THE ENIGMA OF SALES TAXATION
THROUGH THE USE OF STATE OR
FEDERAL “AMAZON” LAWS: ARE WE
GETTING ANYWHERE?

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COMMENT

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“Taxes are what we pay for a civilized society.”

I. INTRODUCTION

In 2010, online retail sales were projected to account for approximately 7% of all retail sales in the United States. This amounts to

nearly $173 billion in online retail spending.\textsuperscript{3} In most states,\textsuperscript{4} when an online retailer sells a product into a state in which it has some physical presence, it is required to collect the sales tax on that purchase.\textsuperscript{5} Hence, a retailer, such as Wal-Mart Stores, Inc. (“Walmart”), who has both physical stores and an online store, must also collect sales taxes on sales made online.\textsuperscript{6} This is because of the close relationship between Walmart’s physical stores and Walmart.com.\textsuperscript{7} In some instances, even if the online seller and the physically based seller are separate entities, the online seller may still have to collect sales taxes on a purchase.\textsuperscript{8} However, the question then arises: What if the organization has little or no physical presence within the state seeking to impose the tax? This is the focus of this article.

For nationwide purchases of goods subject to the sales or use tax in the United States, it is estimated that in 2011 total sales taxes due equated to nearly $41 billion, with over $10 billion going uncollected.\textsuperscript{9} For example, in states such as California, the total projected losses from uncollected use taxes were nearly $1.7 billion for 2011.\textsuperscript{10} In Idaho, the total losses from uncollected use taxes were projected to be over $40 mil-

\textsuperscript{3} Id.

\textsuperscript{4} There are currently forty-five states that have a sales tax, and as a general principle, entities with a physical presence are required to collect and remit a sales tax on purchases shipped into those states. See infra Part II.A for a discussion on the sales and use tax system and infra Part II.B.3 for a discussion on the physical presence requirement.

\textsuperscript{5} See, e.g., IDAHO CODE ANN. § 63-3615A (2011), which states:

(1) . . . a retailer has substantial nexus with this state if both of the following apply:

(a) The retailer and an in-state business maintaining one (1) or more locations within this state are related parties; and

(b) The retailer and the in-state business use an identical or substantially similar name, trade name, trademark or goodwill to develop, promote or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting or maintaining the in-state market.


\textsuperscript{7} See id.

\textsuperscript{8} A good example of this is in the seminal case Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176 (1st Dist. 2005). Here, Borders Online challenged the Board’s determination that Borders Online must pay sales tax on nearly $1.5 million in sales shipped into California on the basis that the traditional brick-and-mortar Borders was an entity separate from Borders Online and was not their representative operating in the state. The Court agreed with the Board.


\textsuperscript{10} Id.
lion for 2011.\textsuperscript{11} In times of economic downturn, states are in need of funding more than ever.\textsuperscript{12} However, even if we disregard the massive state budgetary shortfalls, unequal treatment of sales taxation puts traditional “brick-and-mortar” stores\textsuperscript{13} at a disadvantage when compared to their competitors who are outside the reach of state sales taxation.\textsuperscript{14} Many such brick-and-mortar stores have aggressively fought against entities such as Amazon.com, Inc. (“Amazon”),\textsuperscript{15} in an attempt to end this unequal treatment.\textsuperscript{16} Some have even taken their concerns to court in an effort to force the states to require Amazon to collect the sales tax just as they do.\textsuperscript{17}

So what is the solution? No one is quite sure. But because Congress has been either unable or unwilling to pass legislation addressing this issue,\textsuperscript{18} some states have taken matters into their own hands. The result is enactment of so-called “Amazon Laws,”\textsuperscript{19} which are used to obtain the requisite connection in order to require collection of the tax.\textsuperscript{20} However,
companies like Amazon, Overstock.com, Inc. (“Overstock”), and many others have called into question the constitutionality of these laws.\textsuperscript{21}

With these issues in mind, the purpose of this article is to: (1) explain the structure of the Amazon Laws in those states that have taken the most action to curb non-collection; (2) examine the constitutionality of such laws as criticized and supported by prominent tax professionals; (3) briefly discuss other potential methods of acquiring the revenue from sales from which the use tax goes uncollected; and (4) address what other states, and ultimately Congress, can do to tax these purchases, while at the same time meeting constitutional requirements. Part II offers a general background on state sales taxation. Part III examines states’ attempts to compel tax collection, including both California and New York. Part IV addresses what can be done to ease the burdens typically imposed by state Amazon Laws. Finally, Part V addresses the most likely outcome in the current legal atmosphere and broadly suggests the next steps toward what should happen to make sales tax collection easier for the states and online retailers alike.

II. BACKGROUND ON STATE SALES TAXATION

A. The Sales and Use Tax System

In those states that have a sales tax, sales taxes are levied on the purchase of tangible personal property within a state.\textsuperscript{22} Forty-five states (and the District of Columbia) currently have a state sales tax.\textsuperscript{23} In 2008, states raised approximately 31% of their tax revenue from the general retail sales tax.\textsuperscript{24} However, in some states, the sales tax constituted as much as 46% of their tax revenue.\textsuperscript{25} There is no federal counterpart to the state sales tax in the United States. As such, states have come to view the sales tax as being in their “exclusive domain” and strongly oppose restrictions placed on their taxing powers.\textsuperscript{26}
Use taxes are a backup to a sales tax and aim to simulate a sales tax had the item been purchased in the state. These taxes are “levied upon the use, storage, or consumption of tangible personal property within the state if such property had not already been subject to the state’s sales tax.” Generally, state law requires the use tax to be paid regardless of whether the item was purchased in the state. The economic burden of paying the tax is directly on the purchaser/resident. Interestingly enough, some state statutes even prescribe criminal penalties for failure to pay the tax. However, very few people who owe the use tax actually pay it.

What is the difference between a sales tax and a use tax? One tax professor, Mark J. Cowan, has explained it in this way:

Assume State A has a 5% sales tax, and State B has no sales tax. State A’s sales tax extends to the purchase of televisions in the state. If Taxpayer, who resides in State A, buys a television in State B, the State A sales tax cannot apply because the sale took place outside of State A’s jurisdiction. Taxpayer takes the television back to State A and uses (or stores) it in his home. Taxpayer now owes State A a use tax equal to the State A sales tax he would have paid had he purchased the television in State A. In this way, Taxpayer is not able to avoid the impact of the State A sales tax merely by shopping in State B. Similarly, if Taxpayer purchases the television from an online retailer with no connection to State A, under current law the online retailer would not collect the State A sales tax. Upon using or storing the television in State A, however, Taxpayer would owe a use tax equal to the sales tax that had not been collected by the online retailer.

Thus, the use tax treats the newly purchased item as if the item was purchased in the state in which it is used.

But what if both State A and State B have a sales tax? One may think that a sales tax and a use tax may lead to double taxation; the sale being taxed in one state (as a sales tax), and then taxed again in

27. Id. at 6-36.
28. For example, the relevant Idaho statute specifies that “[e]very person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the [use] tax.” IDAHO CODE ANN. § 63-3621(a) (2011) (emphasis added).
29. See id.
30. E.g., IDAHO CODE ANN. § 63-3621(g) (providing that “[a]ny person violating any provision of this section is guilty of a misdemeanor and punishable by a fine not in excess of one hundred dollars ($100), and each violation shall constitute a separate offense.”).
31. POMP, supra note 24, at 6-38. Note that a failure to pay the use tax may be due, at least in part, to taxpayer ignorance. Colorado has attempted to address this issue by requiring the seller to notify the resident of the obligation. See COLO. REV. STAT. § 39-21-112(c)(1)(C) (2011); see also infra Part III.D.
the state in which it is used (as a use tax). However, states that administer a sales or use tax generally give the taxpayer a credit up to the amount of tax that the state would normally require. Hence, as long as the sales tax rate in State B (state of purchase) is equal to or greater than the rate in State A (state of use), no additional tax is due. If however, the rate in State B is less than the rate in the State A, the difference owed would be the use tax.

In the e-commerce world, a large portion of online sales is not subject to a sales tax at the retailer level, and the use tax goes unpaid by the consumer. The inability of states to collect a sales or use tax is what led to the enactment of Amazon Laws in an attempt to compel “e-tailers” to do the state’s bidding and collect a sales tax. But, before a state can require any retailer to collect the tax from a purchaser, a number of constitutional requirements must first be satisfied.

B. Constitutional Requirements and Restraints on State Taxation

In order for a state to assert its power to impose a sales tax collection responsibility on a retailer, two constitutional requirements must be met: due process nexus under the Fourteenth Amendment and Commerce Clause nexus under the negative, or dormant component of the Commerce Clause. Both requirements were addressed by the United States Supreme Court in Quill Corporation v. North Dakota.37

1. Illustration: Quill Corporation v. North Dakota

Quill Corporation was a supplier of office equipment and supplies. It conducted its sales by catalog via common courier. Quill had essentially no tangible assets or employees in North Dakota (although the state disposed of twenty-four tons of Quill’s catalogs and flyers each year). Quill was also the sixth largest vendor of office supplies in the state, with revenues of approximately $1 million. Quill appealed the North Dakota Supreme Court’s decision, which held that Quill was required to collect and remit sales taxes on products shipped into North

33. E.g. Idaho Code Ann. § 63-3621(j) (2012); see Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶¶18.08[1]–[2] (3d ed. 2009) (explaining how each state with a sales tax gives a credit for taxes paid in other states and how there is a constitutional obligation to provide such a credit).
34. “E-commerce” is the phrase used to describe “the online transaction of business.” What is E-Commerce, EXPORT.GOV (last updated Nov. 3, 2009), http://export.gov/sellingonline/eg_main_020761.asp.
35. An “e-tailer” is simply an online retailer that conducts business entirely online.
38. Id. at 302.
39. Id.
40. In one footnote, the Court recognized that Quill also had “a few floppy diskettes” within the state. See id. at 315 n.8.
41. Id. at 302.
42. Id.
Dakota. This holding hinged on whether there was sufficient due process nexus and Commerce Clause nexus. The North Dakota Supreme Court held that both due process and Commerce Clause nexuses were met. In so doing, however, the Court disregarded what it saw as “obsolescent precedent” because of the “tremendous social, economic, commercial, and legal innovations since 1967.” As discussed infra, on appeal the United States Supreme Court found that the North Dakota Supreme Court’s holdings were incorrect. Although Quill’s activities met the general due process nexus requirements, because Quill had an insignificant physical presence in North Dakota, there was no Commerce Clause nexus. As such, North Dakota could not require Quill to collect a sales or use tax.

2. Due Process Nexus under the Fourteenth Amendment

Generally the due process nexus requirements follow the ordinary personal jurisdiction requirements, which examine the connection between an out-of-state entity, and the state seeking to regulate that entity’s conduct. As explained by the United States Supreme Court, “[t]he Due Process Clause ‘requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’” The Supreme Court has further explained that due process also requires that the “income attributed to the State for tax purposes [be] rationally related to [the] ‘values connected with the taxing state.’” In sum, due process nexus requires notice and fair warning to a person or entity that they are subject to a state tax.

Although it was once important, the Supreme Court has determined that due process may be satisfied even if the entity is not physically present in a taxing state. What matters is that “a defendant’s contacts with the forum [state are] reasonable, in the context of our fed-

43. Id. Twenty-five years before Quill was decided, in Nat’l Bellas Hess v. Dept of Revenue of Ill., the Supreme Court addressed this same issue. 386 U.S. 753 (1967). Bellas Hess had no property, employees, or other contacts with the state. The Court decided that because Bellas Hess’s only connection with customers in the state was by common carrier or the United States mail, the retailer lacked the requisite minimum contacts with the state to satisfy the Dormant Commerce Clause nexus requirement. Id. at 758. The Court determined that when a vendor’s only connection was by mail or common carrier, the Commerce Clause nexus requirement could not be met. See id. at 759–60; see also Quill, 504 U.S. at 311. The Quill court decided that as to the Dormant Commerce Clause nexus, National Bellas Hess is still good law. Id. at 314, 317–18.
45. Id. at 208.
46. Quill, 504 U.S. at 306 (citing Miller Bros. v. Maryland, 347 U.S. 340, 344–45 (1954)).
48. Quill, 504 U.S. at 313.
49. Id. at 307.
eral system of Government, to require it to defend the suit in that State.”

This means that “if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s [personal] jurisdiction even if it has no physical presence in the State.”

In *Quill*, the Court determined that because Quill had been advertising its products in, and mailing its catalogs to, North Dakota, these activities easily met the due process nexus requirement. The analysis does not stop there. Just because an entity meets the due process nexus requirement based on economic presence, does not mean its presence automatically meets the other nexus requirement under the Dormant Commerce Clause.

3. Dormant Commerce Clause Nexus and the Physical Presence Requirement

The Commerce Clause “says nothing about the protection of interstate commerce in the absence of any action by Congress.” The Supreme Court has interpreted it to include a negative or dormant component. This component “by its own force’ prohibits certain state actions that interfere with interstate commerce,” This is the part of the Commerce Clause that limits the power of the states to impede commerce, even if Congress has not specifically taken a position on the situation.

To be valid under the Dormant Commerce Clause, a tax must satisfy each prong of the four-prong test from *Complete Auto Transit*. There, the court had to determine whether a state could assert its powers to tax an interstate entity. Its outcome resulted in a four-prong analysis of whether a state can impose taxing restrictions. The first prong is the most important for our analysis. It requires a substantial nexus—a sufficient connection between the state and the taxpayer.

The other three prongs require that a tax: be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services the state is providing (e.g. right to use roads, access to hospitals, hospitals,

50. *Id.*
51. *Id.* at 307–08 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985): “So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”
52. *Quill*, 504 U.S. at 308.
53. The Commerce Clause states that “[t]he Congress shall have power . . . [t]o regul- late commerce with foreign nations, and among the several states, and with the Indian Tribes.” U.S. CONST. art. I, §8 cl. 3.
54. *Quill*, 504 U.S. at 309.
55. *Id.*
56. *Id.* (quoting S.C. State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185 (1938)).
58. *Id.* at 274–75.
59. *Id.* at 277–78.
60. *Id.*
Generally, e-tailers challenging an Amazon Law do not dispute the last three prongs of the test. Rather, the primary attack on Amazon Laws lies with the nexus requirement.

Concerning the first prong of Complete Auto Transit, the Quill Court stated that “a vendor whose only contacts with the taxing State [is] by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.” The Court determined that although some facts are sufficient to meet the due process nexus requirement (where no physical presence is required), it does not necessarily mean that those same facts will satisfy the Commerce Clause nexus requirement.

In so doing, the Court upheld prior precedent and reaffirmed that some kind of physical presence was necessary to satisfy the demands of the Commerce Clause nexus.

Of this precedent, one such case was extensively quoted and cited in Quill. In National Geographic Society v. California Board of Equalization, National Geographic operated a mail-order business, whereby customers could order books, maps, atlases, and other goods via catalog, and the goods would be shipped from out of state via common carrier. National Geographic had offices in California that had nothing to do with its mail-order business, except for soliciting advertising for the Society’s monthly magazine. The Board argued that National Geographic should have collected sales tax on orders shipped into California from its mail-order activity. The Supreme Court agreed. This outcome turned on whether the offices, although unrelated to the activity that the state was seeking to tax, provided a sufficient nexus between the out-of-state seller and the state. In addressing the question of how much physical presence was enough to create Commerce Clause nexus, the Court recognized that something more than the “slightest presence” is required.

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61. Id.
62. This is the case for most Amazon Laws, such as those found in New York or Illinois. However, this general proposition may not accurately extend to Colorado’s law. See infra Part III.D (discussing a challenge to the constitutionality of Colorado’s reporting requirements, including the third prong of Complete Auto discrimination against interstate commerce).
64. Id. at 312–13 (stating that “the ‘substantial nexus’ requirement is not, like due process ‘minimum contacts’ requirement, a proxy for notice but rather a means for limiting state burdens on interstate commerce.”). See Tyler Pipe Indus. v. Wash. State Dep’t of Revenue as an example of when due process nexus was met but that the state’s actions still unduly burdened interstate commerce. 483 U.S. 232 (1987).
65. See Quill, 504 U.S. at 314–16.
67. Id. at 552.
68. Id.
69. Id. at 562.
70. Id.
71. Id. at 554.
72. Id. at 556.
Ultimately, the Court held that National Geographic’s two offices and regular solicitation within California “establish[ed] a much more substantial presence than . . . ‘slightest presence’ connotes.”\footnote{Id.} Thus, when an entity simply has employees and office buildings within a state, the physical presence is more than enough to satisfy Commerce Clause requirements.\footnote{Id.}

What happens when an entity has no employees or office buildings in the state seeking to impose a collection responsibility? What if the only presence an entity has are independent contractors who are in the state to solicit sales? The Supreme Court held over fifty years ago in \emph{Scripto, Inc. v. Carson} that even those relationships constitute a sufficient physical presence.\footnote{Scripto, Inc. v. Carson, 362 U.S. 207 (1960). Note that although \emph{Scripto} was decided much earlier than both \emph{Complete Auto} and \emph{National Bellas Hess}, it is still good law. The \emph{Quill} court’s discussion also involved examination of \emph{Scripto}. \textit{See Quill}, 504 U.S. at 315.}

\emph{Scripto} was a Georgia-based corporation that manufactured and sold mechanical pencils.\footnote{Scripto, 362 U.S. at 207–08.} Some of these pencils were sold and shipped to customers who lived in Florida.\footnote{Id. at 208.} All of \emph{Scripto’s} advertising, however, was conducted by \emph{Scripto’s} specialty advertising division, Adgif.\footnote{Id.} In Florida, Adgif did not own, lease or maintain any property: own any bank accounts; or have any employees or agents.\footnote{Id. at 208–09.} Adgif’s only “presence” in Florida was ten independent contractors, called “jobbers,” with whom the company contracted to solicit orders.\footnote{Id. at 209.} The jobbers were paid a commission for sales they made.\footnote{Id.} However, the contractors were not allowed to collect money or incur debts for the company, all orders were placed through an office in Georgia, and all commissions were paid directly by the company.\footnote{Id.} In analyzing these activities, the Court specifically recognized that the jobbers were “not regular employees . . . devoting full time to [the company’s] service” but ultimately determined that the distinction between employee and independent contractor is constitutionally insignificant.\footnote{Id. at 211.} In its holding, the Court determined that there was a constitutionally sufficient connection between Adgif (and ultimately Scripto) and Florida due to the “nature and extent of the activities” of the company’s contractors.\footnote{Id. at 211–13 in this way, \emph{Scripto} illustrates that even when an out-of-state entity has very few contractors within a taxing state, and even when those contractors cannot collect on sales
from a customer directly, this presence within the state is still constitutionally sufficient for Dormant Commerce Clause purposes.

The Quill court, relying on National Geographic, Scripto, and other precedent, determined that Quill’s limited physical presence in North Dakota was insufficient to create a Commerce Clause nexus, upholding a bright-line rule over a more flexible one.

Viewed as a whole, the aforementioned authority suggests that there is a safe harbor for organizations wanting to avoid being caught in the net of state taxation. Under such safe harbor, if all a company does is mail catalogs into a state and use mail and common carriers to deliver products, there is no Commerce Clause nexus. This safe harbor is essentially the de minimis exception explained in Quill, and any entity with nothing more than the slightest physical presence should not be subject to collection responsibilities.

4. Aftermath of Quill?

Since Quill, the Supreme Court has yet to hear another case regarding a Commerce Clause nexus. As such, both Quill and National Geographic are still good law as neither have been preempted by Congress (yet). In response to Quill, many states have beefed up their attempts to collect use tax from consumers. Examples of such attempts include: modifying state individual tax returns to include a line item for the use tax, sending random letters to taxpayers reminding them of the use tax.

85. See supra note 43 discussing National Bellas Hess.

86. Although Quill also had a few floppy disks in North Dakota, the Court recognized that to allow this to constitute a sufficient presence would lead to a “slightest presence” standard, one specifically rejected in National Geographic. See Quill Corp. v. North Dakota, 504 U.S. 298, 315, n.8 (1992).

87. Quill, 504 U.S. at 319.

88. Id. at 315–19 (discussing National Bellas Hess’s importance and the benefits of a bright-line rule).

89. However, it is not entirely clear exactly how applicable Quill is to non-mail-order companies. Some experts suggest that there may be wiggle room with the physical presence requirement as applied to non-mail-order companies. See Hellerstein, supra note 33 at ¶19.02[3][c][vi].

90. This result is not entirely unexpected however. The Supreme Court in Quill recognized that this was an area for Congress to intervene:

[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve . . . Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.

Quill, 504 U.S. at 318.

their obligation to pay the use tax, or engaging in multi-state cooperation agreements such as the Streamlined Sales and Use Tax Agreement. However, some states are testing the limits of Quill and are passing laws that require retailers to collect the sales tax from customers, even in circumstances where there is no physical presence. This is the subject of Part III.

III. WHAT STATES ARE DOING: THE CURRENT STATUS OF THE LAW

Before considering a state’s efforts to require e-tailers to collect a sales or use tax, it is important to first understand a little more about how companies like Amazon conduct business with respect to those states in which they maintain no office, employees, or other tangible assets. It is the sheer amount of attention that Amazon has received in relation to these laws that prompted selection of Amazon as the exemplary entity used in this article. But it is also important to note that there are other e-tailers, such as Overstock, which have similar operational characteristics. After a brief look at Amazon, we will examine state Amazon Laws from New York, Colorado, and California.

A. Brief Overview of Amazon and its Business Operations

Amazon has been operating a retail Internet business since 1995. Amazon is a Delaware corporation with its corporate offices in Seattle, Washington. Today, Amazon forthrightly proclaims it is the “global leader in e-commerce.” As of December 2011, Amazon has opened and 

Note however that Washington state has no general state income tax and derives nearly half of its income from its sales and use tax. See WASH. STATE DEPT OF REVENUE, Income Tax, http://dor.wa.gov/content/findtaxes andrates/incometax/ (last visited Sept. 4, 2012); see also supra note 25 and accompanying text.

92. See NINA MANZI, USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES 8 (2010) for a Minnesota House of Representatives Policy Brief explaining how random mailings boosted use tax reporting and how one state even aired a TV commercial to remind taxpayers of the obligation.


94. Note that the main focus of this article is on those retailers that maintain a limited physical presence in the state seeking to impose a tax collection (or reporting) responsibility. This definition may also include e-tailers that have a physical presence, or a traditional brick-and-mortar establishment in very few jurisdictions but nevertheless sell products nationwide. Furthermore, this article also encompasses traditional mail-order businesses that may not necessarily sell products online.


is operating a fulfillment center, office, or subsidiary in twenty-one states, including California. Seventeen of those twenty-one states have a sales tax, yet Amazon only collects the tax in eight of them. The difference in the number of states in which Amazon has operations in relation to the number of states in which they collect a sales tax is owed, at least partially, to Amazon's ability to influence state and local legislatures. Amazon has been able to secure tax exemptions by making promises to invest in property and create jobs.

Amazon's financial success is partially due to its use of affiliates to advertise products. Generally, an affiliate can be any kind of organization—whether an individual’s blog or a large corporate network—as long as the entity has a website of some kind. The owner of the website can then choose which kind of advertising to do for Amazon, including the particular products or category of products. For example, the operator of an auto mechanics blog can choose to advertise only those products relevant to the automotive industry at Amazon.com. As a result, direct links to products in Amazon’s automotive inventory will

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98. A fulfillment center is a giant warehouse that stores Amazon merchandise for quick shipment. Mihir Dalal, Amazon to Open Second Fulfillment Center in Delaware, REUTERS.COM (Feb. 14, 2012), http://www.reuters.com/article/2012/02/14/us-amazon-istUSTRE81D0YZ20120214. Amazon also allows private merchants to send their products to Amazon and Amazon will hold them in their fulfillment centers until the product sells and then ship it out for them.


101. See, e.g., Clif LeBlanc, House OKs Amazon Deal, THE STATE, (May 19, 2011) http://www.thestate.com/2011/05/18/1824091/house-oks-amazon-deal.html (explaining Amazon’s deal with South Carolina granting Amazon a five-year exemption from collecting a sales tax in exchange for an investment of over $125 million and the creation of 2000 jobs).

102. See id.

103. See Amazon LLC v. N.Y. Dep’t of Taxation and Fin., 877 N.Y.S.2d 842, 845 (N.Y. Sup. Ct. 2009) (explaining, without disclosing total revenues, that Amazon’s “hundreds of thousands” of affiliates have generated revenue).


106. See id.
appear on the blog.\textsuperscript{107} After a customer clicks on the affiliate's link and makes a purchase, the affiliate is paid a certain percentage of that purchase.\textsuperscript{108}

To be sure of the nature of the affiliate relationship, Amazon’s Affiliate Agreement states that the affiliate and Amazon, with respect to each other, are independent contractors.\textsuperscript{109} Furthermore, the agreement may also be terminated at any time by either the affiliate or Amazon without cause.\textsuperscript{110}

Amazon also allows individuals or other entities to sell their own products through its website as a separate merchant through the Amazon storefront. In so doing, Amazon takes a percentage of the merchant’s sale and acts as the web portal for the credit card transaction.\textsuperscript{111} This relationship is not treated as an affiliate relationship. As explained, affiliate agreements involve the solicitation of sales on behalf of Amazon, without regard to whether they are actively selling inventory through Amazon’s merchant services. In contrast, in a merchant services scenario, a merchant provides the inventory of products, but relies on Amazon’s website to advertise and sell its goods. What is more, a merchant can send their product(s) directly to Amazon to be held at a fulfillment center for a fee, and Amazon will complete the shipping component of the merchant’s sale.\textsuperscript{112} Although it is not entirely clear from the Amazon merchant website, it appears that whether a sales tax is collected on the merchant (non-Amazon) sales depends on the merchant’s attributes, and not Amazon’s.\textsuperscript{113} As outlined, the crux of Amazon Laws is primarily the sufficiency of affiliate relationships. Accordingly,

\textsuperscript{107} See id.
\textsuperscript{108} See, e.g., Amazon.com Associates: Advertising Fees, AMAZON.COM, https://affiliate-program.amazon.com/gp/associates/join/landing/referralfees.html (last visited Oct. 22, 2012) (listing a schedule of advertising fees up to 15% of the sales price). Also note that it doesn't matter whether the purchase is in the category of items advertised. Advertising fees are paid on any purchase stemming from the affiliate’s link. See id.
\textsuperscript{109} Amazon.com Associates: Associates Program Operating Agreement, AMAZON.COM ¶16, https://affiliate-program.amazon.com/gp/associates/agreement/ (last visited Oct. 22, 2012). Note, however, that the agreement expressly disclaims that the affiliate is acting in any sort of agency relationship: “[N]othing in this Operating Agreement or the Operational Documentation will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between you and us or our respective affiliates.” Id.
\textsuperscript{110} Id. ¶14.
\textsuperscript{111} For example, at the beginning of this year, I sold a few textbooks on Amazon. Shortly after posting the book and its price, I received an email informing me that my item had sold (it was a very good deal) and that I needed to ship the book. Upon shipment, I received an electronic deposit in my bank account equal to the balance of the sales price, less Amazon’s approximately 12% cut for their role in the process.
this article focuses on this affiliate relationship; merchant relationships will not be considered in the analysis below.

Amazon is not alone in using affiliates to advertise its products and services: thousands of renowned organizations such as Overstock:114 eBay, Inc.:115 Eastbay, Inc.;116 and Apple, Inc.117 do as well. With this understanding in mind, we will now examine briefly what an “Amazon Law” is, and then begin our discussion of state action in this area.

B. What is an “Amazon Law”?

Broadly speaking, states passed Amazon Laws in order to require out-of-state e-commerce vendors to collect taxes on goods the vendor ships into the taxing state. Amazon Laws are sometimes referred to as “affiliate nexus taxes“ or “affiliate taxes.”118 Most involve identifying those circumstances which would lead to the imputation of physical presence by reference to an affiliate. However, many critics argue that by passing these laws, some states have stretched Quill’s physical presence requirements too far, calling into question its constitutionality.119 Nevertheless, for organizations like Amazon, which does not have traditional physical presence in more than half of the states, physical presence is instead imputed through the entity’s use of affiliates.

At least seven states have enacted, and are currently enforcing, Amazon Laws.120 Furthermore, many other state legislatures have at-

119. See id. (questioning the unconstitutionally expansive nexus standard); Edward A. Zelinsky, California’s Once and Future ‘Amazon’ Law, 62 STATE TAX NOTES 83, 86 (2011) (arguing that California’s Amazon Law is unconstitutional); Henchman, supra note 118, at 8 (questioning the unconstitutionally expansive nexus standard); but see Amazon, LLC v. N.Y. State Dept. of Taxation and Fin., 913 N.Y.S.2d 129 (N.Y. App. Div. 2010) (holding that under Quill, Tyler Pipe, and Scripto, the Amazon affiliates created sufficient physical presence to satisfy Commerce Clause nexus).
120. The states are: Arkansas, California, Connecticut, Illinois, New York, North Carolina, and Rhode Island. See Joseph Henchman, Fiscal Fact No. 276: California Becomes Seventh State to Adopt “Amazon” Tax on Out-of-State Online Sellers, TAX FOUNDATION, July 1, 2011, at 1, 4, tbl.1, available at http://taxfoundation.org/article/california-becomes-seventh-state/adopt-amazon-tax/out-state-online-sellers. Note that Colorado also has passed an Amazon Law of sorts, but it does not impose a sales or use tax collection responsibility, only a reporting responsibility. See infra Part III.D.
tempted to enact such laws but were unsuccessful. With online sales projected to grow each year, more and more states have been turning to Amazon Laws to make up for lost revenues. As of June 30, 2011, twenty-one states had considered passing such laws.

The force of these Amazon Laws has not gone unnoticed by e-tailers. Entities like Amazon have aggressively challenged each of these laws, threatened to cut all ties with affiliates in states that have enacted such laws, and in some cases have actually done so. Amazon has recognized, and continues to recognize these laws as a threat to the success of its organization and its ability to compete in the market.

With this background in mind, we will now examine the major variations of these laws. We will begin with New York’s Amazon Law, which is the most emulated law of any other state. Then we will exami-

121. Id. (showing that as of June 3, 2011, in 2011, eleven other states attempted to pass similar laws).


123. This can be seen by looking at the dates in which these statutes were enacted. In 2008, New York was the only state to successfully enact such a law. In 2009, North Carolina and Rhode Island joined the list. But in 2011, Arkansas, California, Connecticut, and Illinois passed similar laws. See Henchman, supra note 120.

124. Id. Notice that at least four state legislatures passed bills containing Amazon Laws, but later a governor or federal court struck down these laws. See id.


126. See, e.g., Scott Morrison, Amazon Threatens to Cut Affiliates in California, WALL ST. J. (Mar. 1, 2011), http://online.wsj.com/article/SB100014240527487035596 04576175023068674498.html (threatening to cut ties with over 10,000 affiliates because of the new law).


128. See AMAZON.COM 10-K, supra note 96, at 13–14. Under the heading titled “Taxation Risks Could Subject Us to Liability for Past Sales and Cause Our Future Sales to Decrease,” the 10-K explains:

Currently, U.S. Supreme Court decisions restrict the imposition of obligations to collect state and local sales and use taxes with respect to sales made over the Internet. However, a number of states, as well as the U.S. Congress, have been considering or adopted initiatives that could limit or supersede the Supreme Court’s position regarding sales and use taxes on Internet sales. If these initiatives are successful, we could be required to collect sales and use taxes in additional states or change our business practices. The imposition by state and local governments of various taxes upon Internet commerce could create administrative burdens for us, put us at a competitive disadvantage if they do not impose similar obligations on all of our online competitors and decrease our future sales.

Id. It would seem that Amazon is stating that by imposing a requirement on it to collect sales taxes, it would put it at a competitive disadvantage compared to other online retailers. This is ironic, considering this is the same argument being made by traditional brick-and-mortar stores, which already have to collect the sales tax. See supra note 16, and accompanying text.
ine the Amazon Laws in Colorado and California, both of which take somewhat different approaches than New York. Taken together, these three state attempts at increasing sales tax collections represent the prevailing approaches in the United States.\(^{129}\)

C. New York

In 2008, New York enacted the first Amazon Law.\(^{130}\) Unlike some Amazon Laws that were passed and then subsequently repealed, New York’s law is still in force.\(^{131}\) Contextually, the statute presumes that a seller of tangible personal property is soliciting business through an independent contractor or other representative “if the seller enters into an agreement with a resident of this state 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, to the seller.”\(^{132}\) The statute essentially extends the holdings from cases such as *Scripto* and presumes that the affiliate relationship is the equivalent of an independent contractor or employee relationship.\(^{133}\) However, there is a *de minimis* exception for those sellers that have cumulative gross receipts of $10,000 or less, in the prior four quarters, from New York customers referred by New York affiliates.\(^{134}\) The statute’s presumption can be rebutted by proof that the resident affiliate did not solicit “in the state on behalf of the seller [in a manner] that would satisfy the nexus requirement of the United States Constitution” during the same period.\(^{135}\)

New York’s approach to its codified Amazon Laws has resulted in North Carolina,\(^{136}\) Illinois,\(^{137}\) and Rhode Island\(^{138}\) following suit. Per-
haps this emulation resulted from New York eventually succeeding in forcing Amazon to collect the sales tax on purchases shipped into New York. However, Amazon did not give up without a fight, and there are still doubts about whether the law is succeeding in fulfilling its purposes.\textsuperscript{139}

In response to New York’s law, Amazon tried to fight the new law in state court.\textsuperscript{140} Amazon argued that because it lacked a substantial nexus (both due process and Commerce Clause), New York’s collection requirement was unconstitutional.\textsuperscript{141} However, relying on Quill, Scripto, and National Geographic, the trial court upheld the law because the affiliate/independent contractor relationship with thousands of New York residents was sufficient physical presence under the Commerce Clause.\textsuperscript{142}

Unhappy with its outcome, but not discouraged, Amazon continued its argument through appeal. Amazon’s appeal was joined by Overstock.\textsuperscript{143} Amazon lost the fight, again, and for the same reasons. In upholding the law, the Appellate Division of the New York Supreme Court (New York’s intermediate appellate court) stated that “the conduct of economic activities in the taxing State performed by the vendor’s personnel or on its behalf” is a sufficient connection for Commerce Clause nexus purposes.\textsuperscript{144}

However, the court left open the possibility that an affiliate relationship could be limited enough to avoid applicability of the new law. It stated that if all Amazon’s affiliates simply provided a “conduit for linkage with [Amazon, the affiliates] will be presumed to have not engaged in activity which would require the vendor to collect sales taxes.”\textsuperscript{145} However, the court found that because Amazon’s program “seeks growth by reliance upon representatives who will look to solicit business,” the obligation in the statute is triggered, and Amazon must collect and remit the appropriate sales taxes.\textsuperscript{146} As such, the court concluded that Amazon affiliate activities constituted solicitation because Amazon’s purpose for its affiliate program was to allow its affiliates to “grow with us,” and in the court’s opinion amounted to something more than a mere advertising role.\textsuperscript{147} As a result, in New York, as long as affiliates are

\begin{footnotesize}
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\item \textsuperscript{139} See infra Part III.F.
\item \textsuperscript{140} See Amazon.com, LLC v. N.Y. Dep’t of Taxation and Fin., 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009).
\item \textsuperscript{141} Id. at 846.
\item \textsuperscript{142} Id. at 847–851. The court recognized, however, that sufficient physical presence could even be implied, not necessarily requiring a title of “independent contractor.” See id. at 847.
\item \textsuperscript{143} See Amazon.com, LLC v. N.Y. State Dep’t of Taxation and Fin., 913 N.Y.S.2d 129 (N.Y. App. Div. 2010).
\item \textsuperscript{144} Id. at 137.
\item \textsuperscript{145} Id. at 139.
\item \textsuperscript{146} Id. (emphasis added).
\item \textsuperscript{147} Id. The court quoted advertising for Amazon’s affiliate program, which stated: “The Performance structure allows you to earn higher fees when you generate a sufficient volume of referrals that result in sales at Amazon.com during a month. The higher your referrals, the greater your earnings will be.” Id. (emphasis in original).
\end{itemize}
\end{footnotesize}
involved in soliciting business, rather than merely advertising, the statute requires sales tax collection.148

Since the Appellate Division held that the law was constitutional, neither Amazon nor Overstock has requested further review. Furthermore, since the statute’s enactment, Amazon has been collecting the sales tax on goods shipped into New York.149

D. Colorado

Rather than require the collection of a sales tax like traditional Amazon Laws, Colorado’s law only imposes upon a “retailer,” who does not collect a sales tax through the standard sales tax requirements, reporting responsibilities.150 To be classified as a “retailer,” the entity merely needs to be “doing business in this state, known to the trade and public as such, and selling to the user or consumer.”151 Once met, the retailer is subject to the remainder of the statute, which requires the retailer to do two things: (1) mail a detailed report to the purchaser,152 and (2) file an annual statement for each purchaser with the Colorado Department of Revenue.153 The first obligation requires the retailer to send notification to all Colorado purchasers by January 31 of each year showing . . . the total amount paid by the purchaser for Colorado purchases made from the retailer in the previous calendar year. Such notification shall include, if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including, if known by the retailer, whether the purchase is exempt or not exempt from taxation. The notification shall state that the state of Colorado requires a sales or use tax return to be filed and sales or use tax paid on certain Colorado purchases made by the purchaser from the retailer.154

The statute, however, goes further and requires that the notification be sent to purchasers by first-class mail, labeled “Important Tax

148. Amazon contended, however, that although its program may suggest solicitation, “as applied,” its affiliates were doing nothing more than advertising on New York-based websites. In response, the court stated that although the record contained incomplete information on the issue, the presumption of solicitation may be rebutted if each affiliate “certified that they are not soliciting.” This, the court added, would allow the New York Department of Taxation and Finance to make the individualized determination. Id. at 143.


150. COL. REV. STAT. § 39-21-112(3.5)(c)-(d) (2012).

151. COL. REV. STAT. § 39-26-1026(b)(8) (2012); see COL. REV. STAT. § 39-21-112(3.5)(b). Notice that neither statute says anything about having some physical presence. Presumably, it is enough that the organization be “doing business” much like the ordinary requirements for personal jurisdiction.

152. COL. REV. STAT. § 39-21-112(3.5)(d)(I).

153. Id. at (d)(II).

154. Id. at (d)(I)(A).
Document Enclosed,” with the name of the retailer, and not included with any other shipment.\footnote{155} In effect, Colorado’s statute works much like the reporting requirements for employee W-2 forms, but is perhaps, even more onerous.\footnote{156}

The second obligation requires the retailer to report Colorado resident purchases to the Colorado Department of Revenue. This reporting entails filing an annual statement by March 1 of each year—for each purchaser—printed on forms approved by the department and listing the total amount paid for Colorado purchases during the year.\footnote{157} Furthermore, retailers with more than $100,000 in sales for any year may be required by the department of revenue to submit the annual statement “by magnetic media or another machine-readable form.”\footnote{158}

In response to Colorado’s law, Amazon terminated all of its agreements with Colorado affiliates.\footnote{159} In a letter from Amazon to its affiliates, Amazon explained that it was cutting all Colorado affiliate relationships because Colorado’s regulations are “burdensome” and unlike any other state’s regulations.\footnote{156} Amazon concluded that the new law was “clearly intended to increase the compliance burden to a point where online retailers will be induced to ‘voluntarily’ collect Colorado sales tax—a course we won’t take.”\footnote{161} Thus, it seems Amazon decided the additional revenues provided from affiliate sales were insufficient to justify the administrative burden of complying with the statute.

Less than a year after Amazon cut ties with its Colorado affiliates, the Direct Marketing Association brought suit against the state, petitioning the U.S. District Court for a preliminary injunction against enforcement of the law.\footnote{163} The request for preliminary injunction was

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\footnote{155} Id. at (d)(I)(B).
\footnote{156} See, e.g., INTERNAL REVENUE SERVICE, GENERAL INSTRUCTIONS FOR FORMS W-2 AND W-3 1, 4–5 (2012) (requiring the mailing of annual W-2 statements listing certain items of income, taxes withheld, and other deductions by the end of January). One major difference between W-2 reporting and the Colorado Amazon Law reporting requirement is that an employee works for the company and has a significant legal relationship with the organization, whereas the purchaser’s only connection may be a single purchase.
\footnote{157} COLO. REV. STAT. § 39-21-112(3.5)(d)(II)(A).
\footnote{158} Id. at (d)(II)(B). The language of the statute does not define what “magnetic media” or “machine-readable form” means, but presumably it includes electronic media, such as compact discs, USB drives, or portable hard drives.
\footnote{159} Ethan Axelrod, Amazon Reacts to Colorado Internet Sales Tax Measure by Firing Its Colorado Associates, HUFFINGTON POST DENVER (Mar. 3, 2010), http://www.huffingtonpost.com/2010/03/08/amazon-reacts-to-colorado_n_490028.html (including a copy of the letter Amazon sent to their Colorado affiliates).
\footnote{160} Id.
\footnote{161} Id.

\end{footnotes}
The court, relying on Quill and Complete Auto, ruled that the statute “likely” placed an undue burden on interstate commerce and “triggered the safe-harbor provisions of Quill.” The court further stated that even though Quill emphasized the burdens of tax collection, the practical effect of the statute created burdens that are “inextricably related in kind and purpose to the burdens condemned in Quill.” At first glance, this looks like a victory for Amazon. However, the scope of the preliminary injunction was restricted so as to encompass only those “retailers who sell to customers in Colorado, but whose only connection to the State of Colorado is by common carrier or the United States Mail.” Thus, a retailer who uses affiliates in Colorado is not likely to be protected by this order. This is probably why Amazon has not renewed any of its affiliate agreements with Colorado residents. Furthermore, it does not appear that the Colorado legislature has given up on this issue. As of this writing, the Colorado legislature is considering a bill to amend the current statutory scheme.

Colorado also places its sales tax reporting requirements on another class of retailers: those that are a part of a controlled group of corporations. To determine what a controlled group of corporations is, the statute follows the Internal Revenue Code’s definition which encompasses: (1) parent-subsidiary relationships when the parent holds 80% or more of the subsidiary’s stock, (2) brother-sister controlled groups, and (3) combined groups where three or more corporations have a common parent and have a brother-sister group. If a “component member” is a retailer with a physical presence in the state, the statute presumes that the other members of the controlled group are also subject to the reporting requirements. However, according to the statute, “[t]his presumption may be rebutted by proof that . . . the component member that is a retailer with physical presence in this state did not engage in any constitutionally sufficient solicitation in this state on behalf of the retailer that does not collect Colorado sales tax.” Therefore, as long as a component member can show it did not actually solicit.

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164. Id.
165. Id. at *5.
166. Id.
167. Id. at *8.
171. Id. at (a)(2).
172. Id. at (a)(3).
173. Essentially this is any member of the controlled group, subject to some exceptions. See id. at (b).
sales for the out-of-state retailer, the obligation to report is not applicable.\textsuperscript{175}

Why does all this matter? Amazon has no fulfillment centers, offices, or subsidiaries in Colorado. However, this second part of Colorado’s sales and use tax statute is important because California drew from it when drafting its statute.\textsuperscript{176} But unlike Amazon’s operations in Colorado, two Amazon subsidiaries call California “home.”

E. California

California’s Amazon Law has been in a state of flux since mid-2011. Approximately three months after the law took effect, the statute was temporarily repealed.\textsuperscript{177} This quick action was partially due to Amazon’s extreme opposition to the state law.\textsuperscript{178} In negotiating the temporary repeal, Amazon sweetened the deal by offering to build distribution centers in California and hire California workers.\textsuperscript{179} In reality, Amazon was only able to buy a year’s worth of time.\textsuperscript{180} The benefit from this extra time, however, was short lived. The new laws took effect on September 16, 2012.\textsuperscript{181} Under the terms of the new laws, Amazon and other online retailers had until July 31 to persuade either Congress or the California legislature to make a change.\textsuperscript{182} Amazon failed to do this and has been collecting taxes on goods shipped into California since September 26, 2012.\textsuperscript{183}

California’s Amazon Law takes a hybrid approach of New York’s and Colorado’s Amazon Laws. Drawing from New York’s law, Cali-
nia’s law prescribes how an entity’s affiliates constitute sufficient physical presence. Drawing from Colorado’s law, California attaches significance to the membership in a controlled group of corporations to meet Commerce Clause nexus requirements.

California’s law attributes nexus based on the definition of a “retailer engaged in business in this state” and defines that retailer as any that has a “substantial nexus” with California under the Commerce Clause. The statute then lists multiple ways this could occur and, like New York, includes:

Any retailer entering into an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise.

Thus, like New York’s and numerous other states’ laws, the statute essentially defines an affiliate relationship as being sufficient to meet the nexus requirement. However, this definition exempts retailers that fit into either of two de minimis exceptions: (1) retailers that, in any twelve-month period, pay $10,000 or less to California affiliates for referring customers under their agreement; or (2) retailers that have total sales of tangible personal property shipped to purchasers in California of $1 million or less. Thus, even if a retailer ships more than one million dollars’ worth of tangible personal property but pays less than $10,000 to affiliates, the de minimis exception can still be met.

Unique to itself, California’s law also imposes a duty to collect and remit the sales tax for those retailers that are a part of a controlled group of corporations. Physical presence is attributed to the out-of-state retailer as long as the in-state enterprise “performs services in [California] in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer.” In theory, the statute presumes a sufficient nexus when, although an out-of-state retailer has no physical presence, a commonly controlled corpora-

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187. Id. at (c)(5).
188. Id. at (c)(3)(i).
189. Id. at (c)(3)ii).
190. See id. at (c).
191. Id. at (c)(4).
192. Id.
tion both has a physical presence in the state and provides services that are somehow connected to property sold or soliciting sales. In effect, the provision seems to be an attempt to equate the situation in National Geographic, where a different division of the same corporation provides unrelated services to the sales activity, to a situation where a different entity provides services that somehow benefit the out-of-state retailer.

California’s approach has prompted dissent from some of the nation’s tax experts, questioning the provision’s constitutionality. One such expert, Professor Edward Zelinsky, explained that there is a big difference between attributing physical presence due to an actual agency relationship and presuming physical presence broadly based on entity relationships.

In ordinary agency relationships, such as the situation in Scripto, there is some agreement that shows assent by the principal to the activities of the agent. The key idea here is that the company did something to allow the agent’s activities to be binding on the corporation. According to Professor Zelinski, allowing physical presence to be imputed based on this agent’s presence is “constitutionally unexceptionable,” because the corporation has agreed to be represented by the agent.

However, when a state attributes physical presence to a common holding of corporations, in the absence of an agency relationship and with no ability to rebut this classification, the attribution becomes “constitutionally problematic.” Unlike Colorado’s law, which allows the presumption to be rebutted by showing that no in-state retailer that is also part of the controlled group solicited sales for the out-of-state retailer, California’s law “irrebuttable impos[es] retailer status” on the out-of-state retailer and provides no such exemption. This is a big problem, as Professor Zelinsky explains, because “despite [the out-of-state retailer’s] common ownership with a corporation operating in California, the seller itself has neither direct nor indirect physical pres-

193. See id.
197. Zelinsky, supra note 195, at 83.
198. Id. at 86.
199. Id.
200. Id. at 94.
Moreover, as the *Quill* court reaffirmed, physical presence is a necessary component of Commerce Clause nexus.\footnote{201}{Id.} California’s controlled group of corporations’ attribution of physical presence also seems to be directly aimed at Amazon. Amazon has two subsidiaries in California, A9 and Lab126.\footnote{202}{Quill Corp. v. North Dakota, 504 U.S. 298 (1992).} A9 created the search engine that Amazon.com and other e-commerce websites use to sell their products.\footnote{203}{See Locations, AMAZON.COM, http://www.amazon.com/locations/Careers?ie=UTF8&node=239366011 (last visited Sept. 5, 2012) (under the heading “United States Subsidiaries”).} It also builds advertising programs.\footnote{204}{See Jobs, A9.COM, http://a9.com/-/company/jobs.jsp (last visited Sept. 5, 2012).} Lab126 is the company that designed and developed the Amazon Kindle.\footnote{205}{Id.} Both of these Amazon subsidiaries have offices and employees in California.\footnote{206}{See About Lab 126, LAB126, http://www.lab126.com/about.htm (last visited Sept. 5, 2012) (Click “LAB126”).} Because of this subsidiary relationship, both Colorado’s and California’s statutes impose a nexus on Amazon as an out-of-state retailer, even though it does not have any offices or employees itself within the state. However, under Colorado’s statute, Amazon could probably show that Lab126, which is primarily concerned with development and design of the Kindle, was not involved in soliciting on behalf of Amazon.\footnote{207}{See A9.COM, supra note 204, and LAB126, supra note 206.} Under California’s statute, however, Lab126’s presence, even if it is not involved in solicitation of any kind for Amazon, is still sufficient to subject Amazon to the statute’s requirements. This result is precisely the result that the *Quill* and *National Geographic* courts sought to avoid—an out-of-state corporation with no employees, warehouses, offices, or independent contractors, whose only connection to the forum state is the use of a common carrier to deliver products, being subject to sales tax collection responsibilities. Admittedly, however, A9 is also in California, and is involved with solicitation activities on behalf of Amazon. But, this example shows that by prescribing an irrebuttable classification, the statute infringes on the physical presence requirements under the Commerce Clause.

F. Major Criticisms

Although Amazon Laws have been challenged on constitutional grounds, there are other reasons why these laws are unhelpful in solving the sales and use tax collection problem, at least for now.

First, although some proponents argue that requiring out-of-state e-tailers to collect sales taxes on merchandise shipped into their states will generate more revenue, there is evidence that the opposite is more
likely. This drop in revenue is at least partly due to e-tailers trying to avoid being subject to the requirement. As has already been seen, Amazon and other entities immediately cut ties with their affiliates when a new law is enacted, thus resulting in a lower income tax base to be taxed by the states. Furthermore, even if companies continue to use affiliates within a state, they still may be able to avoid taxes by not engaging in solicitation under the statute, again reducing the amount of sales taxes the state collects.

Second, by requiring e-tailers to juggle thousands of state and local sales tax regimes, administrative costs could increase to the point that it materially affects the enterprise’s profitability. Just as opponents of the Colorado reporting requirements argue, such an administrative burden contributes to a finding that it discriminates against out-of-state e-tailers and infringes on interstate commerce. Additionally, such a burden may create barriers that limit the ability of potential e-tailers from competing with larger retailers.

Third, by enacting laws so close to the line drawn in Quill, states may be subject to a high risk of litigation. Just as New York, Colorado, and many other states have experienced, the economic and administrative burdens, coupled with potential constitutional problems, have sparked years of litigation.

Finally, legal certainty is undermined by a vast assortment of laws and the prospect of litigation. At least some states are aware of this problem. For example, last year, the Florida Senate’s Subcommittee on Finance and Tax considered the consequences of passing an Amazon Law and issued an interim report concerning their findings. However, all they determined was that it was “unclear” whether any of the state approaches solved the inability to collect the sales tax on out-of-state purchases. Furthermore, they recognized that those state attempts to obtain additional tax collections were largely “unsuccessful” and questioned whether the states actually have the authority to impose these


210. Id.

211. See Zelinsky, supra note 195, at 92.

212. Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill., 386 U.S. 753, 759–60 (1967) (recognizing that there are over “6,000 plus taxing jurisdictions”).

213. See AMAZON.COM 10-K, supra note 96 at 13–14 (explaining how the administrative burdens of sales tax collection could place Amazon at a “competitive disadvantage”).

214. See, e.g., Direct Mktg. Ass’n v. Huber, 2011 WL 250556 at *7–8 (D. Colo. 2011) (granting a preliminary injunction against Colorado for its statute imposing reporting requirements); see also, supra Part III.D.

215. See supra Parts III.C and D.


217. Id.
laws under the Constitution. No doubt, many other states are battling with these same problems.

What is the next step? Because the Supreme Court has not heard a case on the issue since Quill was decided, there is not much new guidance on whether an affiliate relationship is sufficient to meet Commerce Clause requirements. Furthermore, Congress has been either unable or unwilling to do anything about the problem.

IV. WHAT CAN BE DONE?

A. Affiliate Presence in the Supreme Court

Should the Supreme Court take up the issue of whether the traditional affiliate relationship is sufficient to meet Commerce Clause nexus requirements, the Court would most likely conclude that the connection is sufficient.

The key to the Commerce Clause analysis involves, at least in part, the Court’s findings in Scripto. Recall that in Scripto, Adgif used ten jobbers (independent contractors), to solicit sales for Scripto in Florida. The jobbers had no authority to act for the corporation in any way other than to make sales. The Court clearly stated that it made no difference whether the jobbers were working as ordinary employees, or devoting themselves to selling full-time. The fact that the jobbers were acting in the state and that Scripto benefitted from the jobbers’ activities was sufficient. Although the Court did not go into a separate physical presence Commerce Clause analysis, the factual similarities between the jobbers then and the affiliates today are significant.

An affiliate has a very similar relationship to a contracting corporation as did the jobbers to Scripto. The number of the resident solicitors, the solicitive purpose, and the regularity of activities suggest that an affiliate satisfies the “something more than the ‘slightest presence’” required under Quill.

The number of jobbers within Florida seems diminutive compared to the number of affiliates an entity may have within a particular state. In Amazon’s fight against New York, the New York appellate court recognized that Amazon had “hundreds of thousands” of affiliates. Although the number of Amazon affiliates within a certain state is uncertain, examples from newspaper articles suggest that Amazon has more than 10,000 affiliates in some states and “thousands of affiliates” in

218. Id.
219. See supra Part II.B.3 and accompanying footnotes.
221. Morrison, supra note 126 (stating that Amazon had over 10,000 affiliates in California).
When the thousands of Amazon affiliates are compared to Adgif’s ten jobbers in Florida, it is unlikely that this presence can be considered only a “slightest presence.”

An affiliate’s solicitive purpose and regularized activities pose no limit to an entity’s physical presence. Like Adgif’s jobbers, whose purpose was only to solicit sales, an affiliate’s sole purpose is to solicit sales for the corporation. This solicitation provides a benefit to the corporation, and under Quill, this goes to the “nature and extent” of activities. Scripto also recognized that the activities of an entity’s contractors do not have to rise to the level of full-time employment to be sufficient. Although we are not sure how much of the jobber’s time was spent soliciting, we do know that the Internet never sleeps. Because of the way affiliate solicitation works—a continual advertisement on an affiliate’s website—at all times the affiliate could be soliciting sales for Amazon.

Taken together, the Supreme Court is likely to find that the number of affiliates, solicitive purpose, and regularity of an affiliate’s activities constitute a sufficient physical presence for the purposes of the Commerce Clause.

Interestingly, a look at Amazon’s response to state enactment of Amazon Laws may suggest that even Amazon believes that its affiliate relationships could satisfy Commerce Clause requirements. As evidence of this, any time a state enacted such a law, Amazon immediately terminated its affiliate relationships with resident affiliates. The list of states includes Colorado, California, Illinois, North Carolina, Rhode Island, Connecticut, and others. Although it may be that Amazon is not ready to fight the states on the issue, given its recent support of a federally mandated sales tax system, it is very likely that it has finally recognized that the affiliate presence argument is one it cannot win.

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222. Novack, supra note 127 (noting that Amazon had thousands of affiliates in Illinois).
223. Some simple math may be of use here. Suppose that Amazon only had 100,000 affiliates in the United States (although the New York court suggested that this number was much higher). If Amazon had an equal number of affiliates in each state, this would mean that approximately 2000 affiliates would reside in New York (100,000 affiliates ÷ 50 states). This would mean that Amazon would then have 200 times the presence of Adgif! Although this is just a simplified example and it is very unlikely that affiliates would be evenly distributed, it shows just how insignificant the ten jobbers in Scripto were and how much of an effect their presence in Florida had.
224. Axelrod, supra note 159.
225. Kaufman, supra note 127.
226. Novack, supra note 127.
228. Id.
In addition to these reasons, *Scripto* provides us with a good example of just how little physical presence can be enough. In *Scripto*, the Florida sales tax deficiency was just $5,150.66.231 Because the sales and use tax rates in 1960 were 3%,232 such a tax bill equates to total sales, subject to a sales tax, of just about $172,000. This amount is also outside the current *de minimis* exceptions in most state Amazon Laws. As already explained above, states with Amazon Laws typically have *de minimis* exceptions for sales ranging from $5,000 to $10,000233 before the collection responsibility kicks in.234 But remember that, under *Quill*, economic presence alone is not enough to satisfy the demands of the Commerce Clause, which is why the resident affiliate presence is necessary. Taken together, it becomes easy to see that the states measure something more than a “slightest presence” with gross receipts of more than $10,000 plus solicitation by resident affiliates. By requiring both, this reflects the underlying policies from *Scripto* and *Quill* that an entity should be required to collect a sales tax because they financially benefit from an in-state affiliated party’s solicitation. Therefore, because the general policies support a minimally required connection, there is further support for a finding that this affiliate connection is constitutionally sufficient.

Even if the Supreme Court should determine that affiliate connection is a sufficient physical presence, this still does not alleviate the administrative burden of complying with varying state laws, tax rates, and reporting requirements. To ease this administrative burden, Congress can play a helpful role in simplifying the current tax system.

**B. Congressional Action**

Although the states have taken it upon themselves to grab their rightful piece of e-commerce, it is clear that e-tailers will continue to fight because of the unrest about the burden of complying with so many different sales tax regimes. Because of this, states need Congress to step in now more than ever. Since *Quill*, where the Supreme Court gave the
nod to Congress nearly twenty years ago, the Supreme Court and many of the states have been waiting (patiently?) for Congress to act.235

Some members of Congress have tried to do something about this, in what is called the “Main Street Fairness Act.”236 Generally speaking, the bill is an attempt to simplify the sales tax collection system by treating similar transactions equally, without regard to how the sales transaction occurs, “whether in person, through the mail, over the telephone, on the Internet, or by other means.”237

The central thrust of the Act calls for Congress to adopt the Streamlined Sales and Use Tax Agreement (“SSUTA”).238 The SSUTA is an interstate compact that came about through the “cooperative effort of forty-four states, the District of Columbia, local governments[,] and the business community.”239 Its fundamental purpose is “to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance.”240 Again, the potential administrative burden that would be imposed on nationwide e-tailers from having to account for numerous jurisdiction-specific rules could have devastating effects.241 In order to simplify the current system and make compliance more streamlined, SSUTA is aimed at defining an appropriate tax base upon which to levy a sales tax242 and simplifying tax rates to one rate of tax in each jurisdiction.243 As of this writing, twenty-four states are at least partial members of the Streamlined Sales Tax initiative,244 which means that those states have enacted laws, rules, and regulations that conform to the requirements of the interstate compact.245 However, the compact maintains that its goal is not to influence state legislatures on every specific taxable item or exemption,246

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235. See supra note 90.
236. Main Street Fairness Act, S. 1452, 112th Cong. §1(a) (2011).
237. Id. at §3(2).
238. Id. at §2.
240. SSUTA, supra note 93, at §102.
241. See supra Part III.F.
242. See SSUTA, supra note 93, at 124–28 (for an appendix listing the types of items that may be subject to a sales or use tax and where to find the appropriate treatment in the SSUTA).
243. See id. at § 308. Note however that the single rate requirement is exempted for fuel. See id. at § 308 C.
244. Streamlined Sales Tax State Members, Streamlined Sales Tax Governing Bd. http://www.streamlinedsalestax.org/index.php?page=state-info (last visited Sept. 15, 2012) (listing twenty-one states as “full members”; those states in compliance through its laws; and another three states as “associate members”: those that are in compliance with the SSUTA but that its laws are not yet in effect but will be within twelve months).
245. See id.
246. See SSUTA, supra note 93 at §103, under the heading “Taxing Authority Preserved,” which states that the “agreement shall not be construed as intending to influence a member state to impose a tax on or provide an exemption from tax for any item or service.” Id.
but rather, the focus is more on uniform procedures and overall policies.247

Throughout the Main Street Fairness Act, the underlying ideals and goals of SSUTA are represented.248 The effect of the Act—in theory—is to place all retailers on an equal footing (subject to a few de minimis exceptions). This means Amazon would have the same sales tax collection responsibility as a brick-and-mortar Walmart. Surprisingly, the act has received support by large e-tailers, including Amazon.com.249 In a letter sent by Amazon’s VP of Global Public Policy, Paul Misener, Amazon stated that it has “long supported a simple, nationwide system of state and local sales tax collection, evenhandedly applied to all sellers.”250 However, other online e-tailers, such as eBay, strongly oppose the legislation because it imposes “new taxes and regulatory burdens” especially on smaller online businesses.251 This is interesting considering that the act specifically exempts “small seller[s]” from the sales tax collection requirement.252 Either way, as history has shown, there will always be entities challenging legislative action when the legislation has some adverse effect on that entity.

The proposed act was first introduced in 2010, and, at that time, nothing came of the bill.253 So, it was reintroduced again in 2011 with the hope that it might get more attention. However, it seems that despite all the news coverage, corporate support, and YouTube videos,254 nothing is really happening.

Why has nothing happened? Maybe it is because Congress wants to avoid stepping on the toes of the states. It is clear from the language in the act that if it is adopted by Congress, states will most likely be required—or at least strongly urged—to overhaul their state tax laws to conform to the narrow requirements of SSUTA.255 The potential burdens
on the states, when compared to the gains, may not be enough to warrant congressional action.

Even if Congress refuses to do something about the problem, the SSUTA is still around and nearly half of the states already support it. But, this does nothing to allay Amazon’s fears that it will be placed at a disadvantage relative to its competitors who may not have the same obligation that it does. Nor does it really help out the brick-and-mortar stores because they will still be competing with online retailers that are not subject to the same collection requirements.

So what is the solution? At least two other authors believe that it is possible to eliminate this administrative burden on interstate commerce if states were to compensate the e-tailer for the costs of compliance. In reaching their conclusions, the authors hypothesized that although some level of compensation for compliance costs would reduce overall collections, these costs would be considerably outweighed by the additional revenue the state would receive. Thus, the use of an Amazon Law would allow the state to reach the retailer, and the burden of collection would be offset by some form of compensation. As the current system stands, there may be some evidence that states have at least considered this idea.

The upside of this plan is that any state can act without congressional approval. The downside is that without congressional action, retailers may still be subject to heavy administrative burdens in those states which decide not to adopt a vendor compensation plan, which may even disadvantage some e-tailers. Furthermore, a compensation scheme does not eliminate, or at the very least reduce, the variances of state sales tax laws from state to state.

C. A Federal Value Added Tax with a Revenue Sharing Formula

One final thought on smoothing over the sales taxation issues presented in this article is the idea of implementing a federal value added tax (“VAT”) with some sort of revenue sharing agreement among the states. Although implementation of a federal VAT is probably a remote possibility, it may address much of the current sales tax debacle. Twenty years ago, one commentator hypothesized that in times of great financial calamity, the United States may decide to convert its current retail sales tax into a European style VAT. With our current federal

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257. See id. at 526.
258. Id. Of course, this relies on the presumption that administrative costs are less than whatever collections may arise—a likely outcome that may prove hard to measure (at least for now).
259. See SSUTA, supra note 93 at §605 & 606(A) (for a look at an optional compensation requirement for member states to compensate “remote sellers”—those who normally are not legally required to collect sales taxes on behalf of the state, but may choose to do so).
deficit steadily climbing, society and tax experts alike have speculated as to whether this could be a solution to governmental budget shortfalls.261

Although a complete discussion of how a traditional VAT works is beyond the scope of this article, it is important to note that this route may be a viable option. Generally a VAT is a consumption-based tax that operates much like a sales tax.262 But unlike a traditional sales tax, a VAT usually also applies to non-retail sales, so that transactions between businesses and manufacturers would also be included in the tax regime and expand the tax base.263

As the name suggests, a federal VAT would be administered by the federal government. This means that there would be a nationwide tax base, a nationwide tax rate, and a nationwide set of rules for the collection of such taxes. Hence, a federal VAT could address many, if not most, of the problems in our current sales taxation system.

In operation, federal VAT collections could be apportioned to each of the states based on a revenue sharing formula, such as each state’s percentage share of sales. For example, an entity’s state tax return could include total tax collections and remittances for a particular fiscal year on items that would normally be subject to the VAT. It would presumably also have a list of gross revenues on a state-by-state basis and a total revenue amount. At the end of each fiscal year—disregarding potential issues with differing fiscal years—each state could submit a statement showing the total revenue that qualified for collection under the VAT. Then, the federal government could take the total of the state qualifying revenue and divide that number by the total sales across all states to come to the state’s percentage share of collections.264 As for the amount to be distributed among the states, the government could retain a portion of those total collections to cover administration costs, and then distribute the balance to the states.

In this way, most transactions will not escape being subject to the federal VAT, and the states will receive their share of VAT collections. Although the examples above are broad, this shows that many of the issues with the current system could be significantly reduced to the retailers, both online and brick-and-mortar, as well as to the states.

262. See Miller, supra note 260, at 194.
263. Id. Another benefit of a VAT is that it also taxes services, which are typically consumed more often by the financially wealthy. This would help ease the current concerns about the regressiveness of a traditional sales tax.
264. For example, if $100 billion of sales occurred in State A, and total qualifying sales were $2 trillion, this would mean that State A would receive 5% of whatever dollar allotment was available for distribution ($100 billion ÷ $2 trillion = 5%).
V. WHAT WILL PROBABLY HAPPEN VS. WHAT SHOULD HAPPEN

With all the different theories and options at a state’s disposal, there is a lot to analyze. Because the legal boundaries of *Quill* are difficult to define, states have been left to fend for themselves. Furthermore, because no two states are exactly alike, it is very difficult to find a set of rules that would be suitable for each state. What will most likely happen is that the Supreme Court will continue to hold to its word and not hear a *Quill*-type issue. In turn, Congress will probably continue to do what it has done for the last year or so, and not do anything about the problem.

Unfortunately, this is the opposite of what should happen. It seems that should Congress fail to meet state needs on collecting the sales or use tax on purchases made by out-of-state retailers, states will continue to wander through the mist of *Quill* to find their own remedy. As a result, out-of-state retailers will continue to limit any presence in the state seeking to impose the sales tax collection requirement. Just like Amazon has done, an entity seeking to dodge a sales tax collection responsibility could terminate its affiliate agreements, move its business offices and distribution centers, or threaten to pull jobs out of the state in order to pressure states into granting an exemption from collection.

Thus to be truly successful, whatever action taken should be done by Congress. The U.S. Constitution specifically grants Congress the power “to regulate Commerce . . . among the several states.” This power to regulate commerce includes the ability to prohibit state actions that interfere with interstate commerce. In *Quill*, the Supreme Court adamantly recognized that this issue is not only one that “Congress may be better qualified to resolve [but] one that it has the ultimate power to resolve.” In concluding its opinion, the Court stated, “Congress is now free to decide whether, when, and to what extent the States may burden interstate . . . concerns with a duty to collect use taxes,” even if this means preempting *Quill* altogether. All these reasons signal the need for congressional action.

The solution also needs to be simple enough to meet the needs of a varying economic and legal landscape, without infringing on state powers. However as it currently sits, The Main Street Fairness Act, and in turn SSUTA, probably is not the right way to go. Many critics have argued that SSUTA is too complicated, too detailed, and thus, too restrictive upon state sovereignty. Furthermore, trying to get Congress to

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265. U.S. CONST. art. I, §8, cl. 3.
268. *Id.*
269. See *id.*
agreed to such a large overhaul of an area of the law that has traditionally been governed exclusively by the states will not be easy.

Congressional action, however, would not need to rise to the profundity of the Main Street Fairness Act or SSUTA. Allowing states to enact their own Amazon Laws and requiring only a nationwide compensation scheme, rather than a completely new system, would ease the administrative burdens of sales tax collection and would be a step in the right direction. Furthermore, such a scheme would promote collection by e-tailers while at the same time increasing state revenue. But as already pointed out, if such a scheme is not laid down by Congress, but by the individual states alone, this does nothing to ease the administrative burdens in those states that fail to enact a remedying compensatory statute. And it is because of the lack of uniformity in sales tax application that such a large burden is placed on retailers. So, Congress should lay down the compensation scheme. This would ensure that any administrative burden caused by a lack of uniformity would be eased, and the states would not be stuck with their hands out waiting for their rightful share.

If one thing is certain, it is that Amazon’s clock is ticking. As more states follow the lead of New York, California, and others, Amazon and other online-only retailers will start to feel the pressure, both from the administrative costs of compliance and the loss of income due to increased prices. It is time for Congress to answer the Supreme Court’s siren call to dispel uncertainty and fix the current regime.

VI. CONCLUSION

Due to the states’ inability to collect their fair share of sales and use taxes, states have enacted Amazon Laws to compel at least some e-tailers to collect the sales tax. Under the wake of Quill, most state attempts involve attributing physical presence due to a contractual relationship between the entity and the entity’s resident affiliates. However, there is little evidence to suggest that such laws are producing their desired result because entities, such as Amazon, have avoided the collection responsibility by eliminating ties with affiliates and limiting overall physical presence within a state.

Although an entity’s affiliate relationship likely meets constitutional requirements for the purposes of imposing a sales tax collection responsibility, in the current regime, because of the varying sales tax requirements across thousands of taxing jurisdictions, the administrative burden of complying with such laws is high. This burden can be best addressed by Congress. Congress has the ultimate authority over issues affecting interstate commerce and is in the best position to create a nationwide remedy. This remedy, however, need not equal the complexities of the SSUTA or the Main Street Fairness Act, but may well include a compensatory scheme whereby an e-tailer’s administrative burdens
be reduced. Such a scheme would promote collection by e-tailers while at the same time subject a greater portion of qualifying sales to the sales tax.

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