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The Evolution of Due Process and State Tax Jurisdiction

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THE EVOLUTION OF DUE PROCESS AND STATE TAX JURISDICTION

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"Nothing is more powerful than an idea whose time has come."[1]

INTRODUCTION

The Due Process Clause[2] has recently undergone something of a renaissance as a limitation to be applied to the state tax jurisdiction rules pertaining to multistate businesses. The 1992 U.S. Supreme Court case, *Quill v. North Dakota*,[3] suggested that the Due Process Clause was to play second fiddle to the Commerce Clause[4] in such tax matters, and would not typically be relevant given the more likely, more rigorous application of the latter clause.[5] But *Quill* also suggested that

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1. VICTOR HUGO, HISTORY OF A CRIME.

2. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without the due process of law.")

3. 504 U.S. 298 (1992).

4. U.S. CONST. art I, § 8, cl. 3 (Congress shall have the power "to regulate commerce . . . among the several states").

5. *See Quill*, 504 U.S. at 313 n.7 ("[Our prior] comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, [but] it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce."). The analysis in *Quill* was with respect to the "dormant Commerce Clause." *Id*. at 309 ("Article I, § 8, cl. 3, of the Constitution expressly authorizes Congress to 'regulate Commerce' with foreign Nations, and among the several States. It says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless . . . the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause . . . by its own force prohibits certain state actions that interfere with interstate commerce.") (quotations omitted). *See* United Haulers Ass'n v. Oneida-Herkimer

its logic was the product of a bygone era,[6] a point that is more apparent nearly twenty-five years later.[7] In addition, the relevance of the *Quill* holding—pertaining to state tax jurisdiction or "nexus"—has diminished through changes in commercial practices and later judicial developments, further undercutting *Quill's* statement as to the relationship between the two constitutional clauses.[8] As a result, the Due Process Clause has increased in importance relative to the Commerce Clause in the context of state taxes—particularly corporate income and sales tax—as applied to multistate businesses.[9]

Recent state tax cases[10] and commentaries,[11] as well as developments with respect to Congressional legislation directed at state taxation,[12] have cast light on the renewed

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Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) ("[Although the Commerce Clause] 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"—the "so-called 'dormant' aspect of the Commerce Clause."). All references in this Article to the Commerce Clause are to the dormant Commerce Clause unless otherwise specified.

6. *See infra* notes 91–98 and accompanying text.

7. *See* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 85–89 (2012). *See generally infra* notes 28 and 116–47 and accompanying text.

8. *See infra* notes 99–147 and accompanying text.

9. *See id.*

10. *See, e.g.*, Gore Enterprise Holdings, Inc. v. Comptroller, 87 A.3d 1263 (Md. 2014) (affirming a state tax, in part by rejecting a due process challenge); Scioto Ins. Co. v. Oklahoma Tax Comm'n, 279 P.3d 782 (Okla. 2012) (striking down a state tax on due process grounds); Griffith v. ConAgra Brands, Inc., 728 S.E.2d 74 (W.Va. 2012) (striking down a state tax in part on due process grounds). *See also* In re Washington Mutual, Inc., 485 B.R. 510 (Bankr. D. Del. 2012) (federal bankruptcy court finds state lacks tax jurisdiction over a corporation under the Due Process Clause for purposes of pursuing a corporate income tax claim).

11. *See, e.g.*, Paul H. Frankel, Craig B. Fields, & Richard C. Call, *The Due Process Clause as a Bar to State Tax Nexus*, STATE TAX TODAY, (Oct. 29, 2012); Mary Benton, Clark Calhoun & Elizabeth Cha, *Due Process and Commerce Clause Tests Are Never, Ever Getting Back Together*, STATE TAX TODAY, (Jul. 22, 2013); Brian J. Kirkell, Craig Ridenour & Charles Britt, *Sales Factor Presence After McIntyre Machinery*, STATE TAX TODAY, (Feb. 11, 2013); David Sawyer, *Practitioners Anticipate a Resurgence of Due Process Nexus Litigation*, STATE TAX TODAY, (Nov. 1, 2013); Brannon P. Denning, *Due Process and Personal Jurisdiction, Implications for State Taxes*, STATE TAX TODAY, (Jun. 18, 2012).

12. *See* Red Earth v. United States, 657 F.3d 138 (2d Cir. 2011), *vacated*, 2013 Dist. LEXIS 188691 (W.D.N.Y. 2013) (concluding the states may lack the capacity to impose tax jurisdiction under a recently-enacted federal statute, The Prevent All Cigarette Trafficking ("PACT") Act, 15 U.S.C. § 375 et seq., given the provisions of the Due Process Clause); Gordon v. Holder, 721 F.3d 638 (D.C. Cir. 2013) (same); *State's Attorneys General: Marketplace Fairness Act Would Violate Due Process Clause*, STATE TAX TODAY, (June 18, 2013) (questioning the states'

importance of the Due Process Clause. The commentary has cited recent Supreme Court cases pertaining to the application of the Due Process Clause in matters of adjudicative jurisdiction,[13] because the analysis applied for purposes of adjudicative and state tax jurisdiction is "comparable."[14] In particular, the Supreme Court's decision in *J. McIntyre Machinery, Ltd. v. Nicastro,*[15] which pertains to "specific" as opposed to "general" adjudicative jurisdiction,[16] is potentially relevant to the state tax inquiry because state tax cases involve questions of specific jurisdiction.[17]

McIntyre was a plurality decision that rendered three inconsistent opinions that failed to command a majority of the Court.[18] As *McIntyre* was the first specific jurisdiction case decided by the Court in twenty-four years, it was certain to generate a great deal of scholarly attention in the important area of adjudicative jurisdiction—a result enhanced by the Court's somewhat unclear precedential analysis.[19] The facts in *McIntyre* do not resemble those in a typical fact pattern in which state tax jurisdiction is at issue.[20] In part for this reason, the case may be of less relevance in the state tax area.[21] However, given the increased importance of the due process

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ability to impose tax jurisdiction under a proposed federal statute, the Marketplace Fairness Act ("MFA"), S. 336/S. 743/H.R. 684 113th Cong. (2013), given the potential application of the Due Process Clause). The PACT Act and the MFA are discussed in greater detail *infra* notes 420-459 and accompanying text.

13. *See generally* the articles noted *supra* note 11 and accompanying text. The recent U.S. Supreme Court cases are *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) and *Goodyear Dunlop Tires Operations, SA v. Brown*, 131 S. Ct. 2846 (2011).

14. *See Quill*, 504 U.S. at 306–08 (evaluating the Court's adjudicative jurisdiction cases and stating that "[c]omparable reasoning" applies to determine state tax jurisdiction).

15. 131 S. Ct. 2780 (2011).

16. "Specific jurisdiction" refers to adjudicative jurisdiction where the lawsuit "arises out of or relates to the defendant's contacts with the forum," whereas "general jurisdiction" obtains where a defendant's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014).

17. *See supra* note 16 and accompanying text. *See infra* notes 211–12 and accompanying text.

18. *See generally infra* notes 255–313 and accompanying text.

19. *See infra* notes 259–61, 314 and accompanying text.

20. *See infra* notes 333–38 and accompanying text.

21. *See infra* notes 324–48 and accompanying text.

analysis in state tax cases, state tax practitioners must carefully grapple with the multi-part *McIntyre* decision.

The enhanced emphasis on the due process analysis in state tax jurisdiction cases has been a generally favorable development for state governments seeking to impose their taxes. The historic Commerce Clause analysis that the Supreme Court applied to state tax jurisdiction cases often relied upon arbitrary limitations that fostered aggressive tax planning and resulted in decisions that were economically questionable.[22] In contrast, greater reliance upon notions of due process fairness has resulted in decisions that more closely consider whether the taxpayer is being asked to pay its "just share of the state tax burden."[23]

Although the trend emphasizing due process principles in state tax jurisdiction cases has generally improved state tax administration, recent cases and other legal developments suggest several specific areas where the analysis remains uncertain and potentially problematic.[24] In the corporate income tax area, the states have wrestled for more than twenty years with cases in which companies have sought to avoid taxation through structural and transactional planning with respect to company-owned intangible property, such as trademarks.[25] The states have had significant success in these cases, generally by arguing that the "physical presence" nexus standard posited by *Quill* does not apply to the states' corporate income tax—meaning that the relevant test largely tracks the due process standard that determines adjudicative jurisdiction.[26] However, more recent state cases suggest a variation on this same tax planning that may further test the reach of the states' jurisdictional rules.[27]

In the sales tax area, the major state tax issue continues to be taxation of companies that exploit the state's economic market by making tax-free Internet sales in reliance upon the *Quill* physical presence jurisdictional standard.[28] States have

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22. *See infra* notes 56–76 and accompanying text.
23. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623–24 (1981). *See generally infra* notes 99–147 and accompanying text.
24. *See generally infra* Part III.
25. *See infra* notes 106–10 and 371–78 and accompanying text.
26. *Id*.
27. *See infra* notes 380–99 and accompanying text.
28. *See infra* notes 414–19 and accompanying text. A study by economists at the University of Tennessee concluded that the states would collectively lose $10.1 to $11.3 billion in sales tax for the 2012 tax year because of the rule in *Quill*.

successfully applied due process-like fairness principles to narrow the application of the *Quill* physical presence standard to cases where the taxpayer's reliance upon *Quill* is reasonable.[29] But certain fact patterns continue to test the state tax nexus rules, such as an Internet vendor using affiliates or other in-state representatives to perform activities other than making actual Internet sales.[30] Also, more generally, twenty-three years after *Quill* suggested that Congress could resolve the states' sales tax jurisdictional dilemma by legislating as to the appropriate standard, Congress may finally be close to doing just that.[31] But some commentators have questioned whether the Due Process Clause could limit the effectiveness of such a Congressional act.[32]

Accordingly, this Article proceeds in four sections. The first section traces the historical developments that have led to the re-emergence of due process principles as the primary limitation on the assertion of state tax jurisdiction.[33] This section notes that the Commerce Clause was originally intended to permit Congress to address situations where the states were, through their tax or regulatory powers, engaged in some form of economic discrimination favoring in-state commercial actors relative to commercial actors located outside the state.[34] A similar power of judicial oversight, applicable even in the absence of Congressional legislation, was later recognized by the Supreme Court—the application of the so-called dormant Commerce Clause.[35] Subsequent Supreme Court cases broadened the focus of the Commerce Clause, permitting the courts to go beyond the original intention of the Commerce Clause and to generally engage in state tax cases in subjective determinations as to whether the state tax somehow inhibited free trade.[36] However, more recent Supreme Court cases have generally re-posited the Commerce Clause as being an inquiry that is primarily focused on the question of

See Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Sales Tax Revenue Losses from E-Commerce*, 52 ST. TAX NOTES 537 (2009).

29. *See generally infra* notes 116–47 and accompanying text.
30. *See infra* notes 414–19 and accompanying text.
31. *See infra* notes 424–26 and accompanying text.
32. *See infra* notes 442–44 and accompanying text.
33. *See infra* Part I.
34. *See infra* notes 52–54 and accompanying text.
35. *See supra* note 5 and *infra* notes 50–51 and accompanying text.
36. *See generally infra* notes 56–76 and accompanying text.

discrimination.[37]

The first section notes the application of a second constitutional inquiry, the Due Process Clause, which has probed the states' tax jurisdictional reach since the enactment of the 14th Amendment.[38] This section demonstrates that as the Commerce Clause inquiry has receded back to its intended role of policing state tax discrimination—something that is not usually an issue in state tax jurisdiction cases[39]—courts have primarily focused on the application of due process principles.[40]

The second section evaluates the due process standards to be applied in-state tax jurisdiction cases.[41] This section considers the historic approach the Supreme Court has applied and considers the Court's recent adjudicative jurisdiction cases, which apply by analogy in the state tax context.[42] This section provides a detailed analysis of the Court's recent specific jurisdiction case, *McIntyre*,[43] which some persons have claimed may impose additional limits upon the states in tax jurisdiction cases.[44] This section concludes that the Court's recent adjudicative jurisdiction cases, including *McIntrye*, should not impact the due process standards to be applied in state tax cases.[45]

The third section evaluates several recent state corporate income tax and sales tax cases that have considered due process jurisdiction questions,[46] in particular two recent state supreme court cases that have applied the Due Process Clause to impose limits upon a state's assertion of corporate income tax nexus.[47] This section also examines due process questions recently raised by federal cases and commentary pertaining to Congressional legislation that has either been enacted or

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37. *See infra* notes 149–59 and accompanying text.

38. *See infra* note 83 and accompanying text. *See also infra* notes 164–67 and accompanying text.

39. *See infra* note 100 and accompanying text.

40. *See generally infra* notes 77–147 and accompanying text.

41. *See* generally *infra* Part II.

42. *Id*.

43. *See infra* notes 262–368 and accompanying text.

44. *See generally* the articles cited *supra* note 11. *See also infra* note 341 and accompanying text.

45. *See* generally Part II.

46. *See infra* notes 371–419 and accompanying text.

47. *See infra* notes 379–99 and accompanying text. The cases are *Scioto Ins. Co. v. Oklahoma Tax Comm'n*, 279 P.3d 782 (Okla. 2012) and *Griffith v. ConAgra Brands, Inc.*, 728 S.E.2d 74 (W.Va. 2012).

proposed with respect to state tax jurisdiction.[48]

The final section offers some concluding remarks.[49] This section concludes that the trend favoring the Due Process Clause over the Commerce Clause as the primary principle evaluating state tax jurisdiction applied to a multistate business is a positive one for state taxing agencies and for state tax administration in general.

I. DORMANT COMMERCE CLAUSE AND DUE PROCESS LIMITATIONS UPON THE IMPOSITION OF A STATE TAX

A. *The Early History: Defining "Interstate Commerce" and Policing State Tax Burdens*

The Commerce Clause is set forth at Article I, Section 8, Clause 3 of the U.S. Constitution. It states, as relevant to this Article, that Congress shall have the power "to regulate commerce . . . among the several states."[50] It is an affirmative grant of legislative power but has been held to have a dormant aspect that allows it to be applied as a judicial limitation on the states' taxing or regulatory powers in court cases even in the absence of Congressional action.[51]

The application of the Commerce Clause as a limitation on the taxing powers of the states has proven difficult for the Supreme Court, which has utilized various interpretative approaches through the years. The Commerce Clause was intended to address state attempts at economic protectionism, i.e., state attempts to favor in-state economic actors *vis-à-vis* out-of-state economic actors.[52] This form of economic protectionism was common under the country's original governing document, the Articles of Confederation, and was seen as so deleterious that it was one of the driving forces

48. *See infra* notes 420–59 and accompanying text.
49. *See infra* notes 460–72 and accompanying text.
50. U.S. CONST. art I, § 8, cl. 3.
51. *See supra* note 5.
52. Donald H. Regan, *Reflections on United States v. Lopez: How to Think About the Federal Power and Incidentally to Rewrite United States v. Lopez,* 94 MICH. L. REV. 554, 577 n.95 (1995) ("We know . . . that the main reason for giving Congress the power to regulate interstate commerce was to allow Congress to oversee state protectionist measures."); Jesse H. Choper and Tung Yin, *State Taxation and the Dormant Commerce Clause: the Object Measure Approach,* 1998 SUP. CT. REV. 193, 199–200 (1998) (noting the "Dormant Commerce Clause's core prohibition of discrimination against interstate commerce."). *See generally* Fatale, *supra* note 7, at 52–55.

resulting in the ratification of the U.S. Constitution.[53] The role of the Commerce Clause is not limited to state taxation—the Clause addresses such discriminatory action whether affected by a state through the means of its tax law or through regulatory action.[54] But importantly, the national government was formed by state governments, and state sovereignty, including the fundamental right of taxation, was specifically intended to be retained under the U.S. Constitution.[55]

To address states' attempts at economic discrimination, the Court, for much of its history, has attempted to distinguish interstate from intrastate commerce and to restrict state action with respect to the former, but not the latter.[56] At times, these restrictions consisted of outright prohibitions upon the states' capacity to either tax or regulate interstate commerce.[57] These restrictions also sometimes consisted of attempts to prohibit "direct" burdens as imposed upon interstate commerce, as opposed to intrastate commerce.[58]

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53. *See* Paul J. Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 3 WASH. UNIV. L.Q. 234, 234 (1953) ("The need for national economic unity unaffected by state borders and untrammeled by discriminatory and retaliatory state action against commerce from sister states was one of the chief reasons for abandonment of the Articles of Confederation and the adoption of our Federal Constitution, by which Congress was entrusted with the power to regulate interstate commerce."); Fatale, *supra* note 7, at 52–55.

54. *See also Quill*, 504 U.S. at 312 (stating that under the dormant Commerce Clause, "we have ruled that that Clause prohibits discrimination against interstate commerce . . . and bars state *regulations* that unduly burden interstate commerce.") (emphasis added) (cites omitted). *See* Fatale, *supra* note 7, at 60.

55. *See* Fatale, *supra* note 7, at 42–44, 53.

56. *See generally* United States v. Lopez, 514 U.S. 549, 553–54 (1995) (discussing the analysis used by the Court and stating, *inter alia*, "[f]or nearly a century [after *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, (1824)], the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce.").

57. Hartman, *supra* note 53, at 234 ("In its zeal to preserve an unfettered flow of interstate commerce, during most of our constitutional history, including the present, the predominant doctrinal declaration of the Court has been an adherence to the philosophy that interstate commerce cannot be taxed at all by the states."). *See Quill*, 504 U.S. at 309 ("Our early cases, beginning with *Brown v. Maryland*, 12 Wheat. 419 (1827), swept broadly, and in *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888), we declared that 'no State has the right to lay a tax on interstate commerce in any form.'")

58. *See Quill*, 504 U.S. at 309–10 (noting the use of the "direct"-"indirect" test from late in the 1800's until 1946); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) ("It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation

A significant problem with the Court's early approach to the Commerce Clause, which became exacerbated by technological developments during the twentieth century, is that it is not easy to delineate interstate from intrastate commerce.[59] In its early cases, the Court equated intrastate commerce with in-state "production, manufacturing, and mining," which tended to be localized,[60] and considered the economic activities of persons crossing state lines, most significantly sales persons, to represent interstate commerce.[61] This approach became increasingly difficult to implement during the early to mid-1900's as more and more businesses became transient in their operations.[62]

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nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States."). *See also* Hartman, *supra* note 53, at 237 (noting early 20th century cases where "[t]he exactions were upheld on the ground that they were levied on a 'local incident' or 'local activity,' or that the burden of the tax on the commerce was 'indirect' or 'incidental' ").

59. *See* Hartman, *supra* note 53, at 236–37, 237 n.12 (noting cases where the states were allowed to "pass statutes to safeguard their people from injurious local effects that may attend interstate traffic, which nevertheless in some measure affect interstate commerce"). *See also Lopez*, 514 U.S. at 554 (noting the Court's early Commerce Clause cases where there were "difficult determinations" because "the interstate and intrastate aspects of commerce were so mingled together").

60. *See Lopez*, 514 U.S. at 554 (noting a long line of precedent beginning in the 1800's and proceeding into the 1900's where "the Court held that [the regulation of] certain categories of activity such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments . . . under the Commerce Clause."); Hartman, *supra* note 53, at 244 (citing early 20th century cases where the Court permitted "local governments to single out various 'local' events closely related to interstate commerce as the incidence of valid taxes . . . such as [the] installation [and] maintenance of pipelines in the ground").

61. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) (noting that under the Court's longstanding doctrine to prohibit "direct" state burdens as imposed upon interstate commerce, a State could not "impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose such as itinerant drummers"); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 816 (1995) (noting that in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), where the company purposefully limited its state contacts to in-state sales persons, the company argued as did most business litigants of the era that the "state had no power to tax interstate commerce.").

62. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 753–54 (2014) (noting that in the context of adjudicative jurisdiction the "territorial" presence requirement adopted by the 1878 case, *Pennoyer v. Neff,* 95 U.S. 714 (1878) was eventually abandoned in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), "spurred by changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.") (quotes omitted); Cameron and Johnson, *supra* note 61, at 800–03 (discussing select Supreme

The Court's attempt to forbid the states from imposing taxes with respect to interstate commerce eventually raised the prospect that the states would be foreclosed from taxing most forms of commerce, as over time most forms of commerce included an interstate aspect.[63] Problematically, this consequence is potentially inconsistent with the Court's historic understanding that under the Constitution interstate commerce can be made to pay its fair share of the states' taxing burden.[64] Also, over time the judicial determinations as to whether a certain type of commercial activity constituted interstate commerce became progressively more arbitrary.[65]

In 1959, after several cases that trended in this direction,[66] the Court declared in *Northwestern States Portland Cement Co. v. Minnesota*[67] that the states could impose income tax on businesses that merely sent their sales personnel across state lines.[68] Implicitly, this determination dispensed with the

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Court due process cases in the years leading up to *International Shoe*).

63. *See, e.g.*, Hartman, *supra* note 53, at 252 (noting that, though the Court's view allowed for the taxation of "an event which is not part of interstate commerce . . . [f]actually, of course, it is most difficult, if not impossible to find such an event in modern multi-state business").

64. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 n.15 (1977) (stating that administrative inconvenience is not a basis for relieving multistate taxpayers from their share of the states' tax burden and that therefore "interstate commerce may be made to pay its way"). *See also* Barclay's Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310 (1994) ("The [Commerce] Clause does not shield interstate (or foreign) commerce from its fair share of the tax burden") (*quoting Department of Revenue v. Assoc. of Washington Stevedoring Cos*., 435 U.S. 734, 750 (1978); Quill Corp. v. North Dakota*,* 504 U.S. 298, 310 n.5 (1992) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (*quoting Commonwealth Edison v. Montana*, 453 U.S. 609, 623–24 (1981)). *Commonwealth Edison*, quoted in *Quill*, in turn quoted from *Western Livestock et al. v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). *See Commonwealth Edison*, 453 U.S. at 623–24. *See also* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462 (1959) ("It is axiomatic that the founders did not intend to immunize [interstate] commerce from carrying its fair share of the costs of that state government in return for the benefits it derives from within the state.").

65. *See* Hartman, *supra* note 53, at 244 (noting in a 1953 article that the judicial determinations "for determining what events can be segregated [as local] so as to serve as the fulcrum of the tax . . . [o]ftimes seem arbitrary.")

66. *See Portland Cement,* 358 U.S*.* at 459-461 (citing cases).

67. 358 U.S. 450 (1959).

68. 358 U.S. at 452. *Portland Cement* led to an Act of Congress, Public Law 86-272, that preempted the state imposition of a corporate net income tax on facts similar to those in the case. For a detailed discussion of that development and its history, *see* Michael T. Fatale, *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272*, 21 VA. TAX REV. 435, 474–79 (2002).

Court's pre-existing distinction between intrastate and interstate commerce.[69] Further, in 1961, the Court doubled down on the result in *Portland Cement* and held in *Scripto, Inc. v. Carson*[70] that a state could impose a use tax collection obligation on a business whose only in-state contact was the activity of sales representatives.[71] *Scripto* included the important conclusion that it did not matter whether the in-state sales representatives of the business were legally employees of the business.[72] As to this latter point, the Court sought to make clear that the terminology used by a business as a matter of contract was not relevant to the analysis of the business' economic activity for state tax jurisdiction purposes.[73]

The question of whether a burden directly or indirectly impacts interstate commerce raised similar interpretative difficulties. The application of this rule in state tax cases often came to turn upon the phrasing of the state's taxing statute.[74] For example, under the direct-indirect principle, a state tax would be struck down as unconstitutional under the Commerce Clause if it was imposed on the privilege of engaging in business in the state since such a tax was deemed to be a direct tax on interstate commerce.[75] Therefore this rule became more

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69. *See* 358 U.S. at 452 ("We conclude that net income from the interstate operations of a foreign corporation [i.e., generally sales solicitation and related activities] may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same."). The *Portland Cement* holding was predicated on both the Commerce Clause and the Due Process Clause. *See id.*

70. 362 U.S. 207 (1960).

71. *Id*. at 210–13.

72. *Id*. at 211 ("True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance.")

73. *Id*. ("The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida . . . To permit such formal "'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance.") As in the case of *Portland Cement*, 358 U.S. 450 (1959), *see supra* notes 66–69 and accompanying text, *Scripto* was decided on both Commerce Clause and Due Process Clause grounds. *See infra* notes 214–19 and accompanying text (discussing *Scripto* in the context of the Court's adjudicative jurisdiction cases).

74. *See Quill,* 298 U.S. at 310 (noting that the rule was one that attached "constitutional significance to a semantic difference" in statutory wording).

75. *See id.* (noting that in *Complete Auto,* "[w]e expressly overruled . . . *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602 (1951), which held that a

formal than pragmatic in its application. Recognizing this, the Court disposed of the so-called "formal rule" in the 1977 case of *Complete Auto Transit, Inc. v. Brady*.[76]

B. *The Supreme Court's Current Dormant Commerce Clause Approach Focusing on Discrimination and Due Process*

Complete Auto became the bridge to the Court's contemporary Commerce Clause approach. *Complete Auto* replaced the Court's prior direct-indirect burden inquiry with a four prong test that evaluates the legitimacy of a state tax.[77] One of those four prongs is an evaluation whether the state tax is discriminatory[78]—the inquiry that directly probes the rationale embodied in the Commerce Clause.[79] The other three prongs—the "substantial nexus" prong that evaluates state tax jurisdiction and the two prongs that evaluate questions of whether the tax is fairly apportioned and fairly related to services provided by the state[80]—do not directly probe the discrimination question.[81] Therefore, these latter three inquiries are more suspect as Commerce Clause principles.[82]

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tax on 'the privilege of doing interstate business' was unconstitutional, while recognizing that a differently denominated tax with the same economic effect would not be unconstitutional. *Spector*, as we [have] observed . . . created a situation in which magic words or labels could disable an otherwise constitutional levy.") (cites omitted).

76. 430 U.S. 274 (1977). *See Quill,* 504 U.S. at 309–10 ("Most recently, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 285, we renounced [our prior] . . . approach as attaching constitutional significance to a semantic difference . . . *Complete Auto* emphasized the importance of looking past "the formal language of the tax statute [to] its practical effect") (brackets added) (*quoting Complete Auto*, 430 U. S. at 279). *See also* Fatale, *supra* note 7, at 59–60, 60 n.96 (discussing the demise of the "Formal Rule" in *Complete Auto*).

77. *See generally* 430 U.S. 274 (1977).

78. 430 U.S. at 279.

79. *See* Fatale *supra* note 7, at 60–61.

80. 430 U.S. at 279, 288.

81. *See* Choper & Yin, *supra* note 52, at 199 ("The central problem of *Complete Auto* is that its four prongs are functionally overlapping and redundant in attempting to fulfill the bedrock constitutional value serviced by judicial review of state taxation of interstate commerce: nondiscrimination against interstate commerce."). *See also* Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109, 114 (2004) ("[T]he case for interpreting the dormant Commerce Clause to impose a nexus requirement with respect to state taxes is an uneasy one . . . [it] is unclear whether the Commerce Clause itself says anything about these jurisdictional requirements.").

82. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 618 (1997) (Scalia, J., Thomas, J. and Rehnquist, C.J., dissenting) ("[O]ur

Later Supreme Court cases have made clear that the three non-discrimination prongs of *Complete Auto* generally embody due process principles.[83]

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negative Commerce Clause jurisprudence has taken us well beyond the invalidation of obviously discriminatory taxes on interstate commerce. We have used the Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make."); *id.* at 618–19 (Scalia, J., Thomas, J. and Rehnquist, C.J., dissenting) (citing *Complete Auto* as an example of the Court's foray "beyond the invalidation of obviously discriminatory taxes" to "policy-laden judgments" through the means of "multi factor tests in order to assess the perceived 'effect' any particular state tax or regulation has on interstate commerce.").

The critiques of the dormant Commerce Clause in recent Supreme Court dissents—largely those of Justices Scalia and Thomas, *see, e.g., id.*—have been tacitly reflected, in part, in the Court's majority decisions. A recent example is the 2015 case, *Comptroller v. Wynne*, which applied the dormant Commerce Clause to strike down an aspect of Maryland's personal income tax on discrimination grounds. 135 S. Ct. 1787 (2015). In *Wynne*, a 5-4 decision, the majority specifically defended the dormant Commerce Clause against a challenge by dissenting Justices Thomas and Scalia that the doctrine is not rooted in the Constitution. *Id*. at 1806-07. But the majority's defense referenced only the fact that the dormant Commerce Clause serves to address state tax discrimination, and, for example, made no mention of *Complete Auto's* substantial nexus prong. *Id*. The *Wynne* opinion does more generally reference the four prongs of *Complete Auto*, but notably—particularly given the fact the majority did specifically endeavor to defend the dormant Commerce Clause—only to observe that the lower Maryland court had "evaluated the tax under the four-part test" of that case. *Id.* at 1793. Although the lower Maryland court also struck down the tax in part on fair apportionment grounds, *id.*, the Supreme Court makes no mention of "fair apportionment" in its analysis. *See generally Wynne,* 135 S. Ct. 1787. *See also infra* note 156.

83. *See, e.g.*, Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 373 (1991) ("The *Complete Auto* test[s], while responsive to Commerce Clause dictates, encompas[s] as well the due process requirement that there be a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."); Amerada Hess Corp v. Director*,* 490 U.S. 66, 79–80 (1989) (noting that the "appellants recognize that the *Complete Auto* test encompasses due process standards"). *See also infra* note 103-105 and accompanying text (referencing language in *MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S.Ct. 1501 2008)); Joondeph, *supra* note 81, at 132 (stating that the nexus requirement that the Court has posited under the dormant Commerce Clause in fact has its basis elsewhere in the Constitution "perhaps [as] an essential premise of our federal system [or perhaps as a requirement of] the Due Process Clause of the Fourteenth Amendment; or perhaps both" . . . and that "attributing this nexus requirement to the dormant Commerce Clause seems both unnecessary and misconceived."); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and State Taxation: An Analysis in Terms of Constitutional Structure*, 31 Wayne L. Rev. 885, 919 (1985) (the "only element of [the *Complete Auto*] approach that properly finds itself its source in the negative Commerce Clause . . . is the nondiscrimination element, the other three elements involve due process considerations."); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 Wm. & Mary L.

1. *Quill Corp. v. North Dakota*[84] *and the Application of Due Process Principles in Later State Corporate Income Tax and Sales Tax Cases*

The development of the Due Process Clause as a jurisdictional standard in state tax cases relative to the application of the Commerce Clause was put to the test in the 1992 case, *Quill v. North Dakota.*[85] *Quill* fostered the application of due process principles in the context of the states' corporate income taxes, while stunting the use of those principles in the context of the states' sales and use taxes.[86] However, even in the context of the states' sales and use taxes, *Quill* left an important role for due process principles to play.[87]

Some historical background helps to understand the due process jurisprudential impact of *Quill*. As commercial technology continued to advance in the later part of the twentieth century, a significant question emerged as to whether a business could become subject to tax through its in-state sales or income-producing activity where the contacts of the out-of-state business did not require in-state facilities or sales representatives. An example of this question was resolved in the 1967 case *Bellas Hess v. Illinois Department of Revenue*,[88] where the Court concluded that a mail order business could not be subject to a state's use tax collection duty based merely upon the business's in-state contacts of mail and common carrier (i.e., that some in-state property interest or representational activity was necessary).[89] The Court justified its rule in *Bellas Hess* on both Commerce Clause and Due Process Clause grounds.[90]

In *Quill,*[91] the Court revisited its prior decision in *Bellas Hess* in part because of questions whether the case had become economically outdated or continued to reflect the Court's then-

Rev. 319, 328, 328 n.34 (2003) (noting that in the Court's prior cases leading up to *Complete Auto* "the nexus, fair apportionment, and fairly related prongs of the [*Complete Auto*] test were often rooted in due process rather than dormant Commerce Clause analysis.").

84. 504 U.S. 298 (1992).
85. *Id*.
86. *See infra* notes 99–147 and accompanying text.
87. *See infra* notes 116–47 and accompanying text.
88. 386 U.S. 753 (1967).
89. *Id*. at 758.
90. *See Quill*, 504 U.S. at 305.
91. 504 U.S. 298 (1992).

current state tax constitutional doctrine.[92] The Court suggested that, given the advances in its jurisprudential logic, it would not have reached the conclusion in *Bellas Hess* if the question in that case was a matter of first impression.[93] But the Court retained the holding in *Bellas Hess* on the basis of stare decisis, particularly because it presumed that later growth in the mail order industry may have been due in part to the holding in that earlier case.[94] Also, the Court feared that revocation of the rule from *Bellas Hess* would result in the practical consequence that mail order companies would be made to pay a large amount of retroactive tax.[95]

The Court in *Quill* suggested that, although it had modernized its state tax jurisdiction analysis after *Bellas Hess*, it was now taking a step backwards.[96] The Court re-affirmed

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92. 504 U.S. at 303–04 (the North Dakota decision that the Court reviewed had refused to apply the holding in *Bellas Hess* because "wholesale changes in both the economy and the law made it inappropriate to follow *Bellas Hess* today") (citing North Dakota v. Quill, 470 N. W. 2d 203, 213, 208 (N.D. 1991). *See also infra* notes 93 and 96 and accompanying text.

93. The Court stated, for example, that "*Bellas Hess* was decided in 1967, in the middle of [the Court's shifting its Commerce Clause analysis] between formalism and pragmatism," *id*. at 310; that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today", *id*. at 311, that the rule in the case was "artificial around the edges," *id*. at 315, and that a similar rule had not been applied by the Court in any other instances, *id*. at 318. The three Justices who filed a concurring opinion in *Quill*—who are the three Justices who took part in the case that continue to sit on the Court—stated that they would "not revisit the merits of [*Bellas Hess*], but would adhere to [the holding in that case] on the basis of stare decisis." 504 U.S. at 298, 319 (Scalia, J., Thomas, J. and Kennedy, J., concurring). Justice Kennedy, one of the three concurring Justices, recently stated that "the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided." Direct Marketing Assn. v. Brohl, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

94. *See id.* at 317 (noting that "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry"); *id*. at 320 (Scalia, J., concurring) (agreeing with this statement and noting that "the demands of the [stare decisis] doctrine are at their acme . . . where reliance interests are involved") (internal quotation marks omitted). *See also id.* at 316 ("it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*"). *See also* Fatale, *supra* note 7, at 85.

95. *Id*. at 318 (noting that if it were to reverse the holding in *Bellas Hess*, the likely result would be "retroactive application" of the taxes in question resulting in "substantial unanticipated liability for mail order houses"). *See* Fatale, *supra* note 7, at 86, 86 n.267. Retroactive imposition of a sales or use tax collection duty can be particularly harsh, given that there is generally no longer any practical ability to collect the tax from the purchaser from whom the tax was initially due.

96. For example, the Court commented on the analysis in the state court decision it was reviewing, which had concluded that the Court's rulings since

its anachronistic holding in *Bellas Hess* in part on the theory that Congress was better suited to address the questions presented—a result that the Court specifically invited.[97] To facilitate this result, the Court explicitly based its decision on Commerce Clause grounds, and stated that it was no longer justified on Due Process Clause grounds, thus clearly enabling Congress to reconsider the rule.[98]

a. Due Process and the Corporate Income Tax

Even as the Court in *Quill* was removing the due process component from the state sales tax nexus analysis with the specific goal of eliciting Congressional action, the Court suggested that due process principles remained significant as a state tax jurisprudential tool. The Court observed that claims concerning the application of the Commerce Clause and Due Process Clause in matters of state tax jurisdiction are "closely related."[99] The Court stated that the two clauses impose distinct limits on the taxing powers of the states, but suggested that those distinctions are not meaningful when evaluating a nexus question outside the realm of sales tax.[100]

Bellas Hess had retreated from the formalistic logic of that case; *Quill* stated that, although it would re-affirm the holding in *Bellas Hess*, "it agreed with the state court's assessment of the evolution of our cases." *Quill*, 504 U.S. at 314. *See generally* Fatale, *supra* note 7, at 84–85.

97. *See Quill*, 504 U.S. at 318, 320 (Scalia, J. concurring). *See also* Walter Hellerstein, *Supreme Court Says No State Use Tax Imposed on Mail Order Sellers, For Now*, 77 J. TAX'N 120, 123–24 (1992) (stating that the Court's language may have been intended, as a practical matter, to elicit a Congressional response). Congress, however, has not acted. *See infra* notes 420-426 and accompanying text. In hindsight, it seems apparent the Court would have been more likely to elicit a Congressional response had it ruled for the state—similar to the events that led to the enactment of Public Law 86-272. *See supra* note 68 and accompanying text.

98. 504 U.S. at 308 ("Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process."); *id.* at 318 (noting that Congress may have previously refrained from requiring mail order vendor to collect sales tax because it thought that "the Due Process Clause prohibit[ed] States from imposing such taxes").

99. *Id*. at 305 (stating that in a number of cases involving jurisdictional claims by out-of-state sellers, the Court's holdings have relied on both the Due Process Clause and the Commerce Clause; that "[d]ue process and commerce clause conceptions are not always sharply separable in dealing with [jurisdictional] problems;" and that therefore the Court has "not always been precise in distinguishing between the two [Clauses]") (quotes omitted).

100. *Id*. *Quill* referenced three examples of differences between the Clauses, none of which are typically relevant when a court evaluates state tax jurisdiction

The Court also clarified that it had not established a comparable "physical presence" rule that applies outside the context of a state's sales tax.[101] Therefore, the Court suggested that state corporate income tax nexus should be determined by applying due process principles.[102] In the 2008 corporate income tax case, *MeadWestvaco Corp. v. Illinois Department of Revenue,*[103] the Court acknowledged differences between the Commerce Clause and Due Process Clause, but stated "[t]he broad inquiry subsumed in both constitutional requirements is 'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'—that is, 'whether the state has given anything for which

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in the context of a corporate income tax. One example of a difference between the two Clauses is that under the Commerce Clause, unlike under the Due Process Clause, a court may strike down a state tax as discriminatory—a prospect that is not typically implicated when a state seeks to impose its tax jurisdiction. *See id*. at 305 (citing the Court's prior decision in *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), and noting that case represented a situation where "while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause"). In *Tyler Pipe*, a taxpayer was held subject to a state's tax, whereas other taxpayers were able to show that the state's taxing methodology was unconstitutionally discriminatory as applied to them. *See* 482 U.S. at 253. *See also* Fatale, *supra* note 7, at 63, 63 n.113 (citing recent Supreme Court discrimination cases, none of which involved a nexus claim). A second example of a distinction between the two Constitutional clauses is that the Commerce Clause, unlike the Due Process Clause, has a broad affirmative aspect that authorizes Congress to generally regulate as to the national economy, including with respect to state taxes. *See id*. at 318 (noting Congress's ability to regulate under the Commerce Clause with respect to state taxation). And of course, third, *Quill* itself created a practical distinction between the two clauses in the context of sales tax, by re-affirming the Court's prior "physical presence" rule from *National Bellas Hess*, and justifying the rule on Commerce Clause but not due process grounds. *See generally id*. at 306–18.

101. *Id*. at 314 ("we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes") and 317 ("in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement").

102. *See* Choper & Yin, *supra* note 52, at 202 (noting that although *Quill* purports to differentiate the "substantial nexus" prong of *Complete Auto* from the Due Process minimum contacts requirement, it provides no guidance as to the difference); Swain, *supra* note 83, at 342 (stating that the ruling in *Quill* that a taxpayer's jurisdictional nexus with the state must include a Commerce Clause dimension as well as a Due Process dimension "makes it difficult to know how to fill Commerce Clause nexus with content" as "[m]ost of the nexus 'burdens' that come to mind are also due process concerns: notice, forseeability, fundamental fairness, and the like").

103. 128 S. Ct. 1501 (2008).

it can ask return.'"[104] This reference was to the Court's longstanding due process inquiry as applied in state tax cases evaluating the breadth of the states' taxing powers.[105]

In the aftermath of *Quill*, a series of state tax cases upheld the imposition of a corporate income tax in whole or in part on the theory that no physical presence standard applies to such taxes.[106] Instead of applying the physical presence test, the

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104. 128 S. Ct. at 1505 (*quoting* ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307, 315 (1982), in turn *quoting* Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940)). *Meadwestvaco* pertained to a question of corporate income tax apportionment and not nexus, but the Court analogized between the two inquiries, stating that both evaluate the states' ability "to tax extraterritorial values." *Id*. at 1502. *See also id.* ("The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities."); Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 778 (1992) (stating that in nexus and apportionment questions, the Court is "guided by the basic principle that the State's power to tax an individual's or corporation's activities is justified by the protection, opportunities and benefits the State confers on those activities.").

105. *See* Fatale, *supra* note 7, at 84 and n.252–53. *See also infra* note 104 and accompanying text (citing Court cases with similar language).

106. Geoffrey Inc. v. South Carolina Tax Comm'n, 437 S.E.2d 13,18 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993) (nexus found with respect to an out-of-state corporation engaged in in-state licensing of trademarks to a related party); Kmart Props., Inc. v. Taxation & Revenue Dept., 131 P.3d 27, 39 (N.M. Ct. App. 2001), *writ quashed*, 131 P.3d 22 (N.M. 2005) (same); A&F Trademark, Inc. v. Tolson, 605 S.E.2d 187, 195 (N.C. Ct. App. 2004), *cert. denied*, 546 U.S. 821 (2005) (same); Lanco, Inc. v. Director, Division of Taxation, 908 A.2d 176, 176 (N.J. 2006), *cert. denied*, 551 U.S. 1131 (2007) (same); Geoffrey, Inc. v. Oklahoma Tax Comm'n, 132 P.3d 632, 638 (Okla. Civ. App. 2005) (same); Bridges v. Geoffrey, Inc., 984 So.2d 115, 128 (La. App. 1 Cir. 2008), *writ denied*, 978 S.2d 370 (La. 2008) (same); Geoffrey, Inc. v. Comm'r of Revenue, 453 Mass. 17 (2009), *cert. denied*, 2009 U.S. LEXIS 4584 (2009) (same); Tax Comm'r v. MBNA America Bank, *N.A*., 640 S.E.2d 226, 232, 234 (W.Va. *2006*), *cert. denied*, FIA Card Services, N.A. v. Tax Comm'r, 551 U.S. 1141 (2007) (nexus found with respect to an out-of-state corporation engaged in in-state credit card lending); Capital One Bank v. Comm'r of Revenue, 453 Mass. 1, 15 (2009), *cert. denied*, 2009 U.S. LEXIS 4616 (2009) (same); MBNA America Bank, N.A. v. Indiana Dep't of State Revenue, 895 N.E.2d 140, 143 (Ind. Tax Ct. 2008) (same); KFC Corp v. Iowa Dept of Revenue, 792 N.W.2d 308, 322, 328 (Iowa 2010) *cert. denied*, 2011 WL 4530160 (2011) (nexus found with respect to an out-of-state corporation engaged in licensing trademarks and related intangible property to unrelated in-state franchisees). *See also* Borden Chemicals and Plastics v. Zehnder, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000), *app. denied*, 731 N.E.2d 762 (Ill. 2000) (court states there is no physical presence requirement outside the context of sales and use tax; finds non-resident corporate partner that owns a partnership interest in a partnership doing business in the state is subject to the state's corporate income tax); Couchot v. State Lottery Comm., 74 Ohio St. 3d 417, 424–25 (1996), *cert. denied*, 519 U.S. 810 (1996) (court states there is no physical presence requirement outside the context of sales and use tax; finds non-resident lottery ticket winners are subject to the state's personal income tax); Gen. Motors Corp. v City of Seattle, 25 P.3d 1022, 1029 (Wash. Ct. App. 2001), *pet. rev. denied en banc*, 84 P.3d 1230 (Wash.

focus of these courts was whether the taxpayer was doing business in the state or was otherwise significantly exploiting the state's economic market or its resources.[107] Therefore, although the cases were evaluated under the Commerce Clause, the logic resembled due process analysis.[108] Several of the cases suggested that the state tax jurisdictional standard might require a certain threshold of in-state activity[109]—a higher level of contacts than is typically required in non-tax adjudicative jurisdiction cases.[110] But this general line of analysis focusing on in-state market exploitation is

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2001), *cert. denied*, 535 U.S. 1056 (2002) (court states there is no physical presence requirement outside the context of sales and use tax; finds corporation engaged in wholesale sales activity with respect to in-state car retailers subject to the state's gross receipts tax).

Two cases are sometimes cited as representing a contrary holding: *Rylander v. Bandag Licensing Corp*., 18 S.W.3d 296 (Tex. App. 2000) and *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000). For a critique of the notion that these cases are in fact to the contrary, *see Geoffrey, Inc. v. Oklahoma Tax Comm'n*, 132 P.3d 632, 638 (2005) and *Bridges v. Geoffrey, Inc.*, 984 So.2d 115, 127 (2008). *See also KFC Corp*, 792 N.W.2d at 322 (distinguishing *Bandag*); *Geoffrey*, 453 Mass. at 24 (same); *Capital One*, 453 Mass. at 13 n.16 (noting that the logic in *J.C. Penney Nat'l Bank* was later questioned by the same court that decided the case in *America Online, Inc. v. Johnson*, No. M2001-00927 COA-R3-CV (Tenn. Ct. App. July 30, 2002)).

107. *See generally* the cases cited at *supra* note 106. *See* Michael T. Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard*, 54 TAX LAWYER 105, 111–16, 142 (2000).

108. *See generally* the cases cited at *supra* note 106.

109. *See KFC Corp.*, 792 N.W.2d at 328 ("When a company earns hundreds of thousands of dollars from sales to Iowa customers arising from the licensing of intangibles associated with the fast-food business, we conclude that the Supreme Court would engage in a realistic substance-over-form assessment that would allow a state legislature to require the payment of the company's fair share of taxes without violating the dormant Commerce Clause"); *Capital One Bank*, 453 Mass. at 15–16 (finding nexus where the out-of-state banks "were soliciting and conducting significant credit card business in the Commonwealth with hundreds of thousands of Massachusetts residents, generating millions of dollars in income for the . . . banks"); *MBNA America Bank*, 640 S.E.2d at 235 ("[A]n entity's exploitation of the market must be greater in degree than under the Due Process standard so that its economic presence can be characterized as significant or substantial"). *See also* Alan B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FL. TAX. REV. 157, 181–87 (2012) (evaluating state statutes that assert corporate income tax jurisdiction based upon a taxpayer's purposeful exploitation of the state's economic market, including those that require a certain threshold of in-state sales).

110. *See* Thimmesch, *supra* note 109, at 181, 187, 187 n.179 (referring to "heightened" state corporate income tax nexus standards that require in-state "market exploitation" or a "level of economic connection" that exceeds the "minimum connections required by the Due Process Clause or the simple derivation of revenue from a state.").

nonetheless consistent with due process principles.[111]

While the Supreme Court has never affirmed the result in any of the various corporate income tax nexus cases that were decided in favor of the states post-*Quill*, the Court has repeatedly denied taxpayer petitions for a writ of certiorari in these cases.[112] The denial of such a petition does not constitute a judicial precedent,[113] but these continued denials nonetheless seem legally meaningful. The re-affirmation of *Bellas Hess* in *Quill* was based in part on the Court's concern for the financial well-being of mail order vendors that reasonably relied upon *Bellas Hess,* including the concern that these vendors would otherwise be forced to pay large amounts of retroactive taxes.[114] Similarly, the state courts concluding that *Quill*'s holding is limited to sales and use tax have also relied upon prior language of the Court, as stated in *Quill.* If the Court reversed the results in these state tax cases twenty-plus years after *Quill* there would be significant retroactive revenue consequences to the states.[115]

b. Due Process and the Sales Tax

Quill dispensed with what would have been the otherwise applicable due process inquiry in sales tax nexus cases in favor of a Commerce Clause physical presence standard.[116] The Court concluded, as in its prior case, *Bellas Hess,*[117] that a mail order vendor engaged in substantial in-state market

111. *See, e.g.*, *Quill*, 504 U.S. at 308 ("[s]o long as a commercial actor's efforts are purposefully directed toward residents of another State"—for example, through "continuous and widespread solicitation of business within a State". . . such actor "clearly has fair warning that its activity may subject it to the jurisdiction of a foreign sovereign.") (quotes omitted).

112. *See* the cases referenced *supra* note 106.

113. Missouri v. Jenkins, 515 U.S. 70, 85 (1995).

114. *See supra* notes 94–95.

115. *See* Joe Huddleston, *MTC Supports Economic Presence Standards for Businesses*, St. Tax Today, May 11, 2012 (noting an estimate of the Congressional Budget Office that a federal law preempting the jurisdictional standard applied in these state tax cases would cost the states about $2 billion in the first year of enactment and at least that much in subsequent years). *Cf.* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 342–43 (2007) ("Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. . . . These important responsibilities set state and local government apart from a typical private business.").

116. 504 U.S. at 317–18.

117. 386 U.S. 753 (1967).

exploitation[118] could not be held subject to the state's use tax collection duty based merely upon the "non-physical" in-state contacts of mail and common carrier.[119] In the aftermath of *Quill*, the application of this physical presence standard was clear on facts that substantially resembled the facts evaluated in *Quill*, but often unclear otherwise.[120]

One fundamental difficulty with applying the *Quill* physical presence standard to a corporation making sales into a state is that a corporation is a mere legal construct that has no inherent physical attributes.[121] Therefore, any question probing a corporation's physical presence first requires a determination as to what in-state representational acts or property of that corporation can create physical presence.[122] In such cases, whether the standard is met logically depends on the "quality and the nature" of the corporation's contacts in relation to the purposes that underlie the *Quill* physical presence rule.[123] Since *Quill* was primarily intended to protect mail order vendors that had reasonably relied upon the Court's prior holding in *Bellas Hess*,[124] the physical presence rule of

118. The company made almost $1 million in annual in-state sales to about 3,000 customers in the state. *Quill*, 504 U.S. at 302. These sales were the result of 24 tons of catalogs and flyers mailed by the company into the state every year. *Id*. at 502.

119. This was "the *Bellas Hess* rule" upheld by the Court. *See Quill*, 504 U.S. at 311, 317–18. *See also infra* note 124 and accompanying text.

120. *See* Fatale, *supra* note 107, at 118–30. *See also* Buehner Block Co. v. Wyo. Dep't of Revenue, 139 P.3d 1150, 1158 (Wyo. 2006) ("the bright-line rule [of *Quill*] simply holds that, where there is no physical presence in a state, and the only connection between the state and the entity or transaction is by mail or common carrier, there is no "substantial nexus" that will support imposition of a sales or use tax . . . . While mail or common carrier delivery, alone, cannot support a state's taxing authority, neither does the existence of either of those factors, ipso facto, prohibit the imposition of a [sales or use] tax. Instead, determining the existence or non-existence of "substantial nexus" is a fact-driven inquiry, different in each case.").

121. Acknowledgement of this general point ushered in the Court's modern due process jurisprudence, beginning with International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See infra* notes 179–86 and accompanying text.

122. A substantially similar question formed the basis for the Court's seminal due process case, International Shoe v. Washington, 326 U.S. 310 (1945). *See infra* notes 179–86 and accompanying text.

123. *Cf. International Shoe*, 326 U.S. at 319 ("Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."); *Scripto v. Carson*, 362 U.S. 207, 211-212 (1960) (the constitutional "test" for jurisdiction "is simply the nature and extent of the activities" of the corporation in the state).

124. *Quill*, 504 U.S. at 301 (noting that the case applied, as in *Bellas Hess*, to

Quill should be applied to effectuate that purpose.[125] Applying *Quill* to protect the reasonable reliance interests of taxpayers has the effect of applying due process-like fairness principles to determine whether the taxpayer has met the physical presence test.[126]

State sales tax cases decided post-*Quill* are generally consistent with this analysis. For example, *Quill* was decided at a time when the Internet was not yet widely used to make retail sales, and therefore such vendors were not within the specific class that the Court sought to protect. Nonetheless, it is generally understood that when a vendor's contacts with a state are limited to direct sales solicitation through the Internet and product deliveries by common carrier, the *Quill* safe harbor should apply.[127] Similarly, it is not the case that every in-state representational activity or property interest will establish sales tax physical presence nexus.[128] Most state

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a state's attempt to apply a use tax collection duty to "an out-of-state mail-order house . . . whose only connection with customers in the State is by common carrier or the United States mail."); 315 ("under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes"); and 317–18 (concluding that the "*Bellas Hess* rule remains good law" and that it is not "time . . . to renounce the bright-line test of *Bellas Hess*").

125. *See* Walter Hellerstein, *State Taxation*, ¶ 19.02[3][b] (3d ed. 2011) (Supp. No. 3 2010) ("Many of the reasons the Court advanced for adhering to the physical-presence standard relate principally, if not exclusively, to sales and use taxes on the mail-order industry. . . . *Quill*, therefore, may arguably be read to have established a 'bright-line' physical-presence standard only for sales and use taxes on the mail-order industry alone.") (*quoted in* Adam Thimmesch, *The Fading Bright Line of Physical Presence: Did KFC Corporation v. Iowa Department of Revenue Give States the Secret Recipe for Repudiating Quill?*, 100 KY. L.J. 339, 350 n.88 (2012)). *See also Buehner Block Co.*, 139 P.3d at 1158 (Wyo. 2006) (applying sales tax to a remote vendor that shipped purchased concrete blocks to the state by common carrier and that lacked any other physical contacts with the state where the vendor had previously obtained a state sales tax vendor license and was collecting sales tax on similar in-state transactions).

126. *Cf. Quill*, 504 U.S. at 312 ("Due process centrally concerns the fundamental fairness of governmental activity . . . We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis.").

127. *See* Fatale, *supra* note 107, at 106.

128. *See Quill*, 504 U.S. at 302 n.1, 315 n.8 (noting that the in-state license of software included on "three floppy disks" resulted in an in-state presence that was a mere "slightest presence" and therefore insufficient to establish state tax nexus). *Compare* Texas CPA Hearing No. 106,632, Docket No. 304-13-5657.26 (Tex. Cptr. Pub Acct. Sept. 19, 2014) (electronic licenses of vendor software and digital images downloaded in the state is conceded to constitute "tangible personal property" under state law and, where the volume of such sales is significant, held to exceed a mere slightest presence therefore establishing state tax nexus on the part of the vendor).

courts have assumed in factually difficult cases that the nature and extent of the contacts must be considered.[129] Using this approach, state courts generally conclude that where a vendor's in-state "physical" presence exceeds a mere "slightest" presence, those contacts are sufficient to establish sales tax nexus, particularly if the in-state contacts assist in the vendor's generation of significant in-state sales.[130]

Scripto v. Carson, Inc.[131] and *Tyler Pipe v. Wash. Dept. of Rev.,*[132] two Supreme Court cases decided prior to *Quill*, assist in the sales tax nexus analysis. Those cases establish that certain in-state activities of an independent contractor will establish "physical presence" sales tax nexus on the part of a corporation. *Scripto* held that independent sales persons can establish nexus on the part of an out-of-state vendor and reasoned that to conclude otherwise would permit vendors using salaried sales representatives to engage in tax avoidance by instead using independent representatives.[133] *Tyler Pipe* similarly determined that sales tax nexus was established based on in-state sales-related activity performed by

129. *See, e.g.*, Orvis Co. v. Tax Appeals Tribunal of N.Y., 86 N.Y.2d 165, 179–80 (1995) (nexus found where taxpayer representatives made only 12 visits to the state in 3 years that were "systematic"—with each visit resulting in meetings with up to 19 wholesale customers who during the 3-year period were responsible for about 15% of the company's total in-state sales); Arizona Dept. of Revenue v. Care Computer Systems, Inc., 4 P.3d 469, 472 (Ariz. Ct. App. 2000) (nexus determined based on the "volume" and "nature" of the taxpayer's in-state activity). *See also* Scripto v. Carson, 362 U.S. at 211–12 (1960) (finding sales tax nexus applying a test that "is simply the nature and extent of the [in-state] activities of the [taxpayer]"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("Whether due process is satisfied [in a case pertaining to adjudicative jurisdiction] must depend . . . upon the quality and nature of the activity."); KFC Corp. v. Iowa Dept. of Revenue, 792 N.W.2d 308, 314 (2008) (stating in the context of a corporate income tax case that the Supreme Court's "dormant Commerce Clause nexus requirement . . . has emphasized a flexible approach based on economic reality and the nature of the activity giving rise to the income that the state seeks to tax").

130. *See, e.g.*, Orvis Co. v. Tax Appeals Tribunal of N.Y., 654 N.E.2d 954, 960–61 (N.Y. 1995) (the taxpayer's presence need only "be demonstrably more than a slightest presence") (internal quotes omitted); Brown's Furniture, Inc. v. Wagner, 665 N.E.2d 795, 803 (1996) (holding that the taxpayer had "established more than a slight physical presence within the [s]tate"); *Magnetek Controls*, 562 N.W.2d, 219, 224 (Mich. Ct. App. 1997) ("tax obligations may be imposed, consistent with the Commerce Clause, on taxpayers with demonstrably more than a slightest presence in a state") (internal quotes omitted). *See also infra* note 128 (citing cases evaluating the "slightest presence" nexus standard).

131. 362 U.S. 207 (1960).

132. 483 U.S. 232 (1987).

133. 362 U.S. at 210–11.

independent contractors.[134] *Tyler Pipe* stated, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[135]

Although helpful, the decisions in *Scripto* and *Tyler Pipe* do not always clearly resolve the nexus analysis in particular cases,[136] thus creating the need to also consider the taxpayer's reasonable reliance interests vis-à-vis *Quill*. New York State's highest court provided an often-cited restatement of the applicable sales tax nexus standard in *Orvis Co. v. Tax Tribunal*[137]—that sales tax nexus can be established "by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf."[138] However, the *Orvis* re-formulation of the applicable nexus test also begs the question in some cases as to what particular property interests or economic activities will suffice.[139]

Recent state cases have extended *Scripto* and *Tyler Pipe* to find sales tax nexus where unrelated in-state persons solicited or enhanced sales on behalf of an out-of-state vendor for consideration when the in-state person or persons: (1)

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134. 483 U.S. at 251.

135. *Id*. at 250. *See also* 482 U.S. at 249 (noting that "[t]he sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe's customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe.").

136. *See, e.g.*, Scholastic Books Clubs, Inc. v. Commissioner, 38 A.3d 1183, 1199 (Conn. 2012) ("We first observe that the language in *Bellas Hess* and *Quill* describing *Scripto* as representing the [Supreme Court's] 'furthest' extension of the state's taxing power was no more than an observation concerning the state of the law at that time, and was not necessarily intended to mean that a substantial nexus between the out-of-state retailer and the state could not be found in other, as of yet undefined, circumstances.") (*citing Quill*, 504 U.S. at 306); *Orvis Co*., 654 N.E.2d at 185 (noting the Supreme Court's statement in Scripto v. Carson that its holding in that case "represents the furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax" and stating "[w]e believe that the instant cases go 'further' ") (*citing Quill*, 504 U.S. at 306).

137. 86 N.Y.2d 165 (1995).

138. *Id*. at 178. *See* Borders Online v. State Bd. Of Equaliz., 29 Cal.Rptr.3d 176, 190 (Cal. Ct. App. 2005) (citing this standard); Fatale, *supra* note 107, at 120 n.100 (citing cases that have relied upon this standard).

139. *See generally* the cases referenced *supra* note 138.

facilitated sales but were not professional sales persons,[140] (2) received commissions based on completed sales that resulted from a referral from the person's Internet website,[141] or (3) performed ancillary sales activity for the vendor, such as the performance of warranty work[142] or in-state product delivery and installation.[143]

The logic in *Tyler Pipe* was also recently extended to a fact pattern in which separately incorporated in-state bookstores engaged in "cross-marketing"—including through the shared use of trademarks—with an out-of-state affiliated vendor that was making similar in-state Internet sales.[144] Although state

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140. *See, e.g.*, Scholastic Books Clubs, Inc. v. Commissioner, 38 A.3d 1183, 1199 (Conn. 2012) (school teachers facilitating in-state sales on behalf of out-of-state bookseller); Scholastic Books Clubs, Inc. v. Farr, 373 S.W.3d 558, 564–65 (Tenn. 2012) (same). Similar earlier cases reached mixed conclusions. *See* Fatale, *supra* note 107, at 125–27.

141. *See* Overstock.com, LLC v. New York State Dep't of Taxation and Finance, 20 N.Y.3d 586 (2013), *cert. denied*, 2013 U.S. LEXIS 8648 (2013) (tax jurisdiction established for out-of-state Internet vendor based on an "Associates Program" through which in-state third parties agreed to place links on their own websites that, when clicked, directed users to the vendor's website; the Associates were compensated by commissions determined based on clicks and subsequent online purchases); Amazon.com, LLC v. New York State Dep't of Tax and Finance, 20 N.Y. 3d 586 (2013) (same), *cert. denied*, 2013 U.S. LEXIS 8717 (2013). The court noted that the in-state persons were "not merely engaged to post passive advertisements on their websites," but rather were paid to "actively solicit business in this state." *Id*. at 596.

142. *See* Dell Catalog Sales L.P. v. Taxation & Revenue Dep't, 199 P.3d 863 (N.M. 2008), *cert. denied*, 129 S. Ct. 1616 (2009). *See also* Robert D. Plattner, Daniel Smirlock, & Mary Ellen Ladouceur, *A New Way Forward for Remote Vendor Sales Tax Collection*, STATE TAX TODAY, (Jan. 18, 2010), at 194 (citing the 2008 New Mexico *Dell* case as an example of the circumstance that "under some fact patterns, states could appropriately assert nexus over an out-of-state seller based on a combination of the in-state activities of an 'independent company' providing services to tangible personal property purchased from the out-of-state seller, and the nature of the relationship between the out-of-state seller and in-state service provider").

143. *See* Town Crier, Inc. v. Dep't of Revenue, 733 N.E.2d 780 (Ill. App. Ct. 2000); Furnitureland South v. Comptroller of the Treasury, No. C-97-37872 OC (Md. Cir. Ct August 13, 1999), *rev'd on other grounds*, 771 A.2d 1061 (Md. 2001). *See also* Arco Bldg. Systems, Inc. v. Chumley, 209 S.W.3d 63, 74-75 (Tenn. Ct. App. 2006), *appeal denied*, 2006 Tenn. LEXIS 1002 (Tenn. Oct. 30, 2006) (nexus found with respect to out-of-state vendor that sold buildings in the state based upon the in-state activities of unrelated parties that manufactured and delivered the buildings).

144. *Barnesandnoble.com LLC*, 303 P.3d 824, 825 (N.M. 2013). *See* Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005) (similar). *Barnesandnoble.com* specifically relied upon the fact that *Tyler Pipe* had reasoned that an in-state contractor's activities could establish nexus on the part of a remote vendor when those activities operated to enhance the vendor's "name recognition, market share, goodwill, and individual customer relations."

courts have generally concluded that there is no physical presence nexus standard that applies to the states' corporate income tax, two state cases have similarly concluded that in-state trademark licensing activity can establish corporate income tax nexus, in part because the resulting income-generating activity results in the functional equivalent of physical presence.[145]

Scripto and Tyler Pipe have also been recently applied to a corporation not otherwise present in the state that booked in-state hotel reservations through its website for a fee.[146] The court's reasoning was that the services provided by the unrelated in-state hotels that contracted with the corporation were "significantly associated with [the company's] ability to establish and maintain a market [in the state] for its sales."[147]

Barnesandnoble.com LLC, 303 P.3d at 827, 829. *See* Plattner, et al., *supra* note 142, at 194-195 (discussing this general fact pattern). *See also* Harley-Davidson, Inc. v. Franchise Tax Board, 237 Cal. App. 4th 193, 218 (2015). (corporate income tax case states that under *Tyler Pipe* "the third party's in-state conduct need not be sales related; it need only be an integral and crucial aspect of the business") (quotes omitted).

145. *See* KFC Corp v. Iowa Dept of Revenue, 792 N.W.2d 308, 324 (2010) *cert. denied*, 2011WL 4530160 (2011) ("[T]he Supreme Court would likely find intangibles owned by KFC, but utilized in a fast-food business by its franchisees that are firmly anchored within the state, would be regarded as having a sufficient connection to Iowa to amount to the functional equivalent of 'physical presence' under *Quill*); Kmart Props., Inc. v. Taxation & Revenue Dept., 131 P.3d 27, 39 (N.M. Ct. App. 2001), *writ quashed*, 131 P.3d 22 (N.M. 2005) ("Considering the *Quill* standard in the context of this case, we conclude that the combination of Kmart Corporation's activities in New Mexico, together with the tangible presence of KPI's marks, constitutes the functional equivalent of physical presence as afforded by the independent representatives in *Scripto* and *Tyler Pipe*."). *See also supra* note 106 (citing additional cases that have found corporate income tax nexus based upon the in-state licensing of intangible property); Borden Chems. and Plastics v. Zehnder, 726 N.E.2d 73, 80 (Ill. App. Ct. 2000) (court states there is no physical presence requirement outside the context of sales tax such that a non-resident corporate partner is subject to the state's income tax, but also concludes that such a partner of a partnership doing business in the state would meet a physical presence standard; court notes also that "Illinois has afforded protection and benefits to the Operating Partnership's activities and transactions within the state and that these services provided by Illinois have helped give rise to the income that is distributed to [the partner] plaintiff").

146. Travelscape v. South Carolina Dep't of Revenue, 391 S.C. 89 (S.C. 2011).

147. *Id.* at 106-107. See also Travelocity.com v. Wyoming Dep't of Revenue, 329 P.3d 131, 148-150 (Wyo. 2014) (similar). See also City of Charleston v. Hotels.com, 586 F.Supp. 2d 538, 544 (2008) (stating the court has "no hesitation in ruling" that the physical presence rule does not apply since the online travel companies "are alleged to have proactively booked and leased hotel rooms and other accommodations that are physically located [in the state].").

2. Discrimination and the Evaluation of State Tax Burdens Post-Quill Corp. v. North Dakota[148]

Complete Auto replaced the Court's prior Commerce Clause test for evaluating the legitimacy of a state tax, the direct-indirect burdens inquiry, with four tests—one that probes discrimination and three that generally evaluate due process principles.[149] Therefore, one consequence of *Complete Auto* in state tax cases has been not only to dispense with the Court's previous direct-indirect burdens test, but also to dispense with the general consideration of taxpayer burdens of any type. This is because the consideration of such burdens, to the extent such questions remain relevant, are now subsumed under the three non-discrimination prongs of *Complete Auto*, which focus on whether a state tax meets due process fairness concerns.[150] Consistent with this point, when the Court in *Quill* re-affirmed the "physical presence" rule established by *Bellas Hess*, it reasoned that this rule—an interpretation of *Complete Auto's* first, nexus prong—served to address the potential prospect of an "undue" taxpayer burden.[151] The Court's suggestion was that outside this "bright line" standard—and the *Complete Auto* prongs more generally—there is to be no independent, general consideration of such burdens.[152]

In 1995, in *Oklahoma Tax Commission v. Jefferson Lines*,[153] the Supreme Court upheld a states sale tax that was challenged as imposing an "undue tax burden" because the

148. 504 U.S. 298 (1992).

149. *See supra* notes 74–83 and accompanying text.

150. *See, e.g.*, American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266, 291 (1987) ("[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce."). *See also supra* notes 80–83 and accompanying text.

151. *Quill*, 504 U.S. at 315 (noting that "undue burdens . . . may be avoided . . . by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. . . [like the *Bellas Hess*] safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail.") (internal quotes omitted). *See also id.* at 313 ("The first and fourth prongs [of *Complete Auto*] . . . limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce); *id*. at 325 (White, J., dissenting) ("parts two and three of the *Complete Auto* test . . . [ensure] that interstate commerce not be unduly burdened").

152. *See supra* notes 150-51 and accompanying text.

153. 514 U.S. 179 (1995).

Court concluded that the tax complied with each of *Complete Auto's* four prongs.[154] Since 1995, the Court has taken several cases that have probed state tax discrimination within the meaning of the Commerce Clause.[155] However, only one case, a fair apportionment case that was later dismissed for further state court proceedings, considered any of the other three prongs of *Complete Auto*.[156] State cases that probe the three non-discrimination prongs of *Complete Auto* remain common, but since *Quill* no state case has found that a state tax imposed an "undue burden" on interstate commerce apart from consideration of the *Complete Auto* standards.[157]

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154. *Id.* at 178, 183-200.

155. *See* Fatale, *supra* note 7, at n.113 and accompanying text.

156. *See generally MeadWestvaco*, 128 S. Ct. 149 (2008).
Recently, the Supreme Court in a 5-4 decision affirmed a Maryland opinion striking down a component of that state's personal income tax on dormant Commerce Clause grounds. *Comptroller v. Wynne*, 135 S. Ct. 1787 (2015). Although the lower Maryland court decision had been decided on both fair apportionment and discrimination grounds, *see id.* at 1793, the Supreme Court affirmed only on the discrimination basis, *see id.* at 1795, 1803-1804. The Maryland decision had considered the Court's pre-existing doctrine pertaining to "internal consistency"—which evaluates "double" or "multiple" taxation—to be a principle that evaluates fair apportionment. *Comptroller v. Wynne*, 64 A.3d 453, 463-470 (Md. 2013). However, the Supreme Court's majority decision re-posited that doctrine as one that evaluates discrimination. *See* 135 S. Ct. at 1803-1804. The Court's emphasis on the discrimination principle in the *Wynne* case is striking—the notion is specifically referred to in the majority decision 44 times, whereas fair apportionment is mentioned only 4 times—3 times in the Court's summary of the lower Maryland court decision. *See generally Wynne*, 135 S. Ct. 1787.

The *Wynne* majority specifically endeavored to defend the dormant Commerce Clause against critiques leveled by the dissenting Justices Thomas and Scalia that the doctrine is not rooted in the Constitution. *Id.* at 1806-07. However, that defense—even apart from resting on only 5 votes—was narrow. The majority's defense specifically referenced—consistent with its analysis in the case more generally—only the importance of addressing state tax discrimination as implemented through "tariffs" and as implied by the state-created threat of double taxation. *Id.* at 1804, 1807-09.

157. A LEXIS search performed for this period reveals only three cases where a taxpayer claiming that a tax imposed an "undue burden" prevailed—and in two of those cases the state charge at issue was arguably not even a tax. *See American Business USA Corp. Dep't of Revenue*, *No. 4D13-1472* (Fla. 1st DCA Nov. 12 2014) (concluding imposition of a use tax imposed an undue burden because it violated the *Quill* substantial nexus test); American Trucking Associations, Inc. v. New Jersey, 852 A.2d 142, 166 (N.J. 2004) (annual hazardous waste transporter registration fees assessed against out-of-state transporters are construed to be "taxes" and struck down under *Complete Auto's* fourth prong as imposing an undue burden because the fees were unrelated to the transponders' level of activity in the state; also, the fees are struck down as failing *Complete Auto's* prongs of fair apportionment and discrimination); Radio Common Carriers of New York v. New York, 601 N.Y.S.2d 513 (Sup. Ct., NY County 1993) (similar

Outside the state tax area, the "undue burden" standard is technically still relevant as a matter of Supreme Court precedent as one of two tests that evaluate whether a state regulation—as opposed to a state tax—violates the principles of the Commerce Clause.[158] Even in this context, however, the Court has been reluctant to apply the undue burden test because it invites subjective judicial determinations similar to those that characterized the Court's Commerce Clause state tax cases prior to *Complete Auto.*[159]

II. DUE PROCESS JURISDICTION FOR STATE TAX PURPOSES POST-*J. MCINTYRE MACHINERY, LTD. V. NICASTRO*[160]

Recently, the Supreme Court has decided several cases that apply due process principles to the determination of adjudicative jurisdiction, including the specific jurisdiction case, *J. McIntyre Machinery, Ltd. v. Nicastro*.[161] These cases are relevant to the state tax jurisdiction inquiry because the state tax and adjudicative jurisdiction due process inquiries are "comparable."[162] These cases are potentially important to the state tax analysis because the relevant constitutional limitations that apply to state tax jurisdiction now derive primarily from the Due Process Clause.[163]

The Due Process Clause is set forth in the 14th Amendment of the U.S. Constitution, adopted in 1868, and provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[164] The Due Process

analysis as in *American Trucking* with respect to "special fee" imposed on "paging devices").

158. *See* Fatale, *supra* note 7 at notes 99–100 and accompanying text. The second of the two tests is whether the state regulation is discriminatory. *See id.*

159. *See* Fatale, *supra* note 7 at notes 97–106 and accompanying text. *See also supra* notes 59–76 and accompanying text. In the regulatory context, evaluation of an "undue burden" requires a balancing of the burdens of the regulation as measured against the state's interest in implementing the regulation. *See* Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Or., 511 U.S. 93, 99 (1994) (*quoting* Pike v. Bruce, 397 U.S. 137, 142 (1970)). That approach is particularly problematic in the state tax context because it leaves "much room for controversy and confusion and little in the way of precise guidance to the states in their exercise of their indispensable power of taxation." *See* Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 403 (1984).

160. 131 S. Ct. 2780 (2011).

161. *Id. See infra* notes 169–172 and accompanying text.

162. *See Quill*, 504 U.S. at 308.

163. *See generally supra* notes 96–147 and accompanying text.

164. U.S. CONST. amend. XIV § 1 (stating, "[N]or shall any state deprive any

Clause has been applied to corporations in state tax cases dating back to the late 1800's.[165] In state tax jurisdiction cases, the longstanding due process question is whether the state has given anything for which it can ask a return.[166] More specifically, "[t]he Due Process Clause demands that there exist some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[167]

A. *International Shoe Co. v. Washington*[168] *and the Birth of Modern Due Process Analysis*

There are three recent U.S. Supreme Court cases construing the Due Process Clause that have generated considerable attention: *Daimler AG v. Bauman*,[169] *J. McIntyre Machinery, Ltd. v. Nicastro*,[170] and *Goodyear Dunlop Tires Operations, SA v. Brown*.[171] These cases pay tribute to the 1945 Supreme Court case, *International Shoe Co. v. Washington*.[172] *Goodyear* called *International Shoe*

person of life, liberty, or property, without the due process of law").

165. *See, e.g.*, Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 226 (1897).

166. *See MeadWestvaco*, 128 S. Ct. at 1505 (stating the question as "'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'"—that is, "'whether the state has given anything for which it can ask return.'") (quoting ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307, 315 (1982), in turn quoting Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940)). *MeadWestvaco* stated that this same question also informs Commerce Clause jurisdictional questions. *See id*. *See also supra* note 64 and accompanying text (Court statements to the effect that, notwithstanding the Commerce Clause, interstate commerce can be made to pay its fair share of state tax).

167. *MeadWestvaco*, 128 S. Ct. at 1505 (*quoting Quill Corp*., 504 U.S. at 306, in turn *quoting* Miller Brothers Co. v. Maryland, 347 U. S. 340, 344–45 (1954)). *MeadWestvaco* noted that this due process limitation "on a State's power to tax out-of-state activities" is distinct from that applied under the Commerce Clause but nonetheless "parallel." *Id.*

168. 326 U.S. 310 (1945).

169. 134 S. Ct. 746 (2014).

170. 131 S. Ct. 2780 (2011).

171. 131 S. Ct. 2846 (2011).

172. 326 U. S. 310 (1945). A fourth due process case decided in 2014, Walden v. Fiore, also repeatedly references *International Shoe*. *See* 134 S. Ct. 1115, 1121–23 (2014). But *Walden* is not generally relevant to this Article because the defendant in *Walden* was an individual that was not engaged in business activity. *See id.* at 1119. Also, *Walden* was admitted by the Court to be an easy case that could be decided applying "[w]ell-established principles of personal jurisdiction." *Id.* at 1126. *See* John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Fiore*, LEWIS & CLARK LAW SCH. LEGAL STUDIES RESEARCH PAPER No. 2014-22, (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract _id=2535367## (noting *Walden's* "modest intentions" to "reinforce the minimum

"pathmarking;"[173] *Daimler* called the opinion "canonical."[174] *McIntyre* resulted in three separate decisions with distinct reasoning, but "[a]ll nine Justices agreed that . . . the *International Shoe* test provided the appropriate analysis."[175] Even *Quill*, the most recent Supreme Court case to evaluate due process jurisdiction for state tax purposes, referred to *International Shoe* as the "seminal case" pertaining to such jurisdiction.[176] *International Shoe*, which evaluated a state tax imposed upon an interstate business,[177] first articulated the jurisdictional "minimum contacts" test that continues to be applied in adjudicative and state tax jurisdiction cases.[178] *International Shoe,* therefore, is an appropriate place to begin an analysis of due process jurisdiction as applied to state taxation.

International Shoe evaluated adjudicative jurisdiction as relevant to a multistate corporation that was seeking to avoid the imposition of a state tax.[179] The tax in question was imposed upon employers conducting business in the state for the purpose of providing a fund to be used for financial

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contacts test").

173. 131 S. Ct. at 2851.

174. 134 S. Ct. at 754.

175. Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 60 (2012). Justice Ginsburg's dissent in *McIntyre* argued that Kennedy's plurality opinion is inconsistent with the spirit of *International Shoe*. 131 S. Ct. at 2804 (Ginsburg, J., dissenting) ("I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*.") (quoting *International Shoe*, 326 U.S. at 316). Some commentators have agreed. *See, e.g.*, Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 581–82 (1995); Eric Schepard, *The Battle for the Soul of International Shoe: Why the Author of International Shoe would Condemn the Nicastro Plurality for Hijacking his Legacy of Judicial Restraint*, 32 QUNNIPIAC L. REV. 352, 383–87 (2014).

176. 504 U.S. at 307.

177. 326 U.S. at 311.

178. *See Quill*, 504 U.S. at 307 ("Building on the seminal case of International Shoe Co. v. Washington, 326 U. S. 310 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.") (quoting *International Shoe*, 326 U.S.at 316). *See also MeadWestvaco*, 128 S. Ct. at 1505 ("The Due Process Clause demands that there exist some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax") (quoting *Quill Corp*., 504 U.S. at 306).

179. *International Shoe*, 326 U.S. at 311.

assistance to newly unemployed state workers.[180] The Court's pre-existing rules for due process jurisdiction required that a company maintain an in-state presence to be subject to a state's adjudicative jurisdiction.[181] The corporation at issue had "carefully structured its distribution operations" to avoid creating this jurisdiction in the state in question and in other states.[182] In particular, the corporation limited its contacts with the state to certain specific activities conducted by sales persons that were, under the law of the day, insufficient to establish the required presence necessary for adjudicative jurisdiction.[183]

Despite the applicable law, the Court in *International Shoe* rejected the corporation's claim and re-formulated the Court's long-standing jurisdictional rules to preclude the corporation's argument in future cases. The Court reasoned that applying an in-state presence standard to a corporation made no sense because corporations, unlike natural persons, are not in fact present anywhere.[184] Therefore, the Court concluded that "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[185] The Court re-cast the appropriate due process jurisdiction standard,

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180. *Id*. at 311–12.

181. *See id*. at 316 (*citing* Pennoyer v. Neff, 95 U.S. 714 (1878)).

182. *See* Cameron and Johnson, *supra* note 61, at 803–04. *See also* Cameron and Johnson, *supra* note 61, at 799, 799 n.127 (quoting the company's general counsel in 1995: "[*International Shoe*, 326 U.S. 310 (1945)] was primarily a tax case—we did not want to pay unemployment taxes to the state of Washington.")

183. *See* Cameron and Johnson, *supra note* 61 at 803–04. *See also* *International Shoe*, 326 U.S. at 313–14.

184. The Court stated:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, Klein v. Board of Supervisors, 282 U.S. 19, 282 U.S. 24, it is clear that, unlike an individual, its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.

326 U.S. at 316–17.

185. *Id*. at 319.

holding "that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[186]

International Shoe articulated what would become the Court's recognized due process dichotomy between specific and general jurisdiction.[187] Specific jurisdiction obtains where the cause of action "arises out of or relates to the" the defendant's activity in the state.[188] General jurisdiction obtains where a defendant's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[189] General jurisdiction cases, unlike specific jurisdiction cases, allow a plaintiff to sue the defendant corporation in a forum as to any act of the defendant, wherever undertaken, on the theory that the corporation is either incorporated in, domiciled in, or otherwise "at home" in that forum.[190]

B. General Jurisdiction Due Process Cases

General jurisdiction cases are less common than specific jurisdiction cases.[191] There have been four decisions since *International Shoe* where the Court has considered whether an out-of-state corporate defendant's in-state contacts were sufficiently "continuous and systematic" to justify the exercise of general jurisdiction over claims unrelated to those

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186. *Id*. at 316 (internal quotes omitted). There was no Commerce Clause issue in *International Shoe* because Congress had authorized state collection of the taxes at issue. *See id.* at 315.

187. The Court later defined the concepts based on logic set forth by Professors Arthur von Mehren and Donald Trautman. *See* John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. L. REV. 1707, 1711–12 (2012).

188. *See Daimler*, 134 S. Ct. at 754 (quotes omitted).

189. *Id*.

190. *Id*. at 760–61. *See* Donald Earl Childress, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. 67, 70 (2013) ("The Court has imposed these heightened requirements for the exercise of general jurisdiction because a state may legitimately exercise adjudicative power over a defendant's worldwide conduct only when the defendant is so closely connected to the forum state as to be analogous to a citizen or resident.").

191. *See Daimler*, 134 U.S. at 755 ("Since *International Shoe*[, 326 U.S. 310 (1945)] 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'") (*quoting Goodyear*, 131 S. Ct., at 2854).

contacts.[192]

In *Perkins v. Benguet Consol. Mining Co.*,[193] the Court held that general jurisdiction was appropriately exercised over a Philippine corporation sued in Ohio, where the company's affairs were overseen during World War II.[194] In contrast, in *Helicopteros Nacionales de Colombia, S.A. v. Hall,*[195] the Court held that general jurisdiction did not apply.[196] In *Helicopteros,* a helicopter owned by a Colombian corporation crashed in Peru and survivors of U.S. citizens who died in the crash were barred from maintaining wrongful-death actions against the Colombian corporation in Texas based on the corporation's helicopter purchases and purchase-linked activity in Texas.[197]

More recently, in *Goodyear Dunlop Tires Operations, SA v. Brown*,[198] the Court concluded that there was no general jurisdiction where North Carolina parents of two boys killed in a bus accident that occurred outside Paris brought a wrongful-death suit in North Carolina state court alleging that the bus's tires were defectively manufactured.[199] The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries.[200] The

192. *Goodyear* states that there were "only two [such] decisions postdating *International Shoe*, [326 U. S. 310 (1945)]," 564 U.S. at 2854, but *Goodyear* itself and the 2014 case, *Daimler*, 134 S. Ct. 746 (2014), make four.

193. 342 U.S. 437 (1952).

194. *Id* at 447–48. Benguet had ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Id*. The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. *Id*. at 431. The Court held that the Ohio courts could exercise general jurisdiction over Benguet without offending due process because, as noted in the Supreme Court's later case, *Daimler*, "Ohio was the corporation's principal, if temporary, place of business." *Daimler*, 134 S. Ct. at 756 (quotes omitted).

195. 466 U.S. 408 (1984).

196. *Id*. at 408.

197. *Id*. at 415–16. That company's contacts with Texas were confined to "sending its chief executive officer to Houston for contract-negotiation sessions; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id*. at 416.

198. 131 S. Ct. 2846 (2011).

199. *Id*. at 2851.

200. *Id*. at 2850. The Court posed the question as "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?" *Id*.

Court noted that the foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina.[201] Therefore, because Goodyear's three foreign subsidiaries were "in no sense at home in North Carolina," the Court concluded that those subsidiaries could not be required to submit to the general jurisdiction of that state's courts.[202]

In 2014, in *Daimler AG v. Bauman*,[203] the Court evaluated a fourth general jurisdiction claim pertaining to a foreign corporation.[204] *Daimler* also represented the third time that the Court evaluated such a claim pertaining to injuries sustained as the result of alleged tortuous action.[205] In *Daimler*, the respondents were residents of Argentina who filed suit in California, naming as a defendant a German public stock company (Daimler) that was the parent corporation of an Argentinean subsidiary alleged to have collaborated with state security forces in Argentina to harm certain workers of the subsidiary.[206] A claim for general personal jurisdiction over Daimler was predicated on the California contacts of another subsidiary of the parent, one incorporated in Delaware with its principal place of business in New Jersey.[207] That second subsidiary distributed Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.[208]

201. *Id*. at 2851.

202. *Id*. at 2857. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, which prompted the North Carolina Supreme Court to permit general jurisdiction on the theory that the subsidiaries had placed these tires into a "stream of commerce." 131 S. Ct. at 2851. The Court responded that "[a]lthough the placement of a product into the stream of commerce "may bolster an affiliation germane to specific jurisdiction, . . ." such contacts "do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant." *Id*. at 2855. In its briefs, the plaintiff made a belated claim that the Court should allow general jurisdiction on the theory that the subsidiaries were engaged in a unitary business with the parent, but, given the lateness of this claim, the Court refused to evaluate it. *Id*. at 2857. *See infra* note 408 and accompanying text.

203. 134 S. Ct. 746 (2014).

204. Each of the Court's three prior general jurisdiction cases pertained to a foreign corporation. *See* Goodyear Dunlop Tires Operations, SA v. Brown, 131 S. Ct. 2846 (2011), Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) and Perkins v. Benguet Consol. Mining Co. 42 U.S. 437 (1952).

205. The prior such cases were Goodyear Dunlop Tires Operations, SA v. Brown, 131 S. Ct. 2846 (2011) and Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). *See supra* notes 195–202 and accompanying text.

206. 134 S. Ct. at 750–51.

207. *Id*. at 751.

208. *Id*.

The Court in *Daimler* concluded that Daimler was not amenable to suit in California for injuries allegedly caused by conduct of its Argentinean subsidiary that took place entirely outside the United States.[209] In reaching its conclusion, the Court questioned whether the activities of Daimler's Ohio subsidiary could be imputed to Daimler, but noted that in any event neither Daimler nor its Ohio subsidiary was incorporated in California or had its principal place of business there, as would be required for purposes of establishing general jurisdiction.[210]

The theory that supports general jurisdiction resembles that which permits a state to tax all of the income of the state's residents irrespective of where their income is earned.[211] However, most cases that pertain to a state's ability to tax a multistate business do not raise questions of whether the corporation may be subject to tax on this basis. Rather, most state tax cases raise questions about whether a state can impose tax on income or sales that are derived from within the state. Consequently, most state tax cases are specific jurisdiction cases.[212]

C. *Specific Jurisdiction Due Process Cases*

Subsequent to *International Shoe*, there were several important specific jurisdiction cases relating to state tax

209. *Id*.

210. *Id*. at 760–62. The Court also noted concerns about international comity. *Id*. at 762–63.

211. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 (1995) (a State "may tax all the income its residents, even income earned outside the taxing jurisdiction"); McCullough v. Maryland 17 U.S. 316, 428–29 (noting the States' "power of taxing [their] people and their property to the utmost extent" and finding it "almost . . . self-evident" that "[a]ll subjects over which the sovereign power of a State extends, are objects of taxation."). *See also* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 Yale L.J. 1277, 1307 (1989) ("Since non-domiciliaries lack the opportunity to participate in electoral processes, some sort of purposeful action towards the territory by the individual is necessary to justify the exertion of state authority. Absent such a volitional act, there would be no way at all to influence the legal norms that governed one's behavior."). *But see Comptroller v. Wynne*, 135 S. Ct. 1787, 1798-2000 (2015) (noting that the application of this tax doctrine is subject to the stricture that a state may not discriminate against interstate commerce).

212. *See* Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAWYER 623, 635 (2014); Helen Hecht, *Is There a Due Process Cloud on the Sales and Use Tax Horizon*?, 24 J. MULTISTATE TAX 6, 14 (2014). *See also Harley-Davidson, Inc. v. Franchise Tax Board*, 237 Cal. App. 4th 193, 217 (2015).

collection, leading up to *Quill Corp. v. North Dakota*.[213] In the 1960 case, *Scripto, Inc. v. Carson*,[214] the Court extended the logic in *International Shoe* to state sales taxes, finding that an out-of-state corporation was subject to a state's use tax collection duty based on in-state sales solicitation activities of the company's non-employee representatives.[215] Specifically, the Court concluded that there was, as required, "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[216] The Court noted that although the sales representatives were contractually termed as being "independent contractors"[217] and not "employees," "such a fine distinction is without constitutional significance" since "[t]he formal shift in the contractual tagging of the salesman as "independent" neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into [the state]."[218] The Court further concluded that "[t]o permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance."[219]

In the 1970 case, *National Geographic Society v. California Bd. of Equalization*,[220] the appellant (the "Society"),

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213. 504 U.S. 298 (1992).

214. 362 U.S. 207 (1960).

215. *Id*. at 210–11 (noting, *inter alia,* that the ""salesmen" were "not regular employees of appellant devoting full time to its service" and that these persons worked for "several principals").

216. *Id*. at 211 (internal quotes omitted). The Court stated also, echoing *International Shoe*, 326 U.S. 310, 316–17 (1945), that "[t]he test is simply the nature and extent of the activities of the appellant in [the state]." *Id*. at 211–12.

217. The contract specifically provided that it is the intention of the parties "to create the relationship . . . of independent contractor." *Id*. at 209.

218. *Id*. at 211.

219. *Id*. *See* Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 250 (1987) (agreeing with this logic in *Scripto*). Similar concerns about inadvertently fostering tax planning also informed the Court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), *see supra* notes 179–86 and accompanying text, and have informed the Court's decisions with respect to the "unitary business principle" as applied as an apportionment method in the context of state corporate income tax cases. *See* Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 164–65 (1983) (critiquing a different methodology, "formal geographical or transactional accounting," as a way of attributing corporate income to a state because one "problem with this method is that formal accounting is subject to manipulation."). *See also Complete Auto*, 430 U.S. at 281 (expressing disdain for judicial rules evaluating state taxes that posit form over substance).

220. 430 U.S. 551 (1977).

a nonprofit corporation with headquarters in the District of Columbia, maintained two offices in California that solicited advertising for the Society's magazine.[221] These offices performed no activities that were directly related to the Society's mail-order business through which the Society sold maps, atlases, globes, and books from its headquarters.[222] The Society challenged California's attempt to apply its use tax collection duty to its in-state mail order sales on due process grounds.[223] The Court held that California's imposition of the use-tax-collection liability on the Society's mail-order operation did not violate the Due Process Clause since the Society's continuous presence in California in the two offices provided a sufficient nexus between the Society and the state to justify imposition of the use tax collection duty.[224] The Court concluded that it was immaterial that there was no direct relationship between the Society's sales activity in California and the two advertising offices located there because the issue was "simply whether the facts demonstrate some definite link, some minimum connection, between [the State and] the person . . . it seeks to tax."[225]

The 1985 case, *Burger King Corp. v. Rudzewicz*,[226] is not a state tax case, but is nonetheless important to the state tax analysis, in part because the case was later relied upon by *Quill*.[227] In *Burger King,* the Court concluded that a franchisor headquartered in Florida could maintain a breach-of-contract action in Florida against Michigan franchisees that had no physical ties to Florida, since the parties' agreement contemplated, and in fact resulted in, on-going mail and telephone interactions between the franchisees and the franchisor's headquarters.[228] The Court noted that its decision was warranted given, among other things, that the owner of the franchisees was an "experienced and sophisticated"

221. *Id*. at 552.

222. *Id*. Orders for the Society's sales items were mailed from California directly to appellant's headquarters on coupons or forms enclosed with announcements previously mailed to Society members and magazine subscribers or on order forms contained in the magazine. *Id*.

223. *Id*. at 554.

224. *Id*. at 560–62.

225. 430 U.S. at 561 (internal quotes omitted).

226. 471 U.S. 462 (1985).

227. *Quill*, 504 U.S. at 307–08.

228. *Burger King*, 471 U.S. at 480–81, 487.

businessman who did not act under economic duress,[229] and that the franchise contract reasonably should have suggested to the franchisee that lawsuits under such contract could be filed against him in Florida.[230]

In 1992, *Quill* determined that a mail order vendor not otherwise present in the state was subject to due process jurisdiction when it mailed a large volume of catalogs into the state and used common carriers to deliver its considerable products sold there.[231] *International Shoe* had previously held that an in-state corporate presence is not required for adjudicative jurisdiction and *Quill* relied upon *International Shoe* and *Burger King* to conclude that physical presence is also not required as a matter of due process for state tax jurisdiction.[232] In so holding, *Quill* formally overruled the Court's prior contrary holding in *National Bellas Hess*.[233] The Court noted that under its current jurisprudence "notice" or "fair warning" is the analytic "touchstone of due process nexus analysis."[234] It concluded that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State"—for example, through "continuous and widespreadsolicitation of business within a State"-–such actor "clearly has fair warning that its activity may subject it to the jurisdiction of a foreign sovereign."[235]

D. Asahi Metal Industry Co., Ltd. v. Superior Court of Calif.[236]

For the past several decades the Court's application of the minimum contacts analysis set forth in *International Shoe* has relied significantly on *Asahi Industry Co., Ltd. v. Superior*

229. *Id*. at 484–85.
230. *Id*. at 481–82.
231. *Quill*, 504 U.S. at 306–08.
232. *Id*.
233. *Id*. at 308 ("Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process."). In contrast, the case retained the physical presence standard for Commerce Clause purposes so the company in question was not required to pay retroactive use taxes. *See supra* notes 88–98 and accompanying text.
234. *Id*. at 312.
235. *Id*. at 308 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) and Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).
236. 480 U.S. 102 (1987).

Court of Calif.[237] *Asahi* was a plurality decision that splintered 4-4 as to the practical application of this test.[238]

In *Asahi*, a Taiwanese motorcycle manufacturer sought jurisdiction in California over a Japanese company that manufactured motorcycle parts in Japan that were alleged to be the proximate cause of a motorcycle accident that took place in California.[239] The Japanese company sold its parts into the stream of commerce and was aware that tires incorporating its parts would be sold in California.[240] However, the company did not: (1) do business in California; (2) have an office, agents, employees, or property in California; or (3) advertise or solicit business in California.[241] The company also did not create, control, or employ the distribution system that brought its assemblies to, or design these assemblies in anticipation of sales in, California.[242]

Justice Brennan, writing for four Justices, concluded that as long as a party is aware that its product is being marketed in the forum state, jurisdiction premised on the placement of the product into the stream of commerce is consistent with the Due Process Clause, and no showing of additional conduct is required.[243] He further concluded that even though the petitioner did not design or control the distribution system that carried its assemblies into California, the fact that it made regular and extensive sales to a manufacturer that it knew was making regular sales of the final product in California was sufficient to establish minimum contacts jurisdiction.[244] Applying this standard, Justice Brennan would have found the existence of jurisdiction if not for the existence of special factual circumstances.[245]

Justice O'Connor, also writing for four Justices, differed with Justice Brennan. She concluded that the "substantial connection" between a defendant and the forum state necessary for a finding of minimum contacts must derive from

237. *Id.*
238. *See id.*
239. *Id*. at 105–06.
240. *Id*. at 106–07.
241. *Id*. at 112–13
242. 480 U.S. at 112–13.
243. *Id*. at 116–17, 121 (Brennan, J.).
244. *Id.* at 121
245. *Id*. at 116–17, 121. The special factual circumstances are discussed *infra* notes 249–254 and accompanying text.

an action purposely directed toward the forum state.[246] Also, she concluded that the mere placement of a product into the stream of commerce is not such an act, even if done with awareness that the stream will sweep the product into the forum state—absent additional conduct indicating an intent to serve the forum state market.[247] Those additional acts could include, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.[248]

Despite the disagreement on the minimum contacts analysis, all nine Justices that took part in *Asahi* agreed that jurisdiction was not appropriate on the facts.[249] The holding was based on the Justices' conclusion that, given the unusual facts, it would not have been fair and reasonable for jurisdiction to apply.[250] In making this determination the Court considered the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief.[251] It also weighed in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[252] In general, the outcome of the reasonableness analysis turned on the facts that: (1) the action was one for indemnification, not a case with respect to the underlying California accident; (2) the transaction on which the claim was based took place in Taiwan; and (3) both parties were foreign

246. *Id*. at 112 (O'Connor, J.).

247. *Id*. at 112–13 (O'Connor, J.). *See id.* at 108 (noting the fact that "Asahi did not design or control the system of distribution that carried its valve assemblies into California").

248. 480 U.S. at 112. *See also id*. ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.").

249. *See generally* 480 U.S. 102 (1987). Justice Stevens did not join the minimum contacts analysis of either Justice Brennan or Justice O'Connor because he did not think it was necessary for the disposition of the case. *Id*. at 121–22 (Stevens, J.).

250. *Id*. at 113–16, 121–22 (eight of the nine Justices—all but Justice Scalia—agreed with this analysis). *Compare* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (stating that jurisdiction must not offend "traditional notions of fair play and substantial justice").

251. 480 U.S. at 113.

252. *Id*.

nationals.[253] Consequently, the interest of California in hearing the case was slight, and there was a need to consider the procedural and substantive policies of other nations.[254]

E. J. McIntyre Machinery, Ltd. v. Nicastro[255]

After *Asahi*, the courts split on the appropriate minimum contacts theory to apply, with some courts applying Justice Brennan's stream of commerce theory and other courts applying Justice O'Connor's stream of commerce-plus theory.[256] Almost thirty-five years later the Supreme Court revisited *Asahi* in *J. McIntyre Machinery, Ltd. v. Nicastro.*[257] The Court's decision in *McIntyre* was intended, in part, to resolve the confusion created by *Asahi*.[258] However, *McIntyre* only increased the confusion—and created considerable controversy.[259] Whereas *Asahi* resulted in a 4-4 stalemate on the minimum contacts question,[260] *McIntyre* broke 4-2-3.[261]

1. The Decision

In *McIntyre*, the cause of action was—as in *Asahi*—predicated on an accident allegedly caused by a foreign manufacturer's defective product.[262] Jurisdiction was sought

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253. *Id*. at 114–16.

254. *Id.* The Court stated that "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id*. at 115 (quotes omitted).

255. 131 S. Ct. 2780 (2011).

256. *Id*. at 2789 ("Since *Asahi* was decided, the courts have sought to reconcile the competing opinions"). *See also* Adam N. Steinman, *The Meaning of McIntyre*, 18 Sw. J. Int'l 417, 418 (noting the "post-*Asahi* uncertainty"); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK LAW REVIEW 867, 879–80 (2012) (discussing the post-*Asahi* disagreements in the lower federal courts).

257. *See generally* 131 S. Ct. 2780 (2011).

258. *Id*. at 2785 (stating an intent to address the "decades-old questions left open by *Asahi*" in jurisdictional cases pertaining to an "absent party") (Kennedy, J.).

259. *McIntyre* has been heavily criticized by commentators both for its holding and the fact that it produced no clear single opinion. *See e.g.*, Effron, *supra* note 256, at 868, 868 n.3 (citing articles); Drobak, *supra* note 187, at 1729; Steinman, *supra* note 256, at 425–26; John T. Parry, *Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 851–52 (2012).

260. *See supra* notes 243–48 and accompanying text.

261. *See generally McIntyre*, 131 S. Ct. 2780 (2011).

262. *Compare McIntyre*, 31 S. Ct. 2780, 2786 (2011) *with Asahi*, 480 U.S. 102, 105–06 (1987). The recent 2011 case, *Goodyear*, involved a similar allegation. 131 S. Ct. 2846, 2850. *See also Daimler*, 134 S. Ct. 746, 750–51 (2014) (pertaining

in a court in New Jersey—the site of the accident—based on three primary facts.[263] First, a U.S. distributor agreed to sell the defendant's machines in the United States.[264] Second, officials of the defendant attended trade shows in several states, though not in New Jersey.[265] Third, no more than four of the defendant's machines, including the one at issue, ended up in New Jersey.[266] The New Jersey Supreme Court held that New Jersey's courts could exercise jurisdiction over a foreign manufacturer without contravening the Due Process Clause so long as the manufacturer knew or reasonably should have known that its products were distributed through a nationwide distribution system that might lead to sales in any of the states.[267] The New Jersey court invoked Justice Brennan's "stream-of-commerce" test from *Asahi* to find such jurisdiction, even though at no time had the manufacturer advertised in, sent goods to, or in any relevant sense targeted the state.[268]

a. Justice Kennedy's opinion

The Supreme Court reversed, in a splintered decision that produced minimal analytic consensus. Justice Kennedy, writing for four Justices, agreed with the Court's prior precedent that the appropriate standard was whether the defendant "purposefully avails itself of the privilege of

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to a jurisdiction claim based on a foreign corporation's allegedly tortuous conduct).

263. 31 S. Ct. at 2786, 2790–91.

264. *Id*. The distributor had a similar name as the manufacturer but "the two companies were separate and independent entities with no commonality of ownership or management." *Id*. at 2796 (Ginsburg, J., dissenting) (quotations omitted). There was "no allegation that the distributor was under [the manufacturer's] control." *Id*. at 2786. The distributor "structured [its] advertising and sales efforts in accordance with"the manufacturer's" direction and guidance whenever possible" and "at least some of the machines were sold on consignment to" the distributor. *Id*. (square brackets in original).

265. *Id*. at 2786, 2790–91. *See also id.* at 2795–96 (Ginsburg, J., dissenting).

266. *Id*. at 2786, 2790. The machine that injured the plaintiff was purchased as a result of a demonstration made to the plaintiff's employer at a Nevada trade show. *See* 31 S. Ct. at 2795–96 (Ginsburg, J., dissenting). The employer later purchased the machine from McIntyre's American distributor, based in Ohio, with a check payable to that distributor. *See* Nicastro v. McIntyre Machinery America, 987 A.2d 575, 578 (N.J. 2010), *rev'd*, 131 S. Ct 2780 (2011). There were no conclusive facts as to any other sales made to New Jersey customers. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. at 2795 n.3 (Ginsburg, J., dissenting).

267. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. at 2786.

268. *Id*. (At "no time [had the manufacturer] either marketed goods in the State or shipped them there.").

conducting activities within the forum State, thus invoking the benefits and protections of its laws."[269] He concluded, however, that this standard was not met because the defendant never engaged in any activities in New Jersey that revealed an intention to invoke or benefit from the protection of the state's laws.[270] He noted the fact that the company had no office in New Jersey; neither paid taxes nor owned property there; and neither advertised in, nor sent any employees to, the State.[271] Indeed, he pointed out, the trial court found that the petitioner did not have a single contact with New Jersey apart from the fact that the machine in question ended up there.[272] He concluded that the facts of the case "may reveal an intent to serve the U.S. market, but they do not show that [the defendant] purposefully availed itself of the New Jersey market."[273]

Justice Kennedy acknowledged the confusion caused by the competing plurality opinions in *Asahi*.[274] He rejected Justice Brennan's stream of commerce" test because in his view it is "the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."[275] He stated that a defendant's placement of goods into commerce "with the expectation that they will be purchased by consumers within the forum State" might indicate purposeful availment,[276] but that more was required – "the principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."[277]

Justice Kennedy's injection of the sovereignty analysis into the purposeful availment test was novel.[278] He stated two

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269. *Id*. at 2785 (Kennedy, J.) (quotes omitted).

270. *Id*. at 2791.

271. *Id*. at 2790.

272. *Id*.

273. 131 S. Ct. at 2790.

274. *Id*. at 2789 ("Since *Asahi* was decided, the courts have sought to reconcile the competing opinions.").

275. *Id*. at 2788.

276. *Id*. (stating also that "a defendant may in an appropriate case be subject to jurisdiction without entering the forum . . . as where manufacturers or distributors seek to serve a given State's market.").

277. *Id.* ("In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.")

278. *See id*. at 2798 (Ginsburg, J., dissenting) ("the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not

principles that were implicit in his reasoning. First, personal jurisdiction "requires a forum-by-forum, or sovereign-by-sovereign, analysis."[279] He stated that "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[280] Justice Kennedy's second principle was a corollary of the first: "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."[281] However, he noted that the latter possibility "would be an exceptional case"—in part because "foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums."[282]

Justice Kennedy suggested that his jurisdictional concerns were primarily with respect to foreign defendants—a fact also at issue in *Asahi,*[283] and in the more recent general jurisdiction cases, *Goodyear*[284] and *Daimler*.[285] In *McIntyre,* the foreign corporation was one that had not targeted the markets of any particular state or states, but rather the United States in general.[286] Also, Justice Kennedy's second sovereignty principle—pertaining to whether federal due process jurisdiction might apply where no state court jurisdiction would—presumably would arise primarily with respect to foreign defendants.[287] In her dissent, Justice Ginsburg

state sovereignty"); Shaffer v. Heitner, 433 U.S. 186, 204, 204 n.20 (1977) (recognizing that "the mutually exclusive sovereignty of the States [is not] the central concern of the inquiry into personal jurisdiction").

279. 131 S. Ct. at 2789 (Kennedy, J).

280. *Id*. (stating also that "Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty,' for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.") (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)).

281. *Id*.

282. *Id*. at 2789–90.

283. 480 U.S. 102 (1987).

284. 131 S. Ct. 2846 (2011).

285. 134 S. Ct. 746 (2014).

286. 131 S. Ct. at 2790.

287. *Id*. (Kennedy, J.) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available

repeatedly referenced Justice Kennedy's analysis as being with respect to foreign defendants.[288]

However, Justice Kennedy also made clear that his general analysis potentially applied in situations where the defendant was a U.S. producer. He stated that:

> It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town.[289]

Justice Kennedy conceded that sometimes a defendant might meet his construction of the purposeful availment test "by sending [into the state] its goods rather than its agents."[290] But in those cases, "the defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."[291] Consequently, Justice Kennedy aligned himself with Justice O'Connor's "stream-of-commerce-plus" theory—a point that he admitted.[292] But he also stated that this theory would not by itself resolve many difficult questions of jurisdiction that will arise in particular cases.[293]

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and can exercise general jurisdiction").

288. *See, e.g.*, *id.* at 2799 (Ginsburg J., dissenting) ("This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world. A *foreign-country manufacturer* engages a U. S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers.") (emphasis added); *id*. at 2802 (stating that "this Court has not considered in any prior case the now-prevalent pattern presented here—a *foreign-country manufacturer* enlisting a U.S. distributor to develop a market in the United States for the manufacturer's products.") (emphasis added). Justice Ginsburg's dissent is discussed in more detail *infra* notes 308–13 and accompanying text.

289. *Id*. at 2790 (Kennedy, J.).

290. *Id*. at 2788.

291. 131 S. Ct. at 2788.

292. *Id*. at 2790 ("the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi.*").

293. *Id*. (stating also that "[t]he defendant's conduct and the economic realities

Justice Kennedy did not apply the separate fairness test that resolved the question of jurisdiction with respect to the foreign defendant in *Asahi*—perhaps because he considered this test to be subsumed within his more general sovereignty analysis.[294] Alternatively, the omission may have been because the fairness test was not necessary on the facts, given that the minimum contacts test was not satisfied.[295]

b. Justice Breyer's opinion

Justice Breyer, writing for himself and Justice Alito, agreed with Justice Kennedy as to the disposition of the case, but did not agree with the analysis.[296] Further, he was not willing "to announce a rule of broad applicability without fully considering modern-day consequences."[297] Justice Breyer concluded that the disposition of the case was dictated by the Court's prior "precedents,"[298] and noted that the facts did not meet either Justice Brennan's stream of commerce test or Justice O'Connor's stream of commerce-plus theory.[299] In

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of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.")

294. *See id*. at 2787 ("Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law."). *See* Parry, *supra* note 259, at 844 (arguing that Justice Kennedy's statement that a small domestic farmer would be protected from burdensome litigation in another state by reason of his analysis "suggests that [for him] there is no fairness inquiry at all."); Noyes, *supra* note 175, at 44 (stating that Justice Kennedy "would eliminate the fairness requirement as redundant").

295. *See* Steinman, *supra* note 256, at 430 ("[I]t would be wrong to read *McIntyre* as inferring that second step in the jurisdictional framework. As a logical matter, there was no need for either Justice Kennedy or Breyer to confront the reasonableness or fairness factors. They have each concluded that McIntyre had not purposefully established minimum contacts with New Jersey, which is the first requirement of the traditional test.").

296. 131 S. Ct. at 2794 (Breyer, J., concurring) ("[T]hough I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.").

297. *Id*. at 2791. His rationale was based on the fact that "the case did not present issues arising from recent changes in commerce and communication." *Id*.

298. *Id*. *But see* Drobak, *supra* note 187, at 1735–36 ("Perhaps the most unusual aspect of the opinions in *Nicastro* is the claim by the concurrence that they are doing no more than adhering to . . . precedents.").

299. 131 S. Ct. at 2793 (Breyer, J., concurring). Although Justice Breyer disagreed with the "stream of commerce" approach applied by the New Jersey Supreme Court, he suggested that his difficulty was not with the test but the way the court applied the test. *See id.* (stating that under the New Jersey court's view, "a producer is subject to jurisdiction for a products-liability action so long as it knows or reasonably should know 'that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in

particular, he stated that "the relevant facts show no 'regular . . . flow' or 'regular course' of sales in New Jersey, and there is no 'something more,' such as special state-related design, advertising, advice, or marketing, that would warrant the assertion of jurisdiction."[300]

Justice Breyer also noted that the plaintiff "has shown no specific effort by the British Manufacturer to sell in New Jersey" and "has not otherwise shown that the British Manufacturer purposefully availed itself of the privilege of conducting activities within New Jersey, or that it delivered its goods in the stream of commerce with the expectation that they will be purchased by New Jersey users."[301] Among other things, "[h]e has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows."[302]

Justice Breyer emphasized that what was key to his determination was that "none of the Court's precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient."[303] Unlike Justice Kennedy, Justice Breyer also applied a fairness inquiry similar to that applied in *Asahi*.[304] He concluded that a finding of jurisdiction would not be fair given the manufacturer's limited contacts.[305] Justice Breyer suggested that fairness might

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any of the fifty states.' ") (quoting Nicastro v. McIntyre Machinery America, 987 A.2d 575, 592 (N.J. 2010), *rev'd*, 131 S. Ct 2780 (2011)) (emphasis in original).

300. *McIntyre*, 131 S. Ct. at 2792 (*generally quoting Asahi*, 480 U.S. 102 (1997)).

301. *Id*. (quotations omitted).

302. *Id*. Justice Breyer made reference to the more extensive analysis of the facts set forth in the dissent. *Id.* He stated that "[t]here may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. And the dissent considers some of those facts . . . But the plaintiff bears the burden of establishing jurisdiction, and here I would take the facts precisely as the New Jersey Supreme Court stated them." *Id. Compare id*. at 2801 (Ginsburg, J. dissenting) ("How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?").

303. *Id*. at 2792. *But see* Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 G. WASH. L. REV. 204, 227–28 (arguing that Justice Breyer's one-sale conclusion with respect to prior Supreme Court cases is incorrect); Drobak, *supra* note 187, at 1734–36 (similar). *See infra* note 336 and accompanying text (discussing commentary and cases that suggest that one in-state sale might be sufficient to establish due process jurisdiction in some instances).

304. 131 S. Ct at 2793. *Compare Asahi*, 480 U.S. at 113–16.

305. 131 S. Ct. at 2793 (Breyer, J., concurring) (stating that he could not

dictate that a large domestic manufacturer using a large distributor should be subject to a state's jurisdiction given its in-state sales, whereas similar facts would not be sufficient with respect to a small-sized manufacturer.[306] He also stated—consistent with the holding in *Asahi*—that the requisite fairness necessary for due process jurisdiction is less likely to exist where the defendant corporation is foreign.[307]

c. Justice Ginsburg's opinion

Justice Ginsburg's dissent on behalf of three justices concluded that there was due process jurisdiction.[308] She reasoned that the defendant had utilized its independent but exclusive distributor to target the national U.S. market, including New Jersey.[309] By using the distributor to promote and sell its machines in the United States, she concluded that the defendant had "purposefully availed itself" of the United States market nationwide, not a market in a single State or a discrete collection of States.[310] Therefore, the defendant had availed itself of the market of all States in which its products were sold by its exclusive distributor and could be subject to adjudicative jurisdiction on that basis.[311] She concluded that it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where its products caused injury.[312]

Justice Ginsburg also disagreed with Justice Kennedy's

"reconcile" the New Jersey court's approach with "defendant-focused fairness.")

306. *Id*. He stated that "a rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue." *Id*.

307. *Id*. at 2793–94 ("[T]he fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain."). He stated also that "[i]t may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good." *Compare Asahi*, 480 U.S. 102, 113–16 (1987).

308. 131 S. Ct. at 2804 (Ginsburg, J., dissenting).

309. *Id*. at 2801.

310. *Id*.

311. *Id*.

312. *Id*. at 2800–01.

emphasis on sovereignty. She concluded, "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty.[313]

2. Analysis

Commentators have criticized *McIntyre* for seeking to resolve the confusion created by *Asahi* in the adjudicative jurisdiction context and instead creating more confusion.[314] However, it is clear that *McIntyre* should not impact the due process jurisdiction analysis applied in state tax cases.

No one opinion in *McIntyre* was supported by a majority of the Justices.[315] Under the rule in *U.S. v. Marks*,[316] if the Justices are split as to the rationale for a judgment, with less than five joining in any one opinion, the rule of the case is limited to the rationale in which at least five Justices who supported the judgment may be said to concur.[317] Subsequent cases and scholars generally agree that *McIntyre's* precedential analysis is that stated in the concurring opinion of Justice Breyer.[318] Justice Breyer expressed allegiance to the

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313. *Id*. at 2798.

314. *See, e.g.*, Peterson, *supra* note 303, at 228 ("not only does *McIntyre* not resolve any of the ambiguities left by *Asahi*, it adds a host of new problems for lower courts and jurisdiction scholars trying to understand the proper scope of specific jurisdiction"); Parry, *supra* note 259, at 841 ("The most straightforward observation one can make about *Nicastro* is that it compounds the [previous] uncertainty.").

315. *See supra* notes 269–318 and accompanying text.

316. 430 U.S. 188 (1977).

317. *Id*. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (internal quotation omitted)).

318. *See, e.g.*, Kaitlyn Findley, *Paddling Past Nicastro in the Stream of Commerce Doctrine: Interpreting Justice Breyer's Concurrence as Implicitly Inviting Lower Courts to Develop Alternative Jurisdictional Standards*, 63 EMORY L.J. 695, 723 (2014) ("Justice Breyer's narrow concurrence in the judgment based on existing precedent is the holding of *Nicastro* and is binding on all lower courts."); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 514 and n.220 (2012) ("*Marks* certainly means that Justice Kennedy's four-Justice plurality would not constitute the Supreme Court's holding in *McIntyre*. If any opinion qualified under *Marks* as the one 'concurring . . . on the narrowest grounds' it would seem to be Justice Breyer's concurrence") (*quoting Marks*, 430 U.S. at 193); Robert M. Pollack, *"Not of Any Particular State": J. McIntyre Machinery Ltd. v. Nicastro and Nonspecific Purposeful Availment*, 89 N.Y.U. L. REV. 1088, 1105 (2014) (noting that since *McIntyre* "lower courts have looked to Justice Breyer's concurrence for guidance").

Court's prior precedents,[319] rejected Justice Kennedy's novel focus on sovereignty concerns,[320] relied heavily on his understanding that only one of the defendant's products was sold in the forum state,[321] and suggested that the plaintiff may simply have failed to prove the facts necessary for jurisdiction.[322] Therefore, in general, it may be that *McIntyre* affected very little change to Supreme Court doctrine.[323]

a. Practical Limitations of McIntyre for State Tax Purposes

For state tax purposes it is important that *McIntyre* suggested practical limits to its holding, both with respect to the type of company and the nature of the activity to which the holding could apply. The facts of *McIntyre* pertained to a *foreign* manufacturer – a focus that tends to characterize the Court's due process jurisdiction cases[324]—and each of the Justices seemed to conclude that it was with respect to such facts that the case reasoning would most likely apply.[325] A significant assumed fact in *McIntyre* was that the defendant

319. 131 S. Ct. at 2791 (Breyer, J., concurring) ("In my view, the outcome of this case is determined by our precedents.")

320. *See id*. at 2792–93 (stating that the facts of the case are "an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.")

321. *Id*. at 2792 ("none of the Court's precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.")

322. *See supra* note 302 and accompanying text.

323. *See* Noyes, *supra* note 175, at 60 (concluding that "The Supreme Court's decision in *Nicastro* does not break much, if any, new ground."); Findley, *supra* note 318, at 733–34 (quoting one federal district court, similar to other courts, as concluding "that *Nicastro*'s precedential value is limited to cases involving an identical fact pattern, 'otherwise leaving the legal landscape untouched.'") (quoting Windsor v. Spinner Industry, 825 F. Supp. 2d. 632, 638 (D. Md. 2011)); Steinman, *supra* note 256, at 426–27 (noting the propensity of lower courts to distinguish *McIntyre* on the facts and quoting one federal district court as stating "At best *McIntyre* is applicable to cases presenting the same factual scenario that it does."); Pollack, *supra* note 318, at 1105 (quoting the Federal Circuit Court as concluding "that the law remains the same after [*Nicastro*]") (*quoting* AFTG-TG, LLC v. Nuvoton Tech Corp., 689 F.3d 1358, 1363 (Fed. Cir. 2012)).

324. *See supra* notes 204-205, 239 and 262 and accompanying text. *See also* Katherine J. Florey, *Beyond Uniqueness: Reimaging Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1511 (2013) ("Although the basic personal jurisdiction framework applied to U.S. and foreign defendants is the same, U.S. courts have often shown particular solicitude for foreigners. . . *Asahi Metal*'s reasonableness test . . . is predominantly used in the international context [and the Court's] . . . most recent personal jurisdiction cases, particularly J. McIntyre Machinery Ltd. v. Nicastro, reaffirm the Court's special concern for the rights of foreign actors.").

325. *See supra* notes 283–88 and accompanying text.

targeted the market of the United States in sum and not the market of any individual state.[326] Justice Breyer noted that the foreign manufacturer did not even possess a list of potential customers in New Jersey—a fact that he considered noteworthy.[327] In contrast, most manufacturers that do business in the United States—certainly businesses of any size or ambition—engage in substantial, sophisticated in-state marketing activity.[328]

The Justices in *McIntyre* seemed to struggle to identify a situation where the reasoning that justified the case holding could apply to a domestic manufacturer.[329] The plurality and the concurring opinions both suggested that the only logical analogy is one where the domestic manufacturer is a very small, localized business.[330] Justice Kennedy gave as an example that of "[t]he owner of a small Florida farm [that] might sell crops to a large nearby distributor . . . who might then distribute them to grocers across the country."[331] Justice Breyer gave as his example that of "a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii)."[332] Fact patterns such as these pertaining to small, localized businesses are not generally of concern to state tax administrators given that very little tax revenue will be at stake.

More particularly, the holding in *McIntyre* was premised on the fact that the defendant had made only a single sale with respect to the forum state.[333] Justice Breyer's opinion, which

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326. *See supra* notes 263–66 and accompanying text. *But see supra* note 302 and accompanying text.

327. *See* 131 S. Ct at 2792 (Breyer, J., concurring) (noting that the plaintiff has "introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows" and referencing this point when saying "[t]here may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction").

328. *See, e.g.*, Lauren E. Willis, *Why Not Privacy By Default?*, 29 BERKELEY TECH. L.J. 61, 64 (2013) (noting that modern businesses "collect reams of data about us for marketing, pricing, product development and other uses").

329. *Id*. at 2790 (Kennedy, J), 2793 (Breyer, J., concurring).

330. *Id*. at 2790 (Kennedy, J). 2793 (Breyer, J., concurring).

331. *Id*. at 2790 (Kennedy, J.).

332. *Id*. at 2793 (Breyer, J., concurring).

333. *See* Pollack, *supra* note 318, at 1106 ("The decisional linchpin of the Breyer opinion lies in his finding that '[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient' contact to justify an exercise of personal jurisdiction.") (*quoting*

is likely the precedential opinion resulting from *McIntyre*,[334] emphasized this point.[335] Therefore the holding in *McIntyre* likely only applies—either with respect to a foreign or domestic entity—in such instances.[336] Perhaps this point more than any other reveals the limitations of *McIntyre* as applied to state taxation. It only takes a single product to bring about a serious injury and so a single sale can be the basis for the claim of adjudicative jurisdiction, as it was in *McIntyre*.[337] But for purposes of corporate income tax or sales tax, state taxation is almost always applied to an out-of-state company in instances in which the company is either engaged in making significant in-state sales or otherwise engaged in significant in-state market exploitation.[338]

All nine Justices in *McIntyre* agreed that when a state's market is targeted in the manner suggested by Justice O'Connor's *Asahi* opinion there would be due process jurisdiction.[339] This targeting included, by way of example,

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McIntyre 131 S. Ct. at 2792 (Breyer, J., concurring)).

334. *See supra* note 318 and accompanying text.

335. 131 S. Ct. at 2792 (Breyer, J., concurring).

336. *See supra* note 323, citing articles and cases suggesting the case should be limited to its facts. But the case does not necessarily mean that when a company makes a single sale into a state there is no potential finding of adjudicative jurisdiction. Justice Breyer specifically stated that he would respect the Court's prior "precedents," 131 S. Ct. at 2791 (Breyer, J., concurring), and in McGee v. Int'l Life Ins. Co., the Court upheld adjudicative jurisdiction in California even though the defendant had "never solicited or done any insurance business in California apart from the policy involved here." 335 U.S. 220, 222 (1957). *See Goodyear*, 131 S. Ct. 2846, 2854 (2011) ("Since *International Shoe* [326 U. S. 310 (1945)], this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving 'single or occasional acts' occurring or having their impact within the forum State) (*quoting International Shoe*, 326 U.S. at 318). For an analysis of how Justice Breyer's opinion can be reconciled with *McGee*, *see* Steinman, *supra* note 256, at 442–43 and n.144. *See also infra* notes 421–36 (discussing the recent cases decided under The Prevent All Cigarette Trafficking ("PACT") Act where, Justice Breyer's statement in *McIntyre* notwithstanding, two courts were not willing to assume that the Supreme Court's precedent stands for the proposition that there can never be adjudicative jurisdiction when only a single sale is made into a state).

337. *See* 131 S. Ct. at 2792 (Breyer, J., concurring) (noting that the accident at issue was caused by a "single, isolated sale").

338. See, for example, the cases cited at *supra* notes 106–47. *See also supra* note 336 (noting that a single sale into a state might be sufficient to establish jurisdiction in some cases).

339. 131 S. Ct. at 2790 (Kennedy, J.) (noting the "conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*"); 131 S. Ct at 2792 (Breyer, J., concurring) (quoting Justice O'Connor's *Asahi* decision favorably"); 2802

"designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[340] Some state tax practitioners have suggested that these standards can be potentially sidestepped by a manufacturer who chooses to sell goods through an intermediary.[341] However, Justice O'Connor's standards literally apply whether a company's in-state targeting is direct or indirect – and *McIntyre* provides no fodder for this argument, as the key relevant point in the case was that there was no such proven customer-specific direct or indirect in-state targeting.[342] Also, in any event, once a company that is engaged in selling products into a state makes significant sales in that state—irrespective as to the nature of the targeting—the logic in *McIntyre* no longer applies.[343]

(Ginsburg, J., dissenting) (same). *See also* Noyes, *supra* note 175, at 45.

340. *Asahi*, 480 U.S. at 112 (O'Connor, J.). Justice Breyer specifically referenced these standards. 131 S. Ct. at 2792 (Breyer, J. concurring). Justice Kennedy embraced Justice O'Connor's general approach, though he said it might not work well in difficult cases. *Id*. at 2790 (Kennedy, J.). Justice Breyer and Justice Kennedy both suggested that in-state advertising would be a sufficient contact. *See id*. at 2790 (Kennedy, J.), 2792 (Breyer, J. concurring).

341. *See, e.g.*, Benton, et al., *supra* note 11 (stating that, given the analysis in *McIntyre*, "the interposition of an affiliated or independent "middleman" may further bolster an argument that an entity is not subject to tax under the due process clause, so long as the interposed party is truly responsible for directing the business"); Brian J. Kirkell, et al., *supra* note 11 ("*J. McIntyre Machinery* has infused life into the due process clause of the U.S. Constitution as an effective bar to state taxation"); Charloette Noel and Karen H. Currie, *One-Step-Removed, or 'Economic,' Nexus: Not All Contacts With States Are Constitutionally Equal*, BNA WEEKLY STATE TAX REPORT, Sept. 16, 2011 (concluding that *McIntyre* supports the claim that indirect or "one-step-removed" state tax nexus assertions are unconstitutional). *Compare McIntyre*, 131 S. Ct. at 2793 (Breyer, J.) (asking but not answering the question: "does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders?").

342. The foreign defendant in *McIntyre* made sales through an unrelated intermediary, but Justice Breyer suggested that, despite this fact, the plaintiff would have prevailed had he shown that the defendant maintained a "list of potential New Jersey customers who might . . . have regularly attended [U.S.] trade shows." *Id*. at 2792 (Breyer, J., concurring). In the particular case where a state seeks to assert a use tax collection duty, the use of an intermediary by a manufacturer likely would not defeat this collection requirement—irrespective as to the due process analysis—since, among other things, the obligation to collect use tax could merely be transferred to the intermediary. *See* Hecht, *supra* note 212, at 9.

343. *See* Noyes, *supra* note 175, at 45, 60–62 (stating that *McIntyre* does not apply where the company's contacts with the state amount to a "regular course of

Justice O'Connor's "stream of commerce plus" standard as stated in *Asahi* requires that the defendant place its products into the stream of commerce and also engage in some additional state-directed activity, as referenced in the previous paragraph.[344] *McIntyre* did not resolve whether Justice Brennan's mere stream of commerce test survives when the defendant has not targeted a state directly but nonetheless makes more than *de miminis* in-state sales. Justice Breyer suggested that it did when he expressed general commitment to the Court's precedents and even cited Justice Brennan's *Asahi* decision favorably,[345] and some subsequent lower court decisions have concluded as much.[346] But this issue is largely academic when evaluating a state tax. When a state seeks to apply a sales tax, there is currently a physical presence jurisdiction requirement that dictates that a vendor do more than merely place its goods into the stream of commerce to

dealing" rather than the consummation of "a single sale.") One of the Court's precedents retained by *McIntyre*, *see supra* notes 318–19 and 323 and accompanying text, was Quill Corp. v. North Dakota, which stated that where a commercial actor is engaged in "continuous and widespread solicitation of business within a state" it is subject to jurisdiction there. 504 U.S. 298, 308 (1992). *See supra* notes 231–35 (discussing the due process analysis in *Quill*). In her dissent in *McIntyre*, Justice Ginsburg commented on the distinct character of the product at issue—a $24,000 shearing machine used to process recyclable materials. She stated: "[McIntyre's] machine . . . is unlikely to sell in bulk worldwide, much less in any given State. By dollar value, the price of a single machine represents a significant sale. Had a manufacturer sold in New Jersey $24,000 worth of flannel shirts, cigarette lighters, or wire-rope splices, the Court would presumably find the defendant amenable to suit in that State." 131 S. Ct. at 2803 n.15 (Ginsburg, J., dissenting).

344. *See supra* notes 339-340 and accompanying text. *See also* Pollack, *supra* note 318, at 1098 (noting that Justice O'Connor's standard has been referred to in shorthand as a "stream of commerce plus" or "foreseeability plus" standard).

345. 131 S. Ct. at 2792 (Breyer, J., concurring) (*quoting Asahi*, 480 U.S. 102, 117 (Brennan, J.)). *See also supra* notes 298-99 and accompanying text.

346. *See supra* notes 318, 323 and accompanying text. Pollack, *supra* note 318, at 1105 ("Most courts have declined to view the rejection of jurisdiction in *Nicastro* as an endorsement of Justice O'Connor's narrower 'stream of commerce plus' minimum contacts test, since in a splintered decision the holding is represented only by the narrowest agreement among opinions supporting the outcome, and Justice Breyer's concurrence did not favor any particular test for determining minimum contacts"); Oscar G. Chase & Lori Brooke Day, *Re-examining New York's Law of Personal Jurisdiction after Goodyear Dunlop Tires Operations, S.A. v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro*, 76 ALBANY L. REV. 1009, 1050–51 (2012) ("Justice Breyer's concurring opinion leaves open the possibility of exercising jurisdiction if a large and consistent enough flow of a defendant's product enters [the state] through the stream of commerce [even if] the defendant has targeted [only] the United States market") (square brackets added).

create jurisdiction.[347] Also, the states' corporate income taxes usually require that a taxpayer must have significant in-state sales or other activity to be subject to tax, and when this standard is met it is fair to presume that a company has sufficiently targeted the state.[348]

b. *Conceptual Problems with Applying McIntyre to State Taxation*

More fundamentally, subsequent to *McIntyre*, it remains the case that considerations of fairness are an essential part of the due process jurisdiction test. Both the *McIntyre* concurrence and the dissent—five of the nine Justices – specifically concluded as much, and Justice Kennedy's plurality decision is not inconsistent with this point.[349] Fairness considerations apply differently in the context of state taxation than they do for purposes of adjudicative jurisdiction.

The Court's recent adjudicative jurisdiction cases, including *McIntyre*, have paid homage to the Court's 1945 decision in *International Shoe Co. v. Washington*,[350] and each of the opinions in *McIntyre* embraced *International Shoe* as the controlling precedent.[351] *International Shoe* reevaluated the Court's prior adjudicative jurisdiction rules to permit a state to collect tax from a multistate business seemingly because the Court was concerned with a tax avoidance strategy that was apparent on the facts.[352] The Court has decided subsequent due process cases where it has similarly expressed concern with taxpayer attempts to rely upon the Court's constitutional precedent for tax planning purposes,[353] and those cases—as well as all of the Court's prior due process precedents—were specifically retained by *McIntyre*.[354] Justice Breyer's opinion is understood to be the precedential opinion that resulted from

347. *See Quill*, 504 U.S. at 317–18.

348. *See* Hecht, *supra* note 212, at 14 (noting the tendency on the part of courts to use the amount of sales in a state "as a proxy for evidence of purposefulness of a seller's activities with respect to that market."). *See supra* notes 109–10 and accompanying text.

349. *See* Chase and Day, *supra* note 346, at n.183. *See supra* notes 294–95 and accompanying text (evaluating Justice Kennedy's view of the due process fairness inquiry).

350. 326 U.S. 310 (1945).

351. *See supra* notes 169–75 and accompanying text.

352. *See supra* notes 179–86 and accompanying text.

353. See *supra* note 219 and accompanying text.

354. *See* Noyes, *supra* note 175, at 60.

McIntrye and Justice Breyer has previously stated, by way of analogy, that "[i]f *International Shoe* stands for anything, it is that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings."[355]

Justice Kennedy's plurality decision argued that sovereignty, not fairness, is the touchstone of the jurisdictional analysis,[356] but his view was not the majority view, and there is reason to think that even his view would be qualified if applied to an attempt to collect state tax. Justice Kennedy's sovereignty analysis has been criticized for being ambiguous.[357] However, it is at least clear that his implicit concern relates to the legal doctrines of choice of law and full faith and credit.[358] In essence, the concern is that if an inappropriate forum becomes the chosen state of adjudication, the final decision rendered by that court—applying that state's law, as a matter of full faith and credit—operates to the detriment of the appropriate state of adjudication.[359] Also,

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355. *See* Benitez-Allende v. Alcan Aluminio do Brasil, S.A., 857 F.2d 26, 30 (1st Cir. 1988) (quoting Vencedor Manufacturing Co., Inc. v. Gaugler Industries, 557 F.2d 886, 891 (1977)) (internal quotation marks omitted) (concluding the fact that title to the allegedly defective products sold passed outside the jurisdiction in question was immaterial to the due process question).

356. 131 S. Ct. at 2789 (Kennedy, J.).

357. *See, e.g.*, Wendy Collins Perdue, *What's "Sovereignty" Got to Do with it? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 740 (2012); Steinman, *supra* note 318, at 496–98.

358. *See* 131 S. Ct. at 2787 (Kennedy, J.) ("Jurisdiction is power to declare the law") (*quoting* Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("[T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."); Brilmayer and Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. Rev. 617, 624 (stating that *McIntyre* is "but the latest case to adopt some of [the] line of thinking . . . that a state could use the operation of the Full Faith and Credit Clause to efface the borders of its sister states and threaten their authority.").

359. *See* Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163 (2013) ("concerns about the sovereign interests of other jurisdictions and the expectations of parties who rely on particular rules of law dominate the discussion in a closely related doctrinal area: choice of law . . . [n]ot surprisingly, choice of law is the "elephant in the room" in most personal-jurisdiction cases"); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 Hastings Const. L.Q. 819, 830 (1991) (noting the "inextricable relationship between choice of law and jurisdictional

such a decision, because rendered by the wrong jurisdiction, is potentially unfair to the defendant.[360]

Justice Kennedy's sovereignty concerns have no analog where a state seeks to tax the sales of a multistate business made to persons in the state or the income of such a business as fairly apportioned to the state.[361] There is no choice of law or full faith and credit concern in these cases. Also, state sovereignty has an additional, countervailing meaning when evaluating state taxation that is not represented in the adjudicative jurisdiction analysis. The U.S. Constitution confers upon the states a sovereign right to impose taxes,[362] and the Court has recognized that under the Constitution multistate businesses doing business in a state may be made to pay their fair share of state tax.[363] These points in sum suggest that when evaluating state taxation Justice Kennedy's state-versus-state sovereignty concerns should simply not apply.

Justice Kennedy's *McIntyre* decision – focused as it was on a foreign defendant—also broached possible concerns with respect to a second kind of sovereignty, state-versus-federal judicial sovereignty.[364] His general notion was that certain claims might be subject to federal judicial jurisdiction rather than state judicial jurisdiction.[365] But these concerns are also

issues"); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 753 (1987) ("Choice of law and choice of jurisdiction are not significantly different issues. Both seek to determine whether the forum can act as sovereign in one respect or another.") (footnote omitted).

360. *See supra* notes 279-80 and 359 and accompanying text.

361. *See* Hecht, *supra* note 212, at 9 (stating that the choice of law concerns that have influenced the Supreme Court's thinking about adjudicative jurisdiction are "irrelevant to [state] tax enforcement jurisdiction").

362. *See* Fatale *supra* note 7, at 42. *See also* Alden v. Maine, 527 U.S. 706, 750–51 (1999) (recognizing the importance of the states' fisc as furthering their "ability to govern in accordance with the will of their citizens") (Kennedy J.) (opinion joined by Justices Thomas and Scalia).

363. *See supra* note 64 and accompanying text. Justice Kennedy recently referenced this specific point in his concurrence in DMA Marketing Assn. v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). In that opinion, Justice Kennedy criticized the physical presence sales tax nexus rule stated in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), as "now inflicting extreme harm and unfairness on the States". . . resulting in the weakening of the "States' education systems, healthcare services, and infrastructure." *Id.* For a discussion of *Quill*, *see supra* notes 85–98 and accompanying text.

364. *See supra* note 281–82 and accompanying text.

365. *See* 131 S. Ct. at 2789 (Kennedy, J.) (stating also ["o]urs is a legal system unprecedented in form and design, establishing two orders of government, each

irrelevant when evaluating state taxation because there is no functional overlap between state and federal taxation since the state and federal governments each impose distinct taxes.[366]

There is, of course, no certainty that Justice Kennedy's sovereignty rationale will ever be supported by a majority of the Supreme Court's Justices. However, should this rationale one day be supported by the Court more generally, it would have to be re-stated with respect to the considerations that are unique to state taxation. There would be no inconsistency in drawing such a distinction between adjudicative and state tax jurisdiction. Although the Court has stated that the jurisdiction rules that apply to state taxation are "comparable" to those that apply for purposes of adjudicative jurisdiction[367] that articulation allows for differences, and three of the four Justices that signed the plurality decision in *McIntyre* have specifically expressed their understanding that there can be differences between the two jurisdictional standards.[368]

III. CURRENT AREAS OF CONTROVERSY

Several recent state corporate income and sales tax cases have evaluated due process jurisdiction questions.[369] The Due Process Clause has also been recently considered in federal cases and commentary pertaining to Congressional legislation that has either been enacted or proposed with respect to state tax jurisdiction.[370] This section considers these recent developments.

A. Recent State Corporate Income Taxes Cases

In the aftermath of *Quill Corp. v North Dakota*,[371] there was a series of state corporate income tax cases that evaluated

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with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.") (quotes omitted).

366. Fatale, *supra* note 7, at 48.

367. *Quill*, 504 U.S. at 308.

368. *Id*. at 319–20 (Scalia, J., Kennedy, J. and Thomas, J., concurring) (agreeing with the majority opinion that "comparable" reasoning applies when evaluating state tax jurisdiction under the Due Process Clause as compared with the analysis applied for purposes of adjudicative jurisdiction, but noting that "I do not understand this to mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical").

369. *See infra* notes 371–419 and accompanying text.

370. *See infra* notes 420–43 and accompanying text

371. 504 U.S. 298 (1992).

fact patterns in which a company engaged in tax planning sought to avoid nexus on the part of one or more of its corporate affiliates by arguing that those affiliates lacked "physical presence" Commerce Clause nexus with the state.[372] These fact patterns resulted in a series of state tax cases in which the court concluded that the *Quill* physical presence standard did not apply outside the context of state sales tax.[373]

In particular, many of the corporate income tax nexus cases decided by the states after *Quill* were cases where the general facts were that an in-state retailer separately incorporated an out-of-state affiliate as an "intangible holding company" (IHC).[374] In these cases the retailer transferred its valuable trademarks to the IHC, then licensed back the right to use the trademarks for a royalty payment paid in connection with the in-state sale of trademarked products – a payment that the retailer then deducted for state income tax purposes.[375] The arrangement was intended to shift the in-state retailer's otherwise taxable income outside the state's taxing jurisdiction.[376]

To address the IHC tax planning, some states sought to apply income tax to the royalty paid by the retailer by asserting tax jurisdiction over the IHC based upon the retailer's in-state use of the trademarks.[377] The state courts generally upheld these nexus assertions on the theory that in the absence of a physical presence standard the question under the Commerce Clause is whether the taxpayer is engaged in sufficient in-state market exploitation.[378]

In the various IHC cases that post-date *Quill*, the issue was almost always the application of the Commerce Clause, because taxpayers were focused on extending the *Quill* physical presence standard to the states' corporate income

372. *See supra* note 106 and accompanying text. *See also* Comptroller of Treasury v. Syl, Inc., 825 A.2d 399 (Md. 2003) (similar).

373. See the affiliate licensing cases cited *supra* note 106 and accompanying text.

374. See the affiliate licensing cases cited *supra* note 106 and accompanying text.

375. For a description of this structure as a tax planning arrangement, *see* Sheldon H. Laskin, *Only a Name? Trademark Royalties, Nexus, and Taxing that which Enriches*, 22 AKRON TAX J. 1, 4–8 (2007).

376. *See id.*

377. See generally the affiliate licensing cases cited *supra* note 106.

378. See generally the affiliate licensing cases cited *supra* note 106.

taxes.[379] The repeated losses by taxpayers in these cases resulted in revised tax planning and a shift in focus from the Commerce Clause to the Due Process Clause.[380] Two recent state Supreme Court cases in which the taxpayer prevailed, *Scioto Ins. Co. v. Oklahoma Tax Comm'n*[381] and *Griffith v. ConAgra Brands, Inc.,*[382] illustrate this trend.[383]

In *Scioto,* the tax planning pertained to an IHC established by the fast food company, Wendy's.[384] The tax planning was structured such that the IHC did not directly license the trademarks to an affiliate doing business in the state, but rather licensed the trademarks to an intermediate affiliate, which then licensed the trademarks to another affiliate doing business in the state.[385] The trademarks and similar intangible property transferred to the IHC were used at Wendy's restaurants.[386] The parent corporation, Wendy's International, had previously licensed this intangible property directly to the in-state restaurants,[387] but then the parent transferred the trademarks to a subsidiary IHC, licensed the marks from the IHC, and sublicensed the marks to the restaurants.[388] The issue was whether jurisdiction could be

379. The due process analysis in these cases was secondary, see generally the affiliate licensing cases cited at note 106, and in three of the cases, *A&F Trademark*, 605 S.E.2d 187, *Lanco*, 908 A.2d 176, and *Geoffrey*, 452 Mass. 17, 23 n.9 (2009), no due process argument was even made.

380. *See, e.g.*, Benton, et al., *supra* note 11 ("The reemergence of the due process clause in *McIntyre* . . . has come at a crucial time for state taxpayers, who have been watching for years as states have chipped away at the constitutional contours set forth in *Quill* and other U.S. Supreme Court decisions.").

381. 279 P.3d 782 (Okla. 2012).

382. 728 S.E.2d 74 (W.Va. 2012).

383. A recent federal bankruptcy case also applied the Due Process Clause along with the Commerce Clause to prevent the imposition of state tax on a parent company that wholly owned several in-state REITs. *See In re Washington Mutual, Inc*., 485 B.R. 510 (Bankr. D. Del. 2012). *But see Bridges v. Autozone Properties, Inc.,* 900 S,2d 784, 800-809 (La. 2009) (finding that a parent corporation was subject to tax under the Due Process Clause based on the in-state activity of a wholly-owned REIT). State tax planning with respect to REITs has also been common in recent years. *See, e.g.*, BankBoston Corp. v. Comm'r of Revenue, 68 Mass. App. Ct. 156 (2007); Charles F. Barnwell, "*Is State Tax Planning Still Viable? REITs and RICs*," ST. TAX TODAY, Nov. 22, 2010.

384. *See* 279 P.3d at 783.

385. *See* 279 P.3d at 783, 784–85 (Gurich, J., and Taylor, C.J., dissenting).

386. *Id*. Some of the in-state restaurants were affiliate-owned and some were franchisee-owned. *Id.* at 785 (Gurich, J., and Taylor, C.J., dissenting).

387. Such direct licensing activity would have established nexus under Oklahoma law. *See* Geoffrey, Inc. v. Oklahoma Tax Comm'n, 132 P.3d 632, 638 (Okla. Ct. App. 2005).

388. 279 P.3d at 783, 784–85 (Gurich, J., and Taylor, C.J., dissenting).

asserted over the IHC, despite the fact that the IHC arguably had no contractual privity with the state.[389] The exact amount of royalties was not stated, but the tax assessment was nearly $500,000.[390] The dissent noted the fact that the corporate structure was motivated by tax purposes.[391] Similar tax planning involving indirect or "embedded" royalties has been common on the part of other taxpayers and in other states.[392]

In *ConAgra*, the IHC licensed the trademarks to affiliates and other entities outside the state and received significant royalties from the efforts of those entities marketing the company's trademarked products inside the state.[393] There was a joint stipulation of facts that the court concluded was "favorable to the taxpayer"[394] that the court repeated or made reference to four times, including in its holding.[395] This stipulation included the fact that "all products bearing the trademarks and trade names were manufactured solely by unrelated or affiliated licensees of the foreign licensor outside of West Virginia."[396] Twice the court singled out what it seemed to consider the most important stipulated fact – that the IHC "did not direct or dictate how the licensees distributed the products bearing the trademarks and trade names."[397]

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389. *Id*.

390. *Id*. at 785 (Gurich, J., and Taylor, C.J., dissenting).

391. *Id*. at 788 ("The motivation behind this corporate anatomy was to shelter [from state tax] royalties generated from use of Wendy's trademarks and the company's proprietary information throughout the United States.").

392. *See, e.g.*, Kimberly-Clark Corporation v. Commissioner of Revenue, 83 Mass. App. Ct. 65, 81 (2013). *See also* Lynnley Browning, *Critics Call Delaware a Tax Haven*, NEW YORK TIMES, May 29, 2009, http://www.nytimes.com/2009/05/30/business/30delaware.html?_r=0 (noting the comments of Michael Mazerov that "embedded royalty" companies are a new way to exploit the state tax IHC "loophole").

393. *See* 728 S.E.2d at 76 ("Through the execution of licensing agreements, [the IHC] began collecting royalty payments for the use of its trademarks and trade names by various unrelated, third party licensees and [company] *affiliated licensees*. The trademarks and trade names, to name but a few, included familiar brands, such as Armour, Butterball, Country Skillet, Healthy Choice, Kid Cuisine, Morton, Swift and Swift Premium. The royalties were collected by [the IHC] from the sale by the licensees of food products bearing the trademarks and trade names to clients and customers throughout the United States, *including West Virginia*") (emphasis added); *id.* at 77 (noting that during the 3-year audit period the in-state licenses generated between $19,269,000 and $46,247,000 in sales, resulting in royalties for the IHC of approximately $1,156,000).

394. *Id*. at 82

395. *See id.* at 76, 82, 84.

396. *Id*. at 84.

397. *See id*. at 76, 82.

Assuming that the IHC—or the company more generally—did in fact engage in this activity, as would seem likely as a practical matter, the case may mostly suggest a failure of proof on the part of the state.[398]

In both *Scioto* and *ConAgra*, the taxpayer prevailed in whole or in part on due process grounds.[399] But the analysis in each case is obviously incorrect because due process jurisdiction cannot be defeated merely by re-structuring a company's in-state market penetration such that this targeting is indirect—certainly not when the company generates significant in-state sales.[400] Each fact pattern suggests that it

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398. A similar failure of proof may have undermined the plaintiff's case in the Supreme Court's recent decision, *McIntyre*, 131 S. Ct. 2780 (2011). *See supra* note 302 and accompanying text. *See also infra* note 400 (discussing further the ConAgra facts during the relevant tax years).

399. *See Scioto*, 279 P.3d at 784; *ConAgra*, 728 S.E.2d at 84. Neither decision relied upon *McIntyre*, although *ConAgra* purported to rely on Justice Brennan's decision in *Asahi*, 480 U.S. 102 (1987). *See ConAgra*, 728 S.E.2d at 82–83 (citing *Asahi*, 480 U.S. at 117 (Brennan, J., concurring)). *ConAgra* also concluded, with reference to its due process analysis, that there was no state tax jurisdiction under the Commerce Clause. *See id.* at 84.

400. *See supra* notes 339–48 and accompanying text. *See also* Truck Renting and Leasing Assn. v. Comm'r, 433 Mass. 733, 738–40 (2001) (finding due process corporate income tax nexus with respect to an out-of-state trucking company whose trucks were brought into the state by unrelated lessees because the company's income was derived from in-state property, i.e. the trucks, and the company both knew and intended that its trucks would be driven in the state by such lessees); Missouri Gas Energy v. Kansas Division of Property Valuation, 313 P.3d 789, 799–800 (Kan. 2013), *cert. denied*, 2014 WL 1364664 (2014) (finding due process nexus for purposes of an ad valoreum property tax with respect to out-of-state entities engaged in the delivery of natural gas where: (1) the entities' gas was consigned to unrelated pipelines and stored in the state on an interim basis to be subsequently delivered in another state and (2) the decision to store the gas in the state was made by the unrelated pipelines).

The dissent in *Scioto* would have found jurisdiction under both the Due Process Clause and Commerce Clause because the taxpayer "intentionally placed its property into the stream of Oklahoma commerce, realizing the benefits and protections afforded by the people and laws of this state." *See Scioto*, 279 P.3d at 788 (Gurich, J., and Taylor, J., dissenting). In *ConAgra*, public records reveal similar in-state market exploitation directed at the various states, including, presumably, West Virginia. *See* ConAgra Form 10—K/A, filed with the Securities and Exchange Comission, Apr. 29, 2005, http://www.epa.gov/region1//superfund /sites/wellsgh/547715.pdf, at 37 (noting that during two of the years at issue in *ConAgra*, 2002-2003, the company incurred "various types of marketing costs in order to promote its products, including retailer incentives and consumer incentives"); *id.* at 27 (noting that ConAgra's retailer incentives during this period were retailer-specific and its consumer incentives included consumer coupons). *See* ConAgra Brands, Inc. v. Comptroller, 2015 Md. Tax LEXIS 2, 3–12 (Md. Tax Ct. 2015) (finding Due Process and Commerce Clause nexus as to the IHC in ConAgra, "Brands," on similar facts for a subset of the same tax years).

was the result of tax planning that was intended to bring about the court's result.[401] However, the Supreme Court's precedent beginning with *International Shoe Co. v. Washington*[402]—which ushered in the Court's modern due process analysis[403]—makes clear that the Court does not sanction the use of due process fairness principles as a methodology for state tax planning.[404]

In contrast to *Scioto* and *ConAgra*, in *Gore Enterprise Holdings, Inc. v. Comptroller*,[405] Maryland's highest court rejected a taxpayer argument that the state lacked due process jurisdiction as to a corporation that held patents for, and provided financing services to, an in-state related retailer corporation.[406] *Gore* concluded that nexus was appropriate with respect to the out-of-state corporation because it was engaged in integrated business activity with the in-state retail corporation and had no "separate economic substance" apart from that in-state corporation.[407] Such fact determinations are frequently possible when an affiliated enterprise divides itself into separate corporations for tax purposes and would seem clearly to be appropriate under due process principles evaluating fairness and notice.[408]

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401. As to *Scioto*, *see supra* notes 391–92 and accompanying text. *ConAgra* does not reference tax planning, but the corporation owning the trademarks resembles those in cases where the tax planning was exposed. *See generally* the affiliate licensing cases cited *supra* note 106. *See also* ConAgra Brands, Inc. v. Comptroller, 2015 Md. Tax LEXIS at 8 (case evaluating similar facts during the same tax years concludes "Brands was organized in part to obtain a reduction in taxes").

402. 326 U.S. 310 (1945).

403. *See supra* notes 168–78 and accompanying text.

404. *See supra* notes 350–55 and accompanying text.

405. 87 A.3d 1263 (Md. 2014).

406. *Id*. at 1271–80. The court rejected the taxpayer's related Commerce Clause claim as well.

407. 87 A.3d at 1276–78, 1280.

408. Similarly, recent state tax cases have found for sales tax purposes that an out-of-state Internet vendor is subject to tax in the state based upon the activities of an affiliated corporation that owns and operates in-state retail stores. *See supra* note 144 and accompanying text. *See also* John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?* 75 S. CAL. L. REV. 419, 441–45, 465–67 (2002) (arguing that when an in-state corporation is engaged in a unitary business with an out-of-state corporation that relationship, without more, should confer nexus as to the out-of-state corporation for corporate income tax purposes); Handel, *supra* note 212, at 663 (similar). A similar analysis to that advocated by Professors Swain and Handel was used to justify the lower court decision in *Gore*. Gore Enter. Holdings, Inc. v. Comptroller, 60 A.3d 107, 115–17 (2013), *aff'd* 87 A.3d 1263 (Md. 2014). When the Maryland Court of Appeals affirmed that lower court decision in *Gore*, it stressed that it was re-focusing the

Scioto, *ConAgra,* and *Gore* each suggest that state law considerations can significantly impact the constitutional nexus analysis. In *Scioto*, the court suggested that the state could have addressed the tax inequity apparent on the facts some other way—seemingly the court's preference.[409] In *ConAgra*, the court was unwilling to extend to the facts an "economic presence" doctrine for evaluating constitutional nexus that it had articulated in a prior case.[410] In *Gore*, the court made clear that it was applying a judicial doctrine that it had previously applied in state tax cases.[411]

State law furnishes an important component of the tax nexus analysis, as state efforts to assert jurisdiction cannot advance to a constitutional test if they are not authorized under state law.[412] But it is neither appropriate nor wise to

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decision on the conclusion that the entities in question had no "separate economic substance," rather than on the conclusion that the entities were engaged in a unitary business. 87 A.3d at 1276–78. However, the Court's analysis nonetheless resembled unitary analysis. *See* Mary C. Alexander and Jeffrey A. Friedman, *Maryland's Gore-y Nexus Standard: Out-of-State Holding Companies Subject to Tax*, ST. TAX TODAY, April 14, 2014. *See also* Harley-Davidson, Inc. v. Franchise Tax Board, 237 Cal. App. 4th 193, 214-219 (2015) (finding nexus on behalf of out-of-state corporations that bundled and securitized loans and serviced such loans on behalf of in-state affiliates in part because the out-of-state corporations' business activities were interdependent with the business activities of its in-state affiliates). *Harley Davidson* rejected the taxpayer's claim that there no due process jurisdiction because the out-of-state corporations did not "target" the state. *See id.* at 217-218.

409. The court's decision is brief—less than 2 pages, *see* 279 P. 3d at 783–84—but its discussion on this point is detailed:

> The proper point at which Oklahoma can assess taxes on the amount that Wendy's International pays to Scioto is when those funds are in the hands of Wendy's International. If the Tax Commission believes the amount paid by Wendy's International to Scioto should be taxed, then the Tax Commission should ask the Legislature to eliminate the deduction for payments made under licensing arrangements like the one in this case. While the Tax Commission is properly concerned with the taxation of business activity in Oklahoma, the Tax Commission cannot unilaterally close deduction lacunae or gaps in the revenue law with which the Commission disagrees. The proper remedy for OTC is not to have the courts expand the . . . Tax Code's scope. . . but rather to press for the gap's closure by the Legislature.

Id. at 784 (quotes omitted). The court also took three sentences to note that the in-state activity of the restaurant chain, Wendy's, brought about the payment of other state taxes, as if that point was somehow legally relevant. *See id.* at 783.

410. 728 S.E.2d at 81–82 (referencing Tax Comm'r v. MBNA Am. Bank, 640 S.E.2d 226 (W.V. 2006), *cert. denied*, 551 U.S. 1141 (2007)).

411. 87 A. 3d at 1275–83 (citing prior Maryland cases).

412. In the midst of the various state cases that concluded that the states could assert tax jurisdiction against an IHC licensing trademarks into the state, *see supra* note 106, the Supreme Court of Missouri concluded that the assertion of this jurisdiction was impermissible under that state's tax nexus statute. Acme

render a decision on state law as a matter of constitutional jurisprudence. The decisions in *Scioto* and *ConAgra* both analogized to adjudicative jurisdiction principles to determine that an out-of-state IHC established as one corporation within a multiple-corporate affiliated enterprise engaged in selling in-state food products was not subject to that state's taxing jurisdiction.[413] The inference is that in a hypothetical situation, where an in-state resident is poisoned by a food product of one of these companies, that the resident would be foreclosed from bringing suit in his or her home state—the state in which both the food product was purchased and eaten, as well as the site of the tragedy—against the IHC, the corporation within the group holding the corporate profits. That result seems neither appropriate nor likely.

B. Recent State Cases and Federal Law Developments with respect to State Sales Tax

With respect to sales tax, the application of the physical presence safe harbor as stated by *Quill Corp v. North Dakota*[414] means that a state seeking to impose tax jurisdiction upon a remote vendor—including a remote Internet vendor—is necessarily focused on whether the vendor has some in-state contact that falls outside such safe harbor.[415] Some of the recent state cases finding sales tax jurisdiction have pertained to a remote vendor that was affiliated with a corporation that owned in-state stores engaged in selling similar products.[416] Other recent cases finding sales tax jurisdiction have been ones where the remote vendor used related or unrelated parties to solicit sales or to otherwise facilitate the in-state sale of its products or services.[417] Remote vendors are typically corporations and the application of the *Quill* physical presence rule can be unclear when applied to a corporation—a legal

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Royalty Co. v. Director of Revenue, 96 S.W.3d 72 (Mo. 2002). The logic employed by *Acme* was questionable—it was a 4-3 decision in which the dissent claimed that the majority's decision "defie[d] economic reality." *Id*. at 76. However, when evaluating its state's tax jurisdiction statute a state supreme court is at least focused on a straightforward question that it is uniquely situated to consider.

413. *See ConAgra*, 728 S.E.2d at 82–83; *Scioto*, 279 P.3d at 784.

414. 504 U.S. 299 (1992).

415. *See supra* notes 121–22 and accompanying text.

416. *See supra* note 144 and accompanying text. *See also* Hecht, *supra* note 212, at 9; Plattner, *supra* note 142, at 193–94.

417. *See supra* notes 140–43 and accompanying text. *See also* Hecht, *supra* note 212, at 9; Plattner, *supra* note 142, at 193–94.

construct that lacks inherent physical attributes—if the corporation's activities do not closely resemble those protected by the Court in *Quill*.[418] Therefore, the states generally apply a due process-like inquiry to determine whether a vendor's in-state contacts permit a determination that the vendor has reasonably relied upon *Quill*.[419]

Recent federal law developments with respect to state taxes have included Congressional bills enacted or proposed pursuant to the Commerce Clause to override the *Quill* physical presence standard.[420] For example, in 2009 Congress passed the Prevent All Cigarette Trafficking (PACT) Act,[421] which dispenses with the physical presence nexus requirement that would otherwise apply, and requires e-sellers of cigarettes as a matter of federal law to comply with the states' cigarette excise collection requirements.[422] The PACT Act imposes federal penalties for failure to comply with the Act.[423] Congress has also since the time of *Quill* considered broader legislation that would preempt the application of *Quill* more generally as to all types of taxable sales in the instance of large-sized vendors.[424] Recently, such a bill, the Marketplace Fairness Act (MFA), passed the Senate,[425] although its prospects in the House remain uncertain.[426]

The PACT Act applies even where an Internet seller has sold only a single pack of cigarettes into a state.[427] In part because of this low threshold several vendors that were to become subject to the Act brought suit in federal court prior to the Act's effective date to enjoin its enforcement, on the theory that the law would apply even in cases in which its application

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418. *See supra* note 120 and accompanying text.

419. *See generally supra* notes 121–47 and accompanying text.

420. *See* The Prevent All Cigarette Trafficking ("PACT") Act, 15 U.S.C. § 375 et seq.; The Marketplace Fairness Act ("MFA"), S. 336/S. 743/H.R. 684 113th Cong. (2013).

421. 15 U.S.C. § 375 et seq.

422. 15 U.S.C. §§ 375–76(a).

423. 15 U.S.C. §§ 377–78.

424. *See* Swain, Cybertaxation, *supra* note 408 n.22.

425. *See* Harry J. Reske, *U.S Senate Approves Marketplace Fairness Act*, STATE TAX TODAY, May 6, 2013 (noting the U.S. Senate's passage of the S.743 by a 69-27 vote "[a]fter more than a decade of deliberation").

426. *See* Jennifer DePaul, *House & Senate Republicans Echo Boehner's Pledge to Kill MFA*, STATE TAX TODAY, Nov. 19, 2014.

427. *See* Red Earth LLC v. US, 657 F.3d 138, 145 (2012); Gordon v. Holder, 721 F.3d 638, 652 (D.C. Cir. 2013).

would violate the Due Process Clause.[428] A preliminary injunction was issued with respect to the state tax provisions set forth in the Act in two of the three cases, but was denied in the third.[429]

The preliminary injunctions issued in the recent PACT Act cases were largely justified in reliance upon Justice Breyer's statement in *McIntyre Machinery, Ltd. v. Nicastro,*[430] that no prior Supreme Court decision had concluded that a single in-state sale would confer adjudicative jurisdiction.[431] The 2nd Circuit U.S. Court of Appeals upheld a preliminary injunction on this basis, but recognized that the Supreme Court's prior cases did not necessarily suggest that a single in-state sale could never result in due process jurisdiction.[432] The court stated that "the underlying constitutional question is close," and that in such cases a court "should uphold the injunction and remand for trial on the merits."[433] The D.C. Circuit Court of Appeals similarly upheld a preliminary injunction in reliance upon Justice Breyer's statement in *McIntyre* suggesting that a single in-state sale might not confer due

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428. *Id. See also* Musser's Inc. v. United States, 1 F. Supp 3d. 308, 310 (E.D. Pa. 2014).

429. The preliminary injunctions were issued in *Red Earth*, *see* 657 F.3d at 145, and *Gordon*, *see* 721 F.3d at 645. The preliminary injunction was denied in *Musser's*. *See* 1 F. Supp at 310. In *Musser's*, the court subsequently denied a motion for consideration and then, in a subsequent action, dismissed the plaintiff's complaint. *Id.* Although the issue is not discussed in any of the three cases, the cases were apparently each brought as "facial" constitutional challenges to the PACT Act, as opposed to "as applied" constitutional challenges, and therefore the two preliminary injunctions were issued on this basis. *See generally Red Earth*, 657 F.3d at 142–43, 148 (discussing the issuing of the injunction); *Gordon,* 721 F.3d at 641 (same); *Musser's*, 1 F. Supp at 310 (discussing the denial of the injunction). Because the issue is not discussed in any of the cases, it is not clear how the claims could appropriately be brought as facial constitutional challenges since typically "a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid', i.e., that the law is unconstitutional in all of its applications." *See Washington State Grange v Washington State Republican Party*, 552 U.S. 442, 449 (2008), (quoting *United States v Salerno*, 481 U.S. 739, 745 (1987)).

430. 131 S. Ct. 2780, 2792 (2011) (Breyer, J., concurring).

431. *Red Earth*, 657 F.3d at 145 (citing *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring); Gordon v. Holder, 721 F.3d 638, 652 (D.C. Cir. 2013) (citing *McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring). Justice Breyer's statement may have been incorrect and in any event the Supreme Court's precedents suggest that a single sale may confer adjudicative jurisdiction in some instances. *See supra* notes 303, 336 and accompanying text.

432. *Red Earth*, 657 F.3d at 145.

433. *Id*.

process jurisdiction.[434] The D.C. Circuit Court concluded, however, similar to the court in the 2nd circuit, that Justice Breyer's statement potentially allowed for a finding of jurisdiction, and so enjoined the case for further fact finding.[435] The D.C. Circuit Court stated that "[w]hile it may prove to be the case that, in the Internet age, a single sale establishes 'minimum contacts' as a matter of law, this seems like precisely the sort of difficult constitutional question on which our analysis would benefit from factual development."[436]

The D.C Circuit Court's decision was rendered by a 2-1 vote.[437] The dissenting judge concluded that the plaintiff's "Due Process Clause claim is entirely without merit" because compliance with the PACT Act is required under federal and not state law.[438] A similar conclusion informed the holding in a third, similar PACT Act case, where a Pennsylvania federal district court refused to issue a preliminary injunction, because "the [PACT] Act's tax-payment requirement is not being imposed by a state, acting unilaterally, but by Congress, and the legislative due process analysis must reflect the federal character of the legislation."[439] The Pennsylvania district court decision stated that "[i]nterstate businesses are subject to the legislative jurisdiction of Congress, which is free to require compliance with state and local law."[440] It also stated that "[a]ll interstate businesses are subject to the legislative

434. *Gordon*, 721 F.3d at 652. ("The Supreme Court has never found 'that a single isolated sale . . . is sufficient' " to establish minimum contacts.") (quoting *Red Earth*, 657 F.3d at 145).

435. *Id.*

436. *Id.* The case was later dismissed with prejudice upon agreement by the parties. 2013 U.S. Dist. LEXIS 188691 (W.D.N.Y. 2013). The PACT Act is now fully enforceable in the 2nd Circuit. *See* http://www.justice.gov/usao-wdny/pr/pact-act-now-fully-enforceable.

437. *See Gordon*, 721 F.3d 638.

438. *Id*. at 659 (Kavanaugh, J., dissenting). That dissenting judge observed that:

> When Congress enacts a federal law of this kind and renders violators of that law subject to federal criminal prosecution or federal civil suit, the law does not violate the minimum contacts principle of the Due Process Clause. The reason is quite simple: In such federal-law cases, the relevant sovereign and jurisdiction is the United States, not one of the individual States.

439. *Musser's*, 1 F. Supp. at 315.

440. *Id*. (the court also quoted *International Shoe*, 326 U.S. at 315: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it").

jurisdiction of Congress who is free to require compliance with state law as a condition of engaging in interstate commerce."[441]

The mixed success of the plaintiffs in the PACT Act cases has caused vendors anticipating the passage of the MFA to think that they may be able to prevent enforcement of the MFA—at least in select instances—on similar due process grounds.[442] The MFA would require an Internet vendor that has total gross receipts from Internet sales exceeding $1,000,000 to begin collecting sales and use tax in the subsequent tax year with respect to any state that has met the sales and use tax simplification standards set forth in the Act.[443] Some commentators have argued that even though the only vendors subject to the Act are those with $1,000,000 or more in total sales, those vendors may be able to challenge the application of the law in any state where the vendor's sales are of lesser significance.[444]

Congressional bills like the MFA that would address the jurisdictional limits that apply to the states' sales and use tax collection duty to be imposed upon remote vendors have been

441. *Id.*

442. *See* James Bull Sterling, *Survey of South Carolina Law: Tax Law: Remote Seller Sales and Use Tax Law: How Proposed Law will Impact South Carolina*, 65 S.C. L. REV. 851, 851 n.25 ("A remote seller could argue the Act violates its individual due process rights because even though the remote seller has aggregate sales over the $1 million mark, it only makes few sales into a particular state."); Kenneth F. Warren, *Regulators Throughout American History Have Been Reluctant to Regulate Cigars and the FDA Still is Today*, *But Why?*, 8 Pitt. J. ENVTL. PUB. HEALTH L. 160, 187, 187 n.63 (2014) (noting the argument of Michael P. Abate that the MFA and the PACT Act may both ultimately fail legal challenges under the Due Process Clause) (*citing Michael P. Abate, E-Commerce Taxation Bill Might be Unconstitutional*, LAW 360 (Apr. 30, 2013)); Denning, *supra* note 11, at 841 (citing *Red Earth* as offering "a preview of the difficulties Congress may face" with respect to succeeding with the MFA). *See also State's Attorneys General: Marketplace Fairness Act Would Violate Due Process Clause*, STATE TAX TODAY, June 18, 2013 (referencing a letter written by 3 state attorney generals "on behalf of remote sales retailers in our states" stating, *inter alia*, "any state's efforts to enforce the collection of use tax proceeds from remote sales retailers with little or no contact with the taxing authority will remain constitutionally suspect").

443. *See generally* S. 336/S. 743/H.R. 684 113th Cong. (2013).

444. *See supra* note 442. These would be "as applied" constitutional challenges that could potentially succeed with respect to individual vendors as to certain states, but even if successful, would not threaten the application of the MFA more generally. *See supra* note 429 and accompanying test. As the Supreme Court has recently stated, a facial challenge to a federal statute on constitutional grounds "must fail where the statute has a plainly legitimate sweep." *See Washington State Grange*, 552 U.S. at 449.

proposed dating back prior to *Quill*[445], so it is difficult to be too optimistic that such a bill will one day become law. However, if the law passes, there are at least two obvious problems with the argument that the MFA may be subject to challenge in certain states on due process grounds—both of which are suggested by the PACT Act analogy.

As noted, two courts have issued preliminary injunctions in PACT Act cases on due process grounds on the theory that the Act can apply to an Internet vendor that sells only a single pack of cigarettes into the state.[446] Those injunctions were specifically justified in reliance on Justice Breyer's statement in *McIntyre* that the Supreme Court has never found due process jurisdiction in a case in which the defendant has made only a single sale into the state.[447] But the two PACT Act cases both acknowledged that the Court has not ruled out that there *could be* jurisdiction on such facts.[448] Also, more fundamentally, unlike the PACT Act, the MFA cannot be imposed on a remote vendor that makes only a single small in-state sale.[449] To be subject to the MFA a remote vendor would have to make significant sales—and only then would it be able to raise a potential due process issue as to specific states where its volume of sales is relatively small.[450] The picture of a remote vendor that makes only one small in-state sale, on which facts the PACT Act could apply, is very different from that of a vendor that makes significant sales, with only a relatively small volume of sales in one or more states. Due process fairness concerns are not so obviously implicated in the latter instance.[451]

The general issue addressed in the PACT Act cases by the Pennsylvania District Court and the dissenting opinion in the D.C. Circuit Court of Appeals also lurks in the MFA context.[452] Compliance with the MFA would be required under a federal law enacted pursuant to the Commerce Clause.[453] Congress is

445. *See Quill*, 504 U.S. at 318, 318 n.11 (noting Congressional bills that would have 'overrule[d]' the *Bellas Hess* rule.") (quotes in the original).

446. *See supra* notes 427–29 and accompanying text.

447. *See supra* notes 430–31 and accompanying text.

448. *See supra* notes 432–36 and accompanying text.

449. *See generally* S. 336/S. 743/H.R. 684 113th Cong. (2013).

450. *Id.*

451. *See supra* notes 306–07 and 333–38 and accompanying text.

452. *Musser's*, 1 F. Supp at 315; *Gordon*, 721 F.3d at 659 (Kavanaugh, dissenting).

453. U.S. CONST. art I, § 8, cl. 3 (Congress shall have the power "to regulate

permitted, in its discretion, to both protect and burden commerce under the Commerce Clause[454]—a point that *Quill* itself made when suggesting that Congress enact a bill like the MFA.[455] Some commentators who have evaluated a prospective challenge to the MFA have argued that, notwithstanding the Commerce Clause, Congressional bills cannot override a business taxpayer's due process rights.[456] But it is likely that because such rights are not "fundamental rights" or "liberty interests" Congress would not be so constrained.[457] Also, in any event, it is questionable whether it really is unfair as a matter of due process for a company with significant U.S. sales to be made to comply with the sales tax laws in the various states in which the company make sales.[458] Certainly the enactment of a Congressional law would seem to give such large-size companies fair notice of their state sales and use tax responsibilities.[459]

CONCLUSION

The Supreme Court's dormant Commerce Clause jurisprudence has been in a state of evolution throughout the

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commerce . . . among the several states").

454. *See* Ne. Bancorp. v. Bd. of Governors of Fed. Reserve Sys, 472 U.S. 159, 174 (1985); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

455. 504 U.S. at 318 (citing Prudential Insurance Co. v. Benjamin, 328 U. S. 408 (1946) for the proposition that "[n]o matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.").

456. See generally the articles cited *supra* note 442.

457. *See* William Cohen, "*Congressional Power to Validate Unconstitutional State Laws: Forgotten Solutions to an Old Enigma*," 35 STAN. L. REV. 385, 412–14, 422 (1983) (arguing that Congress can validate state tax laws and thereby immunize those laws from a potential Constitutional challenge, including one initiated under the Due Process Clause of the 14th Amendment, in any instance where individual "liberty interests" are not impaired); Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1023–24 (1986) (stating that "due process clause protection [may have] more elasticity in the context of fiscal matters in federalism than the clause does in a civil rights context" and that congressional judgments that might be said to impair due process in the state tax context are more likely to be permissible "because Congress would not be restricting due process in the context of fundamental constitutional rights or suspect classifications").

458. *See supra* notes 306–07 and 333–38 and accompanying text.

459. International Shoe Co. v. Washington, 326 U.S. 310 (1945) involved a similar fact pattern since the state employer tax requirement at issue in that case had been specifically authorized by Congress, thereby dispensing with any Commerce Clause claim on the part of the petitioner-corporation. *See supra* note 186 and accompanying text.

Court's history, but now focuses primarily on policing discriminatory state action, consistent with the Framers' intent.[460] As a result, subjective questions concerning the degree to which a state law burdens interstate commerce or whether an economic actor is sufficiently present in a state to be subject to state authority have been generally eliminated from dormant Commerce Clause scrutiny in state tax cases.[461]

Since the time of the 14th Amendment, the Court has generally considered whether the imposition of a state tax is consistent with due process and Commerce Clause principles.[462] As the Court's various Commerce Clause standards for testing state tax jurisdiction have diminished in importance, its due process standards have become more important.[463]

Several recent Supreme Court cases have considered the Court's due process standards as applied to determine adjudicative jurisdiction.[464] Because the standard applied for purposes of adjudicative jurisdiction is comparable to that applied for state tax purposes, these recent Supreme Court cases are relevant to the state tax analysis.[465] One of the Court's recent cases, *J. McIntyre Machinery v. Nicastro*,[466] is of particular importance to the analysis because *McIntyre* is a specific jurisdiction case, similar to most state tax cases, and *McIntyre* pertained to jurisdiction asserted against a business entity doing business in multiple states.[467] Also, *McIntyre* is a plurality decision that has rendered a somewhat ambiguous precedent, and that has created some concern that the Court has narrowed the circumstances in which adjudicative jurisdiction will lie.[468] However, *McIntyre* should have no impact on the typical case pertaining to state tax jurisdiction applied to a multistate business because, among other things,

460. *See generally supra* Part I.B.
461. *Id*.
462. *Id*.
463. *Id.*
464. *See supra* note 13 and accompanying text. *See also supra* notes 161, 169–72 and accompanying text.
465. *See supra* note 162 and accompanying text.
466. 131 S. Ct. 2780 (2011).
467. *See supra* notes 16–17, 211–12 and accompanying text. *Compare* Walden v. Fiore, 134 S. Ct. 1115 (2014) (specific jurisdiction case pertaining to an individual who brought suit in Nevada based on allegedly tortuous conduct that took place in another state). *See supra* note 172 and accompanying text.
468. *See generally supra* Part II.E.

McIntyre is not implicated when a business targets a state's market either directly or indirectly and that business' in-state sales volume or market exploitation is significant.[469]

Recent state tax cases and federal developments with respect to state taxation have raised different issues concerning the future application of due process principles in the context of state tax jurisdiction, some of which depend upon whether the state tax at issue is a corporate income tax or sale tax.[470] In general, those issues will necessarily be resolved over the course of time. However, despite some recent commentator statements claiming that the re-emergence of the Due Process Clause as an important principle probing state tax jurisdiction may result in significant restrictions placed upon the states[471]—and some taxpayer victories in state tax cases where the Due Process Clause has seemed to serve this purpose[472]—state taxing agencies should take comfort in the larger trend. A due process jurisdictional standard emphasizing considerations of fairness and notice is a better standard for purposes of state tax administration than the historical alternative, which emphasized arbitrary and economically questionable limitations imposed under the Commerce Clause.

469. *See supra* notes 339–43 and accompanying text.
470. *See generally supra* Part III.
471. *See supra* note 11 and accompany text. *See also supra* notes 341 and 442 and accompanying text).
472. *See generally supra* Part III.A.