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Congress Should Not Authorize States to Expand Collection of Taxes on Internet and Mail Order Sales

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Abstract

The U.S. Supreme Court's landmark 1992 decision in Quill Corporation v. North Dakota *protects out-of-state businesses in the Internet era from overreaching by revenue-hungry states. The Court's decision prevents a state from forcing an out-of-state business to serve as the state's sales tax collector if the business has no physical presence in the state and simply takes sales orders by Internet, catalog, or telephone. Congress has under consideration legislation (S. 1832) to overturn the* Quill Corporation *decision. To support a strong national economy and encourage fiscal responsibility among the states, Congress should reject the legislation.*

This paper, in its entirety, can be found at **http://report.heritage.org/bg2676**

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Congress has under consideration legislation (S. 1832 of the 112th Congress) to allow states to require out-of-state businesses that have no connection to the state, other than taking orders over the Internet, by mail, or by telephone from in-state customers and sending the ordered goods by common carrier or U.S. mail, to become sales tax collection agents for the states. Enactment of such legislation would increase the amount of tax dollars millions of Americans pay, encourage states to increase the size and scope of their governments, favor some states over others in granting federal authority, and discourage free-market competition in interstate commerce. Accordingly, Congress should not enact the legislation.

The legislation overrules the U.S. Supreme Court's decision in *Quill Corporation v. North Dakota*.[1] The *Quill* decision protects out-of-state businesses that have no facilities or personnel in a state, but that receive orders by Internet, mail order catalog, or telephone from in-state customers (called "remote sales"), from the state's desire to force the out-of-state businesses to serve as tax collectors.

Many state governments have budgetary and political interests

- Current law protects out-of-state businesses that take orders by Internet, mail order catalog, or telephone and that have no physical presence in the state from a state government that wants to force them to serve as the state's sales tax collectors, but Congress is considering legislation (S. 1832) to override that protection.
- Under S. 1832, state governments would take more tax dollars from millions of Americans, further intrude into free-market competition in interstate commerce, and increase the propensity for more government spending.
- Hobbling out-of-state businesses that sell through the Internet or mail order catalogs does not help the national economy.
- To avoid weakening the national economy, Congress should preserve existing protections for out-of-state businesses from state governments that want to reach outside their states for new revenue for governments to spend.
- Congress should therefore reject S. 1832.

in maximizing the revenues they obtain from out-of-state businesses through sales and use taxes.[2] Many in-state businesses have an economic interest in increasing the costs of doing business for their out-of-state competitors to gain a marketplace advantage.

Thus, it is unsurprising that state governments and their national associations,[3] and brick-and-mortar in-state retailers and their trade associations,[4] have endorsed enactment of federal legislation to override the *Quill* decision and allow state governments to require out-of-state businesses to collect and remit state sales and use taxes on remote sales. Associations representing companies that conduct or facilitate remote selling that is protected under the *Quill* decision from state compulsion to collect and remit sales taxes oppose the legislation.[5]

CONGRESS SHOULD REJECT S. 1832 SO THAT IT DOES NOT DISCOURAGE SPENDING RESTRAINT IN THE STATES AND FREE ENTERPRISE IN THE ECONOMY.

In enacting S. 1832, Congress would use its power under the Commerce Clause to regulate interstate commerce, and perhaps its power under the Compact Clause to consent to compacts or agreements among the states, to override the *Quill* decision and allow state governments to increase revenues by requiring out-of-state sellers to collect state sales or use taxes on remote sales.[6] Congress should reject S. 1832 so that it does not discourage spending restraint in the states and free enterprise in the economy.

Quill Decision Protected Out-of-State Sellers from Undue State Burdens on Interstate Commerce

In 1992, the U.S. Supreme Court faced the *Quill* case involving a North Dakota statute that imposed a tax on property purchased for storage, use, or consumption in North Dakota and required retailers to collect the tax from consumers and remit the revenue to North Dakota. North Dakota regulations implementing the statute made clear that retailers covered by the statute included those who engaged in "regular or systematic solicitation of a consumer market in this state."

Quill Corporation ("Quill") was an office supply business incorporated in Delaware, with offices and warehouses in Illinois, California, and Georgia but with no employees, sales representatives, or significant property in North Dakota. Quill solicited sales from North Dakota residents by mail order catalog, advertisements and flyers, and telephone calls. Quill sent the purchased products to customers in North Dakota by U.S. mail or common carrier. Quill had about 3,000 customers in North Dakota and about $1 million in annual sales to them. Quill did not collect and remit the North Dakota use tax on its sales to North Dakota residents. North Dakota sued Quill in state courts for the taxes not remitted, and the case ultimately reached the U.S. Supreme Court.

Quill maintained that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution ("nor shall any State deprive any person of…property, without due process of law") and the Commerce Clause ("The Congress shall have Power… To regulate Commerce…among the several States") barred North Dakota from imposing the use tax on property purchased from Quill for storage, use, or consumption in North Dakota and from requiring Quill to collect the use tax from customers and remit the collections to North Dakota.

In its decision, the U.S. Supreme Court determined that "there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State" and agreed with the "conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill."[7] However, the Court held that the Commerce Clause barred North Dakota from enforcing the state's use tax against Quill.

In discussing the impact of the Commerce Clause with respect to state taxes, the Court noted that "we will sustain a tax against a Commerce Clause challenge so long as the 'tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'"[8] The Court noted with respect to the first requirement that "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."[9]

The Supreme Court adopted in *Quill* a bright-line rule that the

"negative" or "dormant" aspect of the Commerce Clause, which protects against imposition by a state of unreasonable burdens on interstate commerce even in the absence of congressional exercise of power under the Commerce Clause, does not allow North Dakota to require collection and remittance of the state use tax revenue by a corporation whose only connection with customers in the state is by common carrier or U.S. mail.[10] The Court noted, however, that Congress remains free, by an affirmative exercise of its power under the Commerce Clause, to change that rule.[11]

State supreme courts have generally construed the *Quill* decision narrowly and state taxing power broadly,[12] but states remain bound by the Commerce Clause holding in *Quill* that a state cannot require collection and remittance of a sales or use tax on remote sales by an out-of-state seller who has no connection to the state other than by common carrier or U.S. mail.[13] Thus, the holding in *Quill* continues to protect an out-of-state company that has no facilities, personnel, or other connection to a state, other than a common carrier or the U.S. mail, from a requirement to collect and remit the state's sales or use tax on remote sales. Congress, however, has the authority under the Commerce Clause to take away that protection from the out-of-state businesses, as S. 1832 would do.

Overriding *Quill* Would Cause American Businesses and Individuals to Pay Much More to States in Taxes

Enactment of S. 1832 will increase the amount of tax dollars Americans pay to state governments. Although proponents claim that the legislation causes no "tax increase" because state laws imposing sales and use taxes are already on the statute books and S. 1832 does not itself change those state statutes, there is no denying that businesses and individuals will pay more in taxes out of their pockets as a result of enactment of S. 1832. Indeed, that increase in what remote sellers will collect from businesses and individuals and remit to the state in tax revenues is precisely why many state governments want Congress to enact S. 1832.

ENACTMENT OF S. 1832 WILL INCREASE THE AMOUNT OF TAX DOLLARS AMERICANS PAY TO STATE GOVERNMENTS.

The National Conference of State Legislatures (NCSL) has noted with respect to S. 1832 that "[t]here will be some who claim that this is a new tax" and that "[t]his legislation will not require any state to levy a sales tax on any product or means of buying a product." Both claims miss the point. As a direct result of enactment of S. 1832, which allows states to require out-of-state remote sellers to collect state sales and use taxes that the *Quill* case currently prevents states from requiring, businesses and individuals will pay much more money to states in sales taxes. Indeed, the NCSL states that, "[a]t a time when states continue to face severe budget gaps—states closed shortfalls totaling $72 billion leading into the FY 2012 budget process—it is essential states be allowed to collect the revenue generated by uncollected sales taxes," noting further that "[i]n 2012, states will collectively lose an estimated $23.3 billion in uncollected sales taxes from out-of-state sales, with more than $11.3 billion alone from electronic commerce transactions...."[14]

The NCSL could not have made clearer that its objective in asking Congress to enact S. 1832 is to change federal law to authorize states to force remote-selling businesses and individuals to pay more money as sales and use taxes to the states, which want more revenue.

Overriding *Quill* Would Give States an Incentive to Increase Revenues Instead of Cutting the Size, Scope, and Cost of State Governments

Although many state governments have faced difficulty with their budgets, especially in a weak economy, slow improvement of state finances has begun.[15] As a general proposition, states should focus on cutting their spending rather than seeking more money in taxes as the means to balance their budgets. Especially in a weak economy, state governments should generally pursue pro-growth, job-creating tax policies rather than taking more money out of the private economy in sales tax collection.

Whether the NCSL-cited estimate of $11.3 billion in additional money that would be paid to states in sales taxes on electronic remote sales is precise or not, it is clear that businesses and individuals will pay more money to states in such taxes as a result of enactment of S. 1832.[16] The federal government should not enact legislation such as S. 1832, whose principal purpose is to allow states to reach out of the state and take in yet more tax money from businesses and individuals.

Enactment of S. 1832 Would Favor Some States over Others

The proposed federal legislation fails to respect the traditional roles of the states as equal sovereign actors in the federal system and instead has Congress, using its power under the Commerce Clause,

favoring some states over others. The federal legislation has the effect of dividing the states into three classes and gives different federally granted, tax-related authority to the three classes, with some states receiving more than others.

The first class consists of a minority of states, currently numbering 21, that have joined as full members of the multi-state Streamlined Sales and Use Tax Agreement (SSUTA or Agreement), administered by an organization called the Streamlined Sales Tax Governing Board, Inc.[17] The laudable stated purpose of the SSUTA is "to simplify and modernize sales and use tax administration in the member states in order to substantially reduce the burden of tax compliance."[18] Article VI of the SSUTA, however, goes beyond the stated tax-simplification purpose of the agreement and encourages enactment of federal legislation to overrule *Quill* and authorize states to collect sales or use taxes on "remote sales."

The SSUTA defines "Remote sales" as "sales into a state in which the seller would not legally be required to collect sales or use tax, but for the ability of that state to require such 'remote seller' to collect sales or use tax under federal authority," the latter referring to the federal legislation under the Commerce Clause to overrule the *Quill* decision that the SSUTA member states seek.[19] The first class of states gets federal authority to collect its sales or use tax on remote sales under subsection 3(a) of S. 1832, which provides that "Each Member State under the Streamlined Sales and Use Tax Agreement is authorized to require all sellers not qualifying for a small seller exception to collect and remit sales and use taxes with respect to remote sales sourced to that Member State pursuant to the provisions of the Streamlined Sales and Use Tax Agreement."

ESPECIALLY IN A WEAK ECONOMY, STATE GOVERNMENTS SHOULD GENERALLY PURSUE PRO-GROWTH, JOB-CREATING TAX POLICIES RATHER THAN TAKING MORE MONEY OUT OF THE PRIVATE ECONOMY IN SALES TAX COLLECTION.

The second class of states consists of states that are not full members of the SSUTA but that adopt state laws that impose SSUTA-like "minimum simplification requirements." Subsection 3(b) of S. 1832 provides that "[a] State that is not a Member State under the Streamlined Sales and Use Tax Agreement is authorized to require all sellers not qualifying for the small seller exception to collect and remit sales and use taxes with respect to remote sales sourced to that State, but only if the State adopts and implements minimum simplification requirements." Under subsection 3(b), the "minimum simplification requirements" are:

- A "single State-level agency to administer all sales and use tax laws";
- A "single audit for all State and local taxing jurisdictions within that State";
- A "single sales and use tax return";
- A "uniform sales and use tax base among the State and the local taxing jurisdictions within the State";
- A requirement that "remote sellers...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"; and
- Various requirements concerning software, certification of service providers remote sellers can use to remit the taxes collected, relief from liability for mistakes not caused by the remote sellers, and 30-day notice of local tax rate changes.

The "minimum simplification requirements" parallel to some extent SSUTA requirements.[20]

The third class of states under the proposed federal legislation are those that neither wish to join the SSUTA nor wish to adopt the SSUTA-like minimum simplification requirements. Examples of states likely to fall into the third class are Delaware, Montana, New Hampshire, and Oregon, which do not levy general sales taxes. If S. 1832 were enacted, other states could collect sales taxes on remote sales by remote sellers located in those four states even though those four states do not impose general sales taxes on anyone, either in-state or out-of-state. As a result, any remote-seller businesses in Delaware, Montana, New Hampshire, and Oregon, whose state legislatures have made conscious decisions not to impose a general state sales tax, would nevertheless have to collect and remit such sales taxes to other states.

Under S. 1832, the first class of states and the second class of states get federal authority, the *Quill* decision notwithstanding, to require remote sellers—that is, out-of-state

businesses that obtain sales in a state by Internet, mail order, or telephone without having any facilities or personnel in the state—to collect and remit the state's sales or use tax on remote sales. The first class of states—that is, the SSUTA full members—get greater flexibility, however, than the second class of states. States in the first class can, acting in concert through the SSUTA governing board, establish their own alternative small seller exceptions, but the second class of states must follow the small seller exception specified in the federal legislation.[21] Also, states in the first class can, again acting in concert through the SSUTA governing board, change their rules with respect to "sourcing" remote sales (that is, deciding where to treat the sale as having occurred, such as at the point of a product's origin or at its destination, and therefore what state will tax the sale), whereas the other states must follow the sourcing rules set forth in S. 1832.[22]

The third class of states remains covered by the *Quill* decision unless they enact the "minimum simplification requirements" to enter the second class of states or decide to become full members of the SSUTA to enter the first class of states. Clearly, enactment of S. 1832 would pressure the current majority of states that have stayed out of the SSUTA to join the minority of states that are members of the SSUTA.

Enactment of S. 1832 to override *Quill*, authorize state governments to require out-of-state remote sellers to collect sales taxes, and allow SSUTA full member states to have the power to change their sourcing rules from time to time, creates the potential for multiple taxation of the remote sellers in some circumstances, with the same sales transactions taxed by the state of the customer who used the Internet to place the order and the state in which the remote seller is located. Current law prohibits such multiple taxation, but that prohibition expires on November 1, 2014.[23]

AS THE U.S. SUPREME COURT HAS STATED, "[P]RESERVATION OF LOCAL INDUSTRY BY PROTECTING IT FROM THE RIGORS OF INTERSTATE COMPETITION IS THE HALLMARK OF THE ECONOMIC PROTECTIONISM THAT THE COMMERCE CLAUSE PROHIBITS."

Enactment of S. 1832 Would Discourage Free-Market Competition

The National Conference of State Legislatures has said with respect to state sales taxes that "[a]llowing some remote sellers to avoid collecting this tax is unfair to the main street merchants that make up the lifeblood of our local communities."[24] The SSUTA member states complain that "[a]t a time when Main Street retailers face enormous competitive challenges it is appropriate for Congress to end this unfair treatment."[25] The Federation of Tax Administrators believes "the current system disadvantages 'bricks and mortar' stores to the advantage of out-of-state businesses and this Act will help improve business activities in our states and the employment these in-state businesses generate."[26]

From these statements, it appears that these organizations seek enactment of S. 1832 so that states can prefer in-state businesses over out-of-state businesses in the kind of anti-competitive economic discrimination the U.S. Constitution was in part adopted to prevent. As the U.S. Supreme Court has stated, "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."[27]

The Constitution of the United States has set the legal baseline—the level playing field—around which the American free-market economy has built itself. The Constitution, as reflected in the *Quill* decision, is the source of the present arrangement regarding collection of state sales and use taxes by remote sellers. Ever since the Supreme Court decided *Quill* in 1992, American businesses have made millions of business decisions in the competitive marketplace based in part on settled expectations regarding state taxation affecting their sales transactions. The states and businesses advocating S. 1832 seek to change the current, constitutionally prescribed playing field. They seek to use governmental power to intervene in the economy to help in-state, store-based businesses by imposing a new tax-collection burden on out-of-state competitors who sell over the Internet, through mail order catalogs, or by telephone. Free-market principles generally discourage such government intervention in the economy to pick winners and losers based on legislative policy preferences.

The Constitution has not set up a system that is "unfair" to "Main Street" or "brick and mortar" retailers. The issue is not "taxable" in-state businesses selling from stores competing with "untaxable" out-of-state businesses selling through the Internet. Both types of businesses are taxable through some form of tax in some state (or in many states).

Every sale of goods, whether to a business consumer or an individual consumer, has an order ("I'll take it"), payment ("Cash, check, debit,

or credit?"), and a delivery ("Here you go; have a nice day"). If a consumer chooses to go to a store to buy a product, the ordering and delivery typically occur in the seller's physical facility (the store) in a state. If the consumer chooses to go online to buy the product, the ordering occurs online without the involvement of a physical facility of the seller (i.e., the order does not occur in a store), but the sale and delivery require that the seller (directly or through agents) have a physical facility (for example, a warehouse) in some state from which the seller sends goods via common carrier or U.S. mail to the consumer who ordered them online.

Thus, every sale of goods involves at least one physical facility located in one state or another, which provides a basis for taxation by that state. No one has become completely "untaxable."

A consumer's preference between two methods of purchase, such as buying in a store or buying over the Internet, on a given occasion may involve consumer thoughts about price, quality, commercial loyalty, geographical convenience, temporal convenience, perceived pleasantness of the sales method chosen, other reasons, or not much thought at all. A consumer's choice between buying in a store or buying online does not necessarily mean a conscious choice between an in-state and an out-of-state seller, as consumers rarely know the state in which an Internet operation is located. The consumer's choice between buying in a store or buying online does not necessarily even mean a choice between two different sellers. Many companies sell both from stores and through the Internet.[28] Consumers should be free to choose how and where they will buy goods they seek without interference from a state trying to steer that purchase to a local store.

In the long run, the national economy as a whole benefits from allowing consumers to choose freely what they wish to buy, of whatever quality they wish, at whatever prices they choose to pay, and from whatever seller they wish, whether in the same state as the consumer or not. Intervention by the federal government and the states in the consumers' choices by enactment and implementation of S. 1832 would increase the revenues of states, but hobbling out-of-state businesses that sell through the Internet or mail order catalogs does not help the national economy.

Conclusion

Congress should not override the Supreme Court's decision in *Quill Corporation v. North Dakota* that the Commerce Clause prohibits a state from requiring out-of-state sellers over the Internet, by catalog, or by telephone that have no connection to a state other than a common carrier or the U.S. mail to collect and remit the state's sales and use taxes. Enactment of S. 1832 would simply encourage state governments to take more money from taxpayers and spend it instead of getting the size, scope, and cost of state governments under control.

The independent decisions of millions of consumers in the free marketplace should decide the appropriate allocation of sales between the store-based model of selling and the non-store-based model of selling, such as Internet sales, and between sellers who are local and sellers who are elsewhere in America. To support a stronger national economy, Congress should reject economic protectionism for local businesses, reject state government bloat, and reject S. 1832.

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End Notes

1. *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).
2. A useful definition of "sales or use tax" is "a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service." Section 1105(6)(C) of the Internet Tax Freedom Act (47 U.S.C. 151 note).
3. See letters, all dated November 9, 2011, from the National Conference of State Legislatures, Streamlined Sales Tax Governing Board, Inc., National Association of Counties, Federation of Tax Administrators, and heads of the National League of Cities, United States Conference of Mayors, and Government Finance Officers Association to Senators Durbin (D–IL), Alexander (R–TN), Enzi (R–WY), and Johnson (D–SD), available as inserted in the *Congressional Record* at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
4. See letter dated November 7, 2011, from the International Council of Shopping Centers, Inc., to Senators Alexander, Durbin, and Enzi; letter dated November 8, 2011, from the National Retail Federation to Senators Durbin, Alexander, Enzi, and Johnson; and letter dated November 9, 2011, from the Retail Industry Leaders Association to Senator Enzi, available as inserted in the *Congressional Record* at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
5. See, for example, Direct Marketing Association, statement of November 9, 2011, available at *http://www.the-dma.org/cgi/disppressrelease?article=1521*; Computer & Communications Industry Association, statement of November 9, 2011, available at *http://www.ccianet.org/index.asp?sid=5&artid=270&evtflg=False*.
6. The Commerce Clause of the Constitution (art. I, sec. 8) provides that "The Congress shall have Power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…." The Compact Clause (art. I, sec. 10) provides that "No State shall, without the Consent of Congress… enter into any Agreement or Compact with another State…." The Compact Clause "does not require congressional approval of every agreement between or among States." *Star Scientific, Inc. v. Beales*, 278 F. 3d 339, 359 (4th Cir. 2002), *cert. denied sub nomine Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002). In *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, 468 (1978), the U.S. Supreme Court adopted the standard, first stated in *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893), that interstate agreements requiring congressional consent are those "which may encroach upon or interfere with the just supremacy of the United States." Courts might find that the Streamlined Sales and Use Tax Agreement (SSUTA), to which S. 1832 refers, does not encroach upon or interfere with just federal supremacy and therefore does not require congressional approval under the Compact Clause.
7. *Quill Corporation*, 504 U.S. at 308.
8. *Quill Corporation*, 504 U.S. at 311, quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).
9. *Quill Corporation*, 504 U.S. at 312. James Madison, writing near the end of his life, looked back and identified state tax discrimination against interstate commerce as one of the sources of dissatisfaction with the Articles of Confederation: "The other source of dissatisfaction was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on. New Jersey, placed between Phila & N. York, was likened to a cask tapped at both ends; and N. Carolina, between Virga & S. Carolina to a patient bleeding at both arms. The Articles of Confederation provided no remedy for the complaint: which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old." James Madison, *Debates in the Federal Convention of 1787*, "Preface to Debates in the Convention: A Sketch Never Finished Nor Applied" (New York: Prometheus Books, 1987), p. 5, also available at *http://www.teachingamericanhistory.org/convention/debates/preface.html*.
10. The Court has stated succinctly the nature of the "dormant" or "negative" Commerce Clause: "The Commerce Clause provides that 'Congress shall have Power…[t]o regulate Commerce with foreign Nations, and among the several States.' Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007) (citations omitted). The Court has made clear that "[p]reservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994). The interpretation that the clause imposes an implicit restraint on states, although long-standing, is not without critics. Justice Thomas has said that "[t]he negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice…. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence." *United Haulers Association*, 550 U.S. 349 (Thomas, J., dissenting) (citations omitted). Justice Scalia has said that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate Commerce." *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part).
11. *Quill Corporation*, 504 U.S. at 318.
12. See, for example, *Lamtec Corporation v. Department of Revenue*, 170 Wash. 2d 838, 851 (Washington 2011)(en banc), *cert. denied*, 132 S. Ct. 95 (2011) (business and occupation tax) ("Although Lamtec did not have a permanent presence within the state, by regularly sending sales representatives into the state to maintain its market, Lamtec satisfied the nexus requirement. We…hold that the Department had authority under the commerce clause to impose a B & O tax."); *KFC Corporation v. Iowa Department of Revenue*, 792 N.W. 2d 308, 328 (Iowa 2010), *cert. denied* 132 S. Ct. 97 (2011) ("…we hold that a physical presence is not required under the dormant Commerce Clause of the United States Constitution in order for the Iowa legislature to impose an income tax on revenue earned by an out-of-state corporation arising from the use of its intangibles by franchisees located within the State of Iowa. We hold that, by licensing franchisees within Iowa, KFC has received the benefit of an orderly society within the state and, as a result, is subject to the payment of income taxes that otherwise meet the requirements of the dormant Commerce Clause."); *Truck Renting and Leasing Association v. Commissioner of Revenue*, 433 Mass. 733 (2001) (state corporate excise tax applies because Commerce Clause nexus exists when out-of-state truck-leasing company rents out vehicles, knowing that they will enter Massachusetts, and they do, in fact, enter Massachusetts); *Tax Commissioner of the State of West Virginia v. MBNA America Bank*, N.A., 220 W. Va. 163, 171 (2007), *cert. denied sub nomine FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 551 U.S. 1141 (2007) ("…we now hold that the United

States Supreme Court's determination in *Quill Corp v. North Dakota*, 504 U.S. 298 (1992), that an entity's physical presence in a state is required to meet the 'substantial nexus' prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), applies only to state sales and use taxes and not to state business franchise and corporation net income taxes." (parallel citations omitted)).

13. As a practical matter, many of the decisions construing or applying the U.S. Supreme Court's *Quill* decision occur in the courts of the several states, because federal law (28 U.S.C. 1341) prevents federal courts from issuing injunctive remedies against state tax collection in many cases. The law states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Decisions of state supreme courts construing or applying the *Quill* decision may reach the U.S. Supreme Court under the statute that permits the Court to review by writ of certiorari final decisions of the highest courts of a state in which a decision could be had in a case in which "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. 1257(a).
14. Letter dated November 9, 2011, from the National Conference of State Legislatures to Senators Durbin, Alexander, Enzi, and Johnson, available as inserted in the *Congressional Record* at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
15. See "The Fiscal Survey of States: Fall 2011, Executive Summary," National Governors Association and National Association of State Budget Officers ("The slow improvement in state finances began in 2011 as highlighted by 38 states reporting that they had higher general fund spending in fiscal 2011 compared to fiscal 2010 and continued with 43 states enacting fiscal 2012 budgets with increasing general fund expenditures as compared to fiscal 2011. However, 29 states still have lower general fund spending in fiscal 2012 compared to the pre-recession levels of fiscal 2008, illustrating how significantly state fiscal conditions were affected by the recession."), available at *http://www.nasbo.org/sites/default/files/2011%20Fall%20Fiscal%20Survey%20of%20States.pdf*.
16. For the details of the NCSL-cited estimate, see Donald Bruce, William F. Fox, and LeAnn Luna, "State and Local Government Sales Tax Revenue Losses from Electronic Commerce," The University of Tennessee (April 13, 2009), available at *http://cber.bus.utk.edu/ecomm/ecom0409.pdf*. Note that inclusion in the study title of the phrase "Tax Revenue Losses" reveals a certain mindset about the issue: The inability to have a remote seller collect state sales tax on remote sales is a "loss" of revenue to the state only if one assumes that the state is entitled in the first place to force a remote seller to collect and remit such money. But the *Quill* decision holds plainly that a state is prohibited by the Commerce Clause of the U.S. Constitution from forcing the remote seller to do so (absent enactment of federal legislation authorizing it). Thus, the question involved in considering S. 1832 is not whether a state is "losing" revenue absent federal legislation, but rather whether Congress should pass such legislation to allow the state to "gain" revenue that the Constitution, as construed in *Quill*, does not now allow the state to require the remote seller to provide. Note also that the University of Tennessee's study bears on its cover page the note that "the authors are grateful to [name of the Executive Director] of the Streamlined States Governing Board."
17. Streamlined Sales and Use Tax Agreement, adopted November 12, 2002, and amended through December 19, 2011, available at *http://www.streamlinedsalestax.org/index.php?page=modules*. The Streamlined Sales Tax Governing Board, Inc., headquartered in Nashville, Tennessee, lists 21 states as members (Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming) and three states as associate members (Ohio, Tennessee, and Utah). Section 801.1 of the SSUTA defines a "full member" as "a state that has been found in compliance pursuant to Sections 804 and 805 and the changes to their statutes, rules, regulations or other authorities necessary to bring them into compliance are in effect." Section 801.3 of the SSUTA defines "associate state" as "a state that has achieved substantial compliance with the terms of the Agreement taken as a whole, but not necessarily each provision as required by section 805, measured qualitatively." Section 804 of the SSUTA provides that the "governing board shall determine if a petitioning state is in compliance with the Agreement" and that "[a] three-fourths vote of the entire governing board is required to approve a state's petition for membership." Section 805 states in full: "A state is in compliance with the Agreement if the effect of the state's laws, rules, regulations, and policies is substantially compliant with each of the requirements set forth in the Agreement." The Internet website address of the corporation known as the Streamlined Sales Tax Governing Board, Inc., is *http://www.streamlinedsalestax.org*. Under section 3(a) of S. 1832 and the definition of "Member State" in section 6(3) of the legislation, the federal authority granted by section 3(a) extends only to full members of the SSUTA and not to associate states. For an early discussion of concerns with the idea of a state sales tax cartel, see "Why Congress Should Not Authorize a State Sales Tax Cartel," The Heritage Foundation, *Executive Memorandum* No. 778 (September 26, 2001), available at *http://s3.amazonaws.com/thf_media/2001/pdf/em778.pdf*.
18. SSUTA, section 102.
19. SSUTA, section 605. The definition of "Remote sales" applies to sections 606 to 613 in Article VI of the SSUTA.
20. See, for example, SSUTA sections 301 (single agency), 302 (uniform tax base), and 318 (single tax return).
21. Subsection 3(a) of S. 1832 excludes SSUTA member states from collecting sales and use taxes under the legislation from sellers "not qualifying for *a* small seller exception." Subsection 3(b) excludes SSUTA non-member states from such collection from sellers "not qualifying for *the* small seller exception" (italics added to emphasize the distinction between the articles "a" and "the"). Courts assume that the use of different terms within related provisions in a statute generally implies that different meanings were intended. See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") Subsection 3(c) of the bill, captioned "SMALL SELLER EXCEPTION," protects small businesses from having to collect state sales and use taxes on remote sales if they do not have "gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding $500,000." The most reasonable construction of the phrase "*the* small seller exception" in subsection 3(b) is that it refers to the small seller exception set forth in subsection 3(c). In contrast, the most reasonable construction of the phrase "*a* small seller exception" in subsection 3(a) is that it refers to the small seller exception set forth in subsection 3(c) or a present or potential alternative small seller exception. The alternative small seller exception may be that contemplated by section 610 of the SSUTA. Section 610 of the SSUTA states that, taking various factors into account, the SSUTA governing board "shall develop a sales volume threshold for determining which small 'remote sellers' qualify for an exemption from the requirement to collect sales or use taxes on 'remote sales'." Section 610 of the SSUTA gives a further instruction that "[t]he exemption threshold shall be set at a relatively low level and over time adjusted downward so that only sellers making isolated or occasional sales are excluded from the collection requirement." In light of subsections 3(a) and 3(b)

of S. 1832 and section 610 of the SSUTA, courts may well construe the reference to "*a* small seller exception" in subsection 3(a) as indicating that the SSUTA member states could, if they wish, adopt (through concerted action in a vote of the SSUTA governing board) a small seller exception of whatever sales volume threshold and follow that state law–based small seller exception instead of following the small seller exception in subsection 3(a) of S. 1832. Under that construction of S. 1832, SSUTA member states would be free under subsection 3(a), by acting in concert in a vote of the SSUTA governing board, to require remote sellers with total U.S. remote sales gross annual receipts under $500,000 to collect and remit state sales and use taxes, but SSUTA non-member states could not do so under subsection 3(b).

22. Subsection 3(a) of S. 1832 grants authority to require sellers (excluding those within the small seller exception) to collect and remit sales and use taxes with respect to remote sales "sourced to that Member State pursuant to the provisions of the Streamlined Sales and Use Tax Agreement." Then subsection 6(8) of the bill repeats that "[a] State granted authority under section 3(a) shall comply with the sourcing provisions of the Streamlined Sales and Use Tax Agreement." Lastly, section 6(10) defines the term "Streamlined Sales and Use Tax Agreement" to mean "the multi-State agreement with that title adopted on November 12, 2002, as in effect on the date of enactment of this Act and as further amended from time to time." Subsections 6(8) and 6(10), including the phrase "as further amended from time to time," read with the text of section 3(a), allow SSUTA member states, acting in concert through a vote of the SSUTA governing board, to change sourcing rules applicable to them under S. 1832 by making changes (without any involvement by Congress or any of the rest of the federal government) in the SSUTA sourcing rules. In contrast, states in the second class are bound by the unchanging sourcing rules set forth in section 6(8) of S. 1832. Courts might not uphold the congressional delegation to the private party Streamlined Sales Tax Governing Board, Inc., which by three-fourths vote has the power to amend the SSUTA under section 901 of the SSUTA, of legislative power to change the sourcing rules applicable under federal law (S. 1832 if enacted) for SSUTA member states. The ability of the Streamlined Sales Tax Governing Board, Inc., to change from time to time the federal law rule on sourcing applicable to SSUTA member states might be construed as creating federal law without following the constitutional requirements of bicameral passage by the Houses of Congress and presentment to the President required for the making of a federal law. For an early recommendation on sourcing, see "After the Net Tax Commission: The Gregg–Kohl Nexus Solution," The Heritage Foundation, *Backgrounder* No. 1363 (April 25, 2000) ("…by making it clear that extraterritorial taxation would be prohibited in virtually all cases, S. 2401 would encourage state and local governments to adopt an 'origin-based' tax methodology under which they would levy sales taxes only on companies whose principal place of business resided within their taxing jurisdiction. Sourcing all sales to the location of origin instead of the destination of sale would enable state and local governments to impose taxes on Internet (and catalog) sales in the same way they impose them on traditional Main Street retail sales."), available at *http://www.heritage.org/research/reports/2000/04/after-the-net-tax-commission?query=After+the+Net+Tax+Commission:+The+Gregg-Kohl+Nexus+Solution*.
23. Section 1101 of the Internet Freedom Tax Act (47 U.S.C. 151 note) provides that "[n]o State or political subdivision thereof shall impose any of the following taxes during the period beginning November 1, 2003 and ending November 1, 2014: …(2) Multiple or discriminatory taxes on electronic commerce." Section 1105 of the Act defines "discriminatory tax" and "multiple tax" for purposes of the Act. A "multiple tax" is "any tax that is imposed by one State…. . . on the same . . . electronic commerce that is also subject to another tax imposed by another State . . . , without a credit . . . for taxes paid in other jurisdictions."
24. See letter dated November 9, 2011, from National Conference of State Legislatures to Senators Durbin, Alexander, Enzi, and Johnson, available as inserted in the Congressional Record at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
25. See letter dated November 9, 2011, from Streamlined Sales Tax Governing Board, Inc. to Senators Durbin, Alexander, Enzi, and Johnson, available as inserted in the Congressional Record at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
26. See letter dated November 9, 2011, from Federation of Tax Administrators to Senators Durbin, Alexander, Enzi, and Johnson, available as inserted in the *Congressional Record* at *http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/~r112MkIcsa*.
27. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994).
28. For example, the well-known retailers Wal-Mart Stores, Inc., and Target Corporation sell from stores in nearly every state (all states in the case of Wal-Mart as of December 31, 2010, and all but Vermont in the case of Target Corporation as of January 29, 2011) and also accept customer orders electronically over the Internet at the company sites on the World Wide Web at *www.walmart.com* and *www.target.com*. Wal-Mart Stores, Inc., "Fiscal 2011 Unit Count," available at *http://walmartstores.com/sites/annualreport/2011/financials/Fiscal2011_Unit_Count.pdf*; Target Corporation, Annual Report for 2010, Securities and Exchange Commission Form 10-K, Item 2. Properties, available at *http://www.sec.gov/Archives/edgar/data/27419/000104746911002032/a2201861z10-k.htm*.