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THE PACT ACT AS INDICIUM OF THE DUE PROCESS VALIDITY OF THE MARKETPLACE FAIRNESS ACT

By

Eric S. Smith*

ABSTRACT

If passed into law, the Marketplace Fairness Act would impose a federal duty on out-of-state sellers to collect a state-defined and state-benefitting use tax. This unique exercise of federal power implicates due process. The Prevent All Cigarette Trafficking Act of 2009 (PACT Act) represents the only other instance in which Congress has similarly compelled state law compliance. Two circuit courts of appeals have found the PACT Act vulnerable on concerns of due process. This Article relies on the PACT Act analogue to simulate how the Marketplace Fairness Act would fare under similar scrutiny. To this end and in this uncommon context, two novel constitutional questions are considered: (1) with which sovereign, the federal government or the state, are minimum contacts measured; and (2) if measured with the state, is a single sale sufficient to meet due process thresholds?

On balance, the courts and the literature suggest that minimum contacts should be measured between the out-of-state seller and the state exacting sales tax collection responsibilities. If this is true, the Marketplace Fairness Act may violate the Due Process Clause for lack of minimum contacts as it imposes a sales tax collection responsibility on out-of-state sellers with as little as a single in-state sale. A recommendation is offered by which Congress may

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preemptively alleviate concerns related to the magnitude of minimum contacts.

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I. INTRODUCTION

Hellerstein's conclusion in 1997 on the taxation of electronic commerce succinctly described the state tax community's apprehension.[1] He suggested that "existing state tax structures, as confined by federal constitutional restraints" were unlikely to successfully address state tax problems raised by the then burgeoning online marketplace.[2] Hellerstein's proposed resolution was a "uniform legislative approach."[3] It was his hope that states and industry would find enough common ground and mutual benefit to "forge a workable solution to many of the problems of taxing electronic commerce."[4]

State government associations[5] agreed. In the fall of 1999, the Streamlined Sales and Use Tax Project was created.[6] This project gave way to the Streamlined Sales and Use Tax Agreement (SSUTA) in 2005, a model uniform legislation purposed to simplify state sales tax collection. [7] Despite its initial prospects for unification, the SSUTA has failed to garner comprehensive support. To date, only twenty-four of the forty-four sales-tax-imposing states have passed conforming legislation.[8] In response to this stand-

1 Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 TAX L. REV. 425 (1997) [hereinafter Hellerstein, *State Taxation*].

2. *Id.* at 505.

3. *Id.*

4. *Id.*

5. The Streamlined Sales and Use Tax Agreement was created by the National Governor's Association (NGA) and the National Conference of State Legislatures (NCSL). *FAQs*, STREAMLINED SALES TAX GOVERNING BOARD, INC. http://www.streamlinedsalestax.org/index.php?page=gen_2 (last visited Jul. 15, 2015).

6. *Id.*

7. STREAMLINED SALES AND USE TAX AGREEMENT (2015).

8. *FAQs*, STREAMLINED SALES TAX GOVERNING BOARD, INC. http://www.streamlinedsalestax.org/index.php?page=gen_3 (last visited Jul. 15, 2015).

still and reluctance, states have looked to Congress for a federal solution[9] which compels uniformity.[10]

Congress partially acquiesced on April 17, 2013, when the Marketplace Fairness Act of 2013[11] passed the U.S. Senate, but failed in the U.S. House.[12] Deliberation occurred amidst national debate about the prospect

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9. Hellerstein suggested that complete state-level conformity was key to grappling with state tax issues related to e-commerce and foresaw Congressional involvement on at least some level. Hellerstein, *State Taxation*, *supra* note 1, at 497. Whether a uniform solution sprang from the states, or was promulgated by Congress, for Hellerstein, a congressional mandate would likely be required "in order to assure that the solution would indeed be uniform." *Id.* at 496.

10. *See* FAQs, STREAMLINED SALES TAX GOVERNING BOARD, INC. http://www.streamlinedsalestax.org/index.php?page=alias-19 (last visited Jul. 15, 2015).

11. Previous iterations of similar, but unpassed bills include: Streamlined Sales and Use Tax Act, H.R. 3184, 108th Cong. (2003); Streamlined Sales and Use Tax Act, S. 1736, 108th Cong. (2003); Sales Tax Fairness and Simplification Act, S. 2152, 109th Cong. (2005); Streamlined Sales Tax Simplification Act, S. 2153, 109th Cong. (2005); Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. (2007); Sales Tax Fairness and Simplification Act, S. 34, 110th Cong. (2007); Main Street Fairness Act, H.R. 5660, 111th Cong. (2010); Marketplace Equity Act of 2011, H.R. 3179 112th Cong. (2011); Main Street Fairness Act, H.R. 2701, 112th Cong. (2011); Main Street Fairness Act, S. 1452, 112th Cong. (2011).

12. Market Place Fairness Act of 2015, S. 698, 114th Cong. On June 15, 2015, the Remote Transactions Parity Act of 2015 was introduced in the House. H.R. 2775, 114th Cong. (2015). This bill largely builds upon the dichotomous framework of the Marketplace Fairness Act, which separates members and nonmembers of the Streamlined Sales and Use Tax Agreement, subject to notable differences. *Compare* S. 698, 114th Cong., § 2 (2015) with H.R. 2775, 114th Cong. § 2 (2015). For example, the house bill implements additional safeguards for remote sellers and certified software providers. *See* H.R. 2775, 114th Cong. §§ 2(b)(H) and 3(g). It also prohibits audits for remote sellers with gross annual sales of less than $5 million. H.R. 2775, 114th Cong. § (3)(i). This protection gives way, however, in the face of reasonable suspicion of fraud or intentional misrepresentation. *Id.* For purposes of this study, the key distinction between the Remote Transactions Parity Act and the Marketplace Fairness Act exists under the small seller exception. While the small seller exception is triggered indefinitely for remote sellers with less than $1 million annual sales under the Marketplace Fairness Act, the Remote Transactions Parity Act phases in (or phases out depending on your perspective) the exemption from $10 million in the first year, to $5 million in the second year, and $1 million in the third year. *See* S. 698, 114th Cong. § 2(c) and H.R. 2775, 114th Cong. § 2(c)(1). In the fourth year and after, the small seller exception completely dissolves. Moreover, sellers that utilize an electronic marketplace for purposes of "making products or services available for sale to the public" are flatly ineligible for the small seller exception. H.R. 2775, 114th Cong. § 2(c)(1)(A)(ii). This paper suggests that the Marketplace Fairness Act's small seller

of a "national online sales tax bill" and the effect it would have on retailers.[13] Skeptics argued that the bill was an unabashed attempt by government "to collect the maximum amount of tax revenues from [its] citizens."[14] Proponents countered that the Act would simply "enforce a tax that's already on the books but seldom paid"[15] and would put brick and mortar stores "on the same footing as the online retailer."[16]

The Marketplace Fairness Act of 2015[17] (a substantially equivalent bill to the 2013 iteration) was introduced in the 114th Congress on March 10, 2015, to a similarly divided legislature. The political undertones surrounding the bill notwithstanding, a more subtle and complex legal question exists regarding the Marketplace Fairness Act's constitutionality. The case law history regarding the extent to which states can "deputize an out-of-state retailer as its collection agent"[18] is in many respects unsettled. The advents of the Internet and online marketplaces that connect remote buyers and sellers, as Hellerstein predicted,[19] have only added to the confusion.

The constitutional reach of states' taxing authority over interstate transactions is restricted by the Due Process Clause of the Fourteenth Amendment[20] and the Commerce Clause.[21] The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[22] While the Commerce Clause affirmatively grants Congress authority to '"regulate Commerce with foreign Nations, and among the several States,"' the Court has interpreted the provision to have "a negative sweep as well."[23] This negative implication, the

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exception may fall short of satisfying due process with respect to remote sellers. If such is the case, the Remote Transactions Parity Act's heavy-handed approach to the small seller exception certainly would fall short of satisfying the demands of due process as well and warrants even greater caution.

13. Editorial, *Internet Tax a Boom or a Bust?*, USA TODAY, Apr. 30, 2013, at 9A.
14. *Id.*
15. *Id.*
16. *Id.*
17. Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015).
18. Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 757 (1967).
19. *See* Hellerstein, *State Taxation*, *supra* note 1, at 426–27.
20. U.S. CONST. amend. XIV, § 1.
21. U.S. CONST. art. I, § 8, cl. 3.
22. Miller Bros. Co. v. Maryland., 347 U.S. 340, 344–45 (1954).
23. Quill v. North Dakota, 504 U.S. 298, 309 (1992).

Dormant Commerce Clause, "prohibits certain state actions that interfere with interstate commerce."[24]

State tax case history features several cases interpreting the constitutional restrictions imposed by the Due Process Clause and the Commerce Clause on states' abilities to impose sales[25] tax collection duties on out-of-state sellers.[26] Many of these cases gauge the constitutional validity of state statutes that define those who have state sales tax collection duties broadly enough to include out-of-state sellers.[27] The Marketplace Fairness Act, however, is not a direct analogue to these statutes or controversies. If passed into law, it would be a federal statute, which creates a federal duty to collect a state defined sales tax. On this account, the Marketplace Fairness Act presents a novel issue: whether the federal government (read: Congress) must abide by the same Due Process and Commerce Clause standards applicable to states.

To date, Congress has enacted only one other law that requires out-of-state retailers to collect and remit state sales tax on Internet purchases: the

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24. *Id.*(citing South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938).

25 For technical accuracy, the use tax is a complement to the sales tax. While the sales tax is imposed on intrastate transactions, a use tax is imposed on interstate (or international) transactions involving tangible personal property that was purchased out-of-state, but brought (or sent) in state for use. That is, it is a tax "on the use of property which would have been subject to a sales tax had it been purchased locally." Notes and Comments, *The Use Tax*, 16 IND. L. J. 260, 260 (1940). For discussion purposes related to the PACT Act and the Marketplace Fairness Act, this Article, hereafter, refers to the topics collectively as the collection of a state's sales tax.

26. For modern state tax purposes, the headwaters of these cases is *Quill v. North Dakota*. In *Quill,* the Court's progeny of state court decisions largely grapples with the question of what amounts to "substantial nexus" under the Commerce Clause, including whether the bright-line physical presence test for Commerce Clause nexus devised in *Quill* has application to non-sales and use taxes, such as income taxes. A sampling of these cases includes In re Appeal of Intercard, Inc. 14 P.3d 1111 (Kan. 2000); Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954 (N.Y. 1995), *cert. denied*, 516 U.S. 989 (1995); Geoffrey, Inc. v. South Carolina, 437 S.E.2d 13 (S.C. 1993), cert. denied, 510 U.S. 992 (1993); West Virginia v. MBNA America Bank, 220 W.Va. 163 (2006), *cert denied*, 551 U.S. 1141 (2007).

27. *See, e.g.*, Yelverton's, Inc. v. Jefferson County, Alabama, 742 So. 2d 1216 (Ala. 1997); In re The Appeal of Scholastic Book Clubs, Inc. 920 P.2d 947 (Kan. 1996); House of Lloyd v. Pennsylvania, 694 A.2d 375 (Pa. 1997); West Virginia v. MBNA America Bank, 220 W.Va. 163 (2006), *cert denied*, 551 U.S. 1141 (2007); Borders Online, LLC, v. State Board of Equalization, 129 Cal. App. 4th 1179 (2005).

Prevent All Cigarette Trafficking Act (the PACT Act).[28] The PACT Act[29] was passed and went into effect in 2010 and imposed sales tax collection duties on out-of-state online sellers of tobacco and smokeless tobacco.[30] Affected retailers have reached the federal circuit courts of appeals in their constitutional challenges to the PACT Act. Without Court directive, however, the courts have generally struggled to decisively assess the federal statute's constitutionality.

On one front, though, there is general consensus: the PACT Act does not violate the Commerce Clause—despite its clear burdening effect on interstate commerce. In *Quill v. North Dakota*,[31] a cornerstone of modern state and local tax jurisprudence, the Court held that "Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce."[32] In countervailing fashion then, the Commerce Clause question, which is often the center of state tax controversies and scholarly discourse,[33] is quickly settled.

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28. Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010) (codified as amended at 15 U.S.C. §§ 375–378; 18 U.S.C. § 1716E (2012)).

29. Even though the PACT Act may more commonly affect members of Indian tribes, its application is not limited thereto. The language of the PACT Act is directed much more broadly. For example, the PACT Act defines a person whose compliance is required as "an individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company." 15 U.S.C. § 375(10) (2012).

30. 15 U.S.C. § 376a(d) (2012).

31. *Quill*, 504 U.S. at 298.

32. *Id.* at 305.

33. Special scholarly attention has been given to the notion of "substantial nexus"—the standard by which Dormant Commerce Clause nexus is measured. A sampling of scholarly discourse follows: Christina R. Edson, *Quill's Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 TAX LAW. 893 (1995); Michael T. Fatale, *Geoffrey Sidesteps Quill: Constitutional Nexus, Intangible Property and the State Taxation of Income*, 23 HOFSTRA L. REV. 407 (1995); Michael T. Fatale, *State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard*, 54 TAX LAW. 105 (2000); David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U.L. Rev. 483 (2012); Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803 (2012); Andrew J. Haile, *Sales Tax Exceptionalism*, 4 COLUM. J. TAX L. 136 (2012); Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109 (2004); Craig J. Langstraat & Emily S. Lemmon, *Economic Nexus: Legislative Presumption or Legitimate Proposition?*, 14 AKRON TAX J. 1 (1999); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV.

The potential constitutional defect under the PACT Act derives from the Due Process Clause. In the same breath from which the Court in *Quill* affirmed Congress's power to burden interstate commerce, the Court noted that Congress "does not similarly have the power to authorize violations of the Due Process Clause."[34] Thus the PACT Act raises "two substantial and novel constitutional questions."[35] First, with which sovereign—the individual state or the United States as a whole—does the Due Process Clause require minimum contacts if "the federal government is the source of the seller's duty to collect taxes?"[36] And second, if the Due Process Clause "requires minimum contacts with the state or local taxing jurisdiction, does a single delivery sale to a buyer in that jurisdiction create minimum contacts?"[37] These sequential questions would apply with equal weight to the Marketplace Fairness Act if Congress passes it into law.

This Article relies on the PACT Act analogue to simulate how the Marketplace Fairness Act would fare under due process scrutiny. Two circuit courts of appeals, the D.C. Circuit and the Second Circuit, have found the PACT Act constitutionally vulnerable under the Court's due process jurisprudence. In *Gordon v. Holder*,[38] the D.C. Circuit affirmed the trial court's holding that the taxpayer was "likely to succeed on the merits of his due process challenge" to the PACT Act.[39] In *Red Earth LLC v. United States*,[40] the Federal District Court for the Western District of New York applied an equivalent "likelihood of success on the merits" standard to conclude that taxpayer success was likely on the claim that the PACT Act violated the Due Process Clause.[41] The Second Circuit upheld the district court's ruling.[42]

319, 373–93 (2003); Andrew A. Swain & John D. Snethen, *Paying Their Fair Share*, 46 ST. TAX NOTES 749 (Dec. 10, 2007); Adam B. Thimmesch, *The Illusory Promise of Economic Nexus.* 13 FLA. TAX REV. 157 (2012); Adam B. Thimmesch, *The Tax Hangover: Trailing Nexus.* 33 VA. TAX REV. 497 (2014); Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1 (2008).

34. *Quill*, 504 U.S. at 305.

35. Gordon v. Holder, 721 F.3d 638, 645 (D.C. Cir. 2013), *vacated as moot,* 826 F. Supp. 2d 279 (D.D.C 2015).

36. *Id.*

37. *Id.*

38. *Id.* at 638.

39. *Id.* at 645.

40. Red Earth v. United States, 657 F.3d 138 (2d Cir. 2011).

41. Red Earth v. United States, 728 F. Supp. 2d 238, 252 (W.D.N.Y. 2010).

42. *Red Earth*, 657 F.3d at 148.

These decisions, while instructive, are also tempered by the standards of review employed by the courts to evaluate the district court decisions. In both cases, the district courts granted preliminary injunctions against enforcement of the PACT Act. The circuit courts reviewed the district courts' grants through the deferential "abuse of discretion" lens.[43] In so doing, the courts considered the reasonableness of the district courts' conclusions without making final determinations on the merits of the taxpayers' due process claims.

Even while tempered, neither court was cursory in its analysis. In fact, both courts thoroughly framed the issues and engaged them to provide insightful Due Process Clause analysis. While they stopped short of reaching definitive conclusions, for purposes of this Article, they cast enough light on the issues to at least forecast how the Marketplace Fairness Act would fair under similar scrutiny. In any regard, these two cases represent the whole of federal appellate court analysis concerning the constitutional viability of a federal law that compels out-of-state retailers to collect state sales tax on Internet sales. As such, they represent the best available measure for the Marketplace Fairness Act's constitutionality.

In an attempt to backfill where the Second and D.C. Circuits curtailed their analyses, this Article surveys comparable lines of inquiry related to the Fifth Amendment's Due Process Clause and Fourteenth Amendment due process limits on the reach of state judicial power over out-of-state defendants. Borrowing from the Court's personal jurisdiction line of cases to resolve state tax disputes implicating due process is not without precedent. The Court in *Quill* relied on due process principles announced in *International Shoe Co. v. State of Washington*,[44] and applied its minimum contacts framework to a state tax setting. Moreover, bedrock personal jurisdiction cases such as *Burger King Corp. v. Rudzewicz*,[45] and *Shaffer v. Heitner*,[46] also played critical roles in defining the effect of due process on sales tax collection statutes.[47] Following this pattern, two of the Court's personal jurisdiction cases, *J.McIntyre Machinery Ltd. v. Nicastro*[48] and *McGee v. International Life Insurance Co.*,[49] are considered for clues which may aid in understanding the Due Process Clause and its impact on state tax collection laws.

Nicastro, a products-liability case and relatively recent addition to the personal jurisdiction family of cases, found that the Due Process Clause

43. *Gordon*, 721 F.3d at 644; *Red Earth*, 657 F.3d at 143.
44. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
45. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
46. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).
47. *See Quill*, 504 U.S. at 307–08.
48. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
49. McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

prevented New Jersey state courts from exercising jurisdiction over a UK manufacturer.[50] Though the manufacturer purposefully availed itself of the U.S. market, its contacts with the State of New Jersey—which were effected through an unrelated U.S. distributor and deemed to be those that were relevant for due process considerations—fell short of allowing personal jurisdiction over the defendant.

McGee came in the wake of *International Shoe* and represents due process minimum contacts laid bare. Associated contacts with a single contract with a single customer in the State of California served as basis for the exercise of jurisdiction over a Texas insurance company.[51]

In tandem, the *Nicastro* and *McGee* decisions supplement the *Gordon* and *Red Earth* decisions. Though in the context of personal jurisdiction, the *Nicastro* decision aids in determining the appropriate subject for minimum contacts analysis.[52] Justice Kennedy's plurality opinion suggests that minimum contacts should be measured between the forum state and the out-of-state seller, while Justice Ginsburg, under a stream of commerce rationale, proposes that a minimum connection with a state may be created when an out-of-state seller attempts to access the entire U.S. market, including that particular state's market. The *McGee* decision, in turn, suggests that incidental contacts related to a single contract may satisfy due process, so long as those contacts constitute a "substantial connection."[53] Each of these determinations is a critical step towards brightening the due process lens through which the PACT Act and, in sequence, the Marketplace Fairness Act, will be scrutinized if enacted.

To expand these ideas, this Article proceeds as follows. Part II considers the literature on sales tax collection and e-commerce, narrowing from the question generally, to scholarship that informs the issues directly implicated by the Marketplace Fairness Act. This Article updates this line of the literature as the first to gauge the effects of due process on the Marketplace Fairness Act. This Part also considers the personal jurisdiction literature, specifically as it pertains to the Internet and minimum contacts. Part III considers the case law history addressing the relationship that must exist between a state and out-of-state vendor in order to satisfy due process. Part IV analyzes provisions of the Marketplace Fairness Act and explores their relationship to the Streamlined Sales and Use Tax Agreement (SSUTA). In many ways, the SSUTA is antecedent to the Marketplace Fairness Act with

50. *Nicastro*, 131 S. Ct. at 2785 (Kennedy, J., plurality), 2791 (Breyer, J., concurring).

51. *McGee*, 355 U.S. at 223.

52. *Nicastro*, 131 S. Ct. at 2789 ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.").

53. *McGee*, 355 U.S. at 223.

one critical distinction: its basis for correcting perceived constitutional defects in state sales tax collection statutes is voluntary; in contrast, compliance with Marketplace Fairness Act would be required under federal mandate. On this account, the Marketplace Fairness Act exists as proposed legislation only because a critical mass of states was unwilling to freely adhere to the SSUTA.

Part V details controversial provisions of the PACT Act. Part VI considers the *Gordon* and *Red Earth* decisions' application of due process principles to the PACT Act. To round out the discussion, this Part includes an analysis of borrowed due process principles from *Nicastro* and *McGee* decisions and explores their potential application in a state tax setting. Part VII, using the PACT Act and its case law history as a template, evaluates potential due process infractions of the Marketplace Fairness Act, and provides recommendations to address potential constitutional ailments in the Marketplace Fairness Act.

II. LITERATURE REVIEW

A. The Due Process Clause: State Tax and Electronic Commerce

Hellerstein's article was part of the *Tax Law Review*'s 1997 Spring Symposium on Taxation and Electronic Commerce and the Summer Symposium on Internet Taxation. Along with several other issues related to the taxation of electronic commerce, Hellerstein focused on due process implications, specifically those stemming from his proposed uniform rules for state taxation. Most helpfully, he spoke directly to the possibility of federal intervention—"either through consent to legislation that the states develop on their own initiative or by affirmative federal legislation that is thrust upon unwilling states"—[54] in the implementation of uniform state tax rules. On this topic, he posed two questions: 1) whether uniform rules would authorize violations of the Due Process Clause and 2) whether Congress has the power to eliminate the due process bar.[55]

To answer the first question, Hellerstein directed the analysis to minimum contacts. Critically, though, he framed this question as an analysis of the out-of-state seller and its "purposefully directed" activities "towards residents of the taxing state."[56] He did not so much as entertain the idea that

54. Hellerstein, *State Taxation supra* note 1, at 503. Hellerstein took no position on whether the "bottom-up" (developed initially by the states) or "top-down" (developed initially by Congress) approach was preferable. *Id.* at 485–86. He was adamant, however, that under either circumstance, the uniform legislation would need to be mandatory. *Id.* at 496.

55. *Id.* at 504.

56. *Id.*

the appropriate sovereign with which to measure minimum contacts would be the United States as a whole, even in the case of federal legislation.

On the second question, Hellerstein was less definitive, but suggested that "a strong case [could] be made that Congress has power to consent to violations of the Due Process Clause so long as they are not restraints by which Congress itself is bound."[57] In all, he felt due process hurdles could be reconciled. "[I]t seems unlikely that the Court would hold that the Constitution's framers left the country powerless, short of a constitutional amendment, to legislate an administratively feasible solution to the problem of state taxation of electronic commerce, despite the exercise by Congress and the states of their respective constitutional powers."[58]

As part of the 1997 summer symposium, Mines responded to Hellerstein's article. [59] He framed the due process issue as "[w]hether a remote vendor selling via a stationary Website reasonably can be viewed as having purposefully availed itself of the taxing state's market or purposefully directed its commercial activities to the purchaser's state."[60] Mines considered the *Quill* Court's use of the terms purposeful availment and purposeful direction as interchangeable.[61] He defined both terms to require merely that the out-of-state seller "view the taxing state's market as the seller's own and nothing more."[62] He considered an out-of-state seller's website alone to satisfy this tailored standard of purposeful availment.[63]

In all, for Mines, "[d]ue process nexus is not a problem" in the case of Internet-based, out-of-state sellers.[64] Moreover, the assertion of tax jurisdiction over those sales, "if occurring in meaningful magnitude"[65] or "in meaningful quantities"[66] should encounter no due process barrier. In other

57. *Id.* Under this theory, "Congress can authorize what would otherwise be federalism-based violations of the Due Process Clause but not Due Process Clause violations of individual rights." *Id.*

58. *Id.* at 504–05.

59. Paull Mines, Commentary, *Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 TAX L. REV. 581 (1997) [hereinafter Mines, *Conversing with Hellerstein*].

60. *Id.* at 613.

61. *Id.* at 614.

62. *Id.*

63. *Id.*

64. *Id.* at 616.

65. *Id.*

66. *Id.* at 615.

words, with sufficient sales volume, Mines posited that questions related to due process are straight-forwardly answered.[67]

In 2000, three years following the *Tax Law Review*'s double symposium, the *BYU Law Review* issued its Electronic Commerce Taxation Symposium. There, with Houghton, Hellerstein weighed in again on the topic.[68] Their refrain was that the state tax laws were too complex and inconsistent among the states. Given that more out-of-state sellers would be selling "into more states with less contact and less familiarity with the states and their tax systems than ever before,"[69] they reissued the call for simplification through uniform legislation.

Their due process analysis of this proposed uniform legislation followed Hellerstein's *Tax Law Review* article almost verbatim.[70] Hellerstein offered the same analysis a third time in a separate article in the same year at the symposium on e-commerce taxation held by *Harvard Journal of Law and Technology*.[71] Implied in this unaltered litany is that while Hellerstein perceived amplified need for uniform state tax rules, there had not been enough progress to alter due process implications.[72]

More recent scholarly discourse offers another view. In a Gamage and Heckman article[73] proposing near abrogation of the Due Process Clause from

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67. Mines went on to suggest that the Court in *Quill*, "signaled that a taxpayer who satisfies the Commerce Clause necessarily has satisfied the Due Process Clause." *Id.*

68. Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 BYU L. REV. 9 (2000).

69. *Id.* at 13.

70. *See id*. at 73–75 (analyzing the issue following Hellerstein's two question analysis).

71. Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 563–65 (2000).

72. In the same *Harvard Journal of Law and Technology* symposium, distinguished economist Dr. Charles E. McLure Jr. proposed a twenty-first Century overhaul of the America's sales tax regime. McLure cited several key characteristics that would animate such reform including 1) taxation of only consumption, 2) destination-based taxation, 3) uniform taxation, 4) simplicity, and 5) transparency. Charles E. McLure, Jr., *Radical Reform of the State Sales and Use Tax: Achieving Simplicity, Economic Neutrality, and Fairness*, 13 HARV. J. L. & TECH. 567, 569–71 (2000).

73. David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 486 (2012) [hereinafter Gamage & Heckman, *A Better Way Forward*]. The thesis of Gamage and Heckman's paper was that "the *Quill* decision provides a near ideal framework for determining when states

analysis over whether an out-of-state seller may be compelled to collect sales tax, they proposed that "the *Quill* decision should only prevent states from taxing remote e-commerce vendors to the extent that doing so would burden interstate commerce."[74] They defined a burden on interstate commerce to rise above the mere "economic incidence of a state tax."[75] Rather they suggested that "interstate commerce is only burdened when an out-of-state vendor bears reporting or compliance costs as a result of a state's imposing tax collection duties on the out-of-state vendor."[76]

Gamage and Heckman acknowledged due process as a constitutional restraint which "cannot be modified by a state or by Congress,"[77] but suggested that modern due process jurisprudence has rendered the Due Process Clause to impose only a "very light burden on a state's ability to exercise jurisdiction over out-of-staters that do business within a state."[78] This was their inference from the Court's clarification in *Quill* that due process does not require physical presence. Gamage and Heckman acknowledged, consistent with the *Quill* decision, that the Due Process Clause requires out-of-state sellers to "sell to a significant number of in-state residents,"[79] but suggested that due process provides little protection otherwise.[80]

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should be allowed to subject remote e-commerce vendors to sales and use taxation." *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 486–87.

77. *Id.* at 491.

78. *Id.*

79. *Id.* at 492.

80. A sampling of articles deal with state taxation of e-commerce, but do not necessarily focus significantly on the Due Process Clause: Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333 (2002); Arthur J. Cockfield, *Jurisdiction to Tax: A Law and Technology Perspective*, 38 GA. L. REV. 85 (2003); Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171 (2001); Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1 (2003); Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109 (2004); Michael J. McIntyre, Commentary, *Taxing Electronic Commerce Fairly and Efficiently*, 52 TAX L. REV. 625 (1997); Charles E. McLure, Jr., *Rethinking State and Local Reliance on the Retail Sales Tax: Should We Fix the Sales Tax or Discard It?*, 2000 BYU L. REV. 77 (2000); Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269 (1997); John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419 (2002); John A. Swain, *State*

Scholarly tone then, ranges from uncertainty to disregard for the Due Process Clause. This Article is not necessarily a rejoinder to these positions. It is acknowledged that in many cases, an out-of-state seller's contacts with a state will be significant enough to comfortably satisfy due process minimum contacts. This Article's contribution to the literature, in part, comes in consideration of the Marketplace Fairness Act on the fringe. Mines's conclusion, as well as Gamage and Heckman's, is subject to an important qualifier. Mines found that "[d]ue process nexus is not a problem"[81] in the "context of sales and use taxes applied to electronic sales"[82] "if occurring in meaningful magnitude"[83] and "as long as the contacts with the remote market occur in meaningful quantities."[84] Gamage and Heckman's conclusion that "[m]odern due process jurisprudence . . . imposes a very light burden on a state's ability to exercise jurisdiction over out-of-staters that do business within a state"[85] was limited to "out-of-state retailers who sell to a significant number of in-state residents."[86] The negative implication then, is that in circumstances of low magnitude, insignificant sales to in-state residents, the Due Process Clause still holds sway.

The questions, then, center on magnitude: what is the minimum threshold for minimum contacts with which to satisfy due process and does the Marketplace Fairness Act comply with whatever that minimum threshold is? These questions were left unanswered in *Quill* and have largely been ignored or written off in scholarly discourse.

B. The Due Process Clause: Personal Jurisdiction, Minimum Contacts, and the Internet

The consensus in the literature on the development of minimum contacts through Internet activity is that there is no consensus. Lower courts have developed theories, but none of those theories has developed wide-spread approval.

The literature has identified two distinct lines of analysis to assess minimum contacts achieved through Internet activity.[87] The first stems from

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Income Tax Jurisdiction: A Jurisprudential and Policy Persepctive, 45 WM. & MARY L. REV. 319 (2003).

81. Mines, *Conversing with Hellerstein*, *supra* note 59, at 616.

82. *Id.*

83. *Id.*

84. *Id.*

85. Gamage & Heckman, *A Better Way Forward*, *supra* note 73, at 491.

86. *Id.* at 492.

87. *See, e.g.*, Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 359 (2013)

Zippo Manufacturing Co. v. Zippo Dot Com, Inc.[88] There, the Federal District Court for the Western District of Pennsylvania conjured what became known as the *Zippo* sliding-scale test, which concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[89] Personal jurisdiction, on the sliding-scale, became less proper as the defendant's interactions with the state diminished. For example, a defendant who does business over the Internet and has repeated contacts with the forum state—an interactive defendant—would likely be subject to that state's personal jurisdiction.[90] At the other end of the scale, a defendant whose website is informational, even though accessible in the forum state, would not likely be subject to the forum state's jurisdiction.[91]

Despite its provisional acceptance as a workable template to evaluate Internet contacts, the *Zippo* sliding-scale test has generally been abandoned. For example, the Ninth Circuit, in *Boschetto v. Hansing*,[92] flatly disregarded *Zippo*. There, a California resident purchased a car from a Wisconsin seller on eBay.[93] The Ninth Circuit found that "the sale of one automobile via the eBay website, without more, does not provide sufficient 'minimum contacts' to establish jurisdiction over a nonresident defendant in the forum state."[94] The Ninth Circuit concluded that "traditional jurisdictional analyses are not upended simply because a case involves technological developments that make it easier for parties to reach across state lines."[95]

[hereinafter Andrews & Newman, *Choice of Law in the Cloud*]; C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 603 (2006); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 156 (2009); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 74 (2006); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617,657 (2006); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1176 (2005).

88. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

89. *Id.* at 1124.

90. *See id.*

91. *Id.* at 1124–25.

92. Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008), *cert. denied*, 555 U.S. 1171 (2009).

93. *Id.* at 1014.

94. *Id.* at 1020.

95. *Id.* at 1019.

The second theory of Internet personal jurisdiction is the *Calder* effects test, which applies jurisdictional principles from the 1984 Supreme Court case, *Calder v. Jones*,[96] to Internet activities. Under a defamation cause of action, the Court allowed California to exercise jurisdiction over a Florida-based periodical and its affiliated reporter and editor in their individual capacities.[97] The Court's reasoning centered on the effects of the Florida defendants' conduct in California.[98] For example, the defendants' actions were "expressly aimed" towards California as they published an article "they knew would have a potentially devastating impact" on a California resident.[99] Courts have subsequently applied *Calder* to Internet jurisdiction questions.[100]

Following *Zippo*, scholarly reaction was resoundingly negative, which perhaps contributed to its demise.[101] Moreover, Andrews and Newman note that the *Calder* effects test has been criticized by courts for being too "plaintiff-friendly."[102] On this cue, they suggest that "[t]he effects test . . . misses the mark in Internet disputes in that it fails to consider whether a defendant purposefully availed herself to a particular forum."[103]

In all, the world of Internet personal jurisdiction is far from settled. Yet for at least two reasons, the most helpful guidance seems to come from *Boschetto*. First, the Ninth Circuit in *Boschetto* relied on bedrock principles of due process: minimum contacts as demonstrated through the out-of-state party's purposeful availment, taking into account traditional notions of fair play and substantial justice.[104] With this footing, personal jurisdiction due process principles are more easily analogized to state sales tax nexus. Second, the due process issue in *Boschetto* most closely resembled due process issues raised by the Marketplace Fairness Act: whether the out-of-state seller's single

96. Calder v. Jones, 465 U.S. 783 (1984).

97. *Id.* at 791.

98. *Id.* at 789.

99. *Id.*

100. *See, e.g.*, Nissan Motor Co. v. Nissan Computer Corp., 89 F. Supp. 2d 1154 (C.D. Cal. 2000); Blakey v. Continental Airlines, Inc., 751 A.2d 538, 555–56 (N.J. 2000).

101. *See, e.g.*, Andrews and Newman, *Choice of Law in the Cloud*, *supra* note 87, at 361. ("Zippo provides us with minimal, if any, guidance."); M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 135, 146 ("*Zippo*'s bright line test is anything but; it has caused chaos and confusion.").

102. Andrews & Newman, *Choice of Law in the Cloud*, *supra* note 87, at 358.

103. *Id.* at 359.

104. *Boschetto*, 539 F.3d at 1011.

transaction with an in-state customer satisfies minimum contacts. The Due Process Clause should apply in equal measure to sales tax nexus questions.

III. THE DUE PROCESS CLAUSE AS A LIMITATION ON STATES' RIGHTS TO TAX

A. National Bellas Hess, Inc. v. Department of Revenue

National Bellas Hess, Inc. v. Department of Revenue[105] was decided against a backdrop of uncertainty regarding the constitutional authority of states to compel out-of-state retailers to collect state sales taxes. Seven years earlier, in *Scripto, Inc. v. Carson*,[106] the Court upheld a Florida law that imposed upon a Georgia seller the duty to collect state sales tax on the sale of goods shipped to customers in Florida. Dispositive to the case, the Georgia seller's sales representatives were found to have conducted "continuous local solicitation in Florida."[107] That is, they were physically present in Florida, soliciting sales and remitting orders back to Georgia for shipment.[108] To that point, the *Scripto* decision represented the precipice from which state sales and use tax collection laws could reach out-of-state vendors and still maintain constitutional viability.

The facts in *National Bellas Hess*, however, asked the Court to expand constitutional limits one step further. National Bellas Hess, Inc., a Delaware corporation with its principal place of business in Missouri, was a mail order house through which customers placed catalog orders for merchandise.[109] Its marketing plan was founded on semi-annual catalogues mailed to past and potential customers, supplemented with occasional flyers and promotional materials.[110] Among customers in other states, these mailings went to National Bellas Hess, Inc. patrons in Illinois.

Illinois statutes imposed a duty to collect an in-state buyer's use tax on any "[r]etailer maintaining a place of business in this State."[111] They expansively defined the term "retailer" to include any party "soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."[112] This broad definition directly implicated National Bellas Hess, Inc. and

105. Nat'l Bellas Hess, Inc. v. Dept. of Rev., 386 U.S. 753.
106. Scripto, Inc. v. Carson, 362 U.S. 207 (1960).
107. *Id.* at 211.
108. *Id.*
109. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 753.
110. *Id.* at 754.
111. *Id.* at 755; ILL. REV. STAT. c. 120, § 439.1 (1965).
112. ILL. REV. STAT. c. 120, § 439.2 (1965).

imposed a sales tax collection duty on it as an Illinois "retailer," despite its exclusively economic relationship via common carrier or U.S. mail with the state.

Customer orders were sent via post to National Bellas Hess Inc.'s Missouri plant, from which, in turn, the orders were filled "via the United States mail or common carrier."[113] These mailings, along with two catalogs per year, were the only contacts between National Bellas Hess, Inc. and Illinois.[114] National Bellas Hess, Inc. did not maintain any place of business in Illinois, nor did it have any employees or contractors soliciting orders or otherwise representing the company.[115] It owned no tangible property (real or personal) in Illinois.[116] It did not advertise in newspapers, on billboards, or by radio or television in Illinois.[117]

Despite postal correspondences serving as the sole basis for taxing jurisdiction between National Bellas Hess, Inc. and Illinois, the Illinois statute imposed a series of collection responsibilities on the Missouri company as an Illinois "retailer." National Bellas Hess, Inc. was required to offer any Illinois purchaser a receipt in accordance with prescribed Illinois "manner and form."[118] It was required to keep books and records to the extent and in such a form as Illinois "shall require."[119] National Bellas Hess, Inc. was also required to submit to any "investigations, hearings, and examinations as are needed" in order for Illinois to enforce its tax laws.[120] Failure to adhere to these standards exposed National Bellas Hess, Inc. to potential criminal sanctions.[121] Given the perceived banality of its relationship with Illinois, and the onerous nature of the collection statute, National Bellas Hess Inc. challenged the constitutionality of the Illinois statute's imposition of sales tax collection responsibilities.

In its analysis, the Court acknowledged two separate tests for detecting violations of the Due Process Clause and the Commerce Clause, yet the Court did not separately analyze them.[122] Rather, it found the tests to be so similar

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113. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 754.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 755; ILL. REV. STAT. c. 120, § 439.5 (1965).

119. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 755; ILL. REV. STAT. c. 120, § 439.11 (1965).

120. *Id.*

121. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 755. Any Illinois "retailer" that failed to adhere to these record keeping requirements was subject to a fine up to $5,000 and imprisonment up to six months. ILL. REV. STAT. c. 120, § 439.14 (1965).

122. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756–60.

in nature and closely related that they could be commingled in order to determine the overall constitutional validity of the Illinois statute.[123]

The Court held that the Illinois statute unconstitutionally burdened National Bellas Hess, Inc. as an out-of-state retailer.[124] In so doing, the Court distinguished the facts in *National Bellas Hess* from the facts in *Scripto* and proffered a physical presence requirement for the imposition of sales tax collection responsibilities.[125] In *Scripto*, the Georgia seller challenging the Florida statute had sales representatives conducting "continuous local solicitation in Florida."[126] The Georgia seller's physical presence in Florida was enough for the Florida statute to withstand constitutional challenge. In contrast, National Bellas Hess, Inc. had no employees in Illinois. Its contacts with Illinois were exclusively mail-based. Under the Due Process Clause, this was a tenuous enough relationship to find that National Bellas Hess, Inc. did not receive enough benefits from Illinois for the state to constitutionally impose sales tax collection responsibility on National Bellas Hess, Inc.[127] At once, under the Commerce Clause, the Court found that if all other states enacted statutes similar to the Illinois statute, interstate business would be caught in a "virtual welter of complicated obligations" causing unjustifiable entanglements on interstate commerce.[128]

This bifurcated conclusion was consistent with the all-inclusive nature of the opinion. Throughout, the Court made frequent references to both Due Process Clause and Commerce Clause rationale for striking down the Illinois statute, without specifically identifying one over the other as dispositive to the

123. *See Id.* at 756.

124. *Id.* at 760.

125. *Id.* at 758. The Court emphasized that while it had upheld statutes that deputize as collection agents out-of-state retailers with physical presence in the taxing state, it had never "held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Id.* at 757–58. It considered this distinction between mail order sellers and retailers with "retail outlets, solicitors, or property within a State" to be a "valid one" and the Court was not inclined to "obliterate it." *Id.* at 758. The Court, then, distinguished *Scripto* and *Nat'l Bellas Hess* on the basis of physical presence without explaining which constitutional provision required as much: the Due Process Clause or the Commerce Clause.

126. *Id.* at 757–58 (citing *Scripto*, 362 U.S. at 211). Specifically, the Georgia seller had ten representatives conducting "continuous local solicitation" in Florida. *Scripto Inc.*, 362 U.S. at 211.

127. *See Nat'l Bellas Hess, Inc.*, 386 U.S. at 760.

128. *Id.*

case.[129] For example, the Court justified the newly announced physical presence standard on due process grounds because in situations where the out-of-state seller has local agents or local retail stores in the state, the out-of-state seller is "plainly accorded the protection and services of the taxing State."[130] Similarly for the Court, Commerce Clause principles supported the physical presence standard as the Illinois statute caused "impediments upon the free conduct of . . . business," which were "neither imaginary nor remote."[131] Thus, the prospect of imposing sales tax collection duties on out-of-state sellers without physical presence was tantamount to allowing every other state, municipality, school district, and political subdivision throughout the nation the "power to impose sales and use taxes."[132] Compliance with so many different taxing regimes "could entangle . . . interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ."[133] Since "[t]he very purpose of the Commerce Clause was to ensure a national economy free from . . . unjustifiable local entanglement," the Court struck down the Illinois statute.[134]

B. Quill v. North Dakota

Twenty-five years following *National Bellas Hess, Inc.*, the pendulum began its return stroke as the Court more clearly defined constitutional limitations on states to impose sales tax collection duties on out-of-state sellers. In so doing, the Court more precisely delineated and differentiated the unique requirements of the Due Process Clause and the prohibition on states against burdening interstate commerce under the Commerce Clause. This evolution in analysis made clear that both clauses impose separate and distinct

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129. In *Quill*, Justice Stevens affirmed that the holding in *National Bellas Hess, Inc.* derived from both the Due Process clause and the Commerce Clause. *Quill*, 504 U.S. at 301.

130. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 757.

131. *Id.* at 759.

132. *Id.*

133. *Id.* at 759–60.

134. *Id.* at 760. As explained in Part IV, Section B, proponents of the Marketplace Fairness Act argue that maneuvering the variations of tax rates, exemptions, and administrative record-keeping requirements among the thousands of state and local taxing jurisdictions is no longer a valid concern for retailers. Technology affords them opportunity to easily comply with state tax laws. This is probably true, especially when considered in light of the simplification requirements mandated under the Marketplace Fairness Act. But the advent of technology and the conformation measures in the Marketplace Fairness Act only cure potential Commerce Clause defects which are not at issue in weighing the constitutionality of the Marketplace Fairness Act.

restrictions on states' abilities to compel out-of-state sellers to collect their sales taxes.

The substantive facts in *Quill v. North Dakota* were consonant with the facts in *National Bellas Hess, Inc.* in almost all material respects. Quill was a catalog-based retailer of office equipment and supplies with offices and warehouses in California, Georgia, and Illinois.[135] Quill's interaction with North Dakota was comparable to National Bellas Hess, Inc.'s relationship with Illinois. It sent catalogs and flyers to North Dakota customers through the mail and delivered all of its merchandise to its North Dakota customers by mail or common carrier from out-of-state locations.[136] The only incidental distinguishing facts were that Quill exchanged telephone calls with North Dakota customers and ran ads in national periodicals, some of which were surely seen by North Dakota residents.[137]

The main distinction between the *Quill* and *National Bellas Hess, Inc.* cases was legislative restraint, the product of which was a more tailored North Dakota statute relative to the Illinois statute. North Dakota's legislature acted post-*National Bellas Hess*, Inc. to amend the statutory definition of the term "retailer" and attempted to curtail itself in accordance with that decision. In contrast to the broad language of the Illinois statute which defined an Illinois "retailer" as any party "soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State,"[138] the North Dakota statute created a more moderate "regular or systematic solicitation" standard to define a North Dakota retailer. Under the statute, a North Dakota "retailer" was "every person who engages in regular or systematic solicitation of a consumer market in the state."[139] State administrative regulations, however, somewhat obfuscated the state's legislative craftsmanship by defining "regular or systematic solicitation" as merely three or more advertisements within a twelve-month period.[140]

The factual similarities between the two cases, degrees of moderation in statutory definitions notwithstanding, the North Dakota Supreme Court upheld the North Dakota statute and distinguished the case from *National Bellas Hess, Inc.*, on the passage of time and human progress. The North Dakota Supreme Court posited that the "tremendous social, economic, commercial, and legal innovations since 1967" had rendered the conclusions

135. *Quill*, 504 U.S. at 302.

136. *Id.* at 304. Of Quill's $200 million of annual sales, $1 million were sourced to 3,000 North Dakota customers. *Id.* at 302.

137. *Id.* at 302.

138. ILL. REV. STAT. c. 120, § 439.2 (1965).

139. N. D. CENT. CODE § 57-40.2-01(6) (1991).

140. N. D. ADMIN. CODE § 81-04.1-01-03.1 (1988).

reached in *National Bellas Hess, Inc.* "obsolescent precedent."[141] In particular, the North Dakota Supreme Court cited advancements and growth of the mail-order business and the advent of computer technology as cures for the perceived burdens on interstate commerce created by compliance requirements with a "welter of complicated obligations" cited in *National Bellas Hess, Inc.*[142]

The Court's first order of business in reversing the North Dakota Supreme Court was to clarify its own analysis in *National Bellas Hess, Inc.*. While the Court maintained its position that claims under the Due Process Clause and Commerce Clause are "closely related,"[143] it backtracked on the commingled analysis employed in *National Bellas Hess, Inc.*, which considered both clauses simultaneously. Instead, the Court acknowledged that "the Clauses pose distinct limits on the taxing powers of the State" and found that a state statute may meet the standards of one clause, even while running afoul of the other.[144]

To expand on this point, the Court suggested that the analysis in *National Bellas Hess, Inc.* did not adequately account for the fundamental differences between the two clauses.[145] Chief among these differences is the character of the two clauses. The Commerce Clause represents the Constitution's affirmative grant to Congress of plenary power to regulate commerce among the states, even while authorizing actions that burden interstate commerce.[146] In sharp contrast, the Due Process Clause exists as a blanket limitation on the exertion of governmental power. Thus, in its first clarifying point in connection with *National Bellas Hess, Inc.*, the Court held that on account of this underlying distinction, "the Due Process Clause and the Commerce Clause are analytically distinct."[147]

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141. Quill v. North Dakota, 470 N.W.2d 203, 208 (1991).

142. *Id.* at 215 (quoting *Nat'l Bellas Hess, Inc.*, 386 U.S. at 759–60). The court noted the mail-order business's growth from an "inconsequential market niche" to a "goliath" with annuals sales in excess of "$183.3 billion in 1989." *Id.* at 208–09.

143. *Quill*, 504 U.S. at 305 (quoting *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756).

144. *Id.* at 305. In *Quill*, the Court noted that a state statute could meet due process scrutiny while violating the Commerce Clause. *See id.* This sequence of analysis was illustrative and does not foreclose the inverse: that a state statute could comply with the Commerce Clause while violating due process.

145. *See id.* at 305.

146. *Id.* This was the Court's reading of *International Shoe's* pronouncement that "Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *Int'l Shoe Co.*, 326 U.S. at 315.

147. *Quill*, 504 U.S. at 305.

On the Due Process Clause, the Court began with foundational principles first announced in *International Shoe Co. v. Washington*,[148] and first applied specifically to a sales or use tax question in *Miller Bros. Co. v. Maryland*:[149] the Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[150] To define "minimum contacts," the Court reenlisted the *International Shoe* Court's inquiry gauging whether or not imposition of a tax "[o]ffends 'traditional notions of fair play and substantial justice.'"[151]

To further enhance the definition of "minimum contacts" for purposes of state taxing jurisdiction, the Court continued its analogy to due process cornerstones for *in personam* jurisdiction in federal courts. It cited *Burger King v. Rudzewicz*, which established that personal jurisdiction is created between a state and a foreign corporation that "purposefully avails itself of the benefits of an economic market in the forum state."[152] At once, the *Burger King* Court eschewed a physical presence requirement for personal jurisdiction purposes under the Due Process Clause on the basis that a commercial actor could purposefully direct its efforts towards another state through mail communications without being physically present in the state.[153]

The Court found these lines of reasoning to apply with equal force to a state that imposes sales tax collection duties on out-of-state mail-order retailers which engage in "continuous and widespread solicitation of business" within the state.[154] Its rationale for the affiliation: just as a corporation that engages in continuous and widespread solicitation of business in a state has "fair warning" that its activities may subject it to the jurisdiction of the state's courts, so should that warning extend equally to the possibility that the corporation may be required to collect the state's sales tax.[155]

On this basis, the Court overruled any prior Court decisions to the extent they held that the Due Process Clause requires physical presence in a state for the imposition of a duty to collect sales tax to be constitutionally valid.[156] Thus the Court overruled the portion of the *National Bellas Hess, Inc*'s decision that commingled analysis to the extent it could be interpreted to create a physical presence requirement under the Due Process Clause. In *National Bellas Hess, Inc.*, the Court relied heavily on the fact that the Illinois statute imposed sales tax collection responsibilities on mail-order retailers

148. *Int'l Shoe Co.*, 326 U.S. 310.
149. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).
150. *Id.* at 344–45.
151. *Quill*, 504 U.S. at 307.
152. *Id.*
153. *Id.* at 307–08.
154. *Id.* at 308.
155. *Id.*
156. *Id.*

without retail outlets, solicitors, or property in Illinois to distinguish the case from *Scripto*. This distinguishing point gave the Court a foothold to strike down the Illinois Revenue statute. Now in *Quill*, the Court reset and clarified that state-imposed sales tax collection responsibilities on an out-of-state mail-order retailer could not be avoided by lack of physical presence under the Due Process Clause.

With due process minimum contacts analysis now properly framed around "purposeful direction" (lack of physical presence notwithstanding), the Court found that the North Dakota statute was free of any due process infraction.[157] To reach this conclusion, the Court turned its analysis to Quill's interaction with North Dakota and focused keenly on the magnitude of Quill's contacts with the state[158] ($1 million in gross sales revenue/3,000 customers).[159] For the Court, these contacts were more than sufficient to create due process nexus and justify North Dakota's imposition of a sales tax collection duty on Quill.

Yet the *Quill* decision stands as a lighthouse in the foggy abyss of state and local tax matters by creating a bright-line rule that nexus for sales tax collection purposes is created only when a retailer has physical presence in the taxing state. This apparent contradiction to the current discussion can be easily reconciled. *Quill*'s bright-line physical presence standard derives from the Commerce Clause, not the Due Process Clause.

The bridge to physical presence in *Quill* was *Complete Auto Transit, Inc. v. Brady.*[160] There, the Court established a four-part test[161] to "govern the validity of state taxes under the Commerce Clause."[162] In pertinent part, under *Complete Auto*, a state tax will survive scrutiny under the Dormant Commerce Clause only if "the tax is applied to an activity with a substantial nexus with the taxing State."[163]

To define Commerce Clause "substantial nexus," the Court returned to *National Bellas Hess, Inc.* and found its physical presence standard compatible with *Complete Auto*'s "substantial nexus" standard. The notion of Commerce Clause "substantial nexus" was nonexistent when *National Bellas*

157. *Id.* at 308.

158. *Id.*

159. *Id.* at 302.

160. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, (1977).

161. Under the *Complete Auto Body* test, a tax will not violate the Commerce Clause if the tax "[(1)] is applied to an activity with a substantial nexus with the taxing State, [(2)] is fairly apportioned, [(3)] does not discriminate against interstate commerce, and 4) is fairly related to the services provided by the State." *Complete Auto Transit, Inc.*, 430 U.S. at 279.

162. *Quill*, 504 U.S. at 310.

163. *Complete Auto Transit, Inc.*, 430 U.S. at 279.

Hess, Inc. was handed down. Yet, without clearly identifying whether it was compelled by the Due Process Clause or the Commerce Clause, *National Bellas Hess, Inc.* created a physical presence standard. The Court in *Quill* then, upheld *National Bellas Hess Inc.*'s physical presence standard to the extent it was compelled by the Commerce Clause. Thus even though *National Bellas Hess, Inc.* makes no reference to the notion of "substantial nexus" posited in *Complete Auto Transit, Inc.*, the Court was willing to imply, *ex post facto*, that *National Bellas Hess, Inc.*'s physical presence standard stood for the proposition that "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus."[164]

In sum, the Court in *Quill* creates a physical presence standard for sales tax purposes under the Commerce Clause, but clearly renounces any such requirement under the Due Process Clause. As such, efforts have been made to disentangle the various states' tax regimes in order to minimize burdens on interstate commerce. The SSUTA, which is heavily incorporated into the Marketplace Fairness Act, represents the most impactful undertaking towards Commerce Clause compliance.

IV. THE STREAMLINED SALES AND USE TAX AGREEMENT AND THE MARKETPLACE FAIRNESS ACT OF 2013 (SENATE DRAFT)

A. Streamlined Sales and Use Tax Agreement

States generally considered *Quill*'s bright-line rule of physical presence for sales tax purposes to be a serious impediment to revenue collection as it effectively insulated in-state buyers from paying sales tax on purchases from all out-of-state sellers without physical presence in the state.[165] In response, a movement developed to unwind perceived burdens on interstate commerce with self-regulation aimed at simplification and conformity. The Streamlined Sales and Use Tax Agreement (SSUTA) represents the culmination of these efforts as a multi-state compact which "focuses on improving sales and use tax administration systems for all sellers and for all types of commerce."[166]

The SSUTA is a response generally to *Quill*'s physical presence standard for the creation of Commerce Clause "substantial nexus." More precisely, it is a specific response to footnote 6 in *Quill*, which reaffirmed the Court's concerns first registered in *National Bellas Hess, Inc.* regarding burdens on interstate commerce created by "many variations in the rates of

164. *Quill*, 504 U.S. at 311.

165. Though use tax was still due, levels of individual use tax compliance are very low.

166. STREAMLINED SALES AND USE TAX AGREEMENT § 102 (2015).

tax, in allowable exemptions and in administrative and record-keeping" for a mail-order house to comply with the tax laws of the "Nation's 6,000—plus taxing jurisdictions."[167]

The SSUTA attempts to unwind this "welter of complicated obligations" created by the various state and local taxing authorities through simplification and modernization of sales and use tax administration among member states. The expectation is that simplification and modernization will "substantially reduce the burden of tax compliance"[168] and cure the perceived Commerce Clause infractions cited in *Quill*.

Toward this end, the SSUTA requires signee states to adhere to requirements which are aimed at creating uniformity among the states and simplifying the administration and collection of sales tax for out-of-state sellers. Among these requirements, signee states must provide for single-entity state-level administration of sales and use taxes.[169] It is with this state governing body (e.g. the state's tax commission or department of revenue) that sellers, including out-of-state remote sellers, register, file returns, and remit collected funds.[170] The onus is then on the state administrative body to coordinate the collection of sales and use taxes.

Under other SSUTA requirements, signee states must also create identical local and state tax bases and definitions;[171] establish sales and use tax registration systems for sellers which cooperate with other member states;[172] provide notice to sellers advising them of changes in the state sales and use tax laws;[173] and provide and maintain a database for all local jurisdictions which tracks and updates local sales and use tax rates and boundary changes based on five digit and nine digit zip codes within the state.[174]

In addition to these requirements, signee states to the SSUTA must adopt uniform sourcing rules promulgated in the agreement.[175] They must also simplify administration of exemptions, tax return filing requirements, and tax

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167. *Quill*, 504 U.S. at 313 n.6. There are now 9,646 sales tax jurisdictions in the United States. Richard Borean, *Supreme Court Needs to Address Internet Sales Tax*, TAX FOUNDATION (Sept. 24, 2013), http://taxfoundation.org/article/supreme-court-needs-address-internet-sales-tax (last visited Jul. 15, 2015) [hereinafter Borean, *Needs to Address Internet Sales Tax*].

168. STREAMLINED SALES AND USE TAX AGREEMENT § 102 (2015).

169. *Id.* § 301.

170. *Id.*

171. *Id.* § 302.

172. *Id.* § 303.

173. *Id.* § 304.

174. *Id.* § 305.

175. *See id.* § 102.

remittances.[176] The ultimate goal is that all forty-five states, plus the District of Columbia, which impose sales and use taxes will sign on to the agreement and collectively disembowel the perceived burdens on interstate commerce cited in *Quill* and *National Bellas Hess, Inc.*

While well-purposed, the SSUTA has not rallied the states toward the goal of tax conformity as it intended. Only twenty-three states have signed the SSUTA and passed conforming legislation, giving them full member status under the agreement.[177] To some degree, this high level of nonconformity is attributable to states' unwillingness to give up their sovereign power to tax. State legislatures are concerned about losing revenues on out-of-state sales, particularly on Internet sales. Yet they must balance this concern against their states' appetite to conform their tax laws to the model act. Evidently, many states have been unable to justify, politically or otherwise, conceding ability to self-determine portions of their sales tax laws in exchange for the potential to constitutionally compel out-of-state sellers to collect their sales tax.

This lack of conformity underlies the significance and motivates proponents of the Marketplace Fairness Act. The SSUTA became effective on October 1, 2005. Since 2011, membership has gone unchanged. The general consensus among member states is that the time is ripe to shift from a voluntary system of encouraged conformity, to a federal system of compelled conformity. The Marketplace Fairness Act is a vehicle through which this would be accomplished.

B. The Market Place Fairness Act of 2013

1. Comparable Provisions to the Streamlined Sales and Use Tax Agreement

The Marketplace Fairness Act of 2013, as Senate Bill 743, was passed by the U.S. Senate on May 6, 2013, but languished and died in committee in the House.[178] The Marketplace Fairness Act of 2015 was introduced with only slight modification.[179]

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176. *See id.*

177. A full member state is a state that is in compliance with the SSUTA through its laws, rules, regulations and policies. STREAMLINED SALES TAX GOVERNING BOARD, INC., http://www.streamlinedsalestax.org/index.php?page=state-info (last visited Jul. 15, 2015).

178. H.R. 684, 113th Cong. (as reported to H. Comm. on the Judiciary, May 6, 2013).

179. Marketplace Fairness Act of 2015, S. 698, 114th Cong. (2015). The only modification to the 2015 iteration is an implementation measure. Under newly added § 3(h), upon enactment, each state's taxing authority may not exercise authority

The Bill's preface registers a forlorn tone. Its stated purpose is "[to] restore States' sovereign rights to enforce State and local sales and use tax laws . . . ."[180] This language suggests that the collective states have been deprived victims, but leaves unanswered by what or whom. Possible culprits may include the Constitution itself for restricting state-mandated burdens on interstate commerce or state-sponsored curtailments of due process, infringing on state sovereignty, or perhaps the Court for too harshly and narrowly interpreting these constitutional provisions. Perhaps even the states themselves share the blame for overreaching in their definition of "retailers" who are required to collect and remit sales tax and creating an unduly burdensome environment for tax administration.

In any event, whatever the cause of the perceived divestment of states' rights, the Marketplace Fairness Act purports to restore these rights by creating affirmative federal authorization for states to require collection of sales taxes on remote sales. Section 2 of the Act distinguishes between Member States that have signed on to the SSUTA and those which have not.[181] In so doing, the Marketplace Fairness Act builds on the base of the twenty-three SSUTA Member States already seeking conformity and simplicity. Member States are authorized under the Marketplace Fairness Act—not by virtue of membership under the SSUTA, but by federal law—"to require all sellers [except those qualifying for the small seller exception, (discussed *infra*)] . . . to collect and remit sales and use taxes with respect to remote sales sourced to that Member State pursuant to the provisions of the Streamlined Sales and Use Tax Agreement . . . ."[182]

In the following paragraph, the Marketplace Fairness Act similarly authorizes states who are not Member States under the SSUTA (subject again to the small seller exception) "to collect and remit sales and use taxes with respect to remote sales sourced to that State."[183] The Marketplace Fairness Act, however, conditions this authorization on states' enacting conforming legislation which mimics key provisions in the SSUTA. The Marketplace Fairness Act terms these "minimum simplification requirements."[184] For example, akin to the "state level administration of sales and use tax"[185] called for under the SSUTA, a nonmember state must create or appoint a single state

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under the Act for one year from the date of enactment and "during the period beginning October 1 and ending on December 31 of the first calendar year beginning after the date of the enactment." S. 698, 114th Cong., § 3(h) (2015).

180. S. 698, 114th Cong. pmbl. (2015).

181. *Id.* § 2.

182. *Id.* § 2(a).

183. *Id.* § 2(b).

184. *Id.* § 2(b)(2).

185. STREAMLINED SALES AND USE TAX AGREEMENT § 301 (2015).

entity to administer the state and local sales and use tax laws, including return processing and audits for remote sales sourced to the state.[186] In connection with administrative matters, the minimum simplification requirements also limit the state to a single audit of a remote seller,[187] which follows the tone of section 301(A) of the SSUTA, which provides limiting parameters for state and local level audits.[188] The Marketplace Fairness Act also requires that states implement a single return system for all remote sellers to file with the state, piggybacking on the SSUTA's section 318: Uniform Tax Returns.[189]

The parallels continue. Under the Marketplace Fairness Act, congruent with section 302 of the SSUTA, Non-Member States must assimilate their state and local sales and use tax bases to a uniform level.[190] The Marketplace Fairness Act also compels adherence to defined sourcing rules. Echoing section 310(A) of the SSUTA,[191] the statutory rules provide that remote sales will be sourced "to the location where the item sold is received by the purchaser," as indicated by instructions for delivery.[192]

Sections 305(D) and (E) of the SSUTA call on member states to provide and maintain databases for the benefit of remote sellers.[193] These databases track state locality boundary changes and all sales and use tax rates for the state and all of its municipalities. The SSUTA even outlines methods for database navigation: it requires the state to assign "each five digit and nine digit zip code . . . to the proper tax rates and jurisdictions."[194] This then allows remote sellers to easily determine the proper collectible sales and use tax based on the zip code in which the buyer is located.[195]

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186. S. 698, 114th Cong. § 2(b)(2)(A)(i) (2015).

187. *Id.* § 2(b)(2)(A)(ii).

188. The SSUTA provides that generally "local jurisdictions shall not conduct independent sales or use tax audits of sellers and purchasers." STREAMLINED SALES AND USE TAX AGREEMENT § 301(A) (2015).

189. *Id.* § 301(B).Working hand-in-hand with this requirement, states "may not require a remote seller to file sales and use tax returns any more frequently than returns are required for nonremote sellers." S. 698, 114th Cong. § 2(b)(2)(A) (2015). Similarly, states are prohibited from imposing unique requirements on remote sellers which do not apply to nonremote sellers. *Id.*

190. *Id.* § 2(b)(2)(B).

191. STREAMLINED SALES AND USE TAX AGREEMENT § 310(A) (2015).

192. S. 698, 114th Cong. § 2(b)(2)(C) (2015).

193. STREAMLINED SALES AND USE TAX AGREEMENT §§ 305(D), (E) (2015).

194. *Id.* § 305(F).

195. The SSUTA goes on to provide additional options for making the database even more useful to remote sellers. In section 305(G), member states are given the option of providing address-based (in addition to zip code-based) database records for purposes of assigning taxing jurisdictions and their associated rates. *Id.* § 305(G).

Although without the same level of detail, the Marketplace Fairness Act likewise requires states to create databases that track sales and use tax rates and boundary changes.[196] It then goes one step further to mandate that states provide "software free of charge for remote sellers that calculates sales and use taxes due on each transaction."[197] In addition to these protocols, states must create "certification procedures for persons to be approved as certified software providers."[198] This notion of a certified software provider closely resembles the SSUTA's certified service provider.[199]

In connection with the software mandate in the Marketplace Fairness Act, states are required to absolve remote sellers of any liability associated with an "incorrect collection, remittance, or noncollection of sales and use taxes, including any penalties or interest," if the liability is attributable to an "error or omission" made by the software provider.[200] In similar fashion, remote sellers are relieved from liability for incorrect collection, remittance, or noncollection of sales and use taxes if the liability results from "incorrect information or software provided by the State."[201] In circumstances where the state administers its software through a certified software provider, the provider is also released from liability for any "incorrect collection, remittance, or noncollection of sales and use taxes . . . if the liability is the result of misleading or inaccurate information provided by a remote seller."[202] These liability provisions follow the spirit of section 306 of the SSUTA which provides for similar, but not as expansive immunity.[203]

The Marketplace Fairness Act also establishes notice requirements to which states must adhere to apprise remote sellers and certified software providers alike of any rate changes on a state or local level. Failure to provide

196. S. 698, 114th Cong. § 2(b)(2)(D)(i) (2015).

197. *Id.* § 2(b)(2)(D)(ii). The software must also allow remote sellers to file their sales and use tax returns. *Id.*

198. *Id.* § 2(b)(2)(D)(iii).

199. Section 203 of the SSUTA defines a certified service provider as "[a]n agent certified under the Agreement to perform all the seller's sales and use tax functions, other than the seller's obligation to remit tax on its own purchases." STREAMLINED SALES AND USE TAX AGREEMENT §203 (2015).

200. S. 698, 114th Cong. § 2(b)(2)(E) (2015).

201. *Id.* § 2(b)(2)(G).

202. *Id.* § 2(b)(2)(F).

203. *Id.* § 2(b)(2)(H). By way of comparison to the SSUTA, section 306 requires member states to relieve sellers and certified service providers from liability to the member state and local jurisdictions "for having charged and collected the incorrect amount of sales or use tax resulting from the seller or CSP relying on erroneous data provided by a member state on tax rates, boundaries, or taxing jurisdiction assignments." STREAMLINED SALES AND USE TAX AGREEMENT § 306 (2015).

at least ninety days' notice of such a rate change results in liability relief to the remote seller and the certified software provider if they collect at the rate previously in effect preceding the rate change.[204]

In sum, the Marketplace Fairness Act's minimum simplification requirements are premised on fundamental simplification provisions in the SSUTA. To SSUTA Member States, the Marketplace Fairness Act represents federal authorization to enforce already existing state legislation and compel out-of-state remote sellers to collect sales tax. To nonmember states, the Marketplace Fairness Act represents federally mandated conformity with many detailed and substantive simplification provisions of the agreement. This mandate, if the Marketplace Fairness Act becomes law, denotes that a state will no longer be able to balance the ability to compel remote retailers to collect sales tax against retention of its discretion to administer its tax system. Rather, states will now be compelled to give up administrative control for the greater good—to simplify and coordinate the sales and use tax laws of the country. By so doing, an ostensible avenue would open for states to constitutionally reach out-of-state retailers and compel them to collect their sales tax.

2. The Small Seller Exception

The SSUTA provisions geared towards simplification, and their counterparts in the Marketplace Fairness Act, are meant to unwind perceived burdens on interstate commerce that may run afoul of the Commerce Clause. As a self-enforced compact among Member States, Commerce Clause issues were legitimate concerns for drafters of the SSUTA. Yet the Marketplace Fairness Act is federal legislation and Congress, through its plenary power to regulate commerce among the states, is authorized to burden interstate commerce. On this account, simplification provisions of the Marketplace Fairness Act, while expected from an administrative and practical viewpoint (and also, perhaps, from a political posture), are not constitutionally required. On the other hand, section 2(c)'s small seller exception perhaps represents a more critical point at which the Marketplace Fairness Act's constitutional viability is measured under the Due Process Clause.[205]

The small seller exception is motivated equally by Commerce Clause and Due Process concerns. From a Commerce Clause standpoint, it protects small remote sellers from being subject to the state and local sales and use tax

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204. This notice requirement parallels section 304: Notice For State Tax Changes, of the SSUTA. The primary distinction however is that while the Marketplace Fairness Act calls for 90 days' notice, the SSUTA calls for a blurrier "as much advance notice as practicable" standard. *Id.* § 304(A)(1).

205. S. 698, 114th Cong. § 2(c) (2015).

collection regimes of all 9,646 sales tax-imposing jurisdictions in the United States.[206] This protection comes in the form of a $1,000,000 threshold factor, measured by gross annual receipts in the preceding calendar year.[207] "A State is authorized to require a remote seller to collect sales and use taxes . . . only if the remote seller has gross annual receipts in total remote sales in the United States in the preceding calendar year exceeding $1,000,000."[208]

This exception provides reasonable protections for small retailers who are ill-equipped to navigate the sales and use tax laws of every buyer's state, even with the aid of software and even though the laws are simplified. Moreover, this seems like an appropriate response to footnote 6 in *Quill*, which registered concern on the burdensome nature of complying with the United States' then 6,000-plus state and local taxing regimes.[209]

Administrative guidance promulgated in connection with the North Dakota statute at issue in *Quill*, set a very low bar for the imposition of sales tax collection duties on remote sellers. All those who advertised in the state just three times in a single year were required to collect and remit North Dakota sales and use tax.[210] The Court mused that a remote seller which "included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty."[211] The Court then suggested that similar obligations might be imposed by the rest of the nation's taxing jurisdictions, which would create a "virtual welter of complicated obligations."[212] On this account, the North Dakota statute violated the Commerce Clause.

Yet the Marketplace Fairness Act is incapable of violating the Commerce Clause as federal legislation. Thus the small seller exception, though perhaps inspired by the Court's Commerce Clause jurisprudence, is not required by it.

The more complicated question stems from the Due Process Clause and whether the small seller exception adequately accounts for minimum contacts and purposeful availment. That is to say, if the Marketplace Fairness Act becomes law (even with its $1,000,000 small seller exception), are there circumstances in which it will impose sales tax collection duties on remote sellers who, taking into account the magnitude of their contacts with the state,

206. Borean, *Needs to Address Internet Sales Tax*, *supra* note 167.
207. S. 698, 114th Cong. § 2(c) (2015).
208. *Id.*
209. *Quill*, 504 U.S. at 313 n.6.
210. N. D. ADMIN. CODE § 81-04.1-01-03.1 (1988).
211. *Quill*, 504 U.S. at 313 n.6 (1992).
212. *Id.*

lack minimum contacts? If so, the Marketplace Fairness Act potentially risks running afoul of the Due Process Clause.

V. THE PACT ACT

A. Introduction to the PACT Act

In application, the Prevent All Cigarette Trafficking Act of 2009 (PACT Act)[213] is a microcosm of the Marketplace Fairness Act. It grants states the power to reach remote sellers of tobacco and impose on them a duty to collect state imposed tax—just as the Marketplace Fairness Act would do to all remote sellers with sales revenues in excess of the small seller exception amount. Yet while the Marketplace Fairness Act's purpose is distinctly economic—to allow states to recover the millions of sales and use tax dollars each year that go uncollected on out-of-state purchases and create a level economic playing field between brick and mortar and online retailers[214]—the PACT Act's purposes, though partially concerned with foregone state revenues, also aim to curtail terrorist involvement in tobacco smuggling and underage tobacco consumption.[215]

Just as in the case of remote sales generally, the Internet exponentially increased the number and frequency with which buyers of tobacco made purchases from out-of-state sellers. This, of course, engendered the same concerns over foregone revenues and unfair competition that compelled lawmakers to draft and consider the Marketplace Fairness Act. Yet tobacco is a heavily regulated commodity and the Internet marketplace created a work-around by which retailers and consumers alike could skirt federal requirements related to the sale and consumption of tobacco. As such, lawmakers were concerned that the Internet created a medium through which children could more cheaply and easily obtain tobacco products.[216] Congress also understood that terrorist organizations had "profited from trafficking in illegal cigarettes"[217] and such participation was likely "to grow because of the large profits such organizations can earn."[218]

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213. Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, 124 Stat. 1087 (2010).

214. *See* S. 698, 114th Cong. pmbl. (2015).

215. Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 1(c), 124 Stat. 1087 (2010).

216. *Id.* § 1(b)(4).

217. *Id.* § 1(b)(2).

218. *Id.* § 1(b)(3). Other matters motivating the passage of the PACT Act included: 1) the rising trend of state and local tobacco tax rates, increasing "the incentives for the illegal sale of cigarettes and smokeless tobacco" *Id.* § 1(b)(7); 2) an increase in the number of active tobacco investigations being conducted by the Bureau

In response to these concerns, the PACT Act claims the following purposes. Sections 1(c)(1) and (5) directly address state tax revenue collection and unfair competition. In paragraph (1), it is Congress's intent by the PACT Act to require Internet and other remote sellers of cigarettes and smokeless tobacco "to comply with the same laws that apply to law-abiding tobacco retailers."[219] In paragraph (5), the PACT Act affirms its intention to "increase collections of Federal, State, and local excise taxes on cigarettes and smokeless tobacco."[220]

Paragraphs (2), (3), and (4) all purport to undermine the tobacco-trafficking trade. Paragraphs (2) and (3) cite strong disincentives and enhanced enforcement tools as measures that will stymie illegal tobacco transactions.[221] Paragraph (4) suggests that the PACT Act will generally make it more difficult for traffickers to "engage in and profit from their illegal activities."[222] Finally, paragraph (6) notes that the PACT Act will prevent and restrict youth access to tobacco through the Internet.[223]

B. Provisions

The PACT Act was not cut out of whole cloth. Rather it was a supplement and enhancement to existing legislation first announced under the Jenkins Act,[224]which regulates interstate traffic of and associated taxes on cigarettes and smokeless tobacco.

Passed in 1949, the Jenkins Act was offered as a stop-gap to prevent consumers from bypassing state and local sales and use tax laws—or more precisely, tobacco excise taxes—on out-of-state tobacco purchases. To this end, the Jenkins Act obligated out-of-state tobacco retailers to report each interstate sale of tobacco products to the consumer's state tax authority.[225] This then equipped the states with necessary information to track down residents who made out-of-state tobacco purchases and collect the applicable tax.

More than fifty years later, the PACT Act amended definitions in the Jenkins Act, established new reporting requirements, and increased penalties

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of Alcohol, Tobacco, Firearms, and Explosives. *Id.* § 1(b)(3)(8) (2010); and 3) "the number of Internet vendors in the United States and in foreign countries that sell cigarettes and smokeless tobacco to buyers in the United States increased from only about 40 in 2000 to more than 500 in 2005." *Id.* § 1(b)(9).

219. *Id.* § 1(c)(1).
220. *Id.* § 1(c)(5).
221. *Id.* § 1(c)(2), (3).
222. *Id.* § 1(c)(4).
223. *Id.* § 1(c)(6).
224. Jenkins Act, Pub. L. No. 81-363, 63 Stat. 884 (1949).
225. *Id.* § 2.

for criminal violations, all in response to perceived inadequacies of the Jenkins Act. Almost certainly, the 1950s-era Jenkins Act contemplated out-of-state tobacco sales as primarily mail-order transactions, occurring with moderate enough frequency that out-of-state retailers could reasonably be expected to track and report such sales to the various consumers' state tax authorities. Over time, with the advent of online marketplaces, out-of-state retailers became more and more inconspicuous and the prospect of states compelling adherence to the Jenkins Act's reporting requirements became a tenuous proposition. The PACT Act created modern mechanisms for enforcement of the Jenkins Act's provisions while also taking into account modern-day concerns related to child tobacco access/consumption and terrorist trafficking.

Among the various PACT Act provisions amending the Jenkins Act, the most significant for out-of-state tobacco venders introduced the notion of and implemented various restrictions on "delivery sales" of cigarettes and smokeless tobacco products. The PACT Act broadly defines a "delivery sale" as any sale of cigarettes or smokeless tobacco to a consumer which satisfies either of two conditions.[226] The first condition depends on the process through which the cigarette or tobacco product was ordered. If the order was placed via telephone, mail, or Internet, or even if the seller was simply not in the physical presence of the buyer when the order was placed, the transaction qualifies as a "delivery sale."[227] Under the second parameter, a transaction is a "delivery sale" under the PACT Act if either the cigarettes or smokeless tobacco are "delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco."[228]

For an out-of-state tobacco vendor, the ramifications of a "delivery sale" are substantial. In addition to state tax administrator reporting requirements already in place under the Jenkins Act, the PACT Act installs several shipping, recordkeeping, and tax collection duties on the out-of-state seller, the most controversial of which prohibits delivery sales unless all applicable state and local taxes are paid "in advance of the sale, delivery, or tender."[229]

In application, the PACT Act transforms delivery sellers into state tax collection agents akin to in-state sellers. Delivery sellers are required to

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226. 15 U.S.C. § 375(5) (2012).

227. *Id.* § 375(5)(A).

228. *Id.* § 375(5)(B).

229. *Id.* § 376a(a)(3)–(4). Section 376a(d) prohibits a delivery seller from sale, delivery, or tender "to any common carrier or other delivery service, any cigarettes or smokeless tobacco . . . unless, in advance of the sale, delivery, or tender" all state and local excise taxes have been paid. *Id.* § 376a(d)(1).

comply with, under threat of criminal and civil penalties, "all state, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State."[230]

The PACT Act detrimentally impacted remote tobacco sellers on at least two fronts. With the advent of the Internet marketplace, out-of-state sellers exploited their competitive advantage of "tax-free" tobacco products and marketed their products as such. Under the Jenkins Act, these retailers were required to report the names of their customers to state taxing agencies, but no collection duty was imposed. The increasingly untenable burden was then on the states to track down resident customers and extract payment for taxes that would have been paid at the transaction point had the tobacco been purchased in-state. The PACT Act's treatment of delivery sellers as if they were in-state tobacco retailers completely nullified this marketplace gamesmanship.

Concurrently, the PACT Act imposes on out-of-state sellers (regardless of size or sales volume) a burden to collect tobacco excise taxes imposed by any of the states or the District of Columbia.[231] If the duty to report out-of-state purchasers under the Jenkins Act slightly disturbed notions of due process, the PACT Act's obligation to collect and remit appropriate tobacco excise taxes for the several states, under threat of civil and criminal penalties, thoroughly agitated due process.

These concerns, in conjunction with other non-tax provisions,[232] motivated taxpayers to challenge the PACT Act's constitutionality. As a sign

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230. *Id.* §§ 376a(a)(3), 377. Section 377(a) installs criminal penalties which provide for a maximum prison sentence of 3 years and/or a fine under title 18 of the U.S. Code. *Id.* § 377(a). Section 377(b) establishes civil penalties for violation of the act which, in the case of a delivery seller include a fine equal to the greater of: 1) $5,000 for the first violation, and $10,000 for any other violation; or 2) "for any violation, 2 percent of the gross sales of cigarettes or smokeless tobacco of the delivery seller during the 1-year period ending on the date of the violation." *Id.* § 377(b). Both of these provisions were challenged by the taxpayers as well in *Gordon. Gordon* , 721 F.3d 638. The D.C. Circuit upheld the district court's conclusion that these sanctions amounted to threats of "substantial and immediate irreparable injury" in the form of a "prospective violation of a constitutional right." *Gordon*, 721 F.3d at 653.

231. 15 U.S.C. § 376a(d) (2012). The PACT Act's definition of the term "state" also includes the Commonwealth of Puerto Rico, or any territory or possession of the United States. *Id.* § 375(11).

232. The PACT Act added Section 1716E to title 18 of the U.S. Code. 18 U.S.C. § 1716E (2012). This provision made all cigarettes and smokeless tobacco "nonmailable and shall not be deposited in or carried through the mails." *Id.* § 1716E(a)(1) (2012). In *Gordon*, the D.C. Circuit affirmed the district court's dismissal of the taxpayer's Fifth Amendment's Equal Protection Clause challenge to this ban. *Gordon*, 721 F.3d at 656. Likewise, in *Red Earth*, the Second Circuit concluded that the district court properly dismissed the taxpayers' equal protection challenge to the mail ban. *Red Earth*, 657 F.3d at 147.

of their level of unease and distress, taxpayers sought injunctive relief from enforcement of the PACT Act's substantive tax provisions.

Without a great deal of inference, it is reasonable to expect that the Marketplace Fairness Act would be challenged under similar circumstances and on similar grounds. Just as the PACT Act, the Marketplace Fairness Act, though on a much larger scale relative to the scope of impacted retailers under the PACT Act, empowers states to reach out-of-state retailers and compel them to collect sales tax. On this basis for comparability, two cases from the U.S. Courts of Appeals, *Gordon v. Holder*, from the D.C Circuit, and *Red Earth LLC v. United States*, from the Second Circuit, serve as proving grounds for the fundamental question that underlies both the PACT Act's and the Market Place Fairness Act's constitutional viability: whether the bounds of due process allow the federal government to compel adherence to state tax collection laws.

This comparative analysis, however, extrapolating from the Courts' analyses of the PACT Act to gauge the viability of the Marketplace Fairness Act, must be qualified on two counts. The first is procedural and though it is mentioned, *supra*, it bears repeating. In both *Gordon* and *Red Earth*, the trial courts responded affirmatively to the taxpayers' petitions for preliminary injunctive relief from tax provisions of the PACT Act which required them to collect and remit state and local excise taxes on out-of-state sales. These conclusions, however, were reached through application of a threshold of proof unique to petitions for preliminary injunctions. Under this standard, a trial court properly grants a motion for preliminary injunctive relief if the moving party demonstrates "(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction."[233] The first part of the second of these requirements—the likelihood of success on the merits question—received the most attention from both the *Gordon* and *Red Earth* trial courts and both courts found that the taxpayers were likely to succeed on the merits of their due process challenges.[234] The D.C. Circuit and the Second Circuit, respectively, then reviewed for abuse of discretion and found none.[235] Together then, these decisions offer insights into the due process validity of the PACT Act, albeit through a somewhat deferential lens—likelihood of success on the merits at the trial level and abuse of discretion on appellate review. This means that lessons gleaned from these opinions informing a discussion on the due process validity of the Marketplace Fairness Act must be somewhat restrained. This notwithstanding, both courts were candid and insightful in their evaluations of

233. *Red Earth*, 657 F.3d at 143.
234. *Gordon*, 721 F.3d at 643; *Red Earth*, 657 F.3d at 142.
235. *Gordon*, 721 F.3d at 645; *Red Earth*, 657 F.3d at 144–45.

the Due Process Clause's impact on the PACT Act and are therefore worth thorough examination.

The second fundamental constraint relates to differences in scope between the two Acts. The PACT Act is narrow in its scope of applicability—it affects only retailers of cigarettes or smokeless tobacco with out-of-state sales.[236] Yet within that range it applies universally. There are no carve-outs or exceptions for certain retailers of cigarettes or smokeless tobacco, whose gross sales, for example, fall below a certain threshold. All such retailers—from the smallest to the largest—must collect and remit state and local excise taxes as required by the consumer's state.[237]

In contrast, the Marketplace Fairness Act serves as a reverse counterpart. Its potential scope of applicability is very broad. It may affect any retailer with out-of-state customers, without regard to industry or commodity. The Marketplace Fairness Act, however, segregates its collection mandate one out-of-state seller from another through the small seller exception.[238] This is a critical distinction from the PACT Act as it ostensibly excludes those remote sellers whose interactions with any given state are most likely to fall short of due process minimum contacts.

These limitations notwithstanding, the PACT Act represents the exclusive iteration of federal legislation which imposes state and local tax collection duties on out-of-state sellers. As such, it is worthwhile to scrutinize *Gordon* and *Red Earth*, in an attempt to forecast the constitutional issues implicated in the more broadly sweeping Market Place Fairness Act.

VI. THE DUE PROCESS CLAUSE AND THE PACT ACT

A. Gordon v. Holder

1. Facts

Even though Robert Gordon did not likely understand the constitutional issues implicated under the PACT Act, he understood the law's immediate ramifications on his tobacco retail store. Gordon considered the PACT Act's collection requirements to be onerous enough to petition the federal courts to prevent their enforcement.[239] On the eve of the PACT Act's effective date, Gordon sought a preliminary injunction against enforcement of

236. *See* Pub. L. No. 111-154, § 1(c)(1).

237. *See* 15 U.S.C. § 376a(d) (2012).

238. S. 743, 113th Cong. § 2(c) (2013).

239. *Gordon*, 721 F.3d at 643. This filing gave rise to *Gordon I*. Gordon v. Holder (*Gordon I*), 632 F.3d 722 (D.C. Cir. 2011).

the Act's tax provisions and mail ban.[240] Because the request came too late to stop the Act from taking effect, the district court denied the motion.[241] Gordon appealed the adverse decision to the D.C. Circuit. The D.C. Circuit remanded to the district court with instruction to consider whether Gordon satisfied the preset factors for obtaining an injunction.[242] On remand, the district court granted the injunction with respect to the PACT Act's tax provisions on due process grounds, but dismissed all other claims.[243] In the interim, while the second appeal was pending at the D.C. Circuit, Gordon closed his tobacco retail establishment.[244]

Gordon's tobacco retail store was physically located in the Alleghany Territory of the Seneca Nation of Indians.[245] Though geographically sited in western New York, Gordon's retail operations were driven primarily by out-of-state purchasers.[246] For example, at its peak, Gordon's business generated two million dollars of gross sales revenues per month.[247] Ninety-five percent of those revenues came from sales to out-of-state customers.[248]

2. Standard of Review

The standard of review for preliminary injunctions emphasizes deference to the trial court. It reflects a premium on the passage of time and acknowledges that such motions are made and granted without full exploration of the underlying facts. On this account, a reviewing appellate court should not disrupt a granted preliminary injunction if reasonable conclusions support the lower court's decision.

This deference notwithstanding, the moving plaintiff bears the burden of showing that an injunction is appropriate under the circumstances.[249] She must demonstrate that (1) success is likely on the merits; (2) that she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in her favor; and (4) that an injunction is in the public

240. *Gordon I*, 632 F.3d at 723.
241. *Id.* at 724.
242. *Id.* at 726.
243. *Gordon*, 721 F.3d at 643.
244. *Id.* The court's basis for concluding that the business closure did not moot the appeal was based largely on Gordon's wife's sworn declaration affirming her and Gordon's intent to reopen their business upon a positive outcome at the appellate level. *Id.*
245. *Id*. at 642.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at 644.

interest.[250] In turn, the reviewing appellate court's standard of review is divided into two branches. The first branch pertains to the district court's "weighing of the four preliminary injunction factors and its ultimate decision to issue or deny [the injunction]."[251] On this question, as touched upon, *supra*, the appellate court reviews the district court's conclusions through the less-scrutinizing "abuse of discretion" lens.[252]

Following the Court's admonition in *Ashcroft v. ACLU*,[253] this level of respect is amplified in circumstances where grounds for the motion implicate the Constitution and the underlying constitutional question is close.[254] The even more deferential *Ashcroft* standard requires the court to uphold the preliminary injunction and remand for trial on the merits if the lower court's analysis of the preliminary injunction factors reflects reasonable conclusions and contains no legal error.[255]

The second branch, though perhaps subsumed in part by the *Ashcroft* standard of review, pertains to the district court's legal conclusions and findings of fact. Legal conclusions are reviewed *de novo* and the findings of fact are reviewed for clear error.[256]

3. Novelty of Constitutional Issues

Given the unsettled ground on which it seemed to be treading, it should come as no surprise that the court began its due process analysis with the bedrock of minimum contacts; that under *Quill* a state may not impose sales tax collection duties on a retailer with whom the state lacks minimum contacts.[257] Gordon's PACT Act challenge, though, exposed an ambiguity in the minimum contacts refrain: "with which sovereign must the taxed entity possess minimum contacts when there is one sovereign that defines and benefits from the tax obligation (in this case, the state or local government), and another that imposes and enforces the obligation (in this case, the federal government)?"[258] Up until the PACT Act, due process-based taxpayer challenges were directed towards state statutes imposing sales tax collection duties on out-of-state retailers. As a consequence, the resulting due process jurisprudence focused on the breadth and reach of a single state sovereign which at once defined, benefited from, and enforced the duty. On the question

250. *Id.*
251. *Id.*
252. *Id.*
253. Ashcroft v. ACLU, 542 U.S. 656 (2004).
254. *Ashcroft*, 542 U.S. at 664–65.
255. *Id.*
256. *Gordon*, 721 F.3d at 644, 655.
257. *Id.* at 641–42.
258. *Id.* at 645.

of minimum contacts, the relevant interactions were between the state and out-of-state seller.

The PACT Act usurped (with the states' blessing) enforcement of the state sales tax collection responsibilities with respect to excise taxes on tobacco sales. This muddled the minimum contacts analysis by presenting a third party with which all U.S. retailers have minimum contacts: the federal government.

a. With Which Sovereign Are Minimum Contacts Required?

i. The Government's Argument

To resolve the ambiguity, the government read *Quill*'s minimum contacts language with liberty to infer that minimum contacts are analyzed between the out-of-state seller and the sovereign that imposes and enforces the collection duty—here the federal government.[259] To support this assertion beyond conjecture, the government cited two pieces of legislation: the Ashurst-Sumners Act[260] and the Webb-Kenyon Act,[261] both of which purportedly exhibited examples of Congress compelling interstate actors to comply with state-defined duties.

The Ashurst-Sumners Act prohibited transportation of "interstate or foreign commerce goods made by convict labor into any State where the goods are intended to be received, possessed, sold, or used in violation of its laws."[262] The Webb-Kenyon Act prohibited interstate transportation of all liquor "intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of the destination state."[263] The Court upheld both Acts in *Kentucky Whip & Collar v. Illinois Central Railway. Co.*,[264] and *Clark Distilling Co. v. Western Maryland Railway. Co.*,[265] respectively. The Court's rationale for endorsing Congress's power to promulgate laws that enforce state duties was that the statutes were backed by Congress's will, not the states'.[266]

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259. *Id.* at 646.

260. 18 U.S.C. §§ 1761–62. 49, Stat. 494 (1935); *Gordon*, 721 F.3d at 646 (citing Ky. Whip & Collar Co. v. Ill. Central Railroad Co., 299 U.S. 334, 343 (1937)).

261. 37 Stat. 699 (1913); *Gordon*, 721 F.3d at 646 (citing Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S 311, 321 (1917)).

262. *Ky. Whip & Collar Co.*, 299 U.S. at 343.

263. *Clark Distilling Co.*, 242 U.S at 321.

264. *Ky. Whip & Collar Co.*, 299 U.S. at 353.

265. *Clark Distilling Co.*, 242 U.S. at 332.

266. *Ky. Whip & Collar Co.*, 299 U.S. at 347–52; *Clark Distilling Co.*, 242 U.S. at 326.

Likewise, according to the government, Congress's will (as expressed in the PACT Act) "converts the state taxes into federal duties."[267] As federal duties, then, so long as the out-of-state seller has minimum contacts with the federal government, the PACT Act does not violate due process.

The D.C. Circuit was not willing to go as far as the government in its interpretation of minimum contacts. It confirmed the Court's logic in relation to the Ashurst-Sumners and the Webb-Kenyon Acts, but disqualified the Court's reasoning as dispositive to the question of which sovereign is owed minimum contacts on account of the fact that the legislative challenges were brought under the Commerce Clause, not the Due Process Clause.[268] Read in this light, the Court correctly ruled that Congress, through its plenary Commerce Clause power, may authorize state laws that regulate and consequently burden interstate commerce. This did not, however, resolve the PACT Act's potential due process infraction.

ii. Gordon's Argument

All parties—the government, Gordon, and the D.C. Circuit—agreed on a preliminary due process step: that analysis of the issue begins with Court's holding in the *Quill* case. In contrast, however, to the government's argument by analogy to other cases involving federally mandated adherence to state defined laws, Gordon suggested that the *Quill* decision, itself, without any logical calisthenics, identified the sovereign requiring minimum contacts.

In *Quill*, the Court acknowledged that even while Congress may authorize state actions that burden interstate commerce, "it does not similarly have the power to authorize violations of the Due Process Clause."[269] In connection with this pronouncement, the Court in *Quill* further explained that "the Due Process Clause requires minimum contacts between the taxing sovereign and the taxed entity."[270] For Gordon, the taxing sovereign referred to here is the state or local government and consequently minimum contacts must exist between the state and local government and the out-of-state seller.

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267. *Gordon*, 721 F.3d at 646.

268. *Id.* The D.C. Circuit acknowledged in footnote 6 of the opinion that the parties in both *Kentucky Whip & Collar* and *Clark Distilling Co*. brought due process challenges. *Id.* n.6; *See Kentucky Whip & Collar Co.*, 299 U.S. at 352; *Clark Distilling Co.*, 242 U.S. at 320. Those challenges were not, however, based on minimum contacts.

269. *Gordon*, 721 F.3d at 647 (quoting *Quill*, 504 U.S. at 305).

270. *Id.* (quoting *Quill*, 504 U.S. at 306).

iii. Holding

The D.C. Circuit was unwilling to read as much into the Court's pronouncement in *Quill* as Gordon—at least not in the context of the PACT Act. While *Quill*, on its face clearly requires minimum contacts with the taxing sovereign, it does not aid in identification of the taxing sovereign where imposition of the duty is defined by the benefiting state and enforced by the federal government. Moreover, the PACT Act does not grant federal authorization to states to compel out-of-state sellers to collect state taxes (which would, in the D.C. Circuit's estimation, violate due process minimum contacts implicitly); rather it creates a federal duty under which out-of-state sellers must collect state taxes.[271] For the D.C. Circuit, this subtle distinction demonstrated the novelty of the issue and undercut Gordon's exclusive reliance on *Quill* to resolve the issue.[272]

With no discernible direction from the courts, the D.C. Circuit ventured into what it perceived to be uncharted constitutional waters. Even while operating under the deferential *Ashcroft* standard of review, the D.C. Circuit carefully examined due process principles and signaled that the PACT Act was constitutionally vulnerable.

The D.C. Circuit began with due process first principles that "the Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by exercise of lawful power."[273] The D.C. Circuit in *Quill* identified dual elements of this lawful power to require

> some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" and a "rational relationship between the income attributed to the State for tax purposes" and "values connected with the taxing state.[274]

As to the first element, the D.C. Circuit inferred that the fundamental justification of minimum contacts stems from democratic legitimacy: "whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him."[275] Democratic legitimacy is achieved, then, through reliance on due process underpinnings of fair

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271. *Id.* at 648.

272. *Id.*

273. *Id.* (quoting *Nicastro*, 131 S. Ct. 2780, 2789). A brief reference of the first principles of minimum contacts can be found in footnote 7 of the D.C. Circuit's opinion.

274. *Id.* (quoting *Quill*, 504 U.S. at 306).

275. *Id.* at 648–649 (citing *Quill*, 504 U.S. at 312).

warning and purposeful availment.[276] These fundamental principles predate *Quill*, and originate in *International Shoe*.[277] There the Court suggested that the fair warning prescribed by the Due Process Clause presupposes an agreement that as states identify conduct that will be taxed, and as out-of-state persons engage in that conduct, out-of-state persons impliedly agree to be taxed.[278] In *Quill*, the Court applied these principles to reason that

> if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State" and "engage[s] in continuous widespread solicitation of business within a state," then it "clearly has 'fair warning' that [its] activities may subject [it] to the jurisdiction of a foreign sovereign.[279]

On the basis of fair warning and purposeful availment, the D.C. Circuit found traction to support the argument that the Due Process Clause requires minimum contacts with the state that defines the duty, even while minimum contacts exist between the out-of-state seller and the federal government. Application of these due process principles in this light tilted the analysis in the taxpayer's favor. "Without fair warning of which state and local legislatures will be constructing his tax burden, Gordon would lose a critical safeguard at the heart of democratic legitimacy."[280]

The D.C. Circuit's analysis of the second element of *Quill*—that a rational relationship should exist between the income attributed to the state for tax purposes and values connected with the taxing state—only further supported the taxpayer's argument to uphold the injunction.[281] The rational relationship inquiry suggests that due process requires the state to identify a mutually beneficial exchange between the out-of-state retailer and the state.[282] That is, the state must show that the out-of-state seller's interactions with the

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276. *See* i*d.* at 649.

277. *Int'l Shoe*, 326 U.S. at 310. Fair warning themes also informed the Court's reasoning in the headwater case on personal jurisdiction, *Pennoyer v. Neff*. 95 U.S. 714 (1878). There the Court proffered that "the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Id.* at 733.

278. *Int'l Shoe*, 326 U.S. at 318.

279. *Gordon*, 721 F.3d at 649 (quoting *Quill*, 504 U.S. at 307–08).

280. *Id.* at 650.

281. *Id.* at 648–51.

282. *Id.* at 651 (quoting *Nat'l Bellas Hess, Inc.*, 386 U.S. at 757).

state were significant enough to benefit from the broad range of protections and services offered to participants in the state's marketplace. [283] For example, has the state provided a forum for collecting debts from buyers? Has the state provided trash services for shipping cartons?[284]

The Court in *National Bellas Hess, Inc.* framed this issue as a question: has the state given anything "for which it can ask return?"[285] In other words, again with a nod to *International Shoe*, did the taxing state provide benefits and protections to the out-of-state seller at a level that justifies the tax it receives?[286] For the Court, this second element represented the second rung of a sequential relationship to detecting and gauging minimum contacts. As such, the minimum contacts deficiency already identified signaled that the state had offered no services or protections to justify the imposition of tax collection duties on an out-of-state seller. That the federal government brokered the imposition of the tax did not change this fundamental truth about the relationship between the out-of-state seller and the state.[287]

On these separate, but related lines of reasoning, the D.C. Circuit concluded that the district court did not abuse its discretion when it found that the taxpayer was likely to succeed on this segment of his due process violation claim.[288] Successively, the D.C. Circuit cautioned that it was not deciding the issue of which sovereign requires minimum contacts.[289] Rather, it found no error in what it considered to be the district court's reasonable conclusions, and therefore, the injunction was proper.[290]

b. What Level of Minimum Contacts is Required?

With the question of minimum contacts considered, the D.C. Circuit then looked to the lowest possible threshold at which a "delivery sale," as defined under the PACT Act, could potentially establish minimum contacts. Succinctly put, is a single sale enough to establish minimum contacts with a given state?

The government argued in the alternative, that if in fact minimum contacts must be directed to the states rather than the federal government, then

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283. *See Nat'l Bellas Hess, Inc.*, 386 U.S. at 757.

284. *Gordon*, 721 F.3d at 65. Both of these examples are posited by the D.C. Circuit in *Gordon* as instances of protections or services that accrue towards due process.

285. *Nat'l Bellas Hess, Inc.*, 386 U.S. at 756.

286. *Int'l Shoe*, 326 U.S. at 318.

287. *See Gordon*, 721 F.3d at 651.

288. *Id.* at 652.

289. *Id.* at 651.

290. *Id.* at 652.

a single sale is sufficient to satisfy due process.[291] This proposed line of reasoning represents what may be the axis point of viability for the PACT Act. Collection responsibilities under the PACT Act do not quantitatively discriminate. An out-of-state seller with a single sales transaction into another state is required to collect and remit the corresponding state excise tax on an equivalent basis to an out-of-state seller with thousands of sales into the same state.[292]

The point at which interaction between a state and an out-of-state seller satisfies minimum contacts is unclear. No small part of the uncertainty may be ascribed to the Court itself and its fluid consideration of the Due Process Clause between *National Bellas Hess, Inc.* and *Quill.*

National Bellas Hess, Inc. established physical presence as a due process prerequisite to a state's assertion of taxing jurisdiction.[293] This ruling, however, was the product of a compounded Due Process Clause and Commerce Clause analysis which left unclear which constitutional provision was the primary impetus for physical presence. The *Quill* decision, clarified this question and retained a physical presence requirement under the Commerce Clause, but rescinded any such requirement under the Due Process Clause—opting instead for the more broadly-conceived purposeful direction and minimum contacts analysis.[294]

The idiom, "give an inch and they'll take a mile"[295] seems to somewhat describe the states' mindsets following *Quill*. If the analysis shifted with the passage of time, why might it not shift again?

This is precisely the point at which the discomfort of treading into uncharted waters became too much to bear for the D.C. Circuit—at least from the posture of reviewing the appropriateness of the preliminary injunction. The D.C. Circuit acknowledged that the Court in *Quill* overruled *National Bellas Hess, Inc.* to the extent it held physical presence was required under the Due Process Clause.[296] It also reaffirmed that the Court's due process analysis in *Quill* is comparable to the Court's personal jurisdiction line of cases calling for minimum contacts, and thus turns on purposeful direction at a level that is consistent with traditional notions of fair play and substantial justice.[297] On this question in *Quill*, given the high volume of business with North Dakota customers, the Court comfortably found the taxpayer sufficiently and

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291. *Id.* at 651–52.

292. *See* 15 U.S.C. 376a(a) (2012).

293. *Quill*, 504 U.S. at 306–307.

294. *Id.* at 308.

295. CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 247 (1997).

296. *Gordon*, 721 F.3d at 651.

297. *Id.* at 651–52.

purposefully directed itself to North Dakota and that imposition of sales tax collection duties did not violate due process. The Court, then, provided a textbook example of when "the magnitude of those contacts is more than sufficient for due process purposes"—$1 million in gross sales revenue and 3,000 in-state customers.[298] The Court reached this conclusion in *Quill*, however, without providing insight on the threshold question of what level of contacts rises to the level of minimum contacts.

The D.C. Circuit was satisfied to acknowledge that "[t]he Supreme Court has never found 'that a single isolated sale . . . is sufficient' to establish minimum contacts," while remanding for further factual elaboration on this and other close constitutional questions.[299] Yet while concluding and underscoring that it was not resolving the question, the D.C. Circuit raised the possibility that in an era in which the Internet serves as the prevailing means of transacting interstate sales, "a single sale establishes 'minimum contacts.'"[300]

In the end, with no satisfactory answer to the novel constitutional issues detected, the D.C. Circuit upheld the preliminary injunction. In so doing, the D.C. Circuit emphasized that this was not a final determination with respect to due process, but an invitation to the lower court to inquire further into the facts.[301]

B. Red Earth LLC v. United States

Three days before Robert Gordon petitioned the Federal District Court for the District of Columbia for injunctive relief from the PACT Act, Aaron Pierce, the owner of Red Earth, LLC, a tobacco retailer, made an identical request in the Western District of New York.[302] That court granted the petition and the Second Circuit affirmed.[303]

Both taxpayers in *Gordon* and *Red Earth LLC* sought injunctive relief from enforcement of the same provisions of the PACT Act.[304] Both trial courts found grounds to support the injunction on the due process claim with respect

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298. *Quill*, 504 U.S. at 302–308.

299. *Gordon*, 721 F.3d at 652. The D.C. Circuit here takes the Second Circuit at its word in *Red Earth*, as it quoted *J. McIntyre v. Nicastro*. *Red Earth*, 657 F.3d at 145. The validity of this assertion is explored, *infra*, in Part VI, Section D.

300. *Gordon*, 721 F.3d at 652.

301. *Id.*

302. *Red Earth*, 657 F.3d at 141.

303. *Id.*

304. *See id.*; *Red Earth*, 657 F.3d at 142. Those provisions were 15 USC 376a(d)(1) (the excise tax collection duty), 18 USC 1716E(a)(1) (the mail ban), and 15 USC 376a(b) and (c) (the record keeping requirement).

to excise tax collection duties, but dismissed other claims, including the taxpayers' challenges to the ban on using the U.S. Postal Service to deliver tobacco products.[305]

These similarities were not coincidental. In fact, in some respect, Red Earth's petition gave rise to and supported Robert Gordon's petition. Up until Robert Gordon decided to seek separate relief from terms of the PACT Act, his tobacco business enjoyed protective relief petitioned for and obtained using *Red Earth LLC* as support. [306] *Red Earth LLC* represented a consolidated action, consisting of Red Earth, LLC, and members of the Seneca Free Trade Association, of which Robert Gordon's business was part.[307] Robert Gordon opted to seek separate relief in the District Court for the District of Columbia when the mail order ban, which was upheld in *Red Earth*, became too much of a strain on business.[308]

The most striking difference between the D.C. Circuit in *Gordon* and the Second Circuit in *Red Earth LLC* is the depth of their analyses in affirming the respective lower courts' decisions. While both courts engaged the question, the Second Circuit in *Red Earth* was content to frame the issue and recite applicable law in order to illustrate the nature of the question. The D.C. Circuit in *Gordon* opted for a more thorough analysis which ended only at the cusp of settled due process jurisprudence.

Even so, *Red Earth LLC* is notably instructive on the second question addressed in *Gordon*, with respect to whether a single sale produces sufficient interaction between a state and out-of-state seller to create minimum contacts. For example, citing the district court, the Second Circuit in *Red Earth LLC*, observed that the PACT Act '"automatically subjects' delivery sellers to the laws of the forum state 'notwithstanding the presence or absence of any other contacts with that forum."'[309] This remark delicately exposes the PACT Act's potentially fatal flaw: assuming that the out-of-state seller must purposefully avail itself of the state (not the federal government's) economic market, associated protections, and services, the PACT Act provides no buffer for taxpayers whose interactions with a state barely move the needle. That is, an out-of-state seller who sells a single carton of cigarettes to one customer is required to collect and remit taxes on that sale, without any additional interaction with the state. The Second Circuit (again citing the federal district

305. *See Gordon*, 721 F.3d at 642; *Red Earth*, 657 F.3d at 142.

306. *Gordon*, 721 F.3d at 642.

307. The Seneca Free Trade Association is a non-profit organization whose purpose is to support licensed businesses in the Seneca Nation. *Red Earth*, 657 F.3d at 142. Its membership includes at least 140 tobacco retailers. *Id.*

308. *Gordon*, 721 F.3d at 643.

309. *Red Earth*, 657 F.3d at 144 (quoting Red Earth LLC v. United States, 728 F. Supp. 2d 238, 251 (W.D.N.Y. 2010).

court) suggested that this was tantamount to Congress acting impermissibly "without regard to the constraints imposed by the Due Process Clause."[310]

Red Earth LLC also highlighted the federal courts' aversion for entertaining threshold questions related to minimum contacts and whether a single sale has the capacity to satisfy minimum contacts. To this, however, the Second Circuit noted (a proposition also adopted by the D.C. Circuit in this posture) that the "Supreme Court has never found 'that a single isolated sale . . . is sufficient"' to create minimum contacts and satisfy due process.[311] Moreover, cast in contrasting light, the Supreme Court has not held that "a single sale into a state is insufficient for due process purposes, although its 'previous holdings suggest' as much."[312]

The Second Circuit's commentary here, though diminutive on account of the broad berth created under the abuse of discretion standard of review, stems from the case *J. McIntyre Machinery, Ltd. v. Nicastro*,[313] a products-liability case in the Court's Due Process Clause personal jurisdiction line of cases. Given the Court's comparison by analogy to personal jurisdiction cases in *Quill*, it seems appropriate to turn to *Nicastro*, again by analogy, in an attempt to extract instruction regarding the question on which both the PACT Act and the Marketplace Fairness Act may hinge: whether a single sale satisfies minimum contacts under the Due Process Clause.

C. J. McIntyre Machinery, Ltd. V. Nicastro

1. Justice Kennedy's Plurality Opinion

Nicastro is a transnational case gauging the reach of a specific state's judicial jurisdiction. The impetus for the case was a purportedly defective three-ton metal-shearing machine, owned by Curcio Scrap Metal, of Saddle Brook, New Jersey.[314] Robert Nicastro, while performing employment-related activities, seriously injured his hand (four fingers were severed) while using the machine and brought a products-liability action against its manufacturer, J. McIntyre Machinery, Ltd., a United Kingdom Corporation.[315] Nicastro brought suit in New Jersey state court.[316]

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310. *Id.* (quoting *Red Earth LLC*, 728 F. Supp. 2d at 252).

311. *Red Earth*, 657 F.3d at 145 (quoting *Nicastro*, 131 S. Ct. at 2792 (Breyer, J., concurring)).

312. *Id.*

313. *Nicastro*, 131 S. Ct. 2780.

314. *Id*. at 2795 (Ginsburg, J. dissenting).

315. *Id*. at 2786, 2795.

316. *Id.*

J. McIntyre Machinery, Ltd. petitioned the Court for relief from the New Jersey Supreme Court's decision concluding that J. McIntyre Machinery, Ltd. was subject to New Jersey's judicial jurisdiction.[317] The New Jersey Supreme Court's analytical path depended, in part, on the stream of commerce rationale announced in Justice Brennan's plurality opinion in *Asahi Metal Industry Co. v. Superior Court of California Solano City*.[318]

Justice Brennan's stream of commerce analysis considers the fairness and reasonableness of asserting judicial jurisdiction over a defendant, taking into account the movement of goods from manufacturers through distributors to consumers and the foreseeability of being called to answer to the courts of the state forum.[319] Justice Brennan reasoned that in circumstances where the manufacturer is aware that the final product is being marketed in a particular forum state, "the possibility of a lawsuit there cannot come as a surprise."[320]

The Supreme Court of New Jersey applied Justice Brennan's logic under the stream of commerce analysis to conclude that New Jersey's courts could exercise jurisdiction over J. McIntyre Machinery, Ltd.[321] To reach this conclusion, the court suggested that if a manufacturer "knows or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states," then due process allows for the assertion of jurisdiction.[322]

The New Jersey Supreme Court's reliance on Justice Brennan's stream of commerce approach in *Asahi* was somewhat perilous given that it represented the view of only four justices of the court.[323] The counterpoint to Justice Brennan's stream of commerce analysis was registered in Justice O'Connor's opinion which also garnered only a plurality of the Justices' votes.[324] She rejected Justice Brennan's stream of commerce analysis as a means for developing a substantial connection between the defendant and the

317. *See id*. at 2785.

318. Asahi Metal Indus. Co. v. Superior Court of Cal. Solano City, 480 U.S. 102 (1987).

319. *Nicastro*, 131 S. Ct. at 2788 (quoting *Asahi*, 480 U.S. at 117).

320. *Id.*

321. *See id*. at 2786.

322. Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 76–77, 987 A.2d 575, 592 (2010).

323. Justice Brennan's concurrence was joined by Justices Brennan, White, Marshall, and Blackmun. *Asahi*, 480 U.S. at 116.

324. Justice O'Connor delivered the opinion of the Court, but only as to Parts I and II-B. *Asahi*, 480 U.S. at 105. Only a plurality of the Justices joined Justice O'Connor's retort to Justice Brennan's Stream of Commerce theory in Parts II-A and III. *Id.*

forum state that would satisfy due process.[325] To support this conclusion, she posited that minimum contacts cannot be imposed on a defendant unless the defendant purposefully directs its actions toward the forum State.[326] This type of purposeful direction cannot be inferred from placing a product into the stream of commerce alone.[327] It requires additional interaction between the defendant and the forum state.[328]

In many respects, *Nicastro* represents the sequel to *Asahi*, in that it also assesses the jurisdictional capacity of state courts to reach foreign defendants who interact with the state through the stream of commerce. It was also an opportunity for the Court to rectify the confusion created in the wake of *Asahi*, which left courts with less than adequate guidance for assessing minimum contacts of a transnational defendant in relation to a state forum. The Court, however, in step with *Asahi*, was unable to reach an agreement on the appropriate gauge for minimum contacts.[329]

Justice Kennedy's plurality opinion rejected the New Jersey Supreme Court's use of the stream of commerce rationale as a valid basis for jurisdiction over J. McIntyre Machinery, Ltd. At the same time, Justice Kennedy acknowledged that the Court's imprecision and lack of clarity on the issue in *Asahi*, could be responsible in part for what he perceived to be the state court's error.[330]

The centerpiece of Justice Kennedy's analysis was the notion of lawful judicial power and purposeful availment as a precursor to that power. According to Justice Kennedy, Justice Brennan's stream of commerce analysis depended too heavily on considerations of fairness and foreseeability while discounting notions of sovereign authority. For Justice Kennedy, making foreseeability the touchstone of jurisdiction, rather than purposeful availment, undermined the notion of lawful judicial power.[331] Justice O'Connor's plurality opinion focusing on the defendant's actions towards the state—rather

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325. *See Asahi*, 480 U.S. at 112.

The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Id.*

326. *See id.*

327. *See id.*

328. *Id.*

329. *Nicastro*, 131 S. Ct. at 2784.

330. *Id.* at 2786.

331. *Id.* at 2789.

than fairness and foreseeability—demonstrated for Justice Kennedy, a more appropriate assessment of lawful judicial power.

In application, Justice Kennedy concluded that J. McIntyre Machinery, Ltd. had not purposefully directed its activities at New Jersey.[332] That is, Nicastro could not identify any facts that showed J. McIntyre Machinery, Ltd.'s purposeful availment of the New Jersey market.[333] It had no office in New Jersey; nor did it pay taxes or own property in New Jersey.[334] Its only contact with the state was that one of its machines ended up in New Jersey.[335] In other words, the New Jersey Supreme Court's opinion rested on a stream of commerce analysis because there was no closer connection between J. McIntyre Machinery, Ltd. and New Jersey. According to Justice Kennedy, reliance on the stream of commerce analysis was not an appropriate measure of minimum contacts and purposeful availment.[336] On this account, the Due Process Clause rendered the New Jersey Supreme Court "without power to adjudge the rights and liabilities of J. McIntyre."[337]

2. Justice Ginsburg's Dissent

Justice Ginsburg came to the defense of Justice Brennan's stream of commerce analysis in her dissent, joined by Justices Sotomayor and Kagan.[338] In her estimation, Justice Kennedy fell prey to the nuances and subtleties of the Due Process Clause without properly accounting for the patently unjust result. In utter dismay, Justice Ginsburg surmised that the Court's decision was tantamount to unwinding modern long-arm statutes, which prevent a manufacturer from avoiding a particular jurisdiction's judicial system by working through a distributor.[339]

As if reciting counts in an indictment, Justice Ginsburg carefully detailed J. McIntyre Machinery, Ltd.'s purposeful steps towards the U.S. market. Though a United Kingdom Corporation, with headquarters in Nottingham, England, J. McIntyre Machinery, Ltd. held a U.S. patent on its technology.[340] In literature detailing the machine that injured Nicastro, J. McIntyre Machinery, Ltd. highlighted its versatile design which guaranteed

332. *Id.* at 2790.
333. *Id.*
334. *Id.*
335. *Id.*
336. *See id.* at 2791.
337. *Id.*
338. *Id.* at 2794.
339. *Id.* at 2795.
340. *Id.* It also held a UK Patent. *Id.*

serviceability in any location.[341] Instructions included with the manual urged customers to become familiar with, among other standards, the American National Standards Institute Regulations for the use of Scrap Metal Processing Equipment.[342]

Nicastro's injury took place during the course of employment related activities in New Jersey, a known "hotbed of scrap-metal businesses."[343] In the mid-1990s, Nicastro's employer became familiar with J. McIntyre Machinery, Ltd.'s line of equipment at the Institute of Scrap Metal Industries (ISRI) convention in Las Vegas, NV, where J. McIntyre Machinery, Ltd. had been an exhibitor since 1990. [344] J. McIntyre Machinery, Ltd. acknowledged that its purpose in presenting at ISRI conventions was to reach potential customers from "anywhere in the United States."[345]

McIntyre Machinery America, Ltd. served as McIntyre's American distributor.[346] Though similar in name, the two companies were separate and distinct entities, with no commonality of ownership.[347] McIntyre Machinery America, Ltd.'s purpose was to open the U.S. market by promoting J. McIntyre Machinery, Ltd's products in the United States. Though separate entities from one another, McIntyre Machinery America "looked to McIntyre UK for direction and guidance" and the New Jersey Supreme Court noted that the two companies acted "closely in concert with each other."[348]

Justice Ginsburg considered J. McIntyre Machinery, Ltd.'s regular attendance and exhibitions at ISRI conventions alone a purposeful step to reach customers for its products in the United States.[349] All other contacts, including J. McIntyre Machinery, Ltd.'s use of McIntyre Machinery America as a conduit to U.S. customers, made New Jersey a "forum entirely appropriate for adjudication of [Nicastro's] claim."[350] Or casting the question in light of Justice Brennan's "fairness and foreseeable" doctrine, Justice Ginsburg inquired, "Is it not fair and reasonable . . . to require the international seller to defend at the place its products cause injury?"[351] J. McIntyre Machinery, Ltd.

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341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at 2796.
346. *Id.*
347. *Id.*
348. *Id.* at 2797.
349. *Id.*
350. *Id.*
351. *Id.* at 2800. In connection with this inquiry, Justice Ginsburg also posed the following questions:

"'purposefully availed itself' of the United States market . . . not a market in a single state."[352] In so doing, it "availed itself of the market of all States in which its products were sold by the exclusive distributor."[353]

By no means is *Nicastro* a direct analogue to the due process issues implicated by the federal imposition of state tax collection duties on out-of-state sellers. This should not, however, inhibit its use as a guide post for due process principles. After all, *International Shoe* was not perfectly comparable to *Quill*. The case provides certain glimpses into the murky question of minimum contacts thresholds.

Before considering these implications, an additional stepping stone in the path of personal jurisdiction due process, *McGee v. International Life Insurance Co.*,[354] deserves a measure of attention on the critical question of whether a single sale into a state may satisfy minimum contacts. *McGee* responds to this question in the context of whether a state court's judicial jurisdiction can reach an out-of-state insurance company. Both the D.C. Circuit in *Gordon*, and the Second Circuit in *Red Earth LLC*, stopped short of considering this question, yet, for reasons described, *infra*, its answer carries significant meaning for the viability of the PACT Act and the Marketplace Fairness Act as both conceivably impose sales tax collection duties at a single-sale threshold.

D. McGee v. International Life Insurance Co.

In 1944, Lowell Franklin purchased a life insurance policy from Empire Mutual Insurance Company, an Arizona corporation, and named his mother, Lulu B. McGee, beneficiary.[355] Four years later, International Life Insurance, a Texas Corporation, assumed Empire Mutual's insurance obligations.[356] In connection with the new contract, International Life Insurance mailed a reinsurance certificate to Franklin in California.[357] In

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Do not litigational convenience and choice-of-law considerations point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States? Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey? *Id.* at 2800–01.

352. *Id.* at 2801.

353. *Id.*

354. *McGee*, 355 U.S. at 220.

355. *See McGee*, 355 U.S. at 221–22.

356. *Id.* at 221.

357. *Id.*

response, Franklin accepted the terms of the new policy and remitted premium payments to the Texas insurer's office until his death in 1950.[358] Upon Franklin's death, Ms. McGee made a claim against the insurance policy supported by proofs of death.[359] International Life denied the claim on the contention that Franklin had committed suicide.[360]

Ms. McGee filed suit in California state court in order to compel International Life's payout under the contract.[361] The State of California asserted jurisdiction over International Life on the basis of a state statute which imposes jurisdiction on all insurance contracts with residents of the state, "even if they cannot be served with process within its borders."[362] The California trial court entered judgment against International Life.[363] With no assets in California against which to enforce the judgment, Ms. McGee brought the California judgment to the Texas court system for enforcement.[364] The Texas courts found that the judgment was void for lack of proper service.[365] International Life's service of process was via registered mail at its Texas address.[366] The Texas court found that service of process outside the state of California was invalid under the Due Process Clause.[367]

The Court acknowledged that the Due Process Clause creates "some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries."[368] Yet in these circumstances, the California court's assertion of jurisdiction was proper.

The Court acknowledged that where the line falls for measuring constitutional judicial power was a somewhat enigmatic question. Previous standards of "consent," "doing business" and "presence" had all been abandoned with the advent of *International Shoe*, which called for minimum contacts with a state, such that maintenance of a suit does not offend "traditional notions of fair play and substantial justice."[369] After considering

358. *Id.* at 221–22.
359. *Id.* at 222.
360. *Id.*
361. *See id.* at 221.
362. *Id.*; *See* Cal. Insurance Code §§ 1610–1620 (1953).
363. *McGee*, 355 U.S. at 221. International Life was not served with process in California. Rather it was served at its principal place of business in Texas. *Id.*
364. *Id.*
365. *Id.*
366. *Id.* at 221.
367. *Id.*
368. *Id.* at 222.
369. *Id.*

the nature of International Life's contacts with California, the Court concluded that the California courts properly asserted jurisdiction.[370]

It is critical at this point to note the limited nature of International Life's contacts with California. It had no office or agent in California.[371] Apart from the single insurance policy with Franklin, it did not solicit or do business in California with any other customer. In all, International Life's contacts were limited to its mail correspondence with Franklin between 1948 and 1950. These contacts entailed sending Franklin a reinsurance certificate and receiving premium payments. Yet under the Court's assessment of *International Shoe's* minimum contacts, that was enough.

The Court reconciled its conclusion on the basis of a "fundamental transformation of our national economy"; that it was not uncommon for commercial transactions to "touch two or more States and . . . involve parties separated by the full continent."[372] Thus given the increase in the amount of business conducted by mail across state lines, and the fact that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,"[373] the Court found that the Due Process Clause did not preclude California's courts from entering judgment against International Life.

In terms of minimum contacts, the Court found that the California suit was "based on a contract which had substantial connection with that State."[374] For example, it was delivered in California, it insured a California resident's life, and premiums were paid from California.[375] Taken in combination, these contacts satisfied due process and validated California's jurisdiction.

This case stands in sharp contrast to *Nicastro* and undermines Justice Breyer's assertion in his concurring opinion that "[n]one of our precedents find that a single isolated sale . . . is sufficient" for asserting jurisdiction.[376] *McGee* seems to come close to that. International Life's contacts with California were scant: a single contract with a single customer. Yet that was enough for the California courts to assert jurisdiction over the Texas corporation. Even more telling: the Court's justification for following a perceived trend toward expanding state court jurisdiction over out-of-state corporations and nonresidents was the national marketplace in 1957 wherein sales between parties on opposite sides of the continent were more and more commonplace.

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370. *Id.* at 223.

371. *Id.* at 222. Nor did Empire Mutual have an office in California. *Id.*

372. *Id.* at 222–23.

373. *Id.* at 223.

374. *Id.*

375. *Id.*

376. *Nicastro*, 131 S. Ct. at 2792. Justice Breyer may view *McGee* as an example of an ongoing business relationship and not a single isolated sale.

How would Chief Justice Warren perceive today's online marketplace? Following his line of reasoning, would the Due Process Clause be a barrier at all to state court jurisdiction? Would even a single sale be required? Could purposeful availment take place through a party's website which is accessible in all 50 states? Surely at some point, the national marketplace notwithstanding, the Due process Clause must engage. With extrapolation from *Gordon*, *Red Earth LLC*, *Nicastro*, and *McGee*, what follows is an attempt to identify where that point exists in relation to out-of-state sellers and the Marketplace Fairness Act.

VII. THE DUE PROCESS CLAUSE AND THE MARKETPLACE FAIRNESS ACT

The remainder of this article presents alternative analyses related to the Marketplace Fairness Act's constitutional legitimacy under the Due Process Clause. The first analysis presents arguments suggesting that the Marketplace Fairness Act, in the form in which it was passed in the Senate, does not withstand due process scrutiny. The second examination makes a case for the Marketplace Fairness Act's due process validity.

In terms of analytical sequence, two questions are considered. First, does the Due Process Clause require minimum contacts between the state or local taxing authority and the out-of-state seller, even when the federal government is the source of the seller's duty to collect taxes? And second, if due process requires minimum contacts with the state or local taxing jurisdiction, does a single delivery sale to a buyer in that jurisdiction create minimum contacts? Word-for-word, these "substantial and novel constitutional questions" are borrowed from the D.C Circuit's evaluation in *Gordon* of the constitutional viability of the PACT Act. Conveniently, they would apply identically and with equal weight if the Marketplace Fairness Act becomes law.

A. An Argument Against Due Process Validity

1. With Which Sovereign is Minimum Contacts Required: The State or the Federal Government?

The D.C. Circuit in *Gordon* expanded on the direction of minimum contacts by clearly marking the distinctions and fundamental differences between the sovereign that benefits from the tax and the sovereign that imposes the taxing duty. Traditionally, taxes are laid by a single sovereign that benefits from their collection. The Marketplace Fairness Act disconnects benefit from duty as the state defines and benefits from the collection of a sales tax which is enforced by federal mandate.

The government in *Gordon* urged the court to measure minimum contacts between the out-of-state seller and the sovereign imposing the collection duty.[377] Under the PACT Act and the Marketplace Fairness Act, that sovereign is the federal government. To support this argument, the government cited two cases in which the Court upheld federal laws which required adherence to state-defined duties. On this basis, the government contended that because Congress's will converts the state tax collection obligation into a federal mandate, minimum contacts are only required between the out-of-state seller and the federal government.

The D.C. Circuit seemed unpersuaded. On concerns of lawful power, the precursors of which are: '"some definite link, some minimum connection, between the state and the person, property, or transaction it seeks to tax,' and a rational relationship between 'the income attributed to the State for tax purposes' and 'values connected with the taxing state,"' the court intimated that measure for minimum contacts is between the benefiting state and the out-of-state seller.[378] After all, "without fair warning of which state and local legislatures will be constructing [the] tax burden," an out-of-state seller "would lose a critical safeguard at the heart of democratic legitimacy."[379]

The D.C. Circuit, however, did not extend its analysis to consider potential ramifications of measuring minimum contacts between the out-of-state seller and the federal government. For example, in what circumstances would an out-of-state seller not have minimum contacts with the federal government? All domestic sellers have minimum contacts with the federal government and to some degree, enjoy the protections and services of the federal government and the U.S. market. If all sellers have minimum contacts, then what protections remain under the Due Process Clause? Deliberation over whether an out-of-state seller has a minimum connection with the federal government effectively relegates the Due Process Clause to nothing more than a tick-mark.[380] Could the Due Process Clause really be marginalized by merely shifting the duty to collect the tax to the federal government from the states?

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377. *Gordon*, 721 F.3d at 646.

378. *Id.* at 648.

379. *Id.* at 650.

380. This is not to say that if an analysis is easy to satisfy, it is necessarily wrong. It simply assumes that while the Court in *Quill* was willing to redefine due process minimum contacts as something less than physical presence, it retained some level of interactive requirement between the taxing authority and the out-of-state seller which goes beyond an inconsequential formality. It is acknowledged that if minimum contacts were measured with the federal government, the Due Process Clause would still provide a measure of protection for foreign sellers. The Marketplace Fairness Act's definition of a "remote seller" does not distinguish domestic and foreign remote sellers. *See* S. 743, 113th Cong., § 4(6) (2013).

This fatalistic line of reasoning is not inconsistent with Justice Kennedy's explanation of "lawful judicial power" in *Nicastro*. There, Justice Kennedy explained that "[d]ue process protects the defendant's right not to be coerced except by lawful judicial power."[381] Such power can only be asserted when preceded by purposeful availment "invoking the benefits and protections" of the state.[382] Moreover, the substantial connection created through purposeful availment "must come about by an action of the defendant purposefully directed toward the forum State."[383] That is to say, it is "the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."[384]

Hellerstein's scholarship on the topic is instructive. It calls for a "uniform legislative approach" to address problems related to state taxation of electronic commerce.[385] He acknowledges the possibility of congressional action on this question "either through consent to legislation that the states develop on their own initiative or by affirmative federal legislation that is thrust upon unwilling states" and notes that such action raises "difficult" questions with respect to due process.[386] On whether such federal action would violate the Due Process Clause, Hellerstein calibrates his analysis on minimum contacts with the states. "What is required is that the out-of-state taxpayer 'purposefully direct' its activities towards residents of the taxing state."[387] Even assuming a federal solution, he did not so much as raise the possibility that due process would be measured with the federal government. After all, if the Fourteenth Amendment's Due Process Clause limits state power, then how can the minimum contacts analysis be with any other sovereign but the state?

All this, however, amounts to postulation without clear guideposts to determine the sovereign with which to measure minimum contacts. That is to say, instruction is required by which courts may identify the appropriate sovereign with which the out-of-state seller needs minimum contacts. A comparable debate has developed in the context of the Fifth Amendment's due process implications in nationwide service of process cases.[388]

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381. *Nicastro*, 131 S. Ct. at 2785.

382. *Id.*

383. *Id.* at 2788.

384. *Id.* at 2789.

385. Hellerstein, *State Taxation*, *supra* note 1, at 505.

386. *Id.* at 503.

387. *Id.* at 504.

388. *See* Recent Case, *Civil Procedure--Personal Jurisdiction--Eleventh Circuit Holds That Minimum Contacts with the United States Do Not Automatically Confer Jurisdiction over a Defendant Served via a Nationwide Service of Process Statute.--Panama v. BCCI Holdings, 119 F.3d 935 (11th Cir. 1997),* 111 HARV. L. REV. 1359 (1998).

The Fifth Amendment's Due Process Clause represents a counterpart to the Fourteenth Amendment's, but its limitations apply to the federal government rather than the states. Though the "minimum contacts" framework was developed in the context of the Fourteenth Amendment, historically, it has been applied to federal question cases involving the Fifth Amendment as well.[389] This application by association has caused a circuit split on whether personal jurisdiction in these types of cases must consider the defendant's contacts with the federal court's forum state.

A majority of the circuits[390] have adopted a "national contacts" analysis which measures minimum contacts between the defendant and the nation as one. This analysis concludes that the federal government's personal jurisdiction attaches under the Fifth Amendment with respect to all federal courts when minimum contacts with the nation as a whole are met. A minority of circuits have asked for more. On notions of basic fairness, these courts assess "forum contacts" with the state in which the federal court is located in addition to national minimum contacts.

Appleton's[391] suggested rationale for the dichotomy has resonance. In her view, both approaches to Fifth Amendment due process can be traced to *Burnham v. Superior Court of California*.[392] There, though in the context of Fourteenth Amendment due process, two camps were forged. Justice Scalia's plurality opinion (joined by three justices) argued that California properly asserted jurisdiction over the defendant, a New Jersey resident, when he was served with a summons during a brief visit to California.[393] His basis for this conclusion stemmed from the notion that "physical presence alone" satisfied due process and was justified as one of the "continuing traditions of our legal

389. *See* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1068.1, at 595 (3d ed. 2002).

390. The First, Second, Fourth, Fifth, Sixth, and Ninth Circuit Courts of Appeals have adopted the "national contacts" approach. *See* Busch v. Buchman, 11 F.3d 1255, 1257–58 (5th Cir. 1994); United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993); Go-Video Inc. v. Akai Elec. Co., 885 F.2d 1406, 1414–17 (9th Cir. 1989); Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671–72 (7th Cir. 1987); Trans-Asiatic Oil Ltd. v. Apex Oil Co., 743 F.2d 956, 958–60 (1st Cir. 1984); Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984); Mariash v. Morrill, 496 F.2d 1138, 1142–43 (2nd Cir. 1974).

391. *See* Tracy O. Appleton, Note, *The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 COLUM. L. REV. 1944 (2007) [hereinafter Appleton, *The Line Between Liberty*].

392. 495 U.S. 604 (1990).

393. *Burnham*, 495 U.S. at 619–20.

system."[394] In other words, due process is a function of "the fairness of the exercise of power by a particular sovereign."[395]

Justice Brennan's plurality opinion (also joined by three justices) urged a more protracted analysis which would include an "independent inquiry into the . . . fairness of the prevailing in-state service rule."[396] This inquiry would then inform analysis on whether the exercise of jurisdiction over the defendant would be reasonable. Thus, Justice Brennan's due process measurement point turns on "the fairness of imposing [on the defendant] the burdens of litigating in a distant forum."[397]

For Appleton, courts that sympathize with Justice Scalia's views on due process and "focus on the sovereign's power over its own territory in establishing personal jurisdiction"[398] will be more inclined to apply the "national contacts" approach. Just as likely, federal courts that focus on the "liberty interests of the defendants" will tend to also consider the defendant's contacts with the forum state in which the federal court is sited.[399]

Without stretching bounds of logic too much, perhaps these two approaches for addressing the federal courts' jurisdiction over a defendant in a nondiversity action achieved through a federal nationwide service of process statute may inform a discussion on the Marketplace Fairness Act. After all, the Marketplace Fairness Act is a piece of federal legislation and, as such, the Fifth Amendment's Due Process Clause could prove relevant for reviewing courts. Moreover, the substance of the Marketplace Fairness Act and federal nationwide service of process statutes is not all that dissimilar. Federal nationwide service of process statutes provide the statutory basis for personal jurisdiction over an out-of-state defendant. In a similar way, the Marketplace Fairness Act provides the statutory basis for state tax jurisdiction over an out-of-state seller. Of course, the comparison is not perfect. Federal nationwide service of process statutes invoke federal personal jurisdiction on the basis of physical presence. The Marketplace Fairness Act creates state-level tax jurisdiction based on state-level economic activity. Yet, given the novelty of the question, examination of potential compliments is warranted.

The following subparts consider the "national contacts" approach and the "forum contacts" approach and apply them, respectively, to the present question of which sovereign must establish minimum contacts with the out-of-state seller under the Marketplace Fairness Act. To conclude this section, in the alternative, a separate original test—the "Primary Duty Test"—is offered.

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394. *Id.* at 619.
395. Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979).
396. *Burnham*, 495 U.S. at 621, 629 (Brennan, J. concurring).
397. *Fitzsimmons*, 589 F.2d at 333.
398. Appleton, *The Line Between Liberty*, *supra* note 391, at 1958.
399. *Id.* at 1959.

a. The "National Contacts" Approach

The "national contacts" approach seems to flow naturally from the Fifth Amendment's Due Process Clause: a federal statute should be measured by the associated due process limitations applicable to the federal government in the Fifth Amendment. In the context of nationwide service of process in federal question cases, a defendant's presence in the United States should provide ample fair warning of U.S.' adjudicatory powers over that defendant in any federal fora. On this account, minimum contacts with the forum state are unnecessary. This straight-forward tone notwithstanding, the Court has not endorsed the "national contacts" use, despite two separate opportunities to do so.[400]

The rationale for the "national contacts" approach stems from the notion of judicial sovereignty. Each federal court exercises the judicial power of the United States. Thus each federal court's jurisdiction has the potential to extend to the boundaries of the United States.[401] This same rationale, however, does not seem to extend to the Marketplace Fairness Act. While federal nationwide service of process statutes collectively invoke the jurisdiction of the federal judicial system, the Marketplace Fairness Act enforces the tax jurisdiction of the individual states. On this account, just as "national contacts" may be the appropriate approach under a federal nationwide service of process statute based on the federal courts' border-to-border jurisdictional reach, given the question of state tax jurisdiction, minimum contacts with the individual states—akin to the "forum contacts" approach—seems a more appropriate standard to assess the Marketplace Fairness Act.

b. The "Forum Contacts" Approach

The Eighth Circuit was the first to split from the "national contacts" approach. In *Dakota Industries v. Dakota Sportswear, Inc.*,[402] a nationwide service of process case involving a federal question and thus clearly implicating the Fifth Amendment, the court applied the minimum contacts principles from the Fourteenth Amendment. Its logic: if the Fifth Amendment is "essentially a recognition of the principles of justice and fundamental fairness," then it is "appropriate [to] examine the contacts with the forum state."[403]

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400. *See Asahi*, 480 U.S. at 115; Omni Capital International v. Rudolf Wolff & Co. 484 U.S. 97 (1987).

401. *See* FTC v. Jim Walter, 651 F.2d 251, 256 (5th Cir. 1981).

402. Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384 (8th Cir. 1991).

403. *Id.* at 1389 n.2.

The Eleventh Circuit, in *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*,[404] followed with its own hybrid-balancing version of the "forum contacts" approach. On the notion that due process, whether derived from the Fifth or the Fourteenth Amendment, "serves primarily to protect individual liberty," the Eleventh Circuit found "that the Fifth Amendment, like the Fourteenth Amendment, protects individual litigants against the burdens of litigation in an unduly inconvenient forum."[405] In response to these concerns of individual liberty, the Eleventh Circuit proposed a due process balancing test under which the burdens imposed by the individual defendant should be balanced "against the federal interest involved in the litigation."[406] As part of this balancing, the defendant's contacts with the nation as a whole should be considered "rather than his contacts with the forum state," but the defendant's "minimum contacts with the United States do not . . . automatically satisfy the due process requirements of the Fifth Amendment."[407] After balancing, "jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant."[408]

The Tenth Circuit followed this line of reasoning and concluded in *Peay v. BellSouth Medical Assistance Plan*[409] that "due process requires something more"[410] than "national contacts." Following the Eleventh Circuit's lead, the Tenth Circuit could "discern no reason why the Fourteenth Amendment's fairness and reasonableness requirements 'should be discarded completely when jurisdiction is asserted under a federal statute.'"[411] With the Fourteenth and Fifth Amendments' practically indistinct language and the mutual purpose of protecting "individual liberties from the same types of government infringement,"[412] the Tenth Circuit held that "in a federal question case where jurisdiction is invoked based on a nationwide service of process statute, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant."[413] This determination depends, in part, on

404. Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935 (11th Cir. 1997).

405. *Id.* at 945.

406. *Id.* at 946.

407. *Id.* at 947.

408. *Id.* at 948.

409. Peay v. Bellsouth Medic. Assistance Plan, 205 F.3d 1206 (10th Cir. 2000).

410. *Id.* at 1211.

411. *Id.* at 1212.

412. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 331–32 (1976)).

413. *Id.*

"the extent of the defendant's contacts with the place where the action was filed."[414]

Analyses employed in these cases carry at least two important implications on the question of which sovereign must establish minimum contacts with an out-of-state taxpayer. The first is that fairness and reasonableness are the keystones of due process and they cannot be subsumed simply because the basis for jurisdiction is a federal statute. Whether the federal statute is a nationwide service of process statute invoking federal jurisdiction, or the Marketplace Fairness Act imposing state tax jurisdiction on out-of-state sellers, care is required to ensure the individual liberties of affected parties are preserved. The Tenth Circuit suggests that individual liberty preservation, as determined by reasonableness and fairness, are best measured through the Fourteenth Amendment's due process minimum contacts analysis with the states. With similar rationale, the Fourteenth Amendment's due process analysis between the state and the out-of-state seller would apply to the Marketplace Fairness Act, even if it were assessed under the Fifth Amendment's Due Process Clause.

A second implication which permeates each of the "forum contacts" decisions, but which is especially prevalent in *BCCI Holdings*, is the notion of burden. The Eleventh Circuit identified burden as the fulcrum on which balancing would take place. "[J]urisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant."[415] Applied in a state tax setting, the notion of burden is most accurately measured between the out-of-state seller and the state imposing tax collection duties. After all, the out-of-state seller will have to comply with that state's unique tax collection protocols (though simplified through the Marketplace Fairness Act), it will have to remit collected funds to that state, and it will be held liable to the state for failure in either of these respects. These burdens are intrinsically state-imposed. As such, in order to assess burden on the out-of-state seller in light of due process concerns, it seems appropriate to assess the relationship between the out-of-state seller and the duty-imposing state.

c. The Primary Purpose Test

Given the constitutional novelty of questions pertaining to the PACT Act and Marketplace Fairness Act, perhaps a separate due process course should be charted. After all, analogies can only be stretched and massaged so far. Along these lines, this section proposes a separate test to address the specific question of which sovereign must establish minimum contacts with

414. *Id.*
415. *BCCI Holdings*, 119 F.3d at 948.

an out-of-state seller when a federal statute enforces a statutorily defined state duty: the primary purpose test.

The primary purpose test derives from due process first principles. The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[416] This inquiry calls for analysis of interactions between the state and the taxpayer or tax collection agent. Yet, where a federal statute compels adherence to a state tax statute, an additional test is required to identify the appropriate sovereign for detecting the definite link or minimum connection. The primary purpose test fills this void by assessing the connection between the federal statute and the two sovereigns.

The primary purpose test proposes that minimum contacts should be measured with the sovereign whose purposes are primarily fulfilled by or have the closest connection to the federal statute. In the context of the PACT Act, a compelling argument could be made that the Act's primary purpose is federal and therefore minimum contacts should be measured between the out-of-state seller and the federal government. The PACT Act, after all, is meant to bolster and supplement federal control of tobacco products.[417] Tobacco is a commodity already subject to intense federal oversight and regulation and the federal government claims a historical interest in managing its distribution and consumption. The PACT Act, moreover, regulates areas related to the tobacco trade pertaining to significant federal concerns: the consumption of tobacco by minors and the black market trade of tobacco to fund terrorist activities. Without question, the PACT Act serves the states' economic interests as it mandates collection and remittance of state tobacco excise taxes. This purpose, though, considering the nature of the PACT Act as a whole, seems supplementary to the broader purpose of more thorough and strict control of the flow of tobacco in the United States. All this considered, under the primary purpose test, it would be appropriate to measure definite links and minimum connections between regulated out-of-state tobacco sellers and the federal government.

In stark contrast, the primary purpose of the Marketplace Fairness Act is, unabashedly, to collect state sales and use taxes. Apart from enforcement, the federal government has no regulatory interest in the substance of the Marketplace Fairness Act. The tax laws are crafted by the individual states. The collected taxes fund state activities. Federal interests exist, but are limited to a general interest in harmony in interstate commerce and a level playing field for participants in the U.S. markets. These interests are noteworthy, but are also largely in support of and ancillary to state purposes. Under the primary purpose test, the effect of due process on the Marketplace Fairness Act should

416. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).
417. *See* Pub. L. No. 111-154, §§ 1(c)(2), (3), (4), and (6).

be measured based on minimum contacts between the states and affected out-of-state sellers.

2. Does a Single Sale Satisfy Minimum Contacts?

The Due Process Clause not only concerns the existence of contacts, but also their magnitude. On its face, the Marketplace Fairness Act's small seller exception seems a preemptive response to this question regarding minimum contacts. Surely, perhaps the argument went, a seller with more than $1,000,000 in sales revenues should have no due process complaint.[418] This logic is palpable, if minimum contacts are measured against the United States. After all, Quill had $1,000,000 worth of sales to 3,000 customers in North Dakota—what the court considered to be "more than sufficient for due process purposes."[419]

Yet, this analysis suggests that the appropriate measuring point for minimum contacts is between the state and the out-of-state seller. As such, this argument, is fundamentally vulnerable if minimum contacts are measured on a state-by-state basis when considered in light of the Act's scope.[420] Under the Marketplace Fairness Act, a seller whose gross sales revenues exceed $1,000,000 is subject to a duty to collect an in-state buyer's use tax in every state into which it makes even one sale. This all-or-nothing approach squarely centers the issue on minimum contacts and their ramifications on the Marketplace Fairness Act.[421] Can a single sale with a state create the required constitutional connection between the out-of-state seller and the state?

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418. The $1,000,000 figure was a legislative compromise. Earlier versions of the similar bills to the Marketplace Fairness Act placed the small seller exception at $5,000,000. *See*, e.g., Sales Tax Fairness and Simplification Act, H.R. 3396, 110th Cong. § 4(d)(1) (2007); Sales Tax Fairness and Simplification Act, S. 34, 110th Cong. § 4(d)(1) (2007).

419. *Quill*, 504 U.S. 298, 306–07.

420. Though not necessarily a constitutional concern, the $1 million threshold also carries with it an illusionary element. On first blush, the $1 million threshold may appear to be a generous concession. Consider, however, the circumstance of a seller of low margin, high volume product. That seller may have $1,000,001 of sales revenue, an amount which exceeds the small seller threshold. Yet, suppose the seller's cost of goods sold is $999,901, generating only $100 of gross profit. Quickly, the small seller exception becomes only a superficial protection for small out-of-state sellers.

421. The Marketplace Equity Act of 2011 provided out-of-state sellers with an additional layer of protection. Under the bill, out-of-state sellers with less than $100,000 in sales in a given state were exempt from collecting sales tax. H.R. 3179, 112th Cong. §2(b)(1). A similar provision in the Marketplace Fairness Act would enhance the bill's constitutional viability.

The D.C. Circuit's response in *Gordon* to this question began with case history pertaining to the due process question of when and to what extent a state may impose sales tax collection duties on out-of-state sellers. It noted the Court's evolution from *National Bellas Hess, Inc.* to *Quill*: specifically, that the Court in *National Bellas Hess, Inc.* created a standard of physical presence for the imposition of such a duty (albeit on a commingled analysis referring to both the Due Process Clause and the Commerce Clause).[422] Thirty years later in *Quill*, the Court recalibrated due process to require only an economic presence in the state, rather than physical presence. The Court's rationale was that an out-of-state seller may purposefully direct its activities to residents of a state through mail or common carrier. The D.C. Circuit in *Gordon* suggested, though further factual development would be required, that a shift in due process scrutiny might again be in order in the Internet age, such that a single sale may satisfy minimum contacts.[423]

It is worth noting that holding in *Quill* is not dispositive to resolution of this issue. While *Quill* clearly eliminated any physical presence requirement under the Due Process Clause, thus requiring an out-of-state seller's purposefully directed economic presence in the state, it did not consider the threshold of magnitude for that economic presence. This was not, however, a misstep in analysis; it simply was not required. In the Court's view, Quill's contacts in North Dakota, which amounted to almost $1 million in annual sales to about 3,000 North Dakota customers, were of a magnitude "more than sufficient for due process purposes."[424]

Yet this was a determination with respect to a single state. Under the Marketplace Fairness Act, an out-of-state seller with more than $1,000,000 in total sales revenue would be required to collect sales tax on a single sale, in any amount, to a customer in any state. On its face, this seems quite problematic to the Marketplace Fairness Act. Will due process allow the imposition of a sales tax collection duty on an out-of-state seller with a single sale of a trivial amount into a single state?

Observations in *Quill* seem to support this skeptical evaluation. There, the Court justified its due process analysis in part, on the notion that an out-of-state seller who is "engaged in continuous and widespread solicitation of business" clearly has "fair warning that its activities may subject it to the jurisdiction of a foreign sovereign."[425] The Marketplace Fairness Act imposes sales tax collection duties on out-of-state sellers at any level of solicitation and with any magnitude of sales, provided the small seller exception is surpassed, measured on a national scale.

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422. *Gordon*, 721 F.3d at 651–52.
423. *Id.* at 652.
424. *Quill*, 504 U.S. at 308.
425. *Id.*

At the single sale level, without restriction on amount, the Due Process Clause seriously imperils the Marketplace Fairness Act. Contacts are potentially nominal. As a consequence, fair warning that an out-of-state seller is now required to collect sales tax on any sale to any state is diminished. Purposeful availment of the state's market is slight if the single sale is for an inconsiderable amount. Moreover, purposeful availment of the state's protections and services is minimal as mail-order catalogs become less of a marketing tool and many out-of-state sellers rely exclusively on the Internet to market products to customers.

Quill's summation of due process follows this conclusion.

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis.[426]

In other words, the Marketplace Fairness Act has the potential to impose sales tax collection duties on out-of-state sellers without fair warning and who lack minimum contacts.

With some irony, Mines and Gamage and Heckman's analyses support this conclusion. Their dismissals of the Due Process Clause as "a light burden"[427] and "not a problem"[428] were conditioned on the out-of-state seller's contacts occurring with "meaningful magnitude,"[429] in "meaningful quantities"[430] to a "significant number of in-state residents."[431] A single sale is neither of "meaningful quantity" nor is it to a "significant number of in-state residents;" though a single sale, depending on amount, may be of "meaningful magnitude." The Marketplace Fairness Act does not account for this variability of contacts.

What is more, to borrow from the Internet personal jurisdiction line of cases, the Ninth Circuit's disregard for *Zippo*, seems to harmonize with this line of reasoning. There, in *Boschetto v. Hansing*,[432] the Ninth Circuit found that a single auction sale through eBay, for $34,106, was not sufficient to create minimum contacts between the forum state and the Wisconsin seller.[433] The Wisconsin seller's contacts with California were exclusively Internet-

426. *Id.* at 312.
427. Gamage and Heckman, *A Better Way Forward*, *supra* note 73, at 491.
428. Mines, *Conversing with Hellerstein*, *supra* note 59, at 616.
429. *Id.* at 607.
430. *Id.* at 616.
431. Gamage & Heckman, *A Better Way Forward*, *supra* note 73, at 492.
432. *Boschetto*, 539 F.3d 1011.
433. *Id.* at 1021.

based. The car was advertised for sale on eBay's website, which the buyer accessed in California.[434] The buyer and seller exchanged emails to arrange for delivery of the vehicle from Wisconsin to California.[435] The buyer hired a transport company to pick up the car in Wisconsin and drive it to California.[436] Upon delivery, the buyer found the car to be not as advertised and sued the Wisconsin-seller in the U.S. District Court, Northern District of California.[437]

The Ninth Circuit applied a traditional analysis of minimum contacts (dismissing *Zippo*'s sliding scale test) based on the seller's purposeful availment and reasonableness as measured by the guideposts of fair play and substantial justice. The Ninth Circuit found that "the lone transaction for the sale of one item does not establish that the Defendants purposefully availed themselves of the privilege of doing business in California."[438] Moreover, the buyer/seller's contract was "insufficient to have created a substantial connection with California."[439] The Court found the seller's lack of "continuing commitments" under the contract to be particularly relevant.[440] Given that the arrangement "did not create any ongoing obligations" with the Wisconsin-seller in California and following the transaction, the parties "were to go their separate ways," this was a "one-shot affair" which, alone, could not satisfy minimum contacts.[441]

Of particular relevance to the Ninth Circuit was the notion of a "substantial connection" posited in *McGee*. "This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside, but otherwise created no 'substantial connection' or ongoing obligations there."[442] As to the fact that the sale was consummated through the Internet, the court noted that "traditional jurisdictional analyses are not upended simply because a case involves technological developments that make it easier for parties to reach across state

434. *Id.* at 1014.

435. *Id.*

436. *Id.* This is a critical distinguishing point from the present argument. The Wisconsin buyer did not ship the car; rather the California buyer arranged for someone to pick up the car in Wisconsin and deliver it to California. Such is not the case in the typical online transaction where the seller ships the purchased item directly to the in-state resident, thus, arguably purposefully availing itself of the state's protections and services. This critical fact, admittedly, strains the analogy to *Boschetto*.

437. *Id.* at 1015.

438. *Id.* at 1017.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 1019.

lines."[443] It acknowledged that the use of eBay "made it far easier to reach a California buyer," and yet, "the ease with which [an out-of-state defendant] was contacted does not determine whether the nature and quality of the Defendants' contacts serve to support jurisdiction."[444]

This analysis supports the notion that one sale is not sufficient to satisfy due process, which directly affects the Marketplace Fairness Act. Critically, under *Boschetto*, the issue of magnitude comes into slightly clearer focus. A single sale in the amount of $34,106[445] was not sufficient to support minimum contacts for personal jurisdiction. This then, suggests a minimum due process threshold of sorts which readily applies to the sales tax context.[446] The Marketplace Fairness Act compels the collection of sales tax on any sale in any amount to any state, once the small seller exception is met. *Boschetto* suggests that this all-or-nothing approach puts the Marketplace Fairness Act on precarious due process footing for any out-of-state seller who is required to collect sales tax on a single sale in a state in an amount less than $34,106.

In response to these potential due process infractions, an argument might be proposed in the alternative to the effect that significant policy reasons exist for upholding the Marketplace Fairness Act, its constitutional vulnerability notwithstanding. After all, the Marketplace Fairness Act represents the states' last resort. It was understood after *Quill* that physical presence was required under the Commerce Clause for a state to impose sales tax collection duties on out-of-state sellers. Since then, catalog retailers, and

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443. *Id.*

444. *Id.* at 1018. The court noted:

> That is not to say that the use of eBay digs a virtual moat around the defendant, fending off jurisdiction in all cases. Where eBay is used as a means for establishing regular business with a remote forum such that a finding of personal jurisdiction comports with 'traditional notions of fair play and substantial justice,' [citation omitted], then a defendant's use of eBay may be properly taken into account for purposes of establishing personal jurisdiction.

Id. at 1019.

445. *Id.* at 1014.

446. The fact that the Wisconsin seller was an individual (as opposed to a business entity) does not undermine this analogy. The Marketplace Fairness Act does not distinguish between an individual and any other entity in its definition of a "remote seller." *See* S. 698, 114th Cong. § 4(6) (2015). In fact, that *Boschetto* involved an eBay seller may reinforce the parallel. EBay power sellers (who are often individuals) are in the class of those who will be most affected by the Marketplace Fairness Act. If their gross revenues exceed $1,000,000, they will be charged with sales tax collection and remission duties on all sales to buyers in any state. *See id.* § 2.

later and at even more significant levels, online out-of-state retailers, have enjoyed the competitive advantage of not charging sales tax on their purchases. Shopping centers, malls, and other brick-and-mortar establishments have felt the brunt of this competitive advantage, to say nothing of the disappearing state sales tax revenues. Brick-and- mortar retailers go so far as to suggest that customers use their physical locations to test and examine products, only to, in turn, purchase them online where sales tax is not collected.[447]

States, moreover, have made efforts to resolve issues perceived in *Quill*. The SSUTA represents the states' attempt to simplify sales tax collection and compliance. This self-governing effort, however, has only achieved moderate success. Federally proposed legislation in the form of the Marketplace Fairness Act, to some degree, demonstrates the states' frustrations in trying to promote voluntary simplification of the sales tax laws. Perhaps an overarching policy argument centered on the apparent truth that states will not likely come to a consensus on this issue serves as a basis for upholding the Marketplace Fairness Act, despite its potential due process breach.

The Court, however, is unlikely to allow policy to override due process. While there are extremely cogent policy reasons for upholding both the PACT Act and the Marketplace Fairness Act alike, according to *Nicastro*, they cannot supersede the Due Process Clause.

To support its conclusion in favor of New Jersey's assertion of jurisdiction over J. McIntyre Machinery, Ltd., the New Jersey Supreme Court cited "significant policy reasons" to justify its holding.[448] Among those was the state's "strong interest in protecting its citizens from defective products."[449] States' policy justifications for upholding the Marketplace Fairness Act may follow this type of path: states rely on tax collections to fund activities which protect and support their residents. In the Internet age, residents avoid paying these taxes by making purchases from out-of-state sellers that lack nexus with the residents' home state. In order to subdue this type of behavior, a federal response in the form of the Marketplace Fairness Act is entirely appropriate. In response, the Court's rationale would likely follow Justice Kennedy's rejoinder: that even in the face of strong policy interests, "the Constitution commands restraint before discarding liberty in the name of expediency."[450]

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447. This is a phenomenon known as "showrooming," in which a consumer examines a product in store, only to purchase it cheaper and without sales tax online. *See* Matt Schifrin, *How Best Buy Can Beat Showrooming*, FORBES, Jul. 5, 2012, http://www.forbes.com/sites/schifrin/2012/07/05/how-best-buy-can-beat-showrooming/ (last visited May 29, 2014).

448. *Nicastro*, 131 S.Ct. at 2791 (Kennedy, J., plurality).

449. *Id.*

450. *Id.*

On the whole then, due process principles suggest that the individual state, rather than the federal government, must establish minimum contacts with an out-of-state seller before sales tax collection duties may be imposed. Furthermore, purposeful availment through minimum contacts and due process notions of fair warning suggest that the Marketplace Fairness Act potentially violates the Due Process Clause as it imposes a duty to collect an in-state buyer's use tax on out-of-state sellers with as little as a single sale of inconsiderable amount to a single in-state customer.

B. An Argument For Due Process Validity

1. With Which Sovereign is Minimum Contacts Required?

The "national contacts" approach, discussed above, for assessing nondiversity personal jurisdiction under a nationwide service of process statute provides a helpful model for determining the appropriate sovereign with which to measure minimum contacts. A majority of the circuits have endorsed the "national contacts" approach to the Due Process Clause of the Fifth Amendment. It therefore represents the general consensus while the "forum contacts" approach, represents the outlier. On its face, its reasoning is sound, nearly syllogistic. The Fifth Amendment limits the federal government's power. Nationwide service of process statutes are products of the federal government's power. As such, the relevant sovereign for measuring minimum contacts with the regulated entity is the federal sovereign—the United States.

In similar fashion, the Marketplace Fairness Act represents an exercise of federal power. In order to assess whether that power reached beyond the bounds of due process, minimum contacts with the United States should be assessed.[451]

Justice Ginsburg's opinion in *Nicastro*, supports this type of national assessment, even in the context of the Fourteenth Amendment. *Nicastro*, in many ways, was a continuation of the debate initiated in *Asahi*, which disputed the proper test for finding personal jurisdiction over a foreign defendant. Justice O'Connor's opinion in *Asahi*, took a more restrained view of the Due Process Clause's effect on state judicial reach. (Justice Kennedy continued this line of reasoning in *Nicastro*.) In *Asahi*, she reaffirmed that the precursor to personal jurisdiction over a foreign defendant is the defendant's purposefully

451. The primary purpose test proposed here strongly suggests that minimum contacts should be measured between the out-of-state seller and the tax imposing state. As such, it is not analyzed in this section.

directed contacts to the forum state.[452] In order to achieve this type of minimum connection with the state, according to Justice O'Connor's interpretation, a foreign defendant would have to be more than aware that its product might be swept into a foreign state through the stream of commerce.[453] Rather, it would require some affirmative act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of the law.[454]

Justice Brennan's concurring opinion suggested that Justice O'Connor's reasoning went beyond due process expectations. According to Justice Brennan, minimum contacts between a foreign defendant and a state forum could be established through product placement in the stream of commerce.[455] In support of this theory, he noted that the stream of commerce is not comprised of "unpredictable currents or eddies," but a "regular anticipated flow of products from manufacture to distribution to retail sale."[456] As such, to the extent a participant in the stream of commerce is aware that its product is being marketed, sold, or used, in a forum state, "the possibility of a lawsuit there cannot come as a surprise."[457] In other words, the placement of product into the stream of commerce is a significant enough step to create minimum contacts in all states into which that stream flows, so long as the defendant is aware of the current.

In her vehement dissent in *Nicastro*, Justice Ginsburg unabashedly defended Justice Brennan's stream of commerce doctrine. She centered her analysis on McIntyre's interactions and connections with the U.S. market as a whole. On the basis that McIntyre's machine arrived in New Jersey through its marketing efforts in the United States, New Jersey should be a completely appropriate forum in which to litigate the plaintiff's claim of products liability.[458] Justice Ginsburg was unconvinced by the O'Connor/Kennedy

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452. Justice O'Connor's opinion was partially a plurality and partially the opinion of the court. The common ground on which there was agreement prevented the state of California from reaching Asahi on account of concerns over "traditional notions of fair play and substantial justice." Based on the factors of reasonableness established in *World Wide Volkswagen*, which included the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief, the Court reasoned that it was unreasonable to require Asahi to defend itself in the California courts. Justice Brennan suggested that this was one of the rare circumstances in which "the minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of the jurisdiction . . . ." *Asahi*, 480 U.S. at 116

453. *Id.* at 112.

454. *See id*. at 109.

455. *See id.* at 119.

456. *Id.* at 117.

457. *Id.*

458. *Nicastro*, 131 S.Ct. at 2801.

assimilation of state judicial power and maintained that due process provides the only relevant constitutional limits.[459] In all, Justice Ginsburg's opinion depended on reason and fairness and ultimately lamented: how is it possible for a UK metal-shearing machine manufacturer with concerted marketing activities in the United States to be caught unawares when its equipment ends up in the state of New Jersey, the United States' largest recycler of scrap metal, and injures a user or causes death?

2. Does a Single Sale Satisfy Minimum Contacts?

Assuming *arguendo*, that minimum contacts are measured with the individual states, a compelling argument—derived from the Court's personal jurisdiction line of cases and scholarly discourse—can be made that a single sale may satisfy minimum contacts.

Justice Breyer concurred in the judgment in *Nicastro*, but wrote separately (joined by Justice Alito) to explain his separate and distinct analytical path.[460] His reasoning included an observation on which the Second Circuit in *Red Earth LLC*, and the D.C. Circuit in *Gordon*, relied.[461] On the question of magnitude, Justice Breyer noted that "[n]one of our precedents find that a single isolated sale . . . is sufficient."[462] For both circuits, this observation only enhanced the need for additional factual development on remand. *McGee v. International Life Insurance Co.*, however, stands as an example of the Court finding personal jurisdiction on the basis of little more than a single isolated sale.

Reconsider the nature of International's contacts with California: one customer with one life insurance contract. International's only semblance of personal availment was this contract and related mailed correspondence. International had no office or agent in California, nor did it solicit or do any other insurance business in California.[463] Its contacts amounted to a single contract for life insurance. Yet this contact proved sufficient to withstand International's due process challenge and the Supreme Court considered the contract to create a substantial connection with the state.

McGee, then serves as a counter to complaints that the Marketplace Fairness Act may compel out-of-state sellers with a single sale into a given

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459. *Id.* at 2798.

460. *Id.* at 2791.

461. *Red Earth LLC*, 657 F.3d at 145; *Gordon*, 721 F.3d at 652.

462. *Nicastro*, 131 S.Ct. at 2792. Steinman attempts to reconcile Justice Breyer's apparent contradiction with McGee. Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Mach., Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 510–11 (2012).

463. *McGee*, 355 U.S. at 222.

state to collect sales tax. The Court's apparent logic from *McGee*—that "minimum contacts" will be satisfied if the contacts (though limited to a single sale or single contract) create "the very basis for the action"[464]—applies with equal measure to the Marketplace Fairness Act. California's judicial reach extended to International Insurance on the basis of a single contract. Though its contacts were limited solely to that contract, they gave rise to the cause of action and therefore minimum contacts were sufficient. Similarly, an out-of-state seller's single sale into a given state should satisfy minimum contacts as the sale itself creates the very basis for the tax collection burden.

This line of reasoning, which assumes some level of due process adaptability, is consistent with Hellerstein's observation: "[I]t seems unlikely that the Court would hold that the Constitution's framers left the country powerless, short of a constitutional amendment, to legislate an administratively feasible solution to the problem of state taxation of electronic commerce, despite the exercise by Congress and the states of their respective constitutional powers."[465]

After all, the Due Process Clause protects individual rights, but does not bestow them. An out-of-state seller, for example, does not have the right to sell her product into a state without collecting sales tax. Rather, the out-of-state seller is protected under the Due Process Clause from being subject to another state's taxing jurisdiction without a minimum connection with that state. When the out-of-state seller makes the affirmative choice to sell and ship to a single buyer in another state, she, by that very transaction, creates a connection. On the question of whether that connection satisfies due process, Justice Ginsburg might ask: how is it possible for an out-of-state seller to be caught unawares when she packages and ships a package to another state, and the other state asks her to collect sales tax on the transaction?

C. Recommendation

Whether the Marketplace Fairness Act violates the Due Process Clause is a complex question without a clear answer. The Senate Bill is in a political holding pattern, with uncertain prospects in the House. This delay, however, may be an opportunity. Preemptive diffusion of potential due process infractions addressed in this paper is still possible.

The Marketplace Equity Act of 2011, a predecessor-bill to the Marketplace Fairness Act of 2015, included in its small seller exception a state-by-state exemption under which out-of-state sellers would be exempt from collecting sales tax in states where gross annual receipts do not exceed

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464. Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 50 (2012).

465. Hellerstein, *State Taxation*, *supra* note 1, at 504–05.

$100,000, even if gross annual receipts exceeded $1,000,000 in the United States.[466] This type of carve-out would significantly alleviate due process questions related to the magnitude of minimum contacts. Therefore, this Article culminates as a congressional invitation: Congress should consider replication of this type of state-by-state exemption in the Marketplace Fairness Act or any successor bills. This seemingly trivial piece of legislative craftsmanship could prevent, or at least shore up, the government's interests against future constitutional challenges.

VIII. CONCLUSION

The Marketplace Fairness Act attempts to compel states into simplification and uniformity through federal power. In exchange, states are promised freedom from the constraints of *Quill*, to reach out-of-state sellers. Assurances are given of constitutional viability as Congress exercises its plenary power to regulate interstate commerce. Examination of the Due Process Clause and its effect on the PACT Act, as explained in associated circuit court rulings, helps test the validity of these assertions.

The due process viability of the Marketplace Fairness Act depends on two novel constitutional issues. First, with which sovereign, the federal government or the state, are minimum contacts measured where the federal government enforces a state-defined duty? On balance, though persuasive arguments can be raised to the contrary, the courts and the literature suggest that minimum contacts should be gauged between the out-of-state seller and the state exacting sales tax collection responsibilities. If this is true, the second inquiry cuts to the Marketplace Fairness Act's hinge point and asks whether a single sale in a state is sufficient to meet due process thresholds? This question of magnitude has not yet been resolved. The courts and the literature seem to ask for more: connections with a state must be "substantial enough to legitimate the State's exercise of power over him";[467] sales must occur "in meaningful magnitude"[468] in "meaningful quantities"[469] to a "significant number of in-state residents."[470] Yet, *McGee* stands as an example of minimum contacts resting on associated contacts with a single contract. Potential constitutional ailments in the Marketplace Fairness Act may be cured with state-by-state exemptions akin to those proposed in previous iterations of the bill. Even without these modifications however, if the Due Process Clause stands slightly in the way, perhaps Hellerstein's prediction will be correct if

466. H.R. 3179, 112th Cong. § 2(b)(1) (2011).
467. *Gordon*, 721 F.3d at 648–49.
468. Mines, *Conversing with Hellerstein*, *supra* note 59, at 607.
469. *Id.* at 616.
470. Gamage & Heckman, *A Better Way Forward*, *supra* note 73, at 491.

the Court overlooks potential due process infractions in order to allow Congress to "legislate an administratively feasible solution to the problem of state taxation of electronic commerce."[471]

471. Hellerstein, *State Taxation*, *supra* note, at 504–05.