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Close The Loophole: The Marketplace Fairness Act and its Likely Passage

Bryan J. Soukup
University of Richmond

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by Bryan J. Soukup

Introduction

When a consumer makes a purchase at a local book or clothing store, she is required to pay all applicable state sales tax as a matter of course. However, when the same item is purchased from an online retailer, such as Amazon.com or Zappos.com, frequently no state sales taxes are paid. In this stagnant economy, brick and mortar retailers (brick and mortars) are voicing increasingly strong objections to the current state of online tax collection considering they must always collect state sales tax. Due in part to this uneven playing field, brick and mortars lose thousands of dollars a day in sales to online retailers. States, too, are losing revenue in the form of unpaid use taxes and, like the brick and mortars, are proponents of legislation allowing states to require online retailers to collect sales tax from their customers. Proponents of federal legislation on this issue point to the fact that sales tax revenues currently amount to approximately $150 billion annually and constitute about one-third of state revenues, making federal action a matter of fiscal responsibility.[1] Conversely, opponents temper these numbers by citing data that the sales tax due for all consumer e-commerce is only 0.5% of total state and local tax revenue.[2]

To understand this controversy it is imperative to understand the similarities and differences between sales and use taxes. A use tax is a "substitute for sales tax. All states which have a sales tax also impose a use tax… The use tax rate is the same as the sales tax rate."[3] Usually a use tax is assessed when an individual purchases an item without paying his or her home state's sales tax (*e.g.*, the individual purchases the item online without being charged sales tax) and the item is consumed or used in the home state. As a result, a use tax is an indirect tax, while a sales tax is a direct tax.

Sales and use taxes in the United States date back to the early nineteenth century.[4] The sales tax blossomed during the Depression era, with Kentucky being the first state to create a tax exclusively directed at retailers.[5] The last state to impose a sales tax was Vermont in 1969. Presently, Alaska, Delaware, New Hampshire, Montana and Oregon are the only states without a sales tax.[6] One benefit of a use tax, as compared to a sales tax, is that it is easier to impose on out-of-state transactions. As the Supreme Court has held, "[h]owever fatal to a direct [sales] tax a 'showing that particular transactions are dissociated from the local business [is,]' such dissociation does not bar the imposition of the use-tax-collection duty."[7]

Of the 50 states in the union, approximately 12 have enacted legislation, discussed in detail below, mandating the collection of state sales tax on online purchases.[8] These states, and a variety of online retailers both large and small, are crying foul over the lack of guidance provided by the federal government to force others to comply. States want the law changed so that they can collect much needed revenue. Online retailers that already collect these taxes want the law changed to prevent their competitors from escaping their obligation to do so.

In response, in 2011 Congress acted by introducing a bipartisan solution to the issue, *The Marketplace Fairness Act* (the Act). This paper will study the events leading up to the Act, review the legal hurdles the Act will face before its potential passage, analyze current tax laws and loopholes relating to sales tax on online purchases, and examine the policy concerns surrounding the Act. In the end, while the Act will face significant challenges, these challenges will not be enough to prevent its passage during the 113th Congress.

The Necessity of Federal Legislation

The need for federal legislation traces its roots to the "dormant Commerce Clause." While the Commerce Clause grants Congress the right to regulate interstate commerce, the dormant Commerce Clause implies the converse; a negative right that prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce.[9] This principle has been cited in two seminal Supreme Court decisions as the basis for precluding states from imposing sales taxes on retailers that do not have a physical presence in the state where the product is sold.[10] Clearly, federal legislation is necessary to allow states to require online retailers to collect sales tax.

State taxation of remote retailers was first addressed in *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*.[11] Bellas Hess, Inc. was a national mail order catalogue company with its principal place of business in North Kansas City, Missouri.[12] In 1967, the State of Illinois, a state in which Bellas Hess "maintained no office, had no agents or solicitors, owned no property, and had no telephone listing" sought to force Bellas Hess to collect sales taxes from Illinois consumers purchasing its products.[13] The U.S. Supreme Court found in favor of Bellas Hess and refused to allow Illinois to collect a use tax on these sales. In its decision, the Supreme Court observed that it "has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the U.S. mail."[14] Justice Stewart, writing for the majority, also analyzed the crushing burden collecting these taxes would impose on Bellas Hess, Inc. and the negative impact on the free flow of interstate commerce writing, "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National [Bellas Hess'] interstate business."[15] Therefore, the Court held that a **physical presence** in the state is required in order to mandate tax collection by the business.[16]

Twenty-five years later, the Supreme Court again broached this issue in *Quill Corp. v. North Dakota*.[17] Quill Corp. was an office supply distributor incorporated in Delaware with warehouses in Illinois, Georgia, and California.[18] The State of North Dakota sought to collect owed use taxes from the company. Akin to the facts of *Bellas Hess*, "none of [Quill Corp.'s] employees work[ed] or reside[d] in North Dakota, and its ownership of tangible property in that State is either insignificant or nonexistent."[19] Upholding *Bellas Hess* on a Commerce Clause analysis, the Court held that although Quill Corp. satisfied the *International Shoe* minimum contacts rule, because Quill's business did not have a "substantial nexus" with North Dakota, North Dakota's attempt to force Quill to collect sales taxes violated the Commerce Clause. Using the Commerce Clause, the Court reasoned, would better avoid the undue burden on entities that *Bellas Hess* forbids.[20] The Supreme Court's examination found continued "value" in the bright-line, physical presence rule established in *Bellas Hess*.[21]

However, Justice Stevens, writing for the majority, explicitly left the door open for Congressional action stating, "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."[22] Because the fundamental basis for the Court's reasoning was the Commerce Clause and because the Court held that North Dakota's statute did not violate the Due Process Clause of the Constitution, Stevens postulated that Congress should have the final say in whether or not these states could collect these taxes. Hence, while states are currently precluded from collecting sales and use taxes from out-of-state retailers, Congress has the ability to pass legislation-giving states the authority to do so.

The Main Street Fairness Act. In July of 2011 Congress finally heeded the Supreme Court's clear advice and moved forward with legislation to close the loophole formed by *Quill* with Senator Dick Durbin's (D-Ill.) introduction of the Main Street Fairness Act (Main Street). Main Street would allow states to require large Internet and mail-order retailers to collect state and local sales taxes, provided certain conditions have been met.[23] Although enactment of the bill would remove the nexus requirement established in *Bellas Hess* and *Quill*, in order to ease the potential undue burden on interstate commerce, Main Street would require all states that wish to take part in the legislation to fully adopt the Streamlined Sales and Use Tax Agreement (SSUTA).[24]

The SSUTA is a voluntary agreement created by the Streamlined Sales Tax Project (a group composed of members of the National Governors Association and the National Conference of State Legislatures) that simplifies tax collection procedures through the implementation of tax law reorganization, more efficient administrative procedures, and emerging technologies.[25] According to the SSUTA, execution of these procedures minimizes costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states.[26]

Senate Republicans and other opponents of Main Street cited the amorphous term of "large" businesses coupled with the lack of a defined exemption for small businesses as reasons for their opposition. Republicans argue that small businesses, much like the online marketplace in its infancy, deserve some sort of protection, as they do not have the large infrastructure and resources that large corporations do to comply with collecting these taxes. Consequently, by early fall, support for Main Street had mostly disappeared.[27]

The Marketplace Equity Act. Nonetheless, in October 2011, a similar Bill called the Marketplace Equity Act (Equity) was introduced by Reps. Speier (D-Ca.) and Womack (R-Ar.). Like Main Street, Equity would enable states to require online companies that do not have a physical presence in the state to collect and remit state sales taxes.[28] However, unlike Main Street, Equity established a specific small business exemption that would excuse remote sellers with annual U.S. gross revenues of $1 Million or less, or in-state revenues of $100,000 or less.[29] Equity also does not require participation in the SSUTA. It only provides that a state must, "implement a simplified system for administration of sales and use tax collection with respect to remote sellers."[30] However, Equity was criticized for being crafted too hastily in order to collect Republican support and for abandoning too many of the protections for remote retailers prescribed in *Quill*, and the bill ultimately failed.[31]

The Marketplace Fairness Act. Finally, in November of 2011, the Marketplace Fairness Act (the Act) was introduced in the Senate by a bipartisan army consisting of such-heavy hitters as Lamar Alexander (R-Tn.) and Dick Durbin. The Act is an amalgamation of the two previous proposals. Like Main Street, the Act gives a state the option to participate in the SSUTA in order to remedy any undue burden posed by collection of sales taxes across jurisdictions.[32] However, the Act also allows states to adopt a detailed list of stringent procedures short of entering the SSUTA,[33] much like those proposed in Equity.[34] The Act also provides an exemption for small businesses whose gross annual revenue is less than $500,000 nationally. Those states that choose not to ratify the SSUTA must implement the following procedural safeguards to streamline tax collection: (1) a single state level collection agency; (2) a single audit for all state and local taxing jurisdictions within the state; (3) a single sales and use tax return to be used by remote sellers to be filed with the state-level agency; (4) a uniform sales and use tax base among the state and its local taxing jurisdictions; (5) adequate software and services to remote sellers that identifies the state and local sales tax rate to be applied on sales sourced to the state; (6) certification procedures which include an agreement to hold providers harmless for any errors or omissions as a result of relying on state provided information; and (7) 30 days notice to remote sellers and single and consolidated providers of local tax rate changes.[35]

The Act has collected, by far, the most positive attention from officials and pundits on both sides, blessed by some of America's most staunch anti-tax advocates, including Governors

Mitch Daniels (R-In.), Paul LePage (R-Me.), and Haley Barbour (R-Ms.). Rarely, in this political environment, has a bill achieved such bipartisan backing, especially one that deals with the divisive topic of taxation. Though the Act has found the most traction of the three bills and has the greatest likelihood of earning bipartisan support in both chambers, it has been tabled in committee until the 113th Congress. Of the approximately 8,000 bills that go to committee each year, only 10% of them make it out for consideration on the chamber floors.[36]

Legal Challenges to New Legislation

Those opposed to the Act are asserting a variety of legal challenges to the proposed legislation. This section will deal with the two major challenges and explain why each is based on an inaccurate interpretation of the law.

Challenge #1: The Marketplace Fairness Act Will Create a New Unconstitutional Tax. Opponents claim that by allowing states to force remote online retailers to collect sales tax, the Act will, in effect, create a federally based online sales tax. Because each state and locality has different sales and use tax rate, [37] opponents say such a federally mandated tax would be in violation of Article 8, Section 1 of the 16th Amendment, which requires uniform imposition of taxes. Specifically, this section states, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[38]

This argument is not persuasive because the Act is not a new federally mandated "national sales tax"; it is a bill that provides a structure and procedure for states to collect a direct sales tax (that is already due) rather than an inefficient indirect use tax.[39] Presently, 23 states provide for use tax reporting on their individual income tax return form while seven more states provide informational booklets on how to report use taxes.[40] Each state that has sales and use tax (even those that do not have a state income tax and, therefore, no state income tax return) provide some sort of method for what is in theory and in law, mandatory use tax reporting.[41]

Rather than rely on customers reporting a use tax on their tax returns, as they are required to do by law as of right now, the Act would simply require online retailers to collect, directly, sales tax.[42] Under the Act, no item will be subject to more or less tax under the law, and any state without sales and use taxes will be exempt from the legislation.[43] Moreover, any state that does not wish to collect these owed taxes may opt out altogether.[44]

According to the Tenth Amendment to the Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[45] Thus, states have taken the constitutionally protected initiative to levy sales and use taxes in order to generate revenue.

Other than *Quill* and *Bellas Hess*, discussed above, the Supreme Court has provided only limited restriction on a state's right and ability to collect sales and use tax. For example, in 1940, the Court emphatically declared that, "[t]his Court has uniformly sustained a tax imposed by the state on the buyer upon a sale of goods".[46] Considering this precedent, and the Court's suggestion in *Quill* that Congress may enact legislation that will allow states to collect sales tax from online retailers, it is doubtful that the Act would be found to be unconstitutional.

Challenge #2: Even if the Act does not create a new tax, it will impose an unconstitutional undue burden on interstate commerce. Opponents point to the Court's opinion in *Quill* in arguing that the Act will impose an undue burden on interstate commerce. The *Quill* Court examined the nearly 6,000 taxing jurisdictions in the United States and concluded that requiring a company to comply with the tax law and rates of each of those states and localities would impose an unconstitutional undue burden on interstate commerce.[47] *Quill* observed that the purpose of the physical presence nexus requirement is to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce."[48] Challengers of the Act have claimed that even with the SSUTA, interstate commerce will be unduly burdened.[49]

This is incorrect. First, the Supreme Court in *Quill* did not delineate any specific requirements for how to limit the burden on interstate commerce.[50] Second, the SSUTA has already proven to be an effective simplifier of tax codes. As of 2010, there are 20 full member SSUTA states and three associate member states.[51] These states have complied with rate simplification by creating one general state rate per state, allowing a single local rate per jurisdiction, establishing uniform sourcing codes for goods and services that are destination based, uniform treatment of bank holidays, and uniform rules for sales tax holidays.[52] All SSUTA full member states have put into place a central registration system, simplified electronic tax return systems, and a uniform rounding rule.[53] The Act's requirement of states that wish to take part in the legislation to adopt all the provisions of the SSUTA or to enact provisions (detailed in the text of the Act and listed above) that are similar to the SSUTA in depth and breadth, ensures that the imposition of a sales tax will not constitute an "undue burden" on interstate commerce.[54, 55]

In addition, the Supreme Court has provided detailed guidance on what constitutes an undue burden on interstate commerce—standards that the Act clearly does not violate. According to the Court in *Complete Auto Transit, Inc. v. Brady*, the state has a right to tax interstate commerce if a four-prong test is satisfied.[56] The state may impose such a tax if: (1) it is applied to an activity with substantial nexus with the taxing state; (2) it is fairly apportioned; (3) it does not discriminate against interstate commerce; and (4) it is fairly related to the services provided by the state.[57]

The Act passes the *Complete Auto* test. Prongs two and four are relatively self-explanatory. Prong two is met because the tax will be apportioned equally throughout each jurisdiction according to each state's already established, constitutional, sales tax. As to the fourth prong, *Quill* stated, "there is no question that Quill has purposefully directed its activities at North Dakota residents . . . . [T]he use tax is related to the benefits Quill receives from access to the State."[58] Like Quill Corp., online retailers direct their products towards consumers in all U.S. jurisdictions. Therefore, the tax will be related to the benefits the company receives from the state.

As for prong one, the Act would eliminate the "physical presence" rule as it relates to the substantial nexus test and would declare such actions as nondiscriminatory. The Court in Quill specifically acknowledged the possibility such action.[59]

Regarding prong three, the *Quill* Court held that it prohibits "taxes that pass an unfair share of the tax burden onto interstate commerce."[60] As the consumer already owes these taxes in states with sales and use tax should he or she choose to purchase the item instate at a Brick and Mortar retailer or online, the Act will not discriminate against interstate commerce. The Act will not force collection in states where no sales or use tax exists.[61]

Based on the Congressional discretion acknowledged by the Court to Congress in *Quill* and the Court's analysis of the prongs of the *Complete Auto* test, it is unlikely that the Act will be found to create any undue burden on interstate commerce in violation of the Commerce Clause.

Current Tax Law and Loopholes

***State Response*.** While *Quill* has prevented states from directly taxing remote retailers, states have employed a variety of tactics to work within its frame. As will be detailed below, states have done this, largely, in two ways. First, states have lured corporations into their borders by exempting them from collecting sales taxes for purchases made online by state residents. In return, such corporations have generated revenue for those states by bringing jobs, thereby personally taxing the new residents seeking those jobs, and through state corporate income tax. Second, in order to work within the confines of the *Quill* decision, states have tried to find physical nexuses through corporate affiliates (defined below). These two methods have had mixed results.

***The Legality of Exemption as Incentive*.** Many states have weighed the benefits and detriments of how to tax out-of-state-based corporations. A long-standing conundrum has existed between the two predominant modern political and economic ideologies in America on how to increase revenue: (1) increase taxes on corporations and businesses and produce immediate revenue or (2) decrease taxes to attract businesses, increase the tax base and bring more jobs into the state (something of particular urgency in today's economy).

Since *Quill* severely limits states' ability to tax online retailers, rather than try to tax these retailers, some states have focused on providing the retailers with incentives to locate their physical operations in the state. In 2010, Tennessee struck a deal with Amazon for a $139 million project that will reportedly bring between 1,400 and 2,000 new jobs to the state.[62] The deal will also bring two order-fulfillment centers in East Tennessee establishing a physical presence nexus in the state.[63]

As a result of the unique nature of the Tennessee tax code, Tennessee had to provide Amazon with adequate incentive to locate these centers in Tennessee. Tennessee has no state income tax and, instead, has a comparatively high sales tax on products purchased within the state. As a result of the high sales and use tax, a large segment of the state population shops online for large or expensive purchases. A 2009 University of Tennessee study calculated that Tennessee lost approximately $7.7 billion in e-commerce sales tax revenue due to the *Quill* exemptions in 2008. These numbers play heavily on Amazon's and other online retailers' calculus of where to open physical facilities because establishing a nexus in a state with a large population of residents who deliberately purchase products online would likely force these online companies to collect taxes from those online purchasers in that state. Doing this would diminish the likelihood that citizens in that state would make online purchases. Amazon would normally not quash a dependable revenue stream from Tennessee without any incentive.

"[T]o lure [Amazon] to Tennessee, the state gave Amazon an economic-incentive package [including a provision that] the company would not have to collect sales taxes -- even on sales made within the state borders."[64] In striking this deal, Tennessee learned from Texas Governor Rick Perry, who made the mistake of "present[ing] [Amazon] with a $269 million bill for uncollected sales taxes" which resulted in the company "clos[ing] a suburban Dallas distribution center and scrapp[ing] expansion plans."[65] Consequently, Tennessee, in essence, granted tax collection amnesty to Amazon.

In October 2011, however, Tennessee's Attorney General Cooper, a Democrat, reversed course on the state's position. Mr. Cooper, taking from both the holding in *Quill* and the state's *Retailers' Sales Act*, found that a corporation, with a physical nexus, could not be exempt from collecting and remitting state sales and uses taxes in the state of Tennessee.[66] He went on to make a more stringent distinction not addressed in *Quill* stating, "if the in-state distributing house or warehouse is owned by a retailer's subsidiary, instead of the retailer directly, nexus is established only if the subsidiary's in-state activities are significantly associated with the retailer's ability to establish and maintain a market in Tennessee for its sales."[67] In closing, the Attorney General wrote, "[a]s a general rule, the State of Tennessee cannot contractually waive a taxpayer's obligation to pay sales taxes" because of Tennessee's *Retailers' Sales Act* which requires all companies with a physical presence in the state to collect and remit sales taxes.[68] To soften this hard position, the Attorney General granted some discretion to the Tennessee Commissioner of Revenue, in the case of online retailers, by allowing the Commissioner to assess the constitutionality of taxing such entities.[69]

Since the Attorney General handed down his opinion and Congress has moved to legislate on the issue (as discussed above), Republican Governor Bill Haslam, perhaps seeing the writing on the wall, took the initiative and reached a tentative agreement with Amazon to begin collecting state sales tax on January 1, 2014. Despite the imposition of sales tax, Amazon accepted the deal because it will give the company an almost two-year tax holiday should any Congressional action take hold during this year.

In Virginia, where Amazon operates a warehouse in Sterling and a data center at an undisclosed location within the state, the online retailer was also granted a tax collection exemption in return for the company bringing two new distribution centers that would generate approximately 1,300 jobs in the state.[70] According to a 2007 Virginia Department of Taxation decision, Amazon is exempt from collecting and remitting sales taxes in the state because its facilities in Virginia do not handle sales.[71] However, bowing to bipartisan political pressure, Governor McDonnell, Amazon, the Virginia House of Delegates and Senate recently reached a deal to require Amazon to start collecting sales tax on September 1, 2013.[72] Sponsored by Senator Wagner (R–Virginia Beach) the "state legislation also creates a legal presumption that other out-of-state online businesses with a physical presence in Virginia such as distribution centers must collect sales taxes."[73] This legislation mirrors Tennessee's *Retailers' Sales Act*. A similar scenario is unfolding in South Carolina, Arizona, and Nevada.[74]

In states where there is no equivalent to Tennessee's *Retailers' Sales Act*, the practice of contractually exempting companies from collecting sales taxes to draw them to the state, even when they have a physical presence, is currently not illegal under state law or the holding in *Quill*.

The Amazon Tax Laws. Amazon.com, one of the nation's largest online retailers, collects sales or use taxes in only five US states.[75] Generally, these states are where Amazon has a strong physical presence, like a corporate headquarters. Additionally, five other US states don't have statewide sales taxes; thus, Amazon does not collect taxes in 40 states.[76] Seventeen states have taken matters into their own hands by passing "Amazon Tax" laws through their state legislatures. These laws are designed to compel Amazon and other online and remote retailers to collect and remit local sales and use taxes from customers.

In order to collect online sales taxes from these remote retailers, most states target remote retailers' "affiliates" that have an actual physical presence in the state.[77] These Amazon "affiliates" are usually bloggers who link to Amazon products on their blog or website.[78] Since they are registered and monitored by Amazon, they are officially associated with the company. Moreover, since many of these affiliates are individual bloggers, Amazon often has thousands of affiliates in each state thus creating an in-state physical nexus to satisfy the legal requirements of *Quill*. Consequently, Michigan's tax law, for example, "impute[s] [a] nexus to remote sellers that compensate in-state affiliates for sales made on a "click-through basis" from the affiliates' websites."[79] Similar laws have also taken this approach by creating, "a rebuttable presumption that an Internet retailer has a nexus with the applicable state if the seller enters into an agreement with an in-state resident or person to refer potential customers, directly or indirectly, through a link on a website or otherwise."[80]

These laws, as will be detailed in the section (c) below, have varied in their success.

Policy Concerns

The Government's Role in tax "fairness." Just viewing the names of the three proposed pieces of legislation, The Main Street *Fairness* Act, The Marketplace *Equity* Act, and The Marketplace *Fairness* Act, one can easily see that the overriding message sent by Congress is one of equality and fairness. Yet we live in a society that has built a strong economy on principles of competition, laissez faire principals, and survival of the fittest. How can one ensure fairness in a capitalist economy, including the tax regime governing such an economy? Why fairness is a question that both proponents and opponents of the Act have raised.

Is fairness at the heart of the issue; or is it simply a matter of allowing states to enforce their own tax laws? Every American citizen, except those who live within the borders of the five non-sales tax states, is required to report the tax owed on e-commerce interstate purchases by way of use taxes on their individual tax returns or other similar means. Despite this legal requirement, many (or most) consumers do not do it. This lack of compliance has cost states, most of which are struggling in the current economic downturn, an estimated $23 billion for the year 2012 alone.[81] In context, the fifty states, in total, collected an estimated $150 billion in general sales tax in 2011.[82]

The U.S. government should not be in the business of picking winners and losers, be it the auto industry or the online retailers. Right now our laws pick online retailers as the winners, giving them special security not enjoyed by their Brick and Mortar counterparts. Perhaps when e-commerce was in its infancy (about the time *Quill* was decided) it made sense to pad protections to ensure its early survival. Twenty years later we know that e-commerce is a force here to stay. We know it will survive even if it has to play by the same rules as its Brick and Mortar counter parts. If enforcing the laws that are already in place regarding sales and use taxes of online products hurts some online retailers, it is commensurate with the perils of the free market. The best product in the best forum always wins. The online retail business is robust, and making it play by the same rules that the brick and mortars play by is unlikely to dramatically decrease the appeal of shopping, with ease, from the comfort of your living room. In a free market society, the only role of the government is to ensure that each individual and each business entity has the *opportunity* to enter into the market and try its hand at success. This Act does nothing more and nothing less.

Will the Act harm an already weak economy? The first bill dealing with this issue was titled "The Main Street Fairness Act." While this title came across as a bit hackneyed by outwardly appealing to the most sentimental parts within us, the principle behind it was sound. The online tax loophole is hurting Brick and Mortar retailers. These retailers are part of the fabric of our economy and support a significant part of our work force, employing an estimated fourteen million people in approximately one million retail outlets.[83] To compare, Amazon.com only employs 56,200 employees worldwide.[84] Furthermore, eBay only employs 27,000 workers worldwide.[85] While pumping money into the economy with online retail purchases is an effective way to help jumpstart our struggling economy, protecting the millions of Americans who work at and own brick and mortar retailers is even more important.

Many supporters of the Act also tout its ability to simplify our archaic and chaotic tax structure and, perhaps, lower our overall tax rates in each state. State implementation of the SSUTA and/or other prescribed tax simplification procedures will streamline our complicated state and national tax scheme, cutting down on the time, effort, and money required to comply with the tax code. Al Cardenas, a renowned Republican strategist and conservative anti-tax advocate sees the Act as a way to lower taxes across the board. Cardenas writes that the Act "should — allow for commensurate reductions in sales tax rates. For instance, if Internet sales tax revenues will add 10 percent in revenue to a governing body's coffers, then, at a minimum, a corresponding overall reduction in rates should apply."[86]

Moreover, regardless of the impact the Act may have on online retailers, it will not **negatively** affect our economy since, whether online or in a physical store, Americans still will purchase the products that they desire or require. While the sales volume might trend more favorably towards brick and mortar retailers after the Act passes, Americans will keep this economy moving by continuing their consumerism.[87]

Would a state solution work better? For a number of years states have tried crafting their own solution to this problem with little positive result. As discussed above, states that have attempted imposing "Amazon Laws" have run into a buzz saw wielded by online retailers. One tactic of the large retailers has been to remove or cut ties with their affiliates, as we have seen in California and other states. On the day California's Amazon Law was passed, Amazon sent e-mails to its affiliates stating, "[u]nfortunately, Governor Brown has signed into law the bill that we e-mailed you about earlier today. As a result of this, contracts with all California residents participating in the Amazon Associates Program are terminated effective today…"[88] This process has repeated itself in states across the country that have installed Amazon Laws.

Amazon Laws are also running into legal trouble. In New York State, for instance, Amazon and Overstock.com filed claims against the State asserting that New York's Amazon Law was "invalid, illegal, and unconstitutional" based on a *Quill* analysis.[89] Although the action was dismissed by the trial court, it was reinstated on appeal in a ruling by the state appellate court that the previous dismissal was premature.[90]

Other solutions have also faltered. Some states have tried constructing "cooperative agreements between states" involving "each state [agreeing] that if an out-of-state buyer makes a purchase from a vendor within their state, the vendor will collect and remit the applicable use-tax to the state where the buyer has the purchase delivered."[91] This has been largely ineffective since purchasers can get around these agreements by having the goods delivered to a family member or friend outside of the agreeing jurisdiction.[92]

Since states do not have the ability to enforce taxation of online sales, a federal solution is necessary.

Conclusion

While there is no silver bullet for fixing the budgetary crises our states are currently confronting, there are ways to close tax loopholes that allow citizens to escape their duty to pay taxes currently owed. As shown, the debate over the *Marketplace Fairness Act* should not revolve around a traditional Republican-Democrat theorem on taxes and tax structure, but rather, around the fundamental premise of abiding by the law. The Act is not a new tax, it is not prohibited by the Constitution, and it will not create an undue burden on private retailers or interstate commerce. It is, in essence, a net positive for all. For states, it will bring new revenue that, under current law, it is entitled to. For citizens, it will streamline paying taxes for purchases, as they are currently legally obligated to do, and will simplify chaotic and onerous tax codes across the country. For the online retailer, it will make their duty to collect taxes easier and more straightforward. For the brick and mortar retailer, it will level a playing field that has been uneven, in violation of the laws concerning use taxes, for nearly 20 years.

This Act will be mutually beneficial to everyone involved and will pass constitutional muster, and, for those reasons, it is anticipated that Congress will ultimately vote in its favor; though, as of the end of the 2012 calendar year, a vote on the bill has been postponed until the 113th Congress.[93] Senators Alexander and Durbin will be members of the 113th Congress and Senator Durbin has already stated he is committed to championing this cause in the next legislative session. ⌘

Bryan Soukup is a third year student at the University of Richmond School of Law in Richmond, Virginia and a graduate of Vanderbilt University. He has served as a Legislative Fellow for the Office of Federal Affairs and Intergovernmental Relations, City of Los Angeles, California.

Endnotes

1 Staff, *Sales Tax on the Internet - When sales tax must be charged for online purchases*, NOLO.com at http://www.nolo.com/legal-encyclopedia/sales-tax-internet-29919.html.

2 Stephen DelBlanco and Michael Mazerov, *Should States Require Online Retailers To Collect Sales Tax?* The Wall Street Journal, Nov. 14, 2011 at http://online.wsj.com/article/SB10001424052970204528204577007511298359048.html.

[3]*Sales and Use Taxes*, Maine Department of Revenue, http://www.maine.gov/revenue/salesuse/usetax.pdf, last visited (March 6, 2012).

[4]William F. Fox, *History and Economic Impact of the Sales Tax*, Institute for Professionals in Taxation, September 2003.

[5] *Id.*

[6] *Id.*

[7] National Geographic v. Cal. Equalization Bd., 430 U.S. 551 (1977)

[8]Sandra Block, *Momentum growing for sales taxes on online purchases*, USA Today, Feb. 9, 2012 at http://www.usatoday.com/money/perfi/taxes/story/2012-02-08/online-sales-taxes/53015142/1.

[9] *Commerce Clause*, Legal Information Institute, available at http://www.law.cornell.edu/wex/commerce_clause.

[10]These retailers are commonly referred to as "remote retailers."

[11]*National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967).

[12]*Id.*

[13]*National Bellas Hess, Inc.*, 386 U.S. 753 at 759.

[14]*Id.* at 758.

[15]*Id.* at 759.

[16]*Id.*

[17]*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[18]*Id.*

[19]*Id.*

[20]*Id.* at 313.

[21]*Id.* at 312.

[22]*Id.* at 318.

[23]Main Street Fairness Act of 2011, S. 1452, 112th Cong. (2011).

[24]*Id.*

[25]The Streamlined Sales and Use Tax Agreement (1999).

[26]*Id.*

[27]Lamar Whitman, *Main Street Fairness Act Introduced: Requires Interstate Sales Tax Collection*, CompTIA, Aug. 2, 2011 at http://blog.comptia.org/2011/08/02/main-street-fairness-act-introduced-requires-interstate-sales-tax-collection/.

[28]Marketplace Equity Act of 2011, H.R. 3179, 112th Cong. (2011).

[29]*Id.*

[30]*Id.*

[31]Carl Franzen, *Sen. Durbin Tries Again to Tax Online Retailers*, TPM, Nov. 9, 2011 at http://idealab.talkingpointsmemo.com/2011/11/sen-durbin-tries-again-to-tax-online-retailers.php.

[32]The Marketplace Fairness Act of 2011, S. 1832, 112th Cong. (2011).

[33]*Id.*

[34]*Id.*

[35]*Id.*

[36]*The Importance of Committees*, US History.org, http://www.ushistory.org/gov/6c.asp, (last visited on March 5, 2012).

[37]Federation of Tax Administrators (FTA), State Sales Tax Rates and Food & Drug Exwmptions (As of January 1, 2012) (on file with FTA).

[38]U.S. Const. Amend. XVI, Art. 8, §1.

[39]Letter from National Conference of State Legislators President Stephen Morris to the United States Congress (Nov. 9, 2011), *available at* http://www.ncsl.org/press-room/ncsl-announces-support-for-main-street-fairnes38.aspx.

[40]Nina Manzi, *Use Tax Collection on Income Tax Returns in Other States*, Minnesota House of Representatives, June 2012 at http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf.

[41]*Id.*

[42]Nate Anderson, *Marketplace Fairness Act" could force Amazon to collect sales tax*, Ars Technica, January 6, 2012 at http://arstechnica.com/tech-policy/news/2011/11/marketplace-fairness-act-could-force-amazon-to-collect-sales-tax.ars/.

[43]Mike Rud, Online sales tax would create fairness for all retailers, Morrison County Record, Dec. 23, 2011, at http://mcrecord.com/archives/499152/online-sales-tax-would-create-fairness-for-all-retailers/

[44]See 32.

[45]U.S. Const., Amend X

[46]*McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

[47]*Quill Corp.*, 504 U.S. 298 at 312.

[48]*Id.* at 313.

[49]See 2.

[50]*Quill Corp.*, 504 U.S. 298.

[51]State of South Dakota, *Streamlining State and Local Sales Taxes*, January 2010 at http://www.state.sd.us/drr2/businesstax/st/Streamlined%20Master%20Presentation%20SD.pdf.

[52]*Id.*

[53] *Id.*

[54]*Quill Corp.*, 504 U.S. 298

[55]Although each state will create a single sales tax per state and jurisdiction and implement uniform collection procedures, the tax itself will differ according to each state's already existing state sales tax. Accordingly, the SSUTA will not result in an unconstitutional uniform "national sales tax," as suggested by critics of the Act.

[56]*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)

[57] *Id.* at 279.

[58]*Quill Corp.*, 504 U.S. 298 at 308.

[59]*Id.* at 318.

[60]*Id.* at 313.

[61]*See* 32.

[62]Toby Sells, *Exempting Amazon from Tennessee sales taxes strikes competitors is just plain wrong*, Memphis Commercial Appeal, March 27, 2011 at http://www.commercialappeal.com/news/2011/mar/27/amazons-edge/.

[63]*Id.*

[64]*Id.*

[65]*Id.*

[66]Tenn. Att'y Gen. Op. No. 11-71 (Oct. 3, 2011)

[67]*Id.*

[68] *Id.*

[69] *Id.*

[70] John Reid Blackwell, *Amazon to start collecting sales taxes*, The Richmond Times Dispatch, Feb 23, 2012 at http://www2.timesdispatch.com/business/virginia-politics/2012/feb/23/deal-reached-with-amazon-retailer-to-start-collect-ar-1708491/.

[71] *Ruling 07-08 Out-of-state corporation participated in joint ventures operated commercial satellites*, available at http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf/ccd0d2ea93db9ba485256968006a39ed/b7eca0a7f36062b2852572e6004c6126?OpenDocument (last viewed March 27, 2012).

[72] See 70.

[73] *Id.*

[74] Kyung M. Song, *Battle over Internet sales taxes rekindles in Congress*, The Seattle Times, May 21, 2011 at http://seattletimes.nwsource.com/html/localnews/2015116166_amazon22m.html.

[75] *Id.*

[76] *Id.*

[77] Sam Gustin, *Amazon to Connecticut, Arkansas: 'Drop Dead' Over Sales Tax*, Wired.com, June 13, 2011 at http://www.wired.com/epicenter/2011/06/amazon-conn-ark/.

[78] *Amazon Associates Program*, Amazon.com, https://affiliate-program.amazon.com/. (last visited March 6, 2012).

[79] Delores Gregory, *A Flurry of Amazon Laws Introduced, Michigan Governor Seeks Repeal of MBT, and Other Interesting Developments in State Tax Law*, Bloomberg BNA, June 3, 2011 at http://www.bna.com/flurry-amazon-laws-b2147485789/.

[80] *2012 Fiscal Impact Statement*, Virginia State Department of Taxation, available at http://leg1.state.va.us/cgi-bin/legp504.exe?121+oth+SB597FS1161+PDF.

[81] Editor, *The fairness factor*, Rochester Business Journal, Nov. 25, 2011, at http://www.rbj.net/print_article.asp?aID=189534.

[82] See 1.

[83] *No Special Treatment For Online Retailers, Stand With Main Street*, https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/2bffe419-8c69-4712-a09c-1f04170905cf.pdf (last viewed March 7, 2012).

[84] *Amazon.com, Inc.* Hoovers, available at http://www.hoovers.com/company/Amazoncom_Inc/hrcsyi-1.html (last viewed April 12, 2012).

[85] *eBay, Inc. Investor FAQ*, available at http://investor.ebayinc.com/faq.cfm (last viewed April 12, 2012).

[86] Al Cardenas, *The Chief Threat to American Competitiveness: Our Tax Code*, The National Review Online, Nov. 8, 2011, at http://www.nationalreview.com/corner/282557/chief-threat-american-competitiveness-our-tax-code-al-cardenas.

[87] Although the Act may lead to some instances of "rent-seeking" (small businesses setting up shop online rather than in person to avoid collecting taxes), such a practice is still within the general theme of the legislation by encouraging small businesses to compete in the marketplace, while requiring larger online businesses (those who make $500,000 or more annually in net sales and provide a proportionally larger revenue stream to state coffers) to collect and remit sales taxes owed.

[88] Alternatives for Amazon Affiliates – Life After the Tax Bill, The Smart Blog, http://www.smartpassiveincome.com/amazon-affiliate-alternative/?doing_wp_cron=1331142105 (last viewed March 7, 2012).

[89] Declan McCullagh, N.Y. appeals court revives Amazon's sales tax suit, CNET News, Nov. 4, 2010 at http://news.cnet.com/8301-13578_3-20021867-38.html.

[90] *Id.*

[91] Anthony C. Camilli, *Run for the Border! Evasion of Sales and Use Taxes By Mail-Order and Internet Sellers*, 19 J.L. & Com. 137, 140 (1999).

[92] *Id.*

[93] Brendan Sasso, *Online sales tax bill likely dead for 2012*, The Hill, December 25, 2012 at http://thehill.com/blogs/hillicon-valley/technology/274369-online-sales-tax-bill-likely-dead-for-the-year.