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# SOMETHING'S GOTTA GIVE: ORIGIN-BASED E-COMMERCE SALES TAX

## ABSTRACT

*How to tax interstate online purchases is a frequently debated and contentious topic in the business and tax arena. There are numerous parties affected when a transaction occurs and each affected party would like a taxation policy that benefits its own economic interests, without regard for others. Neither the legislative nor the judicial branch has successfully resolved this e-commerce taxation issue. With the growing need for tax revenue, it is prudent for Congress to finally resolve this circuit split and agree on a unifying Online Sales Tax Law. As opposed to the vast majority of proposals pending in Congress, this Note proposes an Origin-Based solution to the e-commerce taxation problem that would require affected parties to compromise, but will bring uniformity to all states and benefit the economy as a whole.*

## INTRODUCTION

How sales tax works is among the most commonly asked questions when businesses file and pay their taxes.<sup>1</sup> The chief complication that encompasses sales tax is the lack of uniformity throughout the states; over 9,000 taxing jurisdictions exist in the United States, each with its own rules and rates.<sup>2</sup> Sales taxes become infinitely more complicated for online businesses, as their customer bases are scattered throughout numerous taxing jurisdictions.<sup>3</sup> The economic and constitutional ramifications create a perplexing problem. These complications must be tamed and regulated through federal congressional action.

The Physical Presence and Nexus tests, derived from *Quill Corp. v. N. Dakota By & Through Heitkamp* and its progeny, currently govern e-commerce sales taxes, and allow many online retailers and consumers to dodge sales taxes entirely.<sup>4</sup> In turn, large online retailers have an unfair advantage over big-box retailers, smaller local retailers, and brick and mortar businesses, as the latter are subject to sales tax rules.<sup>5</sup> In most states, the

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1. See Caron Beesley, *Sales Tax 101 for Small Business Owners and Online Retailers*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/blogs/sales-tax-101-small-business-owners-and-online-retailers> (last updated Aug. 19, 2015).

2. See James G. S. Yang & Frank J. Aquilino, *The Updated Status of Internet Commerce Tax Law*, 20 J. INTERNET L. 3, 8 (2016).

3. See Beesley, *supra* note 1.

4. See generally *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); see Scott Peterson, *A Guide to Click Through Nexus*, AVALARA (June 30, 2016), <http://www.avalara.com/blog/2016/06/30/a-guide-to-click-through-sales-tax-nexus-for-small-businesses/>; see also Robert W. Wood, *3 Ways to Still Avoid Sales Tax Online*, FORBES (Mar. 4, 2014, 8:46 AM), <https://www.forbes.com/sites/robertwood/2014/03/04/3-ways-to-still-avoid-sales-tax-online/#21a51f8d57c2>.

5. See Senator Heidi Heitkamp, *Heitkamp Reinforces Need to Pass Marketplace Fairness Act*, YOUTUBE (July 23, 2013), <https://www.youtube.com/watch?v=AOTzXuOqhRs>.

second highest tax revenues are derived from sales taxes; the highest is personal income tax revenues.<sup>6</sup> In New York State counties, sales tax is the single largest source of revenue, with an average of 27.8%.<sup>7</sup> Because it is such a large source of revenue, e-commerce sales tax avoidance costs states an aggregate of over \$29.6 billion of lost revenues in 2015.<sup>8</sup> As e-commerce continues to grow, those losses will only increase and the tax disparity between online retailers and brick and mortar retailers will only grow. Many states have already attempted to neutralize their revenue losses by targeting online sales tax—some successfully, others not.<sup>9</sup> States are in immediate need of a uniform online tax law, one that will not be thwarted by endless and costly lawsuits by large companies in opposition to the sales tax.<sup>10</sup> It is time for Congress to set working national guidelines that enable the states to enforce and administer sales tax laws that best serve each states' individual tax objectives, local economies, businesses, and citizens.

The issues surrounding taxation of e-commerce were very prominent after the introduction of the Marketplace Fairness Act of 2013,<sup>11</sup> but lost clout soon after. The same complex issues are resurging, as many states search for ways to decrease their deficits through sales tax revenues.<sup>12</sup> While most agree that sales taxation for online retailers must be addressed, the disagreements surround the best way to do so.<sup>13</sup> This Note suggests a strategy for Congress to use in its attempt to resolve the online tax issue in a way that is best for all

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6. See Pareesa Ashabi, *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*, 49 U.S.F. L. REV. 543, 545 (2015).

7. See OFF. OF THE N.Y. ST. COMPTROLLER, LOCAL GOVERNMENT SALES TAXES IN NEW YORK STATE: 2015 UPDATE (Mar. 2015), <https://www.osc.state.ny.us/localgov/pubs/research/salestax2015.pdf>.

8. Joyce Beebe, *E-Commerce: Recent Developments in State Taxation of Online Sales*, BAKER INST. FOR PUB. POL'Y 2 (July 13, 2017), [https://www.bakerinstitute.org/media/files/files/21ea3b88/BI-Brief-071317-CPF\\_Ecommerce.pdf](https://www.bakerinstitute.org/media/files/files/21ea3b88/BI-Brief-071317-CPF_Ecommerce.pdf).

9. See Verne G. Kopytoff, *Amazon Pressured on Sales Tax*, N.Y. TIMES (Mar. 13, 2011), <http://www.nytimes.com/2011/03/14/technology/14amazon.html>.

10. Florida, South Dakota, Colorado, Utah, and Texas offer some examples of states that have released online sales tax bills which have been challenged in court. See *Modernize Florida Taxes to Fill Budget Gaps: Where we Stand*, ORLANDO SENTINEL (Sept. 26, 2016), <http://www.orlandosentinel.com/opinion/os-ed-reform-florida-taxes-20160926-story.html>; Chris Morran, *Why You Should Care About South Dakota's Controversial Online Sales Tax Law*, CONSUMERIST (Sept. 4, 2017, 4:08 PM), <https://consumerist.com/2017/09/14/why-you-should-care-about-south-dakotas-controversial-online-sales-tax-law/>; Jim Brunner, *States Fight Back Against Amazon.com's Tax Deals*, SEATTLE TIMES <http://www.seattletimes.com/seattle-news/states-fight-back-against-amazon-coms-tax-deals/> (last updated Aug. 17, 2015); Chris Morran, *President Signs Bill Making Internet Service Tax Ban Permanent*, CONSUMERIST, <https://consumerist.com/2016/02/24/president-signs-bill-making-internet-service-tax-ban-permanent/> (last updated Sept. 27, 2016).

11. See generally Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

12. See generally *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016); see *Modernize Florida Taxes to Fill Budget Gaps*, *supra* note 10; *Why You Should Care About South Dakota's Controversial Online Sales Tax Law*, *supra* note 10; Brunner, *supra* note 10; *President Signs Bill Making Internet Service Tax Ban Permanent*, *supra* note 10.

13. See generally Yang & Aquilino, *supra* note 2.

parties involved including sellers, buyers, and states, by utilizing a Modernized Origin-Based Taxation Model.<sup>14</sup> This Modernized Test preserves the Physical Presence requirement of *Quill* by charging an Origin-Based sales tax at the rate of the seller's location, rather than a Destination-Based sales tax, which is charged at the rate of the buyer's location. This proposal requires a collective effort from all parties affected by e-commerce taxation; it also reduces complexity, eliminates use tax complications, stimulates equal competition for all business models, preserves state sovereignty, and naturally lowers sales taxes rates overall.

This Note attempts to resolve the complexities involved with the existing e-commerce sales tax models and proposals by suggesting an updated and simplified Origin-Based Physical Presence test for e-commerce taxation. Part I will explain what a sales tax is, how it works, and why it is so complicated in the e-commerce world. Part II discusses the sparse judicial history behind e-commerce taxation, mainly two outdated Supreme Court rulings regarding the constitutionality of e-commerce Sales Taxes. Part III describes several Congressional proposals that have surfaced since the early 1900s. Next, Part IV will discuss the various ways in which the states have dealt with online sales taxes in the absence of federal action. Part V explains why e-commerce taxation is of great economic and commercial significance and considers the fiscal concerns involved. Lastly, Part VI suggests a long-term Modernized Origin-Based Taxation Model for resolving these important financial concerns.

## I. BACKGROUND: NUTS AND BOLTS OF SALES AND USE TAXES

Sales and use taxes have been imposed by state and local governments since the 1930s.<sup>15</sup> They are charged at the "retail point-of-purchase" and based on a percentage of the total cost of the goods or services purchased.<sup>16</sup> As there are over 9,000 taxing jurisdictions, each state, county, and village may have its own sales tax rules and rates.<sup>17</sup> Sellers charge their customers on behalf of local taxing authorities at the point of sale and subsequently remit the sales tax to their local authorities.<sup>18</sup> For example, a resident of Philadelphia, Pennsylvania, makes a purchase at a local shop; the state of Pennsylvania imposes a 6% sales tax rate and the city of Philadelphia

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14. The Modernized Origin-Based Taxation Model is an original proposal for dealing with the e-commerce taxation issue, set forth in Part VI of this note.

15. Ashabi, *supra* note 6, at 545.

16. See Beesley, *supra* note 1.

17. Yang & Aquilino, *supra* note 2, at 8.

18. *Id.*

imposes an additional 2% sales tax rate; an aggregate of 8%.<sup>19</sup> Thus, in addition to the sale price of the item, the seller must also charge an additional 8% sales tax fee on behalf of the state of Pennsylvania and the city of Philadelphia taxing authorities.<sup>20</sup> The *seller* is then responsible for remitting 6% to the Pennsylvania taxing authorities and 2% to the Philadelphia taxing authorities.

This sales tax model assumes that the buyer and seller are residents of the same state, or that the purchase will be consumed in the state it was purchased.<sup>21</sup> Because this is not always the case, “use taxes” were developed to prevent shoppers from dodging sales taxes by traveling across state lines to make purchases.<sup>22</sup> Absent the imposition of a use tax, out-of-state sellers would have an unfair advantage because out-of-state buyers would not be required to pay any tax on out-of-state purchases.<sup>23</sup> To ensure that buyers will not be subject to a double tax, sales taxes and use taxes are mutually exclusive—a buyer is only subject to one such tax on each purchase.<sup>24</sup> For example, John travels from his home state Rhode Island to Virginia to purchase a speed boat for his dock in Rhode Island. Upon leaving Virginia with his new boat, Virginia will reimburse John for any sales tax paid on the boat as he is not a Virginia resident, but when John returns to Rhode Island it becomes *his responsibility* to remit a use tax in his home state.<sup>25</sup> Currently forty-five states, including the District of Columbia, charge their residents general sales and use taxes.<sup>26</sup> On the other hand, five states: New Hampshire, Oregon, Montana, Alaska, and Delaware (known as NOMAD) do not charge any sales and use taxes.<sup>27</sup>

Charging sales taxes for online transactions is considerably more complicated than charging sales taxes for in-person transactions because often the buyer and seller are located in different states.<sup>28</sup> When a buyer and seller are located in the same taxing jurisdiction it is quite simple: taxation works the same way as it does for traditional in-person transactions.<sup>29</sup> However, when the buyer and seller are located in different taxing

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19. See *Sales, Use, & Hotel Occupancy Tax*, CITY OF PHILA., <https://beta.phila.gov/services/payments-assistance-taxes/business-taxes/sales-use-hotel-occupancy-tax/> (last updated Jan. 10, 2017).

20. See generally Yang & Aquilino, *supra* note 2.

21. See *Sales Tax*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/salestax.asp> (last visited Sept. 20, 2016) [hereinafter *Sales Tax*]; see also Yang & Aquilino, *supra* note 2 at 1–2.

22. See *Use Tax*, INVESTOPEDIA, <http://www.investopedia.com/terms/u/use-tax.asp> (last visited Sept. 17, 2017).

23. See *id.*

24. See *What is the Difference Between Sales Tax and Use Tax?*, SALES TAX INSTITUTE, [http://www.salestaxinstitute.com/Sales\\_Tax\\_FAQs/the\\_difference\\_between\\_sales\\_tax\\_and\\_use\\_tax](http://www.salestaxinstitute.com/Sales_Tax_FAQs/the_difference_between_sales_tax_and_use_tax) (last visited Sept. 6, 2016) [hereinafter SALES TAX INSTITUTE].

25. See *Sales Tax*, *supra* note 21.

26. SALES TAX INSTITUTE, *supra* note 24.

27. See *id.*

28. See Beesley, *supra* note 1.

29. See *id.*

jurisdictions the problem becomes infinitely more complicated.<sup>30</sup> In such situations it is difficult to determine which state's tax rates should apply to the transaction and which taxing authorities should receive the tax revenues.<sup>31</sup>

Two major modes of taxation have developed to deal with this problem: Destination-Based sales tax and Origin-Based sales tax.<sup>32</sup> Destination-Based sales taxes require online retailers to charge their customers sales taxes based on the buyer's location.<sup>33</sup> This model requires sellers to keep track of thousands of different taxing laws and to remit sales taxes to governments outside its own jurisdiction.<sup>34</sup> Origin-Based sales taxes are charged based on the seller's location and remitted to the seller's local government.<sup>35</sup> However, this means that buyers will be subject to taxing rates outside of their individual jurisdictions.<sup>36</sup> As the Supreme Court ruled in *National Bellas Hess v. Dep't of Revenue* and in *Quill*, both the Destination-Based and Origin-Based Models face constitutional challenges including due process, commerce clause, and state sovereignty.<sup>37</sup> However, because the Origin-Based Model is taxed according to the seller's rate, it creates the most amicable environment for sellers to expedite sales taxes and to ensure that sales taxes are properly paid. Simply put, the Origin-Based Sales Tax Model is more efficient and less expensive to implement and enforce.<sup>38</sup>

## II. JUDICIAL INACTION: DUE PROCESS AND THE COMMERCE CLAUSE

The following section describes two seminal, yet outdated Supreme Court cases that concern the online sales tax issue. Despite the need for federal guidance, the Supreme Court has not granted certiorari for any cases that would resolve this issue since *Quill* was decided in 1992.

### A. NAT'L BELLAS HESS, INC. V. DEP'T OF REVENUE OF ILL.

E-commerce taxation is so significant because it involves many constitutional implications. In 1967, the Supreme Court ruled that the state of Illinois did not have jurisdiction to tax National Bellas Hess, an out-of-state mail order company.<sup>39</sup> Since National Bellas Hess was an out-of-state

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30. *See id.*

31. *See id.*

32. *See* Daniel Tarantola, *Equal Footing: Correcting the E-Commerce Tax Haven*, 10 BROOK. J. CORP. FIN. & COM. L. 277, at 296–97.

33. *Id.*

34. *See* Yang & Aquilino, *supra* note 2, at 8.

35. Tarantola, *supra* note 32, at 296.

36. *See id.* at 297.

37. *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 760 (1967) *overruled* by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *see also* Tarantola, *supra* note 32, at 296.

38. *See* Tarantola, *supra* note 32 at 298–99.

39. *See* Nat'l Bellas Hess, 386 U.S. at 759–60.

company and did not have minimum contacts in Illinois, the Court ruled that taxing it would violate the Due Process Clause of the Fourteenth Amendment.<sup>40</sup> Furthermore, to allow such a tax would interfere with Congress' right to regulate interstate commerce under the Dormant Commerce Clause.<sup>41</sup> The Court concluded that because National Bellas Hess did not have a physical presence in Illinois, forcing it to tax customers in Illinois violates the Due Process Clause and the Commerce Clause.<sup>42</sup> This case originated the rule that states cannot require companies without physical presence in the given state to impose a sales and use tax.<sup>43</sup>

### **B. QUILL CORP. V. NORTH DAKOTA**

In 1992 the Supreme Court's decision in *Quill* partly overruled its decision in *National Bellas Hess*.<sup>44</sup> The Court reasoned that since the time of its decision in *National Bellas Hess*, the due process analysis had changed for mail order businesses.<sup>45</sup> The Court held that Quill Corporation, having established sufficient minimum contacts in North Dakota and, therefore requiring Quill Corporation to charge North Dakota customers a sales tax, did not violate the Fourteenth Amendment.<sup>46</sup> However, the Supreme Court partly affirmed its decision in *National Bellas Hess*, to the extent that taxation of Quill Corporation infringed on Congress' power to regulate interstate commerce under the Dormant Commerce Clause and was thus unconstitutional.<sup>47</sup> The Supreme Court in *Quill* favored the bright line Physical Presence test established in *National Bellas Hess*.<sup>48</sup> The Court also invited Congressional action, stating that Congress "remains free to disagree with our conclusions" and that it "may be better qualified to resolve" this issue.<sup>49</sup> The Court further stated that, "[i]n this situation, it may be that 'the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.'"<sup>50</sup>

Since the Court's ruling in *Quill*, e-commerce has become the universal norm, forever changing the face of retail shopping.<sup>51</sup> This incredible advancement, however, has also fueled relentless litigation, confusion, and lost tax revenues. In a recent Supreme Court case, *Direct Marketing v. Brohl*, Justice Kennedy, in a concurring opinion, specified that even the majority in

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40. *See id.* at 758.

41. *See id.* at 756, 760.

42. *See id.* at 760.

43. *See id.*

44. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 299 (1992).

45. *See id.* at 303.

46. *See id.* at 304.

47. *See id.* at 312–14.

48. *See id.* at 314–15.

49. *Id.* at 318.

50. *Id.* at 318–19.

51. *See Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

*Quill* recognized that the ruling may have been a mistake.<sup>52</sup> He also noted that many of the Supreme Court Justices ruled “based on *stare decisis* alone . . . a holding now inflicting extreme harm and unfairness in the States.”<sup>53</sup> He exclaimed that although the instant case was not the appropriate time to do so, the *Quill* decision required appraisal.<sup>54</sup> Justice Kennedy’s sentiments lay with brick and mortar retailers who remain seriously disadvantaged compared to online retailers who are not subject to sales tax requirements.<sup>55</sup> As states increasingly face extreme deficits and continue to lose millions in uncollected online sales tax revenues, the *Quill* Physical Presence requirements must be evaluated.<sup>56</sup>

Justice Kennedy is not alone in his belief that the *Quill* Physical Presence test is outdated.<sup>57</sup> The newest justice on the Supreme Court, Justice Neil Gorsuch, seems to hold a similar sentiment.<sup>58</sup> As a Tenth Circuit Judge, Justice Gorsuch explained that the appellate courts are required to follow the *Quill* Supreme Court precedent, “whether or not we profess confidence in the decision itself.”<sup>59</sup> He went on to state that “while some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law a good many others disappear when reliance interests never form around them or erode over time.”<sup>60</sup> Although it is unclear whether the Supreme Court will overrule *Quill* in the near future, what is clear is that there are those on the bench who would relish the opportunity to relinquish *Quill*.

### III. CONGRESSIONAL INACTION IN A TIME OF NEED

Aside from the Supreme Court’s belief that Congress is in a better position to tackle taxing issues, the aforementioned complications may be the true reason that the Supreme Court passed this complex issue onto Congress in 1992.<sup>61</sup> Since then, Congress has left e-commerce sales taxation to the states. This decision goes far beyond the idea that states are the “laboratories of democracy.”<sup>62</sup> The issue is incredibly complex and there is no way to wholly please all the parties involved; parties must be willing to make compromises to settle this problem. However, it is difficult to decide which parties should have to make sacrifices, and asking constituents to

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52. *See id.* at 1134.

53. *Id.*

54. *See id.* at 1135.

55. *See id.*

56. *See generally id.*; *see also* *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); Beebe, *supra* note 8.

57. *See* Michael Tackeff, *The Quill Dilemma: Looming Changes in Collecting Online Sales Tax*, STATE TAX NOTES MAG., Sept. 4, 2017, LEXIS.

58. *See id.*

59. *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring).

60. *Id.* at 1151.

61. *See Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753, 760 (1967), *overruled by Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

62. *Id.*



compromise does not tend to garner reelection votes for incumbent congressmen.<sup>63</sup> Perhaps this is the reason Congress has yet to resolve the issue.

#### A. FROM THE INTERNET FREEDOM ACT OF 1998 TO THE MARKETPLACE FAIRNESS ACT OF 2013

Congress passed the Internet Freedom Act to protect telecommunication from tax fees.<sup>64</sup> At that time, the government worried that fees for internet services would discourage the public from using the Internet, but this Act was designed to counter that fear and encourage wide public use of the Internet.<sup>65</sup> Since then, the Internet has become an indispensable tool. The concern that taxation of online activities would dampen growth and discourage use is severely misplaced. Despite this reality, the Internet Freedom Act was extended by Congress in 2007, allowing online retailers to continue to shirk tax obligations that other businesses are required to pay.<sup>66</sup> In 2015, Congress signed the Trade Facilitation and Trade Enforcement Act which essentially extended the Internet Freedom Act's online taxing moratorium indefinitely.<sup>67</sup> Thus, although there are no longer any rational fears that taxing online companies will discourage e-commerce activities, the current law has not progressed. As such, we now have a system in which there are severe taxing inequalities between online retailers and brick and mortar retailers.<sup>68</sup>

These inequalities have led to numerous proposals and state taxing laws, which aim to end this dichotomy by leveling the playing field for all business models and raising tax revenues by imposing sales tax obligations on online businesses.<sup>69</sup> In 2002, the National Governors Association signed the Streamline Sales and Use Tax Agreement (SSUTA), the result of a collaborative effort by forty-four states and the District of Columbia.<sup>70</sup> SSUTA attempts to simplify the Sales and Use tax system, predominantly the complications associated with sales that cross state lines.<sup>71</sup> However, SSUTA has further complicated online sales taxation with the system of "sourcing

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63. See Chris Cillizza, *Everyone Wants Congress to Compromise. So, Why Don't They?* WASH. POST (July 23, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/07/23/everyone-wants-congress-to-compromise-so-why-dont-they/?utm\\_term=.802add611e66](https://www.washingtonpost.com/news/the-fix/wp/2013/07/23/everyone-wants-congress-to-compromise-so-why-dont-they/?utm_term=.802add611e66).

64. See Yang & Aquilino, *supra* note 2, at 4.

65. See *id.* at 7.

66. See generally JEFFREY M. STUPAK, CONGR. RES. SERV., THE INTERNET TAX FREEDOM ACT: IN BRIEF (2016), <https://www.fas.org/sgp/crs/misc/R43772.pdf>.

67. See *President Signs Bill Making Internet Service Tax Ban Permanent*, *supra* note 10.

68. See *id.*

69. See *id.*

70. *What is the Streamlined Sales and Use Tax Agreement?*, STREAMLINED SALES TAX GOVERNING BOARD, INC. (Sept. 26, 2016), <http://www.streamlinedsalestax.org/index.php?page=en1>.

71. See *id.*

rules.”<sup>72</sup> These rules provide that requirement to charge at either the seller’s or the buyer’s rate depends on a number of factors including: whether the goods are delivered or picked-up, the nature of the item being sold, and the business model of the seller.<sup>73</sup> These are just three of the many elements that a seller must take into consideration upon each individual sale.<sup>74</sup> Overall, SSUTA favors a Destination-Based tax, but this preference requires sellers to jump through hoops, specifically when the buyer’s locality cannot be determined.<sup>75</sup> It also requires sellers to know countless rules scattered throughout the 252-page proposed legislation.<sup>76</sup> Because SSUTA is so complicated, it is unattractive to many states and to most sellers.<sup>77</sup> Despite its complications, SSUTA’s “sourcing rules” are used as a basis for many other proposals, including the Marketplace Fairness Act of 2013.<sup>78</sup>

The Marketplace Fairness Act was introduced 2013, and although it was passed by the Senate, it is still pending in the House of Representatives.<sup>79</sup> It was reintroduced to the Senate in 2015, but again the attempts were fruitless.<sup>80</sup> On April 27, 2017, the Marketplace Fairness Act was introduced to the Senate yet a third time.<sup>81</sup> Although there is bipartisan support, it is still unclear whether the Act will be adopted.<sup>82</sup> One major problem with the Marketplace Fairness Act is that it does not eliminate the complications associated with SSUTA because it requires states to become members of SSUTA.<sup>83</sup> The Act provides that any state that refuses to become a member of SSUTA must comply with certain minimum requirements, which are even more cumbersome than becoming a member of SSUTA.<sup>84</sup> These minimum requirements include establishing a single state taxing administration and one uniform state tax rate, providing sellers with free taxing software, and requiring sellers to comply with the sales sourcing rules.<sup>85</sup> Because the minimum requirements are burdensome and do not provide viable

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72. See STREAMLINED SALES AND USE TAX AGREEMENT (Amended 2017) at 18–32, <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%202017-5-11.pdf>.

73. *Id.* at 19–21.

74. *See id.*

75. *Id.* at 32.

76. *See id.*

77. *See* Yang & Aquilino, *supra* note 2, at 9.

78. *See id.*

79. *See id.* at 10; *see also* Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

80. *See generally* Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015).

81. *See generally* Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017).

82. *See* News Release, U.S. Senator for Wyoming: Mike Enzi, Bipartisan Group of Senators Introduce Marketplace Fairness Act of 2017 to Allow States to Close Sales Tax Loophole (Apr. 27, 2017), <https://www.enzi.senate.gov/public/index.cfm/2017/4/bipartisan-group-of-senators-introduce-marketplace-fairness-act-of-2017-to-allow-states-to-close-sales-tax-loophole>.

83. *See* Ashabi, *supra* note 6, at 560.

84. *See id.*

85. *See* Yang & Aquilino, *supra* note 2, at 10–11.

alternatives,<sup>86</sup> states will be strong-armed into adopting SSUTA against their will.

The Marketplace Fairness Act preserves SSUTA's "sales sourcing rules," thus it does not eliminate many of the complications associated with Destination-Based tax rate.<sup>87</sup> Further, although the Act has a preemption clause allowing the states to adopt legislation that conflicts with the Act, because there are hefty minimum requirements non-member states much implement, it will still be exceedingly difficult for states to deal with e-commerce in their own way.<sup>88</sup> This infringement on state sovereignty will cause states that prefer lower sales tax rates to raise their rates because their local online retailers will be required to charge higher out-of-state rates regardless of their lower in-state tax rates.<sup>89</sup>

The Remote Transactions Parity Act of 2015 is similar to the Marketplace Fairness Act, but with an added layer of protection for small remote retailers.<sup>90</sup> This Act gives small remote sellers a three-year grace period before requiring them to charge and remit sales taxes.<sup>91</sup> After the three-year grace period expires, small remote sellers are required to charge and remit sales taxes like large online retailers.<sup>92</sup> One glaring problem is that the Remote Transaction Parity Act retains all the SSUTA requirements that plague the Marketplace Fairness Act.<sup>93</sup>

## B. VALUE ADDED TAX PROPOSALS

Some politicians have proposed using European Value Added Tax (VAT) in lieu of the current system.<sup>94</sup> In countries that utilize the VAT, taxes are remitted to the government at each stage of a product's development based on a percentage of the value added to the product.<sup>95</sup> For instance, if a flour refinery buys wheat grains for \$50 and sells the flour produced from those wheat grains to a bread maker for \$100, the refinery must remit a tax to its taxing authorities based on a percentage of its \$50 profit.<sup>96</sup> Again, at

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86. *See generally id.*

87. *Id.* at 10.

88. *See generally id.*; *see also* Sylvia F. Dion, *The MFA v. the RTPA: Will Changes in the House and an Expiring ITFA Help Advance or Further Stall Federal Remote Seller Bills?*, BNA (Nov. 20, 2015), <http://www.bna.com/mfa-rtpa-changes-n57982063794/>.

89. *See* Chris Matthews, *Get Ready to Pay a Lot More in Sales Tax*, FORTUNE (Aug. 25, 2016), <http://fortune.com/2016/08/25/online-sales-tax/>.

90. *See generally* Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong. (2015).

91. *See id.*

92. *See id.*

93. *See id.*

94. For examples, *see* Curtis S. Dubay, *The Value Added Tax is Wrong for the United States*, THE HERITAGE FOUNDATION (Dec. 21, 2010), <http://www.heritage.org/research/reports/2010/12/the-value-added-tax-is-wrong-for-the-united-states>; Lila Disque & Helen Hecht, *Beyond Quill and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1175 (2016).

95. *See* Disque & Hecht, *supra* note 94, at 1174.

96. *See generally id.*

the next stage, the bread maker who purchased the flour for \$100 and sells the bread made by that flour for \$200 must remit a tax to his taxing authorities based on a percentage of his \$100 profit.<sup>97</sup> Thus, at each point of sale, a tax is remitted based on a percentage of the seller's gross profit margin, as opposed to charging the consumer at the end of the chain. Implementing a VAT tax system in the United States would require changing the entire tax system as a whole. It does not seem like a plausible solution, nor one that can be swiftly implemented without an arduous battle in government.

The European Union, which utilizes a VAT system, has already faced criticism because the VAT rules only apply to registered VAT businesses; thus, when a transaction occurs between a registered business and a non-registered business, the rules are exponentially complicated.<sup>98</sup> Implementing a VAT system in the United States would pose similar issues. The European Union has reported extensive fraud and tax evasion under the VAT system and nothing suggests that such evasion can be avoided if the United States were to utilize the VAT model.<sup>99</sup> Further, similar to SSUTA, it would require each state to register and agree to comply with VAT rules, and since proper implementation of a VAT system would require national cooperation, it would create a conflict for states who wish to set individual sale tax rates and regulations.<sup>100</sup> For some, the grass looks greener on the other side, but fixing the existing tax system is a more practicable solution than adopting a whole new system.

### C. ONLINE SALES SIMPLIFICATION ACT OF 2015 AND 2016

In January of 2015, Representative Robert Goodlatte proposed the Online Sales Simplification Act of 2015 (2015 Proposal).<sup>101</sup> This proposal requires states to become members of a federal clearinghouse that would be responsible for remitting sales tax revenues from origin states to destination states.<sup>102</sup> To become a member, states must propose a single state tax rate and must charge sales taxes at the rate of the origin state.<sup>103</sup> States that are not members of a federal clearinghouse will not be permitted to receive distributions from the federal clearinghouse, and the sales tax revenues generated by non-member states will be given back to the given origin state.<sup>104</sup> The NOMAD states, those that do not impose any sales taxes, will

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97. See generally *id.*

98. See *id.* at 1176.

99. See Dubay, *supra* note 94.

100. See *Value-Added Tax - VAT*, INVESTOPEDIA, <http://www.investopedia.com/terms/v/valuead-dedtax.asp> (last visited Oct. 14, 2016).

101. See PRICEWATERHOUSECOOPERS, DISCUSSION DRAFT OF ORIGIN-BASED ONLINE SALES SIMPLIFICATION ACT RELEASED 1 (Jan. 16, 2015), <http://www.pwc.com/us/en/state-local-tax/news-letters/salt-insights/assets/pwc-discussion-draft-origin-based-online-sales-simplification-act.pdf>.

102. See *id.*

103. See *id.* at 2.

104. See *id.*

either be required to charge their buyers sale taxes and remit the revenues to the federal clearinghouse, or report the sale to the federal clearinghouse.<sup>105</sup> The main concern of the 2015 Proposal was that Origin-Based taxes pose “constitutional infirmities” under the Due Process Clause for out-of-state buyers who would be subject the tax rates of jurisdictions other than their own.<sup>106</sup> Some critics claim that the 2015 Proposal will cause a race to the bottom for states that desire to remain competitive and attract businesses with their tax rates.<sup>107</sup>

These criticisms of the 2015 Proposal prompted Representative Goodlatte to release a more recent draft of the Proposal in August 2016 (2016 Proposal). This 2016 Proposal is similar to the 2015 Proposal in that it provides for a federal clearinghouse and in its treatment of non-member states and NOMAD states.<sup>108</sup> However, a key difference is that, rather than calculating tax rates by the origin states based on the rates of origin states, sales tax rates are Destination-Based and remitted to the destination state through the clearinghouse.<sup>109</sup> However, the Destination-Based Model is one of the major problems associated with the Marketplace Fairness Act, a probable reason why the Marketplace Fairness Act has been pending in Congress for some time.<sup>110</sup> Further, this 2016 Proposal does not adequately address the problems associated with Destination-Based taxation, such as due process challenges by sellers, state sovereignty, rising tax rates, and a potential double taxation problem for those states that do not wish to become members of the federal clearinghouse.<sup>111</sup>

#### D. NO REGULATION WITHOUT REPRESENTATION ACT OF 2016

Congressman Jim Sensenbrenner introduced a strict Origin-Based Taxing Proposal in July 2016.<sup>112</sup> This proposal aims to establish a federal law based on the narrow *Quill* Physical Presence test in that it would essentially “codify the physical presence requirement” as it was stated by the Supreme Court in *Quill*.<sup>113</sup> It would preempt any state laws that conflict and would not allow any future state legislation regarding e-commerce.<sup>114</sup> The proposal also

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105. *See id.*

106. *See id.*

107. *See* Curtis Dubay & James Gattuso, *Goodlatte's Internet Sales Tax Plan is Better, but Still Falls Short*, THE DAILY SIGNAL (Aug. 29, 2016), <http://dailysignal.com/2016/08/29/goodlattes-internet-sales-tax-plan-is-better-but-still-falls-short/>.

108. *See id.*; *see also* PRICEWATERHOUSECOOPERS, *supra* note 101.

109. *See* Dubay & Gattuso, *supra* note 107; *see also* PRICEWATERHOUSECOOPERS, *supra* note 101.

110. *See* Dubay & Gattuso, *supra* note 107.

111. *See id.*

112. *See* Stephen P. Kranz, Marc Yopp & Eric Carstens, *Breaking New: Physical Presence Requirement Bill Introduced in Congress*, INSIDESALT (July 15, 2016), <http://www.insidesalt.com/2016/07/breaking-news-physical-presence-requirement-bill-introduced-in-congress/>.

113. *See id.*

114. *See id.*

provides that a seller cannot be subject to any given taxing jurisdiction unless it is physically present within that jurisdiction for a minimum of fifteen days per taxable year.<sup>115</sup> This proposal is a relapse, as it would preempt all state legislation that has attempted to level the playing field and raise state tax revenues.

#### IV. STATES TAKING ACTION

##### A. EXPANSION OF *QUILL* PHYSICAL PRESENCE: NEXUS

Although the Supreme Court gave Congress full reign to pass federal legislation to overturn *Quill*, almost twenty-five years have passed and Congress has not taken such action.<sup>116</sup> Accordingly, the Physical Presence requirement is still the prevailing requirement under the Commerce Clause. That said, over the years, many states have been facing budget crises and as a result, have passed legislation to try and capture tax revenues generated by e-commerce.<sup>117</sup> In doing so, states have developed the concept of “Nexus,” or “substantial physical presence” which has expanded the definition of “physical presence” far beyond the narrow confines of the *Quill* Physical Presence test.<sup>118</sup> Companies with a substantial economic presence in a given state are deemed to have a physical presence there under the Commerce Clause, thereby for sales tax purposes.<sup>119</sup> Most states define Nexus as “maintaining, occupying, or using permanently or temporarily, directly *or indirectly* or through a subsidiary” any place of business or business facility.<sup>120</sup> Nexus also includes “having a representative, agent, salesman, canvasser, or solicitor” within a given state although the main businesses are physically located in a different state.<sup>121</sup>

Some states have implemented a “Click-Through-Nexus” which applies specifically to online companies and carries Nexus one step further because it does not require physical presence of facilities or persons;<sup>122</sup> it is established when an out-of-state seller makes a certain amount of revenue from buyers in a given state through referrals from an in-state agent.<sup>123</sup> Sellers must be making commission payments to the in-state agent for any

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115. *See id.*

116. *See generally supra* Part III.

117. For examples, *see Modernize Florida Taxes to Fill Budget Gaps, supra* note 10; *Why You Should Care About South Dakota’s Controversial Online Sales Tax Law, supra* note 10; Brunner, *supra* note 10; *President Signs Bill Making Internet Service Tax Ban Permanent, supra* note 10.

118. *See* Peterson, *supra* note 4.

119. *See What is Nexus?*, SALES TAX INSTITUTE, [http://www.salestaxinstitute.com/Sales\\_Tax\\_FAQs/What\\_is\\_nexus/](http://www.salestaxinstitute.com/Sales_Tax_FAQs/What_is_nexus/), (last visited Sept. 21, 2017).

120. *Id.* (emphasis added).

121. *Id.*

122. *See id.*

123. *Id.*

order that comes about as a result of the click-through referral from the agent's website.<sup>124</sup>

Other states have an affiliate tax which imposes a tax on any activities by an out-of-state business "related to sales, delivery, service and maintaining a place of business in the state on behalf of the out-of-state business to benefit the out-of-state business' customers."<sup>125</sup> These Nexus expansions make it cumbersome and costly for many online businesses that must determine whether they have enough presence within a consumer's state to satisfy that state's particular Nexus laws and whether they must charge a sales tax to consumers in that state.

### B. "AMAZON TAX"

Some states have passed a Nexus test known as an "Amazon Tax."<sup>126</sup> In New York, for example, out-of-state online retailers who receive "cumulative gross receipt from sales" of over \$10,000 a year from New York buyers are required to register as vendors in New York.<sup>127</sup> This creates a "physical presence" in New York for sales tax purposes.<sup>128</sup> Thus, the registered vendor must charge New York consumers New York sales taxes and remit the tax revenues to the New York taxing authorities.<sup>129</sup> The "Amazon Tax" was immediately challenged by large online retailers such as Amazon and Overstock, and while many state courts have upheld the tax, others have stuck it down.<sup>130</sup> Currently, over forty states impose Nexus sales tax laws on out-of-state companies, each state having its own specific requirements that companies must meet in order for Nexus to be established.<sup>131</sup>

### C. COLORADO'S INCREASED NOTIFICATION LAWS

One way that states ensure they will receive sales and use tax revenues from online purchases is through Increased Notification laws.<sup>132</sup> Colorado passed legislation requiring non-Colorado online retailers to inform Colorado buyers of their duty to pay use taxes to Colorado.<sup>133</sup> The law also requires retailers to release the names and addresses of Colorado buyers.<sup>134</sup> The Colorado legislature hopes that sellers prefer to charge the tax and remit the

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124. *Id.*

125. *Id.*

126. *See generally* Performance Mktg. Ass'n v. Hamer, 998 N.E.2d 54 (Ill. 2013).

127. *See* Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013).

128. *See* Yang & Aquilino, *supra* note 2, at 6.

129. *See id.*

130. *See id.* at 6-7.

131. *See* Jennifer Dunn, *What Creates Sales Tax Nexus in Every State*, TAXJAR (May 22, 2017), <https://blog.taxjar.com/sales-tax-nexus-every-state/>.

132. *See generally* Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (10th Cir. 2016).

133. *See generally id.*

134. *Id.* at 1133.

proceeds to Colorado rather than informing buyers of their duties to remit sales taxes on their own. In August of 2016, the Tenth Circuit ruled that the Colorado Increased Notification law is not unduly burdensome on Congress' commerce power and it was not discriminatory; thus, the law is constitutional.<sup>135</sup> In other states, similar laws were struck down by state courts holding that such laws discriminate against out-of-state sellers and that they are an unconstitutional violation of the Commerce Clause.<sup>136</sup> Most recently, the South Dakota courts, citing *Quill*, struck down a Nexus law requiring sellers with over \$100 of sales within South Dakota to remit sales taxes.<sup>137</sup>

Both the Nexus laws and the Increased Notification laws have created a stir in the federal and state court systems.<sup>138</sup> The circuit splits are in desperate need of a resolution from the highest authority, the Supreme Court. Yet, both the Supreme Court and Congress continue to let this long-standing national issue go unresolved.<sup>139</sup> The Supreme Court's avoidance of the e-commerce sales tax issue resonates with many state governments, small businesses, and state citizens who have urged the federal government to act.<sup>140</sup>

## V. "SOMETHING'S GOTTA GIVE"

### A. ADVANTAGE OF DODGING SALES TAXES

Sales taxes may seem like a trivial or negligible competitive edge for online businesses who are not required to charge it, and many question whether it is truly an advantage for online retailers.<sup>141</sup> However, a deeper look shows that small brick and mortar shops, and big-box retailers such as Target, Walgreens, and BestBuy are required to charge sales taxes.<sup>142</sup> These retailers and small shops are caught in a losing battle with online retailers such as Amazon, Overstock, and Wayfair, which are generally able to avoid the sales taxes.<sup>143</sup> Research conducted at Ohio State University revealed that shoppers in jurisdictions that impose an "Amazon Tax" spend 9.5% less on Amazon products.<sup>144</sup> This dip in Amazon sales was especially prominent for big ticket items costing over \$300, which generally incur higher sales

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135. *Id.* at 1147–51.

136. See Yang & Aquilino, *supra* note 2.

137. See *Why You Should Care About South Dakota's Controversial Online Sales Tax Law*, *supra* note 10.

138. See *id.*

139. See generally *supra* Part III.

140. See generally David Pope & Laura Grace Mezher, *Is the Kill-Quill Movement Gaining Momentum?* BAKER MCKENZIE: SALT SAVVY (Apr. 4, 2017), <http://www.saltsavvy.com/2017/04/04/is-the-kill-quill-movement-gaining-momentum/>.

141. See *Online Retailers Have Clear Advantage by Not Collecting Sales Tax*, OHIO ST. U. FISHER C. OF BUS. (Apr. 23, 2014), [https://fisher.osu.edu/article\\_archive/3897](https://fisher.osu.edu/article_archive/3897).

142. See generally Ashabi, *supra* note 6.

143. See *id.*

144. See *Online Retailers Have Clear Advantage by Not Collecting Sales Tax*, *supra* note 141.



taxes.<sup>145</sup> The study further observed that the dip in consumption of Amazon products created a bump in sales for online-only retailers not subject to the tax, and to brick and mortar retailers like BestBuy, where buyers can see the product before purchasing it and return unwanted purchases with greater ease.<sup>146</sup> In other words, after the tax imposition, consumers redirected purchases to local stores, resulting in a 7.1% increase in sales of traditional retailers.<sup>147</sup> This study confirms the suspicion that online retailers enjoy a windfall as long as they are not subject to sales taxes.

## B. EBAY'S OPPOSITION TO THE TAX

Online retailers, eBay and PayPal, strongly oppose online sales taxes—claiming that although imposition of sales tax requirements on online retailers aims to even the playing field between online companies and brick and mortar stores, it creates a disadvantage to smaller online retailers and vendors.<sup>148</sup> Tod Cohen, eBay's Vice President for Government Relations and Deputy General Counsel, spoke out against the Marketplace Fairness Act stating “[t]his is another Internet sales tax bill that fails to protect small business retailers using the Internet and will unbalance the playing field between giant retailers and small business competitors” . . . such a tax “burdens on small businesses at a time when we want entrepreneurs to create jobs and economic activity.”<sup>149</sup> eBay opposes the tax because it will create a tax disparity between smaller online vendors whose revenues are much lower than large online retailers.<sup>150</sup>

Large vendors can easily afford expensive computerized tax programs or accountants to ensure that their sales taxes are properly paid. Conversely, smaller online vendors who do not make nearly as much profit as large companies, like Amazon, do not have the resources to pour into accounting and taxing. Patrick Byrne, CEO of Overstock.com, explained that there are over 9,000 taxing jurisdictions, each taxing different products at different rates: “[i]n one jurisdiction, cotton candy is food; in another it's

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145. *See id.*

146. *See id.*

147. Sarah Halzack, *The True Cost to Amazon of the 'Amazon Tax'*, WASH. POST (Jan. 13, 2016), [https://www.washingtonpost.com/news/business/wp/2016/01/13/the-true-cost-to-amazon-of-the-amazon-tax/?utm\\_term=.7e44cc36fc4e](https://www.washingtonpost.com/news/business/wp/2016/01/13/the-true-cost-to-amazon-of-the-amazon-tax/?utm_term=.7e44cc36fc4e).

148. *See* Robert W. Wood, *Marketplace Fairness Tax Pits Amazon v. eBay*, FORBES (Nov. 14, 2011, 6:14 AM), <http://www.forbes.com/sites/robertwood/2011/11/14/marketplace-fairness-tax-pits-amazon-v-ebay/print/>.

149. *Id.*; *see generally* Tod Cohen, *Sellers: If You Oppose Internet Sales Tax Bill, Make Your Voice Heard*, EBAY COMMUNITY: ANNOUNCEMENTS (Nov. 12, 2014, 9:00 AM), <https://community.ebay.com/t5/Announcements/Sellers-If-you-oppose-the-Internet-Sales-Tax-Bill-make-your-voice-heard/p26163348>.

150. *See* Wood, *supra* note 148; *see also* Cohen, *supra* note 149.

entertainment or candy.”<sup>151</sup> This is yet another reason why smaller online companies and vendors are at a disadvantage compared to large online retailers.

### C. AMAZON’S SWAP

Historically, Amazon has been unwaveringly against any imposition of e-commerce sales taxes.<sup>152</sup> However, “in a hilariously brazen display of crony capitalism, Amazon itself switched sides a few years ago.”<sup>153</sup> Amazon’s board and executives claim that its change of heart is altruistic and that it is about time to level the playing field for all businesses alike.<sup>154</sup> In fact, Amazon’s Vice President for Global Public Policy, Paul Misener, wrote a letter to the Senate on Valentine’s Day of 2013 thanking them for favoring the Marketplace Fairness Act.<sup>155</sup> Despite Amazon’s stated reasons for supporting such tax proposals, a more likely reason for Amazon’s swap is that the tax is burdensome and prohibitive for smaller online retailers.<sup>156</sup> Perhaps Amazon is anticipating that e-commerce sales taxation will discourage and potentially crush existing competition from smaller alternative online retailers.

Amazon’s altruistic reasoning also seems unlikely in light of Amazon’s relatively recent sensation, “Amazon Prime,” providing free and fast shipping. In order to achieve free and fast shipping, Amazon has situated large warehouses in strategic places, like larger cities, around the country.<sup>157</sup> These warehouses give Amazon a “physical presence” in states where they are located, forcing Amazon to charge sales taxes in those states.<sup>158</sup> This is precisely why Amazon traditionally avoided placing warehouses in large states.<sup>159</sup> However, Amazon’s board and executives have realized that its tax-free reign is coming to an end, and while Amazon has agreed to pay more sales taxes, it has also expanded warehouse construction in states it avoided in the past.<sup>160</sup> With warehouses in even more locations, Amazon’s hope is

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151. Farhad Manjoo, *Why I Love the National Internet Sales Tax Plan*, SLATE (Apr. 30, 2013, 6:38 PM), [http://www.slate.com/articles/technology/technology/2013/04/national\\_internet\\_sales\\_tax\\_why\\_i\\_love\\_the\\_marketplace\\_fairness\\_act\\_and.html](http://www.slate.com/articles/technology/technology/2013/04/national_internet_sales_tax_why_i_love_the_marketplace_fairness_act_and.html).

152. See Robert Verbruggen, *Our Online Sales-Tax Loophole: A New Proposal to Close it is Promising*, THE AMERICAN CONSERVATIVE (Sept. 6, 2016), <http://www.theamericanconservative.com/articles/our-online-sales-tax-loophole/>.

153. *Id.*

154. See Tricia Duryee, *Amazon’s Love Note to Senate Backs Sales-Tax Proposal*, ALL THINGS D (Feb. 14, 2013, 12:12 PM), <http://allthingsd.com/20130214/amazons-love-note-to-senate-backs-sales-tax-proposal/>.

155. *Id.*

156. See Jacob Goldstein, *Why Amazon Supports an Online Sales-Tax Bill*, NPR (Apr. 22, 2013, 12:57 PM), <http://www.npr.com/sections/money/2013/04/22/178407898/why-amazon-supports-an-online-sale-tax-bill>.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.*

that it will be able to expedite shipping to free same-day shipping, providing consumers swift gratification at the click of a button.<sup>161</sup> Thus, despite sales tax fees, Amazon will be able to maintain a competitive edge over brick and mortar retailers, and over smaller online retailers who either charge for shipping or require more time to ship products to consumers.<sup>162</sup> This is how large retailers such as Amazon, Alibaba, and Overstock, with copious resources designated for research and development, will be able to maintain their competitive edge over smaller businesses and brick and mortar retailers, despite the imposition of sales taxes.

In March of 2017, Amazon publicly announced its decision to collect sales taxes in every state, except the NOMAD states, and they began doing so the following April.<sup>163</sup> However, it is important to understand that this tax does not apply to Amazon's third-party vendors, which account for about half of Amazon's sales.<sup>164</sup> Further, just one month later, Jeff Bezos, the founder and CEO of Amazon, announced Amazon's bold decision to purchase the brick and mortar giant, Whole Foods.<sup>165</sup> The timing of Amazon's sales tax policy and its subsequent \$13.7 billion decision to establish itself as a brick and mortar business is not a coincidence.

The advent of Amazon Prime was just the beginning of Amazon's quest to revolutionize retail shopping.<sup>166</sup> Amazon also seeks to alter the way in which consumers shop at brick and mortar stores, but the only way to do so successfully was to become a brick and mortar itself.<sup>167</sup> Whole Foods physically resides in over forty states,<sup>168</sup> giving Amazon the physical presence it needs to require payment of sales taxes.<sup>169</sup> Amazon's decision to become a brick and mortar has been a part of Amazon's development plan for several years.<sup>170</sup> It began with physical book stores and moved to grocery shops through another Amazon offshoot, "Amazon Go."<sup>171</sup> Amazon Go eliminates cash registers and the need to wait on lines through the use of

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161. *See id.*

162. *See id.*

163. *See* David Z. Morris, *Amazon to Collect Sales Tax in Most States Starting April 1st*, FORTUNE (Mar. 25, 2017), <http://fortune.com/2017/03/25/amazon-sales-tax-april-1/>.

164. *See* Chris Isidore, *Amazon to Start Collecting State Sales Tax Everywhere*, CNN (Mar. 29, 2017, 2:59 PM), <http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html>.

165. *See* Bruno Aziza, *Amazon Buys Whole Foods. Now What? The Story Behind the Story*, FORBES (June 23, 2017, 12:12 PM), <https://www.forbes.com/sites/ciocentral/2017/06/23/amazon-buys-whole-foods-now-what-the-story-behind-the-story/#5e49c660e898>.

166. *See* CBS This Morning, *Impact of Amazon Buying Whole Foods*, YOUTUBE (June 17, 2017), <https://www.youtube.com/watch?v=xiLNiqFJvvg>. [hereinafter *Impact of Amazon Buying Whole Foods*].

167. *See id.*

168. *See* *Stores by US State*, WHOLE FOODS MARKET, <https://www.wholefoodsmarket.com/stores/list/state> (last visited Nov. 5, 2017).

169. *See* Aziza, *supra* note 165.

170. *See* *Impact of Amazon Buying Whole Foods*, *supra* note 166.

171. *See id.*

sensor technology and cell phone applications.<sup>172</sup> Amazon will likely implement this complex technology system into all of its brick and mortar stores, including Whole Foods.<sup>173</sup> This may explain Amazon's brilliant public relations decision to make the seemingly generous choice to collect sales tax just prior to establishing itself as a brick and mortar.

Amazon's sales tax decision may also be a way for it to mend its sullied history with a number of states. Some states did not wait for Congress to resolve the sales tax issue and resorted to cutting deals with Amazon in order to raise tax revenue.<sup>174</sup> Other states have refused to cut deals with Amazon and, to Amazon's dismay, have passed sales tax litigation hitting Amazon with multi-million-dollar tax bills; such states were met with retaliation.<sup>175</sup> For example, when New York passed the "Amazon Tax" laws it was met with a costly and onerous lawsuit.<sup>176</sup> Similarly, after Texas presented Amazon with a \$261 million tax bill, Amazon stated that the "unfavorable regulatory environment" forced Amazon to close its Texan warehouse, leaving the warehouse employees out of work.<sup>177</sup>

This history of vengeance against state tax legislation prompted many states to cut mutually beneficial tax deals with Amazon.<sup>178</sup> For instance, after California's tax bill was met with aggression, California agreed to postpone the tax for one year.<sup>179</sup> Amazon agreed that if after one year Congress does not pass federal legislation, which it did not, Amazon would comply with the California tax.<sup>180</sup> Alabama agreed to lock the sales tax rate at 8% in exchange for Amazon's compliance with its tax legislation.<sup>181</sup> Similarly, when South Carolina proposed a sales tax on Amazon, Amazon threatened to stop construction on a warehouse it was building there.<sup>182</sup> After much back-and-forth, South Carolina agreed to exempt Amazon from sales taxes for five years, which would expire early only if Congress passes conflicting legislation, and Amazon agreed that its warehouse would create 2,000 jobs.<sup>183</sup>

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172. *See id.*

173. *See id.*

174. *See* Brunner, *supra* note 10.

175. *See Why You Should Care About South Dakota's Controversial Online Sales Tax Law*, *supra* note 10; Brunner, *supra* note 10; *President Signs Bill Making Internet Service Tax Ban Permanent*, *supra* note 10.

176. *See* Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin., 81 A.D.3d 183 (N.Y. App. Div. 2010).

177. *See* Brunner, *supra* note 10.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See* Sid Salter, *Lawmakers Should Review Alabama's Online Sales Tax Solution*, THE CLARION-LEDGER, <http://www.clarionledger.com/story/opinion/columnists/2016/09/30/salter-law-makers-should-review-ala-online-sales-tax-solution/91350256/> (last updated Oct. 2, 2016).

182. *See* Brunner, *supra* note 10.

183. *See id.*

While the states and Amazon are happy with such negotiations, brick and mortar retailers and smaller online vendors with far less bargaining power than Amazon are still left at a disadvantage. Tax deals and loopholes allow large companies like Amazon, Alibaba, Wayfair, and Overstock, to maintain their current taxing advantage by casting the needs of small online retailers and local businesses to the side.<sup>184</sup> Tax deals ignore the larger goal of making sales tax the same for all businesses; thus, in the long term, tax deals will damage local economies and discourage small businesses.<sup>185</sup>

While Amazon is currently collecting sales taxes, it continues to advocate for nation-wide congressional action to resolve the inconsistencies involved with e-commerce taxation.<sup>186</sup> Perhaps Amazon believes federal legislation is a lesser evil compared to state tax legislation, because Amazon will likely have a seat at the negotiation table to ensure that congressional action allows it to maintain its competitive edge. Now that Amazon has begun its foray into the brick and mortar world, its dreams of federal sales tax legislation may soon become reality, but only time will tell whether Congress will indeed take the plunge.

## **VI. A NEW SOLUTION TO THE E-COMMERCE SALE TAXATION PROBLEM: MODERNIZED ORIGIN-BASED PROPOSAL**

A sensible sales tax solution will only result from a collaborative effort at both the federal and state levels. It is possible to create a balanced federal act that does not violate any constitutional tenants and does not trample on states' rights to set their own sales tax rates and regulate their own sales tax systems. The Modernized Origin-Based System Proposed in this Note offers a possible solution to the e-commerce tax problem.

### **A. ADOPTING THE ORIGIN-BASED MODEL**

*Quill* is outdated and in great need of Congressional action to change the status quo by passing legislation that codifies the Nexus test created by many states. Many bills have been proposed, but a middle ground that balances different components of these bills is a more agreeable solution. A successful e-commerce bill must incorporate an Origin-Based sales tax system. Unlike the No Regulation Without Representation Act, which ignores the inequities of the status quo, an Origin-Based Sales Tax Model is uncomplicated, efficient, and will engender healthy competition.<sup>187</sup>

Congress must step in to codify a law based on either an Origin-Based or Destination-Based Sales Tax because granting the states the power to impose

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184. *See id.*

185. *See* John Arensmeyer, *Small Businesses Like Corporate Tax Cut Only if Loopholes Closed*, THE HILL (Mar. 8, 2017, 5:20 PM), <http://thehill.com/blogs/pundits-blog/economy-budget/323031-small-businesses-prefer-closed-loopholes-over-lower>.

186. *See* Brunner, *supra* note 10.

187. *See* Kranz et al., *supra* note 112.

either one could lead to a double taxation. Imagine a buyer lives in a state that imposes a Destination-Based tax but purchases an item from a state that imposes an Origin-Based tax. That buyer will be responsible for a sales tax in both states. Such a system punishes the buyer and cannot be maintained. Congress must make a choice between an Origin-Based Sales Tax Model or a Destination-Based Sales Tax Model, but because an Origin-Based Model is more efficient and easier to implement, it should be adopted. Unlike Representative Goodlatte's 2015 Proposal, which required a federal clearinghouse to administer tax revenues,<sup>188</sup> an added expense that will likely come out of the taxpayer's pockets, the Modernized Origin-Based system would not require any federal administration. Rather, the current system can remain in place, whereby sellers charge local rates and remit the sales tax to the seller's taxing agency.

### B. CAVEAT EMPTOR

If a buyer travels to a foreign state, makes several purchases, and consumes or uses the purchases there, that buyer must pay the foreign sales tax rates. Similarly, when a buyer enters a website and makes purchases in another state, that buyer is virtually traveling to another location. The two are alike and should be treated alike, thus e-commerce sales taxes should be Origin-Based.

Many are opposed to the idea that under an Origin-Based sales tax buyers may be subject to taxing rates outside of their own jurisdictions. In fact, this is the main criticism of Goodlatte's 2015 Proposal.<sup>189</sup> However, with a Destination-Based tax, the same issue occurs in the converse, because sellers are subject to charging sales taxes outside of their own jurisdictions.<sup>190</sup> With the Origin-Based tax, buyers who are opposed to paying foreign rates can also go out and support their local shops, while sellers cannot discriminate against out-of-state buyers. Buyers always have the option to pick and choose sellers with more agreeable rates. This system facilitates the growth of local brick and mortar retailers, as adamant buyers preferring their local tax rates will purchase products from resident shops.

For this system to be truly fair, buyers must be aware of the jurisdiction that online sellers are subject to before making purchases. Thus, the Modernized Origin-Based Proposal would require vendors to list all the jurisdictions in which they have actual Physical Presence or Nexus in their shopping cart tabs. These Nexus notifications are similar to the Increased Notification laws imposed by the Colorado legislature.<sup>191</sup> However, rather than notifying buyers of their duty to remit a use tax, it informs buyers which

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188. See PRICEWATERHOUSECOOPERS, *supra* note 101.

189. See *id.*

190. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 324 (1992).

191. See *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1132 (10th Cir. 2016) (Gorsuch, J., concurring).

taxing jurisdiction governs the given transaction.<sup>192</sup> The jurisdiction lists must be placed at the top of the shopping cart list before the buyers can choose to enter payment information and finalize purchases. Lists must also be in a font, size, and color that stands out and catches the buyer's eye. Further, vendors should provide links, directly under the lists, to additional information about e-commerce sales taxation. This will allow buyers to probe the issue further before making purchases, so buyers can better understand what the sales taxing jurisdiction list represents and understand that completing the purchase may require subjecting themselves to foreign tax rates. Thus, buyers can either knowingly choose to subject themselves to foreign rates, or they can choose to avoid the online purchase and buy a comparable item from a local business.

### C. STATE SOVEREIGNTY

Although the Origin-Based Model would be implemented via Congressional Act, it also sets up a national guideline for the states to follow. Sovereignty will be preserved because the states will still be able to pass their own laws, and set their own rates, so long as the laws are within the confines of the bill. This Modernized Proposal will utilize a clause similar to one found in section six of the Marketplace Fairness Act which provides that “this Act shall not be construed to preempt or limit any power exercised or to be exercised by a State or local jurisdiction under the law of such State or local jurisdiction under any other Federal law.”<sup>193</sup>

The proposal suggests that Nexus laws like the “Amazon Tax” be set at higher rates so that small online businesses, with less resources and revenues, are able to easily calculate sales tax rates and are able to reduce the cost of determining in which states they have a Nexus. Currently, most states have rates set at \$10,000—meaning that if a company sells over \$10,000 worth of goods in a given state, then it has established Nexus and can be subject to sales taxes in that state.<sup>194</sup> PayPal and eBay have stated that a rate of \$5 million better supports small businesses, especially those that have located their businesses in certain states precisely for tax purposes.<sup>195</sup>

What threshold to set is a complicated question and requires consideration of numerous factors. For instance, a vendor that only services two or three states total and sells \$10,000 of revenues in each of those three states, the vendor's total revenue is only \$30,000. Conversely, if a vendor sells \$10,000 of revenue in forty states, that vendor is selling at least \$400,000 of revenue. The contrast between these two vendors is drastic. However, the object is to make taxation simpler, thus setting different

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192. *See id.*

193. Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017).

194. *See* Yang & Aquilino, *supra* note 2, at 6.

195. *See* Wood, *supra* note 148.

minimum thresholds for varying companies is not a viable solution. eBay's \$5 million proposal is too high because it will still allow large companies that service several states to dodge sales taxes.<sup>196</sup> However, the current \$10,000 threshold that many states use is too low, because it can really hurt small business that do not cater to many states.<sup>197</sup> There must be a reasonable and impartial threshold set that will be fair to most businesses across the board.

#### **D. DEDUCTION AND TAX BREAK FREE**

Offering sales tax breaks to large online companies, like Amazon, Wayfair, and Newegg,<sup>198</sup> will not help level the playing field and will defeat the purpose underlying e-commerce sales taxation laws and proposals. States can set their own sales tax rates, but for this to fix the e-commerce tax problem, sales taxes must be applied equally to businesses of all shapes and sizes. There have been tax deals already in place that effectively force such deals to expire should Congress pass e-commerce sales tax legislation.<sup>199</sup> Thus, the most effective way to make things more balanced amongst businesses is to eradicate any existing sales tax breaks and prevent new ones from being formed through Congressional legislation.

#### **E. NO FORUM SHOPPING**

Sellers with multiple locations will be prohibited from forum shopping and choosing the most convenient sales tax rate. If the seller has Physical Presence or Nexus in the same state that the buyer is located, the seller must charge their common state rate. However, under the Modern Origin-Based proposal, when the seller does not have Physical Presences or Nexus where the buyer is located, it charges a sales tax at the jurisdictional "nerve center" or principle place of businesses.<sup>200</sup> The principal place of business is usually where the company is incorporated.<sup>201</sup> Companies that exist solely online—and do not have physical presence anywhere—are still required to incorporate, or maintain a permit or license to conduct business.<sup>202</sup> Wherever such virtual companies are authorized to conduct business should be considered its principal place of business, and it should charge sales taxes at that state's rates.

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196. *See id.*

197. *See id.*

198. "Newegg Inc. is a leading online retailer committed to becoming the most loved and trusted marketplace on the web." *Corporate Summary*, NEWEGG, <https://www.newegg.com/Info/AboutUs.aspx> (last visited Oct. 5, 2017).

199. *See Brunner, supra* note 10 (South Carolina agreed to give Amazon five years of tax amnesty which would disappear if Congress passed federal tax legislation during that five-year period).

200. *See Hertz Corp. v. Friend*, 559 U.S. 77, 1186 (2010).

201. *See id.* at 1183.

202. *See id.*



The “sales sourcing rules” associated with the Destination-Based Streamlined Sales and Use Tax Act are complicated and force sellers to spend needless time and energy to determine where exactly the buyer is located.<sup>203</sup> The result of such a complicated and lengthy rule is that often it is too difficult to pinpoint the exact location of the buyer, thus the seller must change to an Origin-Based tax regardless.<sup>204</sup> Under the Modernized Origin-Based Proposal, the buyer’s location is only relevant when the seller must determine whether it shares a common location with the buyer. If it does, it must charge that shared state’s sales tax rate, even if it is not the seller’s principal place of business. Under this Modernized Proposal, wherever the item is being shipped is assumed to be the buyer’s location. However, if the purchase is a virtual item, the buyer’s location would be determined by the billing address.

Because this new proposal eliminates the SSUTA’s “sales sourcing rules” and has a short list of basic rules that help sellers determine the proper sales tax rate, sellers can save time and money that otherwise would have been spent on accounting and costly tax programs. Instead, this money and time can be invested back into businesses to help them grow, innovate, and flourish. Simpler tax systems, like an Origin-Based tax, facilitate growth of businesses and allow them to put their money to better use.

#### F. NO USE TAX FOR E-COMMERCE

Lastly, the Modernized Origin-Based Proposal eradicates use taxes for e-commerce sales. Use taxes are only utilized by 1.6% of Americans.<sup>205</sup> This low participation rate exists because most people do not even know what a use tax is, how it works, or that they are required to pay a use tax for online purchases.<sup>206</sup> Thus, states lose billions of dollars each year in use tax revenues.<sup>207</sup> Such a system encourages tax evasion. Like Representative Goodlatte’s proposals,<sup>208</sup> under the Modernized Origin-Based Proposal, buyers will not receive a tax credit from the origin state and they are not required to remit that tax credit to the destination state as a use tax. Instead, the Origin-Based tax, at the point of sale, is the end of the line for e-commerce sales taxation. This system makes sense, as sellers are in a better position to charge sales taxes since they are generally more aware of how sales taxes apply to transactions.

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203. See Yang & Aquilino, *supra* note 2, at 9.

204. See *id.*

205. Chana Joffe-Walt, *Most People are Supposed to Pay this Tax: Almost Nobody Actually Pays it*, NPR (Apr. 16, 2013, 3:55 AM), <http://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax>.

206. See *id.*

207. See *id.*

208. See PRICEWATERHOUSECOOPERS, *supra* note 101.

## VII. MODERNIZED ORIGIN-BASED PROPOSAL: A GIVE AND TAKE SOLUTION

One criticism of the Origin-Based sales taxation is that it will engender too much sales tax competition among the states by causing a race to the bottom.<sup>209</sup> While some believe that this sort of competition plagues the Origin-Based tax, others see it as an asset.<sup>210</sup> However, since lowering sales tax rates benefits buyers, sellers, and the economy overall, it is a strength of an Origin-Based system. Further, taxing according to the purchaser's location is unreasonable; buyers do not choose where to maintain a home or job because of the local sales tax rates, but sellers often choose where to locate their businesses using sales tax as a determining factor.<sup>211</sup> Thus, the state where the seller is located should be the state that chooses the sales tax rates, which sellers will ultimately tack onto final sales prices. This system encourages states to lower sales tax rates in attempt to entice companies to not only move there, but develop and grow their businesses in the state.

At first blush, some states may be unhappy with the idea of lowering tax rates. However, in the long run, losses incurred from lower sales tax rates will be offset because when companies move to a state, they assist in feeding the local economy by increasing spending and bringing jobs, and through other forms of tax revenues, such as income taxes and corporate taxes.<sup>212</sup> Further, when more sellers are located in a given state due to favorable tax rates, either physically or by way of Nexus, that state will likely collect sales taxes for a larger number of transactions overall.

Once Nexus laws, like the "Amazon tax," are regulated and incorporated into a Congressional Act that sets proper threshold requirements, many states would adopt Nexus laws with far less fear of costly judicial challenges. Thus, states like New York, that do not wish to compete by lowering tax rates, will pass laws like the "Amazon Tax" without fear of judicial backlash. Such a law will require businesses that reach the threshold to register as local vendors and subject them to local tax rates via Nexus.<sup>213</sup> The only piece of the "Amazon Tax" that the Modernized Origin-Based proposal will regulate is the minimum threshold for establishing an Economic Nexus.

Although this requires the parties involved to compromise, each party will benefit from this long-term solution to the e-commerce taxation problem. States will only gain tax revenue when local sellers or sellers with Nexus

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209. See Ryan Riebe, *The Unfair Effects of the Marketplace Fairness Act*, FREEDOMWORKS (Mar. 26, 2013), <http://www.freedomworks.org/content/unfair-effects-marketplace-fairness-act>.

210. See *id.*

211. See generally *The Best (and Worst) States to Incorporate In*, MAXFILINGS, <https://www.maxfilings.com/incorporation-knowledge-center/which-states-have-the-best-business-tax-climate.php> (last visited Oct. 6, 2017).

212. See Daniel Mitchell, *The Historical Lessons of Lower Tax Rates*, THE HERITAGE FOUNDATION (Aug. 13, 2003), <http://www.heritage.org/node/18247/print-display>.

213. See Yang & Aquilino, *supra* note 2, at 4–5.

transact business, but not from transactions between in-state buyers and out-of-state sellers. Brick and mortar retailers will gain business from local buyers who prefer in-state rates to foreign rates. Since the Modernized Origin-Based Proposal will lower sales tax rates overall, sellers will not have to charge high tax rates and buyers will not have to pay high rates. Although lower tax rates will cause states to lose sales tax revenues, the losses will be recaptured through increased consumption, job creation, income taxes, corporate taxes, and other such tax revenues that businesses generate. Further, NOMAD states with no sales taxes will enjoy state sovereignty and will not be required to charge any sales tax. Lastly, lower tax rates will encourage companies to stay in the United State instead of offshoring, thereby strengthening the economy overall.

With the advent of the Internet and e-commerce, retail has truly become a global market. To compete in a modern world, many retailers have become accessible online. Thus, e-commerce sales taxes represent an enormous portion of tax revenues. The United States must resolve this issue at the federal level in a way that allows it to remain competitive in the global market. The Modernized Origin-Based Proposal would accomplish this by lowering sales tax rates and simplifying the sales tax system—making the United States a welcoming environment for corporations.

## CONCLUSION

Since the explosion of e-commerce, the *Quill* decision has become incredibly outdated. Severe issues arise for sales tax purposes when buyers and sellers do not have a physical presence in the same state, as the *Quill* precedent requires. This decision has created great conflict within the judicial system, economic disparity between online retailers and brick and mortar retailers, and state tax deficits. Congress must implement and codify guidelines for the states to follow when imposing sales taxes.

In contrast to the numerous Designation-Based Proposals that have been pending in Congress, the Modernized Origin-Based sales tax proposed in this Note will reduce e-commerce sales tax complexities, eliminate use tax complications, stimulate equal competition for all business models, preserve state sovereignty, and naturally lower sales tax rates overall. Although all parties will have to compromise, an Origin-Based sales tax for online retailers is the surest way to please the largest number of parties involved. Lastly, the Modernized Origin-Based Proposal will ensure that the states receive the much needed sales tax revenue of which they have been deprived for far too long.

**EPILOGUE**

On January 12, 2018, just prior to publication of this Note, the Supreme Court granted certiorari of *South Dakota v. Wayfair Inc.*,<sup>214</sup> stating that it will consider the physical presence test generally.<sup>215</sup> It will likely overturn the physical presence test and sufficient minimum contacts tests germinated by *National Bellas Hess*, decided in 1967, and *Quill*, decided in 1992.<sup>216</sup> These decisions do not allow a state to tax a business unless that business is physically located or conducts a sufficient amount of business within that given state, as allowing such taxation would interfere with Congress' power to regulate interstate commerce.<sup>217</sup> Countless brick and mortar businesses and state governments have argued that the physical presence test affords online retailers an unfair advantage by allowing them to evade taxes.<sup>218</sup> The large online retailer defendants of *South Dakota v. Wayfair* argue that Congress is in a better position to address this issue than the Supreme Court, hoping to avoid payment of sales taxes for as long as possible.<sup>219</sup> Wayfair and its co-defendants may see Congressional action before the Supreme Court issues an opinion on their case, but the long history of discord regarding e-commerce sales taxation makes such a scenario improbable.<sup>220</sup> Congress is more likely to will wait until the Supreme Court overturns the physical presence test before enacting federal legislation in an effort to harmonize inconsistent state laws.<sup>221</sup> Although the landscape of federal action is still unclear, after nearly thirty years, the Supreme Court has certainly broken its silence.<sup>222</sup>

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214. *South Dakota v. Wayfair, Inc.*, 901 N.W.2d 754 (S.D. 2017), *cert. granted*, No. 17-494, 2018 WL 386568 (U.S. Jan. 12, 2018).

215. See Brent Kendall & Richard Rubin, *Supreme Court to Consider Internet Sales Tax Collection*, WALL ST. J. (Jan. 12, 2018, 5:52 PM), <https://www.wsj.com/articles/supreme-court-to-consider-internet-sales-tax-collection-1515788446?mod=searchresults&page=1&pos=1>.

216. See *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753, 760 (1967), *overruled* by *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

217. See generally *id.*; see also Kendall & Rubin, *supra* note 215.

218. See generally Yang & Aquilino, *supra* note 2.

219. See Kendall & Rubin, *supra* note 215.

220. See *id.*

221. See *id.*

222. See *id.*

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