CAPTURING TAX REVENUE ON INTERNET SALES: ABANDONING THE STREAMLINED AGREEMENT FOR ORIGIN SOURCING

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This Note discusses the constitutional impediments to state taxing power with respect to enforcing sales and use tax collection on Internet retailers outside a state's jurisdiction. The most current U.S. Supreme Court precedent on the issue, Quill Corp. v. North Dakota, *holds that a state violates the dormant Commerce Clause when it requires a business with no physical presence in its jurisdiction to collect and remit sales taxes. Congress has considered several pieces of legislation over the past two decades that would authorize states to require remote businesses, under certain conditions, to collect and remit sales tax. A majority of the legislative proposals have conditioned such authorization on states' adoption of the Streamlined Sales and Use Tax Agreement, which seeks to simplify states' sale tax regimes, easing the burden on businesses. This Note argues for another solution to the issue: origin sourcing, or requiring all sales taxes to be sourced to the point of purchase. This approach not only avoids the many difficult questions presented in simplifying sales tax regimes, but also captures sales tax on every eligible transaction and preserves state and local government autonomy in approaching sales tax.*

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INTRODUCTION

As e-commerce has continued to grow over the last quarter of a century, some Internet sellers have had a competitive advantage over sellers who maintain their brick-and-mortar stores because state and local governments cannot always require Internet sellers to collect sales tax on their transactions.[1] While consumers may revel in this Internet sales tax haven by spending marginally more on consumables than they otherwise would, every upside has its downside. Here, that downside is a considerable loss of sales tax revenue to states, which have recently struggled to pay for government services, pensions, and other obligations.[2] Furthermore, Internet sellers' ability to offer tax-free products has substantial negative impacts on businesses operating as physical retailers, which cannot avoid collecting and remitting sales tax. The loss in tax revenue, and the corresponding advantage to Internet sellers, continues to grow: from $1.9 billion in 2001 to $4.5 billion in 2011.[3]

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1. Although consumers generally owe a use tax to their domicile state for sales-tax-free products purchased on the Internet, compliance is very low. *E.g.*, Alan D. Viard, *Use Tax Collection on Interstate Sales: The Need for Federal Legislation*, 66 ST. TAX NOTES 657, 657 (Nov. 26, 2012).

2. *See generally* Cara Griffith, *Are States Facing Their Own Fiscal Cliffs?*, 66 ST. TAX NOTES 899 (Dec. 17, 2012).

3. PETER A. JOHNSON, A CURRENT CALCULATION OF UNCOLLECTED SALES TAX ARISING FROM INTERNET GROWTH 22 (Mar. 11, 2003).

Sales and use taxes vary across states; nevertheless, they all share core characteristics.[4] Scholars often refer to a normative sales tax, or the theoretical ideal of a sales tax, which is "a single-stage levy on the final sale of goods and services to the consumer."[5] A state tax on a retail transaction is the typical state sales tax.[6] The tax incidence falls upon the consumer, but the state places the legal responsibility of collecting and remitting the sales tax on the business.[7] Use taxes exist to "complement" a state's sales tax for retail transactions that occur outside the state, but consumption, or use, occurs within the state.[8]

States certainly do not allow Internet sellers to avoid collecting and remitting use taxes by choice. In *Quill Corp. v. North Dakota*, the U.S. Supreme Court held that the respondent state's law violated the dormant Commerce Clause: The law in question permitted the state to enforce sales tax collection and remittance against an out-of-state seller with no "substantial nexus" to the state.[9] In order to minimize uncertainty, the Court established a "bright-line test" that made a business's physical presence the determinative factor for its substantial nexus with the jurisdiction enforcing the sales tax collection.[10]

Prior to the Court's decision in *Quill*, the Court's precedent on the matter, *National Bellas Hess, Inc. v. Illinois*, held that a state's enforcement of sales tax collection violated the dormant Commerce Clause and the Due Process Clause of the Fourteenth Amendment.[11] *Quill* reversed *Bellas Hess*, in part, by holding that the state's enforcement of collecting sales tax did *not* violate the Due Process Clause.[12] With Congress's power to "[t]o regulate Commerce . . . among the several states,"[13] it could authorize states to require remote sellers to collect sales tax. Congressional approval of a state practice, therefore, removes any concerns that the practice violates the dormant Commerce Clause. By holding that the law in *Quill* did not violate the Fourteenth Amendment's Due Process Clause (around which Congress cannot legislate), the Court in *Quill* effectively permitted Congress to make a rule governing when states can require remote sellers to collect sales tax.

Accepting the Court's invitation in *Quill* to find a federal legislative solution to the dormant Commerce Clause violations, Congress has drafted and considered numerous bills to authorize the states to enforce collection of sales tax

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4. *See* 2 WALTER HELLERSTEIN, THE GROWTH OF STATE AND LOCAL SALES TAXATION ¶ 12.02 (3d ed. 2012).
5. *Id.* ¶ 12.06[3].
6. *Id.* ¶ 12.01.
7. *Id.*
8. *Id.* ¶ 6.01[2].
9. Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992).
10. *Id.* at 317–18.
11. Nat'l Bellas Hess, Inc. v. Illinois, 386 U.S. 753, 756–58 (1967), *overruled in part by Quill*, 504 U.S. at 308.
12. *Quill*, 504 U.S. at 308.
13. U.S. CONST. art. I, § 8, cl. 3.

from remote sellers.[14] Much of the legislation has conditioned Congress's authorization on a state's acceptance of the Streamlined Sales and Use Tax Agreement (SSUTA).[15] The SSUTA requires states to adopt certain measures aimed at reducing the burden on interstate commerce that results from requiring remote sellers to collect sales taxes for numerous jurisdictions.[16] Other legislative proposals require less comprehensive reform among the states before authorizing them to enforce remote sellers' collection and remittance of sales tax.[17]

This Note begins, in Part I, by analyzing how requiring remote sellers to collect and remit sales tax burdens interstate commerce. Part II discusses and analyzes why the nexus rule put forth in *Quill* is an antiquated and inappropriate test to measure the constitutionality of a state's taxing power. Part III looks at the various proposals available to Congress to authorize states to require remote sellers to collect and remit sales tax. These include: the Main Street Fairness Act,[18] the Marketplace Equity Act,[19] the Marketplace Fairness Act,[20] and various proposals from academics that Congress has yet to consider. Finally, Part IV will introduce an alternative to the current legislative proposals.

I. *QUILL* AND NEXUS

The Court's holding in *Quill* had two very important consequences. First, the Court reversed its previous holding in *Bellas Hess* that states requiring sellers without physical presence in the state to collect and remit sales or use tax violated

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14. *See generally* Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. § 4(a)(1) (2005); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. § 4(a) (2003); Internet Moratorium and Equity Act, S. 512, 107th Cong. § 7(a)(1)–(2) (2001).

15. *See generally* Main Street Fairness Act, H.R. 2701, 112th Cong. § 4(a)(1) (2011). Once ten states, comprising at least 20% of the total population of all states imposing a sales tax, have become members of the Streamlined Sales and Use Tax Agreement, then all member states will have congressional authorization to require sales and use tax collection by remote sellers. *Id.* § 4(a)(2)(A). *See* Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. § 4(a)(2)(A) (2005); Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. § 4(a) (2003).

16. *See About Us*, THE STREAMLINED SALES TAX GOVERNING BD., http://www.streamlinedsalestax.org/index.php?page=About-Us (last visited Jan. 26, 2014).

17. *See* Marketplace Fairness Act of 2013, S. 743, 113th Cong. § 2(b)(2)(A)–(H) (as passed by Senate, May 6, 2013); Marketplace Equity Act of 2011, H.R. 3179, 112th Cong. § 2(b)(4)(A)–(C) (2011).

18. This proposed legislation requires states to adopt the SSUTA prior to authorizing them to enforce collection and remittance of sales tax. Main Street Fairness Act, H.R. 2701, 112th Cong. § 4(a)(1) (2011).

19. This proposed legislation requires various tax reform measures at the state and local level prior to authorization. Marketplace Equity Act of 2011, H.R. 3179, 112th Cong. § 2(b)(4)(A)–(C) (2011).

20. This proposed legislation, passed by the Senate on May 6, 2013, authorizes states that are member states of the SSUTA or have made other minimum simplification changes to their sales and use tax regimes to enforce collection and remittance of sales and use tax on remote sellers. Marketplace Fairness Act of 2013, S. 743, 113th Cong. §§ 2(a)–(b) (2013).

the Fourteenth Amendment's Due Process Clause.[21] Second, the Court reaffirmed the *Bellas Hess* holding that this practice continued to violate the dormant Commerce Clause by burdening interstate commerce.[22] In removing due process concerns from a state's requirement that Internet sellers collect and remit sales tax, the *Quill* holding opened the door for Congress to redefine the substantial nexus test, and thus authorize states to require that remote sellers collect and remit sales tax. Still, many commentators remain puzzled as to why the Court did not entirely reverse the seemingly outdated holding in *Bellas Hess*.[23]

A. The Supreme Court's Sales Tax Jurisprudence

A logical starting point in understanding the current restrictions placed on states' ability to require the collection of sales tax is *National Bellas Hess, Inc. v. Illinois*.[24] There, the corporation challenged Illinois's law requiring the corporation to collect sales tax on goods sold to residences in Illinois.[25] National is a mail-order business located in North Kansas City, Missouri and was licensed to do business both there and in Delaware, where it was incorporated.[26] Furthermore, the corporation did not have real or personal property, agents, or salesman engaged in commercial activity within Illinois.[27] The only connection that it had with Illinois was through a common carrier, which delivered catalogues to Illinois residences on a biannual basis and then shipped goods purchased through the catalogue to Illinois.[28] Therefore, National argued, the liabilities imposed by the Illinois law requiring National to collect and remit a tax for goods sold to Illinois customers violated the Fourteenth Amendment's Due Process Clause and created an unconstitutional burden on interstate commerce.[29]

The Court agreed with this argument.[30] Citing its prior decisions, the Court reaffirmed the "sharp distinction . . . drawn between mail order sellers with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business."[31] If Illinois were permitted to impose sales tax liability

21. Quill Corp. v. North Dakota, 504 U.S. 298, 307–08 (1992).

22. *Id.* at 330.

23. Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX. REV. 1, 43–49 (2008).

24. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 753–54 (1967), *overruled in part by Quill*, 504 U.S. at 308.

25. *Id.* at 754.

26. *Id.* at 753–54.

27. *Id.* at 754.

28. *Id.* at 754–55.

29. *Id.* at 756.

30. *Id.* at 758.

31. *Id.*; *see also* Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364–66 (1941) (holding that Iowa could require a New York corporation making catalogue sales delivered by common carrier to Iowa residents to collect and remit a use tax because of its physical retail locations within the state). *Cf.* Miller Bros. Co. v. Maryland, 347 U.S. 340, 346–47 (1954) (holding that Maryland could not require a Delaware merchandising corporation with its retail location in Delaware—a sales-tax-free jurisdiction—to collect and remit use

on National, then every political subdivision in the United States with a sales tax could impose liability on National.[32] If this were the case, the administrative burden "could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a fair share of the cost of local government."[33]

Justice Fortas dissented, noting that the Court had typically addressed the levy of a state tax on an out-of-state business by asking "whether the state has given anything for which it can ask return."[34] In the case at hand, Justice Fortas believed the answer was yes.[35] The corporation's regular, systematic, and large-scale offerings to Illinois residents and solicitation of deferred-payment credit accounts should suffice, he argued, for the state to enforce collection and remittance of sales tax without Commerce Clause or Due Process Clause violations.[36] Nevertheless, the *Bellas Hess* holding has curtailed state and local taxing authority to the present day.

Ten years later, in *Complete Auto Transit, Inc. v. Brady*, the Court established a four-part test to determine whether a state or local tax, including a sales or use tax, burdens interstate commerce.[37] A state's tax assessment does not violate the dormant Commerce Clause if (1) there is a substantial nexus between the entity and the state; (2) it is fairly apportioned; (3) it does not discriminate against interstate commerce; and (4) it is fairly related to the benefits provided by the state.[38] The first part of the test embodies the principle reaffirmed in *Bellas Hess*: A state may not require a remote seller, with no real or personal property, agents, or employees in the taxing jurisdiction, to collect sales tax.

In 1992, the Supreme Court handed down *Quill*, altering its sales tax jurisprudence and inviting Congress to fashion a rule governing the collection and remittance of sales and use taxes by remote sellers.[39] Originating in North Dakota state court, the state's Tax Commissioner filed a lawsuit requiring the Quill Corporation to collect and remit a use tax on goods purchased by consumers for use in North Dakota.[40] The Quill Corporation had nearly identical characteristics as the National Bellas Hess Corporation: a Delaware corporation maintaining no offices, employees, or agents in the state of North Dakota.[41] Quill solicited orders for office supplies "through catalogs and flyers, advertisements in national

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taxes from Maryland residents who made purchases at the store, even if the corporation delivered the goods through a common carrier and advertised in Maryland).

32. *Nat'l Bellas Hess*, 386 U.S. at 759 (1967).

33. *Id.* at 759–60 (internal quotation marks omitted).

34. *Id.* at 765 (Fortas, J., dissenting) (citing Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

35. *Id.* at 765–66.

36. *Id.*

37. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274 (1977).

38. *Id*.

39. Quill Corp. v. North Dakota., 504 U.S. 298, 318 (1992).

40. *See id.* at 302.

41. *Id.*

periodicals, and telephone calls," and all products shipped from outside North Dakota by common carrier.[42]

After granting certiorari, the U.S. Supreme Court overturned *Bellas Hess* with respect to its due process holding. The Court explained that, in its evolving due process jurisprudence, the Court had abandoned a formalistic approach to the analysis that focused on a person or entity's physical presence within a jurisdiction.[43] In *International Shoe Co. v. Washington*, the Court adopted a test analyzing the quality and quantity of "minimum contacts."[44] And in *Burger King Corp. v. Rudzewicz*, the Court emphasized that "purposefully avail[ing]" oneself of the benefits of a forum's market is sufficient activity to confer in personam jurisdiction, even if one was never "physically present" in the forum.[45] Quill Corporation's actions, the Court held, satisfied the modern approach to due process analysis, and therefore the state's enforcement of collection and remittance of a use tax did not violate the Fourteenth Amendment's Due Process Clause.[46]

The Court did not follow this logic of evolving jurisprudence and reverse its holding with respect to the dormant Commerce Clause. Instead, the Court bifurcated the nexus requirement into two separate tests, one for the Due Process Clause and one for the Commerce Clause.[47] Whereas the nexus requirement for the Due Process Clause focuses on "minimum contacts" with a forum, the Court employs a "substantial nexus" test to determine compliance with the Commerce Clause.[48] Defining substantial nexus, the Court rearticulated the holdings of *Bellas Hess* and its progeny as a "bright-line" test solely determined by the person or entity's physical presence.[49]

B. Explaining **Quill**

The Supreme Court has long recognized that "[i]t was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the [sic] business."[50] That principle, however, stands at odds with the Court's holding in *Quill*. While the dormant Commerce Clause prevents individual states from unduly burdening interstate commerce and favoring intrastate businesses over interstate businesses, *Quill* has, for over two decades, given a distinct advantage to interstate businesses selling goods in jurisdictions where they are not physically present.

The *Quill* decision has been thoroughly analyzed. At this point, modern commentary focuses on the ways in which states may overcome the ruling of the Court and finally capture sales and use taxes on goods purchased from remote

42. *Id.*
43. *Id.* at 307.
44. 326 U.S. 310, 316 (1945).
45. 471 U.S. 462, 475–76 (1985).
46. *Quill*, 504 U.S. at 308, 318–19.
47. *Id.* at 312–13.
48. *Id.* at 312.
49. *Id.* at 314.
50. W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

sellers. An understanding of *Quill*'s holdings is essential to finding a solution. Generally, the Court's decision is viewed through two principles: settled expectations and the burden on interstate commerce.[51]

1. Settled Expectations

As e-commerce was still in its infancy, the *Quill* decision only focused on the "sizeable industry" of mail-order sellers and buyers.[52] Reaffirming the "bright-line rule" of physical presence established in *Bellas Hess*, the *Quill* Court, in its own words, "[demarcated] a discrete realm of commercial activity that is free from interstate taxation."[53] Acknowledging that its own jurisprudence in this area of law is "something of a quagmire,"[54] the Court said that its *Bellas Hess* bright-line test is "artificial at its edges."[55] Nevertheless, the Court appeared to find solace in the fact that "it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation."[56]

The Court's focus on maintaining certainty in the marketplace on which a sizeable industry relied[57] has led courts and commentators to believe that the *Quill* decision is best explained through the doctrine of stare decisis.[58] Certainly, settled expectations form the basis of the doctrine's application. Still, *Quill* did not extend stare decisis to the due process holding of *Bellas Hess*, noting that developments in due process jurisprudence superseded that holding.[59] Meanwhile, heavily weighted pragmatic factors such as industry expectations and minimizing litigation justified the Court's affirmation of the *Bellas Hess* bright-line Commerce Clause rule.[60]

2. The Burden on Interstate Commerce

Another view of *Quill* emphasizes the burden that an expansive state taxing authority would have on out-of-state sellers.[61] In some respect, the *Quill* Court found itself between a rock and a hard place: Reaffirming the *Bellas Hess* physical presence rule may give remote sellers a distinct economic advantage over in-state sellers, while overturning the rule could have subjected a remote seller to

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51. John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 365–70 (2003).

52. *Quill*, 504 U.S. at 317–18.

53. *Id*. at 314–15.

54. *Id.* at 315 (citing Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959)) (internal citations omitted).

55. *Id.*

56. *Id.* at 316.

57. *See id.* at 317.

58. Tax Comm'r v. MBNA America Bank, N.A., 640 S.E.2d 226, 232 (W. Va. 2006); Swain, *supra* note 51, at 365.

59. *Quill*, 504 U.S. at 308; Swain, *supra* note 51, at 359–60.

60. Swain, *supra* note 51, at 359–60.

61. *See* David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 486–87 (2012); Swain, *supra* note 51, at 361.

compliance with over 6,000 taxing jurisdictions in the United States.[62] Undoubtedly, complying with that number of tax rules, returns, and remittances would burden any business. Meanwhile, a seller with physical retail outlets must collect and remit sales tax for only the jurisdictions where the seller chooses to locate.

Today, many look to this burden on interstate businesses as the primary impediment to authorizing states to enforce collection and remittance of sales and use tax.[63] Amazon.com cites the excessive cost of compliance in its opposition to extending states' use tax regimes to e-commerce.[64] But for those who believe that such sellers should not have an economic advantage over in-state sellers, overcoming the administrative burden posed by the nation's many taxing jurisdictions is critical.[65] One of the solutions addressing this problem, the SSUTA, which is discussed in detail in Part II.A, contains a laundry list of sales and use tax reforms aimed at lowering the compliance burdens associated with collecting and remitting sales tax.[66] Advocates of the SSUTA hope that Congress will authorize the states to enforce collection and remittance of sales and use taxes on remote sellers.[67]

Finally, despite the wide criticism of the Court's *Quill* decision,[68] the opinion aptly noted that Congress is in a much better position to set the limitations of state taxing authority in this situation.[69] The *Quill* Court faced two choices, each with unfavorable results. Furthermore, establishing a balancing test to determine a state's taxing authority would clearly create great uncertainty among sellers and would result in substantial litigation.[70] It is true that the cost of compliance does not burden all multistate sellers equally.[71] The burden of compliance is substantial for an out-of-state business that sells only a minimal amount of goods in a particular jurisdiction.[72] Meanwhile, behemoth sellers such as Overstock.com cannot possibly maintain that they are equally burdened by such compliance.[73] Nevertheless, it is beyond the role of the Court, but within the role of Congress, to

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62. *Quill*, 504 U.S. at 313 n.6.

63. *See* Gamage & Heckman, *supra* note 61, at 499–500 (noting that *Quill* was not based on a notion that remote sellers should have an advantage over in-state sellers).

64. *Id.* at 502.

65. Swain, *supra* note 51, at 371.

66. *Id.*

67. *See id.*

68. Zelinsky, *supra* note 23, at 43–49 (summarizing various commentators' criticisms of the Quill decision).

69. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) ("[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve").

70. *See id.* at 315.

71. *See* Gamage & Heckman, *supra* note 61, at 504.

72. *See id.*

73. There is, undoubtedly, an economy of scale to complying with a particular sales tax jurisdiction. *See id*.

establish a volume-of-sales test where the level of sales within a jurisdiction would justify a state requiring a remote seller to collect sales tax.[74]

C. The Antiquated Nexus Rule

Courts and commentators alike have criticized the *Quill* decision as outdated and offered suggestions for a new nexus rule to determine the constitutionality of a state tax liability.[75] First and foremost, technology has transformed the economy in ways that the *Quill* Court could not have fully understood. Primarily, the Internet has become so ubiquitous that businesses can have substantial economic presence in a state without being physically present there. The antiquity of the physical presence nexus test shows the need to construct a new rule so that states can fully capture sales and use tax. The *Quill* decision's "apologetic tone,"[76] acknowledgement of the physical presence test's artificiality, and reversal of *Bellas Hess*'s Due Process Clause holding have made it clear that the Court hoped that Congress would address the issue. Through affirmative legislation, Congress could allow states to require remote sellers to collect sales and use taxes without offending the Commerce Clause. Secondarily, due to the onslaught of criticism focused on the *Quill* decision,[77] the Court may one day revisit its holding.[78]

The West Virginia Supreme Court of Appeals explained why the physical presence nexus test was outdated in *Tax Commissioner v. MBNA National Bank, N.A.*[79] There, the court recognized that technology now allows states to have significant economic presence within a state without being physically present.[80] The respondent bank issued and serviced credit cards, grossing over $10 million a year from business with West Virginia residents.[81] MBNA challenged the constitutionality of West Virginia's business franchise and corporate income taxes.[82] At issue before the court in *MBNA* was whether *Quill*'s physical presence nexus test prevented West Virginia from assessing the two taxes on a business without physical presence in its jurisdiction.[83] Accepting the argument that the physical presence test in *Quill* only applied to the collection of sales and use tax,

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74. Swain, *supra* note 51, at 336.

75. *See, e.g.*, KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 318 (Iowa 2010) ("[T]echnological developments made the physical presence requirement look rather quaint."); Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 234 (W. Va. 2006) ("The development and proliferation of communication technology exhibited, for example, by the growth of electronic commerce now makes it possible for an entity to have a significant economic presence in a state absent any physical presence there."); Swain, *supra* note 51, at 365.

76. Swain, *supra* note 51, at 333.

77. Gamage & Heckman, *supra* note 61, at 485.

78. Swain, *supra* note 51, at 365.

79. 640 S.E.2d at 234.

80. *Id.*

81. *Id.* at 227–28.

82. *Id.* at 227.

83. *Id.*

the court held that imposing business franchise and income tax on an entity was consistent with the Commerce Clause if the business had a substantial economic presence in the taxing jurisdiction.[84]

Where, with the aid of communication technology, a business can now have a *substantial* economic presence in a state without physical presence, "the mechanical application of a physical-presence standard . . . is a poor measuring stick of an entity's true nexus with a state."[85] The court described a "substantial economic presence test" as a combination of the "purposeful direction" Due Process Clause analysis, and a Commerce Clause analysis focusing on the "frequency, quantity and systematic nature of a taxpayer's *economic* contacts within a state."[86] The West Virginia court thought that the substantial economic presence test was an appropriate measure in determining whether a business franchise or corporate income tax would burden interstate commerce.[87] It seems that much of the logic supporting this determination could likewise apply to sales and use tax.

It is clear—as the *MBNA* court recognized—that it is far easier to apply an economic presence test to the validity of business franchise and corporate income taxes than it is to sales and use taxes.[88] The principal reason is that the administrative burden in remitting a business franchise and corporate income tax is far less than the burden of collecting and remitting a sales or use tax.[89] Where other state taxes generally require only one remittance per state, sales and use tax collection requires remittances more than once a year[90] and compliance with a multitude of tax rates and jurisdiction-specific regulations.[91] This observation makes clear that this unique burden on interstate commerce must be addressed in any solution that disposes of *Quill*'s physical nexus test. Still, *MBNA*'s presentation of the substantial economic presence test shows that allowing businesses to avoid collecting sales taxes due to a lack of physical presence should change.

In the context of sales and use tax, it is clear that a business can have significant economic presence in a state and yet avoid collecting sales and use taxes. Recall that the constitutionality of all state and local tax assessments is reviewed under the Court's *Complete Auto* test.[92] The first prong requires that a business has a "substantial nexus" with the state imposing tax liability;[93] the fourth prong requires that the tax be "fairly related to the services provided by the

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84. *Id.* at 236.
85. *Id.* at 234.
86. *Id.* at 234 (emphasis added) (citation omitted).
87. *Id*.
88. *Id.* at 233–34.
89. *Id*.
90. Vendors in West Virginia must remit sales taxes to the Tax Commissioner on a monthly basis. *Id.*
91. *Id.* at 233.
92. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278–79 (1977); *see also supra* notes 36–37 and accompanying text.
93. *Complete Auto*, 430 U.S. at 278–79.

state."[94] The Supreme Court itself has recognized that the first and fourth prongs of the test are "closely related."[95] In other words, if a business has substantial nexus with a taxing jurisdiction, then the tax is likely related to benefits provided by the state.[96] However, that observation does not work in its reverse: A business can benefit from services provided by the state but be beyond the state's taxing power due to its lack of physical presence in the state. Therefore, where the bright-line physical presence test is applied to sales tax, it allows for a business to take full advantage of states' infrastructure and services, yet avoid collecting one of a state's most important revenue sources.[97]

In *Commonwealth Edison Co. v. Montana*, the Supreme Court reviewed the constitutionality of Montana's severance tax on coal mined within the state.[98] Commonwealth Edison challenged this tax on the grounds that it was not closely related to the services provided by the state.[99] The company argued that because 90% of the coal mined in Montana is shipped out of state, customers outside the state bear the economic burden of the severance tax.[100] Therefore, the company argued, the tax is not fairly related to the benefits that the out-of-state customers—who bear the burden of the tax—receive from Montana.[101] The Court held, however, that "[w]hen a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of police and fire protection, the benefit of a trained work force, and the advantages of a civilized society."[102] In support of the Court's conclusion that the severance tax was fairly related to the services of the state provided to the taxpayer, it reiterated its precedent that "interstate commerce [must pay] its fair share of the cost of state government."[103]

Businesses, which now can avoid having to collect sales tax on transactions due to their physical absence from a jurisdiction, depend upon services provided by the state. They depend on a civilized society, government infrastructure, and police and fire protection in both the state where they operate and in the state where their goods are consumed. Whichever jurisdiction eventually collects the tax, this observation should compel the need to abandon the physical presence test and ensure that remote sellers, like every other business, pay their fair share of the cost of government.

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94. *Id.*

95. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981) (discussing whether or not a state's severance tax applied to mining ventures violated the fourth prong of the *Complete Auto* test).

96. *See id.* at 626–27.

97. HELLERSTEIN, *supra* note 4, ¶ 12.02.

98. *Commonwealth Edison Co.*, 453 U.S. at 612.

99. *Id.* at 620.

100. *Id.* at 617–18, 620.

101. *Id.* at 620. The petitioner principally protested the high rate of the severance tax in its argument that it is not fairly related to the services provided by the state. *Id.*

102. *Id.* at 627.

103. *Id.* at 616 (quoting Washington v. Assoc. of Wash. Stevedoring Cos., 435 U.S. 734, 748 (1978)).

Finally, technology has not only made it feasible for a business to have an economic presence without having a physical presence, but also decreased the administrative burden that sales tax collection imposes upon businesses.[104] Prior to the Supreme Court accepting certiorari, the North Dakota Supreme Court upheld the tax at issue in *Quill*, noting that "automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty."[105] While the U.S. Supreme Court eventually rejected altering its physical presence rule to determine a tax's burden on interstate commerce,[106] technological advancements will continue to minimize the burden of sales tax collection.

II. EASING THE BURDEN OF COMPLIANCE

Generally, most proposed solutions to authorize states to collect sales tax from remote sellers focus on ways to ease the burden of complying with different tax regimes over thousands of taxing jurisdictions. Along with the criticisms that have grown out of the *Quill* decision, most academics and policymakers still recognize the need for sales and use tax reform with respect to the collection and remittance from remote sellers. Several individual states have moved towards reform in this area, adopting the provisions of the SSUTA. Adherence to this Agreement is a prerequisite in many congressional proposals to authorize states to require that remote sellers collect sales tax. Other solutions tend to focus on the creation of a *de minimis* exception, which would exclude smaller businesses from sales tax collection requirements, or where the cost of compliance to the business outweighs the tax revenue gained by the state. The *de minimis* exception appears in currently pending congressional legislation.

A. The Streamlined Sales and Use Tax Agreement

Formed in March 2000, the Streamlined Sales and Use Tax Governing Board seeks to "find solutions for the complexity in state sales tax systems."[107] The creation of the organization came in response to the Supreme Court's decisions in *Bellas Hess* and *Quill*.[108] By encouraging states to adopt the SSUTA, the Governing Board hopes that Congress will also take affirmative steps in granting member states the authority to enforce the collection and remittance of sales tax from remote sellers.[109] Currently, 24 states have adopted the Agreement.[110] Conspicuously absent from the Agreement's member states, however, are the nation's most populous states: California, New York, Florida,

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104. State v. Quill Corp., 470 N.W.2d 203, 215 (N.D. 1991), *rev'd sub nom*, Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

105. *Id.*

106. *Quill*, 504 U.S. at 317–18.

107. *About Us*, *supra* note 16.

108. *Id.*

109. *See id.*

110. *Id.*

Texas, and Illinois.[111] In fact, the population of the current membership represents just over 31% of the United States's population.[112]

Many provisions of the SSUTA are aimed at reducing the remote seller's sales and use tax collection burden in multiple jurisdictions. Among its many provisions, the SSUTA requires uniformity across state and local tax bases;[113] establishes uniform definitions for major products;[114] creates a central, electronic registration system for all member states;[115] establishes uniform sourcing rules for all taxable transactions;[116] and requires uniform state administration of exemptions, tax returns, remittances, and audits.[117] The following sections discuss the SSUTA's major themes and areas ripe for further debate and improvement.

1. One Rate per State

Many in the business community had hoped that truly streamlining the states' sales and use taxes would involve requiring that each state adopt a single rate for all transactions and services occurring within the state.[118] Instead of a remote seller potentially complying with over 6,000 different taxing jurisdictions in the United States,[119] it would have to comply with no more than 50. The National Tax Association issued a report concerning its Communications and Electronic Tax Project ("Project") findings,[120] acknowledging that "among the most difficult philosophical issues faced by the Project" was the issue of tax rates.[121] While requiring a single sales tax rate per state would greatly ease the burden on interstate commerce, the Project also recognized the importance of local governments maintaining control of an important revenue source.[122]

Bringing together representatives of various stakeholders, state officials, and policy experts, the Project saw and debated both the benefits and consequences derived from requiring a single sales tax rate per state.[123]

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111. THE STREAMLINED SALES TAX GOVERNING BD., STATE STATUS 10-01-12 (2012).

112. *About Us*, *supra* note 16.

113. Streamlined Sales and Use Tax Agreement, art. I, § 302 (2013) [hereinafter SSUTA].

114. *Id.* § 327.

115. *Id.* § 303.

116. *Id.* §§ 309–11.

117. *See id.* § 301.

118. *Sales Tax Fairness and Simplification Act: Hearing on H.R. 3396 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 58 (2007) [hereinafter *Sales Tax Fairness and Simplification Act: Hearing*] (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).

119. Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992).

120. NAT'L TAX ASSOC., COMMUNICATIONS AND ELECTRONIC COMMERCE TAX PROJECT FINAL REPORT (Sept. 7, 1999).

121. *Id.* at 13.

122 *Id.*

123. Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and their Constitutionality*, 2000 B.Y.U. L. REV. 9, 16–17.

Undoubtedly, having over 6,000 taxing jurisdictions within the United States burdens commerce.[124] This system may have worked well in a world where sellers existed primarily in sedentary brick-and-mortar buildings. It does not, however, work optimally in an increasingly mobile economy. The burden of complying with numerous taxing jurisdictions disproportionately affects small sellers, whose ability to sell to customers across the globe only became possible with the Internet.[125]

At the same time, recent history has demonstrated a societal proclivity for sales taxes as the preferred method to generate revenue for state and local governments.[126] The U.S. Census Bureau estimates that close to one-third of all state and local revenues come from sales and use taxes.[127] Moreover, 93% of all funding for primary and secondary education comes from state and local tax revenue.[128] Many local governments issue bonds to pay for constructing stadiums, improving roads, and preserving land and enter into bond covenants that promise future tax revenue from sales tax to pay off the bond.[129] Therefore, with local revenues funding local government institutions and services, it follows that localities would like to maintain a degree of control over local tax rates, such as sales tax.[130]

Nevertheless, the National Tax Association issued the recommendation that "[t]here should be one rate per state applicable to all commerce involving goods or services that are taxable in that state."[131] Obviously concerned with local governments' vulnerability and potential loss of tax revenue from this rule, the Association conditioned its recommendation on state governments protecting local jurisdictions by equitably distributing tax revenues.[132] The Project did not suggest any particular policy to achieve this goal, only stating that it required further study.[133]

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124. NAT'L TAX ASSOC., *supra* note 120, at 12.

125. *Id.*

126. Houghton & Hellerstein, *supra* note 123, at 27; NAT'L TAX ASSOC., *supra* note 120, at 13.

127. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118, at 10 (statement of Hon. John Conyers, Jr., a Representative in Congress from the State of Michigan).

128. *Internet Tax Moratorium and Equity Act: Hearing on H.R. 1410 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Hon. Steven Rauschenberger, State Senator from Illinois, on behalf of the National Conference of State Legislatures).

129. *Id.* at 65.

130. *See id.*; NAT'L TAX ASSOC., *supra* note 120, at 13 ("[A]ll Project members recognize the importance of local option sales taxes revenues in the fiscal system of many local governments").

131. *Id.*

132. *See id.* at 13–14.

133. *Id.*

2. Uniform State and Local Tax Bases and Rates

Ultimately, the SSUTA did not adopt a one-rate-per-state policy, likely due to strong opposition from state and local governments.[134] Instead, the push to streamline and develop uniformity came through the SSUTA provisions that required a single, state-level tax rate and a single tax rate for each local taxing jurisdiction.[135] This removes the possibility of a state or locality imposing, for example, a special tax rate for athletic equipment and another rate for the sale of all other goods. This requirement, however, will not apply to fuel or vehicles.[136]

Additionally, each state must have a uniform tax base.[137] A tax base defines which goods or services are subject to sales tax in a particular jurisdiction.[138] Through this requirement, local taxing jurisdictions must adopt their respective state's tax base.[139] Therefore, if a certain item is subject to sales tax at the state level, it will also be subject to sales tax at the local level.[140] Again, many may have hoped that the SSUTA would require a uniform tax base across states.[141] Although a nationwide uniform tax base would have decreased compliance burdens, it would have also greatly restricted the ability of state and local governments to control local tax policy.[142]

While the SSUTA permits each local taxing jurisdiction to establish its own rate and each state to define its tax base, the SSUTA requires that all member states adopt a uniform library of definitions.[143] Each state must use this library of definitions when establishing tax-exempt products or tax holidays.[144] Therefore, in every state—for sales tax purposes—clothing is defined as "all human wearing apparel for general use."[145] Included with this definition is a nonexhaustive list of items that fall under the definition and items that are beyond its scope.[146]

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134. *See Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118, at 58–59 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).

135. SSUTA, *supra* note 113, § 308(A)–(B).

136. *Id.* § 308(C). Also, the requirement did not apply to aircraft, watercraft, modular homes, manufactured homes, or mobile homes. *Id.*

137. *Id.* § 302.

138. *See* BLACK'S LAW DICTIONARY 1599 (9th ed. 2009).

139. *Id.*

140. For example, if footwear is subject to sales tax at the state level, which means it is in the state's tax base, then a local government that imposes sales tax is required to subject footwear to sales tax also. The local government could not exempt footwear from application of *its* sales tax.

141. *See* John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 374 (2003).

142. *Id.*

143. SSUTA, *supra* note 113, § 327.

144. *Id.* § 327(C).

145. *Id.* at App. C, Part II.

146. *Id.* Among the list of items included within the definition of clothing: athletic supporters, baby receiving blankets, girdles, rubber pants, and wedding apparel. *Id.* Included in the list of items *not* included within the definition of clothing: belt buckles sold separately, costume masks sold separately, and patches and emblems sold separately. *Id.*

States have demonstrated an ability to bypass the SSUTA provisions concerning uniform state tax base and uniform product definitions, which has been a major criticism of the SSUTA.[147] Perhaps the most widely cited example of states flaunting the library of definitions and single-tax rate requirements is Minnesota's attempt to impose a "replacement tax" on fur clothing.[148] Minnesota—a full member state of the SSUTA—excludes clothing from its sales tax base and therefore cannot apply a sales tax on fur clothing, as the product falls within the SSUTA's definition of clothing.[149] Therefore, Minnesota could not tax one item falling within the definition of clothing while not taxing other items that also fit within the definition. Nevertheless, Minnesota imposed the tax, and instead of calling it a sales tax, described it as an excise tax.[150] Minnesota's fur tax demonstrates not only the ease with which states are able to bypass the terms of the Agreement, but also the weakness of the SSUTA's Governing Board and Compliance and Review Committee. Both agreed that Minnesota's gross revenues excise tax was separate from the state's sales and use taxes and thus did not fall under the purview of the Agreement—despite its section 334 prohibition on replacement taxes.[151] Shortly thereafter, New Jersey enacted a similar tax to fur clothing purchased in the state.[152] Furthermore, the state taxed fur clothing at a rate of 6%, while its general sales and use tax rate was 7%, a violation of the single sales tax rate per state provision of the Agreement.[153]

Notwithstanding member states defying the Agreement's library of product definitions, developing a uniform library of product definitions is a daunting task. First, it may become quickly outdated with new technology and products entering the marketplace.[154] Second, taxpayers will attempt to find loopholes, arguing with taxing authorities over product definitions.[155]

3. Uniform Sourcing Rules

The question of where to source interstate transactions is answered by section 310 of the SSUTA, which requires that transactions be sourced to the destination of the purchased product.[156] This rule fits well within the ideal of a

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147. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association); Swain, *supra* note 51, at 381–82.

148. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association); Swain, *supra* note 141, at 381–82.

149. SSUTA, *supra* note 113, §§ 308(A), 327(C).

150. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).

151. *Id.* at 62.

152. *Id.*

153. SSUTA, *supra* note 113, § 308(A).

154. Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement*, 40 U.C. DAVIS L. REV. 1381, 1401 (2007).

155. *Id.*

156. SSUTA, *supra* note 113, § 310.

normative sales tax, one which is assessed at the point of consumption.[157] Therefore, under the SSUTA, when a person orders an item over the Internet from a company based in Florida and requests that the item be shipped to Maryland, the sales tax based on Maryland's applicable tax rate should be collected by the company in Florida and remitted to Maryland.

While this provision for uniform sourcing rules appears straightforward, it caused significant debate, as it conflicted with many states' sourcing rules.[158] Many states only apply the destination-based sourcing rule to interstate transactions, while using an origin-based sourcing rule for all intrastate transactions.[159] For example, under an origin-based rule, a person who purchases a good from a seller in Lawrence, Kansas and has the good shipped to her residence in Topeka, Kansas will pay Lawrence's applicable sales tax, and the seller will remit the tax to Lawrence's taxing authority.[160]

Not until January 1, 2010 could member states of the Agreement elect to maintain their sourcing rules for intrastate transactions.[161] Prior to this change, the Agreement made no distinction between state and local taxes and therefore required that the destination-based sourcing rules apply to all transactions except those where the buyer received the good at the seller's business location.[162] An oft-cited example of how a destination-based sourcing rule could affect an intrastate seller is the case of a pizza delivery, which would require the seller to determine the appropriate tax rate where the pizza would be delivered.[163] Due to the "pain" that this rule inflicts upon intrastate sellers,[164] the Agreement adopted section 310.1, permitting states to apply two sourcing rules for sales tax collection and remittance.[165]

4. Streamlined Tax Administration

Returning to the problem of complying with several thousand taxing jurisdictions in the United States, the SSUTA requires that each member-state shall

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157. A normative sales tax would tax pure "household consumption," and would therefore be levied in the jurisdiction where that consumption occurs. HELLERSTEIN, *supra* note 4, ¶ 12.06[3]; Swain, *supra* note 141, at 358.

158. John A. Swain & Walter Hellerstein, *The Streamlined Sales Tax Project and the Local Sourcing Conundrum*, 104 J. TAX'N 230, 230–31 (2006).

159. *Id.*

160. *See Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of Joan Wagon, President of the Streamlined Sales Tax Governing Board and Secretary of Revenue for the State of Kansas).

161. HELLERSTEIN, *supra* note 4, ¶ 19A.06.

162. Swain & Hellerstein, *supra* note 158, at 231.

163. *Id.* at 232.

164. *The Internet Sales Tax: Headaches Ahead for Small Business? Hearing Before the Subcomm. on Regulatory Reform & Oversight of the H. Comm. on Small Business*, 109th Cong. 18 (2006) (statement of Brian Bierbon, Senior Director, Federal Government Relations, eBay, Inc.).

165. SSUTA, *supra* note 113, § 310.1(B)(1); HELLERSTEIN, *supra* note 4, ¶ 19A.06.

provide state-level administration for sales and use taxes subject to the SSUTA.[166] This means that a remote seller will remit all sales and use taxes for a state to a single agency, which will then distribute them to local governments.[167] Similarly, the SSUTA requires that state-level administrators perform audits of sellers and purchasers on behalf of their local taxing jurisdictions.[168] Many had hoped that a single audit would count for all member states of the SSUTA, rather than allowing each state to perform its own audit; the SSUTA Governing Board, however, did not adopt this approach.[169]

All interstate sellers must register once in the sales and use tax registration system. Once registered, the seller will be considered registered for every state in the SSUTA.[170] Each state must make available to registered sellers a database that includes all of the state's applicable sales and use tax rates.[171] In the database, states are required to assign a tax rate to each five- and nine-digit zip code within their jurisdictions.[172] If a zip code contains more than one taxing jurisdiction, then the state must assign to it the lowest of the tax rates.[173] Furthermore, states have the option to assign tax rates to specific addresses.[174] Sellers relying on this data, provided by the states, will not be liable for mistakes resulting from their attempted compliance with the provided information.[175]

States registered under the SSUTA will have the opportunity to provide sellers with software approved by the Agreement's Governing Board to aid in collecting and remitting sales taxes.[176] The software will determine the applicable tax rate for a given transaction, whether the product meets any exemptions, and the amount of tax remitted to each state at the end of the period.[177] Each member state will have the opportunity to review the software, ensuring its accuracy and compatibility.[178] Once the member states and Governing Board have approved of the software, states cannot hold sellers using the software liable for tax collection and remittance failures while relying on the software.[179]

5. The SSUTA Governance

Governing authority under the SSUTA falls under the purview of the Governing Board, which is comprised of a single delegate representing each

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166. *Id.* § 301(A).
167. *Id.*
168. *Id.*
169. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).
170. SSUTA, *supra* note 113, § 303(A).
171. *Id.* §§ 305(E), 307(A).
172. *Id.* § 305(F).
173. *Id.*
174. *Id.* § 305(G).
175. *Id.* § 306.
176. *Id.* § 501(C)(1)–(3).
177. *Id.*
178. *Id.* § 502(A).
179. *See id.* § 502(B)–(C).

member-state.[180] Each member-state has one vote.[181] The SSUTA places a high bar on its own ability to ensure compliance among its members,[182] requiring a three-quarters affirmative vote to approve a new state's membership to the SSUTA,[183] remove member states,[184] and impose sanctions upon noncomplying members.[185] In a sense, the Governing Board operates much like the U.S. Senate, where representation is not based on population.[186] Therefore, the SSUTA Governing Board could allow for a group of states, representing a relatively small portion of the United States's population, to establish rules to alter the sales and use tax regimes of a few states, representing a relatively large portion of the United States's population. This may explain why the nation's most populated states are not members to the SSUTA—fearing perhaps a loss of sovereignty to the Governing Board on local tax policy questions.[187]

The Governing Board of the SSUTA does not impose strict compliance requirements on its member states.[188] Perhaps this signals the Governing Board's desire to grow and maintain an alliance by allowing significant wiggle room in state compliance—rather than moving for sanctions on noncomplying states—leading to fracturing among the Agreement's members.[189] Furthermore, if the Governing Board were to sanction member states, short of expelling them from the SSUTA (the only sanction explicitly mentioned in the SSUTA), it is unclear what form the sanctions would take.[190] Lastly, the SSUTA's requirement that states be "substantially compliant" with the provisions of the SSUTA provides a rather vague standard, which could encourage states to deviate away from certain requirements.[191]

Nevertheless, if Congress authorizes only the states adopting the SSUTA to collect sales tax on remote sellers, it may strengthen the power of the Governing Board.[192] First, federal legislation could encourage states to adopt the Agreement and become members due to the prospects of collecting additional tax revenue.[193] Second, congressional approval of the SSUTA will reinforce the legitimacy of the Governing Board and demonstrate to the states that the SSUTA "means business."[194] Third, Congress could introduce the judiciary into the SSUTA,

180. *Id.* § 806.
181. *Id.*
182. *See* Galle, *supra* note 154, at 1413.
183. SSUTA, *supra* note 113, § 804.
184. *Id.* § 808.
185. *Id.* § 809(A).
186. John A. Swain, *supra* note 141, at 381.
187. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).
188. *Id.* at 62; *see also supra* Part II.A.2 (discussing states' ability to bypass the SSUTA requirements by imposing "excise taxes").
189. *See* Swain, *supra* note 141, at 381.
190. Galle, *supra* note 154, at 1413.
191. *Id.* at 1418; SSUTA, *supra* note 113 § 805.
192. *See* Galle, *supra* note 154, at 1406.
193. *See* Swain, *supra* note 141, at 382.
194. *See id.*

allowing federal courts to review questions of state membership, compliance, sanctions, and removal.[195] This last step could significantly encourage member states to comply with the terms of the SSUTA.

6. State Sovereignty and Other SSUTA Concerns

Many states hesitate to join the SSUTA, which requires changing their tax regimes to comply with the SSUTA provisions and surrendering their sovereign right to select the best tax policy for their jurisdiction to the discretion of the Governing Board.[196] By relinquishing the ability to define their own tax base and define product exemptions, localities and states lose considerable power to adjust tax policy to achieve state interests. Furthermore, states with larger populations are especially reluctant to join the SSUTA,[197] perhaps because larger states do not wish to share equally in the dictates of the SSUTA's Governing Board with their less populous peers.[198] Further, the cost to overhaul its own tax regime might outweigh any benefits a state derives from joining the Agreement.[199]

Another concern regarding the Governing Board and the SSUTA is its relative instability. Between the years 2000 and 2007, the SSUTA has been subjected to over 70 amendments.[200] When the SSUTA's effort to streamline the states' sales and use tax came to heads with states' desire to maintain control over local tax policy, the states often won: allowing local jurisdictions their own tax rate, allowing each state to define its own tax base, and allowing states to adopt two sourcing rules. Instead of sanctioning states for failure to comply with the SSUTA, the Governing Board simply issues interpretive rulings.[201] These issues may arise from the lack of federal legislation granting authority to the SSUTA and the Governing Board's desire to maintain membership and cohesion. Nevertheless, the absence of the nation's most populous states should concern Congress as it contemplates legislation.

B. The SSUTA Congressional Legislation

The SSUTA has been the subject of several proposed pieces of legislation in Congress.[202] The Main Street Fairness Act, the most current bill adopting the SSUTA, authorizes states who are members of the SSUTA to require collection

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195. *Id.* (noting that "states [may have] to waive sovereign immunity as a condition of SSUTA membership to ensure that federal jurisdiction could be invoked effectively").

196. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).

197. *Id*.

198. See *id.* at 56.

199. *Id.*

200. *Id.* at 60.

201. *Id.*

202. *See, e.g.*, Main Street Fairness Act, H.R. 5660, 111th Cong. § 4(a)(1) (2010); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. § 4(a)(1) (2005); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. § 4(a) (2003).

and remittance of sales and use tax by remote sellers.[203] This authorization is granted to states as soon as ten states, representing at least 20% of the total population of all states imposing a sales tax, become members of the SSUTA.[204] Included in the proposed legislation are minimum simplification requirements from which the SSUTA and the Governing Board may not deviate.[205] Furthermore, the bill requires that member states reduce administrative burdens from their sales and use tax regimes, though it provides no specific guidance to accomplish the requirement.[206]

The Main Street Fairness Act also grants jurisdiction to the United States Court of Federal Claims to review the determinations of the SSUTA Governing Board.[207] Any person affected under the SSUTA must first petition the Governing Board concerning member state compliance, nondiscretionary duties of the Governing Board, or failure of the SSUTA to comply with minimum requirements specified in section 6 of the Main Street Fairness Act.[208] Only after petitioning and receiving a decision from the Governing Board may a party bring suit in the Court of Federal Claims.[209] The courts shall have the jurisdiction to "set aside the actions, findings, and conclusions of the Governing Board found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[210]

C. **De Minimis** *Legislation*

Alternatively, Congress is considering legislation that would grant states the authority to require remote sellers' collection and remittance of sales tax for goods sold to customers in the state.[211] The Marketplace Equity Act of 2011 utilizes congressional power to regulate commerce and accepts the Court's invitation to resolve the issue presented in *Quill*.[212] Noticeably absent from the bill are any requirements for states to adopt the SSUTA.

Still, the bill sets forth a few requirements, aimed at reducing the burden of collection and remittance on remote sellers, to which states must adhere.[213] First, the bill sets a *de minimis* exception for sellers whose gross annual receipts do not exceed $1 million in the United States or $100,000 in a given state.[214] In other words, under this legislation, a state does not have authority to require a business

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203. Main Street Fairness Act, H.R. 2701, 112th Cong. § 4(a)(1) (2012).
204. *Id.* § 4(a)(2)(A).
205. *Id.* § 6. The minimum requirements set forth in this section, which the SSUTA must maintain in order to have congressional approval, are already adopted in the SSUTA.
206. *Id.* § 6(b).
207. *Id.* § 5.
208. *Id.* § 6(a), (b)(1)(A)–(D).
209. *Id.* § 5(b).
210. *Id.* § 5(d)(1).
211. *See, e.g.*, Marketplace Equity Act of 2011, H.R. 3179, 112th Cong. (2011).
212. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).
213. *See* Marketplace Equity Act of 2011, H.R. 3179, § 2(b), 112th Cong. (2011).
214. *Id.* § 2(b)(1).

to collect and remit sales tax if the business makes less than $100,000 worth of sales in that state or less than $1 million throughout the United States.[215]

Assuming that a business exceeds the *de minimis* exception, a business must be able to remit sales or use tax for all jurisdictions within a state to a single taxing authority.[216] A state must also have a uniform tax base throughout the state, and sales tax exemptions for certain goods must be identical throughout the state.[217] If a state requires a business to collect a sales tax comprised of a state-level rate and a local jurisdiction's rate, it must make software available to the remote seller to ease the burden of collecting multiple rates in a single state.[218] Finally, the bill allows states to require remote sellers to collect taxes at different rates for food or drugs and medicine.[219]

Clearly, the Marketplace Equity Act is a simple way forward for states and Congress. Unlike SSUTA legislation, it does not attempt to create an interstate agreement and governing board to ensure that member states comply with a substantial number of requirements. Also, it does not attempt the daunting task of establishing uniform product definitions. Lastly, it does not require states to cede any tax sovereignty to a governing board with one vote per state representation.

While the legislation still grants states the authority to require remote sellers to collect sales tax, some may argue that it does not do enough to reduce the burden that sales tax collection places on remote sellers.[220] For instance, under the Marketplace Equity Act, a remote seller may have to comply with the approximately 6,000 taxing jurisdictions in the United States.[221] This issue was central to the Court's determination, in *Quill*, that such compliance would unduly burden interstate commerce.[222]

Nevertheless, the Marketplace Equity Act appears to confront these concerns with a *de minimis* exception.[223] The exception recognizes that the burden of collecting sales and use taxes is higher for smaller businesses than it is for large businesses.[224] In effect, the Marketplace Equity Act casts aside *Quill*'s physical presence test for a substantial economic presence test, where states may require sales tax collection *only* for businesses with *substantial* economic presence in the

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215. *Id.*

216. *Id.* § 2(b)(2).

217. *Id.* § 2(b)(3).

218. *Id.* § 2(b)(4)(A)(iii).

219. *Id.* § 2(b)(4)(B).

220. *Marketplace Equity Act of 2011: Hearing on H.R. 3179 Before the H. Comm. on the Judiciary*, 112th Cong. 103–04 (2012) [hereinafter *Marketplace Equity Act of 2011: Hearing*] (statement of Seteve DelBianco, Executive Director, NetChoice).

221. *See* Marketplace Equity Act of 2011, H.R. 3179, § 2(b)(4)(A)(iii), 112th Cong. (2011).

222. Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992).

223 Marketplace Equity Act of 2011, H.R. 3179, § 2(b)(1), 112th Cong. (2011).

224. *Marketplace Equity Act of 2011: Hearing*, *supra* note 220, at 17 (statement of Hon. Steve Womack, a Representative in Congress from the State of Arkansas).

state.[225] State courts have adopted such a test for determining whether out-of-state businesses must pay franchise or income taxes, with the belief that it is a better indicator of nexus for dormant Commerce Clause purposes.[226] Due to the increasing ability of a business to engage in commerce from a remote location, an economic presence test may be suitable for sales tax purposes as well.[227]

D. Roadblocks

Decades after *Quill*, there is still no solution to overcoming the dormant Commerce Clause obstacle preventing states from collecting sales tax from remote sellers. There are a number of reasons that Congress and the states have not wholeheartedly endorsed the SSUTA and its corresponding legislation.[228] Certainly, all tax legislation is destined to encounter great debate and conflicting interests. Nevertheless, given the current fiscal situation, it is surprising that state and local leaders, through their congressional representation, are not calling for immediate change to increase their governments' revenues and reduce their budget deficits. Allowing states to require remote sellers to collect and remit sales tax will not solve the budget crisis, but it could bring mild alleviation to the issue.

A point of contention, resulting in many states not adopting the SSUTA, is the transfer of control over state tax policy from states and their subdivisions to the Governing Board.[229] Today, sales tax remains one of the few taxing instruments not shared with the federal government, and thus it allows states and local governments to determine their design and rates. Just as states would not go quietly into the night if the federal government were to commandeer sales taxes on e-commerce, states do not wish to give away their prerogative to control sales tax policy to the SSUTA Governing Board. Furthermore, of primary concern for the larger states, the SSUTA gives equal voice to all of the states, irrespective of population, in determining the future of sales tax policy.[230]

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225. *Compare Quill*, 504 U.S. at 317–18 (holding that an entity's physical presence within a jurisdiction determines the compatibility of a state's enforcement of sales tax collection and remittance with the dormant Commerce Clause), *with* Marketplace Equity Act of 2011, H.R. 3179, §§ 2(a), (b)(1), 112th Cong. (2011) (authorizing states to enforce collection and remittance of sales and use tax on remote sellers, but exempting remote sellers from collecting and remitting sales and use tax when they make sales not exceeding $1,000,000 nationwide or sales not exceeding $100,000 in the state that would collect the tax).

226. Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 234 (W. Va. 2006).

227. *See Quill*, 504 U.S. at 317.

228. Swain, *supra* note 141, at 354–58.

229. *Sales Tax Fairness and Simplification Act: Hearing*, *supra* note 118 (statements of Hon. Zoe Lofgren, a Representative in Congress from the State of California, and member, Subcomm. on Commercial and Administrative Property and George S. Isaacson, Tax Counsel, Direct Marketing Association).

230. *Id.* (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association).

In addition to the loss of state and local sovereignty to establish its own sales tax regime, the SSUTA undertakes several challenging prospects, such as creating uniform product definitions and a balancing between origin and destination sourcing rules.[231] Each of these challenges required time-intensive debate and negotiation to reach an agreement among member states. Furthermore, in the case of uniform product definitions, member states have already found a way around the SSUTA's constraints by merely substituting the term "excise tax" for "sales tax."[232] Lastly, creating a *de minimis* exception to the collection and remittance of sales tax for small businesses places them at a competitive advantage over large retailers.[233]

On May 6, 2013, the U.S. Senate passed the Marketplace Fairness Act of 2013, which was subsequently referred to the House subcommittee on Regulatory Reform, Commercial and Antitrust Law.[234] The Marketplace Fairness Act differs from the Main Street Fairness Act because it does not make membership to the SSUTA a requirement for a state to require a remote seller to collect sales tax.[235] The congressional authorization for both members and nonmembers of the SSUTA requires minimum simplification requirements: a uniform state and local tax base, remittance to a single state taxing authority, and state provision of software to calculate and remit sales tax.[236] The Marketplace Fairness Act of 2013 also contains a small seller exception.[237] As the bill makes its way to the House, whether it will be enacted into law is still uncertain, as many conservative representatives have voiced strong opposition to the measure.[238] Nevertheless, the 69 senators voting in favor of the bill presently marks the apogee of congressional action in resolving the Commerce Clause impediments to collecting sales taxes on Internet purchases.[239]

III. ORIGIN SOURCING: AN ALTERNATIVE TO PROPOSED LEGISLATION

The SSUTA and all of its provisions or the *de minimis* legislation may seem appropriate, or even necessary, if there were not the availability of a third option to capture sales tax on interstate sales: taxing the sale of a good at the transaction's originating source. By sourcing a transaction to its origin, the seller's jurisdiction would impose sales tax liability on the transaction rather than the

231. *See infra* Part III.A

232. *Supra* notes 147–49 and accompanying text.

233. Andy Wagner & Wade Anderson, *Origin-Based Taxation on Internet Commerce*, 17 ST. TAX NOTES 187, 191–92 (July 19, 1999).

234. Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013).

235. *Id.* § 2(a)–(b).

236. *Id.* § 2(b)(2).

237. *Id.* § 2(c).

238. Henry J. Reske, *Passage of Marketplace Fairness Act Unlikely*, 69 ST. TAX NOTES 9 (Jul. 1, 2013); Jonathan Weisman, *Senate Passes Bill to Widen Tax Collection on the Web*, N.Y. TIMES, May 7, 2013, at B1.

239. *See* Reske, *supra* note 238, at 9.

buyer's jurisdiction. To be clear, there is no perfect solution to the issue of how state and local governments should tax interstate transactions, or if there is one, it has yet to be discovered. Therefore, imposing a sales tax based on the seller's jurisdiction rather than the buyer's jurisdiction has its drawbacks. Likewise, adopting the approach set forth in the proposed congressional legislation has clear drawbacks. The literature and discussion considering origin sourcing for sales tax is sparse. This Part discusses the various benefits and drawbacks of imposing an origin-based sourcing rule to interstate transactions and asserts that the advantages of an origin sourcing rule merit further consideration.

A. Drifting Away from the Normative Sales Tax

To a certain extent, the idea of taxing a sale at the origin of the transaction departs from the traditional normative principle that a sales tax is one on consumption.[240] In other words, a normative sales tax should not always be levied at the origin of the sale of the good, because that is not where the consumption occurs.[241] Therefore, by adopting an origin sourcing rule, sales tax will operate less like a levy on consumption and more like a levy on the transaction. Despite the divergence from this normative sales tax principle, the origin sourcing rule can maintain other characteristics of the normative sales tax.[242] One reason that a normative sales tax is described as a tax on household consumption[243] is because a normative sales tax should not apply to transactions involving business inputs.[244] An origin sourcing rule can similarly preserve this characteristic of a normative sales tax. To the extent that an origin sourcing rule does not tax business inputs, it will continue to have a similar effect as a tax on consumption.

State and local governments have historically used an origin sourcing rule for sales taxes applied to intrastate commerce and over-the-counter transactions.[245] A resident who purchases a good from a store in a neighboring city will pay a sales tax that the seller will remit to the city where the seller is located, rather than to the city where the consumer resides, even if the city of residence is where the consumption or use occurs.[246] States likely follow this sourcing rule due to the impracticability of administrating a destination sourcing rule.[247] Adopting an origin sourcing rule for interstate sales taxation would create a seamless approach to sales taxation, treating local and remote sellers equally.

Adopting a destination-based rule for e-commerce would be less troublesome than adopting the rule for intrastate commerce and over-the-counter transactions. First, local governments make the assumption that consumption

240. Swain, *supra* note 141, at 351.
241. *Id.*
242. *See id*.
243. HELLERSTEIN, *supra* note 4, ¶ 12.
244. *Id.* ¶ 12.01; Swain, *supra* note 141, at 351. In reality, 40% of all sales tax revenues are generated from business purchases. HELLERSTEIN, *supra* note 4, ¶ 12.01.
245. Swain & Hellerstein, *supra* note 158, at 231.
246. *See id.*
247. *See id.*

occurs at the origin of the transaction for intrastate commerce and over-the-counter transactions. For e-commerce, however, it is a far greater assumption that consumption occurs at the origin of the transaction due to the possibly great distances between the transaction and the eventual point of consumption. Second, remote sellers typically have to ship the good through a common carrier to the consumer at a specified address. The address could easily serve as a proxy for the good's final destination or point of consumption, which is the rule under the SSUTA.[248] The mere fact that e-commerce has these unique characteristics does not in itself make an origin sourcing rule a bad idea. At best, it argues that a destination-based sourcing rule using the shipping address as a proxy for the point of consumption is practicable as applied to e-commerce.

Under the SSUTA's approach, a consumer will pay the same amount of sales or use tax regardless of where the purchase is made.[249] Under an origin sourcing approach, the sales tax that a consumer pays will depend upon the tax rate in the seller's jurisdiction.[250] Therefore, under an origin sourcing approach, a consumer is incentivized to make purchases in jurisdictions with no sales tax or in jurisdictions with the lowest sales tax.[251] This leads to the principal critique of an origin sourcing rule: Remote sellers will locate or relocate to jurisdictions with no sales tax.[252] Whether adopting origin sourcing will create a mass exodus to sales-tax-free or low-sales-tax jurisdictions is questionable; however, there are collateral benefits to this possible consequence.[253]

If an origin sourcing rule does cause businesses to locate or relocate in jurisdictions with the lowest possible sales tax rate, state and local governments that want remote sellers to operate in their jurisdictions will have to keep their sales tax rates competitive. States already compete for business development by adjusting their respective corporate net income taxes.[254] Some commentators and scholars believe that tax competition among states is bad because it leads to a "race

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248. SSUTA, *supra* note 113, §§ 310(A)(2)–(3).

249. *See id.* § 310.

250. Terry Ryan & Eric Miethke, *The Seller-State Option: Solving the Electronic Commerce Dilemma*, 15 ST. TAX NOTES 881, 883 (Oct. 5, 1998).

251. *See* Swain, *supra* note 141, at 352.

252. *See* Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 804 (1996) (stating that "sales or property tax breaks for investment within the state or locality probably play some role in many taxpayers' business location decisions"); Ryan & Miethke, *supra* note 250, at 885; Swain, *supra* note 141, at 352. Alaska, Delaware, Montana, New Hampshire, and Oregon have no general sales tax. HELLERSTEIN, *supra* note 4, ¶ 12.02.

253. *See* Ryan & Miethke, *supra* note 250, at 885; Wagner & Anderson, *supra* note 233, at 191–92.

254. *See* Dan Bucks & Frank Katz, *Explanation of the Multistate Tax Commission's Proposed Factor Presence Nexus Standard*, 25 ST. TAX NOTES 1037, 1039 (2002) (noting that "[b]etween 1980 and the year 2000, the effective rate of state corporate income taxes declined nearly by half from 9.6 percent to approximately 5.2 percent . . . ."); James R. Rogers, *State Tax Competition and Congressional Commerce Power: The Original Prudence of Concurrent Taxing Authority*, 7 REGENT U. L. REV. 103, 103–04 (1996).

to the bottom."[255] Therefore, those opposed to tax competition would say that a race to the bottom will eventually lead to an underproduction of government services.[256]

Notwithstanding the belief that tax competition can be to the detriment of state and local government services, there is good reason to add sales tax to the competitive mix of business considerations. Most scholars agree that sales taxes are inherently regressive and therefore have a greater impact on low-income individuals than on high-income individuals.[257] Generally, low-income individuals spend a greater proportion of their income on consumption than high-income individuals do.[258] This fact is mitigated by most jurisdictions' exemption of basic expenditures, such as food, clothing, gas, electricity, and prescription drugs.[259] Still, unlike personal income taxes, sales taxes are not designed to decrease their burden on low-income individuals by, for example, subjecting their consumption to a lower tax rate.

While generally lowering sales tax rates may have beneficial consequences, businesses locating or relocating in jurisdictions with no sales tax under an origin-based taxing rule is still a concern.[260] To address this concern, states or the U.S. Congress could agree on a rule to limit a business's ability or desire to locate in a no-sales-tax jurisdiction.[261] The rule, for example, would not allow businesses to simply move sales representatives, computer servers accepting orders, or warehouses to a jurisdiction without sales tax in order to claim the jurisdiction as the origin of the transaction.[262]

Commentators have suggested several rules to prevent businesses from sidestepping into sales-tax-free jurisdictions.[263] First, states could agree that remote sellers in a jurisdiction with no sales tax must collect a default sales tax at a uniform rate.[264] Second, states could agree that residents in sales tax jurisdictions who make purchases in sales-tax-free jurisdictions will be liable for use taxes.[265] Finally, states could agree to a rule that determines a seller's origin for sales tax purposes that is not easily manipulated by businesses.[266]

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255. Billy Hamilton, *The Perfectly Imperfect Sales Tax*, 69 ST. TAX NOTES 545 (Aug. 26, 2013); Bartley Hildreth et al., *Cooperation or Competition: The Multistate Tax Commission and State Corporate Tax Uniformity*, 38 ST. TAX NOTES 827 (Dec. 5, 2005).

256. Hildreth et al., *supra* note 255.

257. HELLERSTEIN, *supra* note 4, ¶ 12.03.

258. *Id.*

259. *Id.*

260 *See supra* notes 262–67 and accompanying text; *see also* Swain, *supra* note 141, at 352.

261. Ryan & Miethke, *supra* note 250, at 885–86; Wagner & Anderson, *supra* note 233, at 191–92.

262. *See* Wagner & Anderson, *supra* note 233, at 191–92.

263. *See* Ryan & Miethke, *supra* note 250, at 885–86; Wagner & Anderson, *supra* note 233, at 191.

264. *See* Ryan & Miethke, *supra* note 250, at 885.

265. *See id.*

266. *See id.*

This final suggestion, to create a rule that businesses cannot easily manipulate in order to avoid sales tax collection, would require further study and discussion. It would be undesirable, for example, to determine a seller's residence based on the state of incorporation or business formation. More than 50% of U.S. publicly traded companies are incorporated in Delaware,[267] a state that does not impose a general sales tax.[268] Instead, a better rule would establish a seller's residence in a jurisdiction where it has the greatest nucleus of business operations.[269] This rule could be similar to the method that states use to apportion income among the various states where a business operates.[270] Locating the greatest plurality of business operations to determine a seller's residence, including, at a minimum, the seller's real and tangible property and employees, would make it difficult for a business to claim residence in a jurisdiction without sales tax.

B. The Benefits of an Origin Sourcing Rule

The reason that the benefits of an origin sourcing rule outweigh the above concerns is that it removes most of the issues addressed by the SSUTA from the debate.[271] Many of these issues have dogged the progress of federal legislation, while states continue to wait for the authority to require remote sellers to collect and remit sales taxes, and e-commerce businesses continue to have an advantage over brick-and-mortar businesses.[272]

1. State and Local Tax Sovereignty

For states deciding whether or not to join the SSUTA, a loss of control over state and local tax policy is a serious drawback.[273] If states were to adopt an origin sourcing rule for sales tax, state and local governments could maintain control over tax policy. State and local governments could adopt different tax bases, exempting certain products from sales tax at the state level, while assessing a sales tax at the local level. Additionally, state and local governments will not have to adopt uniform product definitions. Therefore, they could assess a sales tax on fur clothing while keeping all other clothing exempt from sales tax. Recently,

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267. WILLIAM K. SJOSTROM, BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH 13 (2013).

268. HELLERSTEIN, *supra* note 4, ¶ 12.02.

269. *See* Wagner & Anderson, *supra* note 233, at 191.

270. *See* HELLERSTEIN, *supra* note 4, ¶ 8.15.

271. *See* Ryan & Miethke, *supra* note 250, at 884.

272. *See* Wagner & Anderson, *supra* note 233, at 188–89.

273. *See Sales Tax Fairness and Simplification Act*, *supra* note 118 (statement of George S. Isaacson, Tax Counsel, Direct Marketing Association); *See, e.g.*, Main Street Fairness Act, H.R. 5660, 111th Cong. (2010); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. (2005); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003).

many countries have contemplated establishing a tax on trans fats.[274] Under the current SSUTA product definitions, a state could not tax trans fats without taxing most other food products.[275] These choices, along with many others, would be decided by the SSUTA Governing Board for states who are members.[276] Due to the composition of the Governing Board, amendments to the SSUTA could be stalled by a number of states representing a small population of the United States.[277]

2. The Burden on Interstate Commerce

Another distinguishing feature of the origin sourcing rule is that it will not require a business to comply with the hundreds of taxing jurisdictions in the United States.[278] Instead, an e-commerce business would only have to comply with a single taxing jurisdiction, or for larger business, a limited few taxing jurisdictions of the business's own choosing. Therefore, the concerns expressed by the Court in *Quill*, that a remote seller complying with several thousand taxing jurisdictions constituted a burden on interstate commerce,[279] disappear in an origin sourcing taxing regime for Internet sellers.

Furthermore, the U.S. Supreme Court precedent indicates that an origin-sourced sales tax does not burden interstate commerce in violation of the dormant Commerce Clause.[280] In *Oklahoma v. Jefferson Lines, Inc.*, the Court upheld a tax that the state assessed on the purchase of a bus ticket, where the final destination for the ticket was outside the state of Oklahoma.[281] In *Jefferson Lines*, as is the case with origin sourcing generally, there is no doubt that the seller has a substantial nexus with the taxing jurisdiction that is attempting to collect the tax.[282]

Because the burden on interstate commerce is substantially reduced under the origin sourcing rule, states will not have to give reasonable compensation for the costs of sales tax compliance to businesses. Providing monetary allowances to sellers for the cost of sales and use tax compliance remains a part of the SSUTA.[283] While some jurisdictions allow businesses to retain a percentage of the collected

274. Olga Khazan, *What the World Can Learn from Denmark's Failed Fat Tax*, WORLDVIEWS BLOG (Nov. 11, 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/11/what-the-world-can-learn-from-denmarks-failed-fat-tax/.

275. *See* SSUTA, *supra* note 113, App. C, Part II; *id.* § 327(C).

276. SSUTA, *supra* note 113 § 901.

277. *Id.*

278. Ryan & Miethke, *supra* note 250, at 884.

279. Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992).

280. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 177, 184 (1995).

281. *Id.* at 178.

282. *Id.* at 184.

283. *See* SSUTA, *supra* note 113, §§ 601–602.

sales tax to compensate them for the costs of compliance, under an origin sourcing rule, it will remain the decision of state and local leaders.[284]

3. Equal Footing

Origin sourcing will treat Internet retailers and brick-and-mortar retailers alike by only subjecting them to the sales tax regimes of the jurisdictions where they choose to physically locate. Similarly, an origin sourcing rule would treat large and small retailers equally.[285] Under both current congressional proposals, a *de minimis* exemption would give small retailers a competitive advantage over large retailers.[286] With origin sourcing, the *de minimis* exception will be unnecessary where, like small brick and mortar retailers, small Internet retailers will only need to comply with a single taxing jurisdiction. While some may appreciate an advantage for small retailers, in pure economic terms, tax policy should minimize its influence on consumers' purchasing decisions.

4. Avoiding Lingering Due Process Concerns

Prior to the Court's decision in *Quill*, a state requiring a remote seller to collect and remit sales and use tax for sales made within the state violated the Due Process Clause of the Fourteenth Amendment.[287] Citing its evolving due process jurisprudence, the Court held in *Quill* that the business had "purposefully directed its activities" at the state that imposed the tax liability.[288] While practitioners in state and local taxation believed that *Quill* clarified due process issues,[289] they now fear that the "revolution" in due process jurisprudence may indicate willingness for courts to rethink *Quill*'s holding.[290] Changes in the area of due process jurisprudence could undermine the congressional legislation authorizing states to collect sales tax from remote sellers because Congress cannot legislate around the Due Process Clause.[291]

Due to the relative newness of the Internet, the law is far from settled regarding if and how an Internet retailer would meet the requirements for due process.[292] "The placement of a product into the stream of commerce, without

284. Gamage & Heckman, *supra* note 61, at 509–10. For example, Utah law allows vendors to be compensated for verifiable costs related to compliance *and* they remit a certain threshold amount of sales tax annually to the state. *Id.* at 509. Wyoming allows vendors to retain up to 1.95% of the sales taxes they remit to the state. *Id.*

285. Wagner & Anderson, *supra* note 233, at 191–92.

286. *See* Main Street Fairness Act, H.R. 2701, § 6(a)(16) 112th Cong. (2012); Marketplace Equity Act of 2011, H.R. 3179, § 2(b)(1), 112th Cong. (2011).

287. Nat'l Bellas Hess, Inc. v. Illinois, 386 U.S. 753, 756 (1967), *overruled in part by* Quill Corp. v. North Dakota., 504 U.S. 298, 308 (1992).

288. Quill Corp. v. North Dakota., 504 U.S. 298, 308 (1992).

289. *See, e.g.*, Jennifer Carr, *U.S. Supreme Court's Due Process Cases Could Affect SALT*, 69 ST. TAX NOTES 807 (Sep. 30, 2013).

290. David Sawyer, *Resurgence of Due Process Nexus Litigation Possible, Practitioners Say*, 70 ST. TAX NOTES 285, ¶ 7 (Oct. 31, 2013).

291. *Id.*

292. Ryan & Miethke, *supra* note 250, at 890–91.

more, is not an act of the defendant purposefully directed toward the forum State."[293] One state and local tax practitioner said that the Supreme Court's most recent due process case, *J. McIntyre Machinery, Ltd. v. Nicastro*,[294] created more questions than answers with respect to e-commerce and state jurisdiction to tax.[295] The effect of this evolving due process jurisprudence on the destination-based sales tax in the proposed legislation before Congress is beyond the scope of this Note. However, it is clear that an origin sourcing rule does not implicate these due process concerns. Under an origin sourcing rule, states will only collect sales tax from sellers operating within their respective jurisdictions. For due process purposes, the nexus between the seller and the tax collecting jurisdiction is unquestionable.

CONCLUSION

The true beauty of the origin sourcing rule is its simplicity. The SSUTA, on the other hand, is well over a hundred pages, which makes one wonder just how much of a simplification it is. In addition, the SSUTA takes away considerable control over sales tax policy from state and local governments and gives it to a Governing Board that is susceptible to control by states representing a small percentage of the United States's population. These concerns do not exist under an origin sourcing rule: Control over sales tax policy will remain in the hands of state and local governments. Of course, origin sourcing is not without its drawbacks. Primarily, states will need to make a rule to ensure that e-commerce does not quickly relocate to sales-tax-free jurisdictions. Still, it appears to be the modus operandi of legislators and policy experts to create a myriad of complex rules to address political and economic problems facing state and federal governments. Perhaps in the issue of tax collection on Internet sales, the simplest solution is the best one.

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293. Asahi Metal Indus., Co. v. Superior Ct. of Cal., 480 U.S. 102, 112 (1987) (O'Connor, J.) (plurality opinion).

294. 131 S. Ct. 2780 (2011).

295. Carr, *supra* note 289, at 807.