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FAIR FOR WHOM? AMAZON KINDLES THE FIGHT OVER INTERNET SALES TAX

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I. INTRODUCTION

A law student peruses the shelves of the campus bookstore, book list in hand. As he locates each book, a pit grows in his stomach when he sees the prices of the books. Frustrated, he goes home empty-handed. He flips on the computer, fires up the Internet, and within thirty minutes, he has bought all of his books and scheduled their shipment—all while saving \$200.¹

Over the last two decades, the Internet has exploded as a means for users to do practically anything imaginable, from interfacing with old friends through social media to purchasing products online.² The latter use has changed the interplay between the traditional retail store and the consumer.³ Whereas the

* JD, The John Marshall Law School, January 2013; BA in History, University of Michigan Ann Arbor. I would like to thank *The John Marshall Law Review* Editorial Board and my personal editor, Nicole Detweiler, for their assistance with this Comment. *Ad astra per aspera*.

1. While this story is fictional, it represents a money saving strategy used not only by students, but also consumers in general. This Comment provides numerous examples of consumers hopping online to enjoy the many benefits including a greater selection, lower prices, and, as this Comment discusses in detail, the ability to avoid a state sales tax charge.

2. See THE INTERNET AND AMERICAN BUSINESS 4 (William Aspray & Paul E. Ceruzzi eds., 2008) (noting the commercial history of the Internet began in 1992, when the U.S. Congress first permitted the Internet to be used by people besides academic, government or military users). See also DEBORA L. SPAR, RULING THE WAVES: CYCLES OF DISCOVERY, CHAOS AND WEALTH FROM THE COMPASS TO THE INTERNET 260 (2001) (finding by 1995, the Internet had already grown to comprise between forty and fifty million users over 160 countries). Today, Facebook alone claims one billion users. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last visited Nov. 12, 2012).

3. See DON TAPSCOTT, GROWING UP DIGITAL: THE RISE OF THE NET GENERATION 190-92 (1998) (tracing the rise of cyber commerce). See also James W. Cortada, *New Wine in Old and New Bottles: Patterns and Effects of the Internet on Companies*, in THE INTERNET AND AMERICAN BUSINESS, 391, 393-399 (William Aspray & Paul E. Ceruzzi eds., 2008) (looking at the stages of adoption of the Internet and the effect the Internet has had on American business). While some companies were initially hesitant to move their business online, whole industries have been created because of the internet and its accessibility. *Id.* Because of the internet, a company such as Amazon can become a giant retailer without having a physical store for customers to shop in. *Id.*

consumer previously depended on a local or easily accessible store to purchase products from, now online retailers, most notably Amazon, have changed the game.⁴ Through business maneuvering, Amazon and other online retailers are able to sell to a greater number of consumers without having to charge the sales tax that normal retailers are obligated to charge.⁵

In the current economic environment,⁶ the federal and state governments are looking to raise revenue in any way possible.⁷ Two pieces of pending legislation in Congress will attempt to close the sales tax loophole, namely the Main Street Fairness Act, introduced by Illinois Senator Dick Durbin, and the Marketplace Equity Act, sponsored by two representatives.⁸ While Congress is

4. See NATIONAL RESEARCH COUNCIL, GLOBAL NETWORKS AND LOCAL VALUES: A COMPARATIVE LOOK AT GERMANY AND THE UNITED STATES 188-89 (2001) (explaining that “mail-order retailing” is now equally prevalent in rural areas and large cities). Initially, mail-order retailing was more prevalent in rural areas because consumers could not get to stores as easy as those who lived in large cities. *Id.* With the increasing availability of the internet and computers, even those in large cities find it more convenient to do their shopping from home, even when there is a store in close proximity. *Id.* Amazon was founded by Jeff Bezos, the current CEO, and incorporated in Washington in 1994. *FAQs*, AMAZON.COM, <http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-faq> (last visited Nov. 12, 2012). It opened its “doors” to the online community in July, 1995. *Id.* It has since reincorporated in Delaware, with its principal place of business in Seattle. *Id.* Amazon completed its initial public offering in 1997 and currently trades on NASDAQ under the symbol AMZN. *Id.* Its vision statement is “to be earth’s most customer centric company; to build a place where people can come to find and discover anything they might want to buy online.” *Id.* See also, Randall Stross, *Sorry, Shoppers, but Why Can’t Amazon Collect More Tax*, N.Y. TIMES (Dec. 27, 2009), <http://www.nytimes.com/2009/12/27/business/27digi.html?scp=1&sq=randall%20stross%20december%2027,%202009&st=cse> (noting that Bezos considered placing the company on an Indian Reservation in California). Bezos wanted to “have access to talent without all the tax consequences.” *Id.*

5. The intricacies will be fully presented in subsequent sections, however the ability to avoid sales tax stems from the Supreme Court decision of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This decision will receive substantial attention throughout. While there are many companies that can be considered online retailers, the focus of this study will be on Amazon, and its role in the internet sales tax issue.

6. See *State Revenue Systems: Options for the Current Fiscal Crisis*, AMERICAN FEDERATION OF TEACHERS 30-42 (2009), <http://www.aft.org/pdfs/pubemps/revenuesurvey1109.pdf>.

7. California, one of many states seeking to raise revenue, currently faces a budget deficit of nearly \$10 billion. Andrew Dalton, *California Budget Deficit Slips Below \$10 Billion*, SFIST (May 18, 2011), http://sfist.com/2011/05/18/california_budget_deficit_slips_bel.php.

8. Main Street Fairness Act, S. 1452, 112th Cong. (2011); Marketplace Equity Act, H.R. 3179, 112th Cong. (2011). See also Paul Demery, *Federal Sales Tax Bill Introduced*, INTERNET RETAILER (July 29, 2011), <http://www.internetretailer.com/2011/07/29/federal-sales-tax-bill-introduced> (discussing the thrust of the bill in addition to several responses from those companies that would be affected).

trying to protect the important interests of retail stores, which are trying to remain competitive with online retailers, Amazon and other online retailers should not be saddled with an undue burden in an effort to balance competition. Instead, a compromise position should be advanced that will provide the most benefits to all parties.

This Comment explores issues with the regulation of internet sales tax. Part II provides background information in three sections. The first section analyzes the genesis of the controversy, with a focus on the Supreme Court decision in *Quill Corp. v. North Dakota*.⁹ The second section discusses the growth of online retailers, including the strategies they pursued, and the states and traditional retailers' responses. The third section introduces the pending federal legislation on the topic. Part III analyzes the contentious battle between states and Amazon. It also analyzes proposed legislation, advances the arguments for and against this legislation, and discusses their likelihood of success. Part IV proposes an alternative legislative solution to the current proposed legislation that finds a middle ground and is best for all parties involved.

II. BACKGROUND

A. *Coming Online: The Supreme Court Speaks*

Even before *Quill* was decided in 1967, the Supreme Court addressed the issue of whether a mail-order firm was required to collect tax within states it sold, in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*.¹⁰ In *Bellas Hess*, the Court struck down an Illinois statute requiring an out of state mail-order house to collect and pay a tax on goods that it sold within the state.¹¹

Specifically, the Main Street Fairness Act would close the loophole in this fashion: "States that voluntarily and adequately simplify their tax systems should be authorized to correct the present inequities in taxation through requiring sellers to collect taxes on sales of good or services delivered in-state, without regard to the location of the seller." S. 1452, § 3(4).

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

10. *Nat'l Bellas Hess v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967). This case was one in a series of cases. See Sam Zaprzalka, Comment, *New York's Amazon Tax Not Out of the Forest Yet: The Battle Over Affiliate Nexus*, 33 SEATTLE U. L. REV. 527, 533 (2010) (listing the cases that touch on the issue in chronological order). See generally *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Bellas Hess*, 386 U.S. 753 (1967); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977); *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232 (1987). These decisions all led up to the *Quill* decision in 1992. Zaprzalka, *supra*.

11. *Bellas Hess*, 386 U.S. at 760. In his separate opinion in *Quill*, Justice White notes that several commentators have "rightly criticized *Bellas Hess*."

The Court had the chance to revisit the issue again in 1992, and subsequently handed down the *Quill* decision.¹² The case involved an attempt by North Dakota to tax Quill, a Delaware corporation that sold office equipment and supplies and delivered merchandise to its customers in North Dakota through postal service or common carrier.¹³ The Court held that Quill did not have a substantial nexus in the state to justify the state's demand that it collect the state tax, and reversed the decision of the North Dakota Supreme Court.¹⁴ The Court held that there should be a "bright-line rule" on the subject that allows business and individuals to act with certainty, fostering investment and economic activity.¹⁵

At the end of the opinion, Justice Stevens wrote:

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. False [and] is now free to decide whether, when and to what extent the States may burden interstate [commerce] concerns with a duty to collect use taxes.¹⁶

Because Congress has not successfully legislated on the issue since, *Quill* remains the standard for mail-order retailers, the retailers of primary concern in 1992, when the case was decided. *Quill* continues to be important as a new generation of online retailers seek the same exemption.¹⁷

Quill, 504 U.S. at 323 (White, J. concurring in part and dissenting in part). See Paul J. Hartman, *Collection of Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1006-15 (1986) (discussing the need to review *Bellas Hess*); Jerome R. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961, 984-85 (1986) (tracing the history of important court decisions on the issue); Sandra B. McCray, *Overturing Bellas Hess: Due Process Considerations*, 1985 BYU L. REV. 265, 288-90 (providing critical commentaries as enumerated by Justice White). Justice White takes the position that the majority did not go far enough, and that *Bellas Hess* should have been completely overruled. *Quill*, 504 U.S. at 323 (White, J. concurring in part and dissenting in part).

12. *Quill*, 504 U.S. at 303.

13. *Id.*

14. *Id.* at 318.

15. *Id.* at 316. Justice White criticized this approach by the majority in his opinion partly concurring and partly dissenting. *Id.* at 331 (White, J., concurring in part and dissenting in part). He opined "the Court's seeming but inadequate justification of encouraging settled expectations in fact connotes a substantive economic decision to favor out-of-state direct marketers to the detriment of other retailers." *Id.*

16. *Id.* at 318.

17. See *Sales Tax Basis (Sales Tax 101): Commerce Clause, Due Process & Quill Corp.*, SALES TAX SUPPORT.COM, <http://www.salestaxsupport.com/sales-tax-information/sales-tax-101/sales-tax-what-why.php> (last visited Nov. 12, 2012) (discussing how *Quill* is still the landmark case regarding nexus).

Since *Quill*, states are forced to rely on consumers to collect the tax. A use tax requires the consumers to track purchases and then pay the tax themselves.¹⁸ As compared to having retailers directly collect a sales tax, the use tax system is more challenging because its “administrative costs are relatively high and rate of collections quite low.”¹⁹ Many shoppers are not even aware that they are required to pay sales tax on their online purchases, with the process for collecting use tax described as “an honor system—one that’s rarely honored.”²⁰ The stakes for states to successfully collect the taxes are enormous, though, as projections of uncollected taxes from online commerce in 2011 range from \$4.5 billion to \$54.8 billion.²¹

B. Growth of Online Retailers

When the Supreme Court issued *Quill*, the Internet was not yet used on a large scale.²² However, in today’s age, an increasing amount of business is done through e-commerce, with many companies selling only online and having no retail presence at all.²³ Online businesses have grasped onto the *Quill* holding to enjoy substantial advantages, namely structuring their operations to avoid collecting any use or sales tax.²⁴

18. Use tax is defined as “a tax imposed on the use of certain goods that are bought outside the taxing authority’s jurisdiction.” BLACK’S LAW DICTIONARY 1597 (9th ed. 2009).

19. *Economic Issues in Taxing Internet and Mail-Order Sales*, CONGRESSIONAL BUDGET OFFICE vii (Oct. 2003), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/46xx/doc4638/10-20-internettax.pdf>.

20. Uri Friedman, *Why Amazon May Soon Collect Sales Tax*, THE ATLANTIC WIRE (Feb. 28, 2011), <http://www.theatlanticwire.com/business/2011/02/why-amazon-may-soon-collect-sales-tax/20931/>. See Hannah Ness, *Illinois Prods for Rarely Collected Sales Tax*, STLTODAY.COM (Jan. 27, 2011), http://www.stltoday.com/news/local/govt-and-politics/article_9050d1f0-bdc5-524c-ba5d-a308097e9168.html (describing the efforts of Illinois to make consumers aware of the tax they are expected to pay). On the most recent state income tax return form, there is a red box on the form that alerts taxpayers they must declare their online or mail-order purchases and pay a 6.25 percent tax on them. *Id.* A state representative admits, though, that only those who make large online purchases, such as a boat, are likely to pay sales tax. *Id.*

21. *Economic Issues in Taxing Internet and Mail-Order Sales*, *supra* note 19, at vii.

22. TAPSCOTT, *supra* note 3, at 190-92.

23. The U.S. Census Bureau e-commerce sales data, reported a fifteen percent increase in “nonstore retailers sales.” *Advance Monthly Sales for Retailers and Food Services*, U.S. CENSUS BUREAU (Oct. 15, 2012), http://www.census.gov/retail/marts/www/marts_current.pdf.

24. See Sam Gustin, *Amazon Spars with States Over Taxes*, WIRED (Mar. 17, 2011), <http://www.wired.com/epicenter/2011/03/amazon-vs-states/all/1> (discussing how Amazon will use affiliates within a state to promote their

1. Strategies Pursued by Online Retailers

For an online retailer, avoiding collecting any use or sales tax becomes simple: per *Quill*, as long as the company has no substantial nexus in a state, it does not have to collect any taxes.²⁵ One method to avoid creating a substantial nexus is to establish distribution centers outside the state that ship the merchandise into the delivery state.²⁶ When Amazon was first established, it shipped all of its products from Seattle, Washington.²⁷ This system became quite laborious and expensive, so Amazon shifted to regional distribution centers.²⁸ Regional distribution centers, utilized by many large retailers, help save money, ensure quicker delivery of the product, and allow companies to avoid creating a substantial nexus to delivery states.²⁹

Another response Amazon utilizes when a state threatens to impose a tax is to end its relationship with its affiliates, completely pulling itself from a state in an effort to avoid paying sales taxes.³⁰ Amazon also fights the state taxation initiatives on

product, thus attempting to avoid a physical presence within the state).

25. *Quill*, 504 U.S. at 318.

26. Amazon's first East Coast distribution center was built in Delaware. Friedman, *supra* note 20. Thus, Amazon was able to have a physical presence and substantial nexus in a state where it would not have to worry about collecting sales tax. *Id.* Delaware is one of five states that do not charge a sales tax. See *Retiree Tax Map*, KIPLINGER (Sept. 2012), http://www.kiplinger.com/tools/retiree_map/?map=2 (showing the five states that do not charge sales tax in the United States: Alaska, Delaware, Montana, New Hampshire, and Oregon).

27. JACK L. GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 57 (2006).

28. *Id.*

29. Today, Amazon has distribution centers in ten states (Arizona, Delaware, Indiana, Kansas, Kentucky, Nevada, Pennsylvania, Texas, Virginia, and Washington), and collects sales tax in five states (Kansas, Kentucky, New York, North Dakota, and Washington). Mark Nowlin, *Amazon's U.S. Distribution Network*, SEATTLE TIMES (Jan. 23, 2011), <http://seattletimes.nwsourc.com/ABPub/zoom/html/2014020430.html>. The company is building distribution centers in Tennessee and South Carolina. *Id.*

30. Eric Engleman, *Amazon Cuts Off Affiliates in Colorado Over New Sales Tax Law*, PUGET SOUND BUS. J. (Mar. 8, 2010), http://www.bizjournals.com/seattle/blog/techflash/2010/03/amazon_cuts_off_affiliates_in_colorado_over_new_sales_tax_law.html (reporting on Amazon's response to Colorado's sales tax collection law). Affiliates are "businesses that link to Amazon products," helping Amazon to sell more products within a certain state, and in return "receive [a percentage of the] resulting sales." *Id.* While affiliates are important to Amazon's business within a state, Amazon will swiftly cut the connection in order to avoid a physical presence or substantial nexus within a state, and thus, the requirement to collect any sales tax. *Id.* See also Marianne Goodland, *Lawsuit Filed Over Recent Internet Sales Tax Bill*, THE COLORADO STATESMAN (July 9, 2010), <http://www.coloradostatesman.com/content/991959-lawsuit-filed-over-recent-internet-sales-tax-bill> (detailing the filing of a lawsuit in

the front lines by circulating petitions at the local level to put the sales tax issue on the state ballot.³¹

One successful strategy undertaken by Amazon has been to enter into direct negotiations with states.³² Amazon negotiated with both Texas and South Carolina in order to find a middle ground solution amenable to both parties.³³ The deals involve a pledge from Amazon to bring jobs to the state in exchange for the state delaying enforcement of tax collection or a guarantee from the state that it will repeal its unfavorable law.³⁴

Colorado over the new sales tax reporting legislation). Direct Marketing Association, an association of businesses that markets products to consumers via mail and electronic means, was granted a preliminary injunction, to prevent enforcement of the new Colorado legislation, by the District Court of Colorado on January 26, 2011. *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 2011 WL 250556, at *1 (D. Colo. Jan. 26, 2011).

31. Josh Goodman, *Amazon Fighting California Tax Law at the Ballot Box*, KNOXVILLE NEWS SENTINEL (Aug. 16, 2011), <http://www.knoxnews.com/news/2011/aug/16/amazon-fighting-california-tax-law-ballot-box/> (detailing Amazon's reaction to the new California law trying to force the company to collect state sales taxes). Amazon hired petition workers to stand outside stores and collect signatures in order to challenge the law in a referendum. *Id.* See also David Streitfeld, *Amazon and California in Deal on Tax*, N.Y. TIMES (Sept. 9, 2011), <http://www.nytimes.com/2011/09/09/technology/amazon-and-california-strike-a-deal-on-sales-tax.html?hp> (reporting that Amazon and California reached a compromise in the state's fight to force Amazon to collect sales tax). Until this point, Amazon spent \$5 million in collecting signatures to put the measure on the ballot. *Id.*

32. See Dale Kasler & Torey Van Oot, *Amazon Offers Jobs to Avert Ballot Showdown Over Tax*, SACRAMENTO BEE (Sept. 4, 2011), <http://www.sacbee.com/2011/09/01/3876555/amazon-offers-jobs-to-avert-ballot.html> (discussing Amazon's negotiation strategies with various states to delay sales tax legislative efforts). One of the downsides to this process would seem to be that it pits the states in a competition against each other, with potential effects on interstate commerce, the traditional realm of the federal government. *Id.* But see R. David L. Campbell, *Guest Post: Why Amazon Is Doing the Right Thing for Online Sales Tax*, FORBES (Aug. 29, 2011), <http://www.forbes.com/sites/kellyphillipsrb/2011/08/29/guest-post-why-amazon-is-doing-the-right-thing-for-online-sales-tax/> (discussing the need for federal legislative action regarding sales tax collection by online retailers).

33. Dawn Kawamoto, *Amazon Offers Texas a Big Deal to Delay Internet Sales Tax Law*, DAILY FINANCE (June 23, 2011), <http://www.dailyfinance.com/2011/06/23/amazon-offers-texas-a-big-deal-to-delay-internet-sales-tax-law/> (reporting that Amazon offered a \$300 million investment in Texas and the promise of 5000 jobs in the state, in exchange for Texas postponing legislation that would force Amazon to collect sales tax on purchases made within Texas). See also Diane Kennedy, *South Carolina Reaches Agreement for Amazon Distribution Center*, NEXUS NEGOTIATOR (June 8, 2011), <http://www.nexusnegotiator.com/blog/south-carolina-reaches-agreement-for-amazon-distribution-center/> (discussing the deal between Amazon and South Carolina). South Carolina will grant Amazon a five-year exemption on collecting sales tax, in exchange for a promise from Amazon to build a \$125 million facility and hiring 2000 employees in the state. *Id.*

34. See Kennedy, *supra* note 33 (explaining that the sales tax agreement

2. Response of States and “Brick-and-Mortar” Retailers³⁵

In an effort to plug budget holes and to counteract the initial measures taken by Amazon that have led to the sales tax controversy, states have aggressively introduced tax legislation that seeks to end the sales-tax free ride that Amazon has enjoyed in many states.³⁶ Current legislation in several states places the responsibility to track online purchases and pay sales tax on the consumer as part of their annual tax reporting.³⁷ Needless to say, this system is infrequently used, and next to impossible to enforce.³⁸ Rather than go after the small-pocket consumer, states instead launched an attack on the deep-pocket online retailer, from which it will be easier to recover the bulk of the lost revenue.³⁹

Recently, states have attempted to break down the barrier and passed laws designed to require online retailers to pay the taxes on items sold within the state.⁴⁰ Some laws, such as those

between Amazon and South Carolina would exempt Amazon from collecting sales tax for five years). *See also* Kasler & Van Oot, *supra* note 32 (discussing Amazon’s strategy to offer jobs in a state in exchange for leniency on a sales tax collection measure). In today’s economic climate, states are eager to attract new jobs to the state, giving Amazon an important bargaining chip. *Id.*

35. *See* Shari Waters, *Brick and Mortar*, ABOUT.COM, <http://retail.about.com/od/glossary/g/brickandmortar.htm> (last visited Oct. 12, 2012) (defining brick-and-mortar stores as “retail shops that are located in a building as opposed to an online shopping destination, door-to-door sales, kiosk or other similar site not housed within a structure”).

36. *See* Richard Rubin & Juliann Francis, *States Pursue Sales Tax Revenue Vanishing into Computing Cloud*, BLOOMBERG (Aug. 21, 2011), <http://www.bloomberg.com/news/2011-08-22/states-pursue-sales-tax-revenue-vanishing-into-computing-cloud.html> (discussing how states are dealing with the digital revolution and explaining that technology advances at a much quicker pace than legislation). Thus, states are trying to revise their tax codes to maximize the revenue they are collecting. *Id.* Washington reformed its sales tax laws in 2009, and shifted to an approach where it looks at “what is being purchased and not” where it is being purchased. *Id.*

37. *See, e.g.,* Ness, *supra* note 20 (detailing Illinois’ shift to a more aggressive method of reminding Illinois residents to pay the sales tax on any “tax free” online purchases they have made in their annual state tax filings).

38. *Id.*

39. *Id.*

40. Some of the states that have enacted legislation, or are in the process of enacting legislation include: California (CAL. REV. & TAX. CODE § 6203 (West 2011)); Colorado (COLO. REV. STAT. § 39-26-102 (2010)); Illinois (35 ILL. COMP. STAT. 105/2 (2011)); New York (N.Y. TAX LAW § 1101(b)(8)(vi)(McKinney 2010)); North Carolina (N.C. GEN. STAT. § 105-164.3 (2009)); Rhode Island (R.I. GEN. LAWS § 44-18-15 (2010)); and Texas (H.B. 2403, 82(R) Legis. Sess. (Tex. 2011)). *See also* Stu Woo, *Amazon Battles States over Sales Tax*, WALL ST. J. (Aug. 3, 2011), <http://online.wsj.com/article/SB10001424053111904772304576468753564916130.html> (follow “Interactive Graphics”) (charting the various states that have enacted laws attempting to force Amazon to collect sales tax). The graphic also lists the states that Amazon considers bad, neutral, and safe, as well as the

passed in New York and Colorado, tax internet retailers who use affiliates within the state, or as in the case of Texas, when Amazon operates a distribution center in the state.⁴¹ Others, such as Illinois and California, will levy the tax on those companies whose gross sales exceed \$10,000 over the preceding four quarterly periods.⁴²

In an effort to protect their market share, “brick-and-mortar” retailers have joined in the crusade against online retailers and have pumped money into the effort.⁴³ Wal-Mart, notably, has been one company that has devoted considerable resources to the effort, arguing that the current system poses an unfair burden for the company to collect the sales tax in physical stores within a state, while Amazon can avoid the tax by operating solely online.⁴⁴

estimated amount of state and local taxes lost from e-commerce. *Id.* For example, New York, a bad state, is listed as having lost around \$25 billion between the years of 2007 and 2012. *Id.* Amazon’s safe states are Alaska, Delaware, Kansas, Kentucky, Montana, New Hampshire, North Dakota, Oregon, and Washington. *Id.* Five of those states do not charge state sales tax. See Nowlin, *supra* note 29 (identifying the states that do not charge sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon); Karen Bouffard, *Bill Pushes for Online Sales Tax Collections*, THE DETROIT NEWS (Sept. 21, 2011), <http://www.detnews.com/article/20110920/POLITICS02/109200377/1001/Propo-sal-in-Michigan-expected-to-target-tax-for-online-sales> (reporting on the effort of Michigan lawmakers to push through a measure that would force online retailers to collect sales tax in the state).

41. See generally Michael Mazerov, *New York’s ‘Amazon Law’: An Important Tool for Collecting Taxes Owed on Internet Purchases*, CTR. ON BUDGET & POLICY PRIORITIES 1 (July 23, 2009), <http://www.cbpp.org/files/7-23-09sfp.pdf> (detailing the law that was passed by New York, one of the first states to do so). The legislation is the subject of a court battle between the state and Amazon. *Id.* at 1. Amazon is currently forced to collect the sales tax in the state while it pursues its claims in the court system. *Id.* at 4. See also COLO. REV. STAT. § 39-26-102 (2010); and Tex. H.B. 2403 (citing Colorado and Texas state laws requiring online retailers with certain connections to a state to collect taxes from purchasers).

42. See Janet Novack, *Illinois Governor Signs Amazon Internet Sales Tax Law*, FORBES (Mar. 10, 2011), <http://www.forbes.com/sites/janetnovack/2011/03/10/illinois-governor-signs-amazon-internet-sales-tax-law/> (noting that soon after Illinois Governor Pat Quinn signed the law into force, Amazon informed its affiliates that it would no longer do business with them). Quinn delayed signing the bill for two months, finally signing it the day before it would have become law without his signature. *Id.* Quinn was under pressure to veto the bill from Amazon and other online retailers who threatened to flee the state if he signed the bill into law. *Id.*

43. See *id.* (noting “brick-and-mortar” retailers who have joined the fight to require online retailers to collect sales tax on customer purchases).

44. See Steve Flowers, *Fiscal Year Begins Oct. 1, Budgets Looking Bleak*, THE ATMORE ADVANCE (Sept. 28, 2011), <http://www.atmoreadvance.com/2011/09/28/fiscal-year-begins-oct-1-budgets-looking-bleak/> (stating that “[t]raditional retailers such as Wal-Mart, Target, Best Buy, J.C. Penney and Sears . . . have formed an alliance to push for more

3. The Federal Government Enters the Fray

Despite the green light given to the federal government by *Quill* and the assortment of state legislation on the matter, Congress has been unable to insert itself into the matter with any type of finality.⁴⁵ Two attempts to remedy congressional inaction are the Main Street Fairness Act and the Market Place Equity Act.⁴⁶

a. Main Street Fairness Act

The Main Street Fairness Act aims to encourage states to sign on to the Streamlined Sales and Use Tax Agreement to simplify their sales and use tax laws.⁴⁷ After signing on to the agreement, the states then are granted the ability to require online retailers to pay state sales tax.⁴⁸

The Streamlined Sales and Use Tax Agreement, adopted in November 2002, seeks to “simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance.”⁴⁹ “To date, twenty-four states” have passed legislation implementing the agreement, “representing [thirty-three percent] of the country’s population.”⁵⁰

stringent tax laws on internet retailers.”). *But see* Capital Confidential, *Busted: ‘Amazon Tax’ Backer’s Hypocrisy on Sales Tax Collection*, BREITBART (Aug. 31, 2011), <http://www.breitbart.com/Big-Government/2011/08/31/Busted—Amazon-Tax-Backers-Hypocrisy-on-Sales-Tax-Collection> (uncovering that Wal-Mart, a vocal and aggressive proponent for reform, has “itself fail[ed] to collect sales tax” on some of the items that it sold through its website).

45. *See Internet Sales Tax Fairness*, INST. FOR LOCAL SELF-RELIANCE (May 23, 2011), <http://www.ilsr.org/rule/internet-sales-tax-fairness/> (discussing the lack of federal action on the matter). *See also* Christopher J. Schafer, Comment, *Federal Legislation Regarding Taxation of Internet Sales Transactions*, 16 BERKELEY TECH. L.J. 415, 415-19 (2001) (discussing the Internet Tax Freedom Act (“ITFA”). The ITFA, initially passed in October 1998, “imposed a three-year moratorium on all new sales and use taxes.” *Id.* at 415.

46. *See* Campbell, *supra* note 32 (positing that Amazon is doing the right thing in fighting the attempts of the individual states to legislate on the issue). Instead, the federal government should encourage states to coordinate and simplify their sales tax systems. *Id.*

47. S. 1452. Section 6 provides “minimum simplification requirements” that a state must meet in order to qualify to charge the sales taxes. *Id.* at § 6.

48. “Each Member State under the Streamlined Sales and Use Tax Agreement is authorized, subject to the requirements of this section, to require all sellers not qualifying for the small seller exception to collect and remit sales and use taxes with respect to remote sales source to that Member State.” *Id.* at § 4(a)(1).

49. *Streamlined Sales and Use Tax Agreement*, STREAMLINED SALES TAX GOVERNING BOARD, INC. 7 (May 19, 2011), <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2005-19-11.pdf>.

50. *See Frequently Asked Questions*, STREAMLINED SALES TAX GOVERNING

The federal legislation seeks to encourage states to join the agreement by providing the incentive for the state to charge sales tax.⁵¹ While Amazon supports federal legislation, this particular bill is unlikely to find the support it needs to be enacted as legislation in this political climate.⁵²

b. Marketplace Equity Act

The most recent attempt to legislate on the matter comes in the form of the Marketplace Equity Act.⁵³ The purpose of the bill is to “improve the States’ rights to enforce the collection of State sales and use tax laws.”⁵⁴ While the act does not require a state to sign on to the Streamlined Sales and Use Tax Agreement, it still seeks to have states simplify their sales tax systems, with the benefit of being able to force collection of internet sales tax if the states comply.⁵⁵ One specific provision in the act, not explicitly found in the Main Street Fairness Act, is a small-seller exception, which would exempt certain sellers who do not meet sales thresholds from having to collect the sales tax.⁵⁶

c. Importance of Federal Legislation

The impetus is in place for legislation to be enacted regarding the internet sales tax issue. The Supreme Court, in *Quill*, explicitly stated Congress is free to legislate on the issue; however,

BOARD, INC., <http://www.streamlinedsalestax.org/index.php?page=faqs> (last visited Nov. 12, 2012) (explaining that the states who have passed legislation are “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.”). Legislation has been introduced in California, Florida, Hawaii, Illinois, Maine, Massachusetts, Missouri, Texas, and Virginia. *Id.*

51. See S. 1452 (providing a benefit for states that simplify their sales tax system).

52. See Marc Perton, *Amazon’s Bezos: Federal Legislation Required to Address Sales Tax Issues*, CONSUMER REPORTS (May 11, 2011), <http://news.consumerreports.org/money/2011/05/amazons-bezos-federal-legislation-required.html> (reporting on Bezos’ view that the sales tax system needs to be simplified and that it needs to be done by the federal government). Bezos notes that the company already collects sales taxes, or their equivalent, in more than half of the markets where the company does business. *Id.* Bezos notes that everyone is following the same rules domestically, and that the entire system would benefit from simplification. *Id.*

53. H.R. 3179.

54. *Id.*

55. *Id.* at § 2.

56. *Id.* at § 2(b)(1). Remote sellers with gross annual receipts of less than \$1 million nationally, or less than \$100,000 in the state are exempt from collecting sales tax. *Id.* The Main Street Fairness Act only includes language that refers to the small seller exception under the Streamlined Sales and Use Tax Agreement. S. 1452 at § 4(a)(1).

with the decision almost two decades old, there is still no resolution of the issue.⁵⁷ The current work being done by the states only muddies the water and makes for contentious relations with Amazon.⁵⁸ It also forces Amazon to fight a legal battle against a variety of state legislative bills, all while devoting a substantial amount of time and money to the effort.⁵⁹ As long as Amazon has the *Quill* bargaining chip in its back pocket, it can use the enticement of jobs to secure favorable terms to their entrance into, or out of, a state.⁶⁰ The time has come for the federal government to end its period of inaction, insert itself into the situation, find a solution, and reach a compromise.

III. ANALYSIS

This Part first analyzes the difficulties presented by having a wide range of state laws and initiatives, including the burden on both retailers and states. This Part concludes that the federal government must exercise its Commerce Clause powers in order to settle the matter.⁶¹ Once it is established that the federal government must act on the matter, this Part analyzes the current government approaches, the Main Street Fairness Act and the Marketplace Equity Act, and looks at the strengths and weaknesses of each.⁶² Finally, the perspectives of each party are analyzed to come to an understanding of what type of legislation has the best chance to succeed.

57. *Quill*, 504 U.S. at 318.

58. See Kenneth Corbin, *Amazon Reaches Agreement with Indiana on Sales Taxes*, ECOMMERCE BYTES (Jan. 11, 2012), <http://www.auctionbytes.com/cab/abny12/m01/i11/s04> (reporting on Amazon's agreement with Indiana on the sales tax issue as the latest step in its often contentious dealings with the states).

59. See Tiffany Kaiser, *Amazon Pushes for Online Sales Tax Standards, Smaller E-Tailers Push Back*, DAILYTECH (Dec. 2, 2011), <http://www.dailytech.com/Amazon+Pushes+for+Online+Sales+Tax+Standards+Smaller+ETailers+Push+Back/article23421.htm> (mentioning that Amazon has spent a great deal of time on this issue).

60. See *Amazon May Bring Jobs to Florida if Deal Reached*, SOUTH BEND TRIBUNE (Jan. 30, 2012), <http://www.southbendtribune.com/business/sbt-amazon-may-bring-jobs-to-florida-if-deal-reached-20120130,0,7561121.story> (reporting on Amazon's attempted dealings with Florida).

61. The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

62. S. 1452; H.R. 3179.

A. *Battle of the States: States Take on Amazon, and Each Other*

Amazon collects sales tax in only five states,⁶³ but sells its products in all fifty, and its operations are so fine-tuned that it can label certain states “good states” or “bad states” based on the internet sales tax issue.⁶⁴ To avoid sales tax, Amazon has to keep current on the tax policies of forty-five different states. The policies can range from simple, either no sales tax or Amazon collects it⁶⁵; to complex and contentious, such as the battle between Amazon and New York where Amazon sought a court ruling against the state tax.⁶⁶

1. *Eluding Sales Tax Collection Through Strategic Locations*

The issue of sales tax has shaped corporate policy ever since the founding of the company.⁶⁷ Today, the issue not only affects the behavior of corporate management, but also staff who travel around the country and must consult a company map before entering a state where their work may force Amazon to collect taxes in that state.⁶⁸ Sales tax is believed to be “critical to its performance.”⁶⁹ Indeed, a recent estimate by Credit Suisse found that if Amazon were forced to collect sales taxes in all states, it would lose as much as \$653 million in sales.⁷⁰ Given these stakes, it is understandable that Amazon has actively fought the introduction of internet sales tax laws throughout the country.⁷¹

63. See Jeanine Poggi, *Amazon Sales Tax: The Battle, State by State*, THESTREET.COM (Sept. 8, 2011), <http://www.thestreet.com/story/11052898/amazon-sales-tax-the-battle-state-by-state.html> (listing the five states in which Amazon collects sales tax: Kansas, Kentucky, New York, North Dakota, and Washington).

64. See *id.* (charting the states that are working with Amazon, states where Amazon has cut ties with affiliates, states where Amazon collects sales tax, and states at risk of being cut off by Amazon). Amazon is working with Tennessee and Texas. *Id.* Amazon has cut ties with its affiliates in Alabama, California, Colorado, Connecticut, Hawaii, Illinois, North Carolina, and Rhode Island. *Id.* The states that risk being cut off by Amazon are Arkansas, Massachusetts, Minnesota, Missouri, New Mexico, Nevada, South Carolina, South Dakota, and Vermont. *Id.*

65. *Id.*

66. See Zaprzalka, *supra* note 10, at 530 (chronicling the extensive litigation between the state of New York and Amazon over § 1101(b)(8)(vi) of the New York Tax Law). See also Daniel Tyler Cowan, Comment, *New York's Unconstitutional Tax on the Internet: Amazon.com v. New York State Department of Taxation & Finance and the Dormant Commerce Clause*, 88 N.C. L. REV. 1423, 1425 (2010) (analyzing the New York County Civil Supreme Court decision which upheld the constitutionality of the tax).

67. Stross, *supra* note 4.

68. Woo, *supra* note 40.

69. *Id.*

70. *Id.*

71. Amazon's estimated revenue for 2011 is \$45.5 billion. *Id.* Thus, \$653 million is approximately 1.4% of their revenue. *Id.*

2. *The Cost of the Sales Tax Battle*

A lengthy, wide-ranging battle like this one comes with a high cost. Amazon has spent at least \$5.25 million in California *alone* fighting a ballot measure that would force it to collect sales tax in the state.⁷² While Amazon's actual legal costs fighting the issue are not known, the company feels strongly enough about the fight that it is willing to keep pumping money into the cause.⁷³

3. *Reasons for Resisting Sales Tax*

Amazon presents two arguments for their resistance to paying sales tax: (1) it would be administratively burdensome; and (2) the company receives no meaningful benefits from states in which it maintains no facilities.⁷⁴ While some rebut these arguments,⁷⁵ the fact remains that if Amazon did not have to defend itself in so many states, it could divert those resources to programs that could generate substantial revenue, such as research and development of new products.

4. *Interstate Taxation Warfare*

While Amazon wages its own war with states that attempt to force collection of sales tax, these states inherently battle with one another. Amazon has successfully negotiated with states to avoid

72. Aaron Glantz, *Amazon Spends Big to Fight Internet Sales Tax*, BAYCITIZEN.ORG (Aug. 27, 2011), <http://www.baycitizen.org/taxes/story/amazon-spends-millions-fight-internet/comments/#comments>.

73. See Woo, *supra* note 40 (noting that former Amazon staffers relate the company's aggressive approach to minimizing sales tax). This included requirements to consult lawyers before arranging trips to states including California. *Id.* In addition, former employees were questioned about the purpose of trips and warned about acquiring new customers or promoting products in certain states due to tax concerns. *Id.*

74. Michael Mazerov, *Amazon's Arguments Against Collecting Sales Taxes Do Not Withstand Scrutiny*, CTR. ON BUDGET & POLICY PRIORITIES 1 (Nov. 29, 2010), <http://www.cbpp.org/files/11-16-09sfp.pdf>. See Stross, *supra* note 4 (quoting Bezos as saying "in Washington State, where we have a presence, we get police protection, we get fire protection"). Bezos does not understand why "since we get no services from North Carolina, that they should be able to force us to collect taxes for them." *Id.*

75. Mazerov, *supra* note 74. To Amazon's first argument, Mazerov points out that Amazon already collects sales tax in virtually every state for numerous other companies that sell on its own website. *Id.* Mazerov feels that Amazon could track its own sales with "relatively little additional effort." *Id.* at 1-2. He sees their goal as "exploiting its price advantage and not avoiding sales tax compliance efforts and costs." *Id.* at 2. As to the second argument, Mazerov notes that Amazon has facilities in at least seventeen states that levy sales tax, but only collects tax in four of them. *Id.* See also Stross, *supra* note 4 (opining that "Amazon's employees are too scattered, its customer base and its sales too large and the states' fiscal crisis too grave for it to continue to play tax-avoidance games").

sales tax, such as Texas and South Carolina, by creating jobs in these states.⁷⁶ In the current economic climate, replete with massive state budget shortfalls and high unemployment, states are trying to gain an edge wherever possible.⁷⁷ A job created in Texas is a job that is not created in California. Amazon thus holds a trump card, the ability to build distribution centers with the promise of jobs, in exchange for favorable tax treatment. The issue, however, should not be so complicated. Not only is the fight costing Amazon time and resources, but it also exacts an unnecessary cost on states that cannot afford any extra costs.

Further, any state legislation carries the risk of being declared unconstitutional by a court.⁷⁸ One state tactic is to narrow the definition of physical presence in order to counter the maneuvers of Amazon.⁷⁹ By enacting online sales tax legislation, a state is spinning the roulette wheel, unsure of what will result from its efforts. Given this breakdown and the inability of the states to solve the situation, it becomes imperative for the federal government to become involved in the matter.

B. The Bright Lights of the Federal Stage: The Government Attempts to Legislate

Despite the clear words in *Quill* inviting Congress to legislate on the issue⁸⁰, Congress has been unable to enact legislation that does anything more than pass on the issue.⁸¹ Given the fierce nationwide battle being waged, though, the federal government is

76. Kawamoto, *supra* note 33; Kennedy, *supra* note 33.

77. See Phil Oliff, Chris Mai & Vincent Palacios, *States Continue To Feel Recession's Impact*, CTR. ON BUDGET & POLICY PRIORITIES (June 27, 2012), <http://www.cbpp.org/cms/index.cfm?fa=view&id=711> (providing an in-depth analysis of state budget shortfalls and the consequences of these shortfalls, which have been a result of weak tax collections and the recession).

78. See Gregory R. Evans, Comment, *Separate But Taxed: A Rejection of the Streamlined Sales Tax Project Through a Commerce Clause and Federalist Analysis*, 56 AM. U. L. REV. 421, 453 (2006) (critiquing the approach of states to use the Streamlined Sales Tax Project to collect internet sales tax revenue because it runs the risk of being deemed unconstitutional based on the commerce clause).

79. See Friedman, *supra* note 20 (noting how some states have altered their perception of "physical presence"). *E.g.*, New York required internet retailers to collect state taxes if they partnered with an affiliate within the state. *Id.* Amazon's response is to swiftly drop the affiliates in that state. *Id.*

80. See *Quill*, 504 U.S. at 299 (declaring that Congress has the ultimate power to resolve the tax issue).

81. See Walter J. Baudier, Comment, *Internet Sales Taxes from Borders to Amazon: How Long Before All of Your Purchases Are Taxed?*, 2006 DUKE L. & TECH. REV. 5, 16 (2006) (discussing the Internet Tax Freedom Act, enacted in 1998, which imposed a moratorium on collecting taxes on internet-related services and on discriminatory taxation of e-commerce). As of that paper's submission, the ban was scheduled to be in effect until 2007. *Id.*

slowly lurching into action⁸² with the Main Street Fairness Act in the Senate and the Marketplace Equity Act in the House of Representatives.⁸³

1. *Main Street Fairness Act*

Introduced by Senator Dick Durbin, the purpose of the Main Street Fairness Act is “to promote simplification and fairness in the administration and collection of sales and use taxes.”⁸⁴ While this purpose suggests a noble pursuit, the clear desire of the sponsors is to allow states to require online retailers to collect sales tax on internet purchases.⁸⁵ The act seeks to encourage states to “streamline their taxes as part of an effort called the Streamlined Sales Tax Project.”⁸⁶

A critique of this measure is the limitation to states that are part of the Streamlined Sales and Use Tax Agreement.⁸⁷ Several large states, notably California and New York, are not part of the agreement, and thus would gain little from the passage of this bill.⁸⁸ Furthermore, the bill would perish if the agreement were found to be unconstitutional, as some have suggested.⁸⁹

Given its extensive court battles with the states, one might be surprised that Amazon is actually in support of this legislation.⁹⁰

82. The first state internet sales tax bills began to appear in 2008. Nathaniel Popper, *For Amazon, Stakes Are High in Sales Tax Fight*, L.A. TIMES (July 19, 2011), <http://articles.latimes.com/2011/jul/19/business/la-fi-amazon-taxes-20110719>. Legislation before the federal Congress was just introduced in July 2011 and October 2011. Demery, *supra* note 8.

83. S. 1452; H.R. 3179.

84. S. 1452, Preamble.

85. *See id.* at § 3(2). (stating that “[a]s a matter of economic policy and basic fairness, similar sales transactions should be treated equally, without regard to the manner in which sales are transacted, whether in person, through the mail, over the telephone, on the internet, or by other means”).

86. *See* Michelle Quinn, *Online Sales Tax Bill Splits Community*, POLITICO (Oct. 13, 2011), <http://dyn.politico.com/printstory.cfm?uuid=9F83162B-A33B-494C-8311-C040A3036457> (noting that the act would require retailers to collect online taxes if the state streamlines their taxes).

87. *See* Juliana Gruenwald, *House Online Sales Tax Bill Draws Bipartisan Support*, NATIONAL JOURNAL (Oct. 13, 2011), <http://www.nationaljournal.com/tech/house-online-sales-tax-bill-draws-bipartisan-support-20111012> (noting only twenty-four states adhere to the Streamlined Sales Tax Project, so the other states would gain little from the bill).

88. Paul Demery, *A New Take on Web Sales Tax Collection*, INTERNET RETAILER (Oct. 13, 2011), <http://www.internetretailer.com/2011/10/13/new-take-national-web-sales-tax>.

89. *See* Evans, *supra* note 78, at 440 (arguing that the Streamlined Sales Tax Project likely violates the Commerce Clause). Evans also argues that the project is contrary to the federalist structure of the Constitution. *Id.* at 448.

90. *See* Quinn, *supra* note 86 (stating that Amazon has supported the Durbin bill). Quinn also quotes an Amazon spokeswoman as saying “we support enactment of federal legislation and expect several bills to be

Amazon claims that it is not trying to avoid collecting online sales tax, but rather is advocating for a system that is simple for online retailers.⁹¹ In other words, Amazon is willing to support legislation that would require it to pay sales tax, as long as it comes at the federal level.⁹² In the same way that it is bargaining with states to get the best deal, Amazon is again posturing before the federal government to get the best deal.⁹³ Because the matter will likely be resolved one way or another by either the Supreme Court or Congress,⁹⁴ it makes sense for Amazon to get involved in the discussion at an early stage.

2. *Marketplace Equity Act*

The House of Representatives attempted to legislate on the matter a couple of months after its Senate counterpart.⁹⁵ This act seeks to give states some flexibility by providing three rate

introduced.” *Id.*

91. See Perton, *supra* note 52 (noting Amazon’s CEO has called for federal action because of the vast complexity of the issue). See also Woo, *supra* note 40 (writing that Amazon advocates a national sales tax law for online retailers, which it argues would simplify tax collection).

While the bill has the support of Amazon, not all online retailers share Amazon’s sentiment. See Jenna McKinnley, *Critics of Durbin’s New ‘Main Street Fairness Act’ Say It Will Trade High Paying Small Business Jobs for Minimum Wage Retail Positions*, ALLMONEYNEWS.COM (July 31, 2011), <http://www.allmoneynews.com/critics-of-durbins-new-main-street-fairness-act-say-it-will-trade-high-paying-small-business-jobs-for-minimum-wage-retail-positions/851325/> (outlining the shortcomings of the bill as argued by its opponents, mainly small internet businesses); See also Greg Lamm, *A National E-commerce ‘Amazon Tax’ Law Draws Harsh Reaction*, (July 30, 2011), PUGET SOUND BUS. J. <http://www.techflash.com/seattle/2011/07/a-national-ecommerce-amazon-tax.html> (reporting on the criticism of the bill by eBay, NetChoice and the Information Technology Industry Council). Representatives from both eBay and NetChoice argue against the bill based on the harmful effect to small retailers. *Id.* NetChoice Executive Director Steve DelBianco states: “Congress often says that small businesses are the backbone of the economic recovery, but these new collection costs will break the backs of many small online businesses.” *Id.* An eBay representative said that “forcing small businesses to take on the same costs and tax burdens as national retail businesses is unrealistic, unfair and will unbalance the playing field between giant retailers and small business retailers on the Internet.” *Id.*

92. Perton, *supra* note 52.

93. Max Eddy, *Amazon Supports Internet Sales Tax Law*, GEEKOSYSTEM (Aug. 1, 2011), <http://www.geekosystem.com/amazon-internet-tax/> (opining that Amazon realizes a tax deal will eventually be reached).

94. See Woo, *supra* note 40 (quoting University of Connecticut Professor of Law, Richard Pomp, an expert on internet tax issues who stated “[e]ventually, it’ll be the Supreme Court or the Congress that will be the final arbiter of the issue.”).

95. H.R. 3179. The bipartisan bill was sponsored by Reps. Steve Womack (R-Ark.) and Jackie Speier (D-Calif.) and introduced into the House on October 13, 2011. *Id.* It was referred to the Committee on the Judiciary. *Id.*

structures that a state can choose from for its tax policy.⁹⁶ Each member state is then authorized to require online retailers to “collect and remit sales and use taxes with respect to remote sales.”⁹⁷ A state would also have to meet four minimum requirements: “a robust small business exception; a consistent rate throughout the state; a uniform tax base for the state; and centralized filing and remitting.”⁹⁸

The act also provides a clear small-seller exemption.⁹⁹ This reflects a policy to target only the large retailers who are enjoying tax protection.¹⁰⁰ While the Main Street Fairness Act does not provide such an explicit provision, it still allows small sellers the possibility of exemption under the Streamlined Sales and Use Tax Agreement.¹⁰¹ Some critics, though, point out that the exemptions would not spare some online retailers who have low sales but meet the threshold, and would incur the extra burden of collecting sales tax.¹⁰²

The Marketplace Equity Act provides yet more debate on the subject, but the act’s backers argue that the simplicity of the act will appeal to House Republicans, and thus give it a better chance at passing the House.¹⁰³ Durbin himself welcomed the proposal

96. *See id.* at § (4)(A) (including rate structures such as state-wide rates, maximum state rates, and applicable destination rates). The provisions are:

(i) a single State-wide blended rate that includes both the State rate and applicable rates of local jurisdictions, as determined by the State; (ii) the maximum State rate, which is the highest rate at which sellers are required by the State to collect tax, exclusive of tax imposed by or for the specific benefit of local jurisdictions; or (iii) the applicable destination rate, which is the sum of the State rate and any applicable rate for the local jurisdiction into which the sale was made. If a State requires that remote sellers collect at the applicable destination rate, the State must make available adequate software to remote sellers that substantially eases the burden of collecting at multiple rates within the State, and any State providing such software must relieve remote sellers from liability to that State for collection of the incorrect amount of sales or use tax, including any penalties or interest, provided that collection of the improper amount is the result of relying on information provided by that State.

Id. *See also* Quinn, *supra* note 86 (finding that the system is helpful to diverse states because it allows these states to enact tax laws and policies that meet their own needs).

97. H.R. 3179, § 2(a).

98. Dave Grogan, *New Federal Sales Tax Fairness Legislation Introduced*, AMERICAN BOOKSELLERS ASSOCIATION (Oct. 13, 2011), <http://news.bookweb.org/news/new-federal-sales-tax-fairness-legislation-introduced>.

99. H.R. 3179, § 2(b)(1).

100. *See* Lamm, *supra* note 91 (providing the views on the potential effect to small retailers).

101. S. 1452, § 4(a)(1).

102. Lamm, *supra* note 91.

103. *See* Demery, *supra* note 88 (quoting Daniel Schibley, a state tax

into the discussion.¹⁰⁴ Some praise the bill as appealing to a wider range of states than Durbin's Act, which is limited to those that are part of the agreement.¹⁰⁵ Still, there is the feeling that the measure is unlikely to pass given the rigid anti-tax stance of the Tea Party Republicans in the House.¹⁰⁶

C. Views of the Parties

While all parties agree that something needs to be done, there is still disagreement on the best way to resolve the situation.¹⁰⁷

1. The Federal Government

For the first time in years, the federal government is taking the initiative to find an answer.¹⁰⁸ Amazon has also voiced its support for a simple federal solution to the problem.¹⁰⁹ Thus, even though Amazon has been successful in bargaining with states, one federal solution will provide much more clarity than a state-by-state approach with which Amazon is currently working. The trick, though, is to find a solution that will make the states happy.¹¹⁰

2. The States and Amazon

Each state has its own unique approach to tax policy, and some states are pursuing the lost revenue more aggressively than others.¹¹¹ Due, in part, to Amazon's growth in size as a company and need to establish a physical presence in more states,¹¹² Amazon has recently announced that it will start charging sales tax in more locales.¹¹³ Amazon has grown into a large online

analyst with CCH, a unit of Wolters Kluwer that publishes tax and business information). Schibley argues that the bill is positioned as "a matter of states' rights and free markets." *Id.*

104. Quinn, *supra* note 86.

105. Gruenwald, *supra* note 87.

106. Demery, *supra* note 88.

107. S. 1452; H.R. 3179 (demonstrating the disagreement on how to resolve the situation as evidenced by these two differing bills before the Senate and House Of Representatives). This is evident in not only the two differing bills before the Senate and House of Representatives, but also all the different state attempts to collect online sales tax.

108. S. 1452; H.R. 3179.

109. Perton, *supra* note 52.

110. Lamar Whitman, *Another Take on Internet Sales Tax*, COMPTIA (Oct. 25 2011), <http://blog.comptia.org/2011/10/25/another-take-on-internet-sales-tax/>.

111. See James G.S. Yang, *Various Court Rulings on Internet Commerce Taxation*, J. INTERNET L., Oct. 2011, at 18 (analyzing the various measures undertaken by the states).

112. *Id.*

113. Tami Luhby, *Get Ready to Pay Sales Tax on Amazon*, CNNMONEY (July 18, 2012), <http://money.cnn.com/2012/07/18/news/economy/amazon-sales->

retailer, whose customers expect quick delivery of their products. In order to keep costs down, keep delivery, including same day, on schedule, and handle a growing demand, more distribution centers must be built, thereby establishing a substantial nexus in more states.¹¹⁴

One common theme in proposed resolutions is that whatever system is designed, it needs to be simple.¹¹⁵ There is support for an exemption for small sellers, although there is disagreement on how liberal that exemption should be.¹¹⁶ A key issue is whether a package should be designed around an existing tax program, such as the Streamlined Sales and Use Tax Agreement, or if it should be drawn up to provide a solution that will include all states.¹¹⁷

With the economy still struggling to revive itself, the debate of internet sales tax is unlikely to go away any time soon.¹¹⁸ The growth of state budget deficits¹¹⁹ and the growth of Amazon's revenue contribute to this issue.¹²⁰ As some brick-and-mortar retailers shutter their doors and contribute to a rising unemployment rate, the Amazon effect is occupying a place directly in the spotlight.¹²¹ The time may be right to pass legislation on the issue as Amazon seems to be moving away from its hardline stance and open to conciliation.¹²²

tax/index.htm (listing the states that Amazon will begin to charge sales tax in, as well as the increased physical presence of Amazon in those states).

114. *Id.*

115. Woo, *supra* note 40.

116. See Lamm, *supra* note 91 (noting the argument that the proposed legislations does not go far enough to protect the small online retailer from an enormous burden).

117. See Whitman, *supra* note 110 (analyzing the difference in using the Streamline Sales and Use Tax Agreement, which does not include all states, versus legislation that does include all the states).

118. Obama Calls for 'Full-Scale Attack' to Revive Struggling Economy, FOXNEWS (Aug. 30, 2010), <http://www.foxnews.com/politics/2010/08/30/white-house-turns-economy-amid-conflicting-signals/> (reporting on the President's concern that the economy is not recovering in the way that he hoped).

119. Oliff et al., *supra* note 77.

120. See Amazon.com Revenue Growth, YCHARTS (Sept. 30, 2012), http://ycharts.com/companies/AMZN/revenue_growth (tracking the rise of Amazon's revenue).

121. See Tom Cheredar, *Internet Claims Another Victim: Borders Closes Remaining Retail Stores*, VB MEDIA (July 18, 2011), <http://venturebeat.com/2011/07/18/borders-closes-remaining-retail-stores/> (comparing the demise of Borders as the final chapter in a David vs. Goliath story that started in the mid-1990's with the founding of Amazon.com). Cheredar notes, though, that other factors, such as stale selection of products and lack of a digital growth strategy also led to the downfall of Borders. *Id.*

122. Demery, *supra* note 88.

3. Consumers

In a heated political climate, any suggestion of raising taxes is anathema to some.¹²³ Not to be lost in the debate is the consumer.¹²⁴ Amazon will be forced to collect the tax, which may hurt its prices and bottom line, but the consumer is the one who will be paying the sales tax.¹²⁵ Based on recent research projecting consumption in 2016, the average consumer would have to pay \$167 in online purchase taxes.¹²⁶ This same consumer may also be a voter too, with the power to vote out a representative that makes an unfavorable tax change.¹²⁷ The consumer, though, benefits from a federal solution because many currently do not pay the taxes associated with online purchases, even though they are required to do so. Whether this is due to ignorance or an active choice not to pay the tax, either way, consumers are opening themselves up to adverse effects. The issue affects each party in a different way, but it is in the interest of all to find a solution, and to find one quickly.

IV. PROPOSAL

The two current pieces of proposed legislation, the Main Street Fairness Act¹²⁸ and the Marketplace Equity Act¹²⁹ should not be passed. Instead, alternative legislation, presented in this section, is the better option than others presented by Congress so far. The legislation provides a simple federal solution that is the best compromise for all parties involved.¹³⁰

The Main Street Fairness Act should not be passed because of its reliance on the Streamline Sales and Use Tax Agreement.

123. See Stephanie Kichgaessner, *Republican Hopefuls United on Tax Stance* (Aug. 12, 2011), http://www.ft.com/cms/s/0/475c33dc-c4ff-11e0-ba51-00144feabd_c0.html#axzz1bRzQlr8y (noting the stance of Republican presidential candidates to oppose an increase in taxes, even with corresponding budget cuts).

124. See Austan D. Goolsbee, *The Impact of Sales Tax on E-Commerce*, CAPITAL IDEAS (2000), <http://www.chicagobooth.edu/capideas/sum00/goolsbee.html> (tracking consumer sensitivity to price).

125. Ness, *supra* note 20.

126. Abe Carver, *Internet Tax Would Cost Average Shopper \$167.00 A Year*, FORBES (Aug. 8, 2012), <http://www.forbes.com/sites/abegarver/2012/08/08/internet-tax-would-cost-average-shopper-167-00-a-year/> (outlining the effect of an internet tax on the average consumer in the year 2016).

127. *CNN Poll: Time to Clean House in Congress?*, CNN (Aug. 9, 2011), <http://politicalticker.blogs.cnn.com/2011/08/09/cnn-poll-time-to-clean-house-in-congress/> (discussing how those unhappy with Tea Party policies on taxes are strongly considering voting against these legislators).

128. S. 1452.

129. H.R. 3179.

130. All involved includes the states, consumers, traditional retailers and online retailers.

Because several large states are not a party to this bill,¹³¹ it would limit the application of the act if enacted. Further, if the agreement were found to be unconstitutional,¹³² the act would fall. To avoid these potential problems, any proposed act should cover all of the states, not just those signed on to the agreement.

The Marketplace Equity Act also should not be passed. This act is more palatable than its counterpart and its small seller exception is a strong point in its favor,¹³³ but by providing three different options to states, this act is still not a simple enough measure.¹³⁴ Rather than these two acts, the following bill is proposed.

A BILL¹³⁵

To provide a simple means for internet sales tax collection.¹³⁶

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*¹³⁷

SECTION 1. SHORT TITLE.

This Act may be cited as the “Simple Internet Sales Tax Act”

SEC. 2. FINDINGS.¹³⁸

Congress makes the following findings:

131. Gruenwald, *supra* note 87.

132. Evans, *supra* note 78.

133. Lamm, *supra* note 91.

134. See Sylvia F. Dion, *The Marketplace Equity Act: The New Competition on the Block*, SALES TAX SUPPORT.COM (Oct. 25, 2011), <http://www.salestaxsupport.com/blogs/sales-use-tax/internet-tax-ecommerce/marketplace-equity-vs-marketplace-fairness-is-either-right/> (concluding that while the Marketplace Equity Act appears to be simple, there are some who believe that the act was not adequately thought through and was quickly crafted in an effort to create a bipartisan solution to the Main Street Fairness Act). According to a report, the act was drafted to build support amongst Republican House freshmen in order to put pressure on the Republican House leadership to provide “cover” for Senate Republicans. *Id.*

135. The proposed legislation is laid out in a similar fashion as to other proposed congressional bills.

136. In contrast, the purpose of the Main Street Fairness Act is “to promote simplification and fairness in the administration and collection of sales and use taxes.” S. 1452. The Marketplace Equity’s is “to improve the States’ rights to enforce the collection of State sales and use tax laws, and for other purposes.” H.R. 3179.

137. S. 1452; H.R. 3179.

138. See S. 1452 (exemplifying the fact that in order to support its legislation, Congress often inserts its findings into a proposed bill). This also helps the Supreme Court if it is eventually called on to review the constitutionality of a measure. *Id.* S. 1452 does make findings in § 3 while H.R. 3179 does not have a findings section in the legislation). *Id.*; H.R. 3179.

(1) States are engaged in various measures in an attempt to require online retailers to collect tax on internet sales.¹³⁹

(2) Congress may facilitate equal taxation consistent with the United States Supreme Court's decision in *Quill Corp. v. North Dakota*.¹⁴⁰

(3) Collection of internet sales tax can aid in the states' budget shortfalls.¹⁴¹

(4) Just as the states have an interest in collection of sales tax, consumers also have an interest in limiting their tax liability.¹⁴²

(5) Traditional "brick-and-mortar" retailers can benefit by having consumers encouraged to purchase more items in their stores.¹⁴³

(6) The consumer, states, traditional retailers, and online retailers will benefit from a simple system.¹⁴⁴

SEC. 3. AUTHORIZATION TO COLLECT INTERNET TAXES¹⁴⁵

(a) Grant of authority – States are permitted to require all internet sellers, except those qualifying for the small-seller exception, to collect and remit its sales tax on internet purchases, subject to the provisions listed herein.¹⁴⁶

139. Yang, *supra* note 111.

140. See *Quill*, 504 U.S. at 318 (quoting Justice Stevens noting Congress has the power to act on the matter).

141. See Danielle Kurtzleben, *10 States with the Largest Budget Shortfalls*, U.S. NEWS (Jan. 14, 2011), <http://www.usnews.com/news/articles/2011/01/14/10-states-with-the-largest-budget-shortfalls> (charting the largest state budget deficits through the country). See also Michelle Quinn, *Web Sales Tax Fight Heats Up in Congress*, POLITICO (Nov. 8, 2011), <http://hamptonroads.com/2011/11/web-sales-tax-fight-heats-congress> (noting that states are weighing in to support federal legislation to help plug budget shortfalls). States stand to lose \$23.3 billion in 2012 because they cannot collect sales tax from online and catalog purchases. *Id.*

142. Goolsbee, *supra* note 124.

143. See Quinn, *supra* note 141 (reporting that Wal-Mart is so concerned about the matter that it has hired three firms to lobby on the matter). Other traditional retailers have lobbyists working on their behalf. *Id.* Sears, Best Buy, JC Penny, and Jo-Ann Stores are represented by various lobbying groups. *Id.*

144. See Anders Bylund, *Why Amazon Loves Equal Sales Taxes*, THE MOTLEY FOOL (Nov. 10, 2011), <http://www.fool.com/investing/general/2011/11/10/why-amazon-loves-equal-sales-taxes.aspx> (stating that Amazon would prefer a simple federal solution rather than having to worry potentially about differing tax policies in the more than 7500 taxing jurisdictions in the country).

145. *But cf.* "Authorization for States to Require Collection of Sales and Use Taxes" H.R. 3179, § 2 (providing the different position of the Marketplace Equity Act); "Authorization to Require Collection of Sales and Use Taxes" S. 1452, § 4 (providing the different position of the Main Street Fairness Act).

146. U.S. CONST. art. I, § 8, cl. 3.

(b) Small-Seller Exception – Those sellers having sales throughout the country of less than \$10,000,000 or in a particular state of less than \$3,000,000, shall qualify for an exception to the collection of internet sales tax.¹⁴⁷

(c) Sales Tax Collection Process – States may require internet retailers to directly collect its sales tax from the consumer and then remit that tax to the state.¹⁴⁸ An internet retailer may allow another retailer or a third party to aid in the collection and processing of the sales tax.¹⁴⁹

SEC. 4. LIMITATION

(1) If a consumer incurs sales tax charges of less than \$100, that consumer shall be entitled to a tax refund of the sales tax paid. It shall be the responsibility of the consumers to track their purchases and submit the proper documentation showing they qualify for the refund.¹⁵⁰

(2) Congress provides for this limitation in order balance competition for traditional and online retailers. A consumer who makes a minimal purchase online is not shopping to avoid sales tax, and thus is entitled to a return of the tax paid.

(3) This return, to be included on the annual tax return of the consumer, will help to stimulate spending by providing the consumer with a larger refund. This larger refund will be injected back into the stream of commerce, providing a boost to spending and all retailers.¹⁵¹

147. Declan McCullagh, *Internet Sales Tax: An Idea Whose Time Is Now?*, CBSNEWS (Nov. 9, 2011), http://www.cbsnews.com/8301-205_162-57321644/internet-sales-tax-an-idea-whose-time-is-now/ (noting that the U.S. Treasury Dept. suggests the cut-off for small retailers to be \$10 million). The article did not reference a cut-off for sales within a state. *Id.* The Marketplace Equity Act contains a smaller seller exception of receipts not exceeding \$1,000,000 in the United States, and not exceeding \$100,000 in a state. H.R. 3179, § 2(b)(1). The Main Street Fairness Act does not have explicit small seller exception numbers, but refers to the agreement. S. 1452, § 4(a)(1).

148. A state would only be able to charge the sales tax that it already charges within its state. It would not be able to charge a higher sales tax rate only on online purchases.

149. See Marc Lifsher, *Amazon Offers to Serve as Tax Collector—For a Price*, L.A. TIMES (Nov. 3, 2011), <http://articles.latimes.com/2011/nov/03/business/la-fi-amazon-tax-collect-20111103> (reporting that Amazon is now looking to profit off the issue that it has battled for so long). The program will be rolled out February 1, and will provide for Amazon to collect sales taxes for merchants who sell products through its site for a fee equivalent to 2.9 percent of the taxes collected. *Id.*

150. See Ness, *supra* note 20 (stating that consumers already are responsible for reporting the taxes they are supposed to pay, but few actually do). Given that consumers already are supposed to track whether they should pay the tax, they also must track and submit the proper documentation to seek a refund.

151. See Ben Rooney, *Tax Refunds Up 10% Due to Stimulus*, CNNMONEY

SEC. 5. PREEMPTION¹⁵²

This act shall preempt any existing or pending state legislation on the subject.

SEC. 6. SEVERABILITY¹⁵³

If any provision of this Act or its application is held to be unconstitutional, the remainder of the Act and its application shall carry on in full force.¹⁵⁴

As laid out, this proposed bill is beneficial because it provides a simple solution to the current debate raging over the collection of internet sales tax and provides benefits to each party. The states will have the opportunity, at their choice,¹⁵⁵ to require collection of internet sales tax from an online retailer. This increased revenue will help reduce budget shortfalls and provide additional funds that have gone uncollected.¹⁵⁶

For the online retailer, the bill provides a simple method for ensuring collection of sales tax and one authorized by the federal government, two criteria that Amazon posits are key to any successful legislation.¹⁵⁷ With federal legislation in place, Amazon will not have to engage in litigation throughout the country and can instead focus on its new strategy of collecting sales taxes for other companies and generating a profit from this sector of its business.¹⁵⁸

(Mar. 22, 2010), http://money.cnn.com/2010/03/22/news/economy/recovery_act_tax_benefits/index.htm (finding that tax refunds are a boon for the middle class and an important stimulus for the economy).

152. See Caleb Nelson, *Preemption* 86 VA. L. REV. 225, 226 (2000) (discussing the concept of express preemption). Express preemption occurs when “a federal statute includes a preemption clause explicitly withdrawing specified power from the states.” *Id.*

153. Cf. S. 1452, § 10; H.R. 3179, § 6 (indicating both proposed bills include a similar preemption section).

154. See John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 206 (1993) (arguing that if a statute contains a severability clause or a nonseverability clause, such an explicit statement should be construed according to this plain meaning).

155. Thus if a state does not charge a state sales tax, it will not be required to charge a state internet sales tax.

156. See, e.g., Alison Vekshin, *Women’s Programs Face Deep Cuts As States Tackle Budget Deficits*, BLOOMBERG (Nov. 4, 2011), <http://www.businessweek.com/news/2011-11-04/women-s-programs-face-deep-cuts-as-states-tackle-budget-deficits.html> (reporting on the decrease in social welfare programs that are designed for women).

157. See Perton, *supra* note 52 (quoting Amazon CEO Jeff Bezos as calling for a simple federal measure on the issue).

158. Lifsher, *supra* note 149.

The traditional retailer can have confidence that shoppers will choose to shop based on matters other than sales tax.¹⁵⁹ Specifically, by placing a floor at which customers receive a sales tax refund, it will prevent consumers from benefitting from purchasing expensive items online to avoid paying sales tax.¹⁶⁰

Finally, while the consumers must pay the sales tax in instances when they would not have previously, they will benefit in several ways.¹⁶¹ With increased sales tax revenue, their states may have less budgetary problems and will be able to offer more services to their citizens.¹⁶² Also, consumers who buy online sporadically will receive a sales tax refund, which can further stimulate economic activity by increasing the amount of money the consumer has to spend.

V. CONCLUSION

Over the last two decades, as the Internet has exploded in popularity, online sales have grown exponentially. As the Internet was coming online, the Supreme Court handed down *Quill*, which has provided online retailers with a loophole that lets them avoid collecting sales tax in states where they have no physical presence. As states have faced growing budget deficits, a wave of legislation has been passed to close this loophole and force online retailers to collect the tax. While online retailers like Amazon have fiercely resisted legislation, the time has come for the federal government to settle the issue. Measures have been proposed in both the U.S. Senate and House of Representatives, but have yet to be passed. Standardization of the issue will eliminate the competition between states, provide Amazon with a clear understanding of how it must collect sales tax, and provide consumers the measure of the tax they will be expected to pay. It is incumbent on Congress to act quickly on the matter to help the states collect the money they need while maintaining a fair balance between online retailers and consumers.

159. See Brad Tuttle, *Amazon Supports a Bill Forcing Online Shoppers to Pay Sales Tax*, TIME (Nov. 11, 2011), <http://moneyland.time.com/2011/11/11/amazon-supports-a-bill-forcing-online-shoppers-to-pay-sales-tax/> (noting the obvious advantage Amazon holds in not having to collect a sales tax). Consumers often find it cheaper, and more convenient to buy online rather than in a store. *Id.*

160. See Ness, *supra* note 20 (detailing the policy of Illinois to attempt internet sales tax collection on those who make big ticket purchases over the Internet).

161. But see David Cardinal, *What Is Internet Sales Tax, and Will It Cripple E-Commerce?*, EXTREMETECH.COM (Oct. 12, 2011), <http://www.extremetech.com/computing/99509-what-is-internet-sales-tax-and-will-it-cripple-e-commerce> (pointing out that in many states consumers already have the responsibility of paying the tax).

162. Vekshin, *supra* note 156.