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Wayfair Undermines *Nicastro*: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction

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ABSTRACT. This Essay exposes connections between two controversial cases that unsettled two ostensibly distinct areas of constitutional law. The Supreme Court's 2018 decision in *South Dakota v. Wayfair* held that the Commerce Clause permits enforcement of sales taxes against online retailers with no physical presence in the taxing state. In contrast, the Court's 2011 decision in *J. McIntyre Machinery v. Nicastro* held that the Due Process Clause prevents states from exercising personal jurisdiction over nonresident manufacturers who did not target the forum. *Wayfair* and *Nicastro* address conceptually similar questions about extraterritorial enforcement of state law yet rely on inconsistent assumptions. A close reading of *Wayfair* illuminates normative and practical insights that warrant narrowing or overruling *Nicastro*. More generally, this Essay highlights how situating doctrinal problems in the broader context of horizontal federalism can improve constitutional analysis.

INTRODUCTION

Justice Kennedy's final majority opinion before his retirement is already reshaping the U.S. economy. *South Dakota v. Wayfair* held that states may compel merchants to collect and remit taxes on sales to local buyers even if the seller has no physical presence in the taxing state.[1] States may therefore require online retailers to collect the same taxes as the brick-and-mortar stores with which they

1. 138 S. Ct. 2080 (2018). The dissent "agree[d]" that prior doctrine was flawed for "many of the reasons given by the Court," but preferred to respect *stare decisis* and await a legislative solution. *Id.* at 2101 (Roberts, C.J., dissenting).

compete. This expansion of regulatory authority will enable states to raise an additional eight to thirty-three billion dollars of annual tax revenue.[2]

The holding had swift repercussions. Stock prices gyrated,[3] lobbyists mobilized,[4] and Congress considered reactive legislation.[5] Meanwhile, states are rapidly preparing to tap new streams of revenue that the Court's ruling made available.[6]

This immediate economic and political salience has obscured an important theoretical implication with broad practical consequences. The Court's decision links the geographic reach of state power to the nature and magnitude of state interests. *Wayfair* highlights states' "reasonable choices," their need to avoid "serious inequity," and the consequences of an "extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions."[7] The Court thus recognized that states may extend their authority beyond their borders if they have a good reason, subject to ill-defined limits.

Translating the Court's endorsement of extraterritorial power outside the tax context could unsettle several strands of horizontal federalism jurisprudence—the body of law that considers "how the existence of multiple states limits the power of each."[8] Examples of state action implicating horizontal federalism fall into eight categories that I have defined elsewhere, including,

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2. *See id*. at 2088 (majority opinion) (noting varying estimates of increased state tax revenue).

3. *See* Brian Deagon, *E-Commerce Stocks Smacked by Supreme Court Ruling on State Taxes*, INV. BUS. DAILY (June 21, 2018), https://www.investors.com/research/ibd-industry-themes/supreme-court-ruling-ecommerce-stocks [https://perma.cc/ESU6-Q5RK].

4. *See*, *e.g.*, Hamilton Davison, *Supreme Court Sales Tax Ruling Is Clear; Ramifications of It Could Not Be Less Clear*, HILL (June 29, 2018, 8:10 AM EDT), http://thehill.com/blogs/congress-blog/economy-budget/394700-supreme-court-sales-tax-ruling-is-clear-ramifications-of [https://perma.cc/8DNM-P2SK] (expressing views of the President of the American Catalog Mailers Association). For a discussion of the "practice opportunities" that *Wayfair* creates for lobbyists and lawyers, see Jasper L. Cummings, Jr., *Judicial Activism and the Commerce Clause*, 2018 ST. TAX NOTES 889, 890-91.

5. *See*, *e.g.*, Stop Taxing Our Potential Act of 2018, S. 3180, 115th Cong.; Online Sales Simplicity and Small Business Relief Act of 2018, H.R. 6824, 115th Cong.; *see also* Brian Galle, *Kill* Quill, *Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158 (2018) (discussing potential legislative reforms).

6. *See* Joseph Bishop-Henchman et al., *Post*-Wayfair *Options for States*, J. MULTISTATE TAX'N & INCENTIVES, Nov./Dec. 2018, at 6, 11-20 (summarizing state initiatives). States must cautiously consider a "checklist" of factors that *Wayfair* implied were important. *Id*. at 11; *see also Wayfair*, 138 S. Ct. at 2098 (emphasizing that South Dakota's statute provided "protection" for "small merchants").

7. *Wayfair*, 138 S. Ct. at 2088, 2095.

8. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 501 (2008).

> attempts to exercise *dominion* over other states' officers or territory, creation of *havens* for conduct that other states would prefer to ban or limit, *exclusion* of activities that other states promote, *favoritism* for in-state actors at the expense of out-of-state actors, allowing in-state activity to generate negative out-of-state *externalities*, aggressive *rogue* behavior that fails to respect the interests of other states, mutually debilitating interstate *competition*, and *overreaching* of state borders through extraterritorial regulation.[9]

This Essay addresses the last example of state action noted above: reaching beyond state borders to assert authority over nonresidents whose conduct has effects in the forum. Extraterritorial regulation is inevitable in a federal system that fragments a national market into political units. State borders cannot contain the effects of local laws or exclude the effects of out-of-state conduct any more than lane markers in a swimming pool can contain or exclude waves. A rigid fixation on territorial borders is therefore an unhelpful approach to complex problems about the scope of state authority. Instead, courts must analyze nuanced factors and recognize that problems arising in ostensibly distinct fields share common features that may warrant similar solutions. This Essay considers *Wayfair*'s potentially broad implications for horizontal federalism jurisprudence by comparing doctrines governing the states' tax jurisdiction and personal jurisdiction.

The concept of "tax jurisdiction" can be confusing, but for present purposes a simple framework suffices. Analyzing tax jurisdiction requires asking two distinct questions: (1) can states tax a particular transaction; and (2) how can states enforce the tax?[10] When out-of-state merchants sell products to local buyers, states can tax the transactions based on their local nexus.[11] The difficult issue is whether states can enforce taxes effectively. In routine transactions, the burden of enforcement falls on either the buyer or the seller. States can require local buyers to disclose purchases and remit tax payments to the state, or states can compel out-of-state sellers to collect and remit taxes as part of the sales process. Relying on sellers is far more effective than relying on buyers, who often

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9. *Id*. at 496-97.

10. For a discussion of this bifurcation, see Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 4 (2003) (noting that "substantive jurisdiction to tax and enforcement jurisdiction" are not "air-tight categories").

11. *See Wayfair*, 138 S. Ct. at 2087 ("All concede that taxing the sales in question here is lawful.").

neither know nor care about their compliance obligations.[12] Before *Wayfair*, the Court had interpreted the Commerce Clause to foreclose imposing burdens on sellers who lacked a "physical presence" in the taxing state.[13] *Wayfair* removed this impediment to effective tax enforcement, raising a question about whether the Court should reconsider other judicially imposed obstacles to effective extraterritorial enforcement of valid state laws.

Justice Kennedy's exaltation of state interests in *Wayfair* is strikingly inconsistent with his 2011 plurality opinion rejecting personal jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*.[14] The *Nicastro* plurality held that New Jersey lacked jurisdiction over the manufacturer of an allegedly defective product that maimed a local worker despite the state's "strong" regulatory interest.[15] Scholars have extensively criticized *Nicastro*, describing the plurality opinion as "territoriality on steroids"[16] and a "retrogressive" boon for manufacturers at the expense of consumers.[17] Lower courts hoping for guidance from the fractured decision have instead encountered "a bit of mystery."[18] A close reading of *Wayfair* and *Nicastro* reveals several inconsistencies that call for reconsidering the Court's approach to personal jurisdiction. For example, the decisions rely on conflicting approaches to the relevance of state interests, fairness, market dynamics, and outlier fact patterns.

This Essay explores connections between *Wayfair* and *Nicastro* and makes two contributions. Part I illuminates overlooked parallels between the evolution of constitutional limits on state tax authority and personal jurisdiction. Part II explains why *Wayfair* warrants rethinking the Court's excessively restrictive approach to personal jurisdiction.

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12. *See* Hayes R. Holderness, *Questioning* Quill, 37 VA. TAX REV. 313, 321-22 & n.37 (2018). Taxes remitted by buyers are typically called use taxes, while taxes remitted by sellers are typically called sales taxes. Although use taxes and sales taxes are "functionally equivalent," 2 JEROME R. HELLERSTEIN ET AL., STATE TAXATION ¶ 16.01[2] (3d ed. 2018), the Court has fostered uncertainty about whether formal differences affect the application of constitutional standards. *See* Adam Thimmesch et al., Wayfair*: Sales Tax Formalism and Income Tax Nexus*, 2018 ST. TAX NOTES 975, 975-76. I refer to use taxes and sales taxes interchangeably without expressing a view about whether subtle differences might matter in some circumstances.

13. Quill Corp. v. North Dakota, 504 U.S. 298, 314 (1992).

14. 564 U.S. 873 (2011).

15. *Id.* at 887 (plurality opinion).

16. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1093 (2015) (characterizing *Nicastro* as "fetishizing the concept of a purposeful contact").

17. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 352 (2013).

18. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1067.4 & nn.56-59 (4th ed. 2018) (citing cases).

I. PARALLEL EVOLUTION OF CONSTITUTIONAL LIMITS ON PERSONAL JURISDICTION AND STATE TAX AUTHORITY

A. Conceptual Similarities

A state's power to exercise personal jurisdiction over nonresidents is ostensibly distinct from its power to compel nonresidents to collect and remit sales taxes. These powers address different problems, promote different interests, entail different remedies, and implicate different constitutional provisions. The legal academy reinforces these distinctions by addressing personal jurisdiction and tax law in separate courses and separate fields of scholarship.

Formal differences between state authority to enforce taxes and to exercise personal jurisdiction obscure conceptual similarities. Consider a simple hypothetical scenario that illustrates the overlap. A seller (*S*) in State *X* sells a product to a buyer (*B*) in State *Y* without ever physically entering State *Y*. The legislature of State *Y* believes that transactions of this type implicate legitimate regulatory interests and therefore has enacted a statute containing two sections. Section 1 compels *S* to collect and remit sales taxes. Section 2 compels *S* to appear in State *Y*'s courts in any civil suit by *B* arising from the sale.

Both statutory obligations raise at least three similar questions. First, there is a question about State *Y*'s capacity to act: does economic activity in State *Y* justify allowing State *Y* to compel conduct by an actor outside its borders? Second, there is a question about *S*'s rights: is *S* immune from State *Y*'s power if *S* never physically enters State *Y*? And third, there is a question about dormant federal preemption: can State *Y* regulate a commercial actor in State *X* without congressional authorization?

All three questions are difficult for the same reason: the Constitution empowers fifty coequal states without providing clear guidance for addressing overlapping jurisdiction. This ambiguity engenders myriad disputes. States challenge interference from other states, individuals resist state authority, and Congress claims power to intervene that states in turn contest. I have argued elsewhere that these disputes implicate a constellation of doctrines regulating horizontal federalism.[19] Unfortunately, the Court and commentators typically view each problem in isolation, which obscures inconsistent assumptions, priorities, and methods.[20] Doctrine governing personal jurisdiction and state tax authority illustrates both the allure of fragmenting related problems into discrete components and the incoherence that fragmentation can produce.

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19. *See* Erbsen, *supra* note 8, at 498-510.

20. *See id.* at 497, 529-60.

At first glance, questions about the scope of state authority seem to require different answers in the jurisdiction and tax contexts. For example,

- *B*'s interest in a convenient local forum may justify State *Y*'s assertion of personal jurisdiction over *S*, but there is no corresponding individual interest justifying State *Y*'s assertion of tax authority;
- A legal fiction that *S* consented to State *Y*'s authority may more (or less) readily justify tax enforcement than personal jurisdiction;
- Collecting and remitting a tax may be more (or less) burdensome than appearing in a distant court; and
- Federal preemption may be more (or less) appropriate when a state enlists interstate merchants as tax collectors than when the state compels merchants to appear in civil litigation.

These potential distinctions weigh against a simplistic rule making a state's authority to enforce sales taxes coextensive with its adjudicative jurisdiction. However, considering the two contexts concurrently highlights relevant facts and facilitates a more nuanced analysis of state power, individual rights, and federal preemption. This nuance is missing from current case law, resulting in inconsistent applications of similar principles across multiple doctrines. *Wayfair*'s inconsistency with *Nicastro* is the latest evidence of this longstanding pathology in horizontal federalism jurisprudence.

B. Doctrinal Evolution

Conceptual similarities between personal jurisdiction and extraterritorial tax authority are evident in the Supreme Court's decisions. Doctrine governing each area evolved independently yet followed parallel paths. This parallelism underscores the theoretical connections between *Wayfair* and *Nicastro* that make the rhetorical and substantive inconsistencies between the decisions so striking.

The historical sketch in this Section is brief and necessarily simplified. My goal is not to provide a definitive account of two complex areas of law. Instead, I highlight a few often overlooked historical and thematic connections that confirm the importance of analyzing personal jurisdiction and state tax authority as two related strands of horizontal federalism jurisprudence.

The Supreme Court initially imposed strict territorial limits on both personal jurisdiction and tax authority. Consider two opinions by Justice Field that use similar language. *In re State Tax on Foreign-Held Bonds* held in 1872 that the state in which a bond issuer was incorporated could not tax interest on bonds owned

by nonresidents.[21] Justice Field's opinion observed that state "tax laws . . . can have no extra-territorial operation"[22] because

> property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised . . . . The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State . . . . So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State.[23]

One year later, in *Galpin v. Page*, Justice Field reiterated (without citing) this territorial approach when he defined the scope of a state's personal jurisdiction:

> The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy.[24]

Territorial limits on state adjudicative and tax jurisdiction eventually became constitutionally enshrined in the Due Process Clause.[25] The Supreme Court's decisions in both contexts stressed that the presence of property within a state could not authorize state action against an owner located outside the state.[26] Over time, domicile-based exceptions to territorial limits emerged in both contexts. States could: (1) exercise personal jurisdiction over a nonresident

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21. 82 U.S. (15 Wall.) 300, 325 (1872).

22. *Id.* at 325-26.

23. *Id.* at 319-20. This language was dictum because the corporation's treasurer collected the tax within the state by deducting it from payments to nonresidents. The Court therefore rested its holding on the Contracts Clause. *See id.* at 326 (holding that the state could not interfere with contractually required interest payments).

24. 85 U.S. (18 Wall.) 350, 367 (1873).

25. U.S. CONST. amend. XIV, § 1.

26. *See* Union Tank Line Co. v. Wright, 249 U.S. 275, 282 (1919) ("A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment."); Pennoyer v. Neff, 95 U.S. 714, 727-28 (1878) (holding that a nonresident defendant's ownership of property in the forum is not a sufficient basis for personal jurisdiction); *id.* at 733 (citing the Due Process Clause).

domiciliary,[27] and (2) tax a domiciliary's intangible property deemed to have a "real situs" at the domicile.[28] States could also tax nonresidents' tangible property within their territory.[29] But the Court cited personal jurisdiction precedent to hold that a state's remedies were limited to the property; the state could sell the property to cover an unpaid tax, but could not levy an assessment against the nonresident owner.[30]

Just as two opinions by Justice Field illustrate the parallel rise of the territorial approach, two opinions by Chief Justice Stone illustrate its parallel decline. In the famous case of *International Shoe Co. v. Washington*, the Court held that Washington could exercise personal jurisdiction over a foreign corporation operating within its borders.[31] In the relatively obscure case of *Curry v. McCanless*, the Court held that Alabama and Tennessee could tax the same intangible property based on the property's distinct connections to each state.[32] Both cases presented an opportunity for the Court to frame the due process inquiry in terms of an ethereal "presence" within a state's territory.[33] The corporation in *Shoe* could have been deemed to be present in Washington (among other states), while the property in *Curry* could have been deemed to be present either in Alabama, Tennessee, or both. Yet Chief Justice Stone in *Shoe* and *Curry* rejected the Court's prior fixation with situating incorporeal legal concepts in physical space. Both opinions: (1) eschew unrealistic "fictions" about

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27. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for the purposes of a personal judgment by means of appropriate substituted service.").

28. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 205 (1905). The Court justified the domicile state's taxation of intangible property in part because of territorial limits on personal jurisdiction that would have prevented other states from collecting the tax. *See id*.

29. *See* Dewey v. Des Moines, 173 U.S. 193, 202-03 (1899).

30. *See id*. (citing *Pennoyer*). The Court recently granted certiorari in a case that may revisit due process constraints on state authority when a nonresident holds property for the benefit of a resident. *See* Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue, 814 S.E.2d 43, 51 (N.C. 2018) (holding that the Due Process Clause barred North Carolina from taxing the undistributed income of an out-of-state trust even though the trust's beneficiaries resided in North Carolina), *cert. granted*, 87 U.S.L.W. 3274 (U.S. Jan. 11, 2019) (No. 18-457).

31. 326 U.S. 310 (1945).

32. 307 U.S. 357 (1939). In *Curry*, a grantor in Tennessee transferred stocks and bonds to a trustee in Alabama. *Id.* at 360. When the grantor died in Tennessee, her will distributed the trust assets. *Id.* at 361. Both states claimed authority to tax the distributed property based on connections to either the decedent or the trust. *Id.* Although stocks and bonds are physical documents, the Court characterized them as "paper evidences" of "intangibles." *Id*.

33. *Curry*, 307 U.S. at 367; *Shoe*, 326 U.S. at 316.

presence,[34] (2) reject "mechanical" tests of due process,[35] (3) justify state power in part because regulated entities received the "benefit" and "protection" of state law,[36] and (4) emphasize that the state's regulatory interests provide a foundation for asserting authority.[37]

Subsequent decisions — most notably *Quill Corp. v. North Dakota*[38] — clarified that the due process inquiry in personal jurisdiction and state tax authority cases converged, at least at an abstract level. In both contexts, *Quill* held that due process required "minimum contacts" between the state and an entity subject to its authority.[39] The Court's decisions in tax cases occasionally cited personal jurisdiction cases,[40] and vice versa.[41]

The vague "minimum contacts" test offered minimum guidance to judges. Efforts to implement it can be described charitably as multifaceted and more accurately as muddled. But some parallel themes emerged in personal jurisdiction and state tax authority cases.[42] Analyzing contacts often required examining the "nature and extent" of the regulated party's local activities,[43] the correlation between "protection" that a state provided and obligations it

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34. *Curry*, 307 U.S. at 374; *Shoe*, 326 U.S. at 318.

35. *Curry*, 307 U.S. at 373; *Shoe*, 326 U.S. at 319.

36. *Curry*, 307 U.S. at 367; *Shoe*, 326 U.S. at 320.

37. *Curry*, 307 U.S. at 374; *Shoe*, 326 U.S. at 320.

38. 504 U.S. 298 (1992).

39. *Id.* at 307. In the tax context, due process required minimum contacts with both the taxpayer and the taxable activity. *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 778 (1992).

40. *See Quill*, 504 U.S. at 307-08 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Shaffer v. Heitner, 433 U.S. 186 (1977); and *Shoe*, 326 U.S. 310); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 465 (1959) (citing *Shoe*); Nippert v. City of Richmond, 327 U.S. 416, 422 (1946) (citing *Shoe*).

41. *See* Estin v. Estin, 334 U.S. 541, 548 (1948) (citing *Curry*); *Shoe*, 326 U.S. at 321-22 (citing several tax cases); *cf.* Hanson v. Denckla, 357 U.S. 235, 247 (1958) (citing *Curry* while analyzing *in rem* jurisdiction).

42. Of course, some questions are unique to each context. *See*, *e.g.*, ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) (considering due process constraints on the apportionment of taxable income between states); Kulko v. Superior Court, 436 U.S. 84, 97 (1978) (considering the burden imposed on a defendant summoned to an inconvenient forum); *supra* text accompanying notes 20-21.

43. Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960) (tax jurisdiction); *accord Shoe*, 326 U.S. at 319 (analyzing the "quality and nature" of contacts relevant to personal jurisdiction).

imposed,[44] and the state's regulatory interest.[45] Personal jurisdiction cases also emphasized that an actor's contacts with the forum state must be "purposeful."[46] Tax cases generally did not emphasize purpose, presumably because purpose was obvious when the regulated actor knew where transactional counterparties were located.[47] In contrast, when an out-of-state merchant did not know or control a product's destination, the Court rejected both state tax authority[48] and personal jurisdiction.[49]

Although constitutional limits on personal and tax jurisdiction evolved in parallel, an important twist involving the Commerce Clause complicates analysis of the sales taxes upheld in *Wayfair*. Until 1992, the Supreme Court's interpretation of both the Due Process and Commerce Clauses anachronistically prohibited states from enforcing sales and use taxes against merchants who lacked sufficient "presence" in the taxing state.[50] In 1992, the Court partially changed course in *Quill*, which considered whether North Dakota could require a vendor to collect use taxes arising from sales of office supplies to customers in the state.[51] The vendor argued that it was beyond the reach of North Dakota's authority because it lacked a local presence and instead transacted business by mail and telephone.[52] The Court held that the Due Process Clause did not

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44. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (tax jurisdiction); *accord Hanson*, 357 U.S. at 253 (personal jurisdiction).

45. *See* McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (acknowledging the state's "manifest interest" in exercising personal jurisdiction); Miller Bros. v. Maryland, 347 U.S. 340, 343 (1954) (noting potential justifications for "experimental" tax innovations).

46. *Hanson*, 357 U.S. at 253.

47. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992) (devoting only two paragraphs of analysis to the apparently simple question of whether a merchant who sold to local buyers "purposefully directed its activities" toward the taxing state).

48. *See Miller Bros.*, 347 U.S. at 344.

49. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). Both *Nicastro* and *Volkswagen* involved defendants who did not send their products directly into the forum. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011) (plurality opinion) (noting that the defendant manufacturer sold through a distributor); *Volkswagen*, 444 U.S. at 288 (noting that the consumer purchased a car from a defendant in New York and drove it to Oklahoma). But *Nicastro*'s rejection of jurisdiction expanded on *Volkswagen*'s holding by rejecting intentional targeting of the entire U.S. market as a basis for jurisdiction in a state within that market when the defendant sold through an intermediary. *See infra* text accompanying notes 94-95 (discussing *Nicastro*). In contrast, the *Volkswagen* defendants were engaged in regional activity far from Oklahoma and made no effort to "serve the Oklahoma market." *Volkswagen*, 444 U.S. at 295.

50. *Quill*, 504 U.S. at 306-07, 317.

51. *Id.* at 302.

52. *See id.* at 303.

condition state tax authority on a merchant's physical presence.[53] However, this due process holding had little practical effect because *Quill* also held that the presence requirement remained in the Commerce Clause.[54] So North Dakota won the due process battle but still lost the case.

Quill's preservation of the presence test under the Commerce Clause was a stubbornly persistent relic of territorial reasoning. Even the Court acknowledged that the test was "artificial" and at best "not inconsistent" with modern doctrine governing state regulatory authority.[55] The Court hoped that Congress would provide a more nuanced solution.[56] But Congress remained silent for the next twenty-six years. *Wayfair* then abandoned the Court's unrequited preference for legislative action. Instead, *Wayfair* extended *Quill*'s due process holding to the Commerce Clause.[57] Both clauses now permit states to enforce sales taxes against merchants with no physical presence in the forum.[58]

Although *Wayfair* exclusively addressed the Commerce Clause, its analysis is still relevant to *Nicastro*, which exclusively addressed the Due Process Clause.[59] First, both clauses are part of an overlapping web of constitutional provisions governing horizontal federalism that are best understood together rather than in isolation.[60] Despite imposing different tests for different reasons, the two clauses

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53. *Id.* at 308.

54. *See id.* at 317. The Court subsequently declined to decide whether holding intangible property in a state is a sufficient local presence to justify the state's taxation of income from that property. *See* Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 23 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993).

55. *Quill*, 504 U.S. at 311, 315.

56. *See id.* at 318 ("[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve . . . . Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." (footnote omitted)).

57. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093-95 (2018).

58. *Wayfair* left open the possibility that "some other principle" could limit state authority and that merchants with very low sales volumes could be immune from tax obligations. *Id.* at 2099.

59. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879, 887 (2011) (plurality opinion).

60. *See* Erbsen, *supra* note 8. Thus, although the Court often observes that different issues animate constitutional limits on legislative and adjudicative jurisdiction, *see*, *e.g.*, *Nicastro*, 564 U.S. at 885-86 (plurality opinion), that observation invites questions about the magnitude and materiality of any differences, *see* Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 431-39 (2015) (considering potential intersections between doctrines governing extraterritorial legislation and personal jurisdiction).

are "closely related"[61] and generate "parallel"[62] inquiries.[63] Even beyond the tax context, personal jurisdiction doctrine occasionally implicates the Commerce Clause.[64] Second, doctrines interpreting both clauses share a similar history. Supreme Court decisions from the 1920s and 1930s denied "jurisdiction" over defendants due to the "necessities of commerce."[65] These cases relied on the Commerce Clause to serve a function that the Court later allocated to the Due Process Clause. Meanwhile, the Commerce Clause's role as a constraint on state tax authority evolved in parallel with Due Process Clause jurisprudence, but the Court's decisions before *Quill* often failed to distinguish between the two clauses.[66] And as noted above, Chief Justice Stone helped nudge both Due Process Clause and Commerce Clause jurisprudence away from stilted formal tests and toward practical consideration of competing interests.[67] Third, *Wayfair*

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61. Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756 (1967).

62. MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008).

63. *Quill*'s holding that the Commerce Clause foreclosed taxes that satisfied due process stressed differences between the two inquiries, especially that "while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce . . . it does not similarly have the power to authorize violations of the Due Process Clause." *Quill*, 504 U.S. at 305. *Quill* understated Congress's power to authorize personal jurisdiction. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 75-88 (2010) (contending that the Constitution empowers Congress to address the optimal scope of the states' personal jurisdiction).

64. *See* Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 895 (1988) (observing that a state statute requiring a corporation to consent to general jurisdiction as a condition of doing business in the state may impose "an unreasonable burden on commerce").

65. Int'l Milling Co. v. Columbia Transp. Co., 292 U.S. 511, 518 (1934); *see also* Davis v. Farmers' Coop. Equity Co., 262 U.S. 312, 317 (1923) ("[O]rderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside."); Denver & Rio Grande W. R.R. v. Terte, 284 U.S. 284, 287 (1932) (following *Davis*); Mich. Cent. R.R. v. Mix, 278 U.S. 492, 494-95 (1929) (same); Atchison, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101, 103 (1924) (same). Chief Justice Stone recharacterized these cases as addressing "venue" rather than jurisdiction. S. Pac. Co. v. Arizona *ex rel*. Sullivan, 325 U.S. 761, 781 (1945).

66. *See* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 322 (2003) ("Until [*Quill*], the Court had not indicated that the Due Process and Commerce Clause nexus standards diverged in any meaningful way.").

67. *See supra* notes 31-37; Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."). *Compare* Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (rejecting a "mechanical" Commerce Clause jurisprudence of "labels" in favor of considering "all the facts and circumstances"), *with* Raymond Motor Transp., Inc. v. Rice, 434

and *Nicastro* both relied heavily on abstract contentions about state power rather than technical inquiries into obscure elements of doctrine. Inconsistencies between Justice Kennedy's analysis in the two cases therefore raise questions about *Nicastro*'s continuing vitality. Just as the due process holding in *Quill* precipitated the Commerce Clause holding in *Wayfair*, *Wayfair*'s Commerce Clause holding should precipitate reconsideration of *Nicastro*'s due process holding.

II. THE TENSION BETWEEN JUSTICE KENNEDY'S OPINIONS IN *NICASTRO* AND *WAYFAIR*

In *Nicastro*, the defendant manufactured machines that sheared scrap metal. The manufacturer hoped to sell its machines throughout the United States and assisted in marketing them.[68] A scrap-metal recycler in New Jersey installed one of the manufacturer's machines, which severed four of an employee's fingers.[69] The injured worker filed a product liability action in New Jersey.

If the manufacturer had sold directly to the buyer, the Court probably would have upheld jurisdiction.[70] However, the manufacturer instead marketed through a distributor in Ohio, which in turn sold to the buyer before eventually becoming insolvent (and thus judgment-proof).[71] The record did not clearly indicate any other direct contacts with New Jersey.[72] Because sales were through an intermediary, the manufacturer successfully argued that its contacts with New Jersey were not purposeful. The Court therefore rejected New Jersey's attempt to exercise personal jurisdiction over the manufacturer.

Justice Kennedy's analysis in *Nicastro* involves a chain of five linked propositions. The points flow roughly as follows:

U.S. 429, 441 (1978) (citing Justice Stone's dissent in *Di Santo* and holding that Commerce Clause analysis "involves a sensitive consideration" of several factors).

68. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 895-98 (2011) (Ginsburg, J., dissenting).

69. *See id*. at 894.

70. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (endorsing in dicta personal jurisdiction based on direct sales of "defective merchandise" to the forum); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (upholding jurisdiction based on a single intentional transaction, coupled with ancillary interactions, in the forum state).

71. *See Nicastro*, 564 U.S. at 896 n.2 (Ginsburg, J., dissenting).

72. However, jurisdictional discovery may have been inadequate. *See* Miller, *supra* note 17, at 351 (observing that "the record was deficient on certain possibly critical matters that might have affected the view of one or more of the Justices").

1) Constitutional limits on personal jurisdiction ensure that states exercise only "lawful" power.[73]
2) State power is lawful with respect to outsiders only when the outsider has "purposefully" sought to benefit from or obstruct state law, regardless of whether the state has an "interest" in providing a forum.[74]
3) When jurisdiction is premised on selling a defective product that reaches a buyer in the forum, contacts are purposeful only when the forum has been "targeted."[75]
4) Evidence of targeting can be found only in the defendant's "actions" rather than in its "expectations."[76]
5) The manufacturer's only relevant action was selling to the distributor in Ohio. Thus, there was no action targeting New Jersey and no basis for jurisdiction.[77]

This reasoning is tenuous. The manufacturer's targeting of the entire U.S. market also targeted New Jersey, which is a component of the national market. Moreover, the concept of targeting is a red herring. As I have argued elsewhere, a lack of targeting should not be dispositive when the defendant benefits from conduct that causes harm in the forum.[78]

But even if *Nicastro* was defensible at the time it was decided, *Wayfair* undermines the plurality's analysis for five reasons.

First, *Wayfair* and *Nicastro* give inconsistent weight to state interests. In *Wayfair*, the Court sought to avoid an "extraordinary imposition" on states that would enable market participants to "escape" reasonable regulations.[79] But *Nicastro* facilitated such an escape because the plurality contended that protecting state interests would elevate "expediency" over "liberty."[80] The two decisions do not provide any guidance for distinguishing legitimate state priorities from expedient shortcuts. One might think that these discordant approaches to state interests arise from distinctions between the Commerce Clause inquiry in tax cases and the Due Process Clause inquiry in personal

73. *Nicastro*, 564 U.S. at 884 (plurality opinion).

74. *Id*. at 886-87.

75. *Id*. at 882.

76. *Id*. at 883.

77. *Id*. at 886.

78. *See* Erbsen, *supra* note 60, at 427-31.

79. South Dakota v. Wayfair, 138 S. Ct. 2080, 2095 (2018).

80. *Nicastro*, 564 U.S. at 887 (plurality opinion).

jurisdiction cases. However, as *Wayfair* notes, the two inquiries are "closely related,"[81] and the Court's analysis of personal jurisdiction before *Nicastro* often prioritized state interests.[82] Accordingly, if South Dakota's interests justified taxation of nonresident merchants, then New Jersey's interests could have justified jurisdiction over nonresident manufacturers and should not have been so casually dismissed.

The possibility that *Wayfair* affects only merchants who engage in a larger volume of local business than the manufacturer in *Nicastro* cannot support the Court's inconsistent approach to state interests.[83] The record is not clear, but arguably the volume of local sales in *Nicastro* was almost identical to the minimum threshold that the Court upheld in *Wayfair*.[84] Even if *Wayfair* requires a greater volume of local sales than occurred in *Nicastro*, sales volumes are irrelevant when considering whether states have an interest in regulating particular transactions, as opposed to considering whether regulations impose excessive burdens. Analyzing a state's assertion of power over nonresidents requires considering two sides of an equation: the state's *reason* for acting and the *consequences* of its action. A regulatory interest may be a good reason to impose tax obligations and to exercise personal jurisdiction even when the volume of local business is small.[85] But exercising power over an entity based on

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81. *Wayfair*, 138 S. Ct. at 2093.

82. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (recognizing that the forum state had "a significant interest in redressing injuries that actually occur within the State"); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (noting that the forum state had "a manifest interest in providing effective means of redress for its residents"); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 649 (1950) ("The Due Process Clause does not forbid a state to protect its citizens from . . . injustice.").

83. *Compare Wayfair*, 138 S. Ct. at 2089 (noting that the defendants "easily" exceeded the statutory threshold for taxation, which required that merchants "deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State"), *with Nicastro*, 564 U.S. at 886 (plurality opinion) (stressing limited local sales).

84. The machine at issue in *Nicastro* cost $24,900. *See Nicastro*, 564 U.S. at 894 (Ginsburg, J., dissenting). If four machines reached the forum, as the plurality recognized was possible, *see id.* at 886 (plurality opinion), then aggregate sales revenue would have been $99,600 (assuming all four machines were similar). South Dakota's sales threshold for imposing tax obligations is $100,000. *See Wayfair*, 138 S. Ct. at 2089.

85. *See Wayfair*, 138 S. Ct. at 2096 (noting that a state can enforce its tax laws against an entity with "one salesperson" based in the forum); *McGee*, 355 U.S. at 223 (upholding personal jurisdiction based on a single direct sale to the forum); *cf. Nicastro*, 564 U.S. at 888 (Breyer, J., concurring in the judgment) (noting that a single indirect sale might not be sufficient to establish personal jurisdiction); Gordon v. Holder, 721 F.3d 638, 652 (D.C. Cir. 2013) (noting, in an opinion written before *Wayfair*, that whether a single direct sale through the internet creates "minimum contacts" raises a "difficult constitutional question").

a small volume of business can cause disproportionate consequences—such as compliance burdens—that outweigh state interests. A court cannot know whether burdens outweigh state interests until it assesses whether the state interests are important. This is where the Court went astray in *Nicastro*. By dismissing state interests as mere "expediency," the Court never engaged in a nuanced balancing analysis. Burdens on the manufacturer easily tipped the scales because there was no meaningful counterweight. Now that *Wayfair* has recognized the importance of acknowledging state interests, the balancing in *Nicastro* is amenable to reconsideration.

Second, *Wayfair* recognized that allowing extraterritorial tax enforcement might impose "burdens" that raise "legitimate concerns in some instances, particularly for small businesses" with a "small volume" of local sales.[86] These concerns were not a basis for rejecting state power because "other theories" and "other aspects" of doctrine were available to protect deserving claimants.[87] *Wayfair* thus endorsed broad state power while reserving questions about outlier cases. *Nicastro* took the opposite approach, in effect allowing the tail to wag the dog. The Court invoked fears about burdening low-volume small businesses—such as a Florida farmer sued in Alaska[88] or an "Appalachian potter" sued in Hawaii[89]—to deny jurisdiction over *all* businesses that did not directly target the forum. A more sensible solution would have been to recognize state power while deploying other doctrines—such as potential constitutional limits on venue—to protect outlier defendants.[90]

Third, *Wayfair* criticized "[d]istortions" arising from *Quill*'s "incentive" for merchants "to avoid physical presence in multiple States" by operating only through the internet or mail.[91] In other words, doctrine should not encourage market participants to structure their conduct in an inefficient manner simply to evade local regulation. Yet *Nicastro* achieves the opposite result. Its emphasis on targeting the forum incentivizes manufacturers to use intermediaries as a means of insulating themselves from jurisdiction.

Fourth, *Wayfair* stressed the importance of "[f]airness," observing that corporations that "avail themselves of the States' benefits" should bear correlative burdens.[92] In contrast, the *Nicastro* plurality condemned "[f]reeform

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86. *Wayfair*, 138 S. Ct. at 2098.

87. *Id*. at 2098-99.

88. *See Nicastro*, 564 U.S. at 885 (plurality opinion).

89. *Id*. at 891-92 (Breyer, J., concurring).

90. *See* Erbsen, *supra* note 63, at 30-32.

91. *Wayfair*, 138 S. Ct. at 2085.

92. *Id*. at 2096.

notions of fundamental fairness."[93] The manufacturer therefore was immune from burdens imposed by New Jersey. From a "benefits" perspective, both the seller in *Wayfair* and the manufacturer in *Nicastro* were similarly situated: both benefited from state laws creating a stable market for their products. If collecting a sales tax is a reasonable price to pay for access to the market, submitting to adjudicative jurisdiction might also be reasonable. However, one potentially meaningful distinction between the two contexts is that *Wayfair* involved benefits from a direct sale while *Nicastro* involved benefits from a sale through an intermediary. The next point addresses that distinction.

Finally, *Wayfair* noted that doctrine must be "grounded in functional, marketplace dynamics" that respect state efforts to address economic "realities."[94] This principle helped explain why states regulating a modern economy may tax sales through the internet in the same way as sales through competing physical outlets. Extending *Wayfair*'s functional approach to personal jurisdiction undermines *Nicastro*'s emphasis on directly targeting the forum. In the real world, manufacturers of industrial machinery do not necessarily target individual states. They target the entire country. Indeed, the manufacturer in *Nicastro* attended national rather than state-specific sales conventions and told its distributor "[a]ll we wish to do is sell our products in the [United] States — and get paid!"[95] States seeking to hold manufacturers accountable for injuries caused by defective products therefore must be able to reach defendants who did not focus on that individual state's market. If one takes *Wayfair*'s functional approach seriously, then *Nicastro*'s emphasis on direct sales and state-specific targeting seems needlessly myopic.

Of course, *Wayfair* does not formally hold that targeting an individual state is irrelevant because the merchants in *Wayfair* presumably did target South Dakota.[96] However, that targeting does not animate the Court's holding. To see why, suppose that the Delaware-based Acme Corporation creates a website that sells widgets. Acme conducts no marketing beyond buying a single national television advertisement during the Super Bowl. The advertisement generates a million sales, including ten thousand sales to residents of South Dakota. *Wayfair*'s reasoning leads inexorably to the conclusion that South Dakota can require Acme to collect sales taxes even though Acme's marketing did not specifically target the state. Yet *Nicastro* seems to draw a line between entities that target the forum and entities that target the national market. *Wayfair*'s

93. *Nicastro*, 564 U.S. at 880 (plurality opinion).

94. *Wayfair*, 138 S. Ct. at 2095.

95. *Nicastro*, 564 U.S. at 897 (Ginsburg, J., dissenting).

96. *See Wayfair*, 138 S. Ct. at 2095 (noting that online merchants benefit from "targeted advertising and instant access to most consumers via any internet-enabled device").

emphasis on the "functional" "realities" of how merchants generate sales is inconsistent with *Nicastro*'s assumption that only state-specific rather than national marketing justifies state authority over manufacturers who sell through intermediaries.

In sum, *Wayfair* and *Nicastro* take incongruent approaches to conceptually similar problems. *Wayfair* extolls state interests, tries to craft rules that recognize how markets work and avoid distorting behavior, promotes fairness, and does not allow outlier scenarios to drive analysis. *Nicastro* impugns state interests, ignores how markets actually work while incentivizing inefficient behavior, rejects fairness, and emphasizes outlier hypotheticals. The sensible analysis in *Wayfair* should eclipse the thinly reasoned decision in *Nicastro*.[97]

Wayfair poses an especially compelling challenge to *Nicastro* because *Nicastro* is an unstable precedent that is unusually amenable to being overruled or narrowed into obscurity. First, although six Justices concurred in *Nicastro*'s judgment, there was no majority opinion. Justice Kennedy wrote a plurality opinion joined by only three other Justices (Roberts, Scalia, and Thomas). Half the plurality is no longer on the Court, raising a question about whether the opinion's analysis would survive reexamination. Second, the two concurring Justices (Breyer and Alito) expressly noted their willingness to consider "a change in present law" in a future case with a more developed record.[98] Third, the concurrence can be interpreted as agreeing with the dissent's view of applicable law and supporting the plurality only due to ambiguities in the record.[99] Under that interpretation, *Nicastro*'s holding has minimal precedential force and should be read narrowly.[100] Fourth, the Court has conspicuously declined to cite *Nicastro* in its subsequent decisions addressing personal

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97. For further analysis of why the Court's current personal jurisdiction doctrine is flawed, see Erbsen, *supra* note 63.

98. *See Nicastro*, 564 U.S. at 893 (Breyer, J., concurring).

99. *See* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. Rev. 481, 511 (2012) (observing that the concurrence and the dissent disagreed about whether the manufacturer in fact knew that "potential customers were likely to exist in the forum state").

100. *See In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 541 (5th Cir. 2014) (holding that Supreme Court precedent regarding the precedential force of plurality opinions requires focusing on Justice Breyer's narrow concurrence in *Nicastro*).

jurisdiction.[101] Accordingly, Justice Kennedy's reasoning in *Nicastro* is ripe for reconsideration in light of his subsequent opinion in *Wayfair*.[102]

CONCLUSION

Wayfair and *Nicastro* address similar scenarios. Both cases involved: (1) conduct by an entity outside the state (selling/manufacturing); that (2) had consequences within the state (taxable event/physical injury); which (3) motivated the state to react by compelling the entity to take a particular action (collect a tax/appear in court). Labelling *Wayfair* as a tax case and *Nicastro* as a personal jurisdiction case impedes analysis rather than informing it.

Viewing state tax authority and personal jurisdiction as two related strands of horizontal federalism jurisprudence reveals historical and conceptual connections. These connections help illuminate the Supreme Court's inconsistent assumptions and preferences. In particular, *Wayfair*'s functional, interest-oriented endorsement of state power is inconsistent with *Nicastro*'s rigid fixation on targeted contacts. The Court should invoke *Wayfair* to reconsider *Nicastro*'s excessive limit on state authority.

More generally, the Court should be wary of its tendency to construct doctrinal silos that obscure similarities between horizontal federalism problems. The Constitution allocates power to and among states in myriad circumstances using diverse methods. Comparing these contexts rather than addressing them in isolation can provide a richer understanding of the constitutional values at stake, the optimal frameworks for analyzing those values, and the factors that courts should consider.

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101. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (citing *Nicastro* only in the dissent); Walden v. Fiore, 134 S. Ct. 1115 (2014) (ignoring *Nicastro*). Two decisions addressing "general jurisdiction" rather than "specific jurisdiction" also did not cite *Nicastro*. BNSF Ry. v. Tyrell, 137 S. Ct. 1549 (2017); Daimler AG v. Bauman, 134 S. Ct. 746, 757 (2015) (Justice Ginsburg's majority opinion citing only her dissent in *Nicastro*).

102. Prior to *Wayfair*, at least two amicus briefs and one commentator noted that *Nicastro* could be read as supporting tighter limits on state tax jurisdiction. *See* Brief for Montana as Amicus Curiae Supporting Respondents at 10-13, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018) (No. 17-494); Brief of Amicus Curiae Online Merchants Guild in Support of Respondents at 26-27, *Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494); Brannon P. Denning, *Due Process and Personal Jurisdiction: Implications for State Taxes*, 2012 ST. TAX NOTES 837, 841. The fact that *Wayfair* expanded state authority highlights the importance of revisiting elements of *Nicastro* that suggested a different trajectory.