JURISDICTION TO TAX IS NOT JURISDICTION AT ALL: UNDERSTANDING JURISDICTION'S JARGON IN LIGHT OF *SOUTH DAKOTA V. WAYFAIR, INC.*

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INTRODUCTION 716
I. BACKGROUND 721
II. THE LINGUISTIC DILEMMA 723
A. Terminology Matters 723
B. The Many Meanings of Jurisdiction 726
C. Jurisdiction v. Power 730
III. THE LINKAGE 734
A. The Court's Crafting 734
1. Personal Jurisdiction 735
a. From Physical Boundaries to Fairness 735
b. Modernizing Personal Jurisdiction 738
2. A State's Power to Tax 744
a. Linking Power to Personal Jurisdiction 744
b. Wayfair *"Killed* Quill*"* 752
B. Confusion Caused by the Court's Crafting 755
IV. PROPOSAL 758
CONCLUSION 761

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INTRODUCTION

"*O! Be some other name: What's in a name? That which we call a rose by any other name would smell as sweet; So Romeo would, were he not Romeo call'd.*"[1]

Jurisdiction to tax is not jurisdiction at all. A rose by any other name, "jurisdiction to tax" and "tax jurisdiction" actually refer to a state's regulatory power to impose taxes and to require companies to collect and remit sales taxes as state agents.[2] The Supreme Court of the United States has impermissibly conflated personal jurisdiction with a state's regulatory power to tax sales, which is problematic after *South Dakota v. Wayfair, Inc.*[3]

Consider the case of Robert Nicastro, a plaintiff whose hand was seriously injured when using machinery manufactured by the defendant, J. McIntyre Machinery, Ltd.[4] Nicastro filed a products-liability suit in a New Jersey state court against J. McIntyre.[5] Nicastro's case made its way to the Supreme Court, which considered whether the New Jersey state court had personal jurisdiction over J. McIntyre.[6] Although Nicastro injured himself in New Jersey, the machinery was manufactured in England where the defendant corporation was incorporated and operated.[7] Further, an independent company sold J. McIntyre's machines to the United States, and J. McIntyre only sold its machines to a United States distributor who was not under J. McIntyre's control.[8] Although J. McIntyre officials attended United States trade shows, none of those tradeshows were in New Jersey.[9]

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[1] WILLIAM SHAKESPEARE, ROMEO & JULIET act 2, sc. 2.

[2] This Comment, when referring to this power, will use the phrases "state's regulatory power to tax" and "state's taxing power" rather than "jurisdiction to tax" and "tax jurisdiction." Consistent with this Comment's proposal, to use "jurisdiction to tax" and "tax jurisdiction" is illogical.

[3] *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

[4] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011) (plurality opinion).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

No sufficient minimum contact existed between J. McIntyre and New Jersey to subject J. McIntyre to a lawsuit there.[10] The evidence did not show that J. McIntyre purposefully availed itself to the New Jersey market or the benefits and protections of New Jersey law.[11] Therefore, New Jersey could not constitutionally exercise personal jurisdiction over J. McIntyre under the Fourteenth Amendment's Due Process Clause.[12]

The Court decided J. McIntyre's case in 2011. Consider if the Court heard the case after *South Dakota v. Wayfair, Inc*, in which the United States Supreme Court held the Commerce Clause did not require an out-of-state company to have a physical presence in a taxing state before the state could require the company to collect and remit sales taxes to the state.[13] Let's also leave most of the facts of Nicastro's case unchanged, except instead of New Jersey, assume we are in Georgia, which implemented a new economic nexus requirement after *Wayfair*.[14] Under the nexus requirement, if a company sells over $100,000 in goods or makes 200 or more sales to Georgia-based customers during the current or previous calendar year, that company is required to collect sales taxes for the transaction and remit them to Georgia.[15] As a state sales tax statute, Georgia's new threshold requirement is bound by both the Due Process and Commerce Clauses of the United States Constitution.[16] Further, the due process analysis for sales tax is the same as that for personal jurisdiction.[17]

Following *Nicastro*, the Georgia state court would not have personal jurisdiction over J. McIntyre. Even if J. McIntyre made the single sale itself, that would not be enough to subject the

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[10] *Id.* at 887.

[11] *Id.* at 886.

[12] *Id.* at 887; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[13] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

[14] GA. CODE ANN. § 48-8-2(8)(M.1, M.2) (West 2020); GA. CODE ANN. § 48-8-30 (West 2020); *see also* GA. DEP'T OF REVENUE, SUT-2019-02, REMOTE SELLERS – SALES AND USE TAX OBLIGATIONS (May 7, 2019) (discussing previous threshold level of $250,000 in sales or 200 or more transactions)..

[15] *Id.*

[16] *Wayfair*, 138 S. Ct. at 2091.

[17] *Id.* at 2093.

company to a Georgia court's personal jurisdiction.[18] But could Georgia require J. McIntyre to collect and remit sales taxes if it were the company that made the machinery sale? Assuming the machinery cost more than $100,000, the answer is yes in a post-*Wayfair* world. Because due process for sales tax is governed by personal jurisdiction's tests for due process, this outcome is bizarre.[19] It makes sense that states should have broad authority to tax sales in an economy driven by online retail shopping. Nevertheless, this strange hypothetical outcome is an example of an unanswered question that commentators have rightfully grappled with since the Court's decision in *Wayfair*.

The Court has conflated personal jurisdiction with a state's regulatory authority to tax sales in two ways. First, the Court has historically used the terms "jurisdiction to tax" and "tax jurisdiction" to refer to a state's regulatory power to tax sales.[20] Overall, these terms have been used by American courts since the early 1800s.[21]

However, a state's power to tax sales is not jurisdiction. Although it is a form of power like jurisdiction, the two are not one in the same.[22] A state's power to tax is affirmative—either a state has the power to tax or it does not.[23] It is an "on-off" switch of regulatory power.[24] Alternatively, personal jurisdiction is a fuzzy, nuanced concept that is measured on a sliding scale.[25] Although both forms of authority are governed by fairness and geography, it is illogical to refer to a taxing power as jurisdiction.[26]

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[18] J. McIntyre Mach., Ltd. V. Nicastro, 564 U.S. 873, 888-89 (2011) (Breyer, J., dissenting).

[19] For a thorough and enlightening discussion of how *Wayfair* undermines the Court's decision in *Nicastro*, see Allan Erbsen, Wayfair *Undermines* Nicastro: *The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J. FORUM 724 (2019).

[20] *See infra* notes 117-28 and accompanying text.

[21] *See, e.g.*, State v. Ross, 15 Tenn. 74, 76 (1834) (using "jurisdiction to tax").

[22] *See infra* notes 129-39 and accompanying text.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

Second, the Court has used personal jurisdiction's due process standard from *International Shoe*[27] and its progeny to define the due process standard for sales tax.[28] By doing so, the Court has expanded state taxing authority through reliance on personal jurisdiction precedent. Under the Due Process Clause, courts must consider whether out-of-state sellers have sufficient minimum contacts with the taxing state, including if the out-of-state sellers have purposefully availed themselves of the benefits and protections of the taxing state.[29]

Before *Wayfair*, the Court's reliance on personal jurisdiction standards to inform the sales tax meaning of due process was not a problem because sales tax laws are constitutionally restricted by both the Due Process and Commerce Clauses.[30] Under the Commerce Clause, out-of-state sellers were required to have a physical presence in the taxing state before a state could require the seller to collect and remit sales taxes.[31] Therefore, the problem of using personal jurisdiction's standards in a tax due process analysis was partially avoided.

Historically, it makes sense that courts have borrowed this terminology from judicial jurisdiction. As outlined in *Pennoyer v. Neff*, personal jurisdiction was traditionally defined by physical boundaries.[32] A defendant had to have some physical presence in the state—whether it be himself or his property—before a state could assert personal jurisdiction over him.[33] Similarly, prior to *Wayfair*, tax authority was limited by physical boundaries because of the Commerce Clause's physical presence requirement.[34] Further, both concepts are governed by fairness.[35] Even considering this historical framework, however, the terms "tax jurisdiction" and "jurisdiction to tax" should not be used at all.

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[27] *See Int'l Shoe Co.*, 326 U.S. at 310.

[28] *Wayfair*, 138 S. Ct. at 2091.

[29] *Id.*

[30] *See, e.g.*, *id.* at 2093; Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992).

[31] *Quill*, 504 U.S. 298 at 317-18.

[32] Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

[33] *Id.* ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").

[34] *Quill*, 504 U.S. 298 at 317-18.

[35] *Id.* at 307-08; Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985).

Because the Supreme Court has referred to a state's regulatory authority to tax as "tax jurisdiction," the Supreme Court has built upon an accidental foundation. In doing so, the Court has accidentally linked the Commerce Clause to personal jurisdiction.[36] Further, after *Wayfair*, commentators have questioned whether threshold requirements could be considered new evidence of purposeful availment.[37] This Comment proposes that personal jurisdiction should not expand to match state regulatory authority to tax sales.

To remedy this confusion and to undo its conflation, the Court should stop using the terms "tax jurisdiction" and "jurisdiction to tax" to refer to a state's regulatory authority to tax sales. Furthermore, the Court should use a different due process standard, other than *International Shoe* and its progeny, to define due process for sales tax. If it does not, the door will remain open for courts and commentators to consider whether personal jurisdiction should further expand to match the Court's new sales tax jurisprudence.

Part I provides a brief background of *Wayfair*'s framework. Part II discusses the importance of linguistics in judicial interpretation, the many meanings of jurisdiction, and the difference between judicial jurisdiction and state regulatory power. Part III discusses how the Supreme Court has conflated personal jurisdiction with a state's power to tax sales and the confusion that conflation has caused post-*Wayfair*. Part IV proposes that the Supreme Court should stop using the terms "tax jurisdiction" and "jurisdiction to tax" to refer to a state's authority to tax sales. The two doctrines are separate and distinct. Furthermore, the Court should affirmatively settle that sales tax economic nexus thresholds are not indicators of purposeful availment for personal jurisdiction.

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[36] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091-92 (2018).

[37] Daniel Tay, *Wayfair Thresholds May Conflict With Due Process, Panel Says*, LAW 360 (Oct. 6, 2019), https://www.law360.com/tax-authority/articles/1203814/wayfair-thresholds-may-conflict-with-due-process-panel-says (also addressing the impact *Wayfair* could have on a *Nicastro*-type hypothetical); *see also* Joseph Bishop-Henchman, *The History of Internet Sales Taxes from 1789 to the Present Day:* South Dakota v. Wayfair, 2018 CATO. SUP. CT. REV. 269, 280 (2018).

I. BACKGROUND

In *South Dakota v. Wayfair, Inc.*, the Supreme Court overruled long-standing precedent, which prohibited states from requiring out-of-state sellers with no physical presence in the state to collect and remit sales taxes for goods sold in the state.[38] The Court held that sellers who engage in a significant quantity of business within a state may be required to collect and remit taxes, even if that seller has no physical presence in the state.[39]

Sales tax laws requiring companies to collect and remit taxes to the taxing state are constitutionally limited by the Commerce Clause and the Fourteenth Amendment's Due Process Clause.[40] Both clauses impose a nexus requirement.[41] Under the Due Process Clause, the nexus requirement means that an out-of-state corporation must have substantial connections to the taxing state in order for the state to exercise power over it.[42] The standards used to determine if a corporation has a nexus with the taxing state are personal jurisdiction's sufficient minimum contacts and purposeful availment tests.[43]

The Commerce Clause requires a substantial economic nexus to the taxing state.[44] In *Quill Corp. v. North Dakota*, the Court held that the substantial nexus requirement required physical presence.[45] However, the Court's decision in *Wayfair* abrogated this rule.[46] Instead of requiring physical presence, the Commerce Clause's substantial nexus requirement is "closely related" to the due process requirement.[47] The question presented before the Court was whether a South Dakota statute which imposed threshold requirements could constitute a substantial nexus.[48]

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[38] *Wayfair,* 138 S. Ct. at 2099-100 (overruling Quill Corp. v. North Dakota, 504 U.S. 298 (1992) and Nat'l Bellas Hess., Inc. v. Dep't of Revenue, 386 U.S. 753 (1967)).

[39] *Id.* at 2098-99.

[40] *Id.* at 2093.

[41] *Id.*

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

[43] *Id.* at 307.

[44] *Id.* at 313.

[45] *Id.* at 317-18.

[46] *Wayfair*, 138 S. Ct. at 2099.

[47] *Id.* at 2093.

[48] *Id.* at 2089, 2091.

South Dakota's statute imposed a safe-harbor provision, meaning that sellers who sold over $100,000 in goods or conducted over 200 transactions could be subject to collecting and remitting sales taxes to South Dakota.[49] The Supreme Court did not rule whether the threshold level itself met constitutional muster.[50] Instead, it remanded the case for proceedings consistent with *Wayfair* and thus implicitly held that threshold requirements like South Dakota's could pass constitutional muster.[51]

Since *Wayfair*, the legal field has grappled with exactly "how far" threshold requirements may go.[52] For example, the Kansas Department of Revenue recently issued notice that it would implement a new nexus requirement,[53] and this requirement challenges *Wayfair*'s permissible scope. The notice informed remote sellers doing business in Kansas that the state's sales and use tax collection requirements apply to "remote sellers with no physical presence in Kansas," meaning that an out-of-state seller who makes just one sale in Kansas would be required to collect and remit sales taxes for that sale.[54]

Wayfair's lasting question for personal jurisdiction is whether state threshold requirements are new standards for purposeful availment.[55] Under a nexus requirement such as Kansas's, this is intriguing because a single sale, regardless of the cost, establishes a sufficient economic nexus under the Commerce Clause.[56] Although a single sale could establish a substantial nexus with the state, as explained in Part III, it is unlikely that a single sale would warrant a state court's exercise of personal jurisdiction.

The fact that commentators are grappling with the question highlights a manifest error on behalf of the Supreme Court. It accidentally linked a state's power to tax and personal jurisdiction by referring to a state's regulatory authority to tax as "jurisdiction."

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[49] S. 106, 2016 Leg. Assembly, 91st Sess. (S. D. 2016) (S. B. 106). *Cf.* S.D. CODIFIED LAWS § 10-64-2 (2020) (the statute after *Wayfair*).

[50] *Wayfair*, 138 S. Ct. at 2099-100.

[51] *Id.* at 2100.

[52] Tay, *supra* note 37.

[53] *See* 38 Kan. Reg. 1017 (Aug. 15, 2019) (Notice 19-04).

[54] *Id.*

[55] Tay, *supra* note 37.

[56] However, the Supreme Court has not ruled on the constitutionality of a nexus requirement with no thresholds.

Although the Court made clear in *Quill* that a state's power to tax is separate and distinct from personal jurisdiction,[57] the Court has continued to create confusion by using the terms "tax jurisdiction" and "jurisdiction to tax" to refer to a state's power to tax. But "tax jurisdiction" is not jurisdiction at all.

II. THE LINGUISTIC DILEMMA

A. Terminology Matters

Words are important. In law, this rings especially true considering the weight of legal principles hiding behind a single word. Take, for example, the hundreds of principles hiding behind the word "jurisdiction." The importance of words and how judges craft their opinions is no novel phenomenon.[58] Because of the heavy weight that words carry, law school can be considered a crash course in translation, teaching students how to use and manipulate legal principles.[59]

Outside of the classroom, linguistic principles are necessary tools for courts endeavoring to engage in a textual exegesis.[60] As Judge Posner recognized over thirty years ago, law is not an autonomous profession but relies heavily on other disciplines, such as linguistics, to inform its principles.[61] Linguistics can inform judges about the common sense of the language they use and provide a principled path for settling difficult cases of interpretation.[62]

Courts and commentators have accepted this idea with gusto and have created many philosophies of interpretation, ranging from originalism for constitutional interpretation to settled principles for

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[57] Quill Corp. v. North Dakota, 504 U.S. 298, 317-18 (1992).

[58] *See* Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1267-69 (1995). The legal field has long relied upon linguistics as a useful tool for judicial interpretation. From the judiciary, for example the Rehnquist Court's approach to "new textualism," to scholars, such as Clark Cunningham and James Boyd White, the field as a whole has wrestled with linguistic tools of interpretation to decode the English language and its use in the American legal system. *Id.*

[59] *See* JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM xii-xiii (1990).

[60] *See, e.g.*, Alani Golanksi, *Linguistics in Law*, 66 ALB. L. REV. 61 (2002).

[61] Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987).

[62] Golanski, *supra* note 60, at 62.

interpreting vague statutes.[63] However, there is no single, settled approach for interpretation in the legal field overall. Words are capable of being understood in many ways and are often understood differently based on the reader's perspective.[64]

For the problem of jurisdiction, tools of statutory interpretation provide the most insight for understanding why a state's regulatory authority to tax is not jurisdiction at all. Overall, courts and commentators have generally created two divergent roads. On one road, there exists Justice Scalia's plain meaning approach, which only looks to the dictionary and the plain meaning of words to define them.[65] The other road is a holistic approach, partially championed by Judge Easterbrook, which embraces words as "living organisms"[66] whose meanings are susceptible to time.[67] Under this approach, "[w]ords don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words."[68] Overall, this approach embraces the flexibility of language and how meaning is realized in the creativity of actual use.[69]

The Court has used both principles to inform its understanding of language. From the 2000-01 Term through the 2009-10 Term, the Supreme Court Justices relied on dictionaries in forming their opinions a total of 225 times.[70] Alternatively, the

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[63] Robert W. Bennett, *Constitutional Interpretation*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 114, 114 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

[64] SANFORD SCHANE, LANGUAGE AND THE LAW 12 (2006) (explaining that even the word "ambiguity" has varying meanings and subsequently varying methods of interpretation).

[65] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 25-40 (Amy Gutmann ed., 1997).

[66] Chen, *supra* note 58, at 1271, 1296-97.

[67] Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("Plain meaning as a way to understand language is silly. In interesting cases, meaning is not plain; it must be imputed . . . ." (internal quotation marks omitted)).

[68] Frank H. Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at xxv (2012).

[69] Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1616 (1994).

[70] Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 85 (2010).

Court has also used a holistic approach to define words through modern meaning. For example, the Court has taken a modern approach to identifying religion, instructing courts to determine whether an individual's belief is sincere and recognizing that the First Amendment cannot and does not support a singular sect.[71]

Regarding the term "jurisdiction," a plain meaning approach to interpretation does not address why a state's regulatory authority to tax is not jurisdiction. The Court has unintentionally crafted a linguistic dilemma by using the term "jurisdiction" too freely. As explained in the following section, "jurisdiction" has far too many definitions. The true meaning of the term "jurisdiction" has been diluted by this multitude of meanings. This problem has only just come to light, and thus can only currently be reconciled by understanding the meaning of jurisdiction through its actual use.[72] The post-*Wayfair* landscape provides this framework, which explains why referring to a state's regulatory authority to tax as "jurisdiction" is problematic.

Because jurisdiction has far too many meanings, the Court's use of the word "jurisdiction" to refer to a state's regulatory authority to tax sales is a problem of conflation.[73] This means that the Court has "blow[n] together" and "combine[d] or fuse[d] two variant readings of a text into a composite reading."[74] Essentially, the Court has conflated a state's regulatory authority with its judicial jurisdiction. The resulting problem is that courts and commentators are using the term "jurisdiction" incorrectly, and misuse of the term post-*Wayfair* has caused commentators to consider whether economic-nexus threshold levels can provide insight for a court attempting to determine if it has personal jurisdiction over an out-of-state defendant corporation.[75]

The Supreme Court itself has acknowledged that conflation is problematic and has grappled with it on several occasions. In *INS v. Chadha*, for example, the Court clarified the meaning of the term "veto," noting that the term was used to refer to both the President's

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[71] *See* United States v. Ballard, 322 U.S. 78, 85-88 (1944).

[72] Cunningham et al., *supra* note 69, at 1616.

[73] To conflate two words does not mean to confuse them. *See* Merrill Perlman, *Confused on conflated?*, COLUM. JOURNALISM REV. (Feb. 9, 2015), https://archives.cjr.org/language_corner/language_corner_020915.php [https://perma.cc/3W4L-9XA4].

[74] *Conflate*, 3 THE OXFORD ENGLISH DICTIONARY 712 (2d ed. 1989).

[75] Tay, *supra* note 37.

veto and congressional devices authorizing the Congressional veto.[76] The Court has also criticized conflated personal jurisdiction principles. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court held that North Carolina's stream of commerce personal jurisdiction analysis erroneously "elided the essential difference between case-specific and all-purpose (general) personal jurisdiction."[77]

Overall, the Court has misused the term "jurisdiction" in two ways. First, the Court has used the term "tax jurisdiction" to refer to a state's ability to tax and also the area in which a state may impose its tax.[78] Second, the Court has used the term "jurisdiction to tax" to refer to a state's regulatory authority to impose taxes.[79] Both uses are impermissible. By using this terminology, the Court has conflated state taxation principles with personal jurisdiction.

However, it is nevertheless understandable that the Court has done so. "Jurisdiction" is used to refer to a slew of principles, likely because "there is no more familiar word in legal language."[80] A state's regulatory authority to tax has been conflated with jurisdiction and personal jurisdiction's principles because these concepts are concededly similar. Moreover, the Court has freely used the term jurisdiction to refer to many principles.

B. The Many Meanings of Jurisdiction

The Supreme Court has grappled with the meaning of jurisdiction before. As the Court has noted, "Jurisdiction," it has been observed, "is a word of many, too many, meanings."[81] For some, the multitude of meanings of jurisdiction has given the term

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[76] INS v. Chadha, 462 U.S. 919, 925 n.2 (1983); *see also* Samuel A. Thumma and Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 231 n.23 (1999).

[77] Goodyear Dunlop Tires Operations, S.A., et al. v. Brown, 564 U.S. 915, 927 (2011).

[78] *See, e.g.*, N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213, 2224 n.11 (2019).

[79] *See, e.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 223 (2005) (Stevens, J., dissenting).

[80] John W. Walsh, *The True Meaning of the Term "Jurisdiction,"* 49 AM. L. REG. 346, 346 (1901).

[81] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)) (internal quotation marks omitted).

an identity crisis.[82] Jurisdiction not only encapsulates personal jurisdiction, but all of the following:

> Federal-question jurisdiction (including exclusive federal jurisdiction; Diversity Jurisdiction; Supplemental jurisdiction; Removal and remand; Appellate jurisdiction (including certificates of appealability, the finality rule, and the deadline to file a notice of appeal in both criminal and civil cases); Personal jurisdiction; Venue; Forum non conveniens; Exhaustion; Abstention; State-court certification; and The Federal Arbitration Act.[83]

The list could go on and on.[84]

Considering how dynamic the word "jurisdiction" is, it is provocative that nevertheless, "there is no more familiar word in legal language."[85] Over one hundred years ago, it was observed that "an exact and precise definition of this term should not long since have been settled."[86] This could be because definitions are hard to make, or because of a lack of agreement as "to the elements that properly enter into the idea or legal notion for which the term is supposed to stand."[87]

With jurisdiction, the problem is not the inability to compose a definition. If that were the case, jurisdiction would not have so many meanings.[88] Instead, the problem is one of understanding and agreement. Courts and scholars have tried to stuff a multitude of meanings into a single word. It is no surprise that one hundred years later, jurisdiction has no single definition, and the problem of understanding jurisdiction versus a state's regulatory authority to tax has not been solved.[89]

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[82] Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 621, 623 (2017).

[83] *Id.* at 635 (bullet-points omitted).

[84] One could add to the list legislative jurisdiction, statutes of limitation, res judicata, and collateral estoppel.

[85] Walsh, *supra* note 80, at 346.

[86] *Id.*

[87] *Id.*

[88] Dodson, *supra* note 82, at 620-21.

[89] *See id.* at 626-27.

The Supreme Court currently approaches jurisdiction as a trinity of principles.[90] The Court uses the term jurisdiction to refer to: "(1) the power of a court; (2) a label for a defined set of effects; and (3) a creature of positive law."[91] This approach largely mirrors The Oxford English Dictionary's definition of jurisdiction, which provides four definitions overall: (1) "[a]dministration of justice; exercise of judicial authority, or of the functions of a judge or legal tribunal; power of declaring and administering law or justice; legal authority or power;" (2) "[p]ower or authority in general; administration, rule, control;" (3) "[t]he extent or range of judicial or administrative power; the territory over which such power extends;" and (4) "[a] judicial organization; a judicature; a court, or series of courts, of justice."[92] This confirms that jurisdiction is still a word of "many, too many, meanings."[93]

The multitude of meanings aside for now, the legal field historically has categorized jurisdiction by type thereby creating three main categories of jurisdiction: executive jurisdiction, legislative jurisdiction, and judicial jurisdiction.[94] Executive jurisdiction is the authority to execute or administer the law.[95] Legislative jurisdiction is the power to adopt laws.[96] Judicial jurisdiction is the power of a court to hear and adjudicate a case.[97] Overall, administrative agencies illustrate how these categories function: "the agency makes rules, engages in oversight of regulated

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[90] *Id.* According to Dodson, "the Court has given jurisdiction at least three identities: jurisdiction as basic power or authority, jurisdiction as a defined set of effects, and jurisdiction as positive law." *Id.* And "[t]hese three identities are inconsistent with each other, and none is coherent on its own." *Id.* at 627.

[91] *Id.* at 621, 626-32. Jurisdiction as power refers to a court's ability to hear and adjudicate cases. *Id.* at 627. Jurisdiction as effects refers to jurisdictional requirements that are nonwaivable. *Id.* at 629. Jurisdiction as positive law refers to Congress's power to create jurisdictional limits. *Id.* at 631.

[92] *Jurisdiction*, 8 THE OXFORD ENGLISH DICTIONARY 320 (2d ed. 1989).

[93] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) (citing United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

[94] RESTATEMENT (FIRST) OF CONFLICT OF LAWS ch. 3, topic 3 (AM. LAW. INST. 2018).

[95] RESTATEMENT (FIRST) OF CONFLICT OF LAWS: EXERCISE OF EXECUTIVE JURISDICTION § 56 (AM. LAW. INST. 2018).

[96] RESTATEMENT (FIRST) OF CONFLICT OF LAWS: METHOD OF EXERCISING OF LEGISLATIVE JURISDICTION § 59 (AM. LAW. INST. 2018).

[97] RESTATEMENT (FIRST) OF CONFLICT OF LAWS: EXERCISE OF JUDICIAL JURISDICTION § 71 (AM. LAW. INST. 2018).

entities, and enforces the rules when an entity is thought to have violated them."[98]

From these three categories, the multitude of meanings flow. Within each main category of jurisdiction there are subcategories. For example, judicial jurisdiction is comprised of both subject matter jurisdiction and personal jurisdiction,[99] and personal jurisdiction can be either general or specific.[100] Furthermore, to even bring a case, plaintiffs have to jump over the hurdle of jurisdictional bars, such as filing requirements.[101] Within legislative jurisdiction, there is both prescriptive jurisdiction, meaning a state can prescribe its own law, and within executive jurisdiction, there is enforcement jurisdiction, meaning a state can enforce its laws.[102] Truly, the list could never end.

The Supreme Court has recognized the problem with jurisdiction's jargon. In addition to noting that the term encapsulates too many principles,[103] the Court has recognized that it has used the term too freely.[104] Regarding claim-processing rules, "the Court explicitly recognized that overuse of the jurisdictional label had spawned 'drive-by jurisdictional rulings' that should be accorded no precedential weight."[105] Moreover, the Court urged that, at least in the claim-processing setting, clarity could be achieved if courts correctly used the term "jurisdictional" to refer to what the term actually means—"prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority"—as opposed to claim-processing rules.[106]

Overall, this linguistic dilemma is no new problem for the Court. The terms "tax jurisdiction" and "jurisdiction to tax" have

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[98] *Jurisdiction (legislative jurisdiction or executive jurisdiction or judicial jurisdiction)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 583 (compact ed. 2011).

[99] Dodson, *supra* note 82, at 625.

[100] *Id.* at 641 n.134; *see also* 62B AM. JUR. 2D *General versus specific jurisdiction* § 162 (2020).

[101] Dodson, *supra* note 82, at 628-29.

[102] Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 289, 298-302 (2012).

[103] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)).

[104] Dodson, *supra* note 82, at 624.

[105] *Id.* (quoting *Steel Co.*, 523 U.S. at 90-91).

[106] Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *see also* Dodson, *supra* note 82, at 625.

been used too broadly for too long. The post-*Wayfair* landscape illustrates another negative consequence of courts doing so. Jurisdiction and a state's regulatory authority to tax are two different concepts. To refer to both of them as jurisdiction is a terminological conflation.

C. Jurisdiction v. Power

This Comment focuses solely on judicial jurisdiction and a state's taxing power, which has impermissibly been referred to as a type of jurisdiction. Furthermore, this Comment analyzes the problem through the lens of only one of the Supreme Court's three approaches to jurisdiction: power.[107] Because power describes judicial jurisdiction and a state's ability to impose sales taxes, the term "jurisdiction" has been used to refer to the latter. Courts have attempted to siphon the term jurisdiction into these two connected but distinct categories, thus causing havoc post-*Wayfair*.

Pure power and jurisdiction are not the same.[108] Conflating the two is a dangerous misstep towards fallible judicial interpretation. Although the Court has impermissibly used the terms "tax jurisdiction" and "jurisdiction to tax," the latter is the most problematic use because it directly highlights how the Court has conflated power with jurisdiction instead of just using the term "power to tax."

The distinction between power and jurisdiction is rooted in taxation principles. West's Tax Law Dictionary defines jurisdiction as "the power of a court to hear and determine a case."[109] This includes the power of a tax court to adjudicate cases.[110] However, the dictionary takes due care to define tax authority separately as "[a]ny source of the Federal tax law including statutes, regulations,

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[107] Dodson, *supra* note 82, at 626. However, contrary to Dodson's later assertion, jurisdiction cannot be cabined to "inherently descriptive of boundaries that separate or group forums." *See id.* at 637. If that were the case, then it would be permissible to use jurisdiction to refer to a state's regulatory authority to tax.

[108] Wasserman, *supra* note 102, at 302-03. ("[A] court's jurisdiction to adjudicate a case under existing substantive law is different from Congress's jurisdiction to bring that substantive law into existence in the first place.").

[109] Robert Sellers Smith & Adele Turgeon Smith, *Jurisdiction*, WEST'S TAX LAW DICTIONARY § J260, Westlaw (database updated Feb. 2020).

[110] *Id.*

court cases, revenue rulings, and revenue procedures."[111] Of course, states also have tax authority.[112] Furthermore, the area in which a tax is levied is defined as a "taxing district" as opposed to a jurisdiction, further highlighting the difference between power and jurisdiction.[113]

This is an important distinction between these two abstract concepts, but it is understandable why the distinction is overlooked. It makes sense that courts have conflated the two concepts, especially considering the lack of scholarship clarifying legislative power and why it has been broadly categorized as jurisdiction.[114] Of course, "[t]he foundation of jurisdiction is physical power."[115] Similarly, a state has the power to do many things, such as exercising its police power and taxing power.[116] However, not every type of power exerted is jurisdiction.

The origin of the terms "tax jurisdiction" and "jurisdiction to tax" is uncertain. However, these terms have been used for a while. American courts first used the term "tax jurisdiction" in the early 1900s.[117] The first state court to use the term was the Supreme Court of Montana in *State ex rel. Bankers' Trust Co. v. Walker*, a case involving inheritance taxes imposed on shares from an out-of-state corporation's capital stock.[118] In *Wheeling Steel Corp. v. Fox*, the Supreme Court used the term for the first time in an *ad valorem* property tax dispute.[119]

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[111] Robert Sellers Smith & Adele Turgeon Smith, *Tax Authority*, WEST'S TAX LAW DICTIONARY § T210, Westlaw (database updated Feb. 2020); *see also supra* note 108.

[112] JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 12.01 (3d ed.), Westlaw (database updated May 2020).

[113] Robert Sellers Smith & Adele Turgeon Smith, *Taxing District*, WEST'S TAX LAW DICTIONARY § T1520, Westlaw (database updated Feb. 2020) (defining "Taxing District" as the "[g]eographical district in which a tax is levied").

[114] *See*, *e.g.*, Alex Ellenberg, Note, *Due Process Limitations on Extraterritorial Tort Legislation*, 92 CORNELL L. REV. 549, 550 n.11 (2007).

[115] McDonald v. Mabee, 243 U.S. 90, 91 (1917); *see also* Dodson, *supra* note 82, at 623.

[116] Walsh, *supra* note 80, at 355.

[117] These are the first references to "tax jurisdiction" recorded on Westlaw. Although this term could have been used prior to this, this is the first recorded history on Westlaw.

[118] State *ex rel.* Bankers' Trust Co. v. Walker, 226 P. 894, 896 (Mont. 1924).

[119] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 212 (1936).

Overall, in cases currently catalogued by Westlaw, lower courts have used the term "tax jurisdiction" 376 times.[120] The Supreme Court has used the term a total of ten times.[121] Most recently, it used the term in *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*.[122] This reference is particularly notable because, following the Court's decision, the legal field has grappled with whether the Court promulgated a new standard that is on a collision course with due process.[123] This is the same question *Wayfair* poses.[124]

Regarding the term "jurisdiction to tax," courts have used this terminology far more frequently. The Supreme Court has used the term over 50 times.[125] It most recently used the term in 2005 in *City of Sherrill v. Oneida Indian Nation*.[126] Lower courts have used the term over 1,000 times.[127] However, it is not surprising courts have used the term "tax jurisdiction" this frequently. Because jurisdiction can mean power, it is easy to borrow the term to refer to a state's taxing power.[128] Yet, to use the word "jurisdiction" in this way is a mistake because power and jurisdiction are two distinct concepts.

Similarly, the term "jurisdiction to tax" encompasses the meaning of jurisdiction as power by using the term "jurisdiction" instead of "power." Although neither "tax jurisdiction" nor "jurisdiction to tax" should be used, the use of the second term is especially troubling. Instead of referring to jurisdiction, courts should simply use the phrase "power to tax" to avoid a conflation problem.

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[120] Query for "Tax Jurisdiction," WESTLAW EDGE, http://westlaw.com (search "tax jurisdiction" and remove all other jurisdictions but Supreme Ct.) (last visited Dec. 20, 2019).

[121] *Id.*

[122] 139 S. Ct. 2213, 2224 n.11 (2019).

[123] Tay, *supra* note 37.

[124] *Id.*

[125] Query for "Jurisdiction to Tax," WESTLAW EDGE, http://westlaw.com (search "jurisdiction to tax" and remove all other jurisdictions but Supreme Ct.) (last visited Dec. 20, 2019).

[126] 544 U.S. 197, 223 (2005) (Stevens, J., dissenting).

[127] Query for "Jurisdiction to Tax," WESTLAW EDGE, http://westlaw.com (search "jurisdiction to tax" and remove Supreme Ct. as a jurisdiction) (last visited Dec. 20, 2019).

[128] Dodson, *supra* note 82, at 627.

Power and jurisdiction can be distinguished in two main ways. First, power and jurisdiction flow from two separate sources.[129] Power flows from the state.[130] Either the state has the power to do something, or it does not. Therefore, a state's regulatory authority to tax is a matter of pure power—can the state impose the tax or not?[131] Simply, it is like a light switch. Either the power is "on" or "off," and there is no in-between. Alternatively, jurisdiction flows from the case before the court.[132] A court generally has power to adjudicate a case based on the subject matter of the case and the defendant's connections with the forum.[133] As opposed to the state's power light switch, personal jurisdiction is a nuanced concept that is judged by a sliding scale.[134] Depending on the defendant haled to court, a court may or may not have jurisdiction to hear a case.[135]

Second, the purpose for which the authority is exerted is a distinguishing factor.[136] On one hand, the power to tax is exerted in the interest of the state to collect revenue.[137] Alternatively, judicial jurisdiction is exerted to resolve disputes in the interest of the parties, with a forefront consideration of fairness to the defendant.[138] This key distinction explains the need for personal jurisdiction's sliding scale test.[139]

Considering these two distinctions, the reason why power and jurisdiction are frequently conflated is likely because of the geographic limitations on both concepts. The power to tax is not limitless, but is instead "coterminous with the bounds of the

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[129] Walsh, *supra* note 80, at 355.

[130] *Id.*

[131] State legislatures first enacted sales taxes in the 1930s. *See* JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 12.05 (3d ed.), Westlaw (database updated May 2020).

[132] Walsh, *supra* note 80, at 355.

[133] *Id.* at 348.

[134] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (detailing a list of considerations which may serve to establish the reasonableness of personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required); *see also* Kenneth J. Vandevelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 306 (1993) (using the term "sliding scale").

[135] *Burger King*, 471 U.S. at 477.

[136] Walsh, *supra* note 80, at 355.

[137] Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

[138] *Id.*

[139] *Burger King*, 471 U.S. at 477.

sovereign's jurisdiction."[140] Therefore, a state may impose sales taxes only within the boundaries of that state.[141] Local taxes may only be imposed within the locality.[142]

Similarly, jurisdiction not only encompasses a court's power to hear a case but also the physical boundaries in which that power may be exerted.[143] A state court cannot hear a case in which the litigable event took place outside of the jurisdiction unless there exists some other connection between the defendant and the forum state that allows the court to hear the case.[144] Although geography may limit judicial jurisdiction and power, geography does not render judicial jurisdiction and power one in the same.

Nevertheless, it is understandable why the difference between jurisdiction and power has not been fully recognized. Prior to the advent of modern technology and innovation, judicial jurisdiction and a state's power to tax were seemingly one in the same, as described in the following section. However, words are not static concepts frozen in time.[145] The Court's approach to personal jurisdiction and a state's regulatory authority to tax has morphed over the past century, bringing this linguistic conflation to light.

III. THE LINKAGE

A. The Court's Crafting

A state's regulatory authority to tax and personal jurisdiction are governed by separate constitutional limitations, although overlap exists. A state's taxing power is limited by the Commerce Clause and the Fourteenth Amendment's Due Process Clause.[146] On the other hand, personal jurisdiction is only governed by the

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[140] Joseph H. Beale, *Jurisdiction to Tax*, 32 HARV. L. REV. 587, 587-88 (1919) (outlining the multitude of permissible taxes at the outset of the twentieth century).

[141] *Id.* at 587.

[142] *Id.*

[143] Maurice H. Merrill, *Jurisdiction to Tax—Another Word*, 44 YALE L.J. 582, 584 (1935) ("There [was] merely an assumption, specific or tacit, that an American state may not tax persons or property beyond its 'jurisdiction.'").

[144] Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DEPAUL L. REV. 517, 531 (2019).

[145] Cunningham et al., *supra* note 69, at 1615.

[146] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018).

Due Process Clause.[147] How the Court has applied these constitutional limitations has steadily evolved.

The concept of personal jurisdiction has "existed" since 1877,[148] and state sales tax laws were first enacted in the 1930s.[149] However, until the Court's decision in *Wayfair*, the dynamic between the two had largely been left unchanged. After *Wayfair*, for the first time in sales tax jurisprudence, a state has more authority to require companies to collect and remit sales taxes as state agents than to hale out-of-state defendants into court.[150] This explains why the Court's use of personal jurisdiction principles to inform due process in the sales tax context is a significant problem post-*Wayfair*. To understand the problem, an overview of the doctrines' evolution is key. We will start with personal jurisdiction.

1. Personal Jurisdiction

a. From Physical Boundaries to Fairness

The concept of personal jurisdiction has evolved from a principle focused solely on rigid boundaries to a principle based on fairness that remains limited by geography. In *Pennoyer v. Neff*, the Supreme Court first crystallized the concept of personal jurisdiction.[151] For a state to have personal jurisdiction over a defendant, a defendant had to have some physical presence in the state—whether it be himself or his property.[152] During the *Pennoyer* era, personal jurisdiction focused rigidly on geography because "no [s]tate [could] exercise direct jurisdiction and authority over persons or property without its territory."[153] This physical presence requirement fell under the Fourteenth Amendment's Due Process Clause.[154]

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147 Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

148 *Id.* at 720.

149 *See* JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 12.05 (3d ed.), Westlaw (database updated May 2020).

150 Taylor Gast et al., South Dakota v. Wayfair, Inc.*: States Will Collect Sales Tax From Out-of-State Companies Without Physical Presence, Part 2*, 50 MICH. TAX LAW. 22, 24-25 (2019).

151 *Pennoyer*, 95 U.S. at 722.

152 *Id.*

153 *Id.*

154 *Id.* at 733.

Fast forward approximately seventy-five years, and the Supreme Court dramatically changed a court's ability to adjudicate a case by revolutionizing the meaning of personal jurisdiction in *International Shoe Co. v. Washington*.[155] The Court overturned *Pennoyer*'s physical presence requirement in favor of a fairness inquiry limited by geography.[156] After *International Shoe*, a state's exercise of personal jurisdiction over a defendant complies with the Due Process Clause only when that defendant has sufficient minimum contacts with the forum state so as to not "offend traditional notions of fair play and substantial justice."[157]

The Court changed personal jurisdiction from a concept requiring courts to ask if the defendant is *there* in the forum state (the *Pennoyer* standard for personal jurisdiction) to a concept requiring courts to consider if it is *fair* to subject that defendant to the court's jurisdiction.[158] Ultimately, the minimum contacts test depends 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."[159] The Court did not instruct lower courts as to what traditional notions of fair play and substantial justice are, nor specifically what types of activities are required to meet that test.[160]

Interestingly, *International Shoe* was not a simple personal jurisdiction case. Washington State brought suit against International Shoe because the company failed to pay taxes.[161] Therefore, the Court considered whether Washington, which required employers to contribute to the state's unemployment compensation fund a percentage of wages paid for employees within the state, could maintain a suit against International Shoe, a corporation with no physical presence in Washington except for the eleven to thirteen salesmen it employed in the state, for failing to contribute to the state's unemployment compensation fund.[162] The

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[155] 326 U.S. 310, 316 (1945).

[156] *Id.*

[157] *Id.* (internal quotation marks omitted).

[158] *Id.* The author would like to thank Professor John Czarnetzky for his delightful Civil Procedure I course and his engaging discussion of personal jurisdiction.

[159] *Int'l Shoe*, 326 U.S. at 319.

[160] *Id.*

[161] *Id.* at 311-12.

[162] *Id.* at 311-14.

Court's opinion largely addressed personal jurisdiction and barely touched on the tax issue presented.[163] The Court concluded, however, that "[t]he activities which establish[ed International Shoe's] 'presence' subject[ed] it alike to taxation by the state and to suit to recover the tax."[164]

International Shoe indirectly demonstrates that the Court has inadvertently conflated personal jurisdiction with a state's regulatory authority to tax. The Court addressed whether Washington could impose a tax and enforce it against International Shoe.[165] It decided the issue in a personal jurisdiction framework, which echoes the conflation problem.[166] Nevertheless, because the Court did not consider in great detail Washington's regulatory authority to tax, *International Shoe* should not be read to mean that, at the time of its decision, the Court believed the standards for personal jurisdiction and a state's authority to tax were the same.[167]

Since *International Shoe*, the Court has continued to expand the concept of personal jurisdiction. In doing so, it has maintained a distinction between general personal jurisdiction and specific personal jurisdiction.[168] General personal jurisdiction exists when a defendant is "at home" in the forum state.[169] General personal jurisdiction allows a court to exert personal jurisdiction over any claim against that defendant.[170] However, a defendant corporation

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[163] *Id.* at 321 ("Only a word need be said of appellant's liability for the demanded contributions of the state unemployment fund. The Supreme Court of Washington, construing and applying the statute, has held that it imposes a tax on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages, here the commissions payable to the salesmen. This construction we accept for purposes of determining the constitutional validity of the statute."). *See also* Christina R. Edson, Quill*'s Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 TAX LAW. 893, 898-900, 899 n.21 (1996).

[164] Edson, *supra* note 163, at 899 (citing *Int'l Shoe*, 326 U.S. at 321).

[165] *Int'l Shoe*, 326 U.S. at 311-12.

[166] *Id.* at 316.

[167] Edson, *supra* note 163, at 900.

[168] Morrison, *supra* note 144, at 531, 531 n.57 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) and Daimler AG v. Bauman, 571 U.S. 117 (2014)) (providing discussion on why the dichotomy between specific and personal jurisdiction is unworkable when corporations are defendants haled into an out-of-state court).

[169] *Goodyear Dunlop*, 564 U.S. at 919.

[170] Morrison, *supra* note 144, at 531.

is only "at home" when the defendant corporation's place of incorporation or principal place of business is the forum state.[171]

Alternatively, specific personal jurisdiction exists when a defendant has sufficient minimum contacts with the forum state.[172] A sufficient minimum contact can be as simple as a defendant being served in the forum state.[173] A court may exert specific personal jurisdiction over an out-of-state defendant only for claims arising in, or related to, the jurisdiction in which the claim was brought.[174] This Comment takes the approach that the tension between personal jurisdiction and a state's taxing power presented post-*Wayfair* is a matter of specific personal jurisdiction because, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court settled that general jurisdiction exists only when a defendant corporation has such overwhelming contacts with the forum state that it is considered "at home" within that state.[175]

b. Modernizing Personal Jurisdiction

The Supreme Court and lower courts have responded to an incredibly mobile society, the rise of e-commerce, companies doing business online, and customers engaging in online transactions.[176] Overall, personal jurisdiction "has evolved" to match the country's

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[171] *Id.*

[172] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[173] Burnham v. Superior Court, 495 U.S. 604, 628 (1990). Mr. Burnham was served with divorce papers while he was present in California's borders. *Id.* at 608. This was enough for a California court to have jurisdiction over him. *Id.*

[174] Morrison, *supra* note 144, at 531.

[175] However, *Wayfair* could have interesting implications for general personal jurisdiction. The Court has generally narrowed the concept of general personal jurisdiction, requiring a corporation to be "at home" in the forum state. *See* Morrison, *supra* note 144, at 535. However, prior to the Court's narrowing, some lower courts found general jurisdiction to exist based on the defendant corporation's volume of sales into the forum state. *See* Meir Feder, Goodyear*, "Home" and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 672 (2012) (citing Lakin v. Prudential Secs., Inc., 348 F.3d 704, 706 (8th Cir. 2003) and Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 465-67 (6th Cir. 1989)). Because *Wayfair* allows a substantial economic nexus to exist between the taxing state and a seller based on dollar thresholds, *Wayfair* could be considered a call back to these earlier general personal jurisdiction cases. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018).

[176] D.E. Wagner, Note, Hertz *So Good: Amazon, General Jurisdiction's Principal Place of Business, and Contracts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1085, 1090 (2019).

evolving "modern economy."[177] Following *International Shoe*, online companies do not need to have a physical presence in the forum state to be haled to court there.[178] To address whether a defendant has sufficient minimum contacts with the forum state, the Court created a purposeful availment test, which evaluates whether a defendant purposefully availed itself of the benefits and privileges of the forum state.[179] Therefore, geography is no longer a dispositive factor for a state's exercise of personal jurisdiction.

In *Hanson v. Denckla*, the Court limited *International Shoe*'s test by holding that the unilateral acts of a third party could not be the basis for personal jurisdiction over a defendant.[180] In doing so, the Court laid the groundwork for what would become known as the "purposeful availment" test.[181] The *Hanson* Court held that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[182] Without a defendant's purposeful availment, personal jurisdiction over that defendant cannot stand.[183]

Regarding out-of-state corporations, the Court expanded the meaning of purposeful availment in *World-Wide Volkswagen Corp. v. Woodson*, likely to account for the mobility of modern society.[184] The Court created the "stream of commerce" theory, which applies when a corporation sells a good that ends up in another state.[185] Relying on *Hanson*'s holding that a defendant must purposefully avail itself of the benefits and privileges of the forum state to be subjected to the forum state's jurisdiction, the Court held that

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[177] *Id.*

[178] *Id.* at 1095.

[179] *Id.* at 1096.

[180] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[181] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion) (discussing *Hanson*, 357 U.S. at 253).

[182] *Hanson*, 357 U.S. at 253 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[183] *Id.*

[184] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980); *see also* Edson, *supra* note 163, at 893 (noting that the definition of "'doing business within a state' has changed as technological improvements have altered by which companies conduct business").

[185] Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 253 (1988).

placing a product in the stream of commerce only created sufficient minimum contacts with the forum state when the defendant could reasonably foresee being haled into that out-of-state court.[186] Therefore, the Due Process Clause requires a finding of foreseeability.[187] Foreseeability is not "the mere likelihood" that a product will end up in the forum state.[188] Instead, foreseeability means that "the defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there."[189]

In *Word-Wide Volkswagen*, the defendants were a New York car dealership and a New York regional distributor.[190] The plaintiffs brought a products-liability action against the defendants in an Oklahoma state court after a car they purchased in New York caught on fire during a car accident that occurred in Oklahoma.[191] Applying the newly annunciated stream of commerce analysis, the Court found that the defendants did not reasonably foresee the car entering the Oklahoma market and therefore did not purposefully avail themselves of conducting business in Oklahoma.[192] Instead, the Court found that the car arrived in Oklahoma due to the unilateral acts of a third party—the plaintiffs who were driving the car—and therefore Oklahoma did not have jurisdiction over the out-of-state defendant corporations.[193]

The Court applied *World-Wide Volkswagen*'s foreseeability analysis in *Burger King Corp. v. Rudzewicz*, in which the Court addressed a contractual dispute between owners of the Burger King franchise and one of its franchisees.[194] The Court held that because the defendants entered into a long-term contract with Burger King, a Florida-based corporation, the contract called for the application of Florida law, and the defendants were trained in Florida,

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[186] *World-Wide Volkswagen*, 444 U.S. at 297.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 288-89. The plaintiffs originally brought suit against a car manufacturer and importer as well, but these two defendants were not petitioners in *World-Wide Volkswagen*. *Id.* at 288 n.3.

[191] *Id.* at 288.

[192] *Id.* at 295.

[193] *Id.*

[194] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464-66 (1985).

minimum contacts existed to warrant Florida exercising personal jurisdiction over them through the state's long-arm statute.[195] Therefore, the *Burger King* Court again rejected physical presence as a requirement for personal jurisdiction stating that, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."[196]

In *J. McIntyre Machinery, Ltd. v. Nicastro*, Justice Breyer's concurrence identified a threshold level for determining the point at which an out-of-state defendant's contacts with the forum state were not sufficient to meet *International Shoe*'s minimum contact requirement.[197] As a recap of the facts of the case, the plaintiff, Nicastro, seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre.[198] The accident occurred in New Jersey, but the machinery was manufactured in England.[199] Looking to J. McIntyre's contacts with New Jersey, the Court addressed whether a New Jersey court could exercise personal jurisdiction over the foreign corporation.[200] J. McIntyre was incorporated and operated in England.[201] Further, the Court recognized that the company did not market goods to New Jersey or ship goods there.[202] Instead, J. McIntyre targeted the United States generally for sales by attending sales conventions in various states, although never in New Jersey.[203]

The Court ruled that New Jersey did not have jurisdiction over J. McIntyre because the company did not purposefully avail itself of the privileges of conducting business in New Jersey.[204] Even though J. McIntyre's product entered the stream of commerce, J. McIntyre did not target New Jersey's economic market and could

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195 *Id.* at 478-80.

196 *Id.* at 476 (citations omitted); *see also* Edson, *supra* note 163, at 903.

197 J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 888-89 (2011) (Breyer, J., concurring).

198 *Nicastro*, 564 U.S. at 878 (plurality opinion).

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 886-87.

not predict that its machinery would reach New Jersey.[205] Instead, J. McIntyre merely targeted the United States in general.[206]

Justice Breyer concurred with the plurality and provided perhaps the most important analytical framework for highlighting the tension between personal jurisdiction and a state's authority to require companies to collect and remit sales taxes that has been presented post-*Wayfair*: a single, isolated sale into the forum state is not enough to support a finding of personal jurisdiction over an out-of-state corporation.[207] Mirroring the Court's holding in *World-Wide Volkswagen*, Justice Breyer stated that "a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction."[208] Similarly, Justice Breyer recalled another personal jurisdiction case, *Asahi Metal Industry Co. v. Superior Court*,[209] in which the Court held that a single sale of a product into a state does not satisfy *International Shoe*'s minimum contacts test, "even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place."[210] Instead, the Due Process Clause requires something more than a single sale.[211] It requires a single sale plus some other contacts.[212]

Applying this reasoning to a hypothetical situation, Justice Breyer maintained that under the approach adopted by the plurality in *Nicastro*, a producer could not be subject to a court's jurisdiction for a products-liability action "so long as it 'knows or

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[205] *Id.* at 886.

[206] *Id.*

[207] *Id.* at 888 (Breyer, J., concurring); *see also* Red Earth LLC v. United States, 657 F. 3d 138, 145 (2nd Cir. 2011) (noting that the Supreme Court has never found a "single isolated sale" sufficient to satisfy due process requirements).

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

[209] *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987).

[210] *Nicastro*, 564 U.S. at 888-89 (Breyer, J., concurring) (citing *Asahi Metal*, 480 U.S. at 111, 112).

[211] *Id.* at 888-89.

[212] *Id.* Similarly, a defendant's contacts with a forum state must be more than the plaintiff who is located in the forum state. *See* Walden v. Fiore, 571 U.S. 277, 284 (2014). Defendants must create their own connections with the forum beyond the fact that a plaintiff is merely located there. *Id.* at 285. This, too, imposes significant questions for sales tax, considering a company's only connection with a taxing state may be a seller located there who chooses to buy the company's goods.

reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'"[213] Personal jurisdiction does not travel with goods.[214] To hold otherwise would uproot *International Shoe*'s fairness standard.[215] Nevertheless, Justice Breyer noted that *International Shoe*'s standard might be the right test for larger corporations who can handle burdensome litigation miles away.[216] Alternatively, *International Shoe*'s personal availment standard might be unfair for a single seller who sells a single product to a distant state, such as Hawaii.[217] Interestingly, this is the same criticism of *Wayfair*—small companies may have a harder time complying with threshold requirements than larger companies.[218]

Nevertheless, from *Pennoyer* to *Nicastro*, the Court has liberalized personal jurisdiction and the meaning of purposeful availment.[219] While personal jurisdiction once was defined by rigid boundaries, it is now governed by fairness. In this way, personal jurisdiction has *grown*, allowing courts to exercise personal jurisdiction over even the farthest located defendant so long as it remains fair to do so.[220]

Fast forwarding to *Wayfair*, the Court ruled that economic nexus threshold requirements for requiring companies to collect and remit sales taxes to the state were constitutional.[221] The threshold requirement passed by the South Dakota legislature was either 200 transactions or $100,000 in sales.[222] Therefore, South Dakota could require out-of-state companies to collect and remit sales taxes to South Dakota if that company made 200 transactions with customers located in South Dakota, or if the company sold

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[213] *Nicastro*, 564 U.S. at 888-891 (Breyer, J., concurring) (citation omitted) (emphasis added).

[214] *Id.* at 891.

[215] *Id.*

[216] *Id.* at 891-92.

[217] *Id.*

[218] Michael T. Fatale, Wayfair*, What's Fair, and Undue Burden*, 22 CHAP. L. REV. 19, 45-46 (2019).

[219] *See* Wagner, *supra* note 176, at 1093-96.

[220] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[221] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099-100 (2018).

[222] S.D. CODIFIED LAWS § 10-64-2 (2020).

$100,000 in goods to customers located in South Dakota.[223] The question now for specific personal jurisdiction is whether threshold requirements, such as South Dakota's, could provide a new definition of purposeful availment.

2. A State's Power to Tax

a. Linking Power to Personal Jurisdiction

Unlike personal jurisdiction, a state's regulatory power to tax has expanded slowly. Until the Court's decision in *Wayfair*, the dynamic was left largely unchanged.[224] Like personal jurisdiction, the concept of physical boundaries has echoed throughout tax jurisprudence.[225] The Taxing and Spending Clause of the Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[226] Similarly, the fifty states have the power to impose sales taxes.[227] Until June 2018, under the Commerce Clause, a state only had the regulatory authority to require out-of-state companies to collect and remit sales taxes if that company had a physical presence in the state.[228]

A state's regulatory authority to tax, unlike personal jurisdiction, is bound by both the Commerce Clause and the Fourteenth Amendment's Due Process Clause.[229] Prior to *Quill*, the Supreme Court generally applied the same constitutional analyses for both.[230] Both clauses require a nexus between the taxing state and the corporation upon which the state wishes to impose

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[223] *Id.*

[224] Gast et al., *supra* note 150, at 25.

[225] *Id.*

[226] U.S. CONST. art. 1, § 8, cl. 1.

[227] For a discussion of the growth of sales taxation in the United States, see JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 12.02 (3d ed.), Westlaw (database updated May 2020).

[228] Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

[229] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018).

[230] Michael T. Fatale, *State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard*, 54 TAX LAW. 105, 111-12, 112 n.34 (2000) (citing Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967); Gen. Motors Corp. v. Washington, 377 U.S. 436 (1964); and Scripto, Inc. v. Carson, 362 U.S. 207 (1960)).

collection.[231] However, in *Quill* the Court made clear that the two clauses required separate analyses.[232] In *Wayfair,* the Court abrogated *Quill*'s physical presence rule, and for the first time in history, a state now has greater authority to require out-of-state companies to collect and remit sales taxes than it does to hale an out-of-state defendant into court.[233] Like personal jurisdiction, sales taxation is no longer governed by a rigid geographic test but instead a fairness-focused test that is somewhat restricted by geography.[234] However, *Wayfair*'s holding is rooted in *National Bellas Hess, Inc. v. Dep't of Revenue*, in which the Court first conflated personal jurisdiction with a state's power to tax.[235]

In *Bellas Hess*, the Court held that the Due Process and Commerce Clauses required a company to have some physical presence within a state for a state to require that seller to collect and remit taxes to the state.[236] The Illinois Department of Revenue obtained a judgment against a mail order house, which required the mail order house to collect and remit sales taxes to Illinois.[237] The mail order house had its principal place of business in Missouri and was licensed to do business in only Missouri and Delaware.[238] The only connection the mail order house had to Illinois was catalogues that the company mailed to active or recent customers throughout the nation, including in Illinois, twice a year.[239] Thus, the Court had to consider whether this single connection was sufficient to subject National Bellas Hess to Illinois's regulatory power to require companies to collect and remit sales taxes.[240] The mail order house claimed that the judgment violated the Fourteenth Amendment's

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

[232] *Id.*; *see also* Bishop-Henchman, *supra* note 37, at 280 (previewing the conflation conundrum) ("The Court conflated nexus and due process jurisdiction in *Bellas Hess*, separated them in *Quill*, and now leaves open the question of to what extent states may constitutionally regulate out-of-state actors.").

[233] *Wayfair*, 138 S. Ct. at 2092.

[234] *Id.* at 2093.

[235] *Bellas Hess*, 386 U.S. at 758.

[236] *Id.*

[237] *Id.* 753-54.

[238] *Id.*

[239] *Id.* at 754.

[240] *Id.* at 755-56.

Due Process Clause and created an unconstitutional burden upon interstate commerce in violation of the Commerce Clause.[241]

Recognizing that a state's regulatory authority to tax is governed by both the Due Process and Commerce Clauses, the Court noted that the mail order house's two claims were "closely related."[242] Under both constitutional provisions, there must exist "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax."[243] The Court conflated the two clauses and ruled that the minimum link required for both was the same.[244]

Applying this standard, the Court found there was no minimum connection.[245] For Illinois to require a company to serve as the state's tax collection agent when the company's "only connection with customers in [Illinois] is by common carrier or the United States mail" violated the Constitution.[246] To hold otherwise would subject Bellas Hess and other mail order companies to complicated obligations of local "*jurisdictions*" and would entangle interstate business.[247] Overall, companies with "retail outlets, solicitors, or property within a [s]tate" are quite different than companies like Bellas Hess, who did no more than to communicate with customers in the state.[248] Therefore, some physical presence was required.[249]

Justice Fortas and the other dissenting Justices wholly disagreed with the majority's contention that Bellas Hess's mail order connection was not sufficient.[250] Bellas Hess's mail order business was a "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market."[251] Furthermore,

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[241] *Id.* at 756; *see also* Morrison, *supra* note 144, at 542-43.

[242] *Bellas Hess*, 386 U.S. at 756; *see also* Morrison, *supra* note 144, at 543.

[243] *Bellas Hess,* 386 U.S. at 756 (citations omitted); *see also* Edson, *supra* note 163, at 910-11.

[244] *Bellas Hess,* 386 U.S. at 756.

[245] *Id.* at 758.

[246] *Id*.

[247] *Id.* at 759-60 (emphasis added).

[248] *Id.* at 758; *see also* Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 559 (1977); Edson, *supra* note 163, at 923 n. 174.

[249] *Bellas Hess*, 386 U.S. at 758.

[250] *Id.* at 761-62 (Fortas, J., dissenting). *See also* Bishop-Henchman, *supra* note 37, at 284.

[251] *Bellas Hess*, 386 U.S. at 761.

Illinois residents could bypass sales taxes by buying from Bellas Hess.[252] This similar problem was presented to the Court in *Wayfair* with shoppers avoiding paying sales taxes by purchasing items online from out-of-state corporations.[253] Overall, the dissent found no constitutional violation.[254]

Although *Bellas Hess* already required a company to have a physical presence in the state, the Supreme Court first promulgated the nexus requirement in *Complete Auto Transit v. Brady* as part of the four-part test to determine whether state taxes are constitutional.[255] However, unlike in *Bellas Hess*, the Court made clear that the substantial nexus requirement was a dormant Commerce Clause requirement.[256] To surpass a Commerce Clause challenge, a tax must: (1) be "applied to an activity with a substantial nexus with the taxing [s]tate," (2) be "fairly apportioned," and (3) "not discriminate against interstate commerce," and (4) be "fairly related to the services provided by the [s]tate."[257] However, the Court did not define the nexus requirement, and because the *Complete Auto Transit* Court did not mention *Bellas Hess*, commentators questioned whether *Bellas Hess* was still good law.[258]

In *Quill Corp. v. North Dakota*, the Court settled the question.[259] Like in *Bellas Hess*, North Dakota attempted to require Quill, an out-of-state mail order house selling office equipment and supplies, to collect and remit use taxes to North Dakota.[260] Quill had no physical presence or employees in North Dakota.[261] However, it solicited business through catalogues, flyers, ads, and telephone calls.[262] Quill made over $1 million in sales to

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[252] *Id.* at 762.

[253] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018).

[254] *Bellas Hess*, 386 U.S. at 763 (Fortas, J., dissenting).

[255] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). *See also* Bishop-Henchman, *supra* note 37, at 284.

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

[257] *Id.*

[258] Bishop-Henchman, *supra* note 37, at 284.

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

[260] *Id.* at 301.

[261] *Id.*

[262] *Id.* at 302.

approximately 3,000 North Dakota customers, making it the sixth largest vendor of office supplies in the state.[263]

North Dakota imposed a use tax, which was corollary to its sales tax, and required retailers "maintaining a place of business" in North Dakota to collect the tax from consumers and remit it to the state.[264] North Dakota filed an action to require Quill to comply with the state tax statute.[265] In response, Quill maintained that for North Dakota to require it to collect and remit sales taxes to the state violated the Due Process and Commerce Clauses because Quill had no physical presence in the state.[266]

Ultimately, the Court found that it was unconstitutional to require Quill to collect and remit the tax.[267] The *Quill* Court made clear that the Due Process and Commerce Clauses demand different constitutional standards because the clauses are fundamentally different.[268] The Court upheld *Bellas Hess*'s physical presence requirement under the Commerce Clause but overturned it under the Fourteenth Amendment's Due Process Clause.[269]

The clauses protect two different constitutional concerns.[270] Due process is all about fairness.[271] Alternatively, the Commerce Clause is concerned with state regulatory authority and protecting the national economy.[272] Because of this key difference, the Court found that *Bellas Hess*'s physical presence requirement was a Commerce Clause requirement, not a Due Process Clause one.[273] The physical presence requirement was a valuable bright-line test which clearly established the outer-bounds of a state's regulatory authority requiring out-of-state corporations to collect and remit sales taxes to the state.[274]

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[263] *Id.*
[264] *Id.*
[265] *Id.* at 303.
[266] *Id.*
[267] *Id.* at 318-19.
[268] *Id.* at 312.
[269] *Id.* at 318-19.
[270] *Id.* at 312.
[271] *Id.*
[272] *Id.*
[273] *Id.* at 308.
[274] *Id.* at 315-16. Although categorized as a bright line test, a mere "slightest presence" does not establish a constitutional nexus either. *See* Nat'l Geographic Soc'y v.

Because physical presence was not a due process requirement for state taxes, "the requirements of due process [could be met] irrespective of a corporation's lack of physical presence in the taxing State."[275] Interestingly, the Court pointed to personal jurisdiction's definition of due process to define what due process means in the state taxation context.[276] The Court referred to *International Shoe*'s sufficient minimum contacts test, recognizing that the Court abandoned *Pennoyer*'s rigid physical presence test in favor of a flexible fairness inquiry.[277] Even though it was a personal jurisdiction test, the Court noted that the test nevertheless applied to state taxation because "all assertions of state-court *jurisdiction* must be evaluated according to the standards set forth in *International Shoe* and its progeny."[278]

Therefore, "jurisdiction" cannot be avoided because an out-of-state corporation has no physical presence in the state, as the Court held in *Burger King Corp. v. Rudzewicz*.[279] Instead, if an out-of-state corporation purposefully avails itself of the benefits of the taxing state's market, the state can require it to collect and remit sales taxes.[280] This due process standard is adapted to "modern commercial life" and prevents a corporation from benefitting from an economic market while nevertheless avoiding a duty to collect and remit sales taxes to the state.[281]

Applying these principles in *Quill*, the Court found that Quill had purposefully directed its activities at North Dakota's market.[282] Although Quill had no physical presence in North Dakota, that did not matter. Instead, its connections with North Dakota were sufficient to prevent the Due Process Clause from barring enforcement of North Dakota's use tax against the corporation.[283]

Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977); *see also* Edson, *supra* note 163, at 913-14.

[275] Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992).

[276] *Id.* at 307.

[277] *Id.*

[278] *Id.* (emphasis added) (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977)).

[279] *Id.* at 307-08 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

[280] *Id.* at 307.

[281] *Id.* at 308. *See also* Edson, *supra* note 163, at 921-22.

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

[283] *Id.*

Although due process did not bar enforcement, because both the Due Process and Commerce Clauses govern state taxation, the Court continued to address whether the Commerce Clause barred enforcement of North Dakota's use tax against Quill.[284] In doing so, the Court addressed the question of whether *Bellas Hess* was still good law after *Complete Auto Transit, Inc.*[285]

The Court found that *Bellas Hess* was consistent with *Complete Auto*'s four-prong test and that it should be used for the Commerce Clause analysis.[286] Therefore, a substantial nexus must exist between the taxing state and the out-of-state corporation before a state can require that state to collect sales taxes. As a recap, a substantial nexus is not the same as due process's minimum contacts requirement.[287] Therefore, an out-of-state corporation may have minimum contacts with the state but nevertheless lack a substantial nexus with it because it has no physical presence in the state.[288] Because Quill had no physical presence in North Dakota, North Dakota could not require it to collect and remit taxes under the Commerce Clause.[289]

The Court's holding in *Quill* is notable for four reasons. First, the Court linked personal jurisdiction's due process standard to a state's regulatory authority to tax.[290] The Court directly linked *International Shoe*, its progeny, and personal jurisdiction to this state power.[291] Furthermore, although perhaps obvious, the Court recognized that *International Shoe* and its progeny are specific to personal jurisdiction.[292] Therefore, the Court expressly "borrowed" from personal jurisdiction's understanding of due process to inform what due process means for state taxation.

Second, it appears that the majority took due care to not refer to a state's regulatory authority to tax as "jurisdiction."[293] Although

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[284] *Id.* at 313.
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.* at 319.
[290] *Id.* at 308.
[291] *Id.* at 307.
[292] *Id.*
[293] *Id.* at 316-19. Alternatively, the concurring opinions used the term "jurisdiction to tax." *Id.* at 319 (Scalia, J., concurring); *id.* at 326, 327 (White, J., concurring).

the majority used the word "jurisdiction" ten times, it was used only to refer to personal jurisdiction and *in rem* jurisdiction.[294] The majority used the term "taxing jurisdictions" only once, embedded in a footnote.[295] The importance of this terminological choice is that *Quill* should be understood for the proposition that North Dakota had *personal jurisdiction* over Quill but it did not have the power to require it to collect and remit use taxes to the state.[296] Again, this further highlights the court's conflation problem. Personal jurisdiction is not a constitutional sales tax requirement—only due process is.[297]

Third, although *Quill* made clear that the Due Process and Commerce Clauses require separate nexuses, the divide did not have a great impact post-*Quill*.[298] Under the Commerce Clause, an out-of-state company was required to have a physical presence within the state to be required to act as a state's agent in collecting and remitting sales taxes. By no means is due process jurisprudence unimportant, but the significance of *Quill*'s decision only mattered when a company did not have a physical presence within the taxing state.[299] To compare to personal jurisdiction, the framework post-*Quill* was similar to that of *Pennoyer v. Neff*.[300] Tax constitutionality was governed strictly by a geographical bright-line rule.[301] Although the Due Process Clause still required a consideration of whether requiring an out-of-state company to act as a state agent was *fair*, the leading concern was whether the corporation was *there* in the taxing state.[302]

Lastly, the Court created an identical definition for due process's "economic nexus" requirement as *International Shoe*'s

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[294] *Id.* at 307-08.

[295] *Id.* at 313 n.6.

[296] Bishop-Henchman, *supra* note 37, at 299 n.116.

[297] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091-92 (2018).

[298] *See* Gast et al., *supra* note 150, at 25.

[299] *See id.*

[300] *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

[301] Gast et al., *supra* note 150, at 25.

[302] Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.7 (1992) ("We have sometimes stated that the '*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . due process requirement[s].' Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true." (internal citation omitted)).

sufficient minimum contacts test.[303] Additionally, the fact that the Court's opinions used the terms "jurisdiction to tax" and "tax jurisdiction," although more widely used by the concurring Justices, highlight's the Court's conflation problem as well.

The Court's construction, however, is justified. It makes sense that the Supreme Court has relied upon *International Shoe* and its progeny to explain the definition of economic nexus, which is the connection to the state a seller must have for that state to require the seller to collect and remit sales tax. Prior to *Wayfair*, similar to personal jurisdiction, taxation focused on the physical boundaries of the state and whether the seller had a physical presence in that state.[304]

b. Wayfair *"Killed* Quill*"*

Justice Kennedy started the so-called "Kill *Quill*" movement in 2015 with his concurrence in *Direct Marketing Association v. Brohl*.[305] *Brohl* did not address sales tax collection, but Justice Kennedy still used his opinion to drive the issue.[306] Justice Kennedy urged the Court to revisit *Quill* and *Bellas Hess* because of an unfortunate effect of *Quill*: states were unable to collect a large amount of taxes that they imposed on sales.[307]

As a recap, the question under *Quill* was not whether a state could impose a sales tax at all, but whether the state could require an out-of-state corporation to act as state agent by collecting and remitting sales taxes to the state.[308] If the corporation did not collect the taxes, customers were required to remit sales taxes to the states.[309] However, consumer compliance rates under *Quill*'s regime were "notoriously low."[310] Justice Kennedy noted that, for example, California was able to collect only about four percent of the taxes it imposed on sales with out-of-state vendors, and

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[303] *Id.* at 307.

[304] *Id.* at 306-07.

[305] 135 S. Ct. 1124, 1134-35 (2015) (Kennedy, J., concurring); *see* Hayes R. Holderness, *Questioning* Quill, 37 VA. TAX REV. 313, 314 (2018).

[306] Holderness, *supra* note 305, at 314.

[307] *Direct Mktg. Assoc.*, 575 U.S. at 1134-35.

[308] *Id.* at 1134.

[309] *Id.*

[310] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2088 (2018).

Colorado lost an estimated $170 million in sales tax revenue.[311] The advent of e-commerce—shopping online via cell phones, tablets, and laptops—made it easier for customers to shop and harder for states to collect sales taxes.[312]

The Court "killed *Quill*" in *Wayfair v. South Dakota*.[313] South Dakota passed S.B. 106, which required out-of-state sellers to collect and remit sales taxes, even if the company had no physical presence in the state, if the seller generated over $100,000 in sales or engaged in 200 transactions with South Dakota-based customers.[314] The South Dakota legislature knew S.B. 106 was unconstitutional under *Quill*.[315] However, South Dakota sought a declaratory judgment against three out-of-state online retailers with no physical presence in South Dakota who refused to comply with the state's newly passed law: Wayfair, Overstock.com, and Newegg.[316]

Justice Kennedy, writing for the majority, concluded that *Quill*'s physical presence rule was an incorrect interpretation of the Commerce Clause for three reasons.[317] First, the physical presence rule was not a necessary interpretation of the Commerce Clause.[318] Second, *Quill* created market distortions because companies with an in-state presence were at a "competitive disadvantage relative to remote sellers."[319] Lastly, *Quill*'s framework was formalistic, arbitrary, and inconsistent with modern Commerce Clause jurisprudence because of e-commerce.[320]

Regarding the Supreme Court's conflation of personal jurisdiction and a state's regulatory authority to tax, the *Wayfair* Court's first justification for overturning *Quill* is the most important. Justice Kennedy addressed the "close relat[ion]"

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311 *Direct Mktg. Assoc.*, 575 U.S. at 1135 (Kennedy, J., concurring).

312 *Id.*

313 *Connecticut's 'Kill* Quill*' Bet Seems to Pay Off*, LAW 360 (July 25, 2018), https://www.law360.com/retail/articles/1066855/connecticut-s-kill-quill-bet-seems-to-pay-off [https://perma.cc/6FU5-27LQ].

314 *Wayfair*, 138 S. Ct. at 2088-89 (discussing S.B. 106 § 1, 91st Sess. (S.D. 2016)).

315 Adam B. Thimmesch, South Dakota v. Wayfair *and Tax Modernization in Nebraska*, 2018 NEB. L. REV. BULL. 1, 5.

316 *Wayfair*, 138 S. Ct. at 2089.

317 *Id.* at 2092. *See also* Bishop-Henchman, *supra* note 37, at 297.

318 *Wayfair*, 138 S. Ct. at 2092.

319 *Id.* at 2092, 2094.

320 *Id.* at 2092, 2094-95.

between the Commerce Clause's "nexus requirement" and tax's due process requirement.[321] "Due process and Commerce Clause standards," Justice Kennedy explained, "may not be identical or coterminous, but there are significant parallels."[322] The *Wayfair* Court maintained that the same reasons for rejecting the physical presence requirement under the Due Process Clause in *Quill* justified doing the same under the Commerce Clause.[323] In addition to "killing *Quill*," the Court reaffirmed that the due process standard for sales tax is governed by personal jurisdiction's definition of due process.[324] The Court did not hold that South Dakota's economic nexus requirements were constitutional, and instead remanded the case to the South Dakota Supreme Court for proceedings consistent with *Wayfair*'s holding.[325] However, the Court nevertheless implied that economic nexus thresholds are constitutionally permissible.

In essence, *Wayfair* did for state sales taxes what *International Shoe* did for personal jurisdiction: it obliterated a geographically driven test in favor of a fairness test that is nevertheless somewhat limited by geography through the Due Process and Commerce Clauses' nexus standards.[326] For the first time in tax jurisprudence, companies are no longer required to have a physical presence in a particular state in order for that state to require it to collect and remit sales taxes.[327] Just as personal jurisdiction adapted to a modern economy, the *Wayfair* Court recognized that the physical presence rule must be obsolete because of "'dramatic technological and social changes' of our 'increasingly interconnected economy.'"[328]

Most notably, due process was brought to the forefront of the sales tax analysis for the first time since *Quill*.[329] Because *Quill* required a physical presence under the Commerce Clause, due

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[321] *Id.* at 2093.

[322] *Id.*

[323] *Id*.

[324] *Id.*

[325] *Id.* at 2100.

[326] *Id.*

[327] *Id.* at 2099-100.

[328] *Id.* at 2095 (quoting Direct Mktg. Assoc. v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)).

[329] *Id.* at 2093.

process's minimum contacts were a secondary consideration for states determining whether they could require out-of-state sellers to collect and remit sales taxes to the state.[330] Post-*Wayfair*, this is no longer the case. Due process's constitutional considerations are now at the forefront, along with the Commerce Clause.

B. Confusion Caused by the Court's Crafting

The Court's conflation problem has only been recognized post-*Wayfair* because, under *Quill*, a state always had *less* authority to require out-of-state sellers to collect and remit taxes than it had personal jurisdiction over those sellers. *Quill* required a company to have a physical presence in the state under the Commerce Clause, and the Due Process Clause demanded that, under *International Shoe* and its progeny, a company had sufficient minimum contacts with the forum state.[331]

Post-*Wayfair*, this layout has flipped. States have arguably *more* authority to require out-of-state sellers to collect and remit taxes than the ability to hale those sellers into court. Because *Wayfair* overruled *Quill*'s physical presence requirement, a state can require out-of-state sellers to collect and remit sales taxes even if it has no personal jurisdiction over the seller.[332] Reiterating the Court's ruling in *Quill*, this, in itself, is not a problem.[333] The Commerce and Due Process Clauses are separate and distinct, although the "nexus requirement is 'closely related,' to the due process requirement that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'"[334]

However, confusion resulting from *Wayfair*'s decision is rooted in personal jurisdiction principles.[335] The Court used *International*

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[330] *Id.*

[331] Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992).

[332] *Wayfair*, 138 S. Ct. at 2093 ("When considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels. The reason given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales tax. Physical present is not necessary to create a substantial nexus.").

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

[334] *Wayfair*, 138 S. Ct. at 2085 (citations omitted).

[335] Tay, *supra* note 37.

Shoe and its progeny to define what due process means in the sales tax context.[336] Furthermore, although the Court has recognized that due process is different from the Commerce Clause, the only guidance left for lower courts and state legislatures implementing *Wayfair*'s new Commerce Clause rule are these personal jurisdiction standards.

Following *Wayfair*, an overwhelming majority of states have passed sales tax laws with threshold economic nexus requirements similar to that of South Dakota. As of March 2020, forty-seven states and Washington D.C. have passed economic nexus requirements.[337] Some states, such as Hawaii, Iowa, and Michigan have imposed the same economic nexus requirements as South Dakota: either $100,000 of sales or 200 transactions.[338] Some states have imposed higher threshold requirements, such as Mississippi's $250,000 economic nexus.[339] Kansas took the extreme opposite—it imposed an economic nexus with no threshold requirement.[340]

Kansas's extreme substantial nexus requirement illustrates the tension between personal jurisdiction and a state's regulatory authority to tax that the Court created when it linked the two doctrines in *Quill*. The *Nicastro* Court considered whether a New Jersey court had personal jurisdiction over a foreign seller.[341] Justice Breyer pointed out in his *Nicastro* concurrence that personal jurisdiction should not and does not exist over a seller

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

[337] *Economic Nexus State Guide*, SALES TAX INSTITUTE (last updated Mar. 26, 2020), https://www.salestaxinstitute.com/resources/economic-nexus-state-guide [https://perma.cc/8L77-FLKJ].

[338] *Id.* But after originally imposing its "$100,000 or 200 or more separate transactions" requirement, Iowa removed its 200 transactions threshold. *See id.*

[339] *Id.* Mississippi also imposes a requirement that the seller "purposefully or systematically exploit[]" Mississippi's market. 35 MISS. CODE R. Pt. IV, § 3.09 (LexisNexis 2020).

[340] *Id.* The Kansas Attorney General released an opinion stating that the Kansas Department of Revenue did not have the authority to implement this new policy without meeting state procedural requirements. *See Kansas Releases Unprecedented Remote Seller Policy*, SALES TAX INSTITUTE (Sept. 30, 2019), https://www.salestaxinstitute.com/resources/kansas-releases-unprecedented-remote-seller-policy [https://perma.cc/96EF-HQ6F]. Because the Department of Revenue did not go through these proper channels, the Kansas Attorney General maintained that the substantial nexus requirement was invalid. *See id.* However, the Department of Revenue subsequently released a statement that it would enforce the requirement unless barred by the courts. *See id.*

[341] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011) (plurality opinion).

when that seller sells a single good to one customer within the forum state.[342] What would happen if the Court considered the same claim today but a Kansas court was trying to exert personal jurisdiction over the same defendant?

The outcome could be quite bizarre. Under Kansas's new threshold requirement, an out-of-state seller is required to collect and remit sales taxes to Kansas if the seller makes a single sale or transaction with a Kansas-located customer, even if the sale is for one dollar.[343] However, following Justice Breyer's concurrence in *Nicastro*, a Kansas court should not have personal jurisdiction over the seller based on that single contact alone.[344] Logically it makes sense that state regulatory authority differs from a state's ability to hale an out-of-state defendant into court. Considering, however, that tax due process is governed by personal jurisdiction, how can Kansas's new requirement and personal jurisdiction co-exist?[345]

The same problem presents itself with Georgia's nexus requirement. A seller is required to collect and remit sales taxes to Georgia if that seller makes a single sale totaling over $100,000.[346] If that one sale is that seller's only connection to Georgia, Georgia probably lacks personal jurisdiction over the seller but can nevertheless still require the seller to collect and remit sales taxes under a due process doctrine defined by *International Shoe* and its progeny. The outcome is illogical.

But this outcome has not gone unnoticed. Commentators are rightfully concerned that threshold levels could be new evidence of sufficient minimum contacts with a forum state and purposeful availment.[347] Similarly, litigants have argued the same.[348] More unclear is whether the Supreme Court will soon weigh in on an

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[342] *Id.* at 888 (Breyer, J., concurring) ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated [in *Nicastro*], is sufficient. Rather, this Court's previous holdings suggest the contrary.").

[343] *Remote Seller Nexus Chart*, SALES TAX INSTITUTE (last updated Mar. 26, 2020), https://www.salestaxinstitute.com/resources/economic-nexus-state-guide [https://perma.cc/Q5KX-XZRV].

[344] *Nicastro*, 564 U.S. at 888 (Breyer, J., concurring).

[345] *See generally* Erbsen, *supra* note 19.

[346] GA. CODE ANN. § 48-8-2(8)(M.1, M.2) (West 2020); GA. CODE ANN. § 48-8-30 (West 2020)

[347] Tay, *supra* note 37.

[348] *See, e.g.*, *Georgalis v. Facebook, Inc.*, No. 1:18 CV 256, 2018 WL 6018017, at * (N.D. Ohio Nov. 16, 2018).

outlier case where a state's threshold requirement may be constitutional under the Commerce Clause but a seller does not have sufficient minimum contacts with the taxing state.[349]

IV. PROPOSAL

The Supreme Court created a terminological conflation when it linked a state's taxing power to personal jurisdiction in *Quill*, which it later affirmed in *Wayfair*.[350] Post-*Wayfair*, it's unclear whether state tax threshold requirements could be indicators of purposeful availment and sufficient minimum contacts with a forum state for purposes of personal jurisdiction. The answer is probably no. This Comment makes two proposals for how the Court can end its conflation problem.

First, to make clear that these are two separate and distinct doctrines, the Supreme Court needs to stop using the terms "tax jurisdiction" and "jurisdiction to tax" to refer to a state's regulatory authority to tax. Although this Court has made clear that the two doctrines are different and should not be confused, some commentators continue to do so.[351] Nevertheless, the lingering question is whether *Wayfair*'s threshold levels could provide a new understanding for what it means to purposefully avail oneself of a forum state.[352]

However, jurisdiction and power are not the same. Although both may be bound by the Fourteenth Amendment's Due Process Clause, that does that mean they are one in the same analytically. Given this distinction, the Court still has opened the door for commentators to consider whether due process is on a collision course. On one hand, a single sale may meet due process requirements for tax. On the other hand, a single sale may not meet due process requirements for personal jurisdiction.[353]

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[349] Tay, *supra* note 37.

[350] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018).

[351] *See, e.g.*, Alyson Outenreath, *Cheers! Ending* Quill . . . *What Can be Learned From the Wine Industry*, 48 N.M. L. REV. 372, 375 (2018) ("As a result, the difference between sales taxes versus use taxes has been described as one of jurisdiction.").

[352] Tay, *supra* note 37.

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

Jurisdiction's conflation problem does not stop with personal jurisdiction either. Almost one year to the day after the Court's decision in *Wayfair*, the Court handed down its decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, in which it considered whether a state tax on a trust was constitutional under the Due Process Clause considering the only connection between the trust and the state was an in-state trust beneficiary who received no income from the trust, had no right to demand trust income, and had no expectation of receiving trust income in the future.[354] Specifically, the Court considered whether the trust's in-state beneficiary constituted a minimum connection.[355] The Court affirmed that this test was governed by *International Shoe* and its progeny.[356]

Based on this standard, the in-state beneficiary was not a sufficient minimum connection.[357] Just like *Wayfair*, commentators are questioning if *Kaestner* provides any insight for purposeful availment.[358] Although a trustee cannot control where its beneficiaries reside, could an out-of-state trustee purposefully avail themselves of a taxing state if a trust beneficiary unilaterally chooses to reside in that state?[359] This problem echoes the sales tax landscape post-*Wayfair* in which online companies may not purposefully avail themselves of a state's market but may still have to collect and remit sales taxes for that state.

Kaestner provides additional insight to the Court's conflation problem for two reasons. First, *Kaestner* has been called the most influential trust decision from the Court since *Hanson v. Denkla*.[360] Second, *Kaestner* is yet another example of the Court accidentally building its tax jurisprudence on an accidental personal jurisdiction foundation. Interestingly, the last time the Court used the term

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354 N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2224, 2224 n. 11 (2019).

355 *Id.* at 2220.

356 *Id.* ("A State has the power to impose a tax only when the taxed entity has certain minimum contacts with the State such that the tax does not offend traditional notions of fair play and substantial justice." (internal quotation marks omitted) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

357 *Id.* at 2221.

358 Tay, *supra* note 37.

359 *Id.*

360 Bridget J. Crawford, *Magical Thinking and Trusts*, 50 SETON HALL L. REV. 289, 393 n.17 (2019).

"tax jurisdiction" was in *Kaestner*.[361] It is no surprise that the case has opened the door for the same purposeful availment-type questions presented to the legal field post-*Wayfair*.

To make clear that personal jurisdiction and a state's regulatory authority to tax are separate principles governed by separate constitutional standards, the Court needs to stop using the terms "tax jurisdiction" and "jurisdiction to tax." By using these terms, the Court is unintentionally providing itself and lower courts with an erroneous framework to expand tax jurisprudence. Of course, the two principles largely mirror each other, especially since after *Wayfair*, both are now governed by fairness tests nevertheless restricted by geography.[362] However, this tempting comparison has proved problematic for understanding personal jurisdiction's purposeful availment test.

In addition to terminating terminology, this Comment proposes that the Court should not have used *International Shoe* and its progeny to define tax due process in the first place. Although sales tax is governed by due process, a different standard for tax due process should be used. The Court must revisit what this standard means, but under no circumstances should it be governed by *International Shoe*.[363]

Unfortunately, because the Court has linked personal jurisdiction and a state's regulatory authority to tax, it must now also address whether *Wayfair* provides a new purposeful availment test with threshold requirements. The Court has *borrowed* from personal jurisdiction to update its sales tax jurisprudence.[364] It would be unwise for the Court to now update personal jurisdiction's meaning of purposeful availment by *borrowing* from tax jurisprudence.

If the Court terminates its use of "tax jurisdiction" and "jurisdiction to tax," it would make clear that a state's regulatory authority to tax is not jurisdiction at all. To borrow from tax jurisprudence to update the meaning of purposeful availment

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[361] Query for "Jurisdiction to Tax," WESTLAW EDGE, http://westlaw.com (search "jurisdiction to tax" and remove all other jurisdictions but Supreme Ct.) (last visited Dec. 20, 2019).

[362] *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[363] *Int'l Shoe Co.*, 326 U.S. at 310.

[364] Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992).

would be counter-productive and continue to conflate the two principles. Therefore, personal jurisdiction should provide no constitutional framework for that separate power. Jurisdiction is a word of too many meanings. To remedy its conflation problem, the Court should carve out a new meaning for due process that is separate and distinct from personal jurisdiction.

CONCLUSION

"Tax jurisdiction" and "jurisdiction to tax" are not jurisdiction at all. It is understandable, however, that courts and commentators have used this terminology considering that a state's regulatory authority to tax is a form of power that is geographically limited. However, in light of *Wayfair*, it is illogical to continue using this terminology.

The Court has conflated personal jurisdiction with a state's regulatory authority to require out-of-state sellers to collect and remit sales taxes to the state. Jurisdiction and power are not the same. By using *International Shoe* and its progeny to define what due process means in the tax context, the Court has created constitutional havoc post-*Wayfair*. The Court has opened the door for courts and commentators rightfully to consider whether sales tax threshold requirements are new indicators of purposeful availment by out-of-state corporations. This concern is not unfounded considering that the Court has linked the two doctrines.

However, because these two doctrines are separate and distinct, the Court needs to stop using the terms "jurisdiction to tax" and "tax jurisdiction." That is the first step the Court should take to make clear that the two doctrines are not the same. In doing so, the Court can make progress in removing *International Shoe* and its progeny from the sales tax due process analysis. Jurisdiction is not the same as power, and therefore personal jurisdiction's principles should not be used as a constitutional marker for sales tax.

O! Be some other name: What's in a name? That which we call a rose by any other name would smell as sweet; So "tax jurisdiction" or "jurisdiction to tax" would, were it not called jurisdiction at all.