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"[T]hese determinations must continue to be made by the courts, unless the national interests are to be sacrificed until the heavy machinery of Congress can be set in motion."[1]

I. INTRODUCTION

The past few decades have witnessed courts, Congress, and commentators struggle to define the reach of a state's taxing power over corporations' interstate income. During this same period, e-commerce has expanded at exponential rates, followed closely by a concomitant increase in attempts by states to tax out-of-state corporations doing business in their jurisdictions. Over thirty years ago, the Supreme Court in *Complete Auto Transit v. Brady*[2] laid out a four-part test to evaluate the constitutionality of state taxes burdening out-of-state interests: (1) whether the activity taxed has a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned to the taxing jurisdiction; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services the state provides the taxpayer.[3] Though this framework seems facially straightforward, its application in practice is quite challenging. A simple example will suffice to highlight the test's practical complexity.

Suppose that Corporation X, physically located in California, provides an online service exclusively to customers in New York and California, and derives 80% of its revenue from New York customers and 20% of its revenue from California customers. Which state should be able to tax Corporation X's revenue—California, New York, or both? Each state will undoubtedly wish to lay a claim on as much of Corporation X's income as possible, but, obviously, both states will not be free to tax all of Corporation X's income because

1. Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 389 n.176 (1982).

2. 430 U.S. 274 (1977).

3. *Id.* at 279.

such double taxation would violate the second prong of the *Complete Auto* test requiring fair apportionment. Perhaps California should have the exclusive power to tax 100% of Corporation X's income because Corporation X has an exclusive physical nexus with California. After all, Corporation X derives the lion's share of its benefits from the public amenities provided by California's tax dollars, such as roads, schools, and law enforcement.

But New York also provides valuable benefits to Corporation X. Indeed, New York's customer base is uniquely attuned to Corporation X's service offering. If not for New York's stable economy, infrastructure, and public education, delivered through its tax dollars, Corporation X's New York customers would not be in a position to purchase Corporation X's services. While Corporation X does not have a physical nexus with New York as it does with California, it could still be said to have a substantial "economic nexus" with New York, evidenced by the fact that it is from New York that Corporation X derives the majority of its revenue. Should New York be allowed to ask Corporation X for a return on the benefits it provides to Corporation X, even though an "economic nexus" with New York is less direct—and arguably less substantial—than California's nexus measured by actual physical presence within its jurisdictional boundaries?

Whether so-called "economic nexus" is sufficient to establish a "*substantial* nexus" under *Complete Auto* is a matter of heated debate. Another contested issue revolves around *Complete Auto*'s second prong—fair apportionment. Given that both states provide certain unquantifiable benefits to Corporation X, scholars debate how best to achieve a "fair" apportionment of corporate income among states so as to achieve a tax that is fairly related to state-provided benefits. The Supreme Court has refused to establish a single "fair" apportionment practice or formula for fear of treading on states' rights, preferring instead to resolve fairness disputes on a case-by-case basis.[4] But the absence of a single apportionment formula applicable to all states has created a patchwork of state-by-state apportionment formulae that often subjects multi-state corporations to combined state taxation on more than 100% of their income. And corporations are not the only ones that suffer from this currently

4. *See, e.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 171 (1983).

fragmented system. States also suffer from lack of uniform standards because multi-state corporations have learned that they must play the federal and state governments against each other to minimize their state tax liability and avoid taxation on more than 100 percent of their income.[5] Consequently, many state coffers already suffering from the recent economic downturn are being further depleted.[6]

To reform the current mishmash of inconsistent state policies regarding the taxation of multi-state corporate income, some have proposed federal statutory solutions that would modernize the system and impose uniform taxing standards upon the states.[7] Indeed, some proponents of this solution posit that only Congress can repair the broken system, restore predictability and administrative fairness to taxpayers, and ensure a more stable and equitable revenue stream to the states.[8] Though these federal statutory solutions are theoretically sound, their practical value hinges entirely on their ability to emerge from legislative committee and enter the statute books. Congress's track record on state income tax legislation, however, suggests that adoption of this (or any) solution is unlikely. To date, congressional committees have proposed several bills aimed at streamlining the state income tax system, but all have died in committee.[9] This political stalemate highlights one major difficulty of implementing a proper solution to the current debacle.

The Supreme Court has only compounded the problem by repeatedly refusing to offer constitutional guidance on the appropriate reach of state taxing power. The Court has instead

5. *See, e.g.*, Gary Cornia et al., *The Disappearing State Corporate Income Tax*, 58 NAT'L TAX J. 115, 136 (2005).

6. Taxpayer pursuit of rent-seeking and tax planning opportunities is an influential factor in the significant decline of state tax revenue over the past three decades. *See id.*

7. *See, e.g.*, Quinn T. Ryan, *Beyond BATSA: Getting Serious About State Corporate Tax Reform*, 67 WASH. & LEE L. REV. 275, 307–14 (2010); Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 Fla. Tax Rev. 157, 211 (2012).

8. Ryan, *supra* note 7, at 326; David M. Hudson Daniel, *International and Interstate Approaches to Taxing Business Income*, 6 NW. J. INT'L L. & BUS. 562, 614 (1984) ("Interstate uniformity can only be achieved by Congressional action.").

9. *E.g.*, Business Activity Tax Simplification Act of 2009, H.R. 1083, 111th Cong. (2009); Business Activity Tax Simplification Act of 2011, H.R. 1439, 112th Cong. (2011); Business Activity Tax Simplification Act of 2013, H.R. 2992, 113th Cong. (2013); New Economy Tax Fairness Act, S.2401, 106th Cong. (2000); Comprehensive Tax Restructuring and Simplification Act of 1994, S.2160 (1994); *see also* Charles E. McLure, Jr., *The Difficulty of Getting Serious About State Corporate Tax Reform*, 67 WASH. & LEE L. REV. 327 (2010).

chosen to defer to Congress out of ostensible respect for the separation of powers doctrine. Yet without an external catalyst to propel a viable solution through legislative gridlock, these prior bills' burials in the legislative graveyard will continue to foreshadow a similar fate for future statutory proposals. This Comment argues that the Supreme Court should fill this catalytic role—and can do so constitutionally—by acting pursuant to its dormant commerce power. Doing so will allow the Court to correct longstanding problems with the state corporate income tax system that have plagued both states and taxpayers for several decades.

A Supreme Court ruling in this area is constitutionally permissible despite the fact that interstate taxation heavily involves questions of interstate commerce—an area constitutionally assigned to Congress. Although the Constitution has granted Congress the final say on laws touching interstate commerce, the Supreme Court is free (until Congress acts) to utilize the dormant Commerce Clause to prevent states from unduly burdening interstate commerce.[10] The Court's invocation of the dormant Commerce Clause doctrine is valuable because such decisions provide at least temporary solutions to national problems touching interstate commerce and often spur Congress to fashion enduring legislative solutions pursuant to its *affirmative* commerce power.

Despite the value of such decisions, the Court has historically been reticent to decide cases in the area of state income taxation, declaring instead that the appropriate course is to exercise judicial restraint and leave such decisions to the political process.[11] But the Court's hands-off approach in the realm of the dormant Commerce Clause is not as compelled as the Court has represented. In fact, as this Comment suggests, traditional rationales supporting judicial restraint are inherently weaker in the realm of dormant Commerce Clause jurisprudence. Additionally, in light of the well-accepted

10. *See infra* Part II.A.

11. *E.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978) ("It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."); *see also* Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1958) (Frankfurter, J., dissenting); Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546–47 (1950); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188–89 (1940) (Black, J., dissenting); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 449 (1939) (Black, J., dissenting); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 327 (1938) (Black, J., dissenting).

pattern of Court intervention under the dormant Commerce Clause, the Court does not act beyond its powers by appropriately deciding state income tax cases involving the uniquely constitutional issues of state apportionment and nexus standards.

Despite calls for judicial deference for fear that such decisions will irreversibly deplete the Court's political capital,[12] the theory of the dormant Commerce Clause itself ensures that the Court's legitimacy will emerge unscathed after exercise of its dormant commerce power. When the Supreme Court renders a decision under the dormant Commerce Clause, it is essentially making a "remand to Congress."[13] Accordingly, subsequent statutory reversal of the Court's decisions in this arena cannot be perceived as a chastising blow from a co-equal branch of government. Rather, because the Court's dormant Commerce Clause decisions are provided with the understanding that Congress retains full legislative power over issues of interstate commerce, any subsequent legislative actions is, in reality, an appropriate response to the Court's "remand."[14]

In this light, statutory reversal of the Court's dormant Commerce Clause decisions should have minimal impact on the Court's perceived legitimacy. Therefore, proposals for judicial restraint based on the assumption that the Court will theoretically lose its legitimacy should yield to the important interest in bringing stability and predictability to this muddled area of law. The need for the Court's clarification is especially acute in the area of multi-state taxation as business increasingly is conducted electronically and across state borders. In this environment, the obsolescence of anachronistic nexus standards requiring "physical presence" becomes ever more obvious.

12. *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 94–95 (1978) ("The Court's effectiveness . . . depends substantially on confidence . . . . [T]here is a natural quantitative limit to the number of major, principled interventions the Court can permit itself . . . . A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication."); *see also*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 139, 169 (1980) (speaking of the Court's public prestige and institutional capital).

13. *See* Estreicher, *supra* note 1, at 389 (referring to the Court's dormant Commerce Clause decisions as a "remand to Congress").

14. *Id.*

Part II of this Comment begins by surveying the Supreme Court jurisprudence governing the states' power to tax, specifically outlining the dormant Commerce Clause and its applicability to state taxation. Part III then illustrates the current income-tax conundrum, points to a solution, and demonstrates why the political process, by itself, will continue to fail in implementing any solution to the problem. Part IV will then briefly explore the various roles of the Supreme Court—especially its role as a catalyst for federal congressional action and will cite a few historical examples of the Court fulfilling this role. Finally, Part V will briefly conclude by advocating judicial review of state corporate income taxation schemes pursuant to the Court's dormant commerce power as a catalyst for meaningful legislative reform in the area of state income taxation.

II. SUPREME COURT JURISPRUDENCE GOVERNING STATE POWERS OF TAXATION

Most cases dealing with the boundaries of a state's taxing power have arisen under the Supreme Court's interpretation of the Commerce Clause. To understand why, it is necessary to take a short detour into the history of the Court's constitutional interpretation of the Commerce Clause, and, specifically, the judicially created doctrine of the negative or dormant Commerce Clause.[15] After a general introduction to the doctrine, the dormant Commerce Clause analysis applied to state taxation will be explored.

A. The Dormant Commerce Clause Generally

Article I Section 8 of the U.S. Constitution grants Congress the exclusive power to regulate interstate commerce.[16] Accordingly,

15. As a textual matter, of course, there is no "dormant Commerce Clause" in the Constitution; Article I Section 8 contains only an affirmative grant of power to Congress. U.S. CONST. art. I, § 8, cl. 3. When scholars and courts speak of the dormant Commerce Clause, they are referring only to a judicially created doctrine, which interprets Article I's Commerce Clause to grant courts—by negative implication—the power to invalidate state actions that unduly burden interstate commerce. *See infra* Part II.A.

16. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have power . . . to regulate Commerce . . . among the several States."). The argument implying that Congress's interstate commerce power is exclusive can be traced back to a statement made by Chief Justice John Marshall in *Gibbons v. Ogden*, explaining that "when a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." 22 U.S. 1, 199–200 (1824).

federal law preempts state and local law in this area once Congress has acted pursuant to its commerce power. But the question remains whether the federal judiciary should step in—in the absence of congressional legislation—to invalidate state laws because they place an undue burden on interstate commerce. The dormant Commerce Clause doctrine has developed to answer that question in the affirmative.

The Supreme Court has inferred that the Constitution's exclusive grant of commerce power to Congress prohibits, by negative implication, regulation of interstate commerce by the states themselves.[17] And the doctrine permits the Court to review state and local laws challenged as unduly hindering interstate commerce even where Congress has not yet legislated—in other words, where its commerce power essentially lies dormant.[18] Simply put, the dormant Commerce Clause doctrine grants federal courts power, in the absence of congressional legislation, to leave interstate commerce *unregulated* by striking down state laws that unduly burden it.[19] The dormant Commerce Clause doctrine exists to diffuse one of the framers' primary concerns addressed in the Constitutional Convention; that is, preventing the states from engaging in economic protectionism that strained state relations under the Articles of Confederation and threatened national unity and stability.[20] Therefore, the Supreme Court routinely strikes down state regulations under the dormant Commerce Clause when such regulations run counter to the constitutional principle that a state must not favor itself at the expense of other states or the nation as a whole.[21]

17. It is due to this negative implication that the dormant Commerce Clause doctrine is sometimes referred to as the negative commerce clause doctrine. *See, e.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995) ("Despite the express grant to Congress of the power to 'regulate Commerce . . . among the several States,' . . . we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." (quoting U.S. CONST. art. I, § 8, cl. 3)).

18. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419 (3d ed. 2006).

19. *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 18 (1937) ("[T]he Commerce Clause, by its own force and without national legislation, puts it into the power of the Court to place limits on state authority.").

20. *See* Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7–8 (1986).

21. *E.g., id.*; C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994) (holding that a local ordinance impermissibly discriminated against interstate commerce and

B. The Dormant Commerce Clause Applied to State Taxation

1. The Due Process Clause and Commerce Clause as Jurisdictional Limitations on State Taxation

In general, there are two great jurisdictional limitations on the state's ability to tax: (1) the Due Process Clause, and (2) the Commerce Clause. If these limitations are breached by state legislation, then the Supreme Court may strike it down. Both the Due Process and Commerce clauses impose a "nexus" or minimum connection requirement between the taxing state and the entity the state seeks to tax.[22] However, "[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical."[23] The due process nexus analysis in state tax cases is beyond the scope of this Comment, but it largely follows the minimum contacts test the Court has advanced to determine whether a state court can exercise personal jurisdiction over a civil defendant.[24] In essence, the Due Process minimum contacts test serves as a "proxy for notice" that the defendant will be subject to the state's jurisdiction.[25] Notably, the minimum contacts test has evolved over time to keep pace with current economic realities in which "many commercial transactions touch two or more states."[26] By jettisoning archaic physical-presence nexus requirements,[27] the Court's minimum contacts test for personal jurisdiction now elevates substance over form by allowing a forum state to exercise personal

thus violated the dormant Commerce Clause when it required that all solid waste processed or handled within town be done solely at its own transfer station); Granholm v. Heald, 544 U.S. 460, 473–74 (2005) (holding that state statutes prohibiting out-of-state wineries from shipping wine directly to in-state consumers, but permitting in-state wineries to do so if licensed, violated the dormant Commerce Clause); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) (holding that a state's property tax exemption statute, which singled out nonprofit institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business, violated the dormant Commerce Clause).

22. Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

23. *Id.*

24. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

25. Quill Corp. v. North Dakota, 504 U.S. 298, 313 (1992).

26. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

27. See, for example, the decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which overruled the physical presence requirement for in rem jurisdiction set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1877), and held the minimum contacts test to be the governing standard in personal jurisdiction analyses.

jurisdiction over an entity that merely "purposefully avails itself of the privilege of conducting activities within the forum state,"[28] even if the entity does not have a physical presence in the state.[29] Thus, a business that purposefully avails itself of economic opportunities in a given state has notice sufficient for due process that it will be subject to that state's taxing powers.

In addition to satisfying due process standards, a state tax must also satisfy the requirements of the Commerce Clause to be rendered constitutional. In *Complete Auto Transit v. Brady*, the Supreme Court held that a state tax is valid under the Commerce Clause only if it (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.[30] The first and fourth prongs combined are a corollary of the Due Process' nexus requirement, but unlike the minimum contacts test (which serves a notice function), the first and fourth prongs of *Complete Auto* work together to limit the reach of a state's taxing power to "ensure that state taxation does not unduly burden interstate commerce."[31] Because the purposes of the two nexus requirements are different, it is possible for a corporation to "have the 'minimum contacts' with a taxing state as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause."[32] For example, while a taxpayer clearly may have minimum contacts with a state without maintaining a physical presence in the state, in at least some instances the Commerce Clause's "substantial nexus" requirement will be satisfied only if the taxpaying entity is physically present in the taxing state's jurisdiction.

The Court first drew this clear distinction between the Due Process and Commerce Clause nexus requirements in *Quill Corp. v. North Dakota*.[33] In that case, the Court grappled with the issue of

28. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

29. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").

30. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

31. Quill Corp. v. North Dakota, 504 U.S. 298, 313 (1992).

32. *Id.*

33. *Id.* at 314.

whether a nonresident mail-order retailer had the duty to collect and remit sales taxes on behalf of its North Dakota customers.[34] The North Dakota law in question imposed a collection duty on any vendor that advertised three or more times per year in the state.[35] Although Quill, the mail-order retailer, had no physical presence in North Dakota, the company generated a significant amount of revenue from North Dakota customers through mail-order catalogs, periodical advertising, and telephone calls.[36] The Court had no problem finding the Due Process Clause's minimum contacts requirement satisfied in this case because Quill had purposefully availed itself of the benefits of the taxing jurisdiction.[37] But the Court ultimately decided that the Commerce Clause's "substantial nexus" requirement was not met.

Justice Sevens reasoned that imposing a sales tax collection duty on Quill would place an undue burden on interstate commerce by imposing upon a nonresident corporation the duty to collect taxes from customers utilizing the tax rates of a potential pool of over 6,000 state and local tax jurisdictions.[38] Thus, the Court held that the state must first establish a substantial nexus with the nonresident corporation before it can impose a collection duty upon it. This substantial nexus, as Court stated, is demonstrated by the corporation's physical presence in that state.[39] In so deciding, the Court affirmed its holding in *National Bellas Hess, Inc. v. Deparment of Revenue,*[40] which carved out a bright-line exception for nonresident mail-order companies without a physical presence in the taxing state's jurisdiction.[41] The Court admitted that a nexus test analyzing only physical presence was "artificial at its edges."[42] But the Court reasoned that the downsides of artificiality would be offset by the clarity of a bright-line rule, the benefits of stare decisis principles,

34. *Id.* at 301.

35. *Id.* at 303–04.

36. *Id.* at 302.

37. *Id.* at 308.

38. *Id.* at 313 n.6.

39. *Id.* at 314.

40. 386 U.S. 753, 758 (1967).

41. *Quill Corp.*, 504 U.S. at 317 ("[A]lthough in [other cases] we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes." (alterations in original)).

42. *Id.* at 315.

and the need to leave undisturbed the "settled expectations" in the sales and use tax realm.[43] Importantly, the Court explained that its decision was made easier by the fact that "the 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[,]" noting that "Congress remains free to disagree with our conclusions."[44] Rather than overturn its previous decision, the Court found the more prudent path to be one of ostensible judicial restraint, finalizing its decision with the declaration that "the better part of both wisdom and valor is to respect the judgment of the other branches of government."[45]

2. Physical Presence or Economic Nexus?

The current debate surrounding *Complete Auto*'s four-pronged test deals in part with defining the scope of the "substantial nexus" prong. Because the *Quill* Court cabined its physical presence requirement to apply only to a state's sales and use tax jurisdiction, the question remains open whether the same physical presence requirement should extend to business activity taxes (corporate income, franchise, excise, or gross receipts taxes). In the wake of *Quill*, Congress, states, lower courts, and scholars have disagreed on the reach of *Quill*'s physical presence mandate. Some argue that the physical presence standard should be applicable to all state taxes,[46] while others argue that a more functional, "economic nexus" standard should apply to non-sales and use taxes.[47] Of course, the arguments on both sides of this debate are informed only by normative judgments because after *Quill*, neither Congress nor the Supreme Court, outside of the sales and use tax context, has endorsed physical presence or economic nexus as the governing

43. *Id.* at 315–16.

44. *Id.* at 318.

45. *Id.* at 319 (quoting Commonwealth Edison Co. v. Montana, 453 U.S. 609, 637 (1981) (White, J., concurring)).

46. *See, e.g.*, Megan A. Stombock, *Economic Nexus and Nonresident Corporate Taxpayers: How Far Will It Go?*, 61 TAX LAW. 1225, 1242 (2008); Scott D. Smith & Sharlene Amitay, *Economic Nexus: An Unworkable Standard for Jurisdiction*, 25 STATE TAX NOTES 787 (2002).

47. *See, e.g.*, Michael T. Fatale, *State Tax Jurisdiction and the Mythical "Physical Presence" Constitutional Standard*, 54 TAX LAW. 105 (2000); Christina R. Edson, *Quill's Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 TAX LAW. 893, 942–47 (1995); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 373–93 (2003).

standard for satisfying the "substantial nexus" prong of *Complete Auto*.[48]

Some lower federal and state courts have narrowly construed *Quill*'s holding to apply only to a state's jurisdiction over sales and use taxes, but not to its jurisdiction over state income taxes.[49] In these cases, the courts are often applying a more comprehensive "economic nexus" standard, which is akin to the "minimum contacts" test and the "purposeful availment" standard of the Due Process nexus analysis.[50] The most persuasive arguments for denying extension of the physical-presence standard were illustrated in a case in which West Virginia's highest court permitted West Virginia to impose corporate and franchise taxes on a nonresident corporation with no physical presence in the state because the corporation derived economic benefits from sales it made to West Virginia customers.[51] The court proffered four justifications for refusing to extend the physical presence requirement to state corporate income taxes: (1) the *Quill* decision was based on principles of stare decisis and not on sound policy; (2) the *Quill* Court itself limited the language of the physical presence standard to include only sales and use taxes, rather than applying it universally to all state taxes; (3) the compliance burdens imposed by state income taxes are far less than for sales and use taxes; and (4) the technological innovations and economic realities that emerged since *Quill* have rendered the physical presence standard ineffective and obsolete.[52]

Conversely, other states and federal courts have determined that *Quill*'s physical presence mandate does extend to state jurisdiction over income-based taxes.[53] An oft-cited rationale for this approach

48. *See* Megan A. Stombock, *Economic Nexus and Nonresident Corporate Taxpayers: How Far Will it Go?*, 61 TAX LAW. 1225, 1227 (2007).

49. *See, e.g.*, KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 328 (Iowa 2010).

50. *See, e.g.*, Geoffrey, Inc. v. S. Carolina Tax Comm'n, 437 S.E.2d 13, 18 (S.C. 1993).

51. Comm'r v. MBNA Am. Bank, N.A., 640 S.E.2d 226, 235–236 (W. Va. 2006) *cert. denied*, 551 U.S. 1141 (2007).

52. *Id.* at 234 ("[T]he development and proliferation of communication technology . . . now makes it possible for an entity to have a significant economic presence in a state absent any physical presence there. For this reason . . . the mechanical application of a physical-presence standard to franchise and income taxes is a poor measuring stick of an entity's true nexus with a state.").

53. *E.g.*, J.C. Penney Nat'l Bank v. Johnson, 19 S.W.3d 831, 839 (Tenn. Ct. App. 1999), *cert. denied*, 531 U.S. 927 (2000).

involves an analysis of comparative burdens between a state's imposition of sales tax collection duties and its direct income tax obligations.[54] Proponents of a narrow application of *Quill* argue that granting a state sales tax jurisdiction imposes only an administrative burden on the nonresident corporation as it merely requires the collection and remittance of the *customer*'s sales tax obligation, whereas an income tax, on the other hand, is imposed directly on the *corporation's* earnings.[55] Thus, the argument goes, because the imposition of a direct income tax is more onerous than the imposition of a mere duty to collect sales taxes imposed upon others, the substantial nexus requirements for income taxes should be at least as stringent as those imposed for sales tax purposes. Additionally, many proponents of the physical presence standard gravitate to the justification cited in *Quill* relating to the value of clarity and predictability stemming from a bright-line rule. Because actual physical presence is easier to determine than a case-by-case, totality-of-the-circumstances economic presence standard, some commentators argue that compliance burdens on multi-state corporations would be even more burdensome under an economic nexus standard.[56]

Both sides of the debate marshal compelling arguments in support of their position, which likely fuels the wide disparity among states in the application of varying nexus standards. But argument over which side of the debate is normatively correct misses the point: the real problem lies in the state-by-state application of non-uniform nexus standards. As developing technologies increase the prevalence of commerce conducted almost wholly interstate, increasing numbers of states are devising new tax schemes to capture more of this interstate income. And as corporations devise new ways to evade those taxes, the need for an effective uniform solution becomes more acute.

54. R. Todd Ervin, Comment, *The Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day?*, 19 VA. TAX REV. 515, 544 (2000) ("[A] sales and use tax is nothing more than a collection duty imposed on the taxpayer, whereas a direct income tax is actually borne by the taxpayer.").

55. Ryan, *supra* note 7, at 301.

56. WALTER HELLERSTEIN & JOHN A. SWAIN, STREAMLINED SALES AND USE TAX 2–4 (2005).

3. Problems created by inconsistent application of multiple nexus standards and state apportionment formulas

Apportionment formulae vary widely among the states. Many factors contribute to the overall tax burden on a multi-state corporation. Thus far, the focus in this Comment has been on the threshold determination—the substantial nexus standard—but an equally important input into a corporation's state income tax equation is a given state's apportionment formula. The apportionment formula is what states use to determine what portion of a corporation's global revenue is attributable, and therefore taxable, to each state.[57] Most states have adopted an apportionment formula, which takes a weighted average of the individual state's proportion of three inputs—sales, property, and payroll—to come up with an overall percentage of a corporation's global income that is fairly attributable to that state.[58] So, for example, assuming an equally weighted apportionment formula, if a corporation had global sales of $1 million, $350,000 of which were sales made in State X, the sales factor for State X would be 35%.[59] The two remaining factors for property and payroll are determined in like manner. Finally, the weighted average of all three factors would be taken to determine the portion of a corporation's global income a particular state would have jurisdiction to tax.

The Supreme Court has refused to demand a uniform system of apportionment by all states, but attempts at creating uniformity have been made by the Multistate Tax Commission.[60] Nevertheless, uniformity has never been achieved, either by consensus or legislation, and apportionment formulae currently vary from state to state. Many states use a formula that gives double weight to the sales factor, but still uses property and payroll as inputs. Other states have attempted to capture more corporate revenue by shifting to a single-sales-factor formula, which, as the name suggests, focuses

57. Inst. On Tax'n & Econ. Pol'y, *Corporate Income Tax Apportionment and the "Single Sales Factor"*, 8 POL'Y BRIEF 2 (2012), *available at* http://itepnet.org/pdf/pb11ssf.pdf.

58. *Id.* at 1–2.

59. A comprehensive example of the apportionment formula is set forth in Ryan, *supra* note 7, at 280.

60. The only restriction the Supreme Court has placed on States' apportionment formulae is that they must (1) be fair, and (2) not discriminate against interstate or foreign commerce. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169–71 (1983).

exclusively on the sales factor and disregards property and payroll.[61] The remainder of the states uses a myriad of other apportionment formulae that weigh different factors according to how each state feels it will achieve maximum revenue generation.[62]

a. Nowhere income. Although allowing states the freedom to structure their own apportionment formulae may be justified by principles of federalism, the nonuniformity of income apportionment among the states creates a situation where multi-state corporations can be taxed on more—or less—than 100% of their income.[63] Corporations often try to structure their operations so as to leave a portion of their income untaxed by any state. When a corporation is successful in doing so, the untaxed portion of a corporation's income is often called "nowhere income."[64] To see how a corporation achieves nowhere income, consider a hypothetical corporation that situates all of its production facilities and employees in State X, but makes all of its sales exclusively in State Y. This corporation may lobby the State X legislature to require a sales-only apportionment formula, while lobbying the State Y legislature, where the corporation makes 100% of its sales, to adopt an equally-weighted (between property, payroll, and sales) apportionment formula. The desired result is that the corporation will not be required to apportion any income to State X (and therefore pay no income tax in State X) and will be required by State Y to apportion only roughly one-third of its income to State Y, thereby creating what the industry has termed "nowhere income"—income that is not subject to tax in any state—to the tune of roughly two-thirds of its gross income.[65] In

61. Inst. On Tax'n & Econ. Pol'y, *Corporate Income Tax Apportionment and the "Single Sales Factor"*, 8 POL'Y BRIEF 2 (2012), *available at* http://itepnet.org/pdf/pb11ssf.pdf. As of the writing of this Comment, nearly a dozen states have adopted the single-sales-factor apportionment formula.

62. For a table of the different apportionment formulae applicable in the several states, see http://www.taxadmin.org/fta/rate/apport.pdf.

63. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Supreme Court recognized the problem of overlapping taxation, but noted that in practice, eliminating this problem would require the Court to establish a single constitutionally mandated method of taxation and specific rules regarding application of that method in particular contexts. The Court declined to do this, believing that the task was "essentially legislative," and left it to Congress to make this determination. *Id.* at 171.

64. Michael Mazerov, *The "Single Sales Factor" Formula for State Corporate Taxes: A Boon to Economic Development or a Costly Giveaway?*, CTR. ON BUDGET & POL'Y PRIORITIES 24 (rev. 2005), *available at* http://www.cbpp.org/files/3-27-01sfp.pdf.

65. Indeed, the creation of differing tax structures to achieve maximum "nowhere" income has been a prominent focus of corporate lobbyists. *See* Michael Mazerov, *Federal "Business*

sum, "the lack of a uniform method of income apportionment among the states produces undesirable 'gaps and overlaps in the tax bases of the various states.'"[66] The opportunity for tax evasion creates perverse incentives for corporations to divert valuable resources from socially productive endeavors—like improving the quality of products or the efficiency of production—to lobbyists and other tax professionals who can structure corporate operations to take advantage of these artificial gaps and overlaps.

b. Inconsistent and inequitable tax burdens. The nuanced and nonuniform system of state corporate income tax schemes among the states has created inequitable distribution of tax burdens among corporations doing business in any given state. Indeed, many of the most profitable nonresident corporations can afford to structure their business to comply with the letter of the state tax laws—and manage thereby to avoid much of the income tax burden—while still exploiting the state's commercial market. On the other hand, smaller, local businesses that operate entirely within a state's borders are unable to take advantage of the tax loopholes available to nonresident corporations under the current system. The present system is consequently an inefficient tool for revenue generation and has attracted wide criticism.[67] In addition to the system's inefficiency in collecting revenue for the states, it often disadvantages local small businesses and discourages capital investment by in-state corporations.

c. The idealistic solution to the state income tax debacle. As a threshold matter, any viable solution to the state income tax debacle requires three things: (1) a uniform definition of "Unitary Business" (which would bring certainty to taxpayers wishing to know whether they must conform to the apportionment and nexus standards), (2) a uniform apportionment formula applied by all the states (so as to

Activity Tax Nexus" Legislation: Half of a Two-Pronged Strategy to Gut State Corporate Income Taxes, CENTER ON BUDGET AND POL'Y PROIRITIES 3 (2011), *available at* http://www.cbpp.org/files/1-26-05sfp.pdf.

66. Ryan, *supra* note 7, at 284 (quoting Charles E. McLure, Jr., *The Nuttiness of State and Local Taxes—and the Nuttiness of Responses Thereto*, 25 ST. TAX NOTES 841, 849 (2002)).

67. *See, e.g.*, Ryan, *supra* note 7, at 298 (quoting David Brinori, *Stop Taxing Corporate Income*, 25 ST. TAX NOTES 47, 48 (2002)) (criticizing the current system as "probably the most inefficient, least cost-effective revenue source available to the states"); Elliott Dubin, *Back to the BAT Cave*, MULTISTATE TAX COMM'N 7, 7, *available at* http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Back%20to%20the%20bat%20Cave_HR1439_A%20GSM%20Edit.pdf.

ensure that exactly 100 percent of a corporation's income is taxed proportionately among the several states in which it operates), and (3) uniform nexus standards (which would bring certainty to the question of whether a corporation is liable to pay tax in any particular state). Uniformity on these three fronts is widely accepted in the tax community as the optimal solution to the current apportionment problem.[68] Consensus is lacking, however, on the method by which such uniformity should be implemented. In general, there seem to be two prevailing methods of implementation: (1) multilateral state action, or (2) federal congressional action.

(1) Multilateral state action. The proposal for multilateral state action is by far the preferred method of achieving uniformity on these fronts because it accomplishes the goal of uniform taxation without outside intervention by the national government. States certainly have the power to act unilaterally to set definitions for "unitary business" and to prescribe independent apportionment formulae and substantial nexus standards. Since each state individually has the power to act unilaterally, it follows that states also have the power to act in concert to accomplish the same ends on a uniform basis.[69] The problem, however, is that states have not migrated in the direction of uniformity. In fact, in recent years, the divergence in apportionment formulae among states has widely increased.[70] Additionally, with regard to nexus standards, the states' hands are tied by certain federal legislation[71] that imposes restrictions on the states' ability to craft their own uniform nexus standard.[72] Moreover, when states have moved toward uniformity, it has come only in response to the threat of looming federal legislation

68. *See, e.g.*, Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 181–82 (1997) ("[S]cholars have long recognized [the need for uniformity] in state and local taxation and, as our economy has expanded and state and local taxes have increased in amount and scope, state tax administrators, scholars, and taxpayers have all become increasingly sensitive to this need." (footnotes omitted)); Walter Hellerstein, *Federalism in Taxation: The Case for Greater Uniformity*, 47 NAT'L TAX J. 225, 225 (1994) (Book Review) ("[T]he desirability of achieving uniformity in state taxation is one of the rare matters on which state taxpayers, state tax administrators, and the adjudicative bodies that resolve their disputes can agree.").

69. Charles E. McLure, Jr., *The Difficulty of Getting Serious About State Corporate Tax Reform*, 67 WASH. & LEE L. REV. 327, 334–35 (2010).

70. *Id.* at 335.

71. Interstate Income Act of 1959, Pub. L. No. 86-272, § 101, 73 Stat. 555 (1959) exempts from creation of nexus some corporations that sell tangible personal property and have only certain specified contacts with a given state.

72. McClure, *supra* note 69, at 335.

that would impose state uniformity, thereby—in the states' eyes—depriving them of their tax sovereignty and potentially decreasing their revenue.[73] But once the impending legislation lost steam, efforts at cohesive uniformity among the various states subsided, and most states reverted to their old ways of unilateral action.[74] This result comes as no surprise given that states generally have no incentive to act in concert with other states on these matters because differing standards and definitions are valuable as bargaining chips to attract investment and to cater to businesses.[75] Uniformity would even the playing field among the states and would deprive some states of a degree of flexibility in ordering their tax scheme as a tool for attracting foreign investment and economic growth at the expense of other states. Given the inherent incentive against uniformity, therefore, it is unlikely that multilateral state action on this front will prove an effective method for accomplishing this important goal.

(2) Federal congressional action. The alternative to voluntary uniformity through multilateral state action is federally imposed uniformity through federal legislation. In theory, Congress could require states to adopt uniform definitions for unitary business, uniform nexus standards based on economic presence, and uniform apportionment formulae, thereby eliminating tax planning strategies and inequitable tax burdens.[76] Thoughtful proposals for federal legislation of this nature are common.[77] Nevertheless, however theoretically sound a proposal for Congressional legislation may be, it is only valuable if the proposed legislation is actually enacted. And as a matter of history, "Congress has not proven to be an effective forum for state tax reform."[78] For example, since 1967 when the physical presence nexus standard was enunciated in *Bellas*

73. *Id.* at 337.

74. *Id.*

75. *Id.* at 338.

76. *Id.*

77. *See supra* note 7 and accompanying text.

78. John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 370 (2003). Indeed, at least one empirical academic study "predicts that Congress is unlikely ever to enact legislation mandating uniformity in state and local taxation." Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 173 (1997). This assumes, of course, that there is no external catalyst to propel Congress to action. As set forth in the following parts of this Comment, however, the Supreme Court may spur Congress to action by a judicial ruling.

Hess, federal legislation that would replace this antiquated standard with something more akin to economic nexus has been repeatedly introduced only to fail.[79] Likewise, federal legislation that would uniformly establish and expand the physical presence standard, a major culprit in the state income tax conundrum, has been introduced numerous and consecutive times and met a similar demise.[80] Congress's track record on this front has led one commentator to note that "[a]s a practical political matter . . . Congress cannot be counted on either to take the lead or to lead in the right direction."[81]

As the foregoing discussion demonstrates, neither multilateral state action nor federal legislation alone offers tenable solutions. Both proposals lack sufficient steam to propel wholesale adoption of appropriate uniform standards, which are necessary to effectively solve the current morass of state corporate income taxation. This is so because both states and corporations have an abiding interest in nonuniformity. Corporations oppose uniformity because nonuniform standards allow them to shop around among various states and to play states against each other for the most favorable tax treatment.[82] States are also opposed to uniformity because it would eliminate one of their levers for attracting corporate investment and would mean a relinquishment of some degree of states' taxing sovereignty.[83] Accordingly, the last and probably most effective means of spurring uniformity is a Supreme Court ruling on the matter—a ruling with which Congress either agrees and thus will end the debate conclusively, or one with which Congress disagrees and thus will provoke Congress to take a definitive stance at odds with the Court's ruling.

79. *See* Swain, *supra* note 78, at 370.

80. *See* Ryan, *supra* note 7, at 321 (stating that the Business Activity Tax Simplification Act (BATSA), an act which has as one of its primary thrusts the adoption of a physical presence nexus standard, has been proposed, in various forms, in every Congress since 2003, but that each proposal of the Act died in Congress).

81. Swain, *supra* note 78, at 370. While Congress has adopted a solitary statute dealing with the nexus standard in Public Law 86-272, it has only adopted minor legislation that affects corporate taxation since then. *See* Kelley W. Strain, *Geoffrey the Giraffe Arrives in Louisiana: Why Geoffrey Should Not Pay State Income Tax*, 6 LOY. L. & TECH. ANN. 1, 41 (2006) (quoting Kathleen Leslie Roin, *Due Process Limits on State Estate Taxation: An Analogy to the State Corporate Income Tax*, 94 YALE L. J. 1229, 1242 n.69 (1985)).

82. *See* McLure, *supra* note 69, at 338.

83. *Id.*

d. A Supreme Court ruling. The Supreme Court has repeatedly declined petitions to hear a case that would give it the opportunity to definitively resolve the substantial nexus standard under the dormant Commerce Clause.[84] By refusing to hear any cases which would require it to articulate an appropriate nexus standard, the Court seems to be clinging to the deferential statement it made in *Quill*: that adhering to the antiquated physical presence standard enunciated in *Bellas Hess* is motivated by a desire to defer to Congress's ultimate power over interstate commerce.[85] The Court surely is wary about contradicting its principled stance of legislative deference evidenced by its implied instruction to Congress that, at least in the use tax arena, it was "now free to decide whether, when, and to what extent the States may burden interstate [businesses],"[86] thus implying that the Court would no longer be meddling in decisions regarding substantial nexus standards among the states.[87]

However, even though Congress possesses the ultimate power to resolve this issue, Congress has historically failed to adopt (and is unlikely to ever adopt) *any* solution largely because of political stalemate. In the past, the Supreme Court has not shied away from issuing rulings regarding state taxes that burden interstate commerce;[88] in fact, the Court developed the dormant Commerce Clause doctrine for the express purpose of reviewing state actions that negatively impact interstate commerce.[89] Given congressional stalemate and inability of the states to act in unison to overcome this vexing problem, the time is now ripe for the Supreme Court to grant certiorari to an appropriate case and to adopt the solution that will

84. For recent examples involving petitions for clarification of the nexus ambiguity, see *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011), *cert. denied*, 132 S. Ct. 95 (2011), and *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 132 S. Ct. 97 (2011)).

85. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992).

86. *Id.*

87. The *Quill* decision seems like an odd exit point for the Court considering the volumes of case law previously promulgated by the Court, which served to complicate the analysis of *Complete Auto*'s "substantial nexus" prong. It appears that the Court surveyed its collateral damage and decided the current state of confusion (inspired in large part by its own decisions) would only be exacerbated by further judicial interference and therefore chose the mask of legislative deference as an excuse to bow out of the nexus debate rather than risk further compounding the confusion.

88. *See* Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977).

89. *See* Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

promote equity and efficiency to both taxpaying corporations and states in the modern economic environment.[90] Still, even if the Supreme Court were willing to issue a ruling that would implement an appropriate solution, the Court is in a difficult position because it must do so within the confines of a specific case or controversy whose facts may not be ideal for propounding this solution in its entirety. This concern as well as others will be analyzed in the following Part, which will defend judicial review under the dormant Commerce Clause doctrine and will support this defense with an analysis of the distinctive roles of the Supreme Court—specifically, its potential (and less frequently examined) role as a catalyst for legislative reform.

III. JUDICIAL REVIEW UNDER THE DORMANT COMMERCE CLAUSE AND THE CATALYTIC ROLE OF THE SUPREME COURT

A. A Defense of Judicial Review of State Action Under the Dormant Commerce Clause

Judicial review of state action involving interstate commerce is controversial but well established.[91] As early as the days of John

90. Any attempt by the Court to implement a comprehensive policy that solves the state income tax conundrum would likely be met with the argument that such policymaking is precisely the type of action that should be left entirely to Congress and that would represent an overreaching of the Court's judicial bounds into legislative territory. While it may appear so at first blush, it must be recalled that the Court would be acting under the negative commerce clause doctrine, so by definition the Court would be acting in the narrow area in which Congress has the express authority to effectively "overrule" the Supreme Court's decision. The Court admitted as much in its *Quill* decision, noting that "[n]o matter how we evaluate the burdens that . . . taxes impose on interstate commerce, Congress remains free to disagree with our conclusions." Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). Consequently, since the dormant Commerce Clause arena is one in which it is almost expected that Congress will eventually chime in on an important issue dealing with burdens on interstate commerce, any future Congressional statute that contradicts the Court-imposed solution to the problem is very unlikely to be seen as a lack of Congressional respect for the rulings of the Supreme Court. This result obtains in stark contrast to the divergent result that may occur in cases involving judicial activism in an arena other than the dormant Commerce Clause where such action by Congress could potentially result in the Court's legitimacy being depreciated. But it is precisely in those divergent constitutional cases, unlike the dormant Commerce Clause cases, that the justiciability doctrines and other arguments for judicial restraint find their most compelling application. Thus, a dormant Commerce Clause decision by the Court is a proper vehicle for at least initializing reform in the income tax nexus debate.

91. Dormant Commerce Clause opponents dislike the doctrine because it partakes of legislative action. Critics sometimes denounce the doctrine on separation of powers grounds, arguing that it is wholly for Congress—not the Judiciary—to regulate commerce and to

Marshall, the Supreme Court has consistently found that judicial invalidation of certain state laws is supported by the Constitution and by democratic theory.[92] Judicial review of state action currently entails a balancing test that first considers whether the state regulation is rationally related to a legitimate state end, and then balances the burden on and potential discrimination against interstate commerce against the state's interest in enforcing the legislation.[93] Judicial review under this paradigm is supported by at least three important rationales—the first two theoretical and the third practical.

First, judicial review of state legislation is supported by democratic theory, which recognizes that state legislatures represent only a local constituency. Accordingly, the democratic processes of each state will, by their very nature, often favor in-state interests at the expense of unrepresented out-of-state interests.[94] Because this "defect" of localism is an inherent trait of a well-functioning, representative state democracy and is not a symptom of breakdown in the local democratic process, democratic theory supports judicial review of a wide range of even ordinary state legislative measures in order to ensure that interstate commerce is not unduly burdened by their enactment.[95]

Second, judicial review of state action under the dormant Commerce Clause is supported by the fact that the Court's decisions

invalidate state laws that place an undue burden on interstate commerce. *See* CHEMERINSKY, *supra* note 18, at 423. Indeed, Supreme Court Justices themselves have disagreed on the propriety of the doctrine. Justice Thomas, for example, has argued that the doctrine authorizes the "exercise of judicial power in an area for which there is no textual basis," and that the Court is ill-equipped to engage in the extensive "policy-laden decision making" inherent in determinations regarding regulations on interstate commerce. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612, 620 (1997) (Thomas, J., dissenting). Despite such criticisms, however, the dormant commerce doctrine is well established as a matter of history and the propriety of Supreme Court decisions invoking the doctrine is largely uncontested.

92. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 408 (1988).

93. *Id.*; *see also*, S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 770–71 (1945); Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186–87 (1950).

94. TRIBE, *supra* note 92, at 409 (There are no inherent problems with state actions that affect out-of-state interests that have no voice in the state's democratic process. Speaking directly to the issue of judicial review in this context, Tribe asserts that "[w]hatever may be the general merit of a system of judicial review which sanctions intervention by the counter-democratic courts only when the normal processes of democracy have broken down, that model is of little use if mechanically applied in the context of interstate commerce, where problems often arise precisely because the individual states' democratic processes have worked *well*.").

95. *Id.* at 411.

are always subject to subsequent congressional review. Because judicial review under the dormant commerce doctrine derives from negative implications of the constitutional grant of power to Congress, the Court's limitations on state interference are always subject to congressional revision.[96] Thus, doctrinal criticisms resting upon separation of powers ideals are weak because the dormant Commerce Clause is "one of the few areas where Congress has the clear authority to overrule a Supreme Court decision interpreting the Constitution."[97] And since Congress is free to disagree with the Supreme Court and effectively to "overrule" any of its decisions rendered in the dormant Commerce Clause realm, any potential threat of judicial encroachment on Congress's lawmaking prerogative through the exercise of this doctrine is nonexistent.[98] Essentially, in the realm of the dormant Commerce Clause, the relationship between the Court and Congress is similar to the relationship between Congress and the Executive in that the latter branch in both relationships has the ability to exercise veto power over the former branch's decisions. Moreover, once a Supreme Court decision has been "vetoed" or overwritten by an act of Congress, the Supreme Court is powerless to reinstate its prior decision by any means.[99] Consequently, calls for judicial deference based upon the argument that the Court's decision would irrevocably encroach upon the territory of Congress are unwarranted because Congress will always have the last word in these inter-branch disputes concerning state burdens on interstate commerce.

Finally, judicial review of state actions affecting interstate commerce is appropriate because it is the only efficient (and arguably the only possible) way to carry out the goal of leaving interstate commerce substantially unburdened. Opponents of judicial review would instead favor congressional review of state

96. *Id.* at 403–04.

97. CHEMERINSKY, *supra* note 18, at 449. *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 321 (7th ed. 2004) ("When the Court holds that a state law violates the dormant commerce clause, Congress can effectively reverse that ruling by enacting federal legislation . . . .").

98. NOWAK & ROTUNDA, *supra* note 97, at 321 ("Court actions invalidating state laws [under] negative commerce clause principles are not truly incompatible with the democratic process. Rather, such judicial rulings may simply force consideration of multi-state commercial problems by Congress.").

99. To continue the analogy, contrast this with Congress's power to override an Executive Veto by a two-thirds majority in both houses of Congress.

laws that might burden interstate commerce.[100] However, given the sheer volume of state legislation and Congress's limited resource of time, such a proposal would be impossible in practice. Indeed, the Supreme Court has recognized that it is unrealistic to expect Congress to review every state and local law that may potentially unduly burden interstate commerce.[101] Thus, in view of the relative capacities of the two branches, the judiciary is better suited to the task and is not constitutionally prohibited from assuming it.

Given the rationales discussed above and the longstanding history of the dormant Commerce Clause in practice, federal judicial review of state action of all kinds is largely undisputed. Moreover, judicial review of state taxes under the dormant Commerce Clause is especially well established. As discussed in greater detail above in Part II.B.1, judicial review of state burdens on interstate commerce is governed by *Complete Auto*'s functional four-part test. Cases involving judicial review under this test are legion, and there can be no dispute that such review is well established. Thus, the Court should face no serious contest in accepting and deciding a case resolving the persistent lack of uniformity in the state income tax arena.

Having thus demonstrated that the Court *can* exercise its judicial powers to decide a state income tax apportionment/nexus case, the following section makes the case for why the Court *should* decide such a case based on its distinctive roles in our tripartite system of federal government.[102]

100. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); Thomas K. Anson & P.M. Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 79–85 (1980) ("Congress, not the courts, should decide when to override state regulatory initiatives for the sake of the national economy.").

101. *See* Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) ("[T]hese restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters. . . . The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits.").

102. The following Parts discuss the broader law- and policy-making functions of the Supreme Court in order to highlight the normative value of the dialogue that is generated between Congress and the Judiciary when each branch acts in its respective constitutional sphere. This discussion is intentionally broader than the scope of this article's treatment of the dormant Commerce Clause as applied to state income taxation in order to support this Comment's argument that a Supreme Court ruling on this specific issue is desirable, now that the constitutional permissibility of such a decision has been established above.

B. The Roles of the Modern Supreme Court

The Supreme Court wears various hats in its contemporary exercise of judicial power. To fully understand the Court's traditional and progressive roles, this Part first will address the theoretical underpinnings supporting the prohibition against advisory opinions as it provides a framework for thinking about the propriety of judicial intervention generally. Second, this Part will survey the evolution of the role of the judiciary and discuss its capacity as adjudicator, lawmaker, and policymaker. Third, this Part will acknowledge the tension between the traditional and progressive roles of the Court and explore the Supreme Court's emerging role as a catalyst for legislative reform. Finally, evidence of the Court's catalytic role will be demonstrated through a few brief historical examples.

1. Justifications for the prohibition against advisory opinions applied to judicial intervention generally

Article III Section 2 of the Constitution imposes the "cases and controversies" requirement on the Supreme Court, which limits the Court's jurisdiction to adjudicating actual controversies and disputes.[103] In so doing, this requirement also prohibits the Court from offering advisory opinions to either the executive or legislative branches. The prohibition against advisory opinions is at the core of Article III and restrains the judiciary from advising Congress on the constitutionality of legislation before it is passed or from opining on other constitutional issues posed to them by the other branches of government.[104] Three key policy rationales support this prohibition. First, the goal of separation of powers is served by "keeping the courts out of the legislative process."[105] It is generally accepted that it is inappropriate for the judicial branch to opine on what laws should be made because this is a purely legislative function; the judiciary's primary function is to adjudicate concrete disputes, not to advise Congress in its legislative role.

103. In *Flast v. Cohen*, Chief Justice Warren declared that the Constitution's delineation of cases and controversies "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." 392 U.S. 83, 95 (1968).

104. CHEMERINSKY, *supra* note 18, at 53, 60.

105. *Id.* at 54.

Second, this prohibition conserves judicial resources—especially its store of political capital.[106] If the Court were permitted to offer nonbinding advice that other branches could easily ignore or supersede, the vigor and force of Supreme Court rulings would soon depreciate. The efficacy of Court rulings depends on the other branches' voluntary compliance with judicial orders, and such compliance is conditioned on the Court's credibility.[107] Thus, the argument goes, if the Court becomes too loose with its decisions, it would deplete its reserve of political capital and the other branches could, at some point, refuse to enforce the Court's orders. The prohibition against advisory opinions safeguards the Court's legitimacy by placing spending limits on the Court's political capital and allowing its expenditure only when necessary.[108]

While this second policy justification for judicial restraint may be theoreticalically valid, historical evidence does not support the notion that the Court's political piggy bank is as fragile as this argument assumes. The legitimacy of the Court has been tested numerous times with many controversial decisions—some that even produce calls for complete judicial reform—and yet the judiciary seems to have had ample support to survive these occasional storms.[109] In practicality, the Court's legitimacy appears to be largely unaffected by each individual Court decision.[110] Because controversial judicial actions will simultaneously attract support and alienate different segments of the population, the Court's legitimacy appears to largely remain unscathed even after controversial policy-driven decisions.

In addition to limiting the Court's jurisdiction to actual controversies or disputes, the prohibition against advisory opinions requires that there be a "substantial likelihood that a [Supreme Court] decision . . . will bring about some change or have some effect."[111] In one of its earliest cases, the Court expressed that the

106. *Id.* at 51.

107. *Id.*

108. *Id. But see* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 134–38 (1987) (arguing that the Court's legitimacy is not fragile and that conserving judicial credibility should not be a primary objective in constitutional interpretation).

109. Gregory A. Caldeira & Kevin T. McGuire, *What Americans Know About the Courts and Why it Matters, in* THE JUDICIAL BRANCH 262, 272–73 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

110. *Id.*

111. CHEMERINSKY, *supra* note 18, at 56.

concern underlying this criterion was the violation of the separation of powers doctrine. The Court noted that such abstract judicial declarations would be inappropriate because they could be "revised and controuled [sic] by the legislature, and . . . . [s]uch revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts . . . ."[112] However, this concern for separation of powers does not inhere in decisions rendered by the Court in the dormant Commerce Clause realm because the Court is understood to be filling a gap left by Congress's failure to exercise its commerce power. In this way, the Court acts as an appropriate stop-gap until Congress directly reviews the issue. Thus, any later revision of the Court's dormant Commerce Clause decision is not viewed as a violation of the judiciary's independence, but as an appropriate exercise of Congress's commerce power. Hence, the dormant Commerce Clause is unique because it allows both federal branches—Congress and the Supreme Court—to act in ways that would otherwise be seen as an encroachment on each other's separate and independent functions.

Finally, the third justification for the prohibition against advisory opinions is that it improves judicial decision making by limiting the Court's rulings to concrete controversies best suited to judicial resolution.[113] While the Court plainly must rule on an actual dispute, its dormant commerce decisions should not be discredited for their abstract nature. The value of precision in dormant commerce decisions is not as high as it is in other contexts since Congress is free to alter or even abolish the Court's ruling. Because of this unique characteristic of dormant commerce decisions, their highest value is not always in their ability to resolve the particular case in question; rather, it is sometimes in the value of their statement to the coordinate branches of government.

112. Heyburn's Case, 2 U.S. (2 Call.) 409, 411 (1792).

113. CHEMERINSKY, *supra* note 18, at 54; *see also* Flast v. Cohen, 392 U.S. 83, 96–97 (1968) (noting that the prohibition against advisory opinions "recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests" (internal quotation omitted)).

A. The Supreme Court as Adjudicator, Lawmaker, and Policymaker

The Supreme Court is both a lawmaking and policy-setting institution.[114] Rather than merely proclaiming what the law is, the modern Supreme Court participates in policymaking decisions that are largely informed by public opinion.[115] In this way, the modern Court partakes of a "legislative" nature by making law. This is not to say that the Supreme Court does or should legislate in the traditional sense; the Constitutional limits of Article III, of course, still apply. But acknowledging the dual role of the modern Supreme Court gives place for a view of the Court as a contributor in the policymaking Congressional discussion—particularly in decisions involving the dormant Commerce Clause.

1. Supreme Court as adjudicator

The traditional and least controversial role of the Supreme Court is that of adjudicator. Many framers of the Constitution considered the Court's role in the governmental process to be quite limited. Indeed, Alexander Hamilton insisted that the judicial branch would be the least dangerous of the three because it would exercise "no influence over either the sword or the purse," but would have the capacity only to render judgments.[116] Under this narrow view, the Court was to resolve disputes by discovering and applying law that existed independent of judicial judgment. Accordingly, any true lawmaking and policymaking were left within the express purview of Congress. In accordance with this perception, the framers attempted to insulate the federal judiciary from popular whim by requiring

114. *See* Scott H. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343, 379 (noting that the Supreme Court is an "essential policymaking institution"); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1158–61 (2008) (discussing how the Supreme Court is a "policy maker" while acknowledging the ways in which its policymaking differs from that of the overtly political branches); Katherine C. Naff, *From* Bakke *to* Grutter *and* Gratz: *The Supreme Court as a Policymaking Institution*, 21 REV. OF POL'Y RES. 405, 424 (2004).

115. *See, e.g.*, Herbert Hovenkamp, *The Supreme Court as Constitutional Interpreter: Chronology Without History*, 90 MICH. L. REV. 1384, 1388 (1992) ("While the Supreme Court is, quite simply, a political institution, it would have us believe that this is not so; most of the time the Court maintains that it is simply engaged in faithful adherence to rules and decisions previously laid down."); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191–92 (1988) (discussing possible political motives behind legal doctrine in support of the argument that the Supreme Court is political to its core).

116. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton).

judicial appointments to be made by executive nominations and confirmed by the Senate (whose members were selected by the state legislators, not by popular vote as they are today) and also by granting life tenure of federal judges, which could be cut short only upon bad behavior.[117]

Over time, however, the perception that the exercise of the Court's adjudicative function merely involved the recognition and application of common law and positive law has largely been abandoned.[118] As one commentator noted, "American courts, both federal and state, do not simply 'announce' the law; as much as any other set of institutions, they make policy."[119] This realist shift in scholarly perception of the Court has emerged by observation that general laws do not always resolve specific legal questions. In those instances, judges must fill the gap by making law.[120] Additionally, cases often arise in which judges determine that existing legal rules are inadequate to serve justice or overarching societal values.[121] In such cases, judges must make value judgments and engage in policymaking—a role traditionally thought of as purely legislative.[122] Despite Hamilton's narrow conception of the Court's role, the modern judiciary now appears to be significantly involved in creating and implementing public policy.[123]

Moreover, as the nation's political structure has progressed, the judiciary has become more democratized and concomitantly more informed by public opinion.[124] For example, televised Senate

117. Caldeira & McGuire, *supra* note 109, at 263. One reason for life tenure was to "enhance the likelihood that [justices'] decisions [would] be based on the merits of the case and not on political pressure." CHEMERINSKY, *supra* note 18, at 3.

118. *See* EDWARD F. HENNESSEY, JUDGES MAKING LAW 1 (1994) ("The proposition that judges merely find the law that was always there is a fiction."); *see also* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[A] certain degree of discretion, and thus of lawmaking, *inheres* in most . . . judicial action.") (emphasis in original).

119. Kermit L. Hall & Kevin T. McGuire, *Introduction* to THE JUDICIAL BRANCH, xxi, xxii (Kermit L. Hall & Kevin T. McGuire eds., 2005).

120. HENNESSEY, *supra* note 118.

121. *Id.*

122. *See id.*

123. Hall & McGuire, *supra* note 119.

124. *See, e.g.*, William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90, 96 (1993) (concluding that public opinion and Supreme Court decisions influence each other in an iterative process); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 322–25 (2005) (compiling and discussing the research surrounding the interplay between judicial decisions and public opinion).

Judiciary Committee hearings are followed closely by members of the media intending to mobilize mass opinion to influence nomination decisions.[125] Federal courts also continue to find themselves enmeshed in provocative policy issues.[126] Engaging in such salient policy issues forces the Court to be conscious of public values that often find expression in judicial decisions[127]—and rightfully so. Because government derives its "just powers from the consent of the governed, the authority of American courts is conditioned by popular opinion."[128] Although it is argued that the Court should be sequestered from public opinion in order to insulate it from political pressure, public opinion itself serves as a check on potential excesses by the Court.[129] Since the Court relies on the political branches to carry out its orders, "it cannot afford to alienate the average American for very long. Without a basic undercurrent of support for their actions, the justices cannot expect that their decisions will be taken seriously by elected officials who, in the end, are the ones who must translate the Court's rulings into action."[130] As a result, the judiciary, just like Congress, is informed by public opinion and arguably guided thereby.[131]

The modern judicial and legislative processes also exhibit similar features in two additional and important ways. First, judicial decisions and federally enacted statutes both govern the behavior of the population at large. Congressional legislation is directed toward the entire population, or at least those who fall within the ambit of the statute, and imposes an obligation on those citizens.[132] Similarly, although the Court's rulings theoretically apply only to the litigants before the Court, the precedent set by the Court creates

125. Caldeira & McGuire, *supra* note 109, at 263.

126. The Supreme Court "has become actively engaged in, among other things, the regulation of abortion, the development of police procedures, the congressional oversight of the federal bureaucracy, and even the determination of the 2000 presidential election." Hall & McGuire, *supra* note 119, at xxi.

127. *See* Caldeira & McGuire, *supra* note 109, at 263.

128. *Id.* at 272 (internal quotation marks omitted).

129. *Id.* at 270.

130. *Id.*

131. *See, e.g.*, DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY 287–99 (1993) (studying the trend line of public opinion across multiple salient political issues; comparing them to Supreme Court decisions; and concluding that the decisions closely followed the public opinion trend line in each area).

132. Philip B. Kurland, *Toward a Political Supreme Court*, *in* THE SUPREME COURT IN AMERICAN POLITICS 82, 87–88 (David F. Forte ed., 1972).

obligations that must be followed by all similarly situated individuals.[133]

Second, the Court imitates the legislative process through the practice of accepting amicus curiae briefs that bear a strong resemblance—and have an effect similar to—congressional lobbying efforts. For example, some amicus curiae briefs are not submitted by parties with similar or identical interests to those presently before the Court.[134] Instead, the focus of some briefs has been on the "size and importance of the group represented[] or on contemporaneous press comment adverse to the ruling of the Court."[135] In effect, these briefs essentially become an "instrumentality designed to exert extrajudicial pressure on judicial decisions."[136] In some respects, amicus curiae briefs have developed into the equivalent of congressional lobbyists and have become the vehicle for propaganda efforts.[137] Indeed, many of the voices speaking on policy matters in the houses of Congress are the same voices heard in the Supreme Court halls through amicus briefs attached to Supreme Court cases involving similar issues.[138]

In sum, the modern Court and Congress exhibit many similar characteristics in that they are both (1) influenced by public opinion, (2) engaged in frequent policymaking decisions that impact wide swaths of the population, and (3) instructed and persuaded by lobbyists in forming those decisions. As such, it is widely accepted that the role of the judiciary partakes of a policymaking function. But it is similarly accepted that the Court is constrained by the constitutional limits on judicial power. Because of these competing tensions and the practical similarities between modern judicial and legislative functions, another permissive view of the Supreme Court emerges—that of a catalyst for spurring legislative dialogue and reform.

133. *Id.* at 87.

134. *Id.* at 88.

135. *Id.* (citations omitted).

136. *Id.* (citations omitted).

137. *Id.* at 88–89.

138. A good example of this is the KFC case's amicus briefs. Several of those institutions regularly speak on those issues in congressional hearings.

B. The Supreme Court as Catalyst for Legislative Inertia

The similarities between Congress and the Court demonstrate that the Supreme Court can be an active, though limited, player in the legislative process. Specifically, the Court is in the unique position to spur legislative dialogue because it is the only other branch with constitutional authority to make law.[139] Moreover, the need for judicial intervention is especially weighty when both branches' areas of expertise extensively overlap, as they do when a controversy resides at the intersection of Congress's commerce power and the Supreme Court's negative commerce clause jurisprudence. Once the Court hands down a decision utilizing the negative Commerce Clause doctrine, that decision remains governing law until Congress chooses to change it.[140] Often, Congress lacks sufficient incentive to push legislation through the political process unless and until the Supreme Court intervenes. But once the Court rules, Congress often feels reactionary pressure from its constituents, and the ruling becomes part of the political dialogue. By handing down a decision, then, the Court catalyzes legislative gridlock. As a catalyst, the Supreme Court may be viewed in one of two roles: Opinion Leader or Discourse Framer.

1. The Supreme Court as Opinion Leader

Some argue that the Supreme Court, because of its prominence and public visibility, can act as a catalyst for policy reform by ruling in ways that actually shape the public's opinion on issues.[141] This argument, however, appears to be unsupported by empirical evidence.[142] Rather, evidence seems to suggest that the public reacts to court rulings according to their preexisting opinions on the policy

139. Although executive agencies create law through their rulemaking and adjudicatory processes, the Constitution does not discuss this aspect of the modern administrative state.

140. Whether similar intervention by the Court would be permissible in other contexts will not be discussed here. Although examples of the Court's ability to spur legislation outside of the dormant Commerce Clause context will be given below, the purpose of this Comment is to demonstrate that Court intervention under its dormant commerce power is constitutionally permissible and in some cases normatively desirable.

141. Caldeira & McGuire, *supra* note 109, at 274 ("Some have argued that . . . the U.S. Supreme Court can act as an opinion leader by crafting policies that will instruct and persuade the mass public.").

142. *See id.*

issue, instead of in accordance with the Court's handling of them.[143] If anything, the Court's rulings often serve to galvanize previously held opinions on the issue rather than to sway public opinion in a particular direction.[144] Public support for abortion, for example, before and after *Roe v. Wade*[145] evidenced little, if any change.[146] The Court's ruling did, however, seem to intensify both preexisting support and opposition of abortion.[147] This suggests that Supreme Court rulings in salient political issues tend to polarize, instead of change, the direction of political debate.[148] Although the evidence does not support the conclusion that the Court does, in fact, act as an opinion leader, the observed crystallizing and intensifying effect of these decisions on existing public opinion seems to indicate that the Court's decisions can act as a catalyst in potentially fomenting enough legislative fervor to spur otherwise latent congressional action.

2. The Supreme Court as Debate Framer

Even if the Court empirically does not have the ability to actually modify existing public opinion on certain issues, it may still have the power to shape the public debate about those issues. As one commentator noted, certain courts' "adoption of specific policies in the cases that they do decide often provide the specific terms for popular debate."[149] The true benefit of the Supreme Court's decision (in assessing its role as catalyst or debate framer) may not always be the substance of the ruling the Court hands down, but rather the public debate that the decision spurs at the federal congressional level. Indeed, Justice Ginsburg once explained that the driving purpose of her dissent in a particular case was to "attract immediate

143. *Id.*

144. *Id.* at 275 ("[T]he justices' policies [often] have a polarizing, rather than a persuasive effect. Instead of producing attitude change, the Court can serve to crystallize the public's existing attitudes, increasing their intensity.").

145. 410 U.S. 113 (1973).

146. Caldeira & McGuire, *supra* note 109, at 275.

147. *See* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 759 (1989).

148. Similar effects were seen after prominent Court decisions on capital punishment. *Id.*; *see also* Timothy R. Johnson & Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 AM. POL. SCI. REV. 299, 299–309 (1998).

149. Caldeira & McGuire, *supra* note 109, at 274.

public attention and to propel legislative change."[150] She then went on to demonstrate how her purpose was achieved, noting that Congress "responded [favorably] within days after the Court's decision issued."[151] Of course, in most cases, the best decisions in complex social and economic issues are in fact reached in the congressional halls rather than the Justices' chambers, but judicial decisions can kindle the legislative flame of debate and can frame the debate in a way that ultimately results in the most beneficial and efficient congressional action.

A few historical examples will illustrate the Court's ability to issue rulings that prompt reactionary legislation. At times reactionary legislative discussion may not always be framed correctly or result in an agreed-upon normative result. Indeed, in at least the federal takings example that follows, it is clear that the reactionary legislation misconstrued the Court's holding, so the "framing" value of the Court's decision was lost altogether. But the following examples illustrate the fact that the Supreme Court's decisions catalyze public and legislative debate about important issues, and this fact provides a basis for this Comment's argument that the Court should intervene to catalyze such debate and generate a final resolution to the present patchwork of inconsistent standards within the state income tax realm.

a. Eminent Domain. In 2005, the Court decided the case of *Kelo v. City of New London*[152] in which it held that distressed city governments can condemn private land in order to facilitate area-wide, integrated redevelopment projects.[153] The case was received by the public with widespread criticism because the private property, once condemned, was given to a private developer for purposes of eliminating the blighted areas of the city and effectuating a wholesale redevelopment of the city.[154] Many objected to this ruling on the basis that it seemed to grant governments the power to condemn private property and transfer it to another private entity

150. Orin Kerr, *Justice Ginsburg and Legislative Independence*, VOLOKH CONSPIRACY (Oct. 25, 2007, 12:13 AM), http://www.volokh.com/posts/1193284491.shtml.

151. *Id.*

152. 545 U.S. 469 (2005).

153. *Id.* at 474–75.

154. *Id.* at 473. See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1423–26 (2006) for a discussion of criticism in the wake of the *Kelo* decision.

despite the general rule that governmental takings be done for "public use," as long as doing so would provide incidental public benefits.[155] Although this was not the holding of the case,[156] the media and the public latched onto this interpretation and the debate stimulated various federal and state legislative efforts to curb this perceived error. These efforts resulted in the initiation of at least three bills,[157] each with different proposals to limit governmental takings, including one effort at a constitutional amendment.[158] The legislative aftermath of *Kelo* illustrates the power of Supreme Court decisions to instigate public and Congressional awareness of important constitutional issues and to spur Congress to action. Had the Court refused to hear the *Kelo* case, it is unlikely that this narrow issue would have been thrust to the forefront of congressional consciousness in a way that would generate almost immediate legislative action.

b. Free Exercise Clause. In 1990, the Supreme Court passed judgment on the case of *Employment Division, Department of Human Resources of Oregon v. Smith.*[159] In that case, an Oregon law prohibited the use of peyote, a hallucinogenic commonly ingested as part of Respondents' Native American religious rituals.[160] The Respondents were discharged from their employment and denied unemployment benefits for coming to work intoxicated. Afterward, Respondents challenged the law under the Free Exercise Clause claiming that it infringed their ability to freely exercise their religion. The Supreme Court rejected this challenge and held that facially neutral, generally applicable laws that incidentally burden religious practice are not subject to Free Exercise challenges.[161] This decision upended previous Supreme Court precedent, which provided that governmental actions burdening religion must pass a form of strict scrutiny to survive.[162]

155. John R. Nolon & Jessica A. Bacher, *Fallout from Kelo: Ruling Spurs Legislative Proposals to Limit Takings*, N.Y.L.J., Oct. 19, 2005, at A5.

156. *See id.*

157. H.R. Res. 340, 109th Cong. (2005); H.R. Res. 340, 109th Cong. § 1A (2005); H.R.J. Res. 60, 109th Cong. (2005).

158. H.R.J. Res. 60, 109th Cong. (2005).

159. 494 U.S. 872 (1990).

160. *Id.* at 874.

161. *Id.* at 889.

162. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

In direct response to the Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act[163] (RFRA) to override *Smith* and restore the strict scrutiny test that existed prior to the *Smith* decision.[164] RFRA directly contradicted the Court's holding in *Smith* and would have required the Supreme Court to apply strict scrutiny when considering all free exercise challenges—even those dealing with neutral laws of general applicability.[165] Congress claimed authority to enact RFRA under section 5 of the Fourteenth Amendment which allows congress to "enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment.[166] As a counter-response to RFRA, the Supreme Court declared the legislation unconstitutional as applied to the states because the statute had effectively rewritten, rather than merely enforced, the guarantees of the Fourteenth Amendment as interpreted by the Court in *Smith*.[167] This back-and-forth dialogue between the Supreme Court and Congress further demonstrates the power of Court decisions to drive issues to the forefront of congressional debate and subsequently spur a legislative response.

Although RFRA was struck down for attempting to invade the Court's prerogative to declare what the law is, no such separation of powers problem would arise in a Court decision defining substantial nexus requirements for income tax purposes.[168] When the Court decides cases pursuant to its dormant commerce power, such decisions are subject to constitutionally-sanctioned wholesale change by Congress as it deems appropriate.[169]

c. Business activity tax nexus. The most relevant example in this section comes from a Court case and legislative response in the business activity tax nexus arena. This example is especially instructive in the present analysis because it falls squarely within the dormant Commerce Clause realm and illustrates perfectly the Court's power to elicit legislative response.

163. 42 U.S.C. § 2000bb (2006).

164. CHEMERINSKY, *supra* note 18, at 296.

165. 42 U.S.C. § 2000bb–1 (2006).

166. U.S. CONST. amend. XIV.

167. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

168. For support of the Court's prerogative, see *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

169. *See supra* note 90 and accompanying text.

In February 1959, the Supreme Court decided the case of *Northwestern States Portland Cement Co. v. Minnesota*[170] in which it held that an out-of-state corporation *may* establish a substantial nexus for income tax purposes if it uses employees to solicit orders within that state's boundaries.[171] The Court in broad and unspecific language declared that the determination of sufficient nexus must turn on the "controlling question of whether the state has given anything for which it can ask return."[172] The Court's ethereal language created concerns for both businesses and Congress.[173] Most problematic was the Court's failure to provide guidance as to the nature and quantity of contacts that would be sufficient to generate nexus.[174] This created a terrible lack of predictability for businesses engaging in interstate commerce and invited the states to broadly define nexus, as states arguably would need to give very little in order to be able to ask for at least some return.

Congress immediately became concerned with the potential burdens the Court's ruling could have on interstate commerce—both because of uncertainty to businesses and the wide latitude states would have to tax interstate commerce—and responded with astonishing speed to enact Public Law 86-272 as a stop-gap solution.[175] The purpose of this law was to grant greater certainty to businesses and states by more narrowly defining the boundaries of the nexus analysis. In essence, Public Law 86-272 prevents out-of-state vendors from generating nexus with a state if those venders only engage in solicitation activities within a market state. This legislation was intended to be a temporary legislative fix while a more complete statutory solution could be devised.[176] However, over

170. 358 U.S. 450 (1959).

171. *Id.* at 452.

172. *Id.* at 465 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

173. *See* Annette Nellen, *The 50th Anniversary of Public Law. 86–272*, CPA2BIZ.COM (Mar. 27, 2008), http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles2008/Corp Tax/Public_Law032708.jsp.

174. *See id.*

175. Act of Sep. 14 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. §§ 381–391 (2006)). Public Law 86-272 was passed within seven months of the Court's decision in Northwestern States Portland Cement. *See* Nellen, *supra* note 173.

176. Public Law 86-272 prohibits a state from imposing an income tax on out-of-state corporations whose only contacts with a state amount to solicitation of orders for tangible personal property from customers within the market state.

half a century later, no further congressional guidance on nexus requirements has been offered, and none appears to be forthcoming.

Congress's immediate reaction to the Court's dormant commerce ruling provides an excellent example of the Court's catalytic role in propelling Congress to action on state income tax issues. Of course, the Court's decision could be criticized for its lack of clarity, but it appears to have been this very lack of clarity that engendered enough congressional concern to pass legislation to correct the perceived ambiguity.[177] As explained in Part II, Congress is unlikely to enact a statute requiring uniformity in the companion area of state income taxation without a similar external catalyst. The opportunity is now ripe for the Court to once again step in to either solve the problem or give Congress a reason to intervene. At a minimum, a Court decision would provide a measure of predictability to states and taxpayers until Congress, under its commerce power, affirmatively legislates on the matter.

IV. CONCLUSION

Inconsistency, unpredictability, inequity, and confusion have abounded for decades in the area of state corporate income taxation due to the lack of uniformity in application of state income tax principles among the states. Effective legislative proposals have been offered, but due to the misaligned incentives of businesses and states, congressional legislation adopting these proposals has repeatedly failed and is likely to continue failing absent some external catalyst. Over two decades ago, the Supreme Court issued what appeared to be its final ruling in the area of state income tax nexus requirements by overtly deferring to Congress for further guidance. Since that time numerous petitions have come before the Court seeking constitutional guidance in this area, but the Court has refused to hear them out of ostensible respect for the separation of

177. Certainly, the Court should not issue unclear or ambiguous dormant Commerce Clause rulings simply to evoke a response from the legislature. I am simply pointing out that by their very nature, judicial opinions will never be as complete and comprehensive as full-scale legislation because the court is limited to the scope of the particular case or controversy before it. Additionally, the court is often unequipped to answer important policy aspects surrounding larger issues of interstate commerce. Consequently, dormant Commerce Clause decisions will most likely leave gaps to be filled or issues to be clarified by Congress. But an important value of these rulings, clear or not, is their power to draw congressional attention to issues that perhaps would otherwise be lost to legislative inertia.

powers doctrine.

However, constitutional doctrines advocating strict separation of powers do not apply with the same force in the dormant Commerce Clause realm. This narrow area of constitutional law grants the Court permission to rule on issues traditionally left to Congress because it is one of the few areas where Congress has the express power to overrule the Court's decisions. Furthermore, as a functional matter, the modern Court and Congress are both involved in policymaking. Thus, the Court can and should act as a catalyst and debate framer for Congress on the important issue of state income tax nexus and apportionment requirements in order to impose much-needed uniformity in this muddled area of law. Just as it did in the sales-tax nexus debate over a half-century ago, such a course will likely overcome legislative gridlock and incentivize Congress to make appropriate modifications as it sees fit. In so doing, the Court will appropriately fulfill one of its modern roles as catalyst for legislative reform.

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