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THE NOT SO "FAIR" MARKETPLACE FAIRNESS ACT AND THE DUE PROCESS AND COMMERCE CLAUSE CONCERNS IT RAISES

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ABSTRACT

States have reacted to the rise of Internet commerce as any governmental body would, with a "hungry eye" for increased tax revenue. Despite the Supreme Court's holding in Quill*, and constitutional limitations on state tax jurisdiction, states have developed their own nexus statutes that run afoul of the Court's bright-line physical presence rule. What is more, "brick and mortar" establishments interested in "leveling the playing field" with their high-tech competition wholeheartedly support the states in their endeavor. In proposing the Marketplace Fairness Act (MFA), a bill intended to restore state sovereignty regarding sales and use tax laws, Congress too has seemingly sided with the states. The MFA legislatively "overrules"* Quill *by replacing* Quill*'s bright-line rule of physical presence with one of economic nexus, a proposition that neither* Bellas Hess *nor* McIntyre *stand for. As such, the MFA raises a myriad of concerns, most notably Due Process and Commerce Clause concerns, that if not addressed will surely muddy the waters of an already complex tax system.*

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INTRODUCTION

A significant portion of a state's revenue comes from the collection of sales and use taxes.[1] Today, forty-five states, plus the District of Columbia, impose a sales tax on goods and certain services purchased within the state.[2] In addition to implementing a statewide sales tax, thirty-eight states have municipalities that impose a local-level sales tax.[3] The combined result can be financially burdensome on consumers, causing them to forum shop or to buy products online.[4] This has created a problem in itself. As more retailers look to the Internet to conduct their financial transactions, the question of whether these retailers could, or should, be forced to collect a sales tax on their transactions becomes increasingly relevant.[5]

This question hinges on the concept of *nexus*. The United States Constitution, specifically the Due Process Clause and Commerce Clause, imposes limitations on state tax jurisdiction,[6] so that only retailers with the requisite *nexus*, or relationship, to the taxing state could be taxed or forced to collect a tax.[7] For Due Process, the general inquiry is whether "some definite link, some minimum connection"[8] exists between a retailer and the taxing

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[1] Liz Malm & Ellen Kant, *The Sources of State and Local Tax Revenues*, TAX FOUND. (Jan. 28, 2013), http://taxfoundation.org/article/sources-state-and-local-tax-revenues [https://perma.cc/BM8K-FJUC].

[2] Geoffrey E. Weyl, *Quibbling with* Quill*: Are States Powerless in Enforcing Sales and Use Tax-Related Obligations on Out-of-State Retailers?*, 117 PENN ST. L. REV. 253, 256–57 (2012). The five states that do not impose a statewide sales tax are: Alaska, Delaware, Montana, New Hampshire, and Oregon. However, Alaska and Montana charge local-level sales tax. Scott Drenkard & Jared Walczak, *State and Local Sales Tax Rates in 2015*, TAX FOUND. (Apr. 8, 2015), http://taxfoundation.org/article/state-and-local-sales-tax-rates-2015 [https://perma.cc/2PTF-EDAL].

[3] Drenkard & Walczak, *supra* note 2.

[4] Moderately low state sales tax rates could result in high combined state and local rates, compared with states that implement only a statewide rate. *Id.*

[5] Steven C. Salch & Alvin L. Thomas, II, *Taxation of Internet Services and Transactions—A Few 'FAQS,'* 34 HOUSTON LAW., 33, 33–37 (Sept.–Oct. 1996).

[6] *Id.* at 34.

[7] William L.S. Rowe & Emily J. Winbigler, *Constitutional Issues in State Taxation*, 2 (2016). In general, "nexus" is a jurisdictional concept. It refers to the connection between a state and an individual that gives the state the authority to tax. *Id.*

[8] Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

state, and whether "… the state has given anything for which it can ask return."[9] For the Commerce Clause, the general inquiry is whether a tax burdens or discriminates against interstate commerce, one of the defining factors being whether a "substantial nexus" exists between the retailer and the taxing state.[10] While "physical presence" within the taxing state indisputably satisfies the "substantial nexus" requirement,[11] exactly what in-state activities establish "physical presence" remains a point of contention, especially for online retailers who lack offices or employees in the taxing state.[12] The Supreme Court answered this question in its 1992, *Quill Corp. v. North Dakota*, decision.[13] There, the Court reaffirmed the bright-line rule of *National Bellas Hess, Inc. v. Department of Revenue of Illinois*,[14] that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause."[15]

With the rise of e-commerce the "*Quill* standard" has been chastised for its "artificiality;" for predicating the collection and remittance of a state's sales and use tax on the "[physical] presence in the taxing State of a small sales force, plant, or office."[16] Thus, states have taken it upon themselves to interpret "physical presence" liberally, aggressively asserting nexus over remote online retailers who merely have "a web-link or banner that sits on the website"[17] of an in-state resident or company, in an attempt to bolster their sales tax revenue.[18] The result? Nexus statutes vary from one state to the next, making it particularly burdensome

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[9] Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967).

[10] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); Sara Schoenfeld, *Much Ado About Nexus: The States Struggle to Impose Sales Tax Obligations on Out-of-State Sellers Engaged in E-Commerce*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 263, 266 (2013).

[11] Schoenfeld, *supra* note 10, at 266.

[12] *Id.*

[13] *Quill*, 504 U.S. at 298.

[14] *Nat'l Bellas*, 386 U.S. at 753.

[15] *Quill*, 504 U.S. at 299.

[16] *Id.* at 315.

[17] Sylvia Dion, *The Marketplace Fairness Act: What All SMBs (Not Just Internet Retailers) Need to Know*, ALLBUSINESS.COM (2013), https://www.allbusiness.com/marketplace-fairness-act-what-all-smbs-need-to-know-3280-1.html [https://perma.cc/KF49-P9AE]. Take for example, New York's "Amazon Taxes." *Id.*

[18] Schoenfeld, *supra* note 10, at 267.

for businesses to engage in e-commerce.[19] This problem has prompted members of Congress to propose the Marketplace Fairness Act (MFA).[20] The MFA is intended to simplify "sales tax-collecting responsibility"[21] and to restore the sovereign rights of the states, by giving them the power to "compel online and catalog retailers (remote sellers), *no matter where they are located*, to collect sales tax at the time of a transaction."[22] By requiring remote retailers to collect sales and use taxes from customers within the taxing state, regardless of the retailers' "physical presence" there, the MFA legislatively "overrules" *Quill*.[23] That is, it predicates tax-collecting obligations on "economic nexus."[24] This Note addresses the myriad of concerns raised by the MFA, most notably the Due Process and Commerce Clause concerns, through an analysis of key cases. Part I of this Note provides an overview of state and local sales and use taxes. Part II discusses the states' response to the rise of e-commerce. Part III provides an overview and analysis of the MFA. Part IV will discuss the Due Process and Commerce Clause concerns raised by the MFA. Lastly, Part V discusses the administrative concerns raised by the MFA.

I. OVERVIEW OF STATE AND LOCAL SALES AND USE TAXES

State sales taxes are a relatively new occurrence, arising from the collapse of property tax revenues during the Great

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[19] *Id.* at 266. Online retailers must not only determine whether they have established a nexus in the state, according to that state's nexus requirement, but also which of its products are subject to the state's sales tax. *Id.*

[20] *What Is the Marketplace Fairness Act?*, TAXCLOUD, http://marketplacefairness.org/what-is-the-marketplace-fairness-act/what-is-the-MFA.pdf [https://perma.cc/2HU6-DC2F]. The MFA was first proposed during the 112th Congress, but expired at the end of that Congress and was never enacted. A new version of the MFA was proposed during the 113th Congress (MFA of 2013) and the 114th Congress (MFA of 2015). PETER N. BARNES-BROWN ET AL., 1 INTERNET LAW AND PRACTICE § 4:38.

[21] BARNES-BROWN ET AL., *supra* note 20, § 4.38.

[22] *What Is the Marketplace Fairness Act?*, *supra* note 20 (emphasis added); *see also* Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2 (2015), https://www.congress.gov/114/bills/s698/BILLS-114s698is.pdf [https://perma.cc/298R-2FQX].

[23] Joseph Henchman, *Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction*, TAX FOUND. (Nov. 5, 2007), http://taxfoundation.org/article/why-quill-physical-presence-rule-shouldnt-go-way-personal-jurisdiction [https://perma.cc/7EEE-PJQJ].

[24] *Id.*

Depression.[25] Mississippi was the first state to adopt the tax, in 1930, at a rate of 2 percent.[26] By 1940, twenty-two additional states jumped on the sales tax bandwagon,[27] and today, all but five states impose a statewide sales tax.[28] Furthermore, thirty-eight states have municipalities that impose a local-level sales tax, which is added to the rate of the statewide sales tax.[29] The number of sales tax jurisdictions within these thirty-eight states varies from state to state. For example, Texas has a total of 1,515 sales tax jurisdictions, while Virginia has 174, and Idaho has only 9.[30] Local sales tax is collected in the same manner, and at the same time, as state sales tax.[31]

But what exactly is a sales tax? A sales tax is a "license or privilege tax" imposed on individuals engaged in selling "tangible personal property" at retail, or providing a "taxable service."[32] While consumers are responsible for paying the sales tax, retailers who have a "substantial nexus" with the taxing state are responsible for collecting and remitting that state's sales tax.[33] Thus, a state's power in forcing retailers to collect and remit its sales tax is generally limited to transactions that occur *within* its borders.[34]

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[25] JOSEPH HENCHMAN, TAX FOUND., BACKGROUND PAPER NO. 69, *THE MARKETPLACE FAIRNESS ACT* 3 (2014), http://taxfoundation.org/sites/taxfoundation.org/files/docs/TF%20BP69%20The%20Marketplace%20Fairness%20Act.pdf [https://perma.cc/K74C-NG75].

[26] *Id.*

[27] *Id.*

[28] Drenkard & Walczak, *supra* note 2, at 3. The five states without a statewide sales tax are Alaska, Delaware, Montana, New Hampshire, and Oregon; Alaska and Montana, however, have implemented a local-level sales tax. *Id.*

[29] *Id.*; William L.S. Rowe, *Sales and Use Tax in Virginia*, at 3 (2015).

[30] HENCHMAN, *supra* note 25, at 3–4 (explaining the United States as a whole contains 9,998 different sales tax jurisdictions).

[31] *Id.* at 3.

[32] Treas. Reg. § 1.164-3 (as amended in 1960); Rowe, *supra* note 29, at 1.

[33] Weyl, *supra* note 2, at 257; Monika Miles, *Tax Nexus, TPP, Exemptions & Other Sales Tax Terms*, SALESTAXSUPPORT.COM, http://www.salestaxsupport.com/sales-tax-information/sales-tax-101/tax-nexus-tpp-exemptions-other-sales-tax-terms/ [https://perma.cc/HW3S-9PZ5]. Retailers with a nexus to the taxing state are liable for "any sales tax they do not collect and may be subject to fines or criminal penalties for non-compliance." Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1133 (10th Cir. 2016).

[34] Weyl, *supra* note 2, at 257. The "negative" Commerce Clause imposes this limit. JEROME R. HELLERSTEIN ET AL., STATE TAXATION: SALES AND USE TAXES ¶ 16.01[2] (3d ed. 2011).

To cover purchases from out-of-state retailers who lack a "substantial nexus" with the taxing state, states impose a "compensating use tax."[35] In general, an individual "using or consuming tangible personal property in [the taxing state], or storing such property outside [the taxing state] for use or consumption within [the taxing state], is liable for the use tax."[36] Use tax is *complementary* to sales tax, meaning that a customer who has paid sales tax on a purchase is exempt from paying use tax on the same purchase.[37]

Use taxes, in theory, were implemented to prevent forum shopping; the concern was that consumers, in an attempt to avoid paying the sales tax of their state of residence, would purchase goods from states with lower or no sales tax.[38] Use taxes, however, are limited in solving this problem because the burden of remitting the use tax is delegated to the consumer.[39] Unlike sales tax, which is collected by the retailer at the time of purchase, use tax is "self-reported" and is paid by the consumer on his individual tax return.[40] Although failure to report is a criminal offense, most consumers either intentionally or carelessly neglect this responsibility.[41] Because these purchases occur beyond state boundaries,

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[35] Treas. Reg. § 1.164-3; Miles, *supra* note 33. A state's use tax rate is equal to its statewide sales tax rate, but local level use tax rates may vary by jurisdiction. HENCHMAN, *supra* note 25, at 6–7.

[36] Treas. Reg. § 1.164-3; Rowe, *supra* note 29, at 5.

[37] HENCHMAN, *supra* note 25, at 6. A sales tax is a tax on the purchase of an item, while use tax is a tax on the use of an item. *Id.*

[38] *Id.* The use tax ensures uniformity; that all tangible property that is used or consumed within a state is subject to the same tax burden, regardless of whether it was acquired within the state. *Direct Mktg. Ass'n v. Brohl,* 735 F.3d 904, 907 (10th Cir. 2013) (citing Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 66 (1963)).

[39] Treas. Reg. § 1.164-3. HENCHMAN*, supra* note 25, at 7; NINA MANZI, MINN. HOUSE RESEARCH DEPT., USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES 4 (2015), http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf [https://perma.cc/4GB5-V4XY].

[40] HENCHMAN, *supra* note 25, at 7; MANZI, *supra* note 39, at 4. Because of these different reporting requirements, sales and use tax regimes "differ greatly in effectiveness," compliance with sales tax being "extremely high," and compliance with use tax being "extremely low." *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1133 (10th Cir. 2016). However, use tax compliance tends to be higher in the case of "large purchases or business purchases" that are likely to be subjected to state audit. HENCHMAN, *supra* note 25, at 7.

[41] *Direct Mktg. Ass'n*, 735 F.3d at 907; Weyl, *supra* note 2, at 258.

states often have trouble collecting use taxes, resulting in a substantial loss of tax revenue.[42]

II. THE STATES' RESPONSE TO THE RISE OF INTERNET COMMERCE

Americans are spending more and more on e-commerce. In 2013, Americans spent approximately $263 billion in Internet retail purchases, which is a 15 percent increase from 2012.[43] Internet retail sales increased again in 2014 and 2015, reaching approximately $304 billion[44] and $341.7 billion[45] respectively. Forecasts for 2016 are likely to be equally as promising, based on the first three quarterly reports approximating $291.7 billion[46] in Internet retail purchases. While the world of e-commerce seems to be at its peak, growth is expected to continue for another decade.[47]

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[42] Weyl, *supra* note 2, at 258.

[43] HENCHMAN, *supra* note 25, at 7.

[44] U.S. CENSUS BUREAU, CB15-20, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2014 (2015), http://www2.census.gov/retail/releases/historical/ecomm/14q4.pdf [https://perma.cc/96QG-UAPF]. The $304 billion figure was adjusted for seasonal variation, but not for price changes. *Id.* Allison Enright, *U.S. annual e-retail sales surpass $300 billion for the first time*, INTERNET RETAILER (Feb. 17, 2015), https://www.internetretailer.com/2015/02/17/us-annual-e-retail-sales-surpass-300-billion-first-time [https://perma.cc/4RE7-UZ5Y]. 2014 marked the first year that Internet retail purchases exceeded the $300 billion threshold. *Id.*

[45] U.S. CENSUS BUREAU, CB15-20, QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2015 (2016), http://www2.census.gov/retail/releases/historical/ecomm/15q4.pdf [https://perma.cc/5U5G-BZCF]. The $341.7 billion figure was the estimated e-commerce sales for 2015. *Id.*

[46] U.S. CENSUS BUREAU, CB15-133, QUARTERLY RETAIL E-COMMERCE SALES 3RD QUARTER 2016 (2016), http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf [https://perma.cc/T8RM-U3RH]. The $291.7 billion figure was adjusted for seasonal variation, but not for price changes. *Id.*

[47] *See* TIMOTHY P. TRAINER & VICKI E. ALLUMS, CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS § 4:2 (2012); Marc E. Babej, *Forrester: U.S. E-Commerce to Rise 13% This Year*, FORBES (Mar. 13, 2013, 12:36 PM), http://www.forbes.com/sites/marcbabej/2013/03/13/forrester-u-s-e-commerce-to-rise-13-this-year/ [https://perma.cc/K5Y3-ENNJ]. Internet sales are projected to reach $370 billion in 2017. *Id.* Two main drivers of growth are purported to be (1) increased investment by brick-and-mortar establishments in their e-commerce divisions; and (2) increased time spent online, due to the predominance of tablets and smartphones. *Id.* (noting that more than half of online consumers own such devices and use them to "research products, compare prices, and make purchases.").

Despite the limitations imposed on state tax jurisdiction by the Due Process and Commerce Clause, and despite the Supreme Court's holding in *Quill*, the rise of e-commerce has prompted states to expand their nexus statutes to account for lost tax revenue on purchases from out-of-state (remote) retailers who lack the obligation to collect and remit states' sales and use tax.[48] This is understandable since, in today's modern economy, many businesses solely have a virtual presence, or have in-state physical presence (such as an office, or employees) in a minority of states.[49] Because, on average, approximately 31.3 percent of a state's sales tax revenue comes from the collection of sales and use taxes,[50] *Quill*'s bright-line "physical presence" rule has accounted for millions, if not billions, in lost sales tax revenue.[51]

A prime example of an aggressive nexus statute is New York's "Amazon Tax."[52] Essentially, New York's law attempts to satisfy

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[48] HENCHMAN, *supra* note 25, at 12–13.

[49] *Id.*

[50] CHERYL LEE ET AL., U.S. CENSUS BUREAU, G14-STC, STATE GOVERNMENT TAX COLLECTIONS SUMMARY REPORT: 2014 at 1, http://www2.census.gov/govs/statetax/G14-STC-Final.pdf [https://perma.cc/93WD-EXKE]. According to the Census Bureau's latest data, the leading source of state tax revenue is individual income tax, at 35.9 percent; sales tax, however, is a close second, at 31.3 percent. *Id.* Together, sales tax and individual income tax account for two-thirds of total tax revenue. *Id.* The reliance on sales tax revenue is even starker when viewed on a state-by-state basis. For example, in 2014, Tennessee derived approximately 79.6 percent of its tax revenue from the collection of sales tax. *Id.* at 7. The rate for Texas, a state without a state income tax, is even higher (84 percent). *Id.*

[51] States are in a bind because they cannot require remote retailers to collect their sales tax and because use tax compliance is so low; "California, for example, has estimated that it is able to collect only about 4% of the use taxes due on sales from out-of-state vendors." Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (citing CALIF. STATE BD. OF EQUALIZATION, REVENUE ESTIMATE (REV. 8/13), ELECTRONIC COMMERCE AND MAIL ORDER SALES 7 (2013), https://www.boe.ca.gov/legdiv/pdf/e-commerce-08-21-13F.pdf [https://perma.cc/ATK5-TRQV] (Table 3)); HENCHMAN, *supra* note 25, at 7–8.

[52] Kenneth Corbin, *New York's About-Face on E-Commerce Taxation*, INTERNETNEWS.COM (Nov. 14, 2007), http://www.internetnews.com/bus-news/%20article.php/3711236 [https://perma.cc/YR8N-T246]. Former Governor Eliot Spitzer proposed the "Amazon Tax" in November 2007, which required compliance by online retailers beginning December 7, 2007; however, Spitzer quickly rescinded the new tax policy. *Id.* While Spitzer did not comment on whether potential legal challenges to the tax influenced his decision, it is likely that Spitzer viewed the policy as "overreaching," and "afoul of the 1992 U.S. Supreme Court ruling in Quill Corporation v. North Dakota." *Id.* The tax

the substantial nexus requirement by expanding the definition of sales solicitation to include a remote retailer who "enters into an agreement with a resident of [New York] under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller,"[53] provided that such referrals result in over $10,000 in sales per year.[54] Thus, although Amazon had no physical presence in New York,[55] Amazon was required to collect and remit New York sales tax based on its marketing affiliates located in New York.[56] Because Internet retailers have a "virtual presence"[57] that goes beyond state borders, New York's law is applicable "both to retailers that target sales to New York residents and to retailers who sell generally to everyone on the internet, and may or may not end up selling to New Yorkers."[58] The result, therefore, is a presumption that the remote Internet retailer *solicited* sales from a resident in the taxing state and thus satisfied the nexus requirement.[59] This presumption is rebuttable, however, if the retailer can prove that "the resident with whom [he] has an agreement did not engage in any solicitation in the state on behalf of the [retailer]."[60]

Undoubtedly, New York's "Amazon Tax" runs afoul of *Quill*'s bright-line physical presence rule.[61] Yet, this did not stop at least sixteen additional states from also "turn[ing] a hungry eye to

was later reconsidered and approved by the New York State Assembly on April 9, 2008, and took effect on June 1, 2008. Cowan, *infra* note 56, at 1426.

[53] N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2010).

[54] HENCHMAN, *supra* note 25, at 11.

[55] Barnes, *infra* note 78 (Amazon's headquarters are located in Seattle, Washington).

[56] N.Y. TAX LAW § 1101(b)(8)(vi); *see also* Daniel Tyler Cowan, *New York's Unconstitutional Tax on the Internet:* Amazon.com v. New York State Department of Taxation & Finance *and the Dormant Commerce Clause*, 88 N.C. L. REV. 1423, 1429 (2010).

[57] Cowan, *supra* note 56, at 1428.

[58] HENCHMAN, *supra* note 25, at 11.

[59] *Id.*; *see also* Overstock.com, Inc. v. N.Y. St. Dep't of Tax'n and Fin., 987 N.E.2d 621, 627 (N.Y. 2013) (reasoning that "it is not unreasonable to presume that affiliated website owners residing in New York State will reach out to their New York friends, relatives and other local individuals in order to accomplish this purpose.").

[60] N.Y. TAX LAW § 1101(b)(8)(vi).

[61] HENCHMAN, *supra* note 25, at 11.

the thriving e-commerce market"[62] and enacting "click-through," "affiliate,"[63] and comparable nexus statutes.[64] For example, North Carolina,[65] Rhode Island,[66] Arkansas,[67] Vermont,[68] California,[69] Georgia,[70] Maine,[71] and Minnesota[72] have all enacted New York–inspired nexus statutes, containing both rebuttable presumption language and a threshold sales amount.[73] Other states, such as Connecticut,[74] Illinois,[75] and Texas,[76] have pushed the nexus boundaries even further by enacting statutes with an *irrefutable* solicitation presumption.[77] Despite the constitutionality concerns raised by New York's "Amazon Tax" and other "click-through" or "affiliate" nexus statues, the Supreme Court has declined to weigh in on the issue.[78]

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[62] Corbin, *supra* note 52.

[63] HENCHMAN, *supra* note 25, at 12.

[64] Cowan, *supra* note 56, at 1429.

[65] *See* N.C. GEN. STAT. ANN. § 105-164.8(b)(3) (West 2009).

[66] *See* R.I. GEN. LAWS ANN. § 44-18-15(a)(2) (West 2016).

[67] *See* ARK. CODE ANN. § 26-52-110(d)–(e) (2013) (noting that this statute was formerly located at § 26-52-117; the Arkansas Code Revision Commission renumbered this section in order to preserve the integrity of the numbering scheme of the subchapter).

[68] *See* VT. STAT. ANN. tit. 32, § 9783(b)–(c) (West 2016).

[69] *See* CAL. REV. & TAX CODE § 6203(c)(5) (West 2012).

[70] *See* GA. CODE ANN. § 48-8-2(8)(M) (West 2016).

[71] *See* ME. REV. STAT. ANN. tit. 36, § 1754-B(1-A)(C) (West 2014).

[72] *See* MINN. STAT. ANN. § 297A.66(4a) (West 2014).

[73] HENCHMAN, *supra* note 25, at 12–13.

[74] *See* CONN. GEN. STAT. ANN. § 12-407(a)(12)(L) (West 2016).

[75] *See* 35 ILL. COMP. STAT. ANN. 105/2 (West 2015); *id.* 110/2 (under "Retailer maintaining a place of business in this State," § 1.1; and "Serviceman maintaining a place of business in this State," § 1.1, respectively).

[76] *See* TEX. TAX CODE ANN. § 151.107(a)(3), (a)(8) (West 2012).

[77] HENCHMAN, *supra* note 25, at 13.

[78] Korey Clark, *Supreme Court Refuses to Hear New York Amazon Tax Case*, LEGAL NEWSROOM (Dec. 9, 2013), http://www.lexisnexis.com/legalnewsroom/commercial/b/contracts-commercial-law/archive/2013/12/09/supreme-court-refuses-to-hear-new-york-amazon-tax-case.aspx [https://perma.cc/ELQ6-MNGN]; *see also* Overstock.com, Inc. v. N.Y. St. Dep't of Tax'n and Fin., 987 N.E.2d 621, 621 (N.Y. 2013); Amazon.com, LLC v. N.Y. St. Dep't of Tax'n & Fin., 913 N.Y.S.2d 129 (N.Y. App. Div. 2010). On December 2, 2013, the U.S. Supreme Court denied petitions for certiorari from *Amazon.com* and *Overstock.com* to review a New York Court of Appeals judgment upholding the "Amazon Tax." Clark, *supra*. While some view the U.S. Supreme Court's denial as approval of New York's "Amazon Tax," "to treat both online and brick-and-mortar retailers equally and fairly," others see "[t]he failure of the [C]ourt to take … [the] case … [as] an additional burden on interstate commerce since the line between physical

III. THE MARKETPLACE FAIRNESS ACT

A. Overview

On November 9, 2011, the MFA was first introduced in the Senate to restore the states' "sovereign rights to enforce State and local sales and use tax laws."[79] The bill does so by granting states the authority to require *all* sellers exceeding $500,000[80] in total U.S. "remote sales," to collect and remit the sales and use tax of the states to which the sales were "sourced."[81] As defined in the MFA, a "remote sale," is "a sale of goods or services attributed to a State with respect to which a seller does not have adequate physical presence to establish a nexus under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992),"[82] and the term "sourced," refers to "the location where the item sold is received by the purchaser, based on the location indicated by instructions for delivery that the purchaser furnishes to the seller."[83] To illustrate, assume that a New York retailer, who lacks physical presence in Pennsylvania, sells a computer to a customer in Pennsylvania, who receives the computer in Pennsylvania. Under the MFA, which explicitly defies *Quill*'s bright-line physical presence rule, Pennsylvania is authorized to compel the New York retailer to collect and remit

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and virtual presence will only continue to blur." *Id.* (quoting N.Y. State Attorney General Eric T. Schneiderman and David C. Blum, Chicago tax attorney). Overstock responded to the Court's denial by suspending its relationship with its New York affiliates so that it would not fall prey to the New York law. Robert Barnes, *Supreme Court declines case on making online retailers collect sales taxes*, WASH. POST (Dec. 2, 2013), https://www.washingtonpost.com/politics/supreme-court-declines-case-on-making-online-retailers-collect-sales-taxes/2013/12/02/e430ec8c-55f5-11e3-835d-e7173847c7cc_story.html [https://perma.cc/3KN6-BSWW].

[79] Marketplace Fairness Act, S. 1832, 112th Cong. (2011), https://www.govtrack.us/congress/bills/112/s1832/text [https://perma.cc/MSV4-R87K] (the bill was sponsored by Michael Enzi (R-WY)).

[80] This is known as the "small seller exception." *Id.* § 2(c); *see also infra* Part IV.A.3.b.

[81] S. 1832 § 2(c). The MFA treats "similar sales transactions equally, without regard to the manner in which the sale is transacted." *Id.* § 2.

[82] *Id.* § 6(5). The Supreme Court in *Quill*, which is still good law today, established that a State "may not require retailers who lack a physical presence in the State to *collect* use taxes on behalf of the [State]." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127 (2015) (citing Quill v. North Dakota, 504 U.S. 298, 315–18 (2002)).

[83] S. 1832 § 6(8).

the Pennsylvania sales and use tax arising from the remote sale.[84] If perhaps, the customer lived in Pennsylvania but instructed that the computer be delivered to his Connecticut home, under the MFA, Connecticut would be authorized to compel the New York retailer to collect and remit the applicable Connecticut sales and use tax.[85]

The MFA imposes two limitations on states wishing to force the collection and remittance of their sales and use taxes.[86] First, states must agree to simplify, or streamline, their sales and use tax laws.[87] Second, sellers qualifying for the "small seller exception" are exempt from the MFA and therefore beyond the reach of the states.[88]

States wishing to streamline can do so in two ways. For one, they can adopt the Streamlined Sales and Use Tax Agreement (SSUTA).[89] The purpose of the SSUTA is to simplify sales and use tax administration, and thereby reduce the burden of tax compliance,[90] by essentially making the tax administration protocols identical in member states.[91] SSUTA purports to do this in the following ways:

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[84] *See* Peter G. Stathopoulos, *State Taxation of Remote Sellers: Has the Physical Presence Nexus Test been Rendered Obsolete?*, J. MULTIST. TAX'N & INCENTIVES, Aug. 2013, at 24, 24–25.

[85] *See generally* Dion, *supra* note 17; BARNES-BROWN ET AL., *supra* note 20, § 4.38.

[86] *See* BARNES-BROWN ET AL., *supra* note 20, § 4.38.

[87] *See* Marketplace Fairness Act, S. 1832, 112th Cong. § 3(a) (2011).

[88] *Id.* § 3(c).

[89] *See What Is the Marketplace Fairness Act?*, *supra* note 20; STREAMLINED SALES & USE TAX AGREEMENT § 102 (STREAMLINED SALES TAX GOVERNING BD., INC. 2015), http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%20through%209-17-15.pdf [https://perma.cc/BT2J-EHM3]. The SSUTA was adopted on November 12, 2002. Currently, 23 states are full members, while 1 state is an associate member. Full member status is achieved when a state is in full compliance with the laws, rules, regulations, and policies outlined in the SSUTA. Associate member status is achieved when a state is in substantial compliance with the SSUTA as a whole, but not necessarily with each provision. *State Info: Streamline Sales Tax State Members*, STREAMLINED SALES TAX GOVERNING BD., INC., http://www.streamlinedsales-tax.org/index.php?page=state-info [https://perma.cc/H4KJ-Q4NN].

[90] STREAMLINED SALES & USE TAX AGREEMENT, *supra* note 89, § 102.

[91] *Streamlined Sales and Use Tax*, SALESTAXSUPPORT.COM (2016), http://www.salestaxsupport.com/sales-tax-information/streamlined-sales-tax-sst/ [https://perma.cc/KE4B-H4B4].

> State level administration of sales and use tax collections; uniformity in the state and local tax bases; uniformity of major tax base definitions; central, electronic registration system for all member states; simplification of state and local tax rates; uniform sourcing rules for all taxable transactions; simplified administration of exemptions; simplified tax returns; simplification of tax remittances; protection of consumer privacy.[92]

Secondly, states wishing to avoid membership in the SSUTA may still require remote sellers to collect and remit their sales and use taxes if they implement certain minimum simplification requirements.[93] Such states must:

> (A) Provide—(i) a single State-level agency to administer all sales and use tax laws, including the collection and administration of all State and applicable locality sales and use taxes for all sales sourced to the State made by remote sellers, (ii) a single audit for all State and local taxing jurisdictions within that State, and (iii) a single sales and use tax return to be used by remote sellers and single and consolidated providers and to be filed with the State-level agency.
> (B) Provide a uniform sales and use tax base among the State and the local taxing jurisdictions within the State.
> (C) Require remote sellers and single and consolidated providers to collect sales and use taxes pursuant to the applicable destination rate, which is the sum of the applicable State rate and any applicable rate for the local jurisdiction into which the sale is made.
> (D) Provide—(i) adequate software and services to remote sellers and single and consolidated providers that identifies the applicable destination rate, including the State and local sales tax rate (if any), to be applied on sales sourced to the State, and (ii) certification procedures for both single providers and consolidated providers to make software and services available to remote sellers, and hold such providers harmless for any errors or omissions as a result of relying on information provided by the State.
> (E) Hold remote sellers using a single or consolidated provider harmless for any errors and omissions by that provider.
> (F) Relieve remote sellers from liability to the State or locality for collection of the incorrect amount of sales or use tax, including any penalties or interest, if collection of the improper amount is the result of relying on information provided by the State.

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[92] STREAMLINED SALES & USE TAX AGREEMENT, *supra* note 89, § 102.
[93] Marketplace Fairness Act, S. 1832, 112th Cong. (2011).

> (G) Provide remote sellers and single and consolidated providers with 30 days notice of a rate change by any locality in the State.[94]

Under the MFA's "small seller exception," remote sellers having "gross annual receipts" of $500,000 or less, in "*total* remote sales in the United States," are exempt from the bill.[95] In determining whether this threshold has been met, "gross annual receipts" refers to the total amount the seller receives from "all sources during its annual accounting period, without subtracting any costs or expenses;"[96] furthermore, the sales of sellers "related" within the meaning of Internal Revenue Code § 267(b) and (c),[97] or § 707(b)(1),[98] are to be aggregated.[99]

Although the MFA expired at the end of the 112th Congress without being enacted,[100] the Marketplace Fairness Act of 2015 (MFA of 2015), a *nearly* identical bill, was introduced to the Senate

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[94] *Id.*

[95] *Id.* (emphasis added).

[96] Raul Avenir, *What are Gross Receipts?*, ARIZ. CENTRAL: YOUR BUSINESS, http://yourbusiness.azcentral.com/gross-receipts-8325.html [https://perma.cc/98PV-L6TV]; *Gross Receipts Defined*, IRS (Nov. 6, 2012), https://www.irs.gov/charities-non-profits/gross-receipts-defined [https://perma.cc/K8CM-Y48W].

[97] Related persons under sections 267(b) and (c) include: members of a family (whole or half blood brothers and sisters, spouses, ancestors, and lineal descendants); a corporation and an individual who, either directly or indirectly, owns more than 50 percent of such corporation's outstanding stock; a parent corporation and its subsidiary; a fiduciary and grantor of a trust; fiduciaries of two different trusts, if the same person serves as grantor of both trusts; a fiduciary and beneficiary of a trust; a fiduciary and beneficiary of different trusts, if the same person serves as grantor of both trusts; a fiduciary of a trust and a corporation, if the fiduciary owns, either directly or indirectly, more than 50 percent of the corporation's outstanding stock; a partnership and a corporation if the same person owns more than 50 percent of the corporation's outstanding stock, and more than 50 percent of the partnership's capital or profits interests; two S corporations if the same person owns more than 50 percent of each S corporation's outstanding stock; and a C corporation and an S corporation, if the same person owns more than 50 percent of each corporation's stock. I.R.C. § 267(b)–(c) (2016).

[98] Related persons under section 707(b)(1) include "a partnership and a person owning, directly or indirectly, more than 50 percent of the capital interest, or the profits interest, in such partnership," and "two partnerships in which the same persons own, directly or indirectly, more than 50 percent of the capital interests or profits interests." I.R.C. § 707(b)(1) (2012).

[99] Marketplace Fairness Act, S. 1832, 112th Cong. § 3(c) (2011).

[100] *See* BARNES-BROWN ET AL., *supra* note 20, § 4.38.

on March 10, 2015.[101] The starkest difference between the MFA and the MFA of 2015 lies in its "small seller exception."[102] While the MFA exempts remote sellers with gross annual receipts of $500,000 or less in total remote sales, the MFA of 2015 increased this threshold to $1,000,000 or less.[103] That is, under the MFA of 2015, states can only require remote sellers to collect and remit their sales and use taxes if "the remote seller has gross annual receipts in total remote sales in the United States ... exceeding $1,000,000."[104]

Proponents of the MFA allege that the bill will help "level the playing field" between remote, online sellers and local "brick and mortar establishments," by requiring the former to charge sales tax on their goods.[105] The argument goes as such: local store owners are disadvantaged in that they are forced to charge sales tax on their goods, while remote, online sellers can effectively bypass taxation by showing a lack of physical presence in the taxing state.[106] Because sales tax is not a factor in their profit calculations, remote, online sellers are able to offer goods at a lower effective price, which, proponents claim, gives them a more competitive edge and takes a toll on the taxing state's finances and retail job market.[107]

Opponents of the MFA argue that "compel[ling] online and catalog retailers ('remote sellers'), no matter where they are

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[101] *See* Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(b)(2)(D)(ii) (2015). The MFA of 2015 was sponsored by Michael Enzi (R-WY), and is the most recent version of the bill. *Id.* (The MFA of 2015 is nearly identical to the original MFA, with its revised small seller threshold as its starkest difference.) The MFA of 2015 clarifies that nonmember SSUTA states must provide software to remote sellers that calculates the "sales and use taxes due on each transaction at the time the transaction is completed," "*free of charge*." *Id.* (emphasis added).

[102] *Compare* Marketplace Fairness Act, S. 1832 § 2(c), *with* Marketplace Fairness Act of 2015, S. 698 § 2(c). The MFA of 2015 now exempts remote sellers with gross annual receipts under $1,000,000, while the original MFA exempted sellers with gross annual receipts under $500,000. *Id.*

[103] Marketplace Fairness Act of 2015, S. 698 § 2(c). This "small seller exception" is likely to be removed in future drafts of the bill because, according to U.S. Rep. Goodlatte, "laws should be so simple and compliance so inexpensive and reliable as to render a small business exemption unnecessary." HENCHMAN, *supra* note 25, at 17.

[104] Marketplace Fairness Act of 2015, S. 698 § 2(c).

[105] BARNES-BROWN ET AL., *supra* note 20, § 4:38.

[106] *See id.*

[107] *See* Stathopoulos, *supra* note 84, at 26–27. For example, consumers often use brick and mortar retailers as product "showrooms," to gauge prices before ultimately purchasing the desired product from an online, remote retailer, such as Amazon.com. *Id.*

located, to collect sales tax at the time of a transaction,"[108] regardless of physical presence, amounts to "taxation without representation"[109] and unduly burdens interstate commerce.[110] *Complete Auto Transit, Inc. v. Brady* asserts that, in order for a tax to survive a "negative" Commerce Clause challenge, it must be "fairly related to the services provided by the state."[111] Thus, opponents argue that forcing online, remote sellers to collect and remit sales taxes, even though they receive no benefit from the collection and have no voice in how the tax revenue is spent,[112] amounts to a Commerce Clause violation.

IV. Due Process and Commerce Clause Concerns Raised by the MFA of 2015

A. Due Process and Commerce Clause Analysis via Quill

1. Quill*, An Overview*

Quill was a mail-order Delaware corporation that sold office equipment and supplies.[113] Quill had offices and warehouses in only three states (Illinois, California, and Georgia) but solicited

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[108] *What Is the Marketplace Fairness Act?*, *supra* note 20.

[109] BARNES-BROWN ET AL., *supra* note 20, § 4:38; *see also* Cassandra Carroll, *Marketplace Fairness Act Would Cripple Small Businesses*, AMS. FOR TAX REFORM (Oct. 22, 2014), http://www.atr.org/marketplace-fairness-act-would-cripple-small-businesses [http://perma.cc/EH5D-KLXZ]. This argues that the MFA of 2013 sets a troubling example in granting states taxing power over non-constituents: "Their ultimate goal is to export their tax and regulatory burden to Americans who have no recourse at the ballot box. A politician's dream come true." Carroll, *supra*, at 2 (quoting Katie McAuliffe, FORBES: CAPITAL FLOWS (Sept. 4, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/09/04/amazon-can-support-the-internet-sales-tax-because-amazon-is-exempt/#3717a1c5ffb0 [https://perma.cc/RN64-ZSE2]).

[110] *See* Stathopoulos, *supra* note 84, at 27–46.

[111] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); *see also* Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 628 (2014).

[112] BARNES-BROWN ET AL., *supra* note 20, § 4:38. Unlike remote, online retailers, local brick and mortar establishments directly benefit from the sales tax revenue they are forced to collect and remit to the taxing state. For example, in exchange for sales tax revenue, the state provides brick and mortar establishments with better fire and police protection, better-maintained roads, and better-maintained public transportation systems, giving customers greater access to these stores. Stathopoulos, *supra* note 84, at 27–46.

[113] Quill Corp. v. North Dakota, 504 U.S. 298, 302 (1992).

business from across the country via catalogues, flyers, advertisements in national periodicals and direct telemarketing.[114] Quill's annual national sales exceeded $200 million, approximately $1 million of which came directly from sales to 3,000 North Dakota customers.[115] Quill had neither offices, nor warehouses, nor employees who worked or lived in North Dakota, and delivered its products to North Dakota via mail or common carriers from out-of-state locations.[116] Yet, despite its lack of physical presence, North Dakota attempted to compel Quill, through a cleverly worded nexus statute,[117] to collect and pay its use tax on goods purchased for use within North Dakota.[118] Quill challenged North Dakota's statute on Due Process and Commerce Clause grounds, arguing that, since it lacked physical presence in North Dakota, it could not be required to serve as North Dakota's "collection agent."[119]

The trial court ruled for Quill, finding the case indistinguishable from *National Bellas Hess, Inc. v. Department of Revenue Illinois*.[120] In *Bellas Hess*, the Supreme Court held that a "seller whose only connection with customers in the [taxing] State is by common carrier or the United States mail"[121] lacks the "substantial nexus" required by the Commerce Clause, and therefore cannot

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] North Dakota amended its statutory definition of "retailer" in 1987 to broadly include "every person who engaged in *regular or systematic solicitation* of a consumer market in the state;" "*regular or systematic solicitation*" means "three or more advertisements within a 12-month period." *Id.* at 302–03 (emphases added). According to the statute, all "retailers" were required to collect and remit North Dakota's use tax, "even if they maintain[ed] no property or personnel in North Dakota." *Id.*

[118] *Id.* at 301.

[119] *Id.* at 303.

[120] *Id. See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967). Like Quill in North Dakota, National Bellas Hess was a mail-order company that solicited business from Illinois customers. Although it lacked physical presence in Illinois—it had no place of business, no sales representatives, and no real or personal property there—Illinois required that National Bellas Hess collect and pay its use tax on purchases made to Illinois customers. The Supreme Court ruled for National Bellas Hess, finding that a "seller whose only connection with customers in the State is by common carrier or the United States mail" lacks the "substantial nexus" required by the Commerce Clause. *Id. at* 758.

[121] *Nat'l Bellas Hess*, 386 U.S. at 758.

be compelled to collect such state's use taxes.[122] Similarly, the trial court in *Quill* concluded that, since North Dakota failed to show that its tax revenue was spent—at least in part—to benefit mail-order businesses, there was no "nexus to allow the state to define retailer in the manner it chose."[123]

The North Dakota Supreme Court reversed on two grounds. First, it concluded that, because of the "wholesale changes" in the economy—most notably, the exponential growth of mail-order businesses "from a relatively inconsequential market niche [in 1967] ... [to] a goliath" with annual sales that reached "the staggering figure of $183.3 billion in 1989"[124]—*Bellas Hess* was outdated and was no longer appropriate to follow.[125] Second, because Quill's "economic presence" in North Dakota depended on North Dakota's services and benefits, a "constitutionally sufficient nexus" had been created, which justified the "imposition of the purely administrative duty of collecting and remitting the use tax."[126] Ultimately, the Supreme Court of the United States reversed.[127]

2. The Varying Due Process and Commerce Clause Inquiries and Nexus Statutes

Although "closely related,"[128] the Due Process Clause and the Commerce Clause differ in several ways.[129] First, they each pose distinct limits on states' taxing powers. Second, they each call for different nexus requirements. Third, Congress may only authorize violations of the Commerce Clause, not violations of the Due Process Clause.[130]

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[122] *Quill*, 504 U.S. at 311.

[123] *Id.* at 303.

[124] State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 208–09, 213 (N.D. 1991).

[125] *Quill*, 504 U.S. at 303.

[126] *Id.* at 304 (quoting *Quill*, 470 N.W.2d at 219).

[127] *Id.* at 319.

[128] Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967).

[129] *Quill*, 504 U.S. at 305–06; *see also* Int'l Harvester Co. v. Dep't of Treasury of Ind., 322 U.S. 340, 353 (1944) ("'Due process' and 'commerce clause' conceptions are not always sharply separable .... To some extent they overlap .... But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections ... between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce.").

[130] *Quill*, 504 U.S. at 305.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving citizens of "life, liberty, or property, without due process of law."[131] For state tax purposes, this requires that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,"[132] and that the "income attributed to the State for tax purposes ... be *rationally related* to the 'values connected with the taxing State.'"[133] Similar to adjudicative jurisdiction Due Process inquiries,[134] state tax jurisdiction Due Process inquiries focus on an individual's contacts with the taxing state and ensure that they are substantial enough not to "offend traditional notions of fair play and substantial justice."[135]

Since Due Process analysis hinges on the "fundamental fairness of governmental activity,"[136] its nexus standard, justifiably, calls for "notice" or "fair warning," rather than physical presence.[137] Thus, a remote seller who "purposefully avails itself" of the benefits of a state's economic market may very well subject itself to that state's in personam jurisdiction, despite the seller's lack of physical presence there.[138] Based on this reasoning, the Supreme Court rejected Quill's Due Process Clause challenge; despite Quill's lack of physical presence in North Dakota, Quill's commercial efforts were "continuous and widespread," and "purposefully directed" towards North Dakotans,[139] which gave Quill

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[131] U.S. CONST. amend. XIV, § 1.

[132] *Quill*, 504 U.S. at 306 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

[133] *Quill*, 504 U.S. at 306 (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978)) (emphasis added).

[134] Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 595 (2015).

[135] Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945); *Quill*, 504 U.S. at 307 ("All assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.").

[136] *Quill*, 504 U.S. at 312.

[137] *Id.*

[138] *Id.* at 307–08 ("Jurisdiction ... may not be avoided merely because the defendant did not *physically* enter the forum State .... [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines ....") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

[139] *Id.* at 308. Quill mailed twenty-four tons of catalogues and flyers into North Dakota every year. State *ex rel.* Heitkamp v. Quill Corp., 470 N.W.2d 203, 218–19 (N.D. 1991).

"fair warning" that it may be subject to North Dakota's jurisdiction and forced to serve as its "collection agent."[140]

The Commerce Clause expressly grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[141] Congress may either choose to regulate, "thereby preempting the states from doing so ... or to authorize the states to regulate."[142] But what happens when Congress remains silent, "neither preempting nor consenting to state regulation," and a state undertakes to regulate amidst Congress's silence?[143] According to the Supreme Court, the Commerce Clause's "negative sweep" implicitly limits the power of state and local governments by prohibiting regulations that discriminate against and unduly burden interstate commerce.[144]

For a tax to survive a "negative" Commerce Clause challenge, it must: (1) be "applied to an activity with a substantial nexus with the taxing State"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State."[145] This four-part test, derived by the Supreme Court in *Complete Auto*,[146] helps to curb state taxing power by prohibiting "economic protectionism" or state tax laws designed to benefit a state's inside economy (non-remote sellers) by burdening its outside competitors (remote sellers).[147] Thus, unlike Due Process analysis, which focuses on the "fundamental fairness of governmental activity," Commerce Clause analysis focuses on the "effects of state regulation on the national economy."[148]

Because the inquiries are different, the Commerce Clause's "'substantial nexus' requirement is not, like Due Process' 'minimum

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[140] *Quill*, 504 U.S. at 308.

[141] U.S. CONST. art. I, § 8, cl. 3; *see also* Weyl, *supra* note 2, at 258.

[142] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1135 (10th Cir. 2016).

[143] *Id.*

[144] *Quill*, 504 U.S. at 309 (citing Gibbons v. Ogden, 22 U.S. 1 (1824)). As suggested by Justice Johnson in *Ogden*, "the Commerce Clause is more than an affirmative grant of power[.]" *Id.* The "negative" or "dormant" aspect of the Commerce Clause is not explicitly stated in the Constitution—"[the Constitution] says nothing about the protection of interstate commerce in the absence of any action by Congress"—but is derived directly from Article I, Section 8, Clause 3. *Id.*

[145] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); Handel, *supra* note 111, at 628.

[146] *Complete Auto Transit*, 430 U.S. at 279.

[147] *Brohl*, 814 F.3d at 1135.

[148] *Quill*, 504 U.S. at 312.

contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce."[149]

3. Due Process and Commerce Clause Concerns

In essence, the MFA of 2015 legislatively "overrules" *Quill* by replacing the "physical presence" requirement of "substantial nexus" with one of "economic nexus."[150] That is, a remote seller who incurs gross annual receipts in total remote U.S. sales exceeding $1,000,000[151] is presumed to have a "substantial nexus" with all states to which a remote sale is sourced, despite the seller's lack of physical presence in these states.[152] Because the MFA of 2015 purports not to "create any nexus or alter the standards for determining nexus between a person and a State or locality,"[153] the rationale of the bill hinges on the idea that "economic nexus" is sufficient to satisfy the requirements of the Due Process Clause and Commerce Clause, namely "fair warning" and "substantial nexus."[154] However, *Quill* and *McIntyre* stand for the contrary.[155] While a mere *high volume* of sales may mitigate Due Process concerns, it does not similarly mitigate Commerce Clause concerns.[156] As iterated in *Quill*, for a seller to have a "substantial nexus" with the taxing state, the seller must have a "physical presence" there, such as the existence of employees or property;[157] "economic nexus" alone is insufficient.[158] Thus, although when taken

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[149] *Id.* at 313.

[150] James G.S. Yang, *Synchronizing the Concepts of Physical Presence and Economic Nexus under the Marketplace Fairness Act of 2013*, 17 6 J. INTERNET L. 21, 28 (2013).

[151] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015).

[152] *Id.* § 2(a).

[153] *Id.* § 3(b).

[154] *See Quill*, 504 U.S. at 312.

[155] *Id.* at 312–13.

[156] *Id.* at 308.

[157] *Id.* at 301–02, 312–13. "Physical presence" in the taxing state does not include the advertisements, flyers, or catalogues. *Id.*

[158] *Id.* Quill Corp. lacked a "substantial nexus" with North Dakota despite the fact that it sent 24 tons of catalogs and flyers into the State and solicited approximately $1,000,000 in sales from 3,000 North Dakota residents each year. *Id.* at 302, 304. This is because *Bellas Hess* created a safe harbor for sellers "whose only connection with customers in the [taxing] State is by common carrier or the United States mail," freeing them "from state-imposed duties to collect sales and use taxes." *Id.* at 315 (quoting Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 758 (1967)).

at face value the MFA of 2015 purports not to create or alter the sales and use tax nexus standards,[159] it seemingly does exactly what it purports not to do. Any other interpretation of the bill would be inconsistent; since the bill only applies to remote sellers,[160] it is impossible for it to be effective without creating nexus where it did not previously "legally" exist.

a. Due Process Analysis via McIntyre

Although a personal jurisdiction case, *McIntyre*[161] is relevant to state tax jurisdiction inquiries because "the state tax and adjudicative jurisdiction due process inquiries are 'comparable.'"[162] Further, the constitutional limitations applicable to state tax jurisdiction derive predominantly from the Due Process Clause.[163]

McIntyre concerned a New Jersey resident, Nicastro, who was injured while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a foreign company incorporated in England.[164] The injury occurred in New Jersey and Nicastro sued in New Jersey, claiming that J. McIntyre was subject to New Jersey's jurisdiction for three reasons: (1) a U.S. distributor agreed to sell J. McIntyre's machines in the United States; (2) J. McIntyre officials attended trade shows in several states, although not in New Jersey; and (3) at most four of J. McIntyre's machines, including the one that allegedly injured Nicastro, ended up in New Jersey.[165] Invoking Justice Brennan's "stream-of-commerce" test, the New Jersey Supreme Court held that New Jersey may exercise jurisdiction over J. McIntyre, a foreign manufacturer, without offending the Due Process Clause so long as J. McIntyre "knew or reasonably should have known"

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[159] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 3(b) (2015) (emphasis added).

[160] *Id.* § 2(a). "The provisions of this Act shall apply only to *remote* sales and shall not apply to intrastate sales or intrastate sourcing rules." *Id.* § 3(f) (emphasis added).

[161] *See generally* J. McIntyre Mach., Ltd. v. Nicastro*,* 564 U.S. 873 (2011).

[162] Fatale, *supra* note 134, at 595. *McIntyre*, which concerns "specific" rather than "general" adjudicative jurisdiction, is particularly relevant to state tax inquiry since state tax cases consider questions of specific jurisdiction. *Id.* at 568.

[163] *Id.* at 595.

[164] *McIntyre,* 564 U.S. at 878.

[165] *Id.*; Fatale, *supra* note 134, at 608–09.

that its products would be distributed through a national distribution system, resulting in potential sales in any of the fifty states.[166] Finding that J. McIntyre neither had a presence nor minimum contacts in New Jersey, the Supreme Court reversed.[167] Justice Kennedy, writing for four of the Justices, held that in order for a remote seller to be subject to New Jersey's jurisdiction, the seller must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[168] Because J. McIntyre "had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State,"[169] Justice Kennedy reasoned that J. McIntyre had not "purposefully avail[ed] itself" of New Jersey, and, thus, could not be subject to New Jersey's jurisdiction.[170]

Justice Breyer, writing for himself and Justice Alito, agreed with the outcome of the case, but disagreed with Justice Kennedy's analysis.[171] Appealing to the Court's prior precedents, Justice Breyer applied a fairness test, concluding that it would be unfair to submit J. McIntyre to New Jersey's jurisdiction, since J. McIntyre did not have a "single contact with New Jersey short of the machine in question ending up in this state."[172] To quote Justice Breyer, "these facts do not provide contacts between [J. McIntyre] and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case. None of our precedents finds that a *single isolated sale*, even if accompanied by the kind of sales effort indicated here, is sufficient."[173]

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[166] *McIntyre*, 564 U.S. at 879.

[167] *Id.* at 886–87; Fatale, *supra* note 134, at 609–10.

[168] *McIntyre*, 564 U.S. at 877 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[169] *Id.* at 886.

[170] *Id.* Justice Kennedy admitted that J. McIntyre's actions "may reveal an intent to serve the U.S. market," but in no way showed that "J. McIntyre purposefully availed itself of the New Jersey market." *Id.*

[171] *Id.* at 893. Unlike Justice Kennedy, Justice Breyer was unwilling "to announce a rule of broad applicability without full consideration of the modern-day consequences." *Id.* at 887. Justice Breyer did not believe that *McIntyre* presented "issues arising from recent changes in commerce and communication." *Id.* at 875.

[172] *Id.* at 886. There was no "'regular ... flow'" of sales in New Jersey, nor "'something more,' such as special state-related design, advertising, advice, marketing, or anything else." *Id.* at 889.

[173] *Id.* at 888 (emphasis added).

McIntyre's holding is said to be limited in two ways. For one, it was a splintered decision that failed to command a majority of the Court.[174] According to *U.S. v. Marks*,[175] if the Justices agree on the outcome of a judgment, but are split as to the reasoning, the rule of the case is limited to the opinion in which five or more Justices in support of the judgment concur.[176] Because Justice Breyer's opinion iterated the Court's prior precedents, that a "single isolated sale" is insufficient to justify "an exercise of personal jurisdiction,"[177] *McIntyre*'s precedential analysis is said to be limited to Justice Breyer's concurrence.[178] Secondly, *McIntyre* concerned a *foreign* manufacturer who: (1) made a single sale to the forum state; and (2) targeted the U.S. market as a whole and not the markets of individual states.[179] Although domestic manufacturers often engage in substantial "in-state marketing activity," the Justices explained that *McIntyre*'s reasoning is not limited to *foreign* manufacturers and can be extended to *domestic* manufacturers, so long as they meet the above fact pattern.[180] In the realm of sales tax, such fact patterns are usually of little concern to state tax officials since minimal tax revenue is at stake.[181] However, the implementation of the MFA of 2015 would make such fact patterns not only relevant, but also prevalent since it authorizes states to force remote sellers, incurring above $1,000,000 in *total remote U.S. sales*, to collect the sales and use taxes of every state to which a purchase is sourced, regardless of the volume of sales made to individual states and regardless of where the remote sellers are "physically present."[182]

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[174] Fatale, *supra* note 134, at 568, 608.

[175] Marks v. United States, 430 U.S. 188, 193 (1977).

[176] Fatale, *supra* note 134, at 616.

[177] Robert M. Pollack, *"Not of Any Particular State":* J. McIntyre Machinery, Ltd. v. Nicastro *and Nonspecific Purposeful Availment*, 89 N.Y.U. L. REV. 1088, 1106 (2014).

[178] Fatale, *supra* note 134, at 616.

[179] *McIntyre,* 564 U.S. 885–86; Fatale, *supra* note 134, at 617–18.

[180] Fatale, *supra* note 134, at 612, 618. Unlike brick and mortar businesses whose "target market" generally does not extend past the boarders of the states in which they are located, online sellers tend to "direct their products towards consumers in all U.S. jurisdictions," and may very well make only a single sale to a certain jurisdiction. Bryan J. Soukup, *Close The Loophole: The Marketplace Fairness Act and its Likely Passage*, INSIDE BASIS (Fed. Bar Ass'n Section on Taxation), Fall 2013, at 16, 18–19.

[181] Fatale, *supra* note 134, at 618.

[182] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015).

As stated previously, Due Process requires that there be "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax,"[183] and that the tax dollars received by the state be "rationally related" to the state's values.[184] The relevant inquiry therefore, is whether the individual's contacts with the state "ma[k]e it reasonable"[185] for him to be required to submit to the state's power and to serve as the state's "collection agent."[186] Although for different reasons, both Justice Kennedy and Justice Breyer agreed that it would be unreasonable for a remote seller to succumb to a state's jurisdiction, if the seller's sole contact with the state consisted of a single isolated sale made there.[187] This view is not unique to *McIntyre*, but has been expressed by the Court in other opinions. In *Asahi Metal Industry Co. v. Superior Court of California,* the Court had "strongly suggested that a *single sale* of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place."[188] That is, the Court requires "something more," such as "'the regular and anticipated flow' of commerce into the State."[189]

The MFA of 2015 raises Due Process concerns in that it bases a remote seller's "minimum connection" to an individual state on the remote seller's "minimum connection" to the U.S. as a whole.[190] This rationale is predicated on the idea that a remote seller who incurs over $1,000,000 in gross annual receipts from *total* remote

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[183] Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

[184] *Id.* at 306 (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978)).

[185] *Id.* at 298.

[186] Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 756–57 (1967); *see also* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) ("The simple but controlling question is whether the state has given anything for which it can ask return.").

[187] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888 (2011).

[188] *McIntyre,* 564 U.S. at 888–89 (Breyer, J., concurring) (emphasis added) (citing Asahi Metal Industry Co. v. Super. Ct. of Cal., 480 U.S. 102, 111–12 (1987)).

[189] *McIntyre,* 564 U.S. at 889 (Breyer, J., concurring) (citing *Asahi,* 480 U.S. at 111–22 (Stevens, J., concurring in part and concurring in judgment)).

[190] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015). This is because the bill's small seller threshold refers to a seller's "total remote sales in the United States," and not to sales in any one state. *Id.*

sales[191] has "purposefully avail[ed] itself of the privilege of conducting activities within the [taxing] State[s], thus invoking the benefits and protections of [their] laws,"[192] and thus satisfying the minimum connection required by the Due Process Clause.[193] However, this rationale, in failing to account for the "volume" or "value"[194] of remote sales sourced to specific states, seemingly commits the fallacy of division.[195] Take, for example, a Nebraska seller who incurs $2,000,000 in total annual gross receipts from its remote sales to New York and Virginia. Specifically, it made $1,000,000 from 100,000 sales to New York and $1,000,000 from 300,000 sales to Virginia. It is clear from this example that the Nebraska seller has "some definite link, some minimum connection"[196] to both New York and Virginia, based on its commercial activity in these states, to warrant that it serve as "collection agent"[197] for both New York and Virginia.

But what if the facts were slightly changed and the Nebraska seller incurred $100 from a single sale to New York and $1,999,900 from 300,000 sales to Virginia? Despite *McIntyre*'s holding, that "something more" than a single sale into a state is needed to "constitute an adequate basis for asserting jurisdiction over an out-of-state [seller],"[198] the MFA of 2015 would dictate the same result.[199] Because the Nebraska seller exceeded the small seller threshold, it could be forced to serve as "collection agent" for both New York and Virginia, despite its *single isolated sale* of nominal value to New York.[200] The unfairness is glaring. The MFA of 2015 essentially imputes the Nebraska seller's Due Process nexus with Virginia to New York, assuming that what is

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[191] *Id.*

[192] *McIntyre,* 564 U.S. at 877 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[193] *Id.*

[194] *Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in judgment) (indicating that "the volume, the value, ..." of a good may affect the jurisdictional inquiry and emphasizing *Asahi*'s "regular course of dealing").

[195] *Fallacy of Division,* LOGICALLY FALLACIOUS, https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/89/Fallacy_of_Division [https://perma.cc/PEJ8-6QQC].

[196] Quill Corp. v. North Dakota, 504 U.S. 298, 327 (1992) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)).

[197] Nat'l Bellas Hess v. Dep't of Rev., 386 U.S. 753, 756–57 (1967).

[198] *McIntyre*, 564 U.S. at 888–89.

[199] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c) (2015).

[200] *Id.*

true of the whole is also true of the parts,[201] even though the Nebraska seller had not "purposefully avail[ed] itself of the privilege of conducting activities within [New York]," or enjoyed the "benefits and protections of [New York's] laws."[202] Furthermore, this unfairness is amplified by the fact that the bill requires "related" remote sellers (such a parent and its subsidiary) to aggregate their gross annual receipts when determining whether they meet the small seller exception,[203] making it even more likely that one of the parties will lack the requisite "minimum connection" with the taxing state.

b. Commerce Clause Analysis via Complete Auto

As stated previously, the Supreme Court developed the *Complete Auto* test to determine whether a tax discriminates or unduly burdens interstate commerce.[204] According to the Court, for a tax to survive a "negative" Commerce Clause challenge, it must: (1) be applied to an activity with a "substantial nexus" with the taxing state; (2) be "fairly apportioned"; (3) not "discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the State."[205] As iterated in *Bellas Hess* and reaffirmed in *Quill*, the "substantial nexus" requirement of the Commerce Clause requires physical presence.[206]

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[201] *See Fallacy of Division*, *supra* note 195. The bill assumes that since the Nebraska seller has the requisite connection to Virginia and New York combined, that it has the requisite connection to both New York and Virginia separately—based off of the Nebraska seller's significant commercial activity in Virginia and its single nominal sale to New York—this is clearly not the case. *See id.*

[202] *McIntyre*, 564 U.S. at 877 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[203] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(c); Dion, *supra* note 17.

[204] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[205] *Id.*; Handel, *supra* note 111, at 628.

[206] Quill Corp. v. North Dakota, 504 U.S. 298, 311–15 (1992) (the Court decided *Quill* based on the first prong of the *Complete Auto* test and reaffirmed the holding of *Bellas Hess*; both *Bellas Hess* and the negative Commerce Clause create a safe harbor for "vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail"); Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1150–51 (10th Cir. 2016) (explaining that the first prong of the negative Commerce Clause requires physical presence, the court states, "It is a fact—if an analytical oddity—that the *Bellas Hess* branch of dormant commerce clause jurisprudence guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume.").

While the MFA of 2015 satisfies the second and third prongs,[207] it fails to meet the first and fourth prongs, thereby failing the *Complete Auto* test. In an attempt to "treat all sales transactions equally," the MFA of 2015 grants states "collection authority"[208] over remote sellers *regardless* of where these sellers are physically located.[209] Thus, the MFA of 2015 violates the first prong as it eliminates *Quill*'s bright-line "physical presence" rule and replaces it with "economic nexus."[210] The MFA of 2015 seemingly violates the fourth prong as well, since it grants states "collection authority" over remote sellers despite the fact that some, whether due to their lack of physical or economic presence,[211] receive no benefit from the tax collection and have no voice in how the tax revenue is spent.[212] While many modern-day remote sellers, namely online companies, tend to "direct their products towards consumers in all U.S. jurisdictions,"[213] it is highly unlikely that they receive benefits from all fifty states in exchange for the sales and use tax revenue they are required to collect and remit. For example, an online seller who makes nominal remote sales to all 50 states exceeding the $1,000,000 threshold cannot be said to have benefitted

[207] Prong two is satisfied because "the tax will be apportioned equally throughout each jurisdiction according to each state's already established ... sales tax." Soukup, *supra* note 180, at 18–19. In order for a tax to "discriminate," it must treat "similarly situated" taxpayers differently, without "sufficient justification." *Brohl*, 814 F.3d at 1143 (quoting North Dakota v. United States, 495 U.S. 423, 435 (1990)). Although the MFA of 2015 only applies to remote sales and has no effect on intrastate sales, it treats all sellers (remote or nonremote) making remote sales similarly. *See* Marketplace Fairness Act, S. 698, 114th Cong. §§ 2(a)–(b), 3(f) (2015). Further, the bill specifies that a state cannot require a "remote seller to file sales and use tax returns any more frequently than returns are required for nonremote sellers or impose requirements on remote sellers that the State does not impose on nonremote sellers." *Id.* § 2(b). Thus, prong three is satisfied.

[208] Dion, *supra* note 17. "Collection Authority" simply refers to the state's power to force the collection and remittance of its sales and use tax on purchases that are sourced to it. *Id.*

[209] S. 698 §§ 2(a), 6(3); BARNES-BROWN ET AL., *supra* note 20, § 4:38.

[210] S. 698 §§ 2(a), 4(3), 4(6)–(9). The MFA of 2015 grants states "collection authority" if the remote seller exceeds $1,000,000 in total remote sales. *Id.* § 2(c).

[211] To restate the previous example, a remote Nebraska seller who incurs over $1,000,000 in total gross annual receipts from a single sale to New York, amounting to $100, and from 300,000 sales to Virginia, amounting to $1,999,900, could be required to collect and remit both New York's and Virginia's sales and use tax, despite its lack of economic presence in New York. *See supra* Part IV.A.3.a.

[212] BARNES-BROWN ET AL., *supra* note 20, § 4:38.

[213] Soukup, *supra* note 180, at 19.

from each state's fire and police protection, better-maintained roads, and better public-maintained transportation systems.[214]

For the aforementioned reasons, the MFA of 2015 authorizes state actions that would unduly burden interstate commerce.[215] Yet, as iterated in *Quill*, Congress holds the "ultimate power" and discretion to do so.[216] Congress has, to no avail, considered several pieces of legislation since *Quill* was decided that would ultimately "overrule" its bright-line rule.[217] It is not unreasonable to assume that Congress decided against such legislation out of respect for the Court's holding in *Bellas Hess,* "that the Due Process Clause prohibits States from imposing such taxes,"[218] and out of respect for a bright-line rule in general. Although *Bellas Hess's* rule "appears artificial at its edges," predicating the collection and remittance of a state's sales and use tax on the "presence in the taxing State of a small sales force, plant, or office," the benefits of a clear rule arguably outweigh any claims of artificiality;[219] a bright-line rule affords states a "precise guide" as to the boundaries of their taxing authority, reduces state tax litigation by "encourag[ing] settled expectations," and promotes investment.[220] In fact, some attribute the exponential growth of e-commerce at least partly to *Bellas Hess*'s safe harbor.[221]

Although the MFA of 2015 appears to provide a "bright-line" rule of its own—"economic nexus" as opposed to "physical presence"—the bill is riddled with ambiguities. For example, "remote seller" is broadly defined as "a person that makes remote sales in the [s]tate."[222] Since the words "online," "internet" or "web," are not

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[214] Stathopoulos, *supra* note 84, at 27, 46. Contrast this with brick and mortar establishments who benefit directly from the tax revenue they collect and remit on behalf of the state.

[215] *See supra* notes 206–12 and accompanying text.

[216] Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). Although the Court reaffirmed *Bellas Hess*'s bright-line "physical presence" rule, it essentially invited Congress to legislate: "No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." *Id.* The Court went on to say that Congress is "better qualified to resolve" the issue of "whether, when, and to what extent the States may burden interstate [sellers] with a duty to collect use taxes." *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 315.

[220] *Id.* at 315–16.

[221] *Id.* at 316.

[222] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 4(6) (2015).

included in the definition,[223] the bill presumably applies to more than just online sellers; that is, brick and mortar businesses will also fall under the definition.[224] Similarly, the MFA of 2015 defines a "remote sale" as a "sale into a State ... in which the seller would not *legally* be required to pay, collect, or remit State or local sales and use taxes unless provided by this Act."[225] In other words, it is a sale by a seller into a state with which the sellers lacks nexus. While the Supreme Court has defined nexus to mean "physical presence," such as the presence of an office or employees, many states have aggressively expanded the Court's rule to include a "web-link or banner that sits on [a company's] website."[226]

V. ADMINISTRATIVE CONCERNS RAISED BY THE MFA

Despite its bipartisan support,[227] the MFA of 2015 has raised more than just Due Process and Commerce Clause concerns. For one, even with full-fledged adoption of the SSUTA, member states exhibit a significant lack of uniformity concerning their sales and use taxes in various areas.[228] Since the MFA of 2015 hinges on uniformity of sales and use tax laws,[229] any divergence is detrimental to the functional success of the bill. For example, Georgia, a SSUTA member, passed legislation concerning resale exemption certificate provisions[230] that contradicts the SSUTA's

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[223] Dion, *supra* note 17.

[224] *Id.* Brick and mortar businesses support the MFA in hopes that it will "level the playing field." BARNES-BROWN ET AL., *supra* note 20, § 4:38. Yet, the reality is that the bill's scope encompasses more than just online sellers. It grants states "collection authority" over *all* businesses ("such as Internet retailers and out-of-state vendors, catalogue-based sellers, manufacturers/wholesalers, B2B sellers, foreign remote sellers, and non-profit organizations") who do not qualify for the small seller exception and who make remote sales. KPMG, THINK THE MARKETPLACE FAIRNESS ACT IS NOT YOUR REALITY? THINK AGAIN. 2 (2014).

[225] S. 698 § 4(5) (emphasis added).

[226] Dion, *supra* note 17. New York's "Amazon Taxes" are a perfect example. *See id.*; *see also* Stathopoulos, *supra* note 84, at 26.

[227] Marketplace Fairness Act Compliance, TAXCLOUD, http://marketplacefairness.org/support/ [https://perma.cc/WA86-ZRBJ].

[228] Stathopoulos, *supra* note 84, at 47.

[229] BARNES-BROWN ET AL., *supra* note 20, § 4:38; S. 698 § 2(b). States can only force remote sellers to collect and remit the applicable sales and use taxes if they simplify, or streamline, their sales and use taxes. *Id.* § 2(b)–(c).

[230] H.B. 266, 2013 Gen. Assemb., Reg. Sess. § 6 (Ga. 2013) (amending GA. CODE ANN. § 48-8-38).

standard concerning these provisions.[231] Although the SSUTA's standard exonerates a seller from collection responsibility if the seller presents a valid resale exemption certificate, under Georgia's new "good faith" standard, the seller is only exonerated if the seller exercises due diligence.[232]

Secondly, the MFA of 2015 is expected to negatively impact small businesses (both online and brick and mortars alike) by forcing them to allocate their time and resources towards compliance issues instead of towards job creation.[233] Streamlining sales and use taxes is neither an easy nor inexpensive process.[234] In fact, most large retailers employ entire teams of outside advisors dedicated to sales tax compliance.[235] Most small businesses are already bogged down by "Federal and State tax systems that are too complex, too time consuming, and too costly to comply with," and simply cannot afford to hire outside advisors, or to implement new tax-compliance software systems.[236] Although the bill requires states to provide remote sellers with software, free of charge, that calculates the appropriate "sales and use taxes due on each transaction ... that files sales and use tax returns, and that is updated to reflect rate changes,"[237] there still remain significant costs to be borne by the seller.[238] For example, sellers will likely have to revamp their IT

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[231] Stathopoulos, *supra* note 84, at 47.

[232] *Id.*

[233] *See* 159 CONG. REC. S. 2827–31 (daily ed. Apr. 22, 2013) (statement of Sen. Wyden).

[234] *Id.*

[235] *See, e.g.*, Stathopoulos, *supra* note 84, at 47.

[236] 159 Cong. Rec. S. 2827–31 (daily ed. Apr. 22, 2013) (statement of Sen. Wyden).

[237] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(a)(ii) (2014).

[238] *See, e.g.*, *id.* There are also ambiguities as to how exactly the free software provision will work, and the meaning of "free of charge." KPMG, *supra* note 224, at 4. Congresswoman Collins uses athletic apparel as an example of the complexity involved:

> In some States, clothing and athletic footwear are exempt from tax. In others, they are exempt only up to a certain price level. Yet other States make a distinction between clothing and footwear used for athletic purposes—which they tax—and clothing and footwear used for general purposes—which they do not tax. In those States, systems must be programmed to correctly treat articles that can be viewed as either athletic apparel or general clothing, depending on the user. Board shorts, sneakers,

infrastructure in order to implement and integrate the new tax compliance software with their "existing billing, purchasing, and back-end technology."[239] For "multichannel retailers," those who sell "online, through catalogs, over the phones, and in stores," with unique order processing systems, this means that the new software must be "programmed to link to each component of their order processing systems," which would be both costly and time-consuming.[240] In addition, sellers would need to research the sales and use tax policies of every state in which they have customers, to ensure that they have programed their tax collection software correctly.[241] Thus, although sellers would be given the software "free of charge" the many hidden expenses make it seemingly impossible for small businesses to maintain the level of compliance required by the MFA of 2015,[242] suggesting that the small seller threshold be increased to $50 million.[243]

Third, the MFA of 2015 gives the states "carte blanche" to impose more taxes on businesses.[244] Currently, states that cannot legally require remote sellers to collect their sales tax rely on purchasers themselves to report and pay a compensating use tax.[245] However, since the MFA gives states the power to force remote

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> and windbreakers are just a few examples of common items that give rise to substantial complexity.

159 CONG. REC. S. 3081, 3083 (daily ed. May 6, 2013) (statement of Sen. Collins).

[239] KPMG, *supra* note 224, at 4.

[240] 159 CONG. REC. S. 3081–83 (daily ed. May 6, 2013) (statement to Sen. Collins).

[241] *See, e.g.*, *id.*

[242] Stathopoulos, *supra* note 84, at 47; Catherine Chen, *Taxation of Digital Goods and Services*, 70 N.Y.U. ANN. SURV. AM. L. 421, 444 (arguing that "compliance burdens of ascertaining the correct withholding rates would create an unfair disadvantage for small businesses because of the constantly evolving laws of the forty-five taxing states and hundreds of localities"). While large online retailers such as Netflix and Amazon would be subject to the same compliance regulations under the MFA of 2015, their costs would not be as burdensome due to their "economies of scale." *Id.* These companies can not only afford to comply with the MFA of 2015, but would be *benefitted* from its implementation since the high costs of complying with the bill are likely to shut down, or at the very least hurt, their smaller competitors. Carroll, *supra* note 109.

[243] Stathopoulos, *supra* note 84, at 47.

[244] 159 CONG. REC. S. 2827, 2829 (daily ed. Apr. 22, 2013) (statement of Sen. Baucus).

[245] *See, e.g.*, ERIKA K. LUNDER, CONG. RESEARCH SERV., R43800, TAXATION OF INTERNET SALES AND ACCESS: LEGAL ISSUES 1 (2015).

sellers to "play tax collector," there is an incentive for states to increase the variety of items that are taxable, as well as their sales tax rates.[246] To quote Congressman Baucus, "This bill is going to make it very desirable for States to start taxing and collecting on all sorts of services—not just the financial world but also on services provided by attorneys, architects, engineers, and accountants."[247]

Lastly, with the passage of the MFA of 2015, it is argued that consumers will pay an additional $22 billion in sales taxes.[248] Although the MFA calls for "no new taxes,"[249] it allows states to enforce the collection of sales and use taxes that would have otherwise gone uncollectible and unenforceable.[250] Thus, although not literally prescribing a "new tax," the additional tax revenue that will be generated by MFA of 2015 is "money that is going to come out of the pockets of American families that has not come out of their pockets before."[251] Consumers, as a result, will be less likely to shop online and the internet economy will bear the repercussions.[252]

CONCLUSION

The MFA of 2015, no doubt, raises Due Process, Commerce Clause, and administrative concerns. In terms of Due Process, the MFA will likely pass constitutional muster in a majority of situations, where a remote seller has made significant sales to the taxing state. However, there are fact patterns that shed light on the bill's fundamental unfairness; for example, where a remote seller is required to submit to a state's jurisdiction, despite its single isolated sale there of nominal value. The bill also

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[246] 159 CONG. REC. S. 2827, 2828 (daily ed. Apr. 22, 2013) (statement of Sen. Baucus).

[247] *Id.* at 2829.

[248] *Id.* at 2828.

[249] Marketplace Fairness Act of 2015, S. 698, 114th Cong. § 2(e) (2015).

[250] *See* 159 CONG. REC. S. 2827, 2829 (daily ed. Apr. 22, 2013) (statement of Sen. Baucus).

[251] *Id.*

[252] *See id.* Additional causes for concern include: (1) the bill fails to establish a singular audit system, thereby exposing businesses to audits by all 50 states; (2) the bill fails to establish rules for dispute resolution; and (3) the bill "tramples" on a state's decision not to enact a sales tax. For example, Indiana could force a New Hampshire seller to collect and remit its sales and use tax on sales sourced to Indiana, even though the state of New Hampshire has decided against implementing a sales tax of its own. *Id.* at 2829–30.

raises Commerce Clause concerns by substituting "economic nexus" for "physical presence." Since Congress has the plenary power to authorize state violations of the Commerce Clause, though not of the Due Process Clause, the question becomes, *should* it?

If enacted, there are multiple administrative hurdles that the MFA will have to overcome. But if forgone, more and more states are likely to hop aboard the "click-through" and "affiliate" nexus bandwagons,[253] putting Congress in a bind. Is it possible to pass a piece of legislation to grant states the authority they so wish—to force the collection of remote sales and use taxes—without "overruling" *Quill*'s bright-line physical presence rule?[254] A look at Colorado's statute, which imposes reporting obligations on remote retailers, answers this question in the affirmative. Under Colorado's law, remote retailers, who do not qualify for a small seller exception,[255] must: (1) provide transactional notices to Colorado purchasers, informing them that the retailer "has not collected sales or use tax," that the purchase "is not exempt from Colorado sales or use tax," and that "Colorado law requires the purchaser to file a sales or use tax return and to pay tax owed;"[256] (2) send "annual purchase summaries" to Colorado customers whose remote purchases exceed $500, informing them of their duty to "file a sales or use tax return at the end of every year;"[257] and (3) send annual "customer information report[s]" to the Department, which list "purchasers' names, billing addresses, shipping addresses, and total purchase amounts,"[258] informing the Department of taxpayers who failed to pay the tax, so that it can pursue audit and collection actions against these taxpayers. Such a statute allows states to enforce use tax compliance without

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[253] HENCHMAN, *supra* note 25, at 11.

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

[255] 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(1)(a)(iii) (2010). "For purposes of this regulation, the Department will presume that a retailer that makes less than $100,000 in total gross sales in Colorado in the prior calendar year and reasonably expects total gross sales in Colorado in the current calendar year will be less than $100,000 is a retailer whose sales in Colorado are de minimis." *Id.*

[256] Direct Mktg. Ass'n v. Brohl, 735 F.3d 904, 907, 907–08 (10th Cir. 2013) (citing COLO. REV. STAT. § 39-21-112(3.5)(c)(I); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(2)).

[257] *Id.* (citing COLO. REV. STAT. § 39-21-112(3.5)(d)(I); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(3)).

[258] *Id.* (citing COLO. REV. STAT. § 39-21-112(3.5)(d)(II); 1 COLO. CODE REGS. § 201-1:39-21-112.3.5(4)).

stepping on the toes of *Quill* or the Constitution,[259] since *Quill* only applies to *collection* requirements and not to *reporting* requirements.[260] Thus, instead of enacting the MFA of 2015, legislation that will surely muddy the waters of an already complex tax system, Congress should consider enacting national reporting requirements. Such would ensure that *Quill*'s "precedential island would never expand but would, if anything, wash away with the tides of time," making everyone happy.[261]

[259] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1146–47 (10th Cir. 2016) (holding that the "Colorado Law does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce").

[260] *Id.* at 1146. "*Quill* does not establish that out-of-state retailers are free from all regulatory requirements—only tax collection and liability." *Id.* at 1145. This is true even if the sole purpose of the state's reporting statute is to enhance use tax collection. *Id.*

[261] *Id.* at 1151.