Comments

The Struggle Over Internet Sales and Use Tax: Why the Marketplace Fairness Act Could Be the Hero for Wall Street, Main Street, and the Fifty States

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Introduction

THE INTERNET HAS DONE SOMETHING EXTRAORDINARY to the U.S. economy, allowing thousands of purchases to occur over thousands of miles at the click of a button. But while it has made it easier for us to buy just about anything, it has wreaked havoc on our traditional collection of taxes, which was centered on the brick-and-mortar system.[1] As our economy grows exponentially through electronic commerce (e-commerce), states lose their ability to efficiently collect revenue.[2] As commerce becomes more dependent on Internet transactions and less on physical interactions, fewer businesses seem to have a "substantial nexus" with a state, and thus, states inevitably lose tax revenue.[3]

Agitated state politicians have said that "they lose as much as $23 billion in revenue *a year* when consumers buy goods from out-of-state sellers and

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1. *See* Joel Griffiths, *Use It or Lose It: State Approaches to Increasing Use-Tax Revenue*, 60 U. KAN. L. REV. 649, 649 (2012).

2. Katharine R. Conroy & Ralph B. Tower, *A Study in Use Tax Design*, 53 ST. TAX NOTES 747, 749 (Sept. 14, 2009).

3. Griffiths, *supra* note 1, at 668; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

don't pay sales taxes."[4] Retail giants such as Walmart, Target, and Best Buy are tired of losing customers and revenue due to their brick-and-mortar strategy.[5] On the other side are corporate opponents, such as Ebay and Overstock,[6] who believe that this is a governmental overstep. The U.S. Supreme Court has unequivocally proclaimed that the problem of taxing e-commerce is "not only one that Congress may be better qualified to resolve, but also one that Congress *has the ultimate power* to resolve."[7] The Marketplace Fairness Act of 2013 (MFA)[8] is the necessary step by Congress to (1) ease the administrative burden on both states and businesses, (2) collect long-lost revenue rightfully owed to the states, and (3) eliminate advantages in the marketplace by placing the same requirements on small and large businesses alike.

Part I of this Comment lays out the history of sales and use taxes, the constitutional constraints to collecting such taxes, and states' proposed solutions to recovering tax revenue in an Internet-dominated world. Part II discusses *Performance Marketing Association, Inc. v. Hamer*[9] and how the Illinois Supreme Court's decision has added a preemption argument[10] to the debate while sidestepping any commentary on the line of jurisprudence emanating from *Quill Corp. v. North Dakota* (*Quill*). Part III will question the usefulness of *Quill*'s bright-line test in our Internet-dominated economy and will argue that the MFA, or its future incarnation, can be Congress's long-awaited answer to a fair, easy, and effective system to tax remote sellers among the fifty states.

4. Richard Rubin, *Ted Cruz Seeks to Stop Plan to Tax More Internet Purchases*, BLOOMBERG (Nov. 18, 2014), http://www.bloomberg.com/news/print/2014-11-18/ted-cruz-wants-to-stop-bipartisan-internet-sales-taxation-bill.html (emphasis added).

5. Barney Jopson, *Republicans Signal Demise of Internet Sales Tax Bill*, CNBC (Nov. 11, 2014), *available at* http://www.ft.com/intl/cms/s/0/ac18e94a-6930-11e4-b389-00144feabdc0.html#axzz3S3Qop7zQ ("Retailers such as Walmart, Target, and Best Buy have long railed against a perceived loophole that they say gives ecommerce rivals an unfair advantage by enabling many online shoppers to avoid sales tax.").

6. *See* Rubin, *supra* note 4; Jopson, *supra* note 5 ("EBay and Overstock have led opposition to the bill from the internet sector.").

7. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) (emphasis added).

8. Marketplace Fairness Act of 2013, S. 336, 113th Cong. (2013).

9. Performance Mktg. Ass'n, Inc. v. Hamer, 998 N.E.2d 54, 55 (Ill. 2013).

10. *Id.* at 69 (Karmeier, J., dissenting) ("Today's decision by the majority marks the first time a court of review in the United States has determined that the Internet Tax Freedom Act preempts a state from enacting an internet affiliate tax law to facilitate the collection of existing use taxes to which the state is legally entitled.").

I. Background

A. What Are Sales and Use Taxes?

States have been utilizing sales tax, and also complementary "use taxes," since the 1930s.[11] A sales tax is a consumption tax "imposed on the sale of goods and services, usually measured as a percentage of a price."[12] Although the payment of the tax is always the responsibility of the consumer, some businesses collect sales taxes at the time of sale on behalf of the taxing authority.[13] Only five states do not have sales tax.[14] As of 2007, sales taxes accounted for 32% of total state tax collections, which was the second largest source of state revenue after personal income taxes.[15] Use taxes, which are complementary taxes "imposed on the use of certain goods that are bought outside the taxing authority's jurisdiction,"[16] are meant to tax transactions that were otherwise not taxable at the time of purchase. Use taxes are constitutionally permissible as long as they are nondiscriminatory and are allowed an offset for any equivalent tax paid.[17] The operation of use taxes can be illustrated by the following example:

> Suppose a resident of State *A*—a state that imposes sales and use taxes at a rate of 10%—goes to State *B*—a state that has no sales tax—to buy a new widget. Unbeknown to most individuals, if this resident intends to bring the widget back into State *A* and use it there, then he must pay State *A*'s use tax. The amount due is the sales tax that the resident would owe if he purchased the widget in State *A*—10% of the purchase price—less the tax he paid in State *B*. Since State *B* imposes no sales tax, the resident will owe State *A* a use tax equivalent to 10% of the purchase price. Thus, if the resident bought the widget for $1,000, then he would owe $100 in use tax to State *A*. Further, even if State *B* had a sales tax, the resident of State *A* would have a use-tax liability in State *A* so long as the sales tax charged in State *B* was less than 10%. In a situation in which State *B*'s

11. Conroy & Tower, *supra* note 2, at 747.

12. BLACK'S LAW DICTIONARY 1597 (9th ed. 2010).

13. Griffiths, *supra* note 1, at 650.

14. Joe Mullin, *House Speaker Boehner Won't Let Internet Sales Tax Pass This Year*, ARS TECHNICA (Nov. 12, 2014), http://arstechnica.com/tech-policy/2014/11/boehner-internet-sales-tax-wont-pass-congress-this-year/ (listing Alaska, Delaware, Oregon, Montana, and New Hampshire as the states that do not have a sales tax).

15. *Why Was the Streamlined Sales Tax Created?*, STREAMLINED SALES TAX GOVERNING BD., INC., http://www.streamlinedsalestax.org/index.php?page=gen_2 (last visited Apr. 13, 2015).

16. BLACK'S LAW DICTIONARY 1597 (9th ed. 2010).

17. *See* Henneford v. Silas Mason Co., 300 U.S. 577, 582–84 (1937) ("Things acquired or transported in interstate commerce may be subject to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. . . . There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing.").

sales tax rate was 4%, the resident of State *A* would have use-tax liability in State *A* for the remaining 6% of the purchase price.[18]

The purpose of use taxes is to prevent avoidance of sales taxes by those who make out-of-state purchases and protect in-state merchants from a possible diversion of business outside a particular state.[19] Because the ultimate responsibility for paying is on the consumer, the burden is placed on the out-of-state retailer, usually by statute requiring them to collect the use tax on behalf of the home state.[20] Currently, twenty-seven states have a voluntary remittance program that allow taxpayers to calculate the amount of use tax owed and then provide it to the state with their income tax return.[21]

B. Sources of Jurisdiction to Tax Within the State: Constitutional Considerations

1. Commerce Clause

Congress is given the power to regulate commerce "among the several States."[22] The negative inference is that the Commerce Clause also prohibits states from enacting statutes that improperly burden or discriminate against interstate commerce.[23] Before *Complete Auto Transit, Inc. v. Brady*,[24] the U.S. Supreme Court had previously held somewhat opposite views: either no tax could be imposed on an activity that was part of interstate commerce[25] or those engaged in interstate commerce would have to pay their fair share, even if it makes doing business more expensive.[26] The Supreme Court reconciled these views and held that a tax could be sustained if the activity had a substantial nexus with the state, was fairly apportioned, was not discriminatory against interstate commerce, and was fairly related to the services provided by the state.[27]

18. Griffiths, *supra* note 1, at 652–53.

19. Performance Mktg. Ass'n, Inc. v. Hamer, 998 N.E.2d 54, 55 (Ill. 2013).

20. *Id.* at 55.

21. NINA MANZI, MINN. H.R. RESEARCH DEP'T, USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES, at 5 (Apr. 2015), *available at* http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf. Additionally, six states provide information about use tax reporting on their income tax booklet. *Id.*

22. U.S. CONST. art. I, § 8, cl. 3.

23. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 13–17 (1824).

24. 430 U.S. 274 (1977).

25. *Id.* at 278 (citing Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951)).

26. *Id.* at 279 (citing W. Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938)).

27. *Id.* at 279.

2. The Cornerstone in Due Process Litigation: *Quill Corp. v. North Dakota*[28]

The Fifth and Fourteenth Amendments together protect citizens from deprivation of "life, liberty, or property, without due process of law."[29] When considering due process in terms of taxation of out-of-state retailers, the discussion must always begin with *Quill Corp. v. North Dakota*.[30]

In *Quill*, the U.S. Supreme Court considered the constitutionality of North Dakota's requirement that an out-of-state mail-order company, with no outlets or sales representatives within the state, collect and remit a use tax for goods purchased within North Dakota. The Quill Corporation (Quill), an office equipment supplier, did not have employees or tangible property in North Dakota but conducted business in the state through catalogs, flyers, national ads, and phone calls.[31] North Dakota filed an action to require Quill to pay the use tax of products purchased by North Dakota residents, arguing that Quill fit the statutory definition of retailer,[32] which included "every person who engages in regular or systematic solicitation of a consumer market in th[e] state."[33]

The Court took this chance to explain that the power to tax remote sellers under the Due Process and the Commerce Clauses are separate and distinct.[34] While the due process analysis contemplates the legitimacy of the state's exercise of power over a corporation's connections to the state,[35] the Commerce Clause is concerned with the effects of state laws on the nation's economy as a whole.[36] In regards to due process, the Court held that if a foreign corporation purposefully avails itself of the benefits of an economic market of a state, it might subject itself to that state's jurisdiction even without a physical presence in the state.[37] As to how to establish substantial nexus under the *Complete Auto* analysis, the Court upheld the bright-line rule from *National Bellas Hess, Inc. v. Department of Revenue of Illinois*[38] requiring a seller to have a physical presence in a state before the state can impose a duty to

28. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
29. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
30. 504 U.S. 298.
31. *Id.* at 302.
32. *Id.* at 303.
33. *Id.* at 302–03.
34. *Id.* at 305.
35. *Id.* at 312.
36. *Id.*
37. *Id.* at 307.
38. 386 U.S. 753, 756–60 (1967).

collect use taxes.[39]

Justice White dissented to the "uncharted and treacherous foray"[40] into creating two different analyses for the Commerce and Due Process Clauses, reasoning that the *Complete Auto* nexus requirement is essentially a fairness inquiry.[41] However, this line of reasoning from *Quill* has been the foundation for analyzing the states' efforts to tax remote retailers.

3. Preemption of State Law by Federal Law

The U.S. Constitution states that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[42] Under the Supremacy Clause, the laws of Congress must preempt state law in three circumstances: (1) when Congress explicitly withdraws state powers through express statutory language,[43] (2) when Congress has precluded state regulation within a field they intend to exclusively govern,[44] or (3) when state laws conflict with federal law, either because compliance with both regulations is impossible[45] or because state law

39. *Quill*, 504 U.S. at 317 ("In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law.").

40. *Id.* at 325 (White, J., dissenting).

41. *Id.* at 326 ("Instead of the formalistic inquiry into whether the State was taxing interstate commerce, the *Complete Auto* Court adopted the more functionalist approach of Justice Rutledge in *Freeman*. In conducting his inquiry, Justice Rutledge used language that by now should be familiar, arguing that a tax was unconstitutional if the activity lacked a sufficient connection to the State to give 'jurisdiction to tax'; or if the tax discriminated against interstate commerce; or if the activity was subjected to multiple tax burdens.") (citations omitted).

42. U.S. CONST. art. VI, cl. 2.

43. Arizona v. United States, 132 S. Ct. 2492, 2500–01 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.").

44. *Id.* at 2501 ("[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive that Congress left no room for the States to supplement it' or where there is a 'federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'") (citations omitted).

45. *Id.* ("This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (citations omitted).

obstructs achievement of congressional objectives.[46] Part II of this Comment will consider the argument advocated by the Illinois Supreme Court that the Internet Tax Freedom Act, in fact, preempts the state's laws attributing nexus to a remote seller.[47]

C. Sales and Use Taxes in the Age of E-Commerce

The gigantic presence of companies like Amazon.com (Amazon) is impossible to ignore, with a net income of $274 million in 2013[48] from selling its own inventory and working with subsidiaries and affiliates to sell a large range of products.[49] The Internet allows these retailers to go beyond traditional forms of sales and advertising, all while indirectly getting a "free ride" from state tax laws.[50] Even though Congress has attempted to pass legislation,[51] its relative inaction has led to states finding their own ways of reclaiming the revenue that has disappeared from their pockets.[52]

States have utilized three different approaches to take back their rightfully owed revenue: (1) increased notification standards, (2) participation in the Streamlined Sales Tax Project (SSTP), and (3) enactment of affiliate taxes on in-state affiliates of e-commerce.[53]

1. Increased Notification Standards

Some states[54] have increased efforts to notify remote sellers and in-state

46. *Id.*

47. *See infra* Part II.

48. Amazon.com, Inc., Annual Report (Form 10-K) (Jan. 31, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=97664&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTkzNTE3NDEmRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d (listing Amazon's financial reporting to the SEC for the 2013 fiscal year).

49. *See* AMAZON.COM, http://www.amazon.com (last visited Nov. 20, 2014) (showing the large amount of products sold by Amazon and other third-party sellers).

50. Rob Owen, *The "Amazon Tax" Issue: Washing Away the Requirement of Physical Presence for Sales Tax Jurisdiction Over Internet Businesses*, 2013 U. ILL. J.L. TECH. & POL'Y 231, 232–33 (2013).

51. Congress has introduced, but not enacted, any proposals. *See, e.g.*, Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. (2007); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. (2005); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. (2003); Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001).

52. Steven M. Hogan, *Internet Taxes on Trial: New Strategies for Litigating Remote-Seller Sales and Use Tax Cases*, 88 FLA. B.J. 31, 32 (Feb. 2014) (citing Gordon Yu, *Formulation and Enforcement of "Amazon" Taxes*, 67 ST. TAX NOTES 321 (Feb. 4, 2013)).

53. Griffiths, *supra* note 1, at 652.

54. States with increased notification requirements include Colorado, Kentucky, Oklahoma,

purchasers that their transaction is subject to the use tax. Colorado is the perfect example to illustrate this approach by requiring "remote sellers with over $100,000 in sales to Colorado residents to provide a report to the State Department of Revenue detailing the amounts purchased by state residents along with the residents' contact information."[55] This law hopes to increase compliance with Colorado tax laws by giving remote sellers the choice to collect use taxes themselves or notify the consumer that use tax must be remitted to the state.[56] However, states utilizing this strategy still have the same problem of self-reporting.[57]

Ultimately, the district court struck down Colorado's law, holding that this particular law "discriminate[s] against the out-of-state retailers by imposing unique burdens on those retailers" that are not placed on in-state retailers.[58]

2. Participation in the Streamlined Sales and Use Tax Agreement

The SSTP produced the Streamlined Sales and Use Tax Agreement (SSUTA),[59] which intends to "simplify and modernize sales and use tax administration [in the member states] in order to substantially reduce the burden of tax compliance."[60] The SSUTA aims to achieve its goal of uniformity by utilizing a "library of definitions" for potentially taxed products,[61] limiting the number of tax rates allowed in a state,[62] and requiring substantial compliance with the current SSUTA.[63] In addition, uniform and simpler exemption administration, state-level administration of all sales tax,

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South Dakota, Tennessee, and Vermont. *See* Shannon Gilmartin Cuddy & Lauren Zebniak, *Use Tax Check-In: What to Do If You Retail to These 7 States*, MOODY, FAMIGLIETTI & ANDRONICO (Feb. 14, 2014), http://www.mfa-cpa.com/Blog/2014/02/Use-Tax-Check-In-What-to-Do-If-You-Retail-To-These-7-States.

55. Hogan, *supra* note 52, at 32.

56. Griffiths, *supra* note 1, at 661. *See* COLO. REV. STAT. ANN. § 39-21-112 (3.5)(c)(I) (West 2010).

57. *See infra* Part III.C.2.

58. Direct Mktg. Ass'n v. Huber, Civil No. 10-cv-01546-REB-CBS, 2012 WL 1079175, at *7 (D. Colo. 2012).

59. Streamlined Sales and Use Tax Agreement, art. I, § 101 (2014) [hereinafter SSUTA], *available at* http://www.streamlinedsalestax.org/index.php?page=modules.

60. *About Us*, STREAMLINED SALES TAX GOVERNING BD., INC., http://www.streamlinedsalestax.org/index.php?page=About-Us (last visited Apr. 13, 2015).

61. SSUTA, art. I, § 102, art. III, § 327 (2014).

62. *Id.* art. III, § 308.

63. *Id.* art. VIII, § 805.

and uniform sourcing rules[64] give states easier ways to collect revenue that have previously gone missing because of voluntary remittance programs.

Almost half of the states[65] have passed legislation conforming to the SSUTA, meaning that 33% of the United States' population is already under its regime.[66] Since Congress has the ultimate authority to determine what constitutes a burden on commerce,[67] federal adoption of the SSUTA would be a constitutionally permissible solution.[68]

3. Enactment of "Affiliate" Taxes

As of January 2014, thirteen states[69] have active, so-called "Amazon" or "affiliate" taxes. These laws basically state that an out-of-state vendor, such as Amazon, has the requisite "nexus" if it has contractual agreements with residents of the state to refer customers to its website through Internet links.[70] This kind of contractual relationship is called "performance marketing"[71] or "affiliate marketing."[72] Amazon launched one of the pioneer

64. *How Does the Agreement Simplify Sales Tax Administration?*, STREAMLINED SALES TAX GOVERNING BD., INC., http://www.streamlinedsalestax.org/index.php?page=gen_4 (last visited Apr. 13, 2015).

65. *How Many States Have Passed Legislation Conforming to the Agreement?*, STREAMLINED SALES TAX GOVERNING BD., INC., http://www.streamlinedsalestax.org/index.php?page=gen_3 (last visited Apr. 13, 2015) (listing 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 as the states that have passed legislation conforming to the SSUTA).

66. *Id.*

67. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

68. Griffiths, *supra* note 1, at 672.

69. *Affiliate Nexus Tax Legislation Update for 2014*, SCHAAF-PARTNERCENTRIC (Jan. 8, 2014), https://www.schaafpc.com/affiliate-nexus-tax-legislation-update-for-2014/ (listing Arkansas, California, Connecticut, Georgia, Kansas, Maine, Minnesota, Missouri, New York, North Carolina, Pennsylvania, Rhode Island, and Vermont as status with active nexus tax legislation). Illinois's legislation has precluded it from being added to this list, having been found unconstitutional in *Performance Marketing Ass'n, Inc. v. Hamer*, 998 N.E.2d 54 (Ill. 2013). *See infra* Part II.

70. Hogan, *supra* note 52, at 32.

71. *Performance Mktg.*, 998 N.E.2d at 56. ("Performance marketing refers to marketing or advertising programs in which a person or organization which publishes or displays an advertisement (often referred to as an 'affiliate' or 'publisher') is paid by the retailer when a specific action, such as a sale, is completed.").

72. *See* Dinesh Raju, *Referral and Affiliate Marketing: What's the Difference*, REFERRALCANDY, http://blog.referralcandy.com/2010/11/05/referral-and-affiliate-marketing-whats-the-difference/ (Nov. 5, 2010) ("In affiliate marketing, the advocate doesn't know the prospect personally. . . . The advocate helping you make the sale in affiliate marketing is doing it for the financial reward involved.").

online affiliate marketing programs, Amazon Associates, in 1996.[73] These programs use various independent website owners who earn a commission by placing links on their website to direct customers to Amazon.[74]

The first "Amazon" tax law was enacted in New York in 2008.[75] An Internet retailer was required to collect sales tax on sales in New York if it makes taxable sales and "enters into an agreement with a resident of [New York] under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise."[76]

In *Overstock.com, Inc. v. New York State Dep't of Taxation & Fin.*,[77] Amazon and Overstock claimed that their affiliate programs did not provide sufficient nexus with New York to constitutionally justify the State's taxation.[78] The 2008 New York law created a statutory presumption that if a remote seller had an affiliate contract with a New York resident exceeding $10,000, it had the sufficient nexus to be taxed in the state.[79] However, this presumption could be rebutted with proof that the resident did not engage in the solicitation of sales.[80] The court reasoned that since the affiliates urged local residents to make purchases through the seller's links, the vendor had gone beyond passive advertisement and established a sales force within the state.[81] Since using affiliate marketing is not mere passive advertisement, and Amazon essentially pays New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden.[82] The court relied on *Orvis Co. v. Tax Appeals Tribunal of State of New York*[83] to hold that although an in-state physical presence is necessary after *Quill*, it need not be substantial.[84] Rather, it must be demonstrably more than a "slightest presence," which would surely be satisfied by having an economic presence in New York through the seller's employees or having

73. *What is the Amazon Associates Program?*, AMAZON.COM ASSOCIATES, https://affiliate-program.amazon.com/gp/associates/join/getstarted (last visited Nov. 15, 2014).

74. Owen, *supra* note 50, at 234.

75. *Id.* at 233–34.

76. N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2012).

77. 987 N.E.2d 621 (N.Y. 2013).

78. *Id.* at 622.

79. *Id.* at 623.

80. *Id.*

81. *Id.* at 626.

82. *Id.*

83. Orvis Co. v. Tax App. Trib. of New York, 654 N.E.2d 954 (N.Y. 1995).

84. *Overstock.com*, 987 N.E.2d at 625.

affiliate marketers on its behalf, as was the case here.[85]

This is a particularly aggressive view of what constitutes nexus to a taxing jurisdiction. However, without further action by Congress and a refusal to grant certiorari by the Supreme Court,[86] it is likely that states will begin to follow this line of reasoning in deciding subsequent cases. Without an alternative regime, this could lead to more affiliate programs being discontinued by companies.[87]

II. *Performance Marketing Association, Inc. v. Hamer*[88]

Similar to most states,[89] Illinois had two complementary taxes: a sales tax[90] and a use tax.[91] Illinois amended its statutory definition of a "retailer 'maintaining a place of business in this state'"[92] to include

> a retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, *directly or indirectly refers potential customers to the retailer by a link of the person's Internet website*.[93]

Additionally, the new definition of "serviceman" now included any person "having a contract with a person located in this State under which the person, for a commission or other consideration based on the sale of service by the serviceman, *directly or indirectly refers potential customers to the serviceman by a link on the person's Internet website*."[94] In short, out-of-state Internet

85. *Id.*

86. *Overstock.com*, 987 N.E.2d 621, *cert. denied*, 134 S. Ct. 682 (2013).

87. *See Amazon Reacts to Colorado Internet Sales Tax Measure by Firing Its Colorado Associates*, HUFFINGTON POST (May 8, 2010), http://www.huffingtonpost.com/2010/03/08/amazon-reacts-to-colorado_n_490028.html; Adam Belz, *Amazon Drops Blogger Affiliates in Minnesota to Avoid Sales Tax*, STAR TRIBUNE (June 18, 2013), http://www.startribune.com/business/212085341.html; Mark Davis, *Amazon Shuts Down Missouri Associates Program Over Sales Tax Dispute*, KANSAS CITY STAR (Aug. 16, 2013), http://www.kansascity.com/news/local/article325412/Amazon-shuts-down-Missouri-associates-program-over-sales-tax-dispute.html; Gail Cole, *Amazon to Terminate Relationship with Maine Affiliates*, TAXRATES.COM (Oct. 3, 2013), http://www.taxrates.com/blog/2013/10/03/amazon-to-terminate-relationship-with-maine-affiliates/.

88. 998 N.E.2d 54 (Ill. 2013).

89. *See State Sales Tax Rates*, SALES TAX INST., http://www.salestaxinstitute.com/resources/rates (last visited Nov. 28, 2014).

90. 35 ILL. COMP. STAT. ANN. 120/2 (West 2014) ("A tax is imposed upon persons engaged in the business of selling at retail tangible personal property . . . .").

91. 35 ILL. COMP. STAT. ANN. 105/3 (LexisNexis 2014) ("A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail from a retailer . . . .").

92. *Performance Mktg.*, 998 N.E.2d at 56.

93. *Id.* (citing Pub. Act 96-1544, § 5 (effective Mar. 10, 2011) (emphasis added)).

94. *Id.* (citing Pub. Act 96-1544, § 10 (effective Mar. 10, 2011) (emphasis added)).

retailers are now obligated to collect use tax if they have contracted with an Illinois resident to display "a link on his or her website that connects an Internet user to that remote retailer or serviceman's website."[95] However, this definition only applied to referral contracts that generated over $10,000 each year.[96]

A. Parties' Contentions and Judicial History

Performance Marketing Association, Inc., a trade group representing businesses that use performance marketing,[97] filed a complaint in federal court asserting two arguments: (1) Illinois's new definitions of retailer and servicemen were unconstitutional under the Commerce Clause,[98] and (2) Illinois's provisions were "expressly preempted by the Internet Tax Freedom Act (ITFA)."[99]

Section 1101(a)(2) of the ITFA prohibits a state's use of discriminatory taxes on e-commerce.[100] The IFTA further defines a discriminatory tax as "any tax imposed by a State or political subdivision thereof on electronic commerce that . . . imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving *similar property, goods, services, or information accomplished through other means*."[101] "Taxes" can be either a measure to raise revenue or an imposition on a seller to collect and remit the sales or use tax imposed on buyers in that jurisdiction.[102] Lastly, "electronic commerce" refers to Internet transactions that sell property, goods, or services.[103] Because the Illinois Act requires out-of-state sellers, specifically those who have entered into performance marketing agreements with Internet affiliates, to charge and remit a use tax back to Illinois, the plaintiff argued that it violates the "plain language of the ITFA."[104] This tax is discriminatory in that "offline" methods of marketing are not required to

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 56–57.

100. Internet Tax Freedom Act, Pub. L. No. 105-277, § 1101(a)(2), 112 Stat. 2681–719, 719 (1998) (current version at 47 U.S.C. § 151); *Performance Mktg.*, 998 N.E.2d at 57.

101. Internet Tax Freedom Act § 1104(2)(A)(iii) (emphasis added); *Performance Mktg.*, 998 N.E.2d at 57.

102. Internet Tax Freedom Act § 1104(8)(A)(i)–(ii); *Performance Mktg.*, 998 N.E.2d at 57–58.

103. Internet Tax Freedom Act § 1104(3); *Performance Mktg.*, 998 N.E.2d at 58.

104. *Performance Mktg.*, 998 N.E.2d at 58.

remit a use tax, despite their lack of presence in the state and wide reach.[105]

Illinois defended the Act as not discriminatory because the State already imposed a tax on offline methods by including retailers "soliciting orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this State and only secondarily to bordering jurisdictions"[106] in their definition of "maintaining a place of business in [the] State."[107] Alternatively, the State maintained that a "click-through link is 'active' solicitation,"[108] which is subject to use tax collection.[109] The lower court found for the plaintiff, Performance Marketing Association, on both counts, holding that the Act not only failed the substantial nexus requirement[110] but that it was also preempted by the ITFA.[111]

B. The Illinois Supreme Court's Ruling

The Illinois Supreme Court agreed with the plaintiff, making a distinction between locally disseminated advertisements and Internet advertisements, which can be accessed almost anywhere.[112] Additionally, because the Internet affiliate displaying a link is merely a connection to the retailer's website,[113] the Internet advertisement cannot be considered a form

105. *Id.* ("[T]he Act does not require use tax collection by out-of-state retailers who enter into performance marketing contracts with 'offline' Illinois print publishers and over-the-air broadcasters . . . . [M]any out-of-state retailers with no physical presence in the state engage in performance marketing through a variety of media such as catalogs, magazines, newspapers, television and radio, that are accessible by, or distributed to, consumers in Illinois, but are direct at a regional, national and even international audience.").

106. 35 ILL. COMP. STAT. ANN. 105/2(3) (West 2010).

107. *Performance Mktg.*, 998 N.E. 2d at 58.

108. *Id.* at 59.

109. *Id.*

110. *Id.* at 57.

111. *Id.*

112. *Id.* at 58 ("Under paragraph 3 of the definition section of the Use Tax Act, retailers who enter into contracts with Illinois publishers and broadcasters for advertising 'disseminated primarily to consumers located in this State,' *i.e.*, locally, are obligated to collect use tax. But Internet advertising is different. As the parties' joint stipulation of facts states: 'The home page and other publicly-available pages of any Internet website can be accessed from a computer, or other digital device, located anywhere in the world that is connected to the Internet via wire or radio signal. Thus, information appearing on a webpage is available and *disseminated worldwide*.'").

113. *Id.* at 59 ("[A]n Internet affiliate does not receive or transmit customer orders, process customer payments, deliver purchased products, or provide presale or postsale customers services. Further, an Internet affiliate displaying a link on its website does not know the identity of Internet users who clink on the link, and after a user connects to a retailer's website, the affiliate has no further involvement with the user.").

of active solicitation.[114] Since Illinois does not tax retailers who use performance-marketing contracts through nationally targeted "offline" methods,[115] the targeting of Internet performance marketing arrangements imposes a discriminatory tax according to the meaning of the ITFA.[116] Because the Illinois Supreme Court found that the ITFA preempted the Act, and thus rendered it void, the court did not reach the "plaintiff's alternative argument that the new definitions provided in the Act violate the Commerce Clause of the U.S. Constitution."[117]

C. Justice Karmeier's Dissent

Justice Karmeier argued that Illinois's expansion of the definition of "retailer" and "serviceman" was proper in order to solve an inherent problem: it is difficult to rely on the individual consumer to honestly and promptly remit the use tax necessary for his or her out-of-state purchases.[118] When the responsibility to remit use tax is placed on the purchaser, it seems likely that taxable sales will be underreported, mostly because these sales are difficult for the State to monitor.[119] Underreporting puts retailers with a physical presence in the state at an economic disadvantage and deprives the State of revenue to which it is entitled by law.

Had the court conducted the *Quill* analysis, it might have found a sufficient nexus with Illinois to warrant taxing authority. Illinois affiliates were arguably contracted for the purpose of targeting Illinois residents and, as the dissent argues, an internet advertisement's ability to be seen from almost anywhere does not mean it was intended for a national or even international audience.[120]

114. *Id.*

115. *Id.* at 58–59.

116. *Id.* at 59.

117. *Id.* at 60.

118. *Id.* (Karmeier, J., dissenting) ("[Illinois] makes this change for reasons that are entirely reasonable and proper: (1) to enhance the collection of revenue *already* due under Illinois law by reducing the circumstances in which payment of the tax is left to individual purchasers or consumers who may neglect or refuse to remit what they owe to the Department of Revenue, and (2) to ameliorate the competitive disadvantage suffered by existing Illinois retailers and servicemen who must *already include* use and service use taxes in the amount they charge their customers and then take responsibility for remitting the tax to the state.") (emphasis added).

119. *Id.* at 60–61.

120. *Id.* at 68. There is no reason to treat online methods of targeting Illinois consumers differently than when they use broadcast or print media to achieve the same goal. In fact, it must be done out of fairness, since those who use offline retailers are "obliged to collect and remit use tax *no matter how small their sales are.*" *Id.* at 68 n.3 (emphasis added).

D. Did the Illinois Supreme Court Sidestep an Important Issue?

It was imperative that the Illinois Supreme Court proceed with the Commerce Clause argument in its opinion since "[r]ecurrence of the commerce clause issue is highly likely"[121] as e-commerce continues to grow. This argument was bolstered by ITFA's expected expiration in December 2014.[122] If the ITFA was not renewed in December and "the moratorium imposed by the federal law [was] lifted, Public Act 96-1544 [and any other similar state laws would] be revived and reinstated without the need for any express reenactment by the legislature."[123] With the recent New York Court of Appeals decision in *Overstock.com*,[124] the Illinois Supreme Court missed an ample opportunity to add to the body of case law under the *Quill* framework.[125] The court should have taken this opportunity to analyze the case using the perhaps outdated *Quill* framework or to once again call upon Congress to make a rule for the entire nation.

III. The Marketplace Fairness Act of 2013: The Hero for Businesses and States Alike?

The U.S. Supreme Court in *Quill* praised the bright-line rule because it firmly establishes the bounds of legal authority,[126] reduces litigation,[127] and encourages investments when there are settled business expectations.[128] However, in the twenty-two years since *Quill*, it seems that it has not accomplished its purpose. An economy has developed where the players are both large and invisible,[129] and continuing to use a physical presence test will

121. *Id.* at 64.

122. Internet Tax Freedom Act, Pub. L. No. 105-277, § 1101, 112 Stat. 2681–719, 719 (1998) (current version at 47 U.S.C. § 151) (stating that it is a moratorium, not a ban, on taxing Internet services). Lamar Whitman, *Internet Tax Freedom Act Temporarily Extended*, TECHAMERICA (Sept. 19, 2014), http://www.techamerica.org/internet-tax-freedom-temporarily-extended/ (reporting that Congress extended the deadline from November 1, 2014 to December 11, 2014 in order to allow MFA supporters more time to advocate for joining the passage of the ITFA and the MFA bills together).

123. *Performance Mktg.*, 998 N.E.2d at 64 (Karmeier, J., dissenting).

124. Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 626 (N.Y. 2013) ("The bottom line is that if a vendor is paying New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden.").

125. Hogan, *supra* note 52, at 32.

126. Quill Corp. v. North Dakota, 504 U.S. 298, 315 (1992).

127. *Id.*

128. *Id.* at 316.

129. Owen, *supra* note 50, at 232 ("This is inherently a commercial market where the players

not produce ideal results.[130] In this economic climate, it is time to recognize that "a store is a store."[131] The Court in *Quill* reminded the nation that Congress has the right to decide "whether, when and to what extent" the states can collect use taxes.[132]

Congress has unequivocal power under the Commerce Clause to enact legislation that binds all states under a uniform regulatory regime.[133] However, with relative inaction from Congress[134] and states muddying the waters with their own solutions,[135] the time is ripe for a sweeping act by the federal government. Congress can become the hero in this story by using the Commerce Clause to make rules to regulate this interstate Internet commerce. The MFA[136] could be the answer to all questions concerning preemption, discrimination, and the unification of a long-term system. The MFA would answer the concerns regarding the disadvantages, or more bluntly, discrimination, that brick-and-mortar stores face by allowing states to tax all purchases by their residents, including those made outside the state's jurisdiction.[137]

A. Why the Internet Tax Freedom Act is Not Enough

In 1998, Congress passed the ITFA, calling for a three-year moratorium on taxing Internet access or applying multiple or discriminatory taxes on e-commerce.[138] In 2001, the Internet Tax Nondiscrimination Act extended the

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are largely disembodied, free from the typical constraints of retail businesses pertaining to location, overhead costs, and advertising reach.").

130. *Id.*

131. *Id.* at 239.

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

133. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978).

134. Congress has introduced, but not enacted, any proposals. *See* Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. (2007); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. (2005); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. (2003); Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001).

135. Hogan, *supra* note 52, at 32 ("Despite the high court's invitation, Congress has been unable or unwilling to address the issue for the last 20 years."); *Marketplace Fairness Act Questions*, MFA, http://marketplacefairness.org/questions-and-answers/ (last visited Nov. 21, 2014) ("Congress has been debating solutions for more than a decade, and some states have been forced to take action on their own, leading to greater confusion and further distorting the marketplace.").

136. Marketplace Fairness Act of 2013, S. 336, 113th Cong. (as amended and passed by Senate, May 6, 2013).

137. Dan Kedmey, *We Won't Have an Internet Sales Tax Any Time Soon*, TIME (Nov. 12, 2014), http://time.com/3580835/internet-sales-tax/.

138. Internet Tax Freedom Act, Pub. L. No. 105-277, § 1101(a)(2), 112 Stat. 2681–719, 719 (1998) (current version at 47 U.S.C. § 151 note)

ITFA for two more years.[139] In 2004, Congress expanded the definition of Internet access[140] and extended the moratorium for another three years.[141] In 2007, the Internet Tax Freedom Act Amendments Act of 2007 extended the ITFA yet again to 2014.[142]

When Congress enacted the Internet Tax Freedom Act, it clarified in the Act that

> nothing in this [Act] shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act.[143]

While another extension of the moratorium seems likely given its past five extensions,[144] the law will expire in September 2015[145] and if for some reason it is not, preemption will no longer be a viable argument in use tax litigation. As the dissent in *Performance Marketing* emphasized, "How [the Illinois Supreme Court] was going to resolve the issue was therefore a matter of considerable interest, concern, and significance"[146] and it was unfortunate that the court chose to analyze the case only on preemption grounds.[147] Thus, Congress must boldly unite the nation rather than allowing a patchwork of conflicting state and local legislation to exist.

B. What is the Marketplace Fairness Act of 2013?

The MFA would grant a state the authority to "compel online and catalog retailers ("remote sellers"), no matter where they are located, to

139. Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, § 2, 115 Stat. 703 (2001) ("Section 1101(a) of the Internet Tax Freedom Act is amended by striking '3 years after the date of the enactment of this Act' and inserting 'on November 1, 2003.'").

140. Conroy & Tower, *supra* note 2, at 748.

141. Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, § 2(a), 118 Stat. 2615 (2004) ("No State or political subdivision thereof may impose any of the following taxes during the period beginning November 1, 2003, and ending November 1, 2007: . . . Multiple or discriminatory taxes on electronic commerce.").

142. Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, § 2, 121 Stat. 1024 (2007) ("The Internet Tax Freedom Act is amended—(1) in section 1101(a) by striking '2007' and inserting '2014', and (2) in section 1104(a)(2)(A) by striking '2007' and inserting '2014.'").

143. Internet Tax Freedom Act, § 1101(b).

144. John Eggerton, *Permanent Internet Tax Freedom Act Reintroduced*, MULTICHANNEL NEWS (Jan. 10, 2015), http://www.multichannel.com/news/policy/permanent-internet-tax-freedom-act-reintroduced/386816.

145. *Id.*

146. Performance Mktg. Ass'n, Inc. v. Hamer, 998 N.E.2d 54, 62 (Ill. 2013) (Karmeier, J., dissenting).

147. *Id.*

collect sales tax at the time of a transaction—exactly like local retailers are *already* required to do."[148] For example, if a customer, living in State A bought something from Amazon.com and Amazon did not have a warehouse or another presence in State A, Amazon.com would still have to collect a sales tax on behalf of State A.[149] This would level the playing field between Internet retailers and brick-and-mortar retailers, who are required to charge sales tax at the time of purchase.[150]

In order to be granted this taxing authority, a state will have to simplify its tax laws, which can be done in two ways: either by becoming a "Member State" under the SSUTA[151] or by meeting the five designated simplification mandates, which include: (1) notifying retailers in advance of any rate changes within the state; (2) designating a single body to handle sales tax registration, filings, and audits; (3) establishing a uniform sales tax base throughout the state; (4) using destination sourcing to determine sales tax rates for out-of-state purchases; and (5) providing retailers free software for managing sales tax compliance.[152] The MFA seems to endorse becoming a Member State under the SSUTA because there are more grueling requirements when a state chooses to simplify its taxing regime on its own.[153]

C. Why the MFA Is an Efficient and Necessary Piece of Legislation

1. Easing the Administrative Burden on Both States and Businesses

The MFA's purpose is to "[r]estore States' sovereign rights to enforce State and local sales and use tax laws,"[154] inferring that its drafters believed that the U.S. Supreme Court had infringed on those rights by creating a

148. *What is the Marketplace Fairness Act of 2013?*, MFA, http://marketplacefairness.org/what-is-the-marketplace-fairness-act/ (last visited Nov. 25, 2014) (emphasis added); Marketplace Fairness Act of 2013, S. 336, 113th Cong. § 2(a) (2013).

149. Kelly Phillips Erb, *Internet Tax Ban Ending Soon*: *Speaker Boehner Hopes to Keep Internet Tax Free*, FORBES (Nov. 12, 2014), http://www.forbes.com/sites/kellyphillipserb/2014/11/12/internet-tax-ban-ending-soon-speaker-boehner-hopes-to-keep-internet-tax-free/.

150. *Id.*

151. *See supra* Part I.C.2.

152. *What is the Marketplace Fairness Act of 2013?*, *supra* note 148 (emphasis added). S. 336, § 2(b)(2).

153. Once becoming a Member State, that state could exercise its taxing authority as soon as 90 days after it publishes notice of their intent to exercise this authority. S. 336, § 2(a). If not a Member State, that state may only exercise its taxing authority six months after they meet the five simplification mandates. *Id.* § 2(b).

154. S. 336.

physical presence minimum for remote sellers.[155] However, it is important to remember that a state is not as strong when it acts alone as when it is banded with the other forty-nine when addressing important issues such as interstate commerce.[156] If Congress supported state enforcement to collect taxes, the states would be able to begin recovering that lost revenue.

This legislation will help big companies have predictability in their business plans in terms of knowing how much they will be taxed, and more importantly, where they will be taxed. Even Amazon, the company that likely created opposition against the MFA and fought "hard against an online sales tax for years . . . has now changed tack and argues in favor of enforcing sales taxes."[157] It is practical for a company as big as Amazon to see the benefit of supporting federal legislation as opposed to having to strike deals with all fifty states individually.[158] The proposition is simple: If a company is going to be subject for being present in a state, why not have a bigger, and more powerful presence?[159]

2. Collecting Lost Revenue Rightfully Owed to the States

While political conservatives complain about yet another suggestion of a tax increase,[160] this Comment stresses that the MFA does not impose a new tax.[161] Payment of sales tax for online purchases is already mandated by most

155. Peter G. Stathopoulos, *State Taxation of Remote Sellers: Has the Physical Presence Nexus Test Been Rendered Obsolete?*, J. MULTISTATE TAX'N & INCENTIVES 23, 25 (Aug. 2013). The Constitution states that "powers not delegated to the United States by Constitution . . . are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

156. Griffiths, *supra* note 1, at 679.

157. Mullin, *supra* note 14; Jennifer Liberto, *Amazon and EBay Brawl Over Web Sales Tax*, CNNMONEY (Dec. 2, 2011), http://money.cnn.com/2011/11/30/technology/onlines_sales_tax/ ("After years of fighting all efforts to tax its sales, Amazon recently reversed course and said it would support a 'simple, nationwide system of state and local sales tax collection.' The company appears to have decided that it can't fend the states off forever—and that it's better positioned than its rivals to survive the tax hit.").

158. Kelly Phillips Erb, *More States Eye Amazon Sales Tax Deal*, FORBES (Sept. 18, 2011), http://www.forbes.com/sites/kellyphillipserb/2011/09/18/more-states-eye-amazon-sales-tax-deal/ ("[A]ny deal that is struck in D.C. will be generally more favorable to Amazon than the individual states would/could provide.").

159. Kelly Phillips Erb, *Amazon Sees Silver Lining With Sales Tax Collection*, FORBES (Sept. 12, 2012), http://www.forbes.com/sites/kellyphillipserb/2012/09/12/amazon-sees-silver-lining-with-sales-tax-collections/ ("Amazon's CEO, Jeff Bezos, has figured out that if the company is going to be subject to sales tax anyway for having a presence, why not have a bigger presence?").

160. Jopson, *supra* note 5 ("Many conservatives—who exert a powerful influence on House Republican leaders—have complained that the bill amounts to a new tax and would expand states' authority by enabling them to collect tax via online businesses in other jurisdictions.").

161. Mullin, *supra* note 14; *Marketplace Fairness Act Questions*, *supra* note 135 ("Consumers are required under existing state laws to pay sales and use taxes on the goods they purchase, but online

states but, when the burden is on the purchasing consumer, it rarely gets paid.[162] This legislation is necessary to ensure that state revenue is actually collected, since it has been so inadequately enforced in the past. This is money the states' budgets depend on to expand, reform, and modify their provided benefits for citizens. The MFA provides an alternative, and likely more effective, way to collect what is properly owed to the states. [163]

Simply put, all tax systems assume some degree of voluntary compliance.[164] Specifically, remittance, which is how use taxes are collected, assumes some degree of self-assessment.[165] The problem has two possible sources: people are either consciously ignoring it since it is ill enforced or are unaware that they have to pay such a tax. If a consumer is given the choice of two products, one on which they have to pay sales tax in a brick-and-mortar store and one that is purchased online without sales tax, the consumer will probably pick the latter in order to avoid the tax.[166] What is important to remember is that "[w]hile many consumers purchase products online for better deals, remote sellers only use a façade of lower prices."[167] With more awareness, more individual consumers will realize that they have not received tax-free products, but rather they had broken the law.[168]

A more innocent reason for not reporting an accurate amount of use tax is that since the tax "typically involves small amounts owed on a large number of transactions for which the individual has not kept records,"[169] it becomes almost impossible to enforce. Paying one's taxes is a decision based in uncertainty due to the fact that a "failure to report one's full income to the tax authorities does not automatically provoke a reaction in the form of a penalty."[170] The taxpayer has two choices:

sellers simply are not required to collect the tax . . . . Consumers can be audited and charged with penalties for failing to pay sales and use taxes, but too often states are unable to enforce this requirement.").

162. Mullin, *supra* note 14.

163. *See* Stathopoulos, *supra* note 155, at 47 ("The strongest argument in support of the [MFA] is that it allows states to prevent a significant and growing erosion to their sales/use tax revenues. Many states rely heavily on sales and use taxes in their budgets.").

164. Conroy & Tower, *supra* note 2, at 749.

165. *Id.*

166. Michael R. Gordon, *Up the Amazon Without a Paddle: Examining Sales Taxes, Entity Isolation, and the "Affiliate Tax*,*"* 11 N.C. J.L. & TECH 299, 316 (2010).

167. Griffiths, *supra* note 1, at 658.

168. *Id.* at 679.

169. MANZI, *supra* note 21, at 4.

170. Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 324 (1972).

> (1) He may declare his actual income. (2) He may declare less than his actual income. If he chooses the latter strategy his payoff will depend on whether or not he is investigated by the tax authorities. If he is not, he is clearly better off than under strategy (1). If he is, he is worse off. The choice of a strategy is therefore a non-trivial one.[171]

Applying this theory to use tax payments, most taxpayers are able to avoid remitting their rightfully owed use taxes because it is, simply, not enforced well.[172] But why would anyone pay taxes if they know they can "get away with it"? Taxpayers might pay into the tax regime to benefit the common good,[173] because of their duty to finance the government,[174] and even because of their personal concepts of morality.[175] Regardless of whether it is out of conscious disregard, innocent or calculating, or lack of being informed, the MFA can effectively collect the revenue by taking it out of the consumer's realm of responsibility.

3. Eliminating Advantages in the Marketplace by Placing the Same Requirements on Small and Large Business Alike

Companies like eBay have argued that only large retailers, like Amazon, already have the infrastructure in place to begin collecting and to remit sales and use taxes. The opposition notes that this kind of legislation would hurt and stifle small businesses and sporadic sellers.[176] This discrepancy between large and small sellers compels a need for a bright-line rule through federal legislation that will determine which businesses are big enough to be subject to the state's taxation.[177] However, there is an exemption in the MFA for remote sellers that have no more than $1 million in gross receipts.[178] This would allow small sellers, such as those on eBay or Etsy, from being subject to tax collection.[179] While some might say that this is discriminatory against large business, it is impossible to ignore that a large company, like Amazon,

171. *Id.*

172. Conroy & Tower, *supra* note 2, at 749.

173. *Id.* at 749–50.

174. *Id.* at 750.

175. *Id.* For a more in-depth discussion about what types of regulatory regimes work for particular types of taxpayers, see Conroy & Tower, *supra* note 2.

176. Liberto, *supra* note 157.

177. Owen, *supra* note 50, at 244.

178. Marketplace Fairness Act of 2013, S. 336, 113th Cong. § 2(c) (2013).

179. Sales tax is not even addressed on these websites, "as the entire concept is more of an online garage sale than that of an ongoing business that is making a consistent stream of income." Owen, *supra* note 50, at 244.

should pay that much more.[180] This is already similar to the federal progressive income tax rate,[181] which implements higher tax rates for higher levels of income.[182]

D. A Minefield of Political Opposition

In 2013, the then-Democrat-controlled Senate passed the MFA, but it did not pass in the Republican-controlled House of Representatives.[183] The bill is widely supported, with ten bipartisan senators, twenty-six governors, a large number of national and local trade associations, and businesses of all sizes calling for the need for a federal sales tax.[184] But the future of this promising bill seems bleak in the wake of the Republican Party controlling both the Senate and House of Representatives.[185] In December 2014, Speaker of the House John Boehner stated, "[H]e has significant concerns about the bill, and it won't move forward [next] year."[186] If a majority of U.S. states were members of the SSTP, then Congress might feel pressure to enact legislation that would authorize full implementation.[187] Unfortunately, such pressure does not currently exist.

There is some hope within a new Republican Congress. Republican Chairman of the House Judiciary Committee Bob Goodlatte, who is in charge of crafting a House version of the MFA,[188] has stated that he is working on improving the language in the Senate-passed bill in order to appease both the brick-and-mortar retailers and Internet retailers that have previously opposed the bill.[189] Also, Republican Congressman Jason Chaffetz plans to release legislation in 2015 that will address the concerns

180. *Id.* at 243.

181. *Id.*

182. I.R.C. § 1(a)(2) (2012) (assigning different tax rates depending on how much income an individual earns within a given taxable year).

183. Kedmey, *supra* note 137; Mullin, *supra* note 14 ("Last year, the Senate passed the Marketplace Fairness Act on a 69-27 bipartisan vote.").

184. *Who Supports the Marketplace Fairness Act?*, MFA, http://marketplacefairness.org/support/ (last visited Mar. 23, 2015) (listing the different individual supporters of the Marketplace Fairness Act of 2013).

185. Kedmey, *supra* note 137.

186. Mullin, *supra* note 14.

187. Griffiths, *supra* note 1, at 673.

188. Rachael Bade, Kelsey Snell & Brian Faler, *2015—The Year Ahead in Tax Policy*, POLITICO (Jan. 2, 2015), http://www.politico.com/story/2015/01/2015-tax-policy-113929.html.

189. *Id.* ("He was not happy with the Senate bill and was working to hone the language to satisfy both brick-and-mortar retailers like Wal-Mart that backed the bill and nationwide Internet retailers like eBay that have fought the bill every step of the way.").

that the MFA will put an excessive burden on smaller businesses.[190] MFA proponents will have to start over through the legislative process in the 114th session of Congress[191] since the existing legislation is invalidated at the end of the 113th Congress.[192]

Conclusion

In *Quill*, Justice White commented that in our advancing and expanding economy, physical presence is becoming irrelevant in terms of the taxability of a transaction.[193] Despite being decided over twenty years ago and becoming unquestionably outdated, *Quill* remains the law as applied to e-commerce. As society's dependence on e-commerce is only set to grow, the states need a piece of federal legislation to combat these "invisible giants" and reclaim their sales and use tax revenue. In the end, the fundamental measure of whether the MFA or any other approach is successful is by bringing in more revenue.[194] The MFA is not new legislation by any means,[195] but it is the most recent opportunity to use Congress's unequivocal power[196] to guide the fifty states out of a confusing and long battle with e-commerce retailers. The Internet is no longer a novelty, but rather a powerful tool in the U.S. economy, and Internet retailers should no longer be able to skirt tax liability because of this presumed novelty. Without the MFA or similar legislation, the fifty states will continue to lose their rightful

190. *Id.*

191. Grant Gross, *Internet Sales Tax Bill Dead in Congress*, PCWORLD (Nov. 11, 2014), http://www.pcworld.com/article/2846332/internet-sales-tax-bill-dead-in-congress.html.

192. Bade, Snell & Faler, *supra* note 188.

193. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 327–28 (1992) (White, J., dissenting) ("Perhaps long ago a seller's 'physical presence' was a sufficient part of a trade to condition imposition of a tax on such presence. But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax. Wire transfers of money involving billions of dollars occur every day; purchasers place orders with seller by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business."); Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621, 625 (N.Y. 2013) ("The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet.").

194. Griffiths, *supra* note 1, at 676.

195. *See, e.g.*, Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. (2007); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. (2005); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. (2003); Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001).

196. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978) ("It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income.").

revenue due to an uneven fight with e-commerce giants.[197]

197. *What is the Marketplace Fairness Act of 2013?*, *supra* note 148 (emphasis added).