To Tax or Not To Tax? That’s Not the Question: The Role of Tax Within the Maturing World of e-Commerce

Hannah V. Minkevitch

Follow this and additional works at: https://scholarship.law.berkeley.edu/btlj

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38BM4Z

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Technology Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
To Tax or Not To Tax? That’s Not the Question:
The Role of Tax Within the Maturing World of e-Commerce

Hannah V. Minkevitch
TO TAX OR NOT TO TAX? THAT’S NOT THE QUESTION: THE ROLE OF TAX WITHIN THE MATURING WORLD OF E-COMMERCE

Hannah V. Minkevitch†

Tax moratoriums1 and internet growth have paved a path for garage-style e-commerce start-ups to mature into retail titans. As states struggle with reduced budgets, the market gap widens between these internet retailers and their “brick and mortar” competitors. Initially, tax moratoriums on internet commerce were created to protect budding internet companies and to encourage growth.2 Today, e-commerce is a dominant means of purchasing for many consumers.3 As consumers move rapidly from the physical to the virtual world, the law has attempted to impose a physical presence standard on e-commerce.

This Note discusses the question of how to tax e-commerce, focusing specifically on use taxes and sales taxes. One example of the online tax requirement, and the controversy surrounding it, was recently addressed in Amazon.com v. New York State Department of Taxation & Finance.4 This lawsuit occurred after the state of New York attempted to impose a sales tax requirement on out-of-state internet retailers.5 Amazon attacked New York’s sales tax law as “unconstitutional” and, as a result, chose to remove a substantial amount of its business from the state.6 Because the New York Supreme Court upheld the sales tax requirement as constitutional, the

© 2012 Hannah V. Minkevitch.
† J.D. Candidate, 2013, University of California, Berkeley School of Law.
5. Id. at 846.
6. Id.
Amazon case has ignited debate about fair business and a state’s constitutional ability to impose a sales tax requirement on internet retailers.  

This Note will provide an overview of the debate surrounding internet taxation. Part I provides the background and the historical jurisdictional issues of U.S. tax law. Part II explains the Amazon case, highlighting the constitutional arguments regarding e-commerce taxation. Part III discusses proposals and legislation involving internet taxation. Also, in Part III, this Note will argue that legislation created to address tax collection on internet transactions should meet four requirements. The legislation (1) should clarify the tax landscape for internet retailers and consumers; (2) it must be constitutional; (3) it should promote virtual business equally and foster e-commerce growth; and (4) it should be forward thinking, addressing developments in technology and e-commerce.

I. BACKGROUND

A. UNITED STATES APPROACH TO JURISDICTION OF OUT-OF-STATE RETAILERS

When discussing the United States’s approach to the jurisdiction of out-of-state retailers, it is important to understand three things. First, although there are two types of taxes involved in the discussion of internet transactions taxation—use tax and sales tax—this discussion is primarily concerned with the latter type. Second, a state’s ability to tax is determined by its ability to assert personal jurisdiction over a particular entity. Once a state establishes personal jurisdiction, however, the question is not whether to tax internet transactions, but instead how to tax internet transactions. Third, courts are primarily concerned with analyzing Dormant Commerce Clause issues because the Dormant Commerce Clause focuses on state actions that might abuse power in a way that discriminates against interstate commerce, and internet retailers typically engage in interstate commerce. The rest of Section I.A will explore these three considerations in greater detail.

7. Id. at 850.
1. Types of Tax Involved in Internet Transactions

a) Use Tax

The Supreme Court in *McLeod v. J.E. Dilworth Co.* defined a use tax as “a tax on the enjoyment of that which was purchased.” To Because use taxes are harder to enforce, lawmakers are more inclined to impose a sales tax collection requirement on internet retailers. Two primary issues are at the root of this enforcement problem. First, it is logistically challenging for states to educate consumers and to hold them responsible for collecting use taxes. Second, enforcement of use tax laws is administratively onerous, often impractical, and expensive. These issues will be addressed in turn below.

States generally find it too impractical and expensive to educate consumers about their obligations under the use tax laws. Typically, most states apply a use tax requirement to items that would be subject to a sales tax if they were purchased in that state. Most consumers are unaware they must pay a use tax on purchases ranging from televisions sets to tennis shoes. Furthermore, many who know of the use tax have no idea how to calculate what they owe. The calculation percentage is usually the same as the state’s sales tax rate. For example, if a consumer buys a television online, she is required to record the price of the television, multiply this price by the standard use tax rate, and then insert the product of this calculation into a specifically delineated section of her income tax form for the year. This task may not be too challenging if all she purchased online that year was a television. The modern consumer, however, typically buys numerous things online that are subject to sales taxes. Such consumers are technically required to keep track of these items and make calculations to input into

---

15. Id. at 37.
16. Id.
17. Id.
19. Id.
23. See Kessler, supra note 3.
their annual tax returns. Because many consumers are unaware of these obligations, states would be required to spend a significant amount of time and money educating millions of people. Such a task would take a serious bite out of any possible revenue the states would hope to gain from use taxes. Consumers are also unlikely to take the time to record, calculate, and file their use tax forms because of the low chance of being prosecuted for failing to do so. On average, the IRS audits 1.5% of individual taxpayers each year. As such, the functioning of the tax system generally, and the use tax specifically, depends on voluntary compliance.

Second, strict use tax enforcement imposes abundant administrative and economic challenges on a state. States would be required to keep detailed records of individual consumer spending patterns over the course of each tax year. As with the problem of educating consumers, the cost of monitoring their behavior would likely exceed the revenues gained from use tax collection.

b) Sales Tax

Unlike a use tax, a sales tax is “a tax levied on the retail price of merchandise and collected by the retailer or entity selling the good.” Contrary to use taxes that hold the consumer responsible for the tax activity, sales taxes impose the tax collection burden on the retailer.

Because of use tax challenges, legislators have determined that sales taxes are the more realistic method of collecting tax from internet sales. States often have greater opportunities to create legislation incentivizing internet retailers to collect sales taxes on merchandise. Additionally, internet businesses are likely better positioned than the individual consumer to develop methods to collect taxes that can be implemented throughout the

25. Huefner & Hibschweiler, supra note 18, at 37.
26. Id.
28. Id.
29. Id.
30. Id.
31. Id.
34. Id. at 37.
35. Id.
course of business. Lawmakers can create strict business requirements, holding internet retailers accountable for collecting sales taxes, thus facilitating a logistically possible method of enforcement.

2. Personal Jurisdiction

Whether a state can require an out-of-state retailer to remit a sales tax depends upon whether that state can assert personal jurisdiction over that retailer. The Supreme Court has established a physical presence nexus requirement that determines proper jurisdiction and when a state can constitutionally require an out-of-state retailer to pay taxes or collect sales taxes from consumer transactions. Traditionally, taxation was constitutional when an out-of-state retailer made minimum contacts with a state and that state was not trying to hinder interstate commerce by that taxation. Courts determined whether a state constitutionally had jurisdiction to tax an entity by using the International Shoe standard of minimum contacts. This analysis, however, evolved into a “more flexible inquiry” with courts typically looking past a physical presence requirement and determining whether the entity has “purposefully availed” itself enough to satisfy minimum contacts under the Due Process Clause. Judges typically engage in this “flexible inquiry” by addressing the constitutionality of personal jurisdiction through a bifurcated analysis incorporating both the Due Process Clause and the Commerce Clause.

The Due Process Clause, under the Fourteenth Amendment of the Constitution of the United States, holds that no state shall “deprive any person of life, liberty, or property, without due process of law . . . .” For a court to assert tax law jurisdiction, judges must use a personal jurisdiction analysis and first determine if the parties involved have minimum contacts with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” Judges usually

36. Id.
37. See id.
39. Id.
40. Id.
41. Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945). In International Shoe, the Court explained that due process requires that a defendant have minimum contacts with the forum “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Id. at 316.
42. Quill, 504 U.S. at 307.
43. Id. at 305–07.
44. U.S. Const. amend. XIV, § 1.
45. Int’l Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
expand this analysis by determining whether a defendant was able to foresee that his “conduct and connection with the forum State were such that he should [have] reasonably anticipate[d] being haled into court there.” The “conduct or connection,” however, need not be physical. The Court has determined that it 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, thus obviating the need for [a] physical presence within a State in which business is conducted.” Therefore, to constitutionally assert personal jurisdiction, a court usually determines whether the out-of-state defendant has “purposefully directed” his conduct or connection to the residents of the forum state.

3. The Commerce Clause and the Dormant Commerce Clause

The second part of the jurisdictional analysis involves the Commerce Clause, where judges typically consider whether a state’s nexus or physical requirement laws prohibit interstate commerce. Judges divide this physical presence element into two inquiries involving the Commerce Clause and the Dormant Commerce Clause, which, in different ways, attempt to regulate the relationship between federal and state power.

The Commerce Clause expressly grants Congress the power to regulate commerce with “foreign Nations, and among the several States.” Essentially, the Constitution has specifically detailed certain powers listed for the federal government and those that are not specifically listed are reserved for the states. The Commerce Clause grants power to Congress and restricts states’ ability to regulate.

By contrast, the Dormant Commerce Clause is not expressly inscribed in the Constitution, but instead is a power that the Supreme Court has read into the Commerce Clause. The Dormant Commerce Clause attempts to limit state and local governments from impeding interstate commerce by imposing “an implicit restraint on state authority, even in the absence of a conflicting

48. Id. at 472.
53. Id.
54. Gibbons v. Ogden, 22 U.S. 1, 189 (1824).
Essentially, the Dormant Commerce Clause is concerned with state actions that might abuse power over particular areas of commerce in ways that discriminate against interstate commerce. For instance, if a state created a tax that effectively bars foreign state businesses from competing in the state, a court would likely view that state’s act as economic protectionism, and Congress would have the ability to restrict that state from enacting such a tax.

Because internet retailers typically engage in interstate commerce, laws that tax out-of-state retailers implicate Dormant Commerce Clause issues. States, however, can typically overcome a Dormant Commerce Clause challenge to an imposed tax if the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."  

B. HISTORICAL GUIDELINES FOR TAXATION OF REMOTE SALES: THE PHYSICAL PRESENCE STANDARD

Personal jurisdiction challenges the constitutionality of a state tax on an internet retailer. Increasingly, however, courts are reading into a state’s constitutional powers the ability to tax out-of-state retailers. Section I.B. will explain the historical guidelines for determining personal jurisdiction for taxation purposes through two foundational cases, National Bellas Hess, Inc. v. Department of Revenue of Illinois and Quill Corp. v. North Dakota.

In National Bellas Hess, the Supreme Court established a bright-line limitation on state taxation powers. The Court determined—by the Dormant Commerce Clause—that for taxation purposes, an appropriate nexus between an out-of-state retailer and the desired forum required a physical presence. Subsequently, in Quill Corp., the Court reaffirmed its position in National Bellas Hess that the Dormant Commerce Clause requires

56. Gibbons, 22 U.S. at 189.
57. See id.
62. Nat’l Bellas Hess, 386 U.S. at 758–60; see also Quill, 504 U.S. at 311.
63. See Nat’l Bellas Hess, 386 U.S. at 758–60.
some physical presence in the taxing state for that state to assert taxation jurisdiction over out-of-state retailers. 64

1. National Bellas Hess

In National Bellas Hess, a use tax case, the Court created a bright-line rule that requires states to establish a physical presence nexus between an out-of-state retailer and the desired forum before asserting personal jurisdiction:

[the] State of Illinois had no power to impose liability on out-of-state mail order firm to collect use taxes imposed by Illinois Use Tax Act, where mail order firm maintained no office, had no agents or solicitors, owned no property, and had no telephone listing in Illinois, and where all contacts which firm had with state were via United States mail or common carrier.65

In National Bellas Hess, the state of Illinois attempted to require National Bellas Hess, a mail-order company located in Missouri, to remit taxes on mail-order purchases.66 The primary issue was whether the state could constitutionally require an out-of-state company to remit a tax, even though the company had no physical location within the state.67 Although mail-order catalogues were a new advancement at the time that affected interstate commerce, the Court required a physical nexus to exist before the state could override the Dormant Commerce Clause.68 Courts used this physical presence requirement to determine whether or not a state could tax an out-of-state entity.69 The Supreme Court later upheld the requirement in a subsequent case, Quill Corp. v. North Dakota.70

2. Quill Corp.

In 1992, the Supreme Court reaffirmed the physical presence requirement in Quill Corp. v. North Dakota, holding that “a vendor whose only contacts with the taxing State are by mail or common carrier lack[ed] the ‘substantial nexus’ required by the Commerce Clause.”71 Quill was a Delaware corporation with offices in California, Georgia, and Illinois, but the company solicited business in other states, including North Dakota.72 Quill

64. Quill, 504 U.S. at 331.
66. Id. at 753–54.
67. Id.
68. Id. at 758.
69. Id.
71. Id. at 311.
72. Id. at 302.
conducted most of its out-of-state business “through catalogs and flyers, advertisements in national periodicals, and telephone calls.” Prior to 1987, North Dakota had a statute that required “every ‘retailer maintaining a place of business in the State to collect the tax from the consumer and remit it to the State.’” In 1987, North Dakota expanded its definition of “retailer” to include “every person who engages in regular or systematic solicitation of a consumer market in the state.” The new definition mandated that Quill collect a tax on all of the orders it received from North Dakota residents. Quill objected to this requirement and challenged the state’s mandate.

Quill attacked North Dakota’s tax requirement by asserting that the tax was unconstitutional on Due Process Clause and Commerce Clause grounds. When considering Quill’s claims that the state could not constitutionally assert personal jurisdiction to impose a tax requirement, the Court shifted its focus from the historical jurisdiction standard in *International Shoe Co. v. Washington* to a “more flexible inquiry” to determine whether Quill had “purposefully avail[ed] itself of the benefits of an economic market in the forum State.” Using this flexible inquiry, the Court determined that the state had personal jurisdiction over Quill because Quill had purposefully availed itself enough to satisfy minimum contacts under the Due Process Clause.

The Court then addressed Quill’s argument that the tax requirement violated the Dormant Commerce Clause. The Court applied a four-part test from *Complete Auto Transit, Inc. v. Brady*, stating that when addressing taxes facing Dormant Commerce Clause challenges, courts should uphold the tax if it “(1) is applied to an activity with a substantial nexus with the taxing State,

73. *Id.*
74. *Id.* (quoting N.D. CENT. CODE § 57-40.2-07 (Supp. 1991)).
75. *Id.* at 302–03 (quoting N.D. CENT. CODE § 57-40.2-01(6) (Supp. 1991)). “Regular or systematic solicitation” meant “three or more advertisements within a 12-month period.” *Id.* at 303 (quoting N.D. ADMIN. CODE 81-04.1-01-03.1 (1988)).
76. *Quill*, 504 U.S. at 303.
77. See *id.* at 303–04.
78. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the Court explained that due process requires that a defendant have minimum contacts with the forum “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 316; see also *Quill*, 504 U.S. 298 at 307 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
80. *Id.; see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).
81. *Quill*, 504 U.S. at 308.
(2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. In *Quill*, the Court was primarily concerned whether the mail-order business had an adequate nexus to justify taxation under the first prong of *Complete Auto*. The Court found no substantial nexus, and thus upheld the bright-line rule that the Dormant Commerce Clause requires some physical presence in the taxing state for that state to assert taxation jurisdiction over out-of-state retailers.

Since *National Bellas Hess* and *Quill*, the Court has engaged in case-by-case determinations of what constitutes a substantial nexus, with no clear standard prevailing. The determination is muddled by a fact-specific analysis and, as such, courts have not found a predictable answer in many cases.

It is important to understand, however, that the decision in *Quill Corp.* does not prevent states from collecting taxes for items sold online. Instead, it only provides that the state must have some type of substantial nexus to justify a state’s exercise of personal jurisdiction. Therefore, the characterization of the debate surrounding the taxation of internet transactions as pro-tax versus anti-tax is inaccurate. Instead, the debate focuses on whether a state has justified personal jurisdiction that allows the state to constitutionally require out of state retailers to remit a tax on transactions.

---

82. *Id.* at 311 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977)).
83. *See id.* at 311.
84. *Id.*
85. *See Standard Pressed Steel Co. v. Dept’ of Revenue*, 419 U.S. 560, 564 (1975) (stating the presence of an employee of a corporation within a state in which the corporation owned no property was sufficient to sustain a tax on sales); *see also Tyler Pipe Indus., Inc. v. Washington State Dept’ of Revenue*, 483 U.S. 232 (1987) (finding a substantial nexus where the out-of-state retailer used independent contractors to solicit sales).
86. *See Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 207 Cal. App. 3d 734 (Ct. App. 1989) (labeling teachers ‘agents’ of Scholastic who “obtain[ed] sales within California from local customers for a foreign corporation and such a nexus was substantial enough to make Scholastic liable for taxes.”); *see also Orvis Co. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995) (holding that (1) in order to impose duty on out-of-state vendors to collect compensating use taxes from their in-state customers, physical presence of vendors was required, which did not have to be substantial but had to be demonstrably more than “slightest presence,” and (2) activity of out-of-state vendors was sufficient to the impose obligation on vendors to collect sales and use taxes); *see also St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F. Supp. 2d 575, 577 n.1 (E.D. La. 2007) (holding that an out-of-state internet bookseller did not have substantial nexus to be required to remit a sales tax to the foreign state).
87. *See Quill*, 504 U.S. at 311.
C. APPLYING THE PHYSICAL PRESENCE REQUIREMENT FOR ASSERTING PERSONAL JURISDICTION TO THE INTERNET

E-commerce challenges laws that use geographic location or nexus as a fulcrum for determining jurisdiction. Tax law jurisdiction has traditionally focused on the physical location where the transaction occurred. Individuals, however, conduct internet transactions over a network and, as a result, such transactions are difficult to attribute to a single geographic location. The decentralized nature of the Internet also makes it difficult to determine whether an e-business meets the constitutional requirement of establishing a substantial nexus with a state to remit a tax there. Moreover, as discussed in Section I.B, supra, a court’s determination on this issue typically hinges on facts about the specific transaction.

Despite the ambiguity surrounding how states can tax internet transactions, states are nevertheless eager to access the potential revenue from these transactions. As such, state governments have become more creative in finding ways to establish a substantial nexus between internet retailers and their state’s geographic borders in order to access this source of revenue. New York was the first state to statutorily create a nexus between the state of New York and out-of-state retailers and to impose a sales tax and use tax on companies like Amazon and Overstock. Since New York took the first leap, numerous other states passed or are considering passing a similar tax on internet retailers. These states include California,

89. See id. Many states, however, have attempted to draft around the Quill holding. See Mark Alan McGinnis, Comment, Marching to the Beat of the Itinerant Drummer: States Increasingly Refuse to Get Physical Before Finding Nexus, 32 CAP. U.L. REV. 149, 185–86 (2003).
90. See Buechler, supra note 49, at 479, 479–80, 483.
91. In Part III, infra; Table 1 depicts the states that proposed or enacted bills that create a tax requirement on internet retailers.
92. See Amazon.com, LLC v. N.Y. State Dep’t of Taxation and Fin., 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2010).
94. See Table 1 in Part III, infra, for a state-by-state discussion.
95. ABx1 28, proposed by Assembly member Bob Blumenfield (D-San Fernando Valley), specifies the obligations under existing law for out-of-state retailers to collect and remit use tax on sales of tangible personal property to California residents. This bill was passed into law in on June 29, 2011. Governor Brown Signs Legislation, CA.GOV (Oct. 3, 2011), http://gov.ca.gov/news.php?id=17101.
Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Maryland, Minnesota, Mississippi, New Mexico, Rhode Island, Vermont, Virginia, Washington, and Wyoming. Nevertheless, some internet retailers have not readily accepted these state tax requirements. For example, when New York enacted its sales tax and use tax statute, internet retailers like Amazon responded with a lawsuit.

II. AMAZON.COM, LLC V. NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE

In 2008, the state of New York attempted to clarify through legislation what constituted a substantial nexus for purposes of taxation jurisdiction. The New York state legislature addressed the issue of e-commerce taxation

101. S.B. 250, 111 Leg., (Ind. 2010).
103. S.F. No. 2074, 110 Leg., 2nd Engrossment (Minn. 2009).
104. S.B. 2927, 111 Leg., 54 Reg. Sess. (Miss. 2010).
111. See Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin., 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2010).
112. See id.
when it passed § 1101(b)(8)(vi)\textsuperscript{113} of the New York Tax Law, more commonly known as the “Amazon Tax” because of one of the major internet retailers to which it applies.\textsuperscript{114} The statute creates a rebuttable presumption that an out-of-state online retailer has a nexus with the state of New York if the retailer enters into an agreement with a New York resident to refer customers to the retailer’s website for a commission, for example, through a link on the resident’s website.\textsuperscript{115}

Predictably, internet retailers like Amazon responded negatively to this new obligation. Consequently, only a month after New York enacted the statute, Amazon filed a lawsuit against the state challenging the constitutionality of the statute. The New York Supreme Court\textsuperscript{116} ruled in favor of the state of New York, granting its motion for summary judgment.\textsuperscript{117}

A. BACKGROUND OF THE CASE

At the time of the case, Amazon had operated its internet retail services for approximately fifteen years.\textsuperscript{118} Although many New York residents purchased products from Amazon, the company did not own any property in New York, maintain any New York offices, and none of its employees worked or resided in the state.\textsuperscript{119}

\textsuperscript{113} N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney 2012) provides that a person making sales of tangible personal property or services taxable under this article (“seller”) shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods. . . . This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question.


\textsuperscript{115} Amazon, 877 N.Y.S.2d at 846.

\textsuperscript{116} The New York Supreme Court is a court of original instance in the state. The New York Court of Appeals is the highest court.

\textsuperscript{117} Amazon, 877 N.Y.S.2d 842.

\textsuperscript{118} Id. at 846.

\textsuperscript{119} Id.
Amazon’s presence in the state was limited to its “Associates Program” that allowed participants ("Associates") to maintain links to Amazon.com on their own websites.\(^{120}\) In return for this link, Amazon would pay its Associates a percentage of its proceeds for any sale from a consumer who accessed Amazon.com through the link on the Associate’s website.\(^{121}\) Furthermore, Amazon incentivized Associates to refer customers to the Amazon Prime program by compensating Associates twelve dollars for every new enrollee.\(^{122}\) Individuals who aspired to be an Associate for Amazon had to apply.\(^{123}\) Once Amazon accepted her application, the Associate would sign an operating agreement that stated, “the relationship of the Parties [was] that of ‘independent contractors.’”\(^{124}\) Amazon granted Associates “a revocable, non-exclusive, worldwide, royalty-free license . . . solely for purposes of facilitating referrals from their sites to the Amazon site.”\(^{125}\)

Of the hundreds of thousands Amazon Associates, only a small percentage resided in New York.\(^{126}\) Amazon stated, “sales to New York customers originating from New York based Associate referrals constituted less that 1.5% of Amazon’s New York sales.”\(^{127}\)

On April 23, 2008, New York ratified N.Y. Tax Law § 1101(b)(8)(vi) that requires out-of-state sellers to collect sales tax when these sellers pay commissions to New York residents for referring potential customers.\(^{128}\) The new law essentially expanded the nexus requirement a state needed to collect sales taxes from an out-of-state retailer.\(^{129}\) Under the new law, an out-of-state seller is exempt from the sales tax only if it could establish its commissioned New York residents “did not engage in any solicitation . . . that would satisfy the nexus requirement of the U.S. Constitution.”\(^{130}\)

### B. The New York Supreme Court Decision

About two weeks after New York passed the statute, Amazon filed a complaint against the state, alleging three primary issues.\(^{131}\) First, Amazon argued that the state statute violated “the Commerce Clause of the United

\(^{120}\) Id. at 845.
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) Id.
\(^{127}\) Id.
\(^{128}\) Id. at 846.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id.
States Constitution, both facially and as applied to Amazon, because it impose[d] tax collection obligations on out-of-state entities who [had] no substantial nexus with New York.” 132 Second, Amazon contended that “the provision violate[d] the Federal and State constitutions’ Due Process Clauses, both facially and as applied, because ‘it effectively create[d] an irrebuttable presumption of solicitation’ and [was] overly broad and vague.” 133 Third, Amazon alleged the statute “violate[d] the constitutions’ Equal Protection Clauses because ‘it intentionally target[ed] Amazon.’ ” 134

The New York Supreme Court did not accept Amazon’s arguments that the statute violated the Constitution and conflicted with U.S. Supreme Court precedent.135 The court ruled in favor of the state, granting its motion for summary judgment and holding that the statute was “not facially invalid as violative of the Commerce Clause, did not violate the Commerce Clause as applied to the retailer, did not employ improper statutory presumption in violation of the Due Process Clause and was not targeted at the retailer alone.” 136 The court supported its holding on four grounds, determining that (1) Amazon had a substantial nexus to the state of New York, (2) the New York statute did not violate the Commerce Clause, (3) there was no Due Process Clause violation, and (4) the statute did not solely target Amazon’s program in New York.137

The New York Supreme Court dismissed Amazon’s allegation that the statute was facially invalid because of a lack of a substantial nexus.138 The court cited National Geographic Society v. California Board of Equalization stating, “so long as there is a ‘substantial nexus’ with the taxing State, the taxes that must be collected need not derive from the seller’s in-state activity.” 139 The court emphasized that the statute required collecting taxes if a seller enters into a contract with a New York resident, that the New York resident refer potential customers to the seller, and that the seller receive in excess of $10,000 from New York customers referred through this contractual

132. Id.
133. Id.
134. Id.
135. Id.
136. Id. at 851.
137. Id.
138. See id. at 848.
139. Id. at 847 (citing Nat’l Geographic Soc’y v. California Bd. of Equalization, 430 U.S. 551, 560 (1977)).
arrangement. The court found that all three of these elements were present in Amazon’s Operating Agreement with its Associates.

The New York Supreme Court also rejected Amazon’s second argument, that the statute violated the Commerce Clause. The court based its analysis on the U.S. Supreme Court’s decision in *Scripto v. Carson*. In *Scripto*, the Supreme Court held that “a state could require tax collection by an out-of-state company that had contracts with ten in-state residents—deemed ‘independent contractors’—who solicit orders for products on its behalf.” Following *Scripto*, the New York court stated that Amazon was benefiting from its New York Associates who were labeled “independent contractors” in the Operating Agreement. Thus, the court determined that these Associates who encouraged Amazon sales reasonably fell within the statute.

Rejecting Amazon’s allegations of due process violations, the New York Supreme Court stated that a legislative presumption—here, the presumption of solicitation—will withstand constitutional challenge if “there is some rational connection between the fact proved and the ultimate fact presumed, and . . . the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.” Consequently, the court determined that there was a “reasonably high degree of probability” that Amazon would want to encourage its Associates to solicit sales through the click-through links. The court determined that Amazon was incorrect in stating that the presumption was “irrebutable” by finding that out-of-state sellers could prevent tax collection by stopping all in-state solicitation activities.

Finally, the New York court dismissed Amazon’s argument that the statute targeted Amazon specifically because it failed to state in its complaint that it was treated differently from other internet retailers. To state a valid claim under the Equal Protection Clause, a plaintiff “must allege that it was

---

140. *Id.* at 848.
141. *Id*.
142. *Id.* at 849.
143. *Id*.
144. *Id.* at 847 (quoting *Scripto v. Carson*, 362 U.S. 207, 209 (1960)).
145. *Id*.
146. *Id*.
147. *Id.* at 850 (quoting *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)).
148. *Id.* at 849.
149. *Id.* at 846.
intentionally treated differently from similarly situated individuals.\textsuperscript{150} Had Amazon distinguished itself as being treated differently from other internet retailers in its complaint, it may have had a viable Equal Protection claim.\textsuperscript{151}

Having rejected all of Amazon’s constitutional arguments, the court upheld the New York statute. Because of this decision, the New York statute and the similar statutes enacted by other states have affected the relationship between those states and Amazon.\textsuperscript{152}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Amazon Sales Tax Battle in the United States\textsuperscript{153}}
\end{figure}

\section{III. TAX’S ROLE IN THE WORLD OF E-COMMERCE}

As e-commerce evolves, so too does the discussion about its appropriate taxation. Events following the Amazon case reveal some of the primary arguments at play regarding the taxation of internet transactions. This Part will briefly summarize the main arguments for and against sales tax collection on internet transactions. Next, this Part will explain the national proposals aimed at addressing this issue. Then, this Part will examine what courts are likely to decide in light of state and national legislation on the subject. Finally,

\begin{itemize}
\item \textsuperscript{150} \textit{Id.} at 851 (quoting Seabrook v. City of New York, 509 F. Supp. 2d 393, 400 (S.D.N.Y. 2007)).
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} This figure was re-created by the author.
\end{itemize}
this Part will suggest four requirements legislation should meet with regard to the taxation of internet transactions.

A. **TWO SIDES OF THE DEBATE**

1. **Pro-Sales Tax Collection**

   There are four primary arguments for imposing a sales tax on internet transactions. These arguments revolve around preferential treatment by bureaucrats toward internet retailers, unfair advantage of e-commerce against brick-and-mortar establishments, antiquated need to incubate and protect internet retailers, and suffering state economies needing additional revenue sources.

   Advocates of sales taxation on internet transactions argue that lobbying organizations and political pandering inappropriately discourage lawmakers from imposing sales taxes on e-commerce. Many on this side of the debate argue that this preferential treatment of e-commerce distorts economic decision-making because such treatment may lead consumers to choose e-commerce over traditional forms of commerce.

   Second, proponents for the sales tax argue that lack of such taxation increases the digital divide, favoring consumers with internet access and retailers in the digital space. They suggest that the only way to even the playing field is to tax both e-commerce and brick-and-mortar commerce transactions equally.

   Third, the argument that internet retailers are small and in need of protection to survive in the marketplace is no longer as viable as it was in the 1990s. Giants like Amazon, eBay, and Overstock.com account for significant portion of consumer purchases today. Consequently,

---


155. *Id.* at 3.

156. *Id.*

157. *Id.*

158. *Id.*


160. According to Internet Retailer’s Top 100 Guide, Amazon.com is number 1 in the industry. *Id.*
proponents for the internet tax argue that it is no longer necessary to shield such companies from a sales tax requirement to support growth.161

Finally, proponents for the sales tax highlight the struggling economy and the reality that states could use internet taxes as a source of revenue for state coffers.162 These individuals argue that as e-commerce continues to grow, the inability of states to collect taxes on consumer purchases will lead to serious negative economic consequences.163

2. Anti-Sales Tax Collection

Those against requiring internet retailers to collect sales tax from internet transactions assert that the tax is unconstitutional and unfair to e-commerce. The anti-sales taxation position is buttressed by three primary arguments.

First, sales tax opponents argue that an e-commerce sales tax will lead to loss of jobs by harming small businesses.164 Many of the Amazon affiliates were small businesses and, because of state “affiliate” statutes, Amazon simply cut ties with these individuals, negatively affecting their businesses.165 Furthermore, many small e-businesses have stated that they lack the capability to collect taxes on consumer purchases in numerous states, thus affecting their ability to do business in multiple areas.166

Second, those against internet sales taxation argue that legislation—like that at issue in the Amazon case—violates the Commerce Clause.167 Because Supreme Court precedent prohibits a state from requiring an out-of-state retailer to collect and remit a tax unless the retailer has a “substantial nexus” with the taxing state, and because this nexus is arguably lacking in the relationship between internet retailers and the taxing state, laws that impose a sales tax on internet transactions run afoul of the Commerce Clause.168

161. See Moore, supra note 159.
163. Id.
Third, those against the sales tax argue that its imposition is unfair to e-commerce because, even today, internet retailers need protection from taxes to thrive in the marketplace. 169 Opponents of the tax primarily rest their argument on the effect of such a tax on small businesses. 170 For example, over 17,000 small businesses in California submitted letters to their legislators to oppose laws that impose a tax collection obligation on internet retailers. 171 These small businesses primarily oppose this tax collection because many of these businesses earn revenue by placing advertisements from out-of-state retailers on their websites and, “[t]he bill states that if someone has advertisements on California Web sites, then there is a nexus in California, and the business needs to pay taxes on all revenue collected in the state.” 172 This portion of the argument primarily rests on the need to foster the growth of e-commerce as it continues to develop.

B. STATUTES AND PROPOSALS

The inconsistent laws and the complexity of state-by-state legislation have compelled lawmakers to attempt to create uniform tax acts to regulate e-commerce taxation. Most of the legislation attempts to address arguments from both sides of the debate. One example is the Streamlined Use Tax and Sales Agreement, enacted in 2002. 173 Lawmakers have drafted other national proposals, such as the Main Street Fairness Act and the Marketplace Fairness Act. 174 This Section will explain the details of each of these acts and how they attempt to mitigate the constitutional, logistical, and policy challenges facing sales tax collection on internet transactions.

1. Streamlined Sales and Use Tax Agreement

Congress adopted the Streamlined Sales and Use Tax Agreement (“SSUTA”) on November 12, 2002. 175 The fundamental purpose of the act was to “simplify and modernize sales and use tax administration in order to

169. Id.
170. Id.
171. Grimes, supra note 165.
172. Id.
175. Streamlined Sales and Use Tax Agreement, supra note 173.
substantially reduce the burden of tax compliance.” The Streamlined Sales Tax Governing Board, responsible for drafting the act, stated that the goal of [the] effort is to find solutions for the complexity in state sales tax systems that resulted in the U.S. Supreme Court holding (Bellas Hess v. Illionis and Quill Corp. v. North Dakota) that a state may not require a seller that does not have a physical presence in the state to collect tax on sales into that state.

The SSUTA sets standards by which states can create legislation that encourages internet retailers and other remote sellers to collect tax on sales to consumers living in the participating states. States participating in the SSUTA typically work within their own borders to pass legislation that follows the SSUTA and requires sales tax collection. Figure 2, infra, illustrates state participation in the SSUTA.

![Figure 2: Streamlined State Status as of August 8, 2011](image)

2. Main Street Fairness Act

Senator Dick Durbin sponsored the Main Street Fairness Act in August 2011. The Main Street Fairness Act attempts to create consistency and to

---

176. Id.
177. Id.
179. Id.
180. Poggi, supra note 152. This figure was re-created by the author.
level the competition for all businesses. The legislation would require states to “adhere to uniform product definitions, adopt uniform requirements for filing sales tax returns, administer both state and local sales tax collection through a single state office, and allow retailers to register through a centralized, one-stop multistate registration system.”182

The passing of the Main Street Fairness Act would impose a national tax standard but allow states abiding by the SSUTA to force internet sellers to collect tax based on their own state’s legislation.183 Traditional retailers such as Target, Wal-Mart, Best Buy, Home Depot, and Sears all support the Main Street Fairness Act.184 Most large retailers support the passage of a national tax, arguing that it would level the playing field between them and large internet retailers.185

Advocates for the Main Street Fairness Act argue that it would eliminate some of the negative, unintended consequences of nexus legislation such as New York’s “Amazon Tax.” For example, under the “Amazon Tax,” small businesses suffer a disproportionate amount of the adverse consequences, as Amazon has terminated its relationship with some of these businesses when states have passed these laws.186 This type of legislation has also harmed many brick-and-mortar businesses, as customers price shop in their stores and subsequently purchase the item online to save on sales tax.187 By allowing states to require all online retailers, not just those with affiliate programs or substantial nexus, to collect sales tax, the Main Street Fairness Act could purportedly eliminate these harms to small businesses and brick-and-mortar stores.188

Nevertheless, not everyone is pleased with the Main Street Fairness Act. Some internet businesses argue that it is brick-and-mortar retailers who have the competitive advantage. This argument follows from the observation that brick-and-mortar businesses have the tangible advantages of community

182. Id.
183. Id.
185. Id.
187. Gordon-Murname, supra note 162.
involvement, ease of returns, and customer satisfaction, as the customer can see and hold a product prior to purchase. Many small online businesses also oppose the Main Street Fairness Act. These businesses argue that the tax imposition will stifle growth on budding e-businesses, especially in the tough economic climate.

3. Marketplace Fairness Act

In response to some of the concerns about the Main Street Fairness Act, Senators Mike Enzi (Republican of Wyoming), Dick Durbin (Democrat of Illinois), Lamar Alexander (Republican of Tennessee), and Tim Johnson (Democrat of South Dakota) introduced the Marketplace Fairness Act, also referred to as the Enzi-Durbin-Alexander bill. If enacted, the Act will create a constitutional framework for collecting sales tax online; it will “allow states to require out of state retailers to collect sales tax at the time of purchase[,] . . . remit those taxes on behalf of customers, and . . . facilitate collection on behalf of third party sellers.”

The support for the bill is mixed. Amazon has expressed strong support for the bill’s passage, stating that it “strongly supports enactment of the Enzi-Durbin-Alexander bill and will work with Congress, retailers, and the states to get this bi-partisan legislation passed.” Amazon argues that, unlike other bills addressing national taxation that target its affiliate program, the Marketplace Fairness Act is simplified and applies broadly so as to not only target Amazon.

By contrast, eBay does not support the Marketplace Fairness Act. A trade group that represents the company, the Computer and Communications Industry Association, responded to the bill and those fighting against it. The Association stated that “it is extremely heartening to know that there are

192. Id.
those in the Senate, as well as the House, who are willing to stand up in support of innovation and entrepreneurship against retrogressive measures that would draft online vendors into service as remote sales tax collectors. Furthermore, Tod Cohen, the vice president for government relations at eBay, argued “it does not make sense to expand Internet sales tax burdens on small businesses at a time when we want entrepreneurs to create jobs and economic activity.”

In response, opponents to eBay’s position contend that the Marketplace Fairness Act exempts small e-businesses whose gross sales are less than $500,000 annually from sales tax collection. Such a provision takes into consideration the concerns expressed by small businesses that argue that a sales tax collection would disproportionately harm them.

C. THE POTENTIAL EFFECTS OF INTERNET TRANSACTIONS SALES TAX LEGISLATION ON CONSUMERS, RETAILERS, AND STATES

A sales tax on online purchases would affect consumers, internet retailers, and state governments in a variety of ways. Consumers would no longer have the option to avoid sales taxes by purchasing online. Consequently, those consumers who would have purchased online for this reason will likely resort to physical establishments, which would promote brick-and-mortar commerce. Internet retailers may lower prices to maintain an advantage over their brick-and-mortar competitors. The Act may also force internet retailers to develop the logistical systems necessary to collect sales taxes on all transactions. State governments may benefit from streamlined national proposals, as the sales tax collected from internet retailers could go into state budgets, potentially increasing collective state revenue by “23 billion a year in uncollected taxes.”

D. JUDICIAL RESPONSE TO INTERNET TRANSACTIONS SALES TAX LEGISLATION

The divergent nexus requirements detailed on a case-by-case basis reveal an already growing new problem: lack of predictability. Proposals like the

199. See Gordon-Murname, supra note 162.
Main Street Fairness Act, the Marketplace Fairness Act, and a pending decision in the New York Supreme Court reveal the effort legislators and courts are making to address the proper method of taxing internet transactions. Furthermore, courts will likely continue to decide questions of constitutionality and jurisdiction of internet transactions taxation. This Section will discuss how courts will likely decide when faced with state statutes and the pending national proposals.

1. **State Statutes**

Table 1, infra, provides a list of states that either proposed or enacted bills that would require internet retailers to collect and remit a sales tax. One likely concern for the Courts is whether or not such statutes contain an “affiliate” requirement. As noted by the New York Supreme Court in *Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 877 N.Y.S.2d 842, 850–51 (N.Y. Sup. Ct. 2010), such individualized tactics can possibly violate the Constitution. Another primary concern will be the “intentionality requirement,” which requires the plaintiff to “allege that [she] was intentionally treated differently from similarly situated individuals” under the Equal Protection Clause. If a court finds that a statute unjustly targets only one type of retailer, it will likely deem such a law unconstitutional as impeding interstate commerce. However, the plaintiff will typically bear this high burden of alleging the intentionality of the defendant. Furthermore, if Congress passes the Marketplace Fairness Act into law, most of these states will have to simplify their nexus legislation to conform with the law.


202. *Id.* at 851.

203. *See id.; see also* *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992).


Table 1: Selected/Implemented E-Commerce Tax Statutes by State

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
<th>AFFILIATE AS NEXUS?</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>AB 28 1x 28: Enacted.</td>
<td>Yes, included in the Democrats’ 2010 budget proposal and would impose an “affiliate nexus tax” on all purchases made online from out-of-state retailers</td>
</tr>
<tr>
<td></td>
<td>However, Governor Jerry Brown signed AB 155 into law, which repealed the affiliate nexus tax for one year from September 2011.</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>H.B. 10-1193: Enacted</td>
<td>Yes</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Senate Bill 239: Enacted</td>
<td>Yes, “affiliate nexus tax” on all purchases made online</td>
</tr>
<tr>
<td>Florida</td>
<td>Senate Bill 204: Died in committee on April 30, 2010</td>
<td>Not specifically, would have established Streamlined Sales Tax in Florida with the goal of extending the sales tax to out-of-state online purchases</td>
</tr>
<tr>
<td>Hawaii</td>
<td>H.B. 1405: Vetoed by governor</td>
<td>Yes, would have imposed “affiliate nexus” on all online purchases</td>
</tr>
<tr>
<td>Illinois</td>
<td>House Bill 3659: Enacted</td>
<td>Yes, imposes an “affiliate nexus tax” on all internet purchases</td>
</tr>
</tbody>
</table>

---

206. This table was created by the author.  
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Affiliate as Nexus?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>House Bill 250; In committee</td>
<td>Not specifically, would apply the sales tax to sales of digital goods and also conforms the state’s tax code to the Streamlined Sales Tax</td>
</tr>
<tr>
<td>Maryland</td>
<td>Senate Bill 824: Bill never made it out of committee</td>
<td>Not specifically, would apply the sales tax to all products purchased online from out-of-state retailers</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minnesota Senate omnibus tax bill, SF2074: Abandoned without legislative action</td>
<td>Yes</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Senate Bill 2927: Died in committee on February 2, 2010</td>
<td>Yes, would have enacted an “affiliate nexus tax” on all online sales made by in-state consumers and out-of-state retailers would have been required to collect the tax and remit it back to the state</td>
</tr>
<tr>
<td>New Mexico</td>
<td>House Bill 50: Tabled</td>
<td>Yes, would establish an “affiliate nexus tax” and would require out-of-state retailers to collect tax on state consumers and remit it to the state</td>
</tr>
<tr>
<td>Nevada</td>
<td>Governor has proposed a nexus tax in budget</td>
<td>Yes, proposal included “affiliate nexus tax” provision</td>
</tr>
<tr>
<td>North Carolina</td>
<td>HB 867: Enacted</td>
<td>Yes, “Click through nexus” sufficient for sales tax collection</td>
</tr>
</tbody>
</table>

213. S.B. 250, 111 Leg., (Ind. 2010).
215. S.F. No. 2074, 110 Leg., 2nd Engrossment (Minn. 2009).
216. S.B. 2927, 111 Leg., 54 Reg. Sess. (Miss. 2010).
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
<th>AFFILIATE AS Nexus?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island²²⁰</td>
<td>HB 7071: Pending committee</td>
<td>Not specifically, but would require online retailers and catalogue sellers to collect sales tax like other local businesses</td>
</tr>
<tr>
<td>Vermont²²¹</td>
<td>House Bill 661: In committee</td>
<td>Yes; proposal includes “affiliate nexus tax” provision</td>
</tr>
<tr>
<td>Virginia²²²</td>
<td>Senate Bill 660: Tabled in finance by voice vote in 2010.</td>
<td>Yes; language included affiliate tax provision</td>
</tr>
<tr>
<td>Washington²²³</td>
<td>House Bill 2620: Enacted</td>
<td>Not specifically, clarifies prior legislation that enacted a digital goods tax on consumers.</td>
</tr>
<tr>
<td>Wyoming²²⁴</td>
<td>House Bill 29: Enacted</td>
<td>Not specifically, enacts a digital goods tax on digital goods</td>
</tr>
</tbody>
</table>

2. Federal Proposals

Courts will likely look at the federal proposals and analyze whether they provide states with excessive power in a way that obstructs interstate commerce.²²⁵ The primary concern of the Supreme Court in National Bellas Hess and Quill Corp. was whether states had the power to enforce tax burdens on out-of-state retailers in a way that effectively prohibited interstate commerce and thus violated the Constitution.²²⁶ The Amazon case reveals how some courts are moving away from the strict physical presence requirement in Quill Corp. and questioning whether a streamlined proposal might be more appropriate.²²⁷

E. REQUIREMENTS INTERNET TRANSACTION TAXATION LEGISLATION SHOULD MEET

The legal landscape surrounding e-commerce taxation, both statutorily and within case law, is ambiguous and difficult to predict. This Note argues

---

²²¹ H. 661, 111 Leg., 2nd Gen. Assembly (Vt. 2010).
²²² S.B. 660, 111 Leg., 1st Gen. Assembly (Va. 2010).
²²³ H.B. 2620, 111 Leg., 1st Sess. (Wash. 2010).
²²⁴ H.B. 0029, 111 Leg., 2nd Sess. (Wyo. 2010).
²²⁶ Quill, 504 U.S. at 310.
²²⁷ See, e.g., Amazon, 877 N.Y.S.2d 842.
that lawmakers should aim to meet the following four requirements when drafting such legislation: (1) the legislation should clarify the tax landscape not only for internet retailers but for consumers as well;\textsuperscript{228} (2) the legislation must be constitutional;\textsuperscript{229} (3) the legislation should promote virtual business equally and foster e-commerce growth;\textsuperscript{230} and (4) the legislation should be forward thinking, addressing developments in technology and in e-commerce.\textsuperscript{231}

First, the law must be clear and consistent for consumers and businesses alike. As one commentator has explained:

> Anyone doing business in cyberspace needs to know what laws to obey, whether it be a question of what taxes are due and where, or what consumer protections apply to the sale of their products and services. . . . [A] legal infrastructure that can provide the requisite elements of certainty and predictability . . . will allow electronic commerce to flourish as efficiently as market forces dictate.\textsuperscript{232}

By having a clear standard, both consumers and businesses will know what to expect. This would create a predictable foundation upon which e-commerce would thrive. Predictability is a crucial point in both the pro-sales taxation and anti-sales taxation debates.\textsuperscript{233} Small and large businesses will benefit from the ability to incorporate tax issues into their accounting methods, and consumers will benefit from having a better understanding of when they must calculate taxes into their purchase prices.

The law may affect various types of businesses differently, but a consistent standard will promote efficiency the most effectively. For example, if each state had a different set of accounting laws and reporting requirements, a business would need to research each state’s laws when doing business there. Such a process, through both research and compliance, could require substantial efforts and resources from a business. Some small business might be indirectly prevented from participating because of such an impediment. This type of inconsistency is at play in the current online sales tax landscape. Instead, legislators should draft a clear requirement that could better manage expectations, facilitate planning for businesses and consumers, and thus help to ensure greater diversification in the market.

\textsuperscript{228} Dan Strempel, \textit{Who Has Jurisdiction over the Internet?}, 39 Fairfield County Bus. J., no. 41, 2000, at 10.

\textsuperscript{229} See, e.g., \textit{Quill}, 504 U.S. 298.

\textsuperscript{230} See Gordon-Murname, supra note 162.

\textsuperscript{231} See Groves, supra note 10, at 619.

\textsuperscript{232} Strempel, supra note 228, at 10.

\textsuperscript{233} Id.
Second, legislation around internet taxation must be constitutional. The Framers designated the Commerce Clause and the Due Process Clause as a means to promote the economy and sustain interstate commerce, and courts will likely address constitutional concerns after the enactment of the aforementioned statutes. The new law should be uniform so as to allow states access to the potential revenue sources while promoting virtual business across state lines.

Internet retailers will likely argue that sales tax collection on online transactions is unconstitutional. Internet retailers, however, seem analogous to mail-order catalogues. Since the laws that require mail-order catalogues to collect sales taxes are constitutional, legislators have the opportunity to create something similar and constitutional for internet retailers. Legislators, however, must take care that such a provision does not target only one particular type of business.

Third, the new law should not be overly burdensome on small retailers. Although some internet retailers are large enterprises, there are still several small e-business that are trying to survive. In order to maintain a diversified marketplace and greater options for consumers, it is necessary that more than a few large businesses dominate the space. As such, legislators should consider whether taxation would limit small businesses from adequately competing.

Fourth, the legislation should be timely. New developments should take into account how the e-commerce landscape will evolve by attempting to create legislation that anticipates further e-commerce evolution. Lawmakers should take into account other issues involved in online transactions—such as privacy or new business technology—and create legislation that is encompassing, but not outdated. E-commerce is essentially an evolution of the mail-order catalogue. Accordingly, lawmakers should analyze what new technological developments are and will be part of the consumer landscape. As technology evolves, so too does consumer mobility. Perhaps the physical nexus and state sales tax is no longer the proper means to determine tax responsibility. It is possible that lawmakers may need to create an entirely

---

234. See, e.g., Quill, 504 U.S. 298.
235. See Strempel, supra note 228, at 10.
237. See Quill, 504 U.S. 298.
238. See Grimes, supra note 165.
new type of tax that addresses online shopping and develops an equitable model to distribute tax revenue to states.

IV. CONCLUSION

A state’s ability to tax an out-of-state entity is not a new discussion. When analogized to mail-order catalogues, the question of how to tax e-commerce transactions is not a completely new discussion either. Initially, legislatures decided issues of taxation in a way to ensure that e-commerce continued to thrive and to protect budding internet retailers. Today, however, many internet retailers are large enterprises, and although the growth of e-commerce has changed many components of the discussion, some elements remain the same. Courts are still fundamentally concerned with the constitutionality of taxes. Although the physical nexus requirement has evolved, courts are primarily interested in whether an entity has “purposefully availed” itself of a particular state as a way to determine whether taxation requirements are proper. One particular case, Amazon v. New York Department of Taxation & Finance, lays out the constitutional debate and the elements a court considers when facing a taxation constitutionality question.

As the discussion evolves, legislators should consider legislation that clarifies the tax landscape, not only for internet retailers, but for consumers as well. Any new laws should promote virtual business equally and foster e-commerce growth. As such, new laws should be forward thinking, addressing developments in technology and e-commerce. As this discussion reveals, the controversy is not about whether to tax, but instead about how to tax. Accordingly, legislators should consider the multifaceted nature of the issue so as to impose tax requirements effectively and within constitutional limits.

---

240. Quill, 504 U.S. at 307.
241. See Amazon, 877 N.Y.S.2d 842.
242. See Strempel, supra note 228, at 10.
243. Id.