,8599,2004089,00.html> (providing overview of Amazon's basic history).

41. *See* Webley, *supra* note 40 (acknowledging Amazon's growth over fifteen-year period).

42. *See id.* (discussing small-scale operation originally conducted by Amazon). Jeffrey Bezos saw online commerce and Amazon as an opportunity that utilized all the advantages of mail-order and catalog companies—centralized distribution and direct-buying—while cutting the costs of printing and mailing numerous catalogs. *See* ANDERSON, *supra* note 25, at 92 (describing advantages of Amazon's model).

43. *See* Webley, *supra* note 40 (discussing transition from local retailers to online retailers). The concept of an online retailer initially raised skepticism due primarily to the consumer's unfamiliarity with the medium of communication and the requirement to provide personal information via the Internet. *See id.* Regardless, for those individuals that lived in a small town without any convenient bookstore, or with one that had little in the way of selection, the Internet quickly became the solution. *See id.*

44. *See* Glenn Llopis, *What We Can All Learn From Amazon About Seeing Business Opportunities Others Don't See*, *FORBES*, Feb. 7, 2011, <http://www.forbes.com/sites/glennllopis/2011/02/07/what-we-can-all-learn-from-amazon-about-seeing-business-opportunities-others-dont-see/>; *see also* Kirsch & Goldfarb, *supra* note 40, at 260 (describing company's rise as simply "Amazonian"); Webley, *supra* note 40 (highlighting Amazon's meteoric rise). The idea of online shopping caught on quickly for Amazon, as well as other online retailers, as the online experience became "more like an in-store shopping trip." Webley, *supra* note 40. Amazon quickly became a success and has continued to excel throughout its existence. *See* Kirsch & Goldfarb, *supra* note 40, at 260. In 2006, Amazon employed more than 12,000 employees in offices across ten countries, marketed more than thirty online stores "selling everything from baby oil to motor oil," and reached annual revenues close to \$10 billion. *Id.* Although evidence demonstrates its success, it is important to note that Amazon had relatively poor returns, and competition continued to create tension. *See id.*

45. *See* *Amazon Associates*, AMAZON, <https://affiliate-program.amazon.com> (last visited Mar. 20, 2013) (providing details for becoming associate); *Tools for Every Site*, AMAZON, <https://affiliate-program.amazon.com/gp/associates/join/landing/tools.html> (last visited Mar. 20, 2013) (outlining key aspects of associate program); *see also* Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin., 913 N.Y.S.2d 129, 139 (App. Div. 2010) (describing Amazon's associate program), *aff'd sub nom.* Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013). In addition to placing advertisements on a personal site, associates have the opportunity to open their own virtual "store"

owners to participate—whether their sites are large and well-known, small and specialized, or anything in between.⁴⁶ A participant, or “associate,” directs Internet traffic from its personal site to Amazon based on click-through links on the associate’s website.⁴⁷ The associate then earns a percentage of the revenue that Amazon generates as a result of all purchases made using the associate’s respective click-through link.⁴⁸ Anyone can sign up and, as advertised on the website, “its easy and free [for anyone] to join.”⁴⁹

In similar fashion, Amazon launched its Marketplace in November 2000.⁵⁰ Using Amazon Marketplace, large and small retailers alike may list their goods for sale on Amazon.⁵¹ Through this program, sellers can use the Amazon platform and take advantage of the Amazon brand to sell their products nationwide.⁵² By the end of 2004, Amazon had over 100,000 Marketplace sellers, which accounted for forty percent of Amazon’s total sales revenue.⁵³ Today, Amazon has become the quintessential twenty-first-century mail-order company, with its website reaching millions of Internet users every day in the United States and around the world.⁵⁴

using Amazon’s interface. *Amazon.com, LLC*, 913 N.Y.S.2d at 139.

46. See *Amazon Associates*, *supra* note 45; *Tools for Every Site*, *supra* note 45. “Current participants in the Amazon Associates program include large, well-known sites, niche content sites and blogs, comparison shopping engines, search engine marketers, and everything in between.” *Spotlight*, AMAZON, <https://affiliate-program.amazon.com/gp/associates/help/main> (last visited Mar. 20, 2013).

47. See *Tools for Every Site*, *supra* note 45 (acknowledging how “associates” promote traffic to their website); see also *Amazon Associates*, *supra* note 45 (detailing how associate program operates).

48. See *Amazon Associates*, *supra* note 45 (noting how associates generate commission). Associates can earn up to ten percent in referral fees for qualifying purchases made as a result of their links. See *id.* An associate then receives monthly payments based on revenue the link generated for Amazon. See *id.*

49. See *id.* (highlighting ease with which individuals may become “associate”).

50. See ANDERSON, *supra* note 25, at 47-51 (noting successful programs implemented by Amazon.com); *History & Timeline*, AMAZON, phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-corporateTimeline (last visited Mar. 5, 2013) (outlining Amazon’s national and international history); see also *Amazon Marketplace*, AMAZON, <http://www.amazon.com/b?ie=UTF8&node=3247953011> (last visited Mar. 20, 2013) (describing Marketplace and Amazon sellers program).

51. See *Selling on Amazon.com*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_bc_anchor?ie=UTF8&nodeId=1161232 (last visited Mar. 20, 2013) (explaining types of Amazon Marketplace sellers). Amazon charges sellers a fee in exchange for allowing them to use Amazon’s site to sell their products. See *id.* While Amazon charges individuals who sell fewer than forty items a month on a per-sale basis, they charge individuals who sell more than forty items on both a monthly and a per-sale basis. See *Sell on Amazon*, AMAZON SERVICES, <http://www.amazonservices.com/content/sell-on-amazon.htm?ld=AZSOACATLNPOINT#!testimonials> (last visited Mar. 20, 2013) (providing information regarding Marketplace program).

52. See *Sell on Amazon*, *supra* note 51. Although the sale is made on the Amazon.com website, almost all other aspects of the sale are handled by the seller, not Amazon. See *id.* With the Marketplace Program, the products are still stored according to each individual seller’s method (whether in shelves, in local retail stores, or in the basement of a personal home), but all products are cataloged and offered in one central place on Amazon.com. See ANDERSON, *supra* note 25, at 94 (describing Marketplace inventory system). As a result of the hands-off approach Amazon takes in this process, Amazon bears no inventory costs for these products. See *id.*

53. See ANDERSON, *supra* note 25, at 93 (noting success of Marketplace program).

54. See *id.* at 47-49 (discussing Amazon’s rise); Daniel Tyler Cowan, Recent Development, *New York’s*

C. Sales Tax

In the United States, there is no national sales tax.⁵⁵ Consequently, state and local governments have historically received complete autonomy in deciding which goods and services will be subject to sales and use tax and, likewise, in administering and enforcing the collection of such taxes.⁵⁶ With the rise of e-commerce, and the issues it raises in terms of states' abilities to tax remote transactions, the courts, with guidance from the Constitution, have shaped the way sales tax and e-commerce complement one another.⁵⁷

1. Case Law

In 1960, the United States Supreme Court held in *Scripto, Inc. v. Carson*⁵⁸ that the presence of ten "specialty brokers" working on behalf of Scripto in the taxing state was sufficient to subject the out-of-state retailer to sales-tax requirements.⁵⁹ Scripto operated an advertising specialty division in Atlanta, Georgia, which did not "own, lease, or maintain" any place of business nor employ any salesperson or agent within the State of Florida.⁶⁰ Scripto did, however, solicit orders from Florida residents using "specialty brokers" who were residents of Florida, ten of whom Scripto employed at the time of suit.⁶¹

Unconstitutional Tax on the Internet: Amazon.com v. New York State Department of Taxation & Finance and the Dormant Commerce Clause, 88 N.C. L. REV. 1423, 1434 (2010) (explaining popularity of Amazon.com).

55. See KARL FRIEDEN, CYBERTAXATION: THE TAXATION OF E-COMMERCE 81 (2000) (articulating lack of federal sales-tax law). The United States imposes excise taxes—similar in nature to a sales tax except that it taxes production—on a few very specific goods and services, such as telecommunications and gasoline. See *id.* As a result of individual states' autonomy, there are thousands of different taxing jurisdictions, including both state and local jurisdictions. See *id.* at 82.

56. See *id.* at 83 (discussing complexity of sales tax as result of multiple jurisdictional tax rates). Because sales tax is largely within the discretion of each state, there is wide variation regarding the goods and services taxed by each state (and among varying jurisdictions within each state) and the percentage at which the states tax those goods and services. See *id.* at 82–83; *State Sales Tax Rates*, SALES TAX INST. (Mar. 1, 2013), <http://www.salestaxinstitute.com/resources/rates> (providing chart of all state sales-tax rates). Generally a sales tax is one collected by the vendor at the time of the purchase; purchasers pay a use tax when their purchase is not subject to sales tax. See FRIEDEN, *supra* note 55, at 83. The individual bears the obligation of reporting and remitting a use tax owed to the state by including it on the yearly tax return. See *id.* For example, when a consumer, resident of State X, makes a purchase from a retailer located in State Y, the consumer must remit the use tax to State X on the yearly tax return. See *id.* Because there is no efficient way of enforcing this, however, many individuals never actually pay taxes on purchases made from online, out-of-state retailers. See *id.* at 84.

57. See *infra* Part II.C.1 (outlining sales-tax case law).

58. 362 U.S. 207 (1960).

59. See *id.* at 209, 211–12 (holding appellant's contacts in Florida sufficient to trigger state's taxing authority).

60. See *id.* at 208–09 (detailing Scripto's connections with Florida). In addition, Scripto did not own or maintain any bank account or stock of merchandise in Florida. See *id.* at 209.

61. See *id.* (discussing use of "specialty brokers"). Each one of these "specialty brokers," or wholesalers, as the Supreme Court of Florida called them, had a written contract with Scripto and a specific territory in which they were to solicit business. *Id.* Pursuant to the contract, Scripto compensated these wholesalers in the

After Florida ordered Scripto to register as a dealer under the state tax statute and required that it collect and remit taxes to the state, Scripto challenged the statute claiming it violated the Due Process Clause and unduly burdened interstate commerce.⁶² The Court used an analytical test, looking at the nature and extent of the activities of the out-of-state retailer within the taxing jurisdiction.⁶³ Applying this test, the Court held that because Scripto purposefully reached out to Florida and employed, albeit part-time, ten salesmen whose sole purpose was to continuously and systematically solicit business from Florida residents, there were sufficient contacts with the taxing state to subject it to tax requirements.⁶⁴

In 1967, the Supreme Court in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*⁶⁵ held that a mail-order company whose only contacts with the taxing state were by means of common carrier or United States mail could not be subject to use-tax liability.⁶⁶ National Bellas Hess (National) was a mail-order house licensed to do business only in Missouri and Delaware; it neither owned any retail stores, offices, warehouses, or any other property, nor employed any form of salesperson or agent within the State of Illinois.⁶⁷ Because National did send advertising flyers and catalogues to past, present, and potential customers, Illinois deemed this activity sufficient under its state statute to subject the out-of-state retailer to its taxing authority.⁶⁸

form of commission based on their individual sales. *See id.* The brokers also earned a commission for repeat orders, even when the broker did not specifically solicit the repeat order, provided that the broker did not become inactive by failing to secure orders during the prior sixty days. *See id.* Each broker received “catalogs, samples, and advertising material” and actively engaged “as a representative ‘of Scripto for the purpose of attracting, soliciting and obtaining Florida customers.’” *Id.* (quoting contract).

62. *See Scripto, Inc.*, 362 U.S. at 207-08 (articulating Scripto’s challenge to Florida statute). Scripto argued that the extent of its operations in Florida was not sufficient to create the requisite nexus under the statute’s requirements. *Id.*

63. *See id.* at 211-12 (articulating test for determining statute’s validity). In determining whether the out-of-state retailer had sufficient contacts with the taxing state, the Court noted that there must be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Id.* at 210-11 (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

64. *See Scripto, Inc. v. Carson*, 362 U.S. 207, 212 (1960) (applying facts of case to Court’s test). In discussing the relevant facts, the Court articulated the insignificance of whether the in-state salesmen were full- or part-time employees. *Id.* at 211.

65. 386 U.S. 753 (1967), *overruled by* *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

66. *See id.* at 758 (following precedent in reaching Court’s holding).

67. *See id.* at 753-54 (describing National’s connections with Illinois). In addition, National did not own any tangible property in Illinois nor did it have a telephone listing or any form of advertisements in Illinois media. *See id.* Likewise, there were no local deliveries made to customers in Illinois. *See id.* at 759. Rather, all contacts with Illinois were made through United States mail or common carrier. *See id.* at 754. National did mail catalogues twice a year to current or recent customers in Illinois (and across the nation) and occasionally mailed “advertising ‘flyers’” to “past and potential customers.” *Id.*

68. *See id.* at 755 (addressing applicability of Illinois statute to National). Under the Illinois statute, any “retailer maintaining a place of business in” the state must submit to the state’s taxing authority. *Id.* (quoting 120 ILL. COMP. STAT. 439.2 (1965) (current version at 35 ILL. COMP. STAT. ANN. 105/2 (West 2013))). The *National Bellas Hess, Inc.* Court quoted the original statute as defining a “retailer” as any retailer “[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such

Subsequently, National argued that requiring the out-of-state retailer to submit to Illinois taxing authority violated the Due Process Clause and unconstitutionally burdened interstate commerce.⁶⁹ In response, the Court stated that the “two claims [were] closely related” and that the same principles were applicable in determining the state’s taxing power—whether there was “some definite link, some minimum connection” between the state and the transaction being taxed.⁷⁰ In applying these principles, the Court disregarded the minimal advertising as insignificant and held that tax-collection obligations may not be imposed on an out-of-state seller whose only contacts with the state were through common carrier or U.S. mail.⁷¹

In 1992, the Supreme Court held in *Quill Corp. v. North Dakota*⁷² that physical presence is required in order to impose sales and use taxes on an out-of-state, or remote, seller.⁷³ Quill Corporation was a Delaware company selling office equipment and supplies, and had no offices or employees in North Dakota.⁷⁴ Quill did, however, solicit sales from customers within North Dakota by means of catalogs, advertisements in national periodicals, and telephone calls.⁷⁵ All North Dakota merchandise purchases and deliveries were done by

orders are received or accepted within or without this State.” *Id.* (quoting 120 ILL. COMP. STAT. 439.2 (1965) (current version at 35 ILL. COMP. STAT. ANN. 105/2 (West 2013))). If imposed, the statute would require National to collect and remit taxes for purchases made by customers located within the state. *See id.*

69. *See Nat’l Bellas Hess, Inc.*, 386 U.S. at 756 (presenting National’s argument against sales-tax liability).

70. *See id.* (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954)) (articulating constitutional requirements for states’ taxing authority). It was not disputed that Illinois had jurisdiction to tax the individual who purchased the goods from National. *See id.* at 757 n.9. Because the individual lives within the taxing state, he or she is required to remit a use tax. *See id.* Here, however, the state seeks to require that the out-of-state retailer collect and remit the tax because this way allows the state to collect taxes due more effectively. *See id.*

71. *See Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 758 (1967) (holding National’s contacts insufficient to subject it to Illinois taxes), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In its analysis, the Court identified other scenarios in which it upheld the power of a state to subject an out-of-state retailer to tax liability. *See id.* at 757. For example, where the out-of-state retailer employed local agents to arrange sales in the taxing state, and where a mail-order seller operated local retail stores, the Court had previously upheld a state’s power to tax the seller. *See id.* The Court noted, however, that in those cases the out-of-state retailer was “plainly accorded the protection and services of the taxing State.” *Id.* In *National Bellas Hess, Inc.*, the majority acknowledged the burden on out-of-state retailers that would result if National, and similarly situated retailers, were required to collect and remit taxes in remote states due to the sheer number of taxing jurisdictions. *See id.* at 759-60. *But see id.* at 761 (Fortas, J., dissenting) (arguing National’s advertising and volume of sales in Illinois justify subjecting it to state tax). The dissent also emphasized the importance of considering the unfair advantage the Court’s holding places on an out-of-state retailer as compared to an in-state retailer. *See id.* at 762-63 (expressing concern over potential for “competitive discrimination”).

72. 504 U.S. 298 (1992).

73. *See id.* at 317 (clarifying validity of rule established in *National Bellas Hess, Inc.*); Sarah Saidel Barris, Note, *New Jersey’s Legislature May Have Trouble Tapping a New Source of Revenue*, 5 PITT. TAX REV. 61, 66 (2007) (discussing nexus and physical presence tests); *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 170-71 (1992) (addressing reasoning in support of physical presence rule).

74. *See Quill Corp.*, 504 U.S. at 302 (providing background information on Quill Corporation).

75. *See id.* at 302 (discussing Quill Corporation’s connections with North Dakota). Quill’s sales to North

mail or common carrier.⁷⁶ As a result of North Dakota's 1987 statute that required a "retailer" who engaged in "regular or systematic solicitation" of North Dakota residents to collect sales taxes from the customers and then remit those taxes to the state, North Dakota filed an action in state court compelling Quill to pay taxes on all sales made to North Dakota residents.⁷⁷ Quill refused to pay the taxes contending that North Dakota's statute violated, *inter alia*, the Due Process and Commerce clauses and arguing that it established unconstitutional nexus requirements.⁷⁸

Finding the case indistinguishable from *National Bellas Hess, Inc.*, the trial court ruled in Quill's favor.⁷⁹ The North Dakota Supreme Court reversed, finding that "social, economic, commercial, and legal" changes since the Court's holding in *National Bellas Hess, Inc.* rendered it obsolete.⁸⁰ When the case came before the Supreme Court, Justice Stevens, writing for the majority, noted that while both the Due Process and Commerce clauses limit a state's taxing power, they are "analytically distinct" and "reflect different constitutional concerns."⁸¹ Consequently, a state may exercise its taxing

Dakota residents totaled about \$1 million, while total national sales exceeded \$200 million. *Id.* Quill sold office supplies to about 3000 North Dakota residents and was ranked the sixth largest office supplies vendor within the state. *See id.*

76. *See id.*

77. *See id.* at 302–03 (explaining North Dakota statute). As a consequence of the 1987 statute, all mail-order companies that "engage[d] in regular or systematic solicitation" of customers in North Dakota were subjected to the sales-tax remittance requirements irrespective of the non-existence of property or personnel within the state. *Id.*

78. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 303 (1992).

79. *See id.* at 301 (noting similarity between *National Bellas Hess, Inc.* and *Quill Corp.*); *see also supra* notes 67–68 and accompanying text (discussing facts of *National Bellas Hess, Inc.*).

80. *See Quill Corp.*, 504 U.S. at 301 (recalling North Dakota Supreme Court holding). The North Dakota Supreme Court argued that *Complete Auto* effectively undercut the holding in *National Bellas Hess, Inc.* *See id.* at 311–12; *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Additionally, the North Dakota Supreme Court reasoned that the nexus requirements of the Due Process and Commerce clauses were equal. *See id.* at 312. The court reasoned that if an out-of-state retailer lacked a physical presence within the state but nevertheless satisfied "minimum contacts," then those contacts were sufficient to satisfy both the Due Process and Commerce clause nexuses, thereby subjecting the out-of-state retailer to taxes. *See id. But see id.* at 319 (reversing North Dakota Supreme Court holding).

81. *See id.* at 305 (introducing differences between Due Process Clause and Commerce Clause). Justice Stevens conceded that the Court had not clearly defined these distinctions in the past. *See id.* Quoting Justice Rutledge's minority opinion in *International Harvester Co. v. Department of Treasury*, Justice Stevens wrote:

"'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems To some extent they overlap There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones."

Id. at 305–06 (quoting *Int'l Harvester Co. v. Dep't of Treasury*, 322 U.S. 349, 353 (1944) (Rutledge, J., concurring)).

authority without overstepping the restrictions imposed by the Due Process Clause, but still run afoul of the Commerce Clause.⁸² With that in mind, Justice Stevens looked at the Due Process Clause in terms of the “minimum contacts” test, drawing an analogy between a state’s power to tax and a state court’s power to exercise jurisdiction over a defendant, stating that Quill had “more than sufficient” minimum contacts with North Dakota to subject it to sales-tax requirements.⁸³ Nevertheless, Justice Stevens discussed the Commerce Clause in terms of “structural concerns” about the national economy and noted that a corporation’s minimum contacts with a state do not automatically create a constitutional requirement that the corporation collect sales tax.⁸⁴ Rather, under the Commerce Clause, a corporation’s requirement to collect sales tax does not merely turn on minimum contacts, but instead the physical presence in the taxing state of, for example, “a small sales force, plant, or office.”⁸⁵ Therefore, while Quill had sufficient contacts with North Dakota under the Due Process Clause that could subject the company to a sales tax, the state ultimately could not impose a sales tax upon Quill because the statute unduly burdened interstate commerce and did not conform to the requisite

82. See *id.* at 313 (recognizing different standards under Due Process Clause and Commerce Clause). The Due Process Clause requires satisfaction of the “minimum contacts” test, a standard based on “traditional notions of fair play and substantial justice” and whether a defendant has purposefully availed itself of a state, before it may be subject to jurisdiction within that state. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); see, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (defining minimum contacts in context of restaurant franchise); *Shaffer v. Heitner ex rel. Heitner*, 433 U.S. 186 (1977) (representing historical evolution of minimum contacts standard); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (providing standard used in “minimum contacts” test); see also *Quill Corp.*, 504 U.S. at 306–08 (summarizing history of minimum contacts inquiry). Under the Due Process Clause, a corporation’s physical presence within a state is irrelevant. See *Quill Corp.*, 504 U.S. at 308. The Commerce Clause, by contrast, “prohibits certain state actions that interfere with interstate commerce.” *Id.* at 309. In assessing a state’s taxing authority under the Commerce Clause, the inquiry is not minimum contacts, but rather a question of the corporation’s physical presence. See *id.* at 315; Jaime Klima, *Mom & Pop v. Dot-Com: A Disparity in Taxation Based on How You Shop?*, 2002 DUKE L. & TECH. REV. 28, *5 (2002) (describing Commerce Clause requirement of physical presence); see also U.S. CONST. amend. V (“nor shall any person . . . be deprived of life, liberty, or property, without due process of law”); U.S. CONST. art. I, § 8, cl. 3 (providing Congress power “[t]o regulate Commerce . . . among the several States”).

83. See *Quill Corp.*, 504 U.S. at 306–08 (analyzing Quill’s minimum contacts with North Dakota); see also *supra* note 82 and accompanying text (explaining minimum contacts test briefly).

84. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 309–18 (1992) (evaluating states’ tax authority under Commerce Clause).

85. See *id.* at 315 (reaffirming *National Bellas Hess, Inc.* bright-line test). In reaching its conclusion regarding the Commerce Clause, the Court applied the facts presented here against the *Complete Auto Transit, Inc.* four-part test that must be met in order for a tax to withstand a Commerce Clause challenge. *Id.* at 311. Under this test, as long as the “tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State,” it will be sustained. See *Complete Auto Transit, Inc.*, 430 U.S. at 279 (establishing requisite test to uphold tax against Commerce Clause challenge); see also *Quill Corp.*, 504 U.S. at 311 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). In *Quill Corp.*, the Court focused on the first prong—the “[s]ubstantial nexus.” See 504 U.S. at 311. In doing so, the Court disagreed with the North Dakota Supreme Court and reaffirmed *National Bellas Hess, Inc.* See *id.* at 317–18.

physical presence test under the Commerce Clause.⁸⁶

2. Sales Tax and Amazon

Since the 1992 *Quill Corp.* holding, the Internet has expanded immensely.⁸⁷ Regardless, *Quill Corp.* remains the controlling case, likely due to the similarities between mail-order companies and companies operating over the Internet—especially the pure-play online retailers that only make contact with customers through the computer.⁸⁸ Despite attempts to simplify interstate sales tax, neither *Quill Corp.* nor any other case or legislation requires an Internet company to charge its customers sales tax unless that company has a “substantial nexus” within a specific jurisdiction.⁸⁹ Currently, online retailers are only required to charge a sales tax to customers for purchases made in a state wherein that online retailer has a physical presence.⁹⁰ Consequently, online retailers that do not also have the traditional brick-and-mortar chains across the country have found it surprisingly easy to avoid taxation almost entirely.⁹¹

86. See *Quill Corp.*, 504 U.S. at 314–15 (articulating reasoning for not permitting North Dakota to exercise taxing jurisdiction over Quill). After articulating the Court’s holding, Justice Stevens reinforced the fact that Congress has the “ultimate power to resolve” this issue and the ability to disagree with the Court’s holding. *Id.* at 318. The Court also noted that Congress’s inaction in the years following *National Bellas Hess, Inc.* and preceding the decision at issue here demonstrated a respect for the *National Bellas Hess, Inc.* holding. See *id.* Thus, the Court reversed the North Dakota Supreme Court holding. See *id.*

87. See *supra* Part II.A (summarizing history of e-commerce). The Supreme Court decided the *Quill Corp.* case in 1992, before e-commerce had a strong presence, or really any presence at all. See *supra* Part II.A. See generally *Quill Corp.*, 504 U.S. 298.

88. See Joseph R. Feehan, Comment, *Surfing Around the Sales Tax Byte: The Internet Tax Freedom Act, Sales Tax Jurisdiction and the Role of Congress*, 12 ALB. L.J. SCI. & TECH. 619, 625–26 (2002) (articulating importance of *Quill Corp.* in Internet world).

89. See *Quill Corp.*, 504 U.S. at 317 (affirming bright-line rule requiring physical presence in taxing state). Historically, the Court has been unwilling to divert from precedent and has deferred to Congress on the issue of state taxing authority. See, e.g., *id.* at 318 (“[T]he underlying issue is . . . one that Congress has the ultimate power to resolve.”); *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 760 (1967) (“[T]his is a domain where Congress alone has the power of regulation and control.”), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Scripto, Inc. v. Carson*, 362 U.S. 207, 211–12 (1960) (stating taxing interstate business subject to congressional powers); see also *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129, 132–33 (App. Div. 2010) (examining New York statute requiring qualifying out-of-state retailers to submit to state taxing authority), *aff’d sub nom. Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013); *Scripto, Inc.*, 362 U.S. at 213 (sustaining tax where out-of-state retailer purposefully availed itself of taxing state); *supra* notes 59–64 and accompanying text (summarizing reasoning for sustaining tax against Scripto).

90. See *supra* notes 73–78, 80 and accompanying text (detailing holding in *Quill Corp.* still controlling today).

91. See *About Sales Tax on Items Sold by Amazon.com*, *supra* note 5 (explaining how Amazon charges sales tax). Consequently, brick-and-mortar stores sought ways to avoid collecting taxes to put them on a more level playing field with pure-play online retailers. See Michael R. Gordon, Recent Development, *Up the Amazon Without a Paddle: Examining Sales Taxes, Entity Isolation, and the “Affiliate Tax,”* 11 N.C. J.L. & TECH. 299, 304–06 (2010) (analyzing *Quill Corp.* in the Internet age). Compare *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (Ct. App. 2005) (holding that because Borders stores accepted returns

In order to avoid being forced to collect sales tax, online retailers—such as Amazon—have been able to take advantage of the physical presence test by using an approach known as “entity isolation.”⁹² To use this approach, a corporation will contract with subsidiary companies to perform specified functions, such as order fulfillment or product research and development.⁹³ These subsidiaries are legally distinct from the main corporation and therefore the presence of the subsidiary in the state does not impose a tax requirement on the main corporation.⁹⁴ Consequently, under *Quill Corp.*, the seller is not required to collect sales tax for the states in which a mere subsidiary is housed.⁹⁵

Amazon, like other online retailers, has taken full advantage of “entity isolation” by conducting business within all fifty states while avoiding charging sales tax to customers in the majority of those states.⁹⁶ Currently Amazon has “offices, fulfillment centers, customer service centers, data centers, and software development centers around the globe.”⁹⁷ Nevertheless, Amazon has

from Borders Online, Borders Online subject to taxes), *with* St. Tammany Parish Tax Collector v. Barnesandnoble.com, 481 F. Supp. 2d 575, 580 (E.D. La. 2007) (holding Barnesandnoble.com lacked sufficient nexus with taxing state because only issued store credit for returns). The preceding two cases stand for the proposition that a brick-and-mortar store could potentially open an online division that would not be subject to the same taxation requirements, but there is a fine line to making that determination. *See* Gordon, *supra*, at 305.

92. *See* Le, *supra* note 2, at 409–10 (articulating arguments for proponents and opponents of “entity isolation”); Gordon, *supra* note 91, at 306–09 (describing “entity isolation”). Although there is little evidence regarding whether charging sales tax significantly impacts companies like Amazon, there may be some adverse effects as a result of being placed on a more level playing field with other retailers. Alistair Barr, *Amazon Holiday Results to Show Sales Tax Impact*, REUTERS (Jan. 17, 2013, 7:06 AM), <http://www.reuters.com/article/2013/01/17/us-amazon-salestax-idUSBRE90G0JZ20130117> (demonstrating possibility for negative economic impact).

93. *See* Gordon, *supra* note 91, at 306 (highlighting how corporation advantageously uses “entity isolation”).

94. *See id.* (describing legal implications of relationship between subsidiary and main corporation); *see also infra* note 97 and accompanying text (providing information regarding Amazon’s locations). For example, because the five Amazon distribution centers in Pennsylvania are operated by subsidiary companies, Amazon has no obligation to charge a sales tax to customers in Pennsylvania. *See* Gordon, *supra* note 91, at 306–07 (explaining Amazon’s ability to take advantage of *Quill Corp.* loophole).

95. *See* Le, *supra* note 2, at 409 (discussing how retailers escape collecting sales tax from customers); Gordon, *supra* note 91, at 307.

96. *See About Sales Tax on Items Sold by Amazon.com*, *supra* note 5 (providing information regarding Amazon’s sales-tax policy). Amazon’s website states that “[r]emote sellers (including Internet retailers and catalog companies) are generally required to collect taxes where they have a *physical selling presence*. If they do not have any such presence, they are not required to collect sales taxes.” *About the Internet Tax Freedom Act*, AMAZON, www.amazon.com/gp/help/customer/display.html?nodeId=201133330 (last visited Mar. 22, 2013) (emphasis added).

97. *See Global Locations*, AMAZON, <http://www.amazon.com/Locations-Careers/b?ie=UTF8&node=239366011> (last visited Mar. 22, 2013) (listing Amazon locations in North America and worldwide). Amazon’s corporate headquarters are in Seattle, Washington; it owns customer service centers in North Dakota, Washington, and West Virginia; fulfillment centers in Arizona, California, Delaware, Indiana, Kansas, Kentucky, Nevada, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia; a shared services center in Las Vegas, Nevada; and a web services center in Herndon, Virginia. *See id.* In addition,

only been obligated to collect sales tax from its customers in four states (Kansas, Kentucky, North Dakota, and Washington) because of its physical presence in those states as specifically defined in *Quill Corp.*⁹⁸ On the one hand, Amazon argues that although its subsidiaries directly benefit from state-granted police protection, Amazon does not directly benefit from this protection and therefore should not be forced to comply with tax obligations.⁹⁹ On the other hand, opponents argue that Amazon should be required to comply with sales-tax requirements because it would not function as smoothly, if at all, without these subsidiaries to fill all Amazon's customer orders.¹⁰⁰ These differing views have resulted in a flood of responses from individuals, businesses, and state governments alike attempting to equalize and simplify the process.¹⁰¹

D. New York's Amazon Law

In 2010, sales tax accounted for 31.9% of state tax revenue nationally.¹⁰² Individual states charging a sales tax generated anywhere from 12.4% to 59.6% of their total state revenue from sales tax.¹⁰³ States have lost a significant amount of revenue otherwise owed to them through unpaid sales and use taxes

Amazon owns subsidiaries in California, Georgia, Kentucky, Michigan, Nevada, New Jersey, New York, South Carolina, Texas, Washington, and Wisconsin. *See id.*

98. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992); *see also About Sales Tax on Items Sold by Amazon.com*, *supra* note 5 (listing states in which Amazon charges sales tax to its customers). Amazon currently charges sales tax in nine states total—Arizona, California, Kansas, Kentucky, New York, North Dakota, Pennsylvania, Texas, and Washington—and *Quill Corp.* requires Amazon to charge sales tax in four of these. *See About Sales Tax on Items Sold by Amazon.com*, *supra* note 5. Directly following the list of states wherein Amazon must charge sales tax, there is a list of states in which all other sellers selling through Amazon must charge sales tax. *See id.* (listing most Amazon sellers and states in which they charge sales tax).

99. *See Gordon*, *supra* note 91, at 307 (presenting argument in favor of “entity isolation”). Proponents argue that the parent corporation would be “unduly burdened” if it were required to collect sales tax in a state wherein it only employs a contractor to perform services. *Id.*

100. *See id.* (articulating argument against online retailers' use of “entity isolation” to avoid taxation).

101. *See, e.g.*, N.Y. TAX LAW § 1131(1) (McKinney 2011) (embodying state statutory response); Main Street Fairness Act, S. 1452, 112th Cong. (2011) (proposing federal response); David Streitfeld, *Amazon and California in Deal on Tax*, N.Y. TIMES, Sept. 8, 2011, <http://www.nytimes.com/2011/09/09/technology/amazon-and-california-strike-a-deal-on-sales-tax.html> (detailing online retailer response).

102. *See 2010 State Tax Collection by Source*, FED'N OF TAX ADM'RS., <http://www.taxadmin.org/fta/rate/10taxdis.html> (last visited Mar. 22, 2013) (providing state-specific data regarding tax collection). In 2010, general sales taxes totaled \$224.5 billion, a 1.9% decrease from 2009. *See MELISSA BRAYBROOKS ET AL.*, U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2010, at 2 (2011), www.census.gov/prod/2011pubs/g10-stc.pdf (discussing state tax collections generally).

103. *See 2010 State Tax Collection by Source*, *supra* note 102 (listing tax percentages of total state tax revenue). Vermont relies the least on sales tax, collecting only 12.4% of its total state tax revenue from sales tax. *See id.* On the contrary, Washington relies more on sales-tax revenue than any other state, collecting 59.6% of its total state tax revenue from sales taxes. *See id.* New York is not too far ahead of Vermont, relying on sales tax for only 16.6% of total state tax revenues. *See id.* California falls somewhere in the middle, relying on sales tax for 29.8% of total state tax revenues, with Rhode Island slightly above California with sales tax accounting for 31.1% of total state tax revenues. *See id.*

because states have been unable to efficiently and effectively collect the sales tax owed from the purchaser.¹⁰⁴ As a result, and especially given the economic downturn's cut into state tax revenue, states have begun to fight for the tax revenue to which they believe they are lawfully entitled.¹⁰⁵ To accomplish this goal, states have attempted to pass legislation transferring the burden of collection from the respective state governments to remote sellers, requiring those sellers to collect and remit the sales tax due on transactions made to their residents, the customers.¹⁰⁶

On April 23, 2008, New York amended its tax law, expanding the definition of what constituted the physical presence of a "vendor" within New York for sales-tax purposes.¹⁰⁷ According to the amendment, a "vendor" is defined as

104. See *About Sales Tax on Items Sold by Amazon.com*, *supra* note 5 (specifying individual remittance requirements when out-of-state retailer does not collect sales tax); *Completing Your Tax Return*, CAL. ST. BD. OF EQUALIZATION, <http://www.boe.ca.gov/sutax/faqreturn.htm#3> (last visited Mar. 22, 2013) (instructing individuals to report out-of-state purchases for use-tax remittance); Michael Mazerov, *New York's "Amazon Law": An Important Tool for Collecting Taxes Owed on Internet Purchases*, CENTER ON BUDGET & POL'Y PRIORITIES (July 23, 2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2876> (noting individuals' requirement to report and remit sales tax on out-of-state purchases); see also Mass. Dep't of Revenue, *Amazon Firmly in Support of Online Sales Tax Legislation*, COMMONWEALTH CONVERSATIONS: OPEN DOR (Dec. 2, 2011), <http://revenue.blog.state.ma.us/blog/2011/12/amazon-firmly-in-support-of-online-sales-tax-legislation.html> ("In tax year 2010, of some 3.4 million tax filers, 54,387 (about 1.6 percent of all filers) paid \$4.799 million in use tax, an average of \$88.25 per taxpayer."). On Amazon's webpage it lists use-tax reporting requirements for purchases made through Amazon by Colorado, Oklahoma, South Carolina, South Dakota, Tennessee, and Vermont residents—all states in which Amazon is not required to charge customers a sales tax. See *About Sales Requirements for States in Which Tax Isn't Collected on Orders*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib?ie=UTF8&nodeId=201133270 (last visited Apr. 21, 2013).

105. See, e.g., *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S. 2d 129 (App. Div. 2010), *aff'd sub nom. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013); Assemb. Bill 28, 2011 First Extraordinary Sess. (Cal. 2011); *Streamlined Sales and Use Tax Agreement*, STREAMLINED SALES TAX GOVERNING BOARD, INC. (May 24, 2012), <http://streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf> [hereinafter SSUTA]; see also David H. Gershel, Comment, *The Day of Reckoning: The Inevitable Application of State Sales Tax to Electronic Commerce*, 14 TUL. J. TECH. & INTELL. PROP. 335, 361 (2011) (highlighting economy as major contributor to states' increased interest in collecting sales tax); Joseph Henchman, "Amazon Tax" Laws Signal Business Unfriendliness and Will Worsen Short-Term Budget Problems, TAX FOUND. (Mar. 8, 2010), <http://taxfoundation.org/sites/taxfoundation.org/files/docs/sr176.pdf> (noting effects of Amazon Laws on certain states); Jeanine Poggi, *Amazon Sales Tax: The Battle, State by State*, THE STREET (Oct. 24, 2011, 3:05 PM), <http://www.thestreet.com/story/11052898/1/amazon-sales-tax-the-battle-state-by-state.html> (outlining individual states' attempts to collect tax from Amazon).

106. See *supra* note 104 and accompanying text (discussing individuals' obligation to remit tax to state). It is too inefficient for the state to audit each individual to collect what may be a nominal amount in taxes owed. See *supra* note 104. If the state could go after the retailer, who presumably makes extensive sales to customers within any given state, it could more efficiently collect taxes owed. See *supra* note 105 and accompanying text (recognizing states' actions to collect tax from retailers). But see Joseph Henchman, *California Becomes Seventh State to Adopt "Amazon" Tax on Out-of-State Online Sellers*, TAX FOUND. (July 1, 2011), www.taxfoundation.org/article/California-becomes-seventh-state-adopt-amazon-tax-out-of-state-online-sellers (noting length of legal battle between New York and Amazon).

107. See N.Y. TAX LAW § 1101(b)(8) (McKinney 2013) (defining when seller presumed to solicit business in New York); *Amazon.com, LLC*, 913 N.Y.S.2d at 132 (stating governor's signing of tax-law amendment gave

any “person who solicits business” in state personally or through the use of agents.¹⁰⁸ Under this statute, if a “vendor” has a program that employs affiliates within New York, it is presumed that the vendor solicits business within the state and is subsequently characterized as having the requisite physical presence to permit New York to enforce sales-tax-collection obligations.¹⁰⁹ In order to trigger this presumption, two conditions must be met: The seller must enter into an agreement with a New York resident under which the resident receives some type of consideration in exchange for referring potential customers to the seller; and the cumulative gross receipts from sales made to customers in New York (resulting from referrals from all New York resident representatives during the prior year ending the last day of November) must exceed \$10,000.¹¹⁰ For purposes of this statute, an agreement with a New York resident merely to place an advertisement on its website that links to the out-of-state seller’s website will not trigger this presumption.¹¹¹

If the aforementioned requirements are met, it is presumed that the seller is soliciting sales in New York, but the seller has an opportunity to rebut this

rise to litigation); Sam Zaprzalka, Note, *New York’s Amazon Tax Not out of the Forest Yet: The Battle over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 540–41 (2010) (discussing legislation’s amendment history). New York was the first state to attempt to statutorily satisfy the substantial nexus required under *Quill Corp.*, making this statute both unique and controversial. See Zaprzalka, *supra*, at 540; see also Cowan, *supra* note 54, at 1426. New York first proposed the statute in November 2007, but tabled it shortly thereafter. See Cowan, *supra* note 54, at 1426.

108. See § 1101(b)(8) (defining “vendor” in detail). Under the statute, the term “vendor” includes, inter alia, a person who solicits business “by employees, independent contractors, agents or other representatives,” by distributing “advertising matter.” *Id.* § 1101(b)(8)(i)(C).

109. See *id.* §§ 1101(b)(8)(i)(C)(I), 1101(b)(8)(iv) (noting when seller presumed to solicit business through sales representative). The statute further states a seller will be presumed to be “soliciting business” through the use of a representative if the seller makes an agreement with a resident of New York for the resident to refer customers to the seller in exchange for some form of consideration, and the seller generates gross receipts totaling in excess of \$10,000 during the previous year. See *id.* § 1101(b)(8)(vi); see also Zelda Ferguson, Note, *Is the Tax Holiday Over for Online Sales?*, 63 TAX LAW. 1279, 1285–86 (2010) (discussing New York tax law). See generally *supra* note 108 (discussing other relevant sections of New York tax law); *infra* note 110 (highlighting clarifications of tax law).

110. See Scott M. Susko & Lucia Cucu, *State and Local Governments Turn to Online Business for Tax Revenue in an Attempt to Remedy Budget Shortfalls*, 19-SEP J. MULTISTATE TAX’N & INCENTIVES 14, 16–17 (2009) (discussing New York statute); OFFICE OF TAX POLICY ANALYSIS, TAXPAYER GUIDANCE DIV., N.Y. STATE DEP’T OF TAXATION & FIN., TSB-M-08(3)S, NEW PRESUMPTION APPLICABLE TO DEFINITION OF SALES TAX VENDOR 1-2 (May 8, 2008), http://nystax.gov/pdf/memos/sales/m08_3s.pdf (providing additional information and clarification regarding amended New York tax law). The tax bulletin recognizes that, under the statute as amended, a seller is “considered to have met the condition of having an agreement with a New York State resident where the seller enters into an agreement with a third party under which the third party, in turn, enters into an agreement with the New York resident” OFFICE OF TAX POLICY ANALYSIS, *supra*, at 2.

111. See OFFICE OF TAX POLICY ANALYSIS, *supra* note 110, at 2. If, however, the placing of an advertisement that links to the seller’s website is done in exchange for consideration based on volume of sales resulting from the link, this would not be considered merely “an agreement to place an advertisement” and would, assuming the \$10,000 requirement was also met, ultimately give rise to the presumption. *Id.* The click-through link is essentially considered akin to the salesperson in *Scripto* that gave rise to the “substantial nexus” requirement. See Ferguson, *supra* note 109, at 1286.

presumption.¹¹² In order to do so successfully, the seller must demonstrate that the contract between seller and representative prohibits any solicitation activity and that the representative has complied with the prohibition.¹¹³ As to the former requirement, the seller can demonstrate that the agreement prohibits solicitation by including a clause that forbids activities such as “distributing flyers, coupons, newsletters and other printed promotional materials,” “sending emails,” and the like.¹¹⁴ To prove the latter requirement, the representatives must, on a yearly basis, submit a signed statement certifying that the resident did not participate in any of the prohibited activities, and the seller must accept the statement in good faith.¹¹⁵ If the seller establishes all requirements to rebut the presumption, it will not be subject to New York tax-collection obligations.¹¹⁶

On April 25, 2008, just two days after the statute was enacted, Amazon filed suit challenging the statute’s constitutionality.¹¹⁷ Recently, the Court of Appeals of New York, New York’s highest court, affirmed the statute’s validity as against facial challenges; throughout litigation Amazon has been collecting sales tax from New York customers and remitting those taxes to the state.¹¹⁸

112. See OFFICE OF TAX POLICY ANALYSIS, TAXPAYER GUIDANCE DIV., N.Y. STATE DEP’T OF TAXATION AND FIN., TSB-M-08(3.1)S, ADDITIONAL INFORMATION ON HOW SELLERS MAY REBUT THE NEW PRESUMPTION APPLICABLE TO THE DEFINITION OF SALES TAX VENDOR AS DESCRIBED IN TSB-M-08(3)S, at 1-2 (June 30, 2008), http://www.tax.ny.gov/pdf/memos/sales/m08_3_1s.pdf (clarifying how to rebut presumption); see also Ferguson, *supra* note 109, at 1286; Zaprzalka, *supra* note 107, at 541.

113. See OFFICE OF TAX POLICY ANALYSIS, *supra* note 112, at 1 (articulating seller’s requisite burden for rebutting presumption).

114. See *id.*

115. See *id.* at 1-2. If the seller knows, or has reason to know, that a certification is false or fraudulent, it will not be acting in good faith and will not be able to rebut the presumption that it is soliciting business in the state by means of representatives. See *id.* at 2.

116. See *id.*; see also Ferguson, *supra* note 109, at 1286; Zaprzalka, *supra* note 107, at 543.

117. See *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129, 134 (App. Div. 2010) (noting Amazon’s immediate filing of suit), *aff’d sub nom. Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013). Overstock.com was a co-plaintiff in this case, but it did not file a complaint until May 30, 2008. See *id.*; Sinead Carew, *Overstock.com Sues New York over Internet Tax Law*, REUTERS, May 30, 2008, <http://www.reuters.com/article/2008/05/31/us-overstock-newyork-iduswen599520080531>. Overstock.com, unlike Amazon, only asserted claims for violation of the Commerce and Due Process clauses of the United States Constitution, as well as the Due Process Clause of the New York State Constitution. See *Amazon.com, LLC*, 913 N.Y.S.2d at 134.

118. See *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013) (addressing facial challenges only and noting parties’ agreement dropping as-applied challenges). Amazon originally filed complaints alleging violation of the Commerce, Due Process, and Equal Protection clauses of the United States Constitution, and similarly Due Process and Equal Protection clauses of the New York State Constitution. See *Amazon.com, LLC*, 913 N.Y.S.2d at 136. First, Amazon argued that the statute is unconstitutional as applied because Amazon lacks a “substantial nexus” to New York. *Id.* Second, Amazon argued that the statute violates the Due Process Clause, both facially and as applied, because as enacted it creates an irrational and irrebuttable presumption, in addition to being vague. See *id.* Last, Amazon argued that the statute violates the Equal Protection Clause because it targets Amazon directly in bad faith. See *id.* Overstock.com, on the other hand, argued on appeal that the statute violates the Commerce Clause both on its face and as applied. See *id.* Additionally, Overstock.com argued that the statute is facially unconstitutional based on due process grounds because of its vagueness. See *id.*

Other states have not been as successful as New York in passing legislation, or in retaining their affiliates, following enactment of legislation similar to New York's.¹¹⁹

E. Proposed Federal Legislation

Due to the complexities and lack of uniformity in sales-tax administration across state and local jurisdictions, the rise of the Internet, and the growth of e-commerce, discussions regarding possible federal regulations to simplify interstate sales tax have increased.¹²⁰ In so doing, the states' concern over lost revenue owed by consumers has been balanced with online retailers' burden of potentially having to conform to every state and local jurisdiction's varying sales-tax policy.¹²¹ As a result of the Supreme Court's holding in *Quill Corp.*, and the tension between state governments and major online retailers, the National Governors Association and the National Conference of State Legislatures created the SSUTA in 1999.¹²² A product of the cooperation of

119. See Ferguson, *supra* note 109, at 1293-94 (articulating expansion of Amazon Laws); see also Stephen Di Benedetto, *Amazon May Fight State's Proposed Tax on Online Sales*, CHI. SUN-TIMES, <http://www.suntimes.com/news/metro/3208655-418/illinois-online-retailers-state-amazon.html> (last visited Apr. 9, 2013) (Illinois); Tami Luhby, *Amazon Drops California Associates to Avoid Sales Tax*, CNN MONEY, June 29, 2011, http://money.cnn.com/2011/06/29/technology/california_amazon_associates/index.htm (California); Ross Ramsey, *Let's Make a Deal, Amazon Tells Texas*, N.Y. TIMES, June 23, 2011, <http://www.nytimes.com/2011/06/24/us/24tramsey.html> (Texas); W. David Gardner, *Amazon Drops North Carolina SMBs over Sales Tax Proposal*, INFORMATION WEEK (June 29, 2009, 1:45 PM), <http://www.informationweek.com/news/internet/retail/218101852> (North Carolina).

120. See SSUTA, *supra* note 105, § 102 (articulating fundamental purpose of SSUTA); Samantha L. Cowne, *The Streamlined Sales and Use Tax Agreement: How Entrepreneurs Can Plan for the Uncertain Future of E-Commerce Sales Taxation*, 4 ENTREPRENEURIAL BUS. L.J. 133, 134-35 (2009) (articulating states' joint attempts to create uniformity in state sales-tax laws); Le, *supra* note 2, at 398 (highlighting "strengthening efforts" by states to collect taxes on internet sales); Robert D. Plattner et al., *A New Way Forward for Remote Vendor Sales Tax Collection*, 55 ST. TAX NOTES 187 (2010), available at http://www.tax.ny.gov/pdf/stats/policy_special/a_new_way_forward_for_remote_vendor_sales_tax_collection.pdf (noting "heightened interest" of states to simplify sales-tax collection); see also Matt Murphy, *Amazon to Begin Collecting Mass. Sales Taxes Next Year*, ST. HOUSE NEWS SERVICE (Dec. 11, 2012) ("Amazon will also support Massachusetts in its effort to promote a national solution to the issue of online retailers collecting sales taxes . . .").

121. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992); *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-12 (1960). In calculating sales tax that an online retailer must charge its customer, the retailer has to take into account both the state and local taxing rates. See Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement ("SSUTA")*, 40 U.C. DAVIS L. REV. 1381, 1387 (2007). Therefore, in addition to the forty-five different state taxes, online retailers must also consider local town and city taxes, amounting to over 7000 taxing jurisdictions. See *id.* As a result of the sheer number of taxing jurisdictions, online retailers, as well as the Supreme Court, have found it unduly burdensome to collect sales tax in this manner. See *Quill Corp.*, 504 U.S. at 318; *Scripto, Inc.*, 362 U.S. at 211.

122. See *Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Mar. 29, 2013) (stating basis for SSUTA's creation). The SSUTA focuses on the following goals: state level administration of sales and use-tax collections; uniformity in the state and local tax bases and major tax base definitions; a central, electronic registration system for all member states; simplification of state and local tax rates; uniform sourcing rules for all taxable transactions; simplified administration of exemptions and tax returns; simplification of tax

forty-four states and the District of Columbia, local governments, and businesses, the SSUTA was put in place “to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance.”¹²³ Currently twenty-four states have adopted, and 1400 retailers operate under, the SSUTA.¹²⁴

In order to take advantage of the SSUTA, both states and sellers must register and be in compliance with specific regulations.¹²⁵ Once a state is in full compliance with all requirements under the SSUTA, it becomes a member state.¹²⁶ For member states, all registered sellers (including remote sellers) must collect and remit sales tax on all purchases made to customers within that state.¹²⁷ While no seller is required to register with the SSUTA, sellers who do

remittances; and the protection of consumer privacy. *See About Us*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=About-Us> (last visited Mar. 23, 2013) (listing SSUTA objectives); *see also* Brian S. Masterson, Note, *Collecting Sales and Use Tax on Electronic Commerce: E-Confusion or E-Collection*, 79 N.C. L. REV. 203, 208–09 (2000) (suggesting tax policies necessary in any reform initiative similar to those on which SSUTA created).

123. *See About Us*, *supra* note 122 (acknowledging SSUTA’s various purposes); *Frequently Asked Questions*, *supra* note 122 (discussing SSUTA’s roots). The Streamlined Sales Tax Governing Board (SSTGB) highlights the importance of a streamlined project as a consequence of the reality that sales tax is the second largest source of state revenue, behind only income tax. *See Frequently Asked Questions*, *supra* note 122 (discussing reasons behind SSUTA’s creation); Plattner et al., *supra* note 120, at 189 (reiterating Streamlined Sales Tax Project’s two main goals before SSUTA). In responding to why a widespread federal solution is necessary, the SSTGB states that brick-and-mortar retailers operate under a competitive disadvantage and a project such as the SSUTA would effectively put them on a similar playing field as the major online retailers. *See What Is the Streamlined Sales and Use Tax Agreement?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=gen_1 (last visited Mar. 23, 2013) (“This Agreement ensures that all retailers can conduct their business in a fair, competitive environment.”). In addition, the SSTGB claims that the SSUTA not only minimizes costs and burdens on retailers required to collect the tax, but also encourages “remote sellers” selling via the Internet and by mail order to collect sales tax from customers living in streamlined states. *See id.* *See generally* SSUTA, *supra* note 105, § 102 (stating fundamental purpose).

124. *See 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. 23, 2013) (stating twenty-four states have passed legislation); *Why Must There Be a Federal Solution?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=alias-19> (last visited Mar. 23, 2013) (stating 1400 retailers collect sales tax under SSUTA). The following states have passed legislation conforming to the SSUTA: Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See How Many States Have Passed Legislation Conforming to the Agreement?*, *supra*; *see also* SSUTA, *supra* note 105, arts. III-IV, VIII (discussing state and sellers’ requirements for registration).

125. *See* SSUTA, *supra* note 105, at arts. III-IV (requiring states and sellers meet particular specifications before becoming members).

126. *See id.* § 801.1 (outlining full membership requirements).

127. *See id.* In addition to member states, there are also “associate” member states which include those states that are either in compliance with the agreement but not all changes to their statutes are currently in effect, or are in compliance with *almost* all parts of the agreement. *See id.* The current associate member states are Ohio and Tennessee. *See generally Streamlined State Status 10-01-12*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/uploads/images/state%20map%2010_1_12.jpg (last visited Mar. 30, 2013) (showing full-member and associate-member states).

register receive benefits including amnesty for a limited time, use of certified sales-tax software (the cost of which may be subsidized by the states), ability to update registration data at one time and place, and one identification number to be used to both file and pay taxes for the registered states.¹²⁸ The SSUTA, part of the Streamlined Sales Tax Project (SSTP), is currently the most extensive and widespread interstate sales-tax policy that attempts to achieve uniformity among states.¹²⁹ The purpose of the SSTP was to clarify sales-tax laws and to ease the states' financial burden of sales-tax collection.¹³⁰ Under the SSUTA, a participating state would be required to simplify sales and use taxes before imposing collection requirements on out-of-state retailers lacking a nexus within that state.¹³¹

III. ANALYSIS

There is no doubt about the disparity in taxation between pure-play online retailers and brick-and-mortar stores.¹³² It is, and has been for some time, quite clear that pure-play online retailers receive a substantial price advantage as a result of their ability to refrain from charging sales tax in the majority of taxing jurisdictions.¹³³ As a result, this raises a number of questions about how this issue should be handled legally.¹³⁴ In *Quill Corp.*, the Court left the ultimate

128. See *What Are the Benefits of Registering Under the Agreement?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=alias-31> (last visited Mar. 20, 2013) (explaining advantages of seller registration). A registered seller receives amnesty benefits, which precludes a state from seeking back taxes together with interest or penalties from all sales made during the period that the seller was not registered in the state, provided the seller registered within twelve months of the effective date of the state's participation in the SSUTA. See *What Are the Amnesty Limitations?*, STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=gen_23 (last visited Mar. 23, 2013) (clarifying amnesty limitations). A member state also has discretion to allow amnesty on more favorable terms than required by the SSUTA. See *id.*; see also SSUTA, *supra* note 105, §§ 401-04 (providing overview of seller registration process).

129. See generally SSUTA, *supra* note 105 (demonstrating breadth of agreement).

130. See *id.* § 102 (stating SSUTA's fundamental purpose); *About Us*, *supra* note 122 (listing purposes of SSUTA); see also *supra* note 56 (commenting on individual's legal right to remit sales taxes on untaxed, out-of-state purchases). But see Press Release, *In US House Testimony, DMA Opposes Mandatory Sales Tax Collection Bill: DMA Warns that H.R. 3396 Would 'Seriously Jeopardize' E-Commerce and Impede an Open-Market Economy*, DIRECT MKTG. ASS'N (Dec. 6, 2007), www.the-dma.org/cgi/disppressrelease?article=1043 (demonstrating opposition to SSUTA). The Direct Marketing Association's tax counsel stated that he opposes passage of the SSUTA because it would "seriously jeopardize the continued growth of electronic commerce" and "result in an unprecedented expansion of state taxing authority." *Id.*

131. See SSUTA, *supra* note 105, §§ 301-34 (addressing multiple requirements to which states must conform for membership).

132. See Masterson, *supra* note 122, at 220 (describing ease with which online retailers can avoid sales tax and obtain price advantage).

133. See *id.* (acknowledging brick-and-mortar retailers' discontent with current system); see also *Quill Corp. v. North Dakota*, 504 U.S. 298, 328-29 (1992) (White, J., concurring in part and dissenting in part) (noting online retailers' competitive advantage); *What Is the Streamlined Sales and Use Tax Agreement?*, *supra* note 123 (discussing SSUTA's attempt to put brick-and-mortar stores and online retailers on equal terms).

134. Cf. *supra* Part II.C (providing background on case law and Amazon's policies); *supra* Part II.D

determination in the hands of Congress.¹³⁵ To date, Congress has failed to act and has deferred to the physical presence test established by the Supreme Court.¹³⁶ While the physical presence test is doctrinally pragmatic, subsequent technological advances since 1992 make the test far more confusing than might have been originally anticipated.¹³⁷ Twenty years after *Quill Corp.*, the need for clarification and potential major change is long overdue.¹³⁸

While the Court may have accurately decided *Quill Corp.* in 1992, changes since then have made sales-tax legislation necessary in order to reconcile *Quill Corp.* with current problems regarding taxation.¹³⁹ States' attempts in recent years have only magnified the problem, requiring federal legislation that adequately balances the states' interest in collecting long-overdue revenue and

(highlighting changes in states' approaches to taxing out-of-state retailers).

135. See *Quill Corp.*, 504 U.S. at 318 (articulating congressional role in interstate taxation). Justice Stevens wrote that the decision was

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. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

Id. Justice Stevens continued, stating that Congress's inaction during the time between *National Bellas Hess, Inc.* in 1967 and *Quill Corp.* in 1992, demonstrates at least some respect for the Court's *National Bellas Hess, Inc.* holding. See *id.* (noting congressional consideration of legislation). "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.*

136. Cf. Main Street Fairness Act, S. 1452, 112th Cong. § 2 (2011) (demonstrating unsuccessful attempt to make SSUTA federal legislation). While this is an example of a recent attempt to pass federal legislation, Congress continues to face a number of obstacles to enact such legislation. See Plattner et al., *supra* note 120, at 193 (stating greatest obstacle as inability to win majority support of House and Senate). Nevertheless, Congress has consistently refused to enact federal legislation on this topic. See *id.* (stating if Congress does not adopt such legislation, it may never pass).

137. See *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 73, at 171-72 (discussing advantages and disadvantages of physical presence test in 1992). Following the holding in *Quill Corp.*, the physical presence test arguably increased certainty, "firmly establishe[d]" state boundaries, and reduced litigation and controversy regarding state taxation authority, all while adhering to the historical presumption of a free national market. *Quill Corp.*, 504 U.S. at 315; see also *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 73, at 170 (predicting impact of physical presence test). Economically speaking, arguably it prevents "administrative costs on out-of-state businesses" and "distortion of prices;" requires that in-state retailers only adhere to one taxation scheme; and does not require out-of-state retailers to comply with every individual state and local jurisdiction. See *The Supreme Court, 1991 Term—Leading Cases*, *supra* note 73, at 172 (noting economic arguments in favor of physical presence test).

138. See *supra* Part II.D and accompanying text (discussing states' responses to out-of-state retailers' attempts to avoid sales-tax requirement). The issue has been a topic of debate long before e-commerce came into existence. See *supra* Part II.C.1 (discussing sales-tax problems related to mail-order companies). Most recently, however, the budget crisis affecting the vast majority of states has brought the issue back to the forefront of legislators' attention. See Gershel, *supra* note 105, at 338, 356-57 (noting budget crisis as major driver of states' interest in taxing online retailers); see also *supra* notes 104-05 and accompanying text (articulating economy's effect on state revenues).

139. See *supra* Part II.A-B (describing history of e-commerce and Amazon's development since 1992 decision).

the retailers' interest in uniformity and efficiency in the tax collection process.¹⁴⁰

A. Problems with Individual State Legislation

Federal courts have long established that a company does not need to be physically located within a state for it to have minimum contacts sufficient to exercise personal jurisdiction there.¹⁴¹ Although the Commerce Clause requires a company to be physically present in order to be subjected to taxing jurisdiction, the existence of a sales force meets that requirement.¹⁴² In *Amazon.com, LLC v. New York State Department of Taxation & Finance*, the issue centered on the constitutionality of the statute and whether the affiliate nexus standard could withstand Due Process and Commerce clause challenges.¹⁴³ Based on extensive precedent, it is not surprising that the New York statute was upheld by New York's highest court of appeals.¹⁴⁴

Although other states have already passed legislation similar to New York's, Amazon has avoided taxation in most of these other states as a result of withdrawing their affiliate programs.¹⁴⁵ Because New York's law has been deemed constitutional, states that have yet to pass legislation may be more incentivized to do so, ultimately leaving Amazon two options: withdraw affiliates in all, or nearly all states, or maintain affiliate programs and submit to

140. See *supra* Part II.D (detailing New York's Amazon Law and other states' responses); *supra* Part II.E (providing overview of SSUTA).

141. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Shaffer v. Heitner ex rel. Heitner*, 433 U.S. 186 (1977); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

142. Compare *Scripto, Inc. v. Carson*, 362 U.S. 207, 209, 213 (1960) (finding ten "specialty brokers" in Florida sufficient for taxing jurisdiction), with *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 754, 759-60 (1967) (holding lack of sales force in state insufficient to give state taxing authority), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). "Whether or not a State may compel a vendor to collect a sales . . . tax may turn on the presence in the taxing State of a small sales force, plant, or office." *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992); see also *supra* Part II.C.1 and accompanying text (discussing case law regarding states' sales-tax authority).

143. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 136-37 (App. Div. 2010) (addressing Commerce Clause and Due Process Clause challenges), *aff'd sub nom. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013); see also *supra* Part II.D (discussing New York's Amazon Law).

144. See *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013) (finding New York statute constitutional on its face); see also *Quill Corp.*, 504 U.S. at 312 (distinguishing between Due Process Clause and Commerce Clause nexus requirements); Klima, *supra* note 82, at 4-5 (providing overview of Commerce Clause analysis). Compare *Scripto, Inc.*, 362 U.S. at 211 (discussing *Scripto's* connections in taxing state), with *Amazon.com, LLC*, 913 N.Y.S.2d at 135 (noting submission of evidence that affiliates solicited New York business). But see Zaprzalka, *supra* note 107, at 547-50 (arguing insufficient contacts to pass Commerce Clause challenge). The present-day affiliates are akin to the salesmen discussed in *Scripto* and therefore should be treated the same. Compare *Scripto, Inc.*, 362 U.S. at 211, with *Amazon.com, LLC*, 913 N.Y.S.2d at 132. But see Cowan, *supra* note 54, at 1438-40.

145. Compare Henchman, *supra* note 105, at 1 (noting effects of Amazon Laws on certain states), with Poggi, *supra* note 105 (noting Amazon's ending of affiliate relationships in response to passage of legislation).

state sales-tax laws.¹⁴⁶ Neither option is entirely appealing to Amazon.¹⁴⁷ To collect the sales taxes that are due, states can pursue an individual directly or pursue the retailer; for obvious reasons it is much more efficient to place the burden of collection on the retailer.¹⁴⁸

Because the 1992 physical presence test continues to control in today's Internet world, it appears that the best way to collect sales tax from all out-of-state retailers is by passing a state Amazon Law.¹⁴⁹ If the remaining states that have not yet passed such a law carefully draft and model their laws after New York's, they will likely prevail over any constitutional challenges.¹⁵⁰ Given the lack of federal involvement, and the fact that Congress appears disinterested in passing federal legislation, states have become desperate.¹⁵¹ Consequently, this seems to be one of the only options left.¹⁵² While this appears to be a viable, though inefficient, resolution, it serves only as a partial solution to the problem.¹⁵³ Not all online retailers operate an affiliate program, and for those that do, it is unclear how sustainable they would be without them—the possibility remains that an online retail giant such as Amazon could withdraw affiliates in at least some states.¹⁵⁴ With regards to Amazon specifically, it has removed affiliates from a number of states throughout the past year and has yet to demonstrate any substantial adverse impact.¹⁵⁵

Individual states' Amazon Laws would further complicate the issue.¹⁵⁶ If every state passes its own legislation, this will create more uncertainty and will

146. See *supra* note 119 and accompanying text (discussing Amazon's reactions to other states' proposed legislation). See generally *Amazon.com, LLC*, 913 N.Y.S.2d 129 (demonstrating one example of Amazon's unsuccessful challenge to state legislation).

147. See *Amazon Associates*, *supra* note 45 (demonstrating widespread use of affiliates for advertising Amazon); see also Henchman, *supra* note 105 (finding little evidence to support proponents' claims regarding affiliate taxes).

148. See Susko & Cucu, *supra* note 110, at 16-17 (discussing treatment of Amazon Law legislation in various states).

149. See Barris, *supra* note 73, at 66 (providing overview of nexus and physical presence tests).

150. See *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 135-36 (App. Div. 2010) (explaining lower court's decision regarding statute's constitutionality), *aff'd sub nom. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013). Provided other states follow New York's lead, they will likely have similar success in court should any online retailer file a claim against them. Compare Susko & Cucu, *supra* note 110, at 16-17 (opining statutes fashioned after New York's constitutional), with Cowan, *supra* note 54, at 1438-40 (arguing New York's Amazon Law unconstitutional).

151. See Main Street Fairness Act, S. 1452, 112th Cong. (2011); see also *supra* Part II.D (describing proposed state legislation).

152. See Henchman, *supra* note 105, at 4 (commenting on minimal options for states to collect sales taxes on out-of-state purchases).

153. See *id.* at 2-4 (describing inadequacies of Amazon Law).

154. See *id.*

155. See Barr, *supra* note 92 (noting potential for dip in Amazon sales due to recent sales-tax requirements).

156. See *supra* Part II.D (providing overview of New York's Amazon Law).

be more burdensome on out-of-state retailers.¹⁵⁷ Similarly, Amazon has responded to proposed legislation in some states by withdrawing affiliates.¹⁵⁸ Instead of increasing tax revenue, these states face the potential that their tax revenues may actually decline due to the drop in income-tax collection.¹⁵⁹ While larger states may not feel this effect as strongly, if at all, because companies like Amazon decide not to drop affiliates (such as in New York), these states will likely be faced with lengthy legal battles that soak up extensive state resources.¹⁶⁰ Therefore, while facts and statistics provide little certainty of the immediate effects on each individual state, it is clear that these laws will not produce drastic increases in revenue in the short-term.¹⁶¹ Because these laws come on the heels of the economic downturn, states want the money and they want it fast.¹⁶² Although the increases in tax revenue on purchases made from out-of-state retailers may increase significantly over time, this must be weighed against the declines in revenue from other sources as a consequence of these laws.¹⁶³

As states continue to propose legislation similar to New York's, Amazon continues to fight back, whether by withdrawing affiliates, challenging the legislation in court, or making a deal to postpone legislation.¹⁶⁴ This demonstrates that Amazon is not going to give up without a fight; although legislation similar to New York's may be constitutional, it is not a sustainable and efficient resolution to the online sales-tax problem.¹⁶⁵

B. Problems with the SSUTA

While the SSUTA, on its surface, presents a valid alternative to Amazon Laws, there are many hurdles that have proven difficult, if not impossible, to

157. See Cowan, *supra* note 54, at 1434-35 (discussing New York's Amazon Law); Zaprzalka, *supra* note 107, at 545-46 (demonstrating New York court's rationale).

158. See Henchman, *supra* note 105, at 2 (showing online companies have responded by withdrawing affiliates).

159. See *id.* (noting Rhode Island's decline in tax revenue following imposition of Amazon Law).

160. See Henchman, *supra* note 106 (discussing litigation over New York law extended more than three years).

161. See Henchman, *supra* note 105, at 2. *But see* Mazerov, *supra* note 104 (stating tax-law change raised over \$100 million over two years).

162. See SSUTA, *supra* note 105 (stating agreement's fundamental purpose); *2010 State Tax Collection by Source*, *supra* note 102 (providing state-specific data regarding tax collection); see also *supra* Part II.D (discussing states' approaches to dealing with online retailers).

163. See Henchman, *supra* note 105, at 3 (noting tax consequences of Amazon Laws). *But see* Mazerov, *supra* note 104 (discussing positive tax consequences).

164. See Streitfeld, *supra* note 101 (reporting Amazon's battle with California); Mazerov, *supra* note 104 (noting importance of New York statute for revenue collection); Poggi, *supra* note 105 (addressing all state responses following New York statute); see also *supra* Part II.D (acknowledging Amazon's options to respond to Amazon Laws).

165. See Plattner et al., *supra* note 120 (arguing unlikelihood of success with individual state statutes); *supra* note 119 and accompanying text (discussing variety of states' approaches to tax problem).

overcome.¹⁶⁶ The biggest hurdle with the SSUTA is the fact that participation in the project is voluntary for both states and sellers alike.¹⁶⁷ This presents a hurdle as many states and sellers do not find the SSUTA's benefits persuasive enough to join.¹⁶⁸ The SSUTA ultimately goes too far, as it creates too many changes from current sales-tax law and places too many requirements on vendors to appeal to all states.¹⁶⁹ The absence of the most populous states' membership to the SSUTA reflects that it is not economical or efficient for these more populous states to join the SSUTA, even when membership means ultimately collecting taxes from participating retailers.¹⁷⁰ Likewise, the SSUTA does not provide enough incentive for a large retailer, such as Amazon, to voluntarily participate and agree to pay sales tax to states where it would otherwise not be required.¹⁷¹

C. Proposed Solution

Therefore, the only comprehensive answer to the problem is to enact federal legislation that is much narrower in scope than the SSUTA, focusing solely on a state's ability to collect sales tax from remote vendors.¹⁷² Both state legislation and the SSUTA provide viable alternatives, but ones that will ultimately create more uncertainty and more litigation.¹⁷³ The federal legislation that would be best suited to fix the problem would incorporate aspects of both approaches, would be straightforward, and would apply equally to all states and all retailers.¹⁷⁴ To do this, the proposed federal legislation should be similar to that of New York's Amazon Law.¹⁷⁵ It would create an affiliate nexus definition of physical presence, but would not go to extreme

166. See Plattner et al., *supra* note 120 (noting challenges to implementing SSUTA); see also Press Release, *supra* note 130 (opposing passage of federal legislation mirroring SSUTA); *supra* Part I.E and accompanying text (summarizing SSUTA).

167. See SSUTA, *supra* note 105, §§ 401-08 (articulating necessary requirements should state or seller decide to participate).

168. See *How Many States Have Passed Legislation Conforming to Agreement?*, *supra* note 124 (listing participating states). Interestingly, the six most populated states—California, Florida, Illinois, New York, Pennsylvania, and Texas—are not members of the SSUTA. See *id.*

169. See *id.* (demonstrating lack of unanimous participation).

170. See *supra* note 168 (noting specific states' lack of participation). Compare SSUTA, *supra* note 105, §§ 301-34 (defining extensive requirements for state membership), with *id.* § 402 (providing amnesty for member states and remittance procedures).

171. See SSUTA, *supra* note 105, §§ 401-04 (outlining advantages of seller participation); see also *supra* notes 128-30 and accompanying text (discussing SSUTA and incentives for seller participation).

172. See Plattner et al., *supra* note 120 (discussing possibility of more focused federal legislation).

173. See *supra* Part II.D (noting controversies between states and Amazon).

174. See Plattner et al., *supra* note 120 (proposing multipronged approach to state sales-tax jurisdiction).

175. See *id.* (suggesting hybrid approach). See generally N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2011); *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129 (App. Div. 2010), *aff'd sub nom. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, No. 33, No. 34, 2013 WL 1234823 (N.Y. Mar. 28, 2013).

lengths to entirely change and attempt to simplify state sales-tax definitions and rates.¹⁷⁶ Because of the advances in technology, it is not as burdensome today as it was pre-*Quill* to collect sales taxes from the thousands of state and local taxing jurisdictions.¹⁷⁷ Federal legislation of this hybrid sort would be in line with precedent, and would not unduly burden interstate commerce or infringe on states' rights.¹⁷⁸ And because Congress has been unwilling to accept federal legislation that mirrors the SSUTA, it is unlikely that will change in the near future, making a straightforward, hybrid approach more appealing and attainable.¹⁷⁹

IV. CONCLUSION

In 1992, the U.S. Supreme Court held in *Quill Corp. v. North Dakota* that physical presence is required in order to impose sales and use taxes on an out-of-state, or remote, seller. Despite twenty years of growing technologies and changing economies, *Quill Corp.* continues to control today. With e-commerce sites constantly growing, states have faced ongoing issues regarding how and when an out-of-state retailer may be required to comply with in-state-sales-tax obligations. Because an out-of-state retailer has no physical presence within a majority of taxing states, and because states have not found an efficient way to go after the individual consumer, states have consistently felt the financial effects of lost sales-tax revenues. Consequently, in recent years states have begun to propose and/or pass legislation that bypasses this intermediate step and deems out-of-state retailers meeting certain specifications as physically present, therefore requiring them to collect sales tax from sales made to customers within that state.

Given the national response in recent years to companies, such as Amazon, being able to avoid sales-tax requirements for the majority of states, it has become even more pressing that some form of federal legislation be enacted. Unfortunately the SSUTA is far too detailed and expansive to ever be passed. Therefore, in order for federal legislation to be enacted, it must be a hybrid approach between the New York Amazon Law passed in 2008 and the SSUTA. It must have minimal requirements, it must not require states to totally revamp

176. See Plattner et al., *supra* note 120. Compare § 1101(b)(8)(vi) (setting out minimal guidelines), with SSUTA, *supra* note 105, § 102 (requiring multiple changes to sales-tax laws before states compliant for membership purposes).

177. See SSUTA, *supra* note 105, § 403 (providing state-subsidized software to calculate taxes for each separate jurisdiction); see also Galle, *supra* note 121, at 1387 (discussing burden on states to collect tax).

178. See Plattner et al., *supra* note 120 (discussing SSUTA's intrusion on states' rights); see also *Amazon.com, LLC*, 913 N.Y.S.2d at 134 (explaining Commerce Clause's role in limiting state interference with interstate commerce). But see Cowan, *supra* note 54 (arguing New York Amazon case blurs application of *Quill Corp.*).

179. See Press Release, *supra* note 130. The Direct Marketing Association's tax counsel argued that the SSUTA did "little in the way of tax simplification." *Id.*; see also Plattner et al., *supra* note 120; *supra* Part II.E.

their current tax laws, and it must have national effect.

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