FOREIGN COMMERCE CLAUSE DISCRIMINATION: REVISITING *KRAFT* AFTER *WAYFAIR*

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I. INTRODUCTION

In 1992, within one month of each other, two decisions were decided by the Supreme Court under the dormant Commerce Clause, *Quill Corp. v. North Dakota*,[1] and *Kraft General Foods, Inc., v. Iowa Department of Revenue and Finance*,[2] both of which significantly infringed upon state sovereignty. *Quill*, construing the Court's dormant interstate Commerce Clause jurisprudence,[3] created a vague, arbitrary "physical presence" jurisdictional standard that limited the states' ability to impose sales and use tax collection duties on out-of-state vendors.[4] *Kraft*, construing the Court's

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

[2] Kraft Gen. Foods, Inc., v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992). Both decisions were authored by Justice John Paul Stevens. *See id.; Quill*, 504 U.S. at 298.

[3] *See* U.S. CONST. art. I, § 8, cl. 3 (stating that the Congress shall have the power "[t]o regulate Commerce . . . among the several States"); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018) ("Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action.").

[4] 504 U.S. at 311–18. *Quill* re-affirmed the holding in a prior case, National Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753 (1967), but effectively broadened that holding by also articulating the "physical presence" standard. *See* Michael T. Fatale, *Wayfair*, *What's Fair and Undue Burden*, 22 CHAP. L. REV. 19, 24 (2019). *Bellas Hess* had stated no such rule. *See id.*

dormant foreign Commerce Clause jurisprudence,[5] prevented the states from taxing a U.S. company's dividends received from foreign subsidiaries engaged in a single "unitary" business applying similarly vague, arbitrary criteria.[6]

Quill and *Kraft* were decided during the Court's re-examination of its dormant Commerce Clause standards as applied to state taxation, which included an emphasis on the principles of state sovereignty embodied in the U.S. Constitution. For different reasons both cases were outliers with respect to this larger judicial trend. *Quill* recognized that its case holding was questionable under the Court's Commerce Clause jurisprudence of the time, but nonetheless ruled against the state in part on stare decisis grounds.[7] Considerations of state sovereignty later helped lead to *Quill* being overruled in 2018 by *South Dakota v. Wayfair, Inc.*,[8] as "unsound and incorrect"[9] – a seismic development for the states with respect to the sales and use tax.

No similar judicial reconsideration has been accorded *Kraft*. But in late 2017, six months before *Wayfair*, the enactment of the federal Tax Cuts and Jobs Act (the "TCJA")[10] prompted significant refocus on *Kraft.* The TCJA posited that certain income booked by foreign subsidiaries of U.S. shareholders is federal taxable income of these shareholders – income that is also generally taxed by the states through their legislative conformity to the Internal Revenue Code. In particular, the TCJA extended the definition of federal taxable income to so-called "deemed repatriation income" and global intangible low-taxed income or "GILTI."[11] Numerous tax commentators have claimed that the Court's holding in *Kraft* restricts the states with respect to taxing this income.[12] As this Article demonstrates, these readings of *Kraft*

[5] *See* U.S. CONST. art. I, § 8, cl. 3 (stating that the Congress shall have the power "[t]o regulate Commerce with foreign Nations"); Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986) (distinguishing between the "dormant interstate Commerce Clause" and the "dormant foreign Commerce Clause" and noting the principles embodied in both clauses may be policed by the judiciary).

[6] 505 U.S. at 76–77, 82.

[7] *See* 504 U.S. at 311, 317; *id*. at 320 (Scalia, J., concurring). *See also* Fatale, *supra* note 4, at 21–29 (discussing the relationship between *Quill* and the case that it re-affirmed, *National Bellas Hess*).

[8] 138 S. Ct. at 2099.

[9] *Id.*

[10] *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[11] *See infra* notes 362–366, 371–377 and accompanying text.

[12] *See infra* notes 367 and 378 and accompanying text.

are incorrect. This Article will also argue that *Kraft*, like *Quill*, was incorrectly decided, as the reasoning in *Wayfair* and the Court's modern Commerce Clause precedent make clear.

A. South Dakota v. Wayfair, Inc. and Quill Corp. v. North Dakota

Wayfair not only overruled *Quill*, it also concluded that the *Quill* physical presence rule was wrong at the time the case was decided and that the error of the case had become more egregious over time.[13] *Wayfair* rejected *Quill* in part because *Quill* was predicated on the out-dated notion that under certain circumstances interstate commerce is immune from state taxation pursuant to the dormant interstate Commerce Clause.[14] *Wayfair* reflects the Court's determination that this Clause does not preclude multistate businesses from paying their fair share of state tax.[15] *Quill* had become more egregious over time because the advent of the Internet greatly increased the volume of transactions that were not subject to a state sales or use tax collection duty.[16] *Wayfair* noted that overruling *Quill* was appropriate because when "it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error."[17]

The *Quill* physical presence test was problematic in part because it conflicted with the Court's contemporary approach to the dormant interstate Commerce Clause. *Wayfair* noted the Court's late 20th century movement away from "arbitrary, formalistic distinction[s] that the Court's modern Commerce Clause precedents disavow" in favor of "a sensitive, case-by-case analysis of purposes and effects."[18] *Wayfair* referenced the Court's modern view that the purpose of the dormant interstate Commerce Clause is to police state-based "economic discrimination,"[19] i.e., state action that provides an

[13] 138 S. Ct. at 2097.

[14] *Id.* at 2091–92. This premise had similarly informed the holding in the Court's prior case, National Bellas Hess v. Dep't of Revenue, 386 U.S. 753 (1967), which *Quill* had re-affirmed. *See supra* notes 4, and 7 and accompanying text.

[15] *See Wayfair*, 138 S. Ct. at 2091.

[16] *Id.* at 2097 ("Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.").

[17] *Id.* at 2096.

[18] *Id.* at 2092, 2094 (cite omitted).

[19] *Id.* at 2094.

impermissible market preference to in-state commercial actors.[20] This inquiry serves the Framers' purpose "to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units."[21] The *Quill* decision had not addressed economic discrimination, but rather created its own "market distortions," unfairly favoring some forms of commerce over others.[22] Therefore, *Quill* imposed arbitrary and formalistic distinctions contrary to the Court's contemporary understanding of the Commerce Clause.[23]

Wayfair rejected the argument that the Court should retain *Quill* under the judicial principle of stare decisis in part because the *Quill* physical presence rule was not a "clear or easily applicable standard."[24] *Quill* left the states with the costly challenge of attempting to apply the vague physical presence standard to novel fact patterns and with the need to defend against claims that the standard should be extended to state taxes other than the sales or use tax.[25] *Wayfair* dispensed with these state impositions. *Wayfair* also concluded that stare decisis was not a sufficient basis to retain *Quill* because *Quill* reflected an incorrect interpretation of the Constitution at the time it was issued and therefore represented "a false constitutional premise of th[e] Court's own creation."[26]

B. Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance

1. The case decision

This article will argue that, like *Quill*, *Kraft* was wrongly decided and that the error of the case has only become more egregious over time. Moreover, it will explain that *Kraft* is inconsistent with *Wayfair* and the Court's

[20] *Id.* at 2099. *See id.* at 2100 (Gorsuch, J., concurring) ("Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms").

[21] *Id.* at 2094 (citing Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978)).

[22] *Id.* at 2092, 2094.

[23] *See id.* at 2092.

[24] *Id.* at 2098.

[25] *See, e.g.*, Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 625–39 (2015); Michael T. Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard*, 54 TAX LAW. 105, 118–41 (2000).

[26] 138 S. Ct. at 2096.

contemporary Commerce Clause doctrine.[27] *Kraft* concluded that the payment of a dividend by a foreign subsidiary to its domestic parent represented "foreign commerce" irrespective of the nature of the underlying earnings.[28] Based on this premise, the Court struck down a state statute that applied corporate income tax to dividends received by a parent corporation from foreign subsidiaries but not to dividends received from domestic subsidiaries, on the theory that the statute unconstitutionally discriminated against foreign commerce.[29] But the corporate domicile of an entity paying a dividend does not necessarily identify whether the associated commerce is foreign or domestic.[30] For example, a foreign corporation can have domestic income, just as a domestic corporation can have foreign income.[31] Also, one cannot fairly presume, as *Kraft* did – certainly in hindsight – that the mere act by which a foreign subsidiary pays a dividend necessarily bespeaks foreign commerce/activity, as dividends paid by foreign corporations can be paid through entirely domestic means.[32] Further, more generally, the corporate domicile of a foreign corporation itself has become less meaningful as an indication of the corporation's locus, since, among other things, foreign

[27] *See* Lee A. Sheppard, *Is Taxing GILTI Constitutional*, 89 STATE TAX NOTES 439, 440 (2018) (alluding to *Quill* when stating *Kraft* was "one of several incorrect state tax decisions made [in 1992] that ought to be reversed").

[28] Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 76 (1992) ("The flow of value between *Kraft* and its foreign subsidiaries clearly constitutes foreign commerce; this flow includes the foreign subsidiary dividends, which . . . themselves constitute foreign commerce."). The question in the case was "whether the disparate treatment of dividends from foreign and from domestic subsidiaries violates the Foreign Commerce Clause." *Id.* at 73.

[29] *Id.* at 77, 82.

[30] *See id.* at 76 (acknowledging that the domicile of an individual corporation does "not necessarily establish that it is engaged in either foreign or domestic commerce"). *See infra* notes 277–289 and accompanying text.

[31] *See infra* notes 278–79 and accompanying text.

[32] *Kraft*, 505 U.S. at 85 (Rehnquist, C.J., dissenting) (noting that when a foreign subsidiary engages in domestic commerce and declares a dividend the dividend payment "may well be accomplished simply by debiting one New York bank account and crediting another," and stating that to "characterize this as 'foreign commerce' seems to me to stretch that term beyond all recognition"). In commerce these days, the payment of dividends does not even require the use of a traditional bank. *See* Michael P. Malloy, *Banking in the Twenty-First Century*, 25 J. CORP. L. 787, 828 (2000) (noting that e-banking "raises serious issues of construction and interpretation with respect to current federal statutory references to the 'location' of a national bank"); Omri Marian, *Are Cryptocurrencies Super Tax Havens?,* 112 MICH. L. REV. FIRST IMPRESSIONS, 38, 42–43 (2013) (noting that dividends can be paid through the means of cryptocurrency, like bitcoin).

corporations frequently "check the box" to be treated as disregarded entities and ultimately U.S. entities for U.S. tax purposes.[33] The holding in *Wayfair* itself suggests that it is no longer necessarily appropriate to characterize the location of commerce based upon its physical or legalistic attributes.[34]

In ruling as it did, *Kraft* relied most significantly on a 13-year-old precedent*, Japan Line, Ltd, v. County of Los Angeles*,[35] which was factually distinguishable[36] and had been severely limited by the Court's later cases.[37] The Court's modern dormant Commerce Clause doctrine rejects "formalistic" rules – like *Kraft*'s simple foreign-domestic dividend comparison – in favor of a "sensitive" analysis that is consistent with the Framers' intent.[38] The Court's dormant foreign Commerce Clause cases leading up to *Kraft* made clear that the Clause was meant by the Framers to prevent the states from interfering with federal policy – non-uniformity that could lead to retaliation by foreign nations.[39] But no such threat existed on the facts of *Kraft*.[40] Iowa's tax law mimicked that of the federal government, which filed an amicus brief on behalf of the state and argued before the Court in support of the state.[41] Also, the taxpayer in *Kraft* was a U.S. corporation being taxed as such – unlike the situation in *Japan Line*, where a tax was

[33] *See, e.g.*, Dep't of Revenue v. Agilent Techs., Inc., 441 P.3d 1012, 1015 (Colo. 2019) (noting that four foreign subsidiaries of a U.S. corporation each made so-called "check-the-box" elections to be treated as disregarded entities [and therefore as divisions of the parent U.S. corporation] for federal income tax purposes). The states generally conform to the federal government's check-the-box rules in the income tax context. *See generally* Bruce P. Ely et. al, *An Update on the State Tax Treatment of LLCs and LLPs*, 83 STATE TAX NOTES 89 (2017).

[34] *See* 138 S. Ct. 2080, 2099 (2018) (noting that entities that lack a physical presence in a state can nonetheless be subject to tax there based upon their virtual or economic presence). *See also* R. Todd Ervin, *State Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day*?, 19 VA. TAX REV. 515, 528 (2000) (noting, pre-*Wayfair,* that as banks ceased to rely upon physical locations in their business operations the question as to the bank's business situs for purposes of determining state tax jurisdiction became more challenging).

[35] 441 U.S. 434 (1979). *See Kraft*, 505 U.S. at 79; *id.* at 83 (Rehnquist, C.J., dissenting) (*Japan Line* was the "only case dealing with the Foreign Commerce Clause substantially relied on by the Court").

[36] *Kraft*, 505 U.S. at 83 (Rehnquist, C.J., dissenting).

[37] *See infra* notes 203–211 and accompanying text.

[38] *See Wayfair*, 138 S. Ct. at 2094; *See also id.* at 2092.

[39] *See infra* notes 183–234 and accompanying text.

[40] *See infra* notes 310–14 and accompanying text.

[41] *Kraft*, 505 U.S. at 73–75.

imposed on a Japanese company with respect to Japanese property that spent almost all of its time in international waters.[42]

Kraft specifically relied on a principle referenced in *Japan Line* that was not applied to a state tax in that or any post-*Japan Line* foreign Commerce Clause case – the Court's discrimination doctrine as derived from its interpretation of the dormant interstate Commerce Clause.[43] *Kraft* concluded that Iowa's statute failed the discrimination test because it provided preferential treatment to U.S. corporate subsidiaries doing business in states outside Iowa over corporate subsidiaries incorporated in foreign countries.[44] But the dormant interstate Commerce Clause was intended to address states seeking commercial benefits for in-state commercial actors at the expense of such actors from other states, not seeking benefits on behalf of actors from these other states.[45] Hence, *Kraft* furthers the policies of neither the domestic nor the foreign Commerce Clause.

The Court's modern Commerce Clause discrimination doctrine generally focuses on a state statute's purposes and effects.[46] Yet the facts of *Kraft* made clear that Iowa had no discriminatory intent, and there were no apparent discriminatory effects – certainly none that the Court identified.[47] The state law with respect to dividends did not favor companies doing business in that state over their foreign competitors, but rather operated to the detriment of corporations doing business in Iowa – a fact the Court acknowledged.[48] Also,

[42] *Cf.* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 188–89 (1983) (distinguishing the facts at issue in the case from those in *Japan Line* because "the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States").

[43] *See generally Kraft*, 505 U.S. at 75–82.

[44] *Id.* at 74 n.10, 78–79.

[45] *See infra* notes 140–68 and accompanying text.

[46] South Dakota v. Wayfair, 138 S. Ct. 2080, 2094 (2018).

[47] *See* 505 U.S. at 86 (Rehnquist, C.J., dissenting) ("To be sure, two Iowa corporations, one with a foreign subsidiary and one with a domestic non-Iowa subsidiary will in some cases pay a different total tax. But this does not constitute unconstitutional discrimination because, as far as the record demonstrates, Iowa's taxing scheme does not result in foreign commerce being systematically subject to higher tax burdens than domestic commerce."); Leigh A. Newman, *Rethinking Discriminatory State Taxation Under the Foreign Commerce Clause: Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 10 CONN. J. INT'L. 695, 712 (1995) (noting that the majority's decision "failed to perform the most basic analysis: determining whether in fact the Iowa Code discriminates against foreign commerce").

[48] *Kraft*, 505 U.S. at 79; *see also id.* at 83–84 (Rehnquist, C.J., dissenting).

Iowa's dividend rules were similar to those applied by the federal government, and, when federal and state law was considered together, U.S. companies with foreign subsidiaries were not disadvantaged.[49] The Court's modern analysis of Commerce Clause discrimination seeks to identify "actual discrimination," because absent such discrimination judicial action to strike down a state tax is an affront to state sovereignty.[50] *Kraft* made no effort to identify actual discrimination and therefore was guilty of this affront.

2. The case aftermath

The Court's mistake in *Kraft* has become more egregious over time in part because, like *Quill*, the rule stated in *Kraft* is not "clear or easily applicable."[51] *Kraft* specifically held that Iowa's "disparate treatment of dividends from foreign and from domestic subsidiaries violate[d] the Foreign Commerce Clause."[52] But that seemingly simple conclusion led to complex questions as to the breadth of the Court's holding in other contexts and with respect to statutory provisions that operated differently than the Iowa dividend deduction statute. A primary example, recently revisited by the TCJA, is state taxation of so-called "subpart F income."[53] Subpart F of the Internal Revenue Code generally pertains to certain passive income that is easily moveable from one jurisdiction to another.[54] Prior to the enactment of subpart F, multinational domestic companies often booked this mobile income in foreign subsidiaries incorporated in so-called "tax haven" jurisdictions, resulting in U.S. tax deferral.[55] To avoid this result and to

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[49] *Id.* at 80–81. *See infra* notes 313–17 and accompanying text.

[50] *See infra* notes 144–154 and accompanying text.

[51] *See Wayfair*, 138 S. Ct. at 2098.

[52] 505 U.S. at 73.

[53] *See* Internal Revenue Service, *Subpart F Overview* (last updated September 3, 2014), https://www.irs.gov/pub/int_practice_units/DPLCUV_2_01.PDF.

[54] *See id.*

[55] *See id. See also* Office of Tax Policy, Dep't of the Treasury, *The Deferral of Income Earned Through U.S. Controlled Foreign Corporations* at 10–11 (December 2000), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-SubpartF-2000.pdf (noting that Subpart F was enacted "in response to techniques for avoiding worldwide taxation . . . particularly involving tax havens"); Nir Fishbien, *From Switzerland with Love: Surrey's Papers and the Original Intent(s) of Subpart F*, 38 VA. TAX REV. 1, 14, 49 n.232 (noting that the Senate Report with respect to the Act, S. REP. NO. 87-1881, at 1–2 (1962), stated that the law was aimed at "tax haven abuses," and that at the time of the law's enactment, subpart F was referred to as the "tax haven legislation").

disincentivize this behavior, Congress enacted subpart F, which generally taxes the U.S. portion of this mobile income in a manner similar to a deemed dividend paid by a foreign subsidiary to a U.S. parent on an annual basis.[56]

Because of the confusion wrought by *Kraft*, Iowa paid retroactive refunds with respect to both foreign dividends and subpart F income.[57] Facing the threat of *Kraft*-like lawsuits,[58] other states also adapted their treatment of Subpart F income to their treatment of foreign dividends on the theory that their taxation of Subpart F income might similarly be found to be discriminatory.[59] As a practical matter, this meant that some states stopped taxing Subpart F income, as well as foreign dividends, entirely.[60]

The cautious approach that some states took in ceasing to tax subpart F income because of *Kraft* reflects a mistaken understanding of that case. As noted, *Kraft* specifically relied upon the conclusion that a dividend payment by a foreign corporation to its domestic parent equates to foreign commerce irrespective of the nature of the underlying earnings – but in the context of subpart F no foreign dividend is actually paid. Therefore, even assuming the logic in *Kraft* was correct, subpart F does not implicate the very type of foreign commerce that formed the predicate for that decision. Further, if one assumes that *Kraft* stands for the proposition that the states cannot favor

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[56] *See Subpart F Overview, supra* note 53; Fishbien, *supra* note 55, at 21, 54–55. The legislation was the result of a presidential initiative. *See Deferral, supra* note 55 at 12 n.1; Richard J. Horwich, *The Constitutionality of Subpart F of the Internal Revenue Code*, 19 U. MIAMI L. REV. 400, 401 (1965).

[57] *See infra* notes 328, 333 and accompanying text.

[58] *See infra* note 333 and accompanying text.

[59] *See infra* note 339 and accompanying text.

[60] *See* Sheppard, *supra* note 27, at 440 (stating that "before the TCJA was enacted, states were either uncertain about the extent to which they could reach nominally foreign income, or had capitulated to business demands not to touch it or, both" – and attributing some of that uncertainty to *Kraft*). *Compare* Office of the Secretary, Dep't of the Treasury, Final Report of the Worldwide Unitary Taxation Working Group, Aug. 6, 1984, at 36, https://archive.org/details/finalreportofwor00unit/page/n15 (noting that as of the time of the report "[a]bout two-thirds of the states include at least some foreign source dividends in the tax base of the recipient U.S. parent corporation" and that therefore "taxing these dividends is the norm in state taxation") *with* Andrew Phillips & Steve Wlodychak, *The Impact of Federal Tax Reform on State Corporation Income Taxes,* prepared for the State Tax Research Institute, at 13 (Figure 7) (Mar. 2018), https://www.ey.com/Publication/vwLUAssets/ey-the-impact-of-federal-tax-reform-on-state-corporate-income-taxes/$File/ey-the-impact-of-federal-tax-reform-on-state-corporate-income-taxes.pdf (noting that as of the time of the 2017 TCJA only 15 states taxed either foreign dividends or subpart F income). *See also infra* note 339 and accompanying text.

domestic earnings over foreign earnings[61] – regardless of the fact that the *Kraft* Court did not focus on the underlying earnings that formed the basis for the foreign dividends – nonetheless subpart F income is treated as domesticated income under the Internal Revenue Code. Subpart F embodies a federal policy to address tax planning whereby U.S. companies shelter certain income in foreign subsidiaries to avoid federal tax.[62] By impeding the states from taxing this income, *Kraft* generally incentivized the very behavior that the federal policy sought to address – thereby frustrating rather than enhancing federal policy, contrary to the goals of the foreign Commerce Clause. As the Supreme Court has said, to apply the dormant Commerce Clause "where the Federal Government has acted, and . . . in such a way as to reverse the policy that the Federal Government has elected to follow" effectively "turn[s the] dormant Commerce Clause analysis entirely upside down."[63]

In furthering tax avoidance by, among other things, generally limiting the states' taxation of subpart F income, *Kraft* is also similar to *Quill* because it serves to create "market distortions,"[64] and to "prevent[] market participants from competing on an even playing field."[65] In the last several decades U.S. companies have liberally used foreign subsidiaries to avoid federal and state tax on domestic income, and, at the state level, *Kraft* has likely been, at least in part, a contributing factor.[66] This corporate behavior in turn has operated

[61] *See*, *e.g.*, Joseph X. Donovan et al., *State Taxation of GILTI: Policy and Constitutional Ramifications*, 90 STATE TAX NOTES 315, 325 (2018) (the "governing principle" not actually stated in *Kraft* "is that a state may not in its income tax structure treat foreign operations less favorably than similarly-situated domestic operations"); Stephen P. Kranz, et al., *Sheppard Guilty on GILTI,* 160 TAX NOTES 1739, 1740 (2018) (the *Kraft* decision was "based on how . . . foreign income was treated vis-à-vis domestic dividends").

[62] *See supra* notes 53–56 and accompanying text.

[63] Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 12 (1986).

[64] South Dakota v. Wayfair, 138 S. Ct. 2080, 2092, 2094 (2018).

[65] *See id.* at 2096 (discussing Quill Corp. v. North Dakota, 504 U.S. 298 (1992)). *See also* Final Report, *supra* note 60, at 12 (noting the argument of persons supporting the states' taxing interests against a possible Congressional rule that would restrict the state taxation of foreign dividends that such a rule would "increase the share of the corporate tax burden carried by purely domestic and smaller business[es]").

[66] *See generally* Kimberly A. Clausing, *Profit Shifting Before and After the Tax Cuts and Jobs Act,* at 7 (Jan. 29, 2019), https://ssrn.com/abstract=3274827 or http://dx.doi.org/10.2139/ssrn.3274827 (noting that, to obtain the tax advantage of deferring income in foreign subsidiaries, prior to the TCJA U.S. companies were "widely reported to have at least $2.6 trillion in foreign earnings sitting offshore, about $1

to the detriment of smaller and midsize U.S. companies because these U.S. companies cannot generally make use of foreign subsidiaries for purposes of income-shifting.[67]

C. The Tax Cuts and Jobs Act

This article further addresses the implications of *Kraft* with respect to the TCJA. Several important provisions of the TCJA were in part a federal response to international tax planning by multinational U.S. companies. The enactment of these provisions constituted overt recognition that these companies were successfully using foreign subsidiaries to avoid federal tax, notwithstanding subpart F.[68] Two categories of income subject to tax under the TCJA – deemed repatriation income and GILTI – generally result in tax imposed on a U.S. parent corporation with respect to income accounted for by foreign subsidiaries.[69] In each case, the legislative intent and statutory mechanics resemble – though are not identical to – the intent and mechanics embodied in subpart F.[70] Consequently, the TCJA has revived questions about the application of *Kraft* with respect to subpart F income, and has prompted questions concerning the application of the case to the TCJA.[71] Tax commentators have pointed to both *Kraft* – and the states' historic treatment of subpart F income, which in part was caused by *Kraft* – to argue that the

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trillion of which was in cash"); ITEP & U.S. PIRG Education Fund, *Offshore Shell Games 2017*, (October 2017), https://itep.org/wp-content/uploads/offshoreshellgames2017.pdf (noting that in 2016 366 of the 500 companies comprising the Fortune 500 list used 9,755 foreign tax haven subsidiaries and listing the companies with those subsidiaries); Shirley Sicilian, *Report of the Hearing Officer regarding the proposed Model Statute for Combined Reporting* at 13–14 (April 25, 2005), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Projects/A_-_Z/CR%20HO%20Report.pdf (advocating for the inclusion of foreign subsidiary tax haven corporations in a model state "combined reporting" statute to help address "the serious problem of income shifting to foreign tax-haven jurisdictions," which "conservative national estimates" estimated cost the states revenue losses of $5.3 billion in fiscal year 2001 alone).

[67] *See* Richard Phillips et al., *A Simple Fix for a $17 Billion Loophole: How States Can Reclaim Revenue Lost to Tax Havens*, STATE TAX NOTES, Mar. 11, 2019, at 863–65; Final Report, *supra* note 60, at 8, 12.

[68] *See infra* notes 351–378 and accompanying text.

[69] *See infra* notes 362–377 and accompanying text.

[70] *See infra* notes 362–366, 375 and accompanying text.

[71] *See infra* notes 367, 378–381 and accompanying text.

states cannot generally tax either the deemed repatriation income or GILTI.[72] On close inspection these arguments merely serve to reveal the flaw in the logic in *Kraft*.

To the extent a taxpayer brings a challenge to the states' taxation of either deemed repatriation income or GILTI based upon *Kraft*, the Court should revisit that case, as in *Wayfair*, to reverse its error.[73] This task would be made easier because, similar to the judicial history post-*Quill*, no subsequent Supreme Court cases have relied upon *Kraft*, and, with one limited exception, no Court case has even mentioned it.[74] Prior to or in the absence of this reversal, state courts should narrowly construe *Kraft*. As the Court noted in *Wayfair*, "stare decisis accommodates only 'legitimate reliance interest[s],'"[75] and, because *Kraft* was erroneous, unfettered reliance on that case is not appropriate. Also, *Wayfair* noted that "constitutional right[s]" should not follow from "practical opportunities [to engage in] tax avoidance,"[76] and that is the result that *Kraft* wrought.

D. Article Outline

This article proceeds in 6 sections. The second section evaluates the general application of the Commerce Clause, and considers the Court's dormant interstate Commerce Clause jurisprudence leading up to *Wayfair*. The third section specifically focuses on the Court's discrimination doctrine as applied under the dormant interstate Commerce Clause. The fourth section considers the Court's analysis under the dormant foreign Commerce Clause and evaluates the Court's threshold case under that Clause, *Japan Line.* The fifth section discusses *Kraft*, and its relationship to the Court's contemporary dormant Commerce Clause analysis, both foreign and domestic. The sixth section considers the recent TCJA and evaluates the application of *Kraft* to deemed repatriation income and GILTI. The seventh and final section offers some concluding remarks.

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[72] *See infra* notes 367, 378–381 and accompanying text.

[73] *See* South Dakota v. Wayfair 138 S. Ct. 2080, 2096 (2018). *See also* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019); Sheppard, *supra* note 27.

[74] *See* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2449 (2015) (citing *Kraft* in a string cite for the proposition that the Court has allowed facial constitutional challenges under otherwise enforceable provision of the Constitution). The Court has also stopped applying the dormant foreign Commerce Clause more generally. *See infra* notes 223-34 and accompanying text.

[75] 138 S. Ct. at 2098.

[76] *Id.*

II. THE COMMERCE CLAUSE, STATE SOVEREIGNTY, AND *WAYFAIR*

The United States is unusual in that it is a nation that includes a national government and subnational governments, and provides for dual sovereignty. The notion of dual sovereignty is implicit in the U.S. Constitution because the original thirteen states that formed the nation intended to retain aspects of their sovereignty as it existed prior to ratification of the Constitution.[77] But at the same time the states agreed to relinquish some of their sovereignty to form an effective union.[78] This dual sovereignty was later specifically confirmed through the ratification of the Tenth Amendment to the Constitution.[79]

The Commerce Clause is an example of a specific circumstance in which the states ceded some sovereignty to the federal government. The primary predicate for the Clause was two-part. There was broad recognition under the Articles of Confederation that the "retaliatory trade barriers" being erected among the states could, if left unchecked, lead to interstate war.[80] Also, state violations of international agreements were commonplace and "corrupted the trust that the nation could inspire in potential treaty partners."[81] Problematically, under the Articles of Confederation Congress "lacked the power to prepare a coherent response to interstate squabbles" and was unable "to frame and implement satisfactory foreign policies."[82] To remedy these problems, the Commerce Clause included an affirmative grant of authority allowing Congress to regulate commerce "among the several States" and "with foreign Nations."[83]

The Commerce Clause potentially applies with respect to both state regulations of commerce and taxes. But under the Constitution the federal

[77] Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 52–54 (2014).

[78] *Id.*

[79] *See id.* (evaluating U.S. CONST. amend. X).

[80] *Id.* at 52.

[81] Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1975 (2015); *See also* Anthony Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 962–64 (2010).

[82] *See* Fatale, *supra* note 77, at 52 (citations omitted).

[83] U.S. CONST. art. I, § 8, cl. 3. The Clause also permits Congress to regulate commerce with Indian tribes. *See id.*

government and the states possess concurrent taxing powers[84] – which suggests a more limited capacity for Congress to interfere in matters of state taxation.[85] This relationship is embedded in the constitutional design, as the Constitution both specifically and implicitly confers dual federal-state governmental sovereignty, and the Framers considered the power to tax to be fundamental to such sovereignty.[86]

A. The Foreign Commerce Clause

The foreign Commerce Clause was intended to enable Congress to present the United States as a single economic unit in its economic relations with foreign nations.[87] The notion was to permit the federal government to make agreements with foreign nations that could not be undermined by states seeking to pursue their own commercial interests and also to ensure that Congress could enforce those agreements.[88]

Although the foreign Commerce Clause was intended to have broad application, it has had minimal application in practice.[89] In general, this is because other aspects of the Constitution, including the broad construction accorded to the U.S. treaty power, have generally rendered the foreign Commerce Clause superfluous.[90] In an early Court case, Chief Justice John Marshall presented an all-encompassing view of the foreign Commerce Clause as a power that "comprehends every species of commercial intercourse between the U.S. and foreign nations."[91] That same case laid out a conception of the dormant interstate Commerce Clause that quickly took

[84] *See* Fatale*, supra* note 77, at 42 n.3, 48, 56–57, 57 n.77; *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 448 (1980) ("Concurrent federal and state taxation of income, of course, is a well-established norm.").

[85] *See* Fatale, *supra* note 77, at 42 n.3, 48, 56–57, 57 n.77.

[86] *See id.*

[87] *See* Japan Line, Ltd., v. County of Los Angeles*,* 441 U.S. 434, 448–49, 448 n.13 (1979).

[88] *See* Colangelo*, supra* note 81, at 963–64.

[89] *See* Sullivan, *supra* note 81, at 1965 ("Unlike the Interstate Commerce Clause, the Foreign Commerce Clause has largely evaded close attention by courts or scholars"); *See also* Baston v. United States*,* 137 S. Ct. 850, 851 (2017) (Thomas, J., dissenting) ("this Court has never thoroughly explored the scope of the Foreign Commerce Clause.") (quotations omitted).

[90] *See* Sullivan, *supra* note 81, at 1968, 1974–77 (discussing U.S. CONST. art. II, § 2, cl. 2). Professor Sullivan also points to judicial developments with respect to the interstate Commerce Clause. *See id.* at 1968, 1971–73.

[91] *See id.* at 1968 (citing Gibbons v. Ogden, 22 U.S. 1, 3 (1824)).

root – under that Clause cases began in the mid-part of the 19^{th} century and have continued to this day. [92] But there was no case construing the dormant foreign Commerce Clause until *Japan Line* in 1979,[93] and after a series of cases that ended with *Barclays Bank PLC v. Franchise Tax Bd. of Cal*. in 1994,[94] there have been no more such cases.[95]

B. The Interstate Commerce Clause

Although the Commerce Clause does not expressly say so, its language granting Congress the power "[t]o regulate Commerce … among the several states" was intended to address the circumstance where the states engage in acts of economic protectionism vis-à-vis each other.[96] Under the interstate Commerce Clause, Congress was endowed with the specific power to preempt state actions that discriminate against interstate commerce, including discriminatory state taxes.[97] Consistent with this narrow purpose, Congress made almost no use of the interstate Commerce Clause during the country's first 100 years.[98] But eventually Congress sought to use the Clause to engage in regulatory acts in limited circumstances where the focus was not state discrimination.[99] Later, the interstate Commerce Clause became the predicate for the social engineering of the New Deal, and several of the major legislative initiatives of the 1960's.[100] The Supreme Court did not initially approve of this expansive federal legislation, but in the late 1930's altered its

[92] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459–60 (2019) (noting that the roots of the interstate "dormant Commerce Clause," date back to *Gibbons*, 22 U.S. at 1, and that, "by the latter half of the 19th century the concept was firmly established," whereupon it "played an important role in the economic history of our Nation").

[93] *See infra* note 170 and accompanying text.

[94] 512 U.S. 298 (1994).

[95] *See* Steiner v. Utah State Tax Comm'n, 449 P.3d 189, 198 (Utah 2019) (noting the Court's dormant foreign Commerce Clause cases, which begin in 1979 with Japan Line, Ltd. v. Cty. of Los Angeles, 441 U.S. 434 (1979), and end in 1994 with *Barclay's Bank,* 512 U.S. at 298).

[96] *See* Fatale, *supra* note 77, at 53–54 (evaluating U.S. CONST. art. I, § 8, cl. 3).

[97] U.S. CONST. art. I, § 8, cl. 3 (stating that the Congress shall have the power "[t]o *regulate* Commerce . . . among the several States") (emphasis added).

[98] United States v. Lopez, 514 U.S. 549, 553 (1995).

[99] *Id.* at 554.

[100] *See* Fatale, *supra* note 77, at 66–67.

analysis to provide Congress with greatly expanded powers to legislate under the interstate Commerce Clause.[101]

In the second half of the 20th Century questions arose as to whether the broad grant of Congressional authority permitted by the Court under the interstate Commerce Clause was, at times, inconsistent with the constitutional notion of state sovereignty.[102] This reconsideration began in the 1960's, but became more rigorous in the 1990's, and continues to this day.[103]

C. The Dormant Interstate Commerce Clause and Wayfair

The Court's analysis under the literal language of the Commerce Clause – the affirmative Commerce Clause – stands in contrast to that as applied for purposes of the dormant interstate Commerce Clause. Under the latter Clause commercial actors are permitted, in the absence of Congressional legislation, to initiate lawsuits to contest state regulations and taxes.[104]

The earliest application of the dormant interstate Commerce Clause was in the middle of the 19th century.[105] Beginning in the late 19th Century and continuing into the first several decades of the 20th Century, the Court's doctrine had evolved and generally prohibited the states from taxing or regulating all forms of interstate as opposed to intrastate commerce.[106] But the Court began to retreat from this "free trade" approach in the mid-part of the 20th Century when it became progressively more difficult to distinguish

[101] *Lopez*, 514 U.S. at 554–56.

[102] *Id.* at 556–57.

[103] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018) ("The legislative powers granted to Congress are sizable, but they are not unlimited . . . [a]nd conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."); *see also Lopez*, 514 U.S. at 556–58; *see* Fatale, *supra* note 77, at 67, 70–73.

[104] *See* Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008) (noting that "[t]he Commerce Clause empowers Congress '[t]o regulate Commerce . . . among the several States' . . . [but] although its terms do not expressly restrain 'the several States' in any way, we have sensed a negative implication in the provision since the early days" – a negative implication that "has come to be called the dormant Commerce Clause"); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (stating that although the Commerce Clause "does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute"- the "so-called 'dormant' aspect of the Commerce Clause").

[105] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459–60 (2019).

[106] *See* Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, *supra* note 25, at 574.

between these two types of commerce.[107] Among other things, these difficulties led to judicial determinations that were inconsistent and arbitrary.[108]

Eventually, the Court abandoned the doctrine that contrasted interstate versus intrastate commerce when evaluating state taxation in the 1977 case, *Complete Auto Transit, Inc. v. Brady*.[109] *Complete Auto* rejected the Court's prior philosophy "that interstate commerce should enjoy a sort of free trade immunity from state taxation,"[110] and "abandoned the abstract notion that interstate commerce itself cannot be taxed by the States."[111] These ideas were inconsistent with the Court's modern view "that businesses engaged in interstate commerce may be required to pay their own way."[112] But, despite *Complete Auto,* in a later case, *Quill Corp. v. North Dakota*,[113] the Court created a "physical presence" jurisdiction rule that effectively prohibited the states from imposing a sales or use tax collection obligation on out-of-state mail order, and later, Internet vendors.[114] The *Quill* physical presence rule was intended to create "a demarcation of a discrete realm of commercial activity that is free from interstate taxation."[115] Therefore, contrary to *Complete Auto, Quill* retained the vestiges of the Court's pre-existing free trade doctrine in one costly respect. That *Quill* physical presence rule was finally eviscerated by the Court in *Wayfair*.[116]

Wayfair struck down the physical presence rule as "unsound and incorrect."[117] It noted that the decision was wrong at the time of issuance and that the error of the decision only became magnified over time.[118] In

[107] *See id.* at 574–75.

[108] *See id.* at 575.

[109] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278, 288–89 (1977).

[110] *Id. See* Goldberg v. Sweet*,* 488 U.S. 252, 259 (1989) ("The wavering doctrinal lines of our pre-*Complete Auto* cases reflect the tension between two competing concepts: the view that interstate commerce enjoys a 'free trade' immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way.").

[111] *See* D.H. Holmes Co. v. McNamara*,* 486 U.S. 24, 30–31 (1988).

[112] *See id. See* Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, *supra* note 25, at 575–77.

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

[114] *Id.* at 317–19. *See supra* note 4 and accompanying text and Fatale, *supra* note 4, at 21–24.

[115] 504 U.S. at 315.

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

[117] *Id.*

[118] *Id.* at 2097.

particular, *Wayfair* concluded that the *Quill* Court had erred in not following *Complete Auto* and that therefore the overruling of *Quill* was appropriate.[119] As the Court noted, *Quill* had been based upon a "false constitutional premise of the Court's own making."[120]

The mistake the Court made in issuing *Quill* became more significant over time because the Internet became prominent subsequent to the decision and Internet vendors later began to invoke the protections of the Court's physical presence rule.[121] In striking that rule, *Wayfair* repeated the Court's modern notion that, rather than being entitled to free trade immunity, multistate businesses can be made to pay their fair share of tax.[122] *Wayfair* also suggested that its reconsideration of *Quill* was driven by the Court's contemporary goal to protect state sovereignty. The Court noted that when "it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error."[123]

An important question in *Wayfair* was, irrespective of the correctness of *Quill*, whether that decision merited retention on the basis of stare decisis.[124] The Court concluded that it did not in part because the *Quill* physical presence rule was not a clear or easily applied standard.[125] Also, taxpayers had engaged in tax planning to secure tax-free treatment under *Quill* – and, as the Court stated, a business "is in no position to found a constitutional right on the practical opportunities for tax avoidance."[126] Prior to *Wayfair*, the

[119] *Id.* at 2091–93, 2099.

[120] *Id.* at 2096. (The *Quill* Court recognized that its Commerce Clause analysis was questionable but ruled against the state in part because it felt obliged to re-affirm a case that pre-dated *Complete Auto,* Nat'l Bellas Hess v. Dep't of Revenue , 386 U.S. 753 (1967), on the basis of stare decisis.). *See* Fatale, *supra* note 4.

[121] *Wayfair*, 138 S. Ct. at 2097 ("Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.").

[122] *Id.* at 2091. S*ee also* Fatale*, The Evolution of Due Process and State Tax Jurisdiction, supra* note 25 and accompanying text.

[123] *Wayfair*, 138 S. Ct. at 2096.

[124] *Id.* at 2096–99. *See* Fatale, *supra* note 4, at 44–45.

[125] *Wayfair*, 138 S. Ct. at 2098.

[126] *Id.*

states struggled to limit the revenue effects of the physical presence rule.[127] This need derived from *Quill* because the physical presence concept was amorphous around the edges.[128] Also, the states were made to address rampant tax avoidance efforts in which taxpayers restructured their operations to avoid creating an in-state physical presence and, in addition, sought to extend the rule to other types of taxes.[129] *Wayfair*, rightly, alleviated the need for the states to struggle with the ambiguous parameters of *Quill*.

III. THE COURT'S CONTEMPORARY COMMERCE CLAUSE DISCRIMINATION STANDARD

A. Evolution of the modern doctrine

Supreme Court cases have policed discrimination under the dormant interstate Commerce Clause dating back to the 19th century.[130] But the need to actually identify discrimination was limited in the early to mid-part of the 20th century because the Court pursued a principle that generally proscribed the states from taxing interstate as opposed to intrastate commerce in any form. It was only in the aftermath of *Complete Auto*, after the Court's free trade principle was largely rescinded, that the Court began to refine its discrimination doctrine.[131] The stakes were high in these cases – as they have been since – because, although the Court considers interstate discrimination intolerable, striking down a tax where there is no discrimination is an affront

[127] *See* Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, *supra* note 25, at 581–91, 624–37; Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard*, *supra* note 25, at 118–41.

[128] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 331 (1992) (White, J., dissenting) (citing the "vagaries" of the rule).

[129] *See* Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, *supra* note 25, at 581–85, 624–31; Fatale, *State Tax Jurisdiction and the Mythical 'Physical Presence' Constitutional Standard*, *supra* note 25, at 130–41.

[130] Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 896–97 (1986).

[131] *See id.* at 897 (stating that *Complete Auto* "marked a breakthrough in state tax adjudication under the commerce clause . . . [because it] enunciated an approach grounded in economic reality rather than in formalistic distinctions . . . [but] that after *Complete Auto* there was difficulty in determining what constitutes discrimination").

to state sovereignty.[132] In these cases, the commercial actor that brings the suit seeks an unjustified immunization from state tax.[133]

Though it was not a case involving claimed discrimination, *Wayfair* reflects this dynamic. Like the Court's recent cases with respect to Congressional legislation under the affirmative interstate Commerce Clause, *Wayfair* exhibits the Court's re-focus on the Framers' foundational principles. In striking down *Quill*, *Wayfair* referenced the Court's 20th century movement away from "arbitrary, formalistic distinctions that the Court's modern Commerce Clause precedents disavow" in favor of "a sensitive, case-by-case analysis of purposes and effects."[134] For this statement, *Wayfair* cited to *West Lynn Creamery, Inc. v. Healy*,[135] where the Court stated that "[t]he commerce clause forbids discrimination, whether forthright or ingenious" and that "[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."[136]

Wayfair states that the focus of the dormant interstate Commerce Clause is to address "economic discrimination," which provides an impermissible market preference to in-state commercial actors over their out-of-state competitors.[137] For the proposition that discrimination is impermissible, *Wayfair* referenced *Granholm v. Heald*[138] – a case that also noted that this principle is "essential to the foundations of the Union."[139] As noted by

[132] *See, e.g.*, Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (noting that the Framers' distrust of discrimination "was limited by their federalism favoring a degree of local autonomy"). Similarly, the Court has stated, with respect to the affirmative Commerce Clause, that a state's sovereign right to impose tax will not be preempted by federal legislation unless such preemption is "the clear and manifest purpose of Congress." Dep't of Revenue of Oregon v. ACF Indus., Inc., 510 U.S. 332, 345 (1994).

[133] *See supra* note 132 and accompanying text; *See also* South Dakota v. Wayfair, 138 S. Ct. 2080, 2091 (2018) (noting that "interstate commerce may be required to pay its fair share of state taxes") (quoting D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988)).

[134] *Wayfair*, 138 S. Ct. at 2092, 2094 (cite omitted).

[135] West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[136] *Id.* at 201. Elsewhere in *West Lynn Creamery* the Court noted the "paradigmatic example of a law discriminating against interstate commerce is the protective tariff" because of a tariff's "distorting effects on the geography of production." *Id*. at 193.

[137] 138 S. Ct. at 2093–94.

[138] Granholm v. Heald, 544 U.S. 460 (2005). *See Wayfair*, 138 S. Ct. at 2091 (quoting *Heald*, 544 U.S. at 476).

[139] *Heald*, 544 U.S. at 472.

Wayfair, the discrimination principle reflects the purpose of the dormant interstate Commerce Clause to prevent states from dividing into "isolated, separable units."[140] Many of the Court's dormant interstate Commerce Clause cases, including *Wayfair*, have repeated verbatim the statement, first made by the Court in 1979 – two years after *Complete Auto* – that the Clause:

> …reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.[141]

The Court has issued other recent decisions apart from *Wayfair* that clarify the Court's current focus under the dormant interstate Commerce Clause on economic protectionism. Two recent cases, decided immediately prior to and post-*Wayfair*, considered the question of whether the Court's doctrine under this Clause had veered so far from the Framers' intent that it should be abandoned as lacking any basis in the Constitution.[142] Both of those recent cases considered this question at length and re-affirmed the continuing

[140] 138 S. Ct. at 2094 (noting "the Commerce Clause was intended to put businesses on an even playing field") (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 329 (1992) (White, J., dissenting)).

[141] *Id.* at 2089 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)). This same quote is repeated in Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019); Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015); *Heald*, 544 U.S. at 472 (2005); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 180 (1995); Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 98 (1994); and Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986). Further similar references to the "balkanization" notion are stated in Camps Newfound/Owatonna Inc., v. Town of Harrison, 520 U.S. 564, 577 (1997) (avoiding "economic Balkanization and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence") and Fulton Corp. v. Faulkner, 516 U.S. 325, 333 n.3 (1996) (a state law that encourages the "promotion of in-state markets at the expense of out-of-state ones furthers the 'economic Balkanization' that our dormant Commerce Clause jurisprudence has long sought to prevent"). *See also* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (referencing "the Framers' distrust of economic Balkanization [which] was limited by their federalism favoring a degree of local autonomy").

[142] *Tenn. Wine,* 139 S. Ct. at 2460–61; *Wynne*, 135 S. Ct. at 1806–07.

viability of the dormant interstate Commerce Clause – for the specific reason that the doctrine serves to police economic discrimination.[143]

B. The current standard

The Court's narrowing of the focus of the dormant interstate Commerce Clause to an evaluation of discrimination necessarily implies that the inquiry should seek to ascertain whether a state tax law results in discrimination in fact. The rejection of a state tax in any other instance would lack constitutional justification.[144] Consistent with this logic, the Court's modern cases in this area generally seek to identify actual discrimination.[145] The Court has stated repeatedly that "actual discrimination, wherever it is found, is impermissible."[146] Also, the Court has stated – reflecting its concern with discrimination more generally – that, once found, the magnitude and scope of such discrimination has "no bearing on the determinative question whether discrimination has occurred."[147] This is because even minor violations strike at the concept of a national union.[148]

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[143] *Wynne* noted that tariffs are "the quintessential evil targeted by the dormant Commerce Clause," *see* 135 S. Ct. at 1792; stated that "[u]nder our precedents, the dormant Commerce Clause precludes States from discriminating between transactions on the basis of some interstate element," *id*. at 1794; and made reference to the concept of state discrimination more generally 44 times, *see generally id.* at 1787. *Tenn. Wine* noted several times that "the Commerce Clause by its own force restricts state protectionism;" 139 S. Ct. at 2460–61, 2464; made repeated references to the notion of "protectionism" as addressed by the dormant Commerce Clause, *id*. at 2460–61; and stated that such protectionism was clearly intended to be addressed under the Constitution in a context in which "no provision other than the Commerce Clause could easily do the job," *id.* at 2460. Two other inquiries, frequently addressed by state courts as dormant Commerce Clause questions, both referenced in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)—nexus, the issue in *Wayfair*, and fair apportionment—have largely been recast by the Supreme Court as due process inquiries. *See* Fatale*, The Evolution of Due Process and State Tax Jurisdiction*, *supra* note 25, at 577–78; Fatale, *supra* note 4, at 37–43.

[144] *See supra* note 132 and accompanying text

[145] *See, e.g.*, *Camps Newfound*, 520 U.S. at 581 n.15; Associated Indus. v. Lohman, 511 U.S. 641, 650 (1994).

[146] *See, e.g.*, *Camps Newfound*, 520 U.S. at 581 n.15 (quoting *Associated Indus.*, 511 U.S. at 650).

[147] *See Associated Indus.*, 511 U.S. at 650.

[148] Granholm v. Heald, 544 U.S. 460, 472 (2005) (noting that "[t]ime and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter . . . [because] [t]his rule is essential to the foundations of the Union") (citations

The Court has insisted that "[d]iscrimination, like interstate commerce itself, is a practical conception" and so the Court's inquiry must generally grapple "with substantial distinctions and real injuries."[149] A state statute may be infirm either because it is discriminatory on its face or has a practical effect that is discriminatory.[150] The analysis as to whether a statute is facially discriminatory is seemingly more straightforward,[151] but nonetheless typically requires an analysis as to the statute's effects.[152] This check is appropriate because logically, if a statute is discriminatory on its face, it is almost certain to be discriminatory in effect.[153] In making its determination as to a statute's effects, the Court is guided by the question whether the tax "operates as a tariff," because tariffs are "[t]he paradigmatic example of a law discriminating against interstate commerce."[154]

State laws violate the dormant interstate Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[155] This inquiry requires both that the purported discrimination differentiate between in-state

omitted); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268–69 (1984) (Court finds state tax discrimination favoring local liquor beverages notwithstanding that those local sales were "well under one percent of the total [in-state] liquor sales" and posed no "competitive threat" to other liquors because neither point "is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition").

[149] *See Associated Indus.*, 511 U.S. at 654 (quotations omitted).

[150] *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1805 (2015). *See also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2471 (2019) ("'[W]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.'") (*quoting Heald*, 544 U.S. at 487).

[151] *See* Kathryn L. Moore, *State and Local Taxation of Interstate and Foreign Commerce: the Second Best Solution,* 42 WAYNE L. REV. 1425, 1475 (1996); Tatarowicz, *supra* note 130, at 901–02.

[152] *See, e.g.*, Camps Newfound/Owatonna Inc., v. Town of Harrison, 520 U.S. 564, 581 n.15 (1997); Healy v. Beer Inst., 491 U.S. 324, 328, 332, 334, 339 (1989); New Energy Co. v. Limbach, 486 U.S. 269, 276 (1988); *Bacchus Imports*, 468 U.S. at 268–72.

[153] *See* Michael E. Smith, *State Discrimination Against Interstate Commerce,* 74 CALIF. L. REV. 1203, 1244 (1986).

[154] *Wynne*, 135 S. Ct. at 1804 (citing West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994)).

[155] *Heald*, 544 U.S. at 472. *See also New Energy Co.*, 486 U.S. at 273–74; *Bacchus Imports*, 468 U.S. at 270–73.

and out-of-state commercial actors or interests, and that the discrimination be with respect to parties or interests that are substantially similar.[156] As to the first requirement, unless the discrimination is with respect to out-of-state versus in-state interests, the predicate for the test has not been met.[157] As to the second requirement, there is no discrimination when the differential tax treatment of two categories of companies "results solely from differences between the nature of their businesses, not from the location of their activities."[158] Also, even where there is differential tax treatment, a state can sometimes "justify [the] differences in treatment between [the] similarly situated taxpayers" by showing the existence of an "alternative, roughly equivalent tax [as a] justification that renders [the] tax disparity nondiscriminatory."[159] Further, a state may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by a reasonable alternative.[160]

[156] *See, e.g.*, Fla. Dep't of Revenue v. DirectTV, Inc., 215 So. 3d 46, 53–54 and nn.1–2 (Fl. 2017), *cert. denied* EchoStar Satellite L.L.C. v. Fla. Dep't of Revenue, 138 S. Ct. 645 (2018) (concluding that a state law taxing direct broadcast satellite providers and not cable providers is not discriminatory within the meaning of the dormant interstate Commerce Clause because both types of companies are out-of-state companies and citing three other state supreme court decisions that reached the same result). For a state tax to be discriminatory, the tax must result in differences between "similarly situated taxpayers." *See also* Ala. Dep't of Revenue v. CSX Transp., Inc., 575 U.S. 21, 30 (2015) ("A State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers.").

[157] *See DirectTV, Inc.*, 215 So. 3d at 53–54 and n.2 (citing cases).

[158] Kraft General Foods, Inc., v. Iowa Dep't of Revenue and Fin., 505 U.S. 71, 78 (1992) (citing Amerada Hess Corp. v. Dir., 490 U.S. 66, 78 (1989)). *See also id.* at 78 n.20 ("In *Amerada Hess*, we rejected the contention that a New Jersey tax violated the Commerce Clause because it 'discriminate[d] against oil producers who market their oil in favor of independent retailers who do not produce oil.'") (quoting *Amerada Hess*, 490 U.S. at 78); Camps Newfound/Owatonna, Inc., v. Town of Harrison, 520 U.S. 564, 582 n.16 (1997) (noting the Court's prior decision in General Motors Corp. v. Tracy, 519 U.S. 278 (1997), where "the Court premised its holding that the statute at issue was not facially discriminatory on the view that sellers of 'bundled' and 'unbundled' natural gas were principally competing in different markets.").

[159] *CSX Transp.*, 575 U.S. at 30–31. This is because "there is simply no discrimination when there are roughly comparable taxes." *Id*. at 31. *See also* Fulton Corp. v. Faulkner, 516 U.S. 325, 332–33 (1996) (similar); Associated Indus. v. Lohman, 511 U.S. 641, 647 (1994) (similar).

[160] *See New Energy Co*., 486 U.S. at 278 ("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.") (citing cases). *See also Heald*, 544 U.S. at 489 (quoting *New Energy Co*. for this

In some cases, a state tax may be struck down where it does not obviously mandate differential treatment of in-state and out-of-state economic interests because it fails the "internal consistency" test – a special test the Court has created to evaluate state tax discrimination under the dormant interstate Commerce Clause.[161] The internal consistency test was "formally introduced" in the context of corporate income tax apportionment, but it has earlier antecedents.[162] The test is an exception to the Court's general approach evaluating discrimination, which otherwise focuses on actual rather than hypothetical effects.[163] In contrast to that general approach, the internal consistency test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[164] The Court has stated that the virtue of the internal consistency test is that "it allows courts to distinguish between tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States."[165]

When the internal consistency standard applies, its mathematical determination to the effect that a state statute has overreached will likely result in the striking of that statute, hence putting pressure on the question whether the test applies in the first place – something that is not always clear.[166] But the test does not apply to "tax schemes that create disparate

point). The Court in *New Energy Co*. noted that, "[t]his is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so." 486 U.S. at 278.

[161] *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1801–02 (2015).

[162] *See id.* at 1802 (citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 160 (1983) for this formal introduction, and noting earlier cases that did not "use the term" but applied a similar test).

[163] *See id.* at 1803–06 (evaluating the state statute's impact on two hypothetical taxpayers, Bob and April). *See also* Peter D. Enrich*, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 433 (1996); Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 277–78 (2017).

[164] *Wynne*, 135 S. Ct. at 1802 (citing Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995)). *See also* Tyler Pipe Industries, Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 246–48 (1987); Armco v. Hardesty, 467 U.S. 638, 644–45 (1984); *Container Corp.*, 463 U.S. at 169.

[165] *Wynne*, 135 S. Ct. at 1802 (citing *Armco*, 467 U.S. at 645–46 and Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277 n.12 (1978)).

[166] *See id.* at 1803–04 (noting the comments of the state's attorney, who contested that the state's statute was discriminatory, but conceded, as to the Court's application of the internal consistency test, "I don't dispute the mathematics"). *Wynne* itself was a 5-4 decision that generated

incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes."[167] Also, as a guidepost – as with the Court's discrimination doctrine more generally – the application of the standard is informed by the principle that it should only apply to identify a state law that operates as a tariff because tariffs are the archetype example of a law that discriminates against interstate commerce.[168]

IV. *JAPAN LINE* AND THE DORMANT FOREIGN COMMERCE CLAUSE

A. Case analysis

The dormant foreign Commerce Clause analysis applied in *Kraft* related back to the Court's prior decision in *Japan Line, Ltd. v. County of Los Angeles*.[169] *Japan Line*, decided 13 years before *Kraft*, was the Court's seminal case applying the dormant foreign Commerce Clause.[170] An analysis of *Japan Line* and its progeny are necessary for an understanding of *Kraft*.

Japan Line was an "as applied" constitutional challenge to an ad valorem property tax imposed under the law of California.[171] The taxes were applied to large cargo containers owned by Japanese shipping companies that were engaged in international commerce but that had been temporarily docked in

two dissenting opinions. *See generally* 135 S. Ct. 1787. *See also* Edward A. Zelinsky, *Double Taxing Dual Residents: A Response to Knoll and Mason*, 86 STATE TAX NOTES 677, 681 (Nov. 13, 2017) (noting that one problem with the *Wynne* internal consistency standard is that it has "no discernible limiting principle"). The confusion in the cases has been suggested by the divergent outcomes in seemingly similar Supreme Court cases. *Compare* Am. Trucking Ass'ns, Inc., v. Scheiner, 483 U.S. 266, 284 (1987) ("[U]napportioned flat taxes . . . penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania.") *with* Am. Trucking Ass'ns, Inc., v. Mich. Public Service Comm'n, 545 U.S. 429, 437 (2005) ("The present fee, as we have said, taxes purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States.").

[167] *Wynne*, 135 S. Ct. at 1802 (citing *Armco*, 467 U.S. at 645–46 and *Moorman*, 437 U.S. at 277 n.12).

[168] *Id.* at 1804.

[169] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

[170] *See, e.g.*, Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 753 (2007).

[171] 441 U.S. at 440.

California.[172] The question, as the Court phrased it, was a "narrow one . . . whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State."[173]

The County of Los Angeles and the other localities took the position that the tax was valid because it met the requirements of the dormant interstate Commerce Clause, including the non-discrimination principle.[174] *Japan Line* assumed, without discussion, that the Court's pre-existing tests as applied for purposes of the dormant interstate Commerce Clause, including the discrimination standard, were relevant when evaluating the dormant foreign Commerce Clause.[175] The Court also presumed, as the localities claimed, that these standards were met on the facts such that, if the focus were interstate commerce, our "inquiry would be at an end."[176] The Court noted, however, that what the case concerned was instrumentalities of foreign commerce.[177] The localities' premise, the Court noted, was that "the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved."[178] But, the Court concluded that premise had to be rejected because "when construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required."[179]

[172] *Id*. at 436–37.

[173] *Id.* at 444. In framing the issue before it, the Supreme Court made it explicit that it was not deciding "questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically owned instrumentalities engaged in foreign commerce." *Id.* at 444 n.7.

[174] *Id.* at 445. The other dormant interstate Commerce Clause tests, like the anti-discrimination principle, were referenced in the Court's 1977 decision, *Complete Auto*—requirements that the state tax be "applied to an activity with a substantial nexus with the taxing State," be "fairly apportioned" and be "fairly related to the services provided by the State." *See id.* at 444–45 (citing Complete Auto, Inc. v. Brady 430 U.S. 274, 279 (1977)). Each of these non-discrimination tests have largely been recast by the Court as due process inquiries. *See supra* notes 142–43 and accompanying text.

[175] *Japan Line*, 441 U.S. at 445–46.

[176] *Id. See* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 72 (1993) (Court notes that in *Japan Line*, it "assumed the property tax in question would have met" the dormant interstate Commerce Clause tests "without passing on the point").

[177] *Japan Line*, 441 U.S. at 445–46.

[178] *Id.* at 446.

[179] *Id.* (quoting the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3).

1. *Japan Line's* stated tests

From the simple conclusion that the foreign Commerce Clause inquiry had to be more rigorous than that of the interstate Commerce Clause, the Court summarily both retained the interstate Commerce Clause standards for purposes of the foreign inquiry and then determined that "two additional considerations . . . come into play."[180] The first of those two new considerations was "the enhanced risk of multiple taxation."[181] The second was the concern that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."[182] The Court then posited two new tests to address each of these concerns.

Japan Line first adopted a test to evaluate multiple taxation with respect to foreign commerce, applying the logic that "[i]t is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause."[183] The Court's support for this test was citations to several dormant interstate Commerce Clause cases that had previously addressed multiple taxation in that context.[184] Despite this authority, however, the Court made clear that its underlying policy concern was that state taxes could undercut the federal government's role in foreign relations.[185]

The Court also adopted a second, federal uniformity or "one voice" test, for which the Court relied on a series of prior cases that stressed the need for

[180] *Id.*

[181] *Id.*

[182] *Id.* at 448.

[183] *Id.* at 446.

[184] *Id.* at 446–47 (citing Evco v. Jones, 409 U.S. 91, 94 (1972); Central R. Co. v. Pennsylvania, 370 U.S. 607, 612 (1962); Standard Oil Co. v. Peck, 342 U.S. 382, 384–385 (1952); Ott v. Miss. Valley Barge Line Co., 336 U.S. 169, 174 (1949); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938)).

[185] *See Japan Line*, 441 U.S. at 456 (stating that multiple tax can implicate "sensitive matters of foreign relations and national sovereignty"). *See also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 189 (1983) 189 (noting this logic to be the rationale for the multiple tax test as stated in *Japan Line*); *Japan Line*, 441 U.S. at 445 (stating, when addressing the localities' defense to the claim of multiple taxation, that "the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies").

national uniformity in the nation's foreign dealings.[186] This part of the Court's analysis primarily referenced the constitutional history that related to Congress' authority to regulate commerce under the affirmative Commerce Clause.[187] In particular, the Court concluded that there is evidence that the Framers intended the scope of Congress' powers under the foreign Commerce Clause to be greater than its powers under the interstate Commerce Clause.[188]

For its second test, the Court also analogized to a recent case in which it evaluated the Import-Export Clause.[189] It determined that the "Framers' overriding concern [was] that 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments.'"[190] By way of analogy, the Court then concluded that the "need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause."[191] The Court emphasized that the constitutional concern in the latter context is that a state tax could create "an asymmetry in the international tax structure [such that] foreign nations disadvantaged by the levy [might] retaliate against American-owned instrumentalities present in their jurisdictions."[192] This retaliation, the Court observed, would be directed

[186] *Japan Line*, 441 U.S. at 448–49 and nn.12–13. The Court noted that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Id.* at 448. It stated also that "[f]oreign commerce is preeminently a matter of national concern" and that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id*. (quoting Board of Trs. v. United States, 289 U.S. 48, 59 (1933)). *See* Colangelo, *supra* note 81, at 963 ("[T]he major incentive behind the foreign Commerce Clause was to establish national uniformity over U.S. commerce with foreign nations so that the U.S. could act as a single economic unit.").

[187] *See generally Japan Line*, 441 U.S. at 448–49 and nn.12–13.

[188] *Id.* at 448.

[189] U.S. CONST. art. I, § 10, cl. 2.

[190] *Japan Line*, 441 U.S. at 449 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

[191] *Id.* The Court went on to discuss how a "state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways." *Id.* at 449–50.

[192] *Id.* at 450.

at American interests in general, not just those of the taxing State, "so that the Nation as a whole would suffer."[193]

The logic underlying the Court's adoption of its two new tests in *Japan Line* was questionable. Although the Court relied on its prior interpretations with respect to the affirmative Commerce Clause, it "ignored the fact that Congress (or the President) could ensure that the nation spoke with one voice by adopting preemptive statutes (or treaties) to deal with differing state regulation."[194] Further, the Court did not consider why, absent action by the other political branches, it was necessary for the Court to enforce the notion that the federal government speak with one voice.[195] As Justice Scalia noted in a later case, applied literally, the one voice test "would always be satisfied, since no state law can ever actually prevent this Nation from speaking with one voice in regulating foreign commerce."[196] As Justice Scalia noted, the "National Government can always explicitly pre-empt the offending state law."[197]

The tax in *Japan Line* failed the multiple taxation test because it created "multiple taxation in fact."[198] This was because the appellants' containers were not only subject to property tax in Japan but were in fact taxed in Japan so that, if the localities' taxes "were sustained, appellants would be paying a double tax."[199] The tax also failed the "one voice" test because it was inconsistent with the Customs Convention on Containers, a Convention signed by the United States and Japan, pursuant to which containers temporarily imported were to be admitted free of "all duties and taxes

[193] *Id.* The Court noted further that, "[i]f other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." *Id.* at 450–51

[194] *See* Wilson, *supra* note 170, at 755.

[195] *See id.*

[196] Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 80 (1993) (Scalia, J., concurring).

[197] *Id.* at 80–81.

[198] 441 U.S. at 452.

[199] *Id.* The Court concluded this was damning because, unlike in the context of corporate income tax where there is a principle of apportionment that courts can apply to address multiple taxation, there is no "authoritative tribunal" capable of addressing that consequence with respect to an ad valorem property tax like the one at issue. *Id.* at 447–48. Conversely, although the Court assumed that no Japanese tax credit would be available with respect to the California tax, there was at least some uncertainty on this point. *See id*. at 452 n.17.

whatsoever chargeable by reason of importation."[200] The Court concluded that California's law would "frustrate attainment of federal uniformity" and, because American-owned containers would not similarly be taxed in Japan, "[t]he risk of retaliation by Japan [was] acute" – "retaliation [that] of necessity would be felt by the Nation as a whole."[201] Although the Customs Convention did not rise to the level of either federal legislation or a U.S. treaty, it stated federal policy, such that the Court's application of the Commerce Clause was arguably not "dormant."[202]

2. Post-*Japan Line* construction of *Japan Line's* tests

In the aftermath of *Japan Line*, the Court limited its holding in that case, and narrowed the application of its two newly-created foreign Commerce Clause standards.[203] The Court's later cases effectively dispensed with the multiple taxation test[204] and generally limited the application of the one voice test to circumstances in which the state tax either implicates foreign policy

[200] *Id.* at 453 (citing the Customs Convention on Containers, Art. I (b), May 18, 1956, 20 U.S.T. 301, 304, T.I.A.S. No. 663420). The Court concluded that the "Convention reflects a national policy to remove impediments to the use of containers as 'instruments of international traffic.'" *Id.* at 453 (citing 19 U.S.C. § 1322 (a)).

[201] *Id.* at 453. The Court stated that "[i]f other States follow California's example (Oregon already has done so), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter." *Id.* The Court also stated that "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Id.*

[202] *See generally id.* at 452–54.

[203] *See* Moore, *supra* note 151, at 1461 (noting that "the Court has never again relied on either of these considerations to strike down a state tax affecting foreign commerce, and its analysis in the post-*Japan Line* cases has weakened the considerations so that they seem to have little substance left to them"). *See also* Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?,* 26 HASTINGS CONST. L.Q. 307, 345 (1999) ("In the years since *Container Corp*. [in 1983], the Supreme Court has been extremely solicitous of state taxation schemes, even when applied to foreign corporations or to foreign commerce"); Newman, *supra* note 47, at 711–13 (stating that *Japan Line* was "emasculated by the time of the *Kraft* decision and has been further undermined since"); Charles Rothfeld, *From Japan Line to Barclays: The Rise and Fall of the Foreign Commerce Clause,* 7 STATE TAX NOTES 379, 385 (Aug. 8, 1994) (concluding "not much" is left of the Foreign Commerce Clause after Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994)).

[204] *See Barclays Bank*, 512 U.S. at 318–20; Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 74 (1993); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 189 (1983).

issues that must be left to the federal government or violates a clear federal directive.[205] The former inquiry, the Court has reasoned, imposes "no absolute prohibition on state-induced double taxation in the international context."[206] As the Court has noted, the "Foreign Commerce Clause cannot be interpreted to demand that a State refrain from taxing any business transaction that is also potentially subject to taxation by a foreign sovereign."[207] As for the one voice test, the Court determined that it can only be applied by reference to objective standards, the "most obvious" of which would be the danger of offending trading partners and risking retaliation.[208] As reconsidered, the one voice test became, the Court has acknowledged, "essentially a species of preemption analysis."[209] The Court's post-*Japan Line* cases generally characterize the one voice test as posing the question whether the state tax conflicts with "express federal policy."[210] As a practical

[205] *See Container Corp.*, 463 U.S. at 194. *See also Barclays Bank,* 512 U.S. at 324 ("As in *Container Corp.* and *Wardair*, we discern 'no specific indications of congressional intent' to bar the state action here challenged."); *Itel*, 507 U.S. at 73 (distinguishing *Japan Line* as a case that involved a conflict with "express federal policy").

[206] *Container Corp.*, 463 U.S. at 189. *Container Corp.* dismissed the application of *Japan Line*, though it noted that the facts were similar "in a number of important respects," including that the California tax at issue resulted in "actual double taxation" that resulted from "a serious divergence in the taxing schemes adopted by California and foreign taxing authorities." *Id.* at 187. The California tax passed muster in *Container Corp.* in part because the tax in question was an income tax not a property tax, which California subjected to apportionment, and the tax was directly imposed, not on cargo, an instrumentality of foreign commerce, but rather on a domestic corporation engaged in business in foreign countries through its subsidiaries. *See id.* at 188–89, 194–95. In a later case the Court concluded that the logic in *Container Corp.* holds true even when the parent corporation that is subject to tax—and potential multiple tax—is a foreign corporation. *See Barclays Bank*, 512 U.S. at 318–20.

[207] *Itel*, 507 U.S. at 74.

[208] *Container Corp.*, 463 U.S. at 194.

[209] *See id. See also id*. at 194–196 (noting the judicial difficulty in evaluating whether a state tax is inconsistent with the federal government's foreign policy, in the absence of a clear federal statement of such policy).

[210] *See id.* at 190; *Itel*, 507 U.S. at 73; *Barclays Bank*, 512 U.S. at 324 (noting the state tax did not conflict with "specific indications of congressional intent"). *See also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000), *affirming*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) ("Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.").

matter, these later developments largely "gutted the one voice test of *Japan Line*."[211]

The effective elimination of the *Japan Line* multiple taxation test makes sense because – as clarified by the Court's later cases – the Commerce Clause does not forbid multiple taxation[212] and multiple taxation is particularly difficult to evaluate in the foreign context.[213] Also, more generally, absent federal direction, the policing of "sensitive matters of foreign relations"[214] is not a straightforward judicial function and is seemingly outside the expertise of the judiciary.[215] Further, the Constitution recognizes that for purposes of U.S. taxation when the federal and state governments apply similar taxes, such as an income tax, they are engaged in concurrent taxation, not multiple taxation.[216] Therefore, it is arguably illogical to conclude that when a state

[211] Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1699–1700 (1997) (discussing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994)). *See also* Rothfeld, *supra* note 203 ("The preemption prong of the one voice test recognized in *Container Corp*. remains in effect – but the Court hardly needs the Commerce Clause to set aside state enactments that have been preempted by Congress."); 1 JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION 8-146 (2d ed. 1993) ("[The] reliance on Congressional action [in *Container Corp.*] in order to determine whether the State tax violated the Federal uniformity requirement and the need to speak with one voice saps the rule of any real significance. For if the need for Federal uniformity and for one voice in speaking for the nation in international trade must be established by proof of Congressional action, nothing is added to the Commerce Clause jurisprudence by the new 'one voice' test.") (quoted in Denning & McCall, *supra* note 203, at 346 n.207).

[212] *See Container Corp.,* 463 U.S. at 189. *See also id.* at 171 (the Court will not endeavor under the dormant interstate Commerce Clause to eliminate "all overlapping taxation"); Goldberg v. Sweet, 488 U.S. 252, 263–64 (1989) (under the dormant interstate Commerce Clause the possibility of multiple taxation is not enough to invalidate the state's statutory scheme).

[213] *See* Japan Line, Ltd. v. City. of L.A., 441 U.S. 434, 447–48 (1979) (noting there was no "authoritative tribunal" capable of evaluating the question); *id.* at 452 n.17 (suggesting that in *Japan Line* there was at least some question whether Japan would have conferred a credit against the California tax, hence nullifying the double taxation).

[214] *Container Corp.*, 463 U.S. at 189.

[215] *See id.* at 189–93. *See also Itel,* 507 U.S. at 76 ("the nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of this Court'") (quoting *Container Corp.,* 463 U.S., at 195–96); *id.* at 80 (Scalia, J., concurring) (concluding that the tests created by *Japan Line* like those applicable under the Court's dormant interstate Commerce Clause analysis "ultimately ask[] courts to make policy judgments").

[216] *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 448 (1980) ("Concurrent federal and state taxation of income, of course, is a well-established norm."); Frick v. Pa., 268 U.S. 473, 499 (1925) ("The power of Congress, in laying taxes, is not necessarily or naturally inconsistent

applies tax to the commerce of a foreign nation, in a context in which the foreign nation also applies tax, that there can be, for that reason alone, impermissible multiple tax.[217] An evaluation of multiple taxation in the international context – if it is a question at all – would seem to necessarily focus on an analysis of tax as applied at both the subnational and national levels.[218]

The narrowing of the one voice test similarly makes sense. Other than where the tax implicates foreign policy issues that must be left to the federal government or the case of a direct conflict with specific U.S. policy, application of this uniformity notion is necessarily also subjective and vague – and therefore not appropriate for judicial determination.[219] Every state action with a de minimis effect on foreign commerce arguably interferes with the ability of the nation to speak with one voice, but it cannot be the case that the states should therefore refrain from any action that would impact such commerce.[220] If the question is one of degree, then it is unclear where the line

with that of the states. Each may lay a tax on the same property without interfering with the action of the other") (citation omitted). *See also* Fatale*, supra* note 77, at 56–57 and n.77.

[217] *See* HELLERSTEIN, ET AL., STATE AND LOCAL TAXATION (10th ed. 2014), at p. 212 (questioning how the imposition of a state tax can result in "multiple taxation" vis-à-vis a tax imposed by a foreign national government when state and federal U.S. taxes imposed on the same actor or interests are considered to be, not multiple taxation, but concurrent taxation). *See also* Steiner v. Utah State Tax Comm'n, 449 P.3d 189, 199 (Utah 2019) (stating that it makes no sense to universalize a state's tax system to conduct a multiple taxation analysis vis-à-vis income imposed by foreign countries since a state is a "single, subnational taxing jurisdiction" and there "is no proper basis to compare the effect of its tax system with the effect of those of foreign jurisdictions encompassing multiple levels of taxation"); Brief for the United States as Amicus Curiae Supporting Respondent, Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin. at *33, 505 U.S. 71 (1992) (No. 90-1918), 1992 U.S. S. Ct. Briefs LEXIS 328 ("in this case, Iowa and the foreign nation [are] concurrent taxing powers, just as Iowa and the U.S. would be in the case of domestic income").

[218] *See Container Corp.,* 463 U.S. at 191 n.30 (stating that a state does not have to grant a foreign tax credit because the federal foreign tax credit vindicates "the goal of not subjecting [a taxpayer] to a higher tax burden than it would have to bear if its subsidiaries were not taxed abroad"). *See also* Brief for United States as Amicus Curiae, *supra* note 217 at *33–34 (similar); Lewis B. Kaden, *State Taxation of Multinational Corporations*, 32 CATH. U.L. REV. 829, 841–42 (1983) (noting that as long as a state taxes foreign income using fair apportionment methodology, the only possible multiple taxation burden is that created by federal law).

[219] *See supra* note 215 and *infra* notes 239 and accompanying text.

[220] *See supra* note 207 and accompanying text. *See also* Wilson, *supra* note 170, at 756 (concluding that, "The *Japan Line* analysis—that state laws impairing either national uniformity with respect to foreign commerce or the ability of the nation to speak with one voice in foreign affairs are invalid—lacked obvious limits. Any state action that had a de minimis effect on foreign

is to be drawn, and that determination is better left to the federal government.[221] The more appropriate judicial approach, which the Court has effectively adopted, is to uphold state action unless it violates a policy explicitly adopted by the federal government since no state can prevent the federal government from speaking with one voice.[222] In any instance where Congress determines that a state tax is such that it could prompt foreign retaliation or is otherwise inconsistent with national policy, Congress can act to eliminate the tax.

By generally narrowing the dormant foreign Commerce Clause standard to the principle that a state tax may not conflict with affirmative federal action, the Court severely limited the "dormant" aspect of this standard.[223] The transition is reflected in the later case, *Crosby v. Nat'l Foreign Trade Council*,[224] which pertained, not to a state tax, but rather to a state regulatory action.[225] In *Crosby*, the state of Massachusetts barred state entities from buying goods or services from any person doing business with the foreign country, Burma.[226] Seemingly, by targeting the activities of a foreign country, the state statute "blatantly" discriminated against foreign commerce.[227] The U.S. Court of Appeals agreed; it concluded that for this reason the statute was unconstitutional under the foreign Commerce Clause.[228] The Supreme Court later affirmed, though not on the basis that the statute violated the dormant

commerce would arguably interfere with the ability of the nation to speak with one voice in foreign affairs.").

[221] *See* Wilson *supra* note 170, at 756.

[222] *See* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 80–81 (1993) (Scalia, J., concurring).

[223] Wilson, *supra* note 170, at 775 (noting that the Court in practice evaluates whether the state action conflicts with some form of action taken by Congress or the executive branch with respect to foreign affairs and that "in reality the Court is applying a form of strong preemption analysis and simply calling it dormancy").

[224] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

[225] *Id.* at 366.

[226] *Id.* at 367.

[227] Denning & McCall, *supra* note 203, at 347.

[228] Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 68 (1st Cir. 1999). The Court also found that the state law both interfered with the foreign affairs power of the federal government, and violated the Supremacy Clause because it was preempted by a law imposing federal sanctions against Burma. *Id.* at 54, 77.

foreign Commerce Clause, but rather because, the Court concluded, the Act conflicted with federal law.[229]

Shortly after *Crosby*, the Court once again refused to apply the dormant foreign Commerce Clause in a case where it arguably applied, where the challenge was also to a state regulation and not a tax.[230] In that case, *American Ins. Ass'n. v. Garamendi,*[231] as in *Crosby*, the Court found that the relevant state statute was preempted, on the basis that it interfered with the conduct of foreign policy by the executive branch.[232] *Garamendi* therefore reinforces *Crosby* by showing the Court's preference for deciding cases on conflict preemption grounds rather than dormant foreign Commerce Clause grounds.[233] Since the time of *Garamendi* – other than a reference in a string citation for the proposition that the Court will sometimes allow a facial challenge to a state statute under the Constitution[234] – the Court has not revisited the foreign Commerce Clause in any respect.

B. Case implications regarding the Court's dormant interstate Commerce Clause discrimination test

Japan Line accepted the Court's pre-existing dormant interstate Commerce Clause inquiries, including the discrimination standard, as

[229] *Crosby*, 530 U.S. at 388. The relevant federal law was the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009-166 to 3009-167, which was enacted after the state statute and imposed a set of mandatory and conditional sanctions on Burma. *See id.* at 368. The Court found that the state statute was an "obstacle to the accomplishment of Congress's full objectives under the federal Act" and undermined its "intended purpose and natural effect" in several respects. *Id.* at 373–75 (citation omitted).

[230] *See American Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 401 (2003).

[231] 539 U.S. 396 (2003).

[232] *Garamendi* evaluated a California statute that required an insurer doing business in the state to disclose certain information about insurance policies sold during the period of the Holocaust. *Id.* at 401. A lower court had considered whether the statute was unconstitutional, including under the dormant foreign Commerce Clause, and upheld the statute. *See* Gerling Glob. Reinsurance Corp. of Am. v. Low, 296 F.3d 832, 851 (9th Cir. 2002). The Supreme Court reversed, and found the state statute was preempted as inconsistent with the national government's conduct of foreign relations. *Garamendi*, 539 U.S. at 401.

[233] *See* Wilson, *supra* note 170, at 773.

[234] *See* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2449 (2015) (citing Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71 (1992)). *See also supra* note 74 and accompanying text.

relevant for purposes of the dormant foreign Commerce Clause.[235] But *Japan Line* did not apply any of those tests,[236] nor – with one limited exception – did any of the Court's subsequent dormant foreign Commerce Clause cases leading up to or subsequent to *Kraft*.[237] Nonetheless, the analysis in *Japan Line* and the Court's subsequent dormant foreign Commerce Clause cases are relevant to the application of the discrimination standard as applied under that Clause.

The policy that underlies all inquiries arising under the dormant foreign Commerce Clause is the same – the uniformity principle that ensures that the federal government speaks with one voice. This policy was carefully evaluated in *Japan Line* and the Court's later dormant foreign Commerce Clause cases.[238] Certainly a state that discriminates against foreign commerce could implicate this federal uniformity concern – no less than, say, a state that imposes multiple taxation with respect to foreign commerce. But in either case the judiciary is ill-equipped to determine when the state action is so problematic that there is a threat of foreign retaliation, i.e., the primary feared consequence to be addressed by the dormant foreign Commerce

[235] Japan Line, Ltd., v. County of Los Angeles, 441 U.S. 434, 451 (1979).

[236] *See Kraft,* 505 U.S. at 79. *See also* Itel Containers Int'l Corp. v. Huddleston*,* 507 U.S. 60, 72 (1993) (in *Japan Line* the Court "assumed the property tax in question would have met" the dormant interstate Commerce Clause tests "without passing on the point").

[237] *See, e.g., Itel*, 507 U.S. at 71–74; Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 8–9 (1986); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 185–97 (1983); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 446–48 (1980). Instead these cases focused on the multiple taxation and one voice tests created by *Japan Line. See id.* The one exception was *Barclays Bank*, where the Court considered, inter alia, whether California's reporting methodology for foreign corporations that were required to comply with the state's worldwide combined reporting regime violated the dormant foreign Commerce Clause because it would require a "prohibitive administrative burden" not similarly faced by domestic corporations. 512 U.S. 298, 312–13 (1994). *Barclays* concluded that the compliance burdens "if disproportionately imposed on out-of-jurisdiction enterprises, may indeed be inconsonant with the Commerce Clause," but concluded that no such burdens were proven on the facts. *Id*. at 313–14. The one case *Barclays* cited for the proposition that there could be discrimination under the dormant foreign Commerce Clause was a dormant interstate Commerce Clause case, Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350–51 (1977). *Id.* at 314. In *Hunt*, as noted by *Barclays*, North Carolina engaged in protectionist activity seeking to protect that state's apple industry from the apple industry of Washington state. *Id.*

[238] *See Itel*, 507 U.S. at 71–74; *Wardair*, 477 U.S. at 8–9; *Container Corp.*, 463 U.S. at 185–97; *Mobil Oil*, 445 U.S. at 446–48*; Japan Line*, 441 U.S. at 448–451.

Clause.[239] Rather, the more appropriate arbiter in either instance is Congress, which can take action to eliminate the offending state tax. It makes particular sense for the Court to evaluate discrimination in the context of foreign commerce similar to the largely hands-off way it evaluates multiple taxation in that same context – the latter as suggested by the Court's post-*Japan Line* cases – because the Court often equates these two concepts when evaluating the dormant interstate Commerce Clause.[240]

In the context of the dormant interstate Commerce Clause, even a relatively minor amount of state tax discrimination can result in a constitutional infringement.[241] But the purpose served by the dormant interstate Commerce Clause is to prevent the states from acting in conflict with each other – behavior that is in all instances deemed detrimental to the country more generally.[242] No level of interstate protectionism is permitted, because it is the very act of such protectionism that is pernicious.[243] In contrast, for a state action to be forbidden with respect to the dormant foreign

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[239] *See Container Corp.*, 463 U.S. at 194 ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please."); Wilson, *supra* note 170, at 777 ("The Court is not adequately prepared to determine what threshold a state action must meet before it implicates foreign affairs and is deemed invalid.").

[240] *See, e.g.,* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794–95 (2015) (twice stating that a state tax may discriminate against interstate commerce when it exposes such commerce to multiple taxation).

[241] *See supra* notes 146–148 and accompanying text.

[242] *See supra* notes 146–148 and accompanying text.

> At the heart of the distinction between having a dormant Interstate Commerce Clause and having a dormant Foreign Commerce Clause is the national unity argument. . . . The dormant Interstate Commerce Clause can be justified as a national unity measure based on the structure of the Constitution; the dormant Foreign Commerce Clause cannot. The rationale for the dormant Foreign Commerce Clause – avoiding retaliation by foreign countries – is not designed to protect one group of United States citizens from the actions of another group of United States citizens, but rather to make sure that the actions of one state do not have too much of an effect on the nation as a whole. Unlike the rationales behind the dormant Interstate Commerce Clause, this is a threshold effect: Only at a certain level does the threat of retaliation become significant; foreign governments do not retaliate for de minimis effects on foreign commerce.

Wilson, *supra* note 170 at 786.

[243] *See supra* note 148 and accompanying text.

Commerce Clause it generally must interfere with the nation's ability to conduct international affairs.[244] But it will be rare that state action has this impact on international affairs. Violations of the dormant foreign Commerce Clause should, therefore, also be rare.

The conclusion that the Court's generic discrimination test should apply differently in the context of the dormant foreign Commerce Clause does not mean that state taxation could never discriminate against foreign commerce in the absence of overt federal disapproval. For example, at least in theory, a state tax could "discriminate against foreign commerce by targeting specific countries and the companies trading with them in foreign commerce, as well as against foreign corporations of the target countries themselves."[245] But certainly the discrimination standard should not be applied such that seemingly minor or questionable discriminatory acts result in a constitutional violation.[246] Further, in many instances the activities of a foreign company subject to state tax may be domestic rather than foreign in nature, and in those cases the Court's interstate anti-protectionist doctrine should apply.[247] In any event, no less than in the domestic context, the discrimination principle as applied in the foreign Commerce Clause context should be construed consistent with the original purpose of the Commerce Clause – because any application of the dormant Commerce Clause that ignores this purpose may ultimately result in an unjustified infringement on state sovereignty.[248]

[244] *See supra* notes 180–93 and accompanying text.

[245] *See* Denning & McCall, *supra* note 203, at 351.

[246] *See generally* Wilson, *supra* note 170, at 756, 786–87.

[247] *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 447 (1980) (noting that, although the taxpayer's claim with respect to the state taxation of foreign dividends was that the state tax imposed an impermissible burden on foreign commerce, "the effect of domestic taxation is the only real issue"). *See also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 187–89 (1983) (distinguishing the facts before it from those in *Japan Line* on the theory that, unlike in *Japan Line*, "the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States"); Star-Kist Foods, Inc. v. County of Los Angeles, 719 P.2d 987, 996 (Cal. 1986), *cert. denied*, 480 U.S. 930 (1987) (domestic corporation that transships goods manufactured outside the country through California for sale in other states is engaged in interstate commerce within the meaning of the Commerce Clause and therefore is protected by the Court's anti-discrimination doctrine as posited under the dormant interstate Commerce Clause); *infra* note 309 (discussing Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 73 (1993), where the Court, in evaluating a dormant foreign Commerce Clause claim, effectively acquiesced in the interstate discrimination analysis applied by the lower court).

[248] *See supra* notes 131–132 and accompanying text.

V. *KRAFT GENERAL FOODS, INC., V. IOWA DEPARTMENT OF REVENUE AND FINANCE*

A. Background

Kraft pertained to an Iowa statute that taxed a U.S. parent corporation doing business in Iowa with respect to dividends paid to the parent by a foreign subsidiary, but that did not tax dividends paid to the parent by a domestic subsidiary.[249] The issue was whether the statutory distinction was facially discriminatory under the foreign Commerce Clause.[250] The dividends paid by a foreign subsidiary would be included in the domestic parent's taxable income when the foreign subsidiary and the parent were engaged in a unitary business and would be taxed on an apportioned basis.[251] Prior to *Kraft*, the Court had held that the states could tax a U.S. corporation on its apportioned share of a dividend paid by a foreign subsidiary with respect to foreign earnings when the two corporations were engaged in a unitary business.[252] Also, a task force established by President Reagan eight years before *Kraft* studied the question whether the states should be congressionally restricted from taxing foreign-source dividends, but came to no conclusion and instead left the issue for "resolution at the state level."[253]

The Court's conclusion in *Kraft* relied heavily on *Japan Line*, even though *Japan Line* pertained to a different legal question[254] and very different facts – a local property tax imposed on shipping containers owned by foreign corporations that spent almost all of their time in international waters.[255] Nor

[249] *See* Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 72–73 (1992).

[250] *Id.* at 73 (stating the question as "whether the disparate treatment of dividends from foreign and from domestic subsidiaries violates the Foreign Commerce Clause").

[251] *Id*. at 78–79.

[252] *See Mobil Oil*, 445 U.S. at 442, 445–48.

[253] *See* Final Report, *supra* note 60, at ii. The introductory letter presenting the report to President Reagan also makes this point. *See generally id.*

[254] *See* Newman, *supra* note 47, at 714 (noting that the Court's heavy reliance on *Japan Line* is "mystifying" because that earlier case did not involve a discrimination challenge).

[255] *See Japan Line*, 441 U.S. at 451–52 ("By stipulation, appellants' containers are owned, based, and registered in Japan; they are used exclusively in international commerce; and they remain outside Japan only so long as needed to complete their international missions."). *See also id.* at 435–36. In his dissent in *Kraft*, Chief Justice Rehnquist stated:

> The only case dealing with the Foreign Commerce Clause substantially relied on by the Court in its opinion upholding petitioner's challenge to the Iowa statute is *Japan Line*,

was there any issue in *Kraft* concerning the two new foreign Commerce Clause standards that the Court had created in *Japan Line* – the multiple taxation and "one voice" tests – which had been the subject of every subsequent dormant foreign Commerce Clause case.[256] Rather, *Kraft* looked to pre-*Japan Line* standards that the Court had posited under the dormant interstate Commerce Clause.[257] *Japan Line* did not apply those older standards, but merely suggested in dicta that they could be relevant under the dormant foreign Commerce Clause.[258] Moreover, the Court's post-*Japan Line* dormant foreign Commerce Clause cases also did not apply those older standards, but likewise merely referred to them in dicta.[259]

Other important differences distinguished *Kraft* from *Japan Line* and its progeny. In *Japan Line* the federal government filed a brief and argued on behalf of the taxpayer.[260] In the Court's later cases, the position taken by the

> [441 U.S. 434]. It is important, therefore, to note how different are the facts in that case from those in the present one. In *Japan Line*, California had levied a nondiscriminatory ad valorem property tax on cargo containers which were owned by Japanese shipping companies based in Japan, had their home ports in Japan, and were used exclusively in foreign commerce. The containers were physically present in California for a fractional part of the year, but only as a necessary incident of their employment in foreign commerce. Japan levied no tax on similarly situated property of United States shipping companies.

Kraft, 505 U.S. at 83 (Rehnquist, C.J., dissenting). *See also Container Corp.*, 463 U.S. at 188–89 (noting as one difference between the facts before the Court and those in *Japan Line* that "the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States" and questioning more generally whether "corporations can be analogized to cargo containers").

[256] *See generally Kraft,* 505 U.S. 71; *supra* note 237 and accompanying text (discussing the Court's post-*Japan Line* cases).

[257] *See Kraft*, 505 U.S. at 79; *Japan Line*, 441 U.S. at 444–45.

[258] *See Japan Line*, 441 U.S. at 445–46. *See also Itel*, 507 U.S. at 72–73 (commenting on *Japan Line*).

[259] *See Wardair*, 477 U.S. at 8–9; *Itel*, 507 U.S. at 73–75; *Container*, 463 U.S. at 183. *Barclays Bank* invoked those earlier standards and considered whether California law imposed discriminatory tax reporting (i.e., administrative) burdens on foreign corporations, but that was not a major focus of the case. *See* 512 U.S. at 312–14. *See also supra* note 237 and accompanying text (discussing this issue as addressed in *Barclays Bank).*

[260] *Japan Line*, 441 U.S. at 435. *See Itel,* 60 U.S. at 68 (noting that the U.S. Government's brief in *Japan Line* argued that "state taxes on [international cargo] containers would frustrate a federal scheme designed to benefit international commerce") (citing Brief for United States as Amicus Curiae in *Japan Line*, at 27–29, and n.22).

federal government was sometimes relevant, and, as in *Japan Line*, generally pre-figured the Court's holding.[261] In contrast, in *Kraft*, the U.S. Solicitor General filed a brief and argued on behalf of the state – but those actions were ignored by the Court in finding for the taxpayer.[262] Also, *Japan Line* was an "as applied" constitutional challenge such that the Court ruled against the state on the facts but left the offending statute intact.[263] In *Kraft*, the Court sustained a facial constitutional challenge to the Iowa statute, striking down that statute in its entirety.[264]

As noted, the question in *Kraft* was whether Iowa's statute imposing tax on dividends paid to a U.S. parent corporation by a foreign subsidiary discriminated against foreign commerce since the state did not tax dividends paid to a U.S. parent corporation by a domestic subsidiary. Iowa was a so-called "separate entity taxing state," which meant that the state only directly taxed corporations, domestic or foreign – using apportionment methodology to determine the percentage of income attributable to the state – when the corporation was itself doing business in the state.[265] The Court's comparison was therefore between the treatment of dividends paid by domestic and foreign subsidiaries that were not doing business in Iowa. Iowa's corporate income tax law, including its provisions imposing tax on dividends, was

[261] *See Container Corp.*, 463 U.S. at 195 (noting that "in this case, unlike *Japan Line*, the Executive Branch has decided not to file an amicus curiae brief in opposition to the state tax"). The Court in *Container Corp.* stated that the "lack of such a submission is by no means dispositive," but that "when combined with all the other considerations . . . it does suggest that the foreign policy of the United States . . . is not seriously threatened by [the state tax]"). *Id.* at 195–96. *See also Itel*, 60 U.S. at 68 (stating that the Government's current position in this case is at variance with *Japan Line* and "expresses agreement with our interpretation") (citing Brief for United States as Amicus Curiae at 12); *Barclays Bank*, 512 U.S. at 329–30 and n.32 (noting the U.S. Solicitor General supported the states' position, affirmed by the Court – though also noting that statements of the executive branch will not always be controlling). *But see Wardair*, 477 U.S. at 9 (dismissing the Solicitor General's amicus filing on behalf of the taxpayer because it was inconsistent with outstanding U.S. international agreements).

[262] *See generally Kraft*, 505 U.S. 71. *See also id*. at 83 (Rehnquist, C.J., dissenting) (noting that, "in the present case, the Executive Branch has not merely remained neutral, as it did in *Container Corporation*, but has filed a brief urging that the tax be sustained against the Foreign Commerce Clause challenge").

[263] *See Japan Line*, 441 U.S. at 453–54.

[264] *See Kraft*, 505 U.S. at 82.

[265] *See id.* at 74 and n.9. The corporate income tax apportionment rules as used by Iowa and other states generally apply in similar fashion to both domestic and foreign corporations. *See, e.g.,* Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 280–82 (1924).

generally in accord with that of the federal government.[266] In particular, in taxing domestic and foreign dividends as it did, Iowa was following the Internal Revenue Code, which similarly taxed foreign but not domestic dividends.[267]

The Iowa statute evaluated by *Kraft* granted a dividends received deduction to dividends paid by a domestic corporation.[268] As a policy matter, a dividends received deduction is generally intended to prevent a corporate dividend from being taxed to the parent-payee when the earnings represented by the dividend have already been taxed to the subsidiary-payer, i.e., a form of double taxation.[269] Iowa's law was modeled on federal law.[270] Under federal law, the earnings of a domestic subsidiary are subject to tax, and a dividend paid out of those earnings is not taxed – i.e., is entitled to a dividends received deduction – when paid to the corporation's parent.[271] But, in contrast, federal law does not necessarily tax the earnings of a foreign subsidiary owned by a domestic parent, and, to the extent these subsidiary earnings are taxed by a foreign country, federal law confers a foreign tax credit.[272] Therefore, the federal government does not provide a dividends received deduction for dividends paid to a U.S. parent corporation by a foreign subsidiary.[273]

The Iowa statute generally followed the federal tax treatment of both domestic and foreign subsidiaries, even though in the case of certain domestic subsidiaries – i.e., those not doing business in Iowa – there was no Iowa tax applied to the corporation's earnings.[274] Iowa law could have opted to tax

[266] *See Kraft*, 505 U.S. at 73–74.

[267] *See id.* at 74.

[268] *Id*.

[269] *See* Brief for United States as Amicus Curiae, *supra* note 217 at *26.

[270] *Kraft*, 505 U.S. at 73–74, 77.

[271] Brief for United States as Amicus Curiae, *supra* note 217 at *26.

[272] *Id.* at *6, *28. *Kraft* could have deducted the foreign taxes or taken a credit but elected to take a credit. *See id*. at *8, *33–34. If the company had taken the deduction its taxable income would have been reduced for both federal and Iowa purposes, and it would have had no basis to sue Iowa. *See id*. at *33–34.

[273] *Id.* at *26.

[274] Hence, Iowa effectively sought to prevent U.S. domestic double taxation. *See Kraft*, 505 U.S. at 86 (Rehnquist, C.J., dissenting) (noting that "45 of 50 States tax corporations on their net income" and that therefore the "deduction that Iowa extends to domestically based dividend payments simply helps to avoid what would otherwise be the near certainty that the domestic income would be doubly taxed—once when earned as income by the subsidiary [i.e., by a state other than

these non-Iowa domestic subsidiaries with the Iowa parent on a combined basis as part of an affiliated group engaged in a unitary business, but the state had not adopted this taxing methodology.[275] Consequently, as a matter of theory, unlike the federal government, Iowa arguably should have taxed the dividends paid by the non-Iowa domestic subsidiaries, just as it did the dividends paid by foreign subsidiaries. Indeed, by not doing so, the state effectively left money on the table. But the state's design was not protectionist; it merely sought to follow federal law to further the goal of administrative convenience.[276]

B. Threshold required determination of the existence of comparative foreign commerce

The threshold question in *Kraft* was whether dividends paid by a foreign corporation to a U.S. parent corporation constituted foreign commerce as compared with the domestic commerce represented by dividends paid by domestic corporations.[277] Only if this were so could Iowa's differential treatment raise a potential claim of discrimination. The Court necessarily focused on the actual payment of the dividends because, although there was a stipulation in the evidentiary record that the foreign subsidiaries "operated in foreign commerce," there was no evidence that the foreign dividends paid were paid with respect to foreign earnings.[278] Also, the Court recognized that foreign corporations could be engaged in domestic commerce – such that the dividends paid by the foreign corporations may have been paid with respect to domestic earnings.[279]

Iowa] and a second time when paid to the parent corporation"). There was no similar policy argument to be made in favor of conferring a deduction on dividends paid by foreign subsidiaries because it was uncertain whether the earnings of these subsidiaries would be subject to tax. *See id. See also supra* notes 270–73 and accompanying text. Iowa did not offer a foreign tax credit, as did the federal government, 505 U.S. at 74, but that was not a relevant consideration in the Court's determination. *See* 505 U.S. at 82. *See also infra* notes 312 and 316 and accompanying text.

[275] *See Kraft*, 505 U.S. at 74 and n.9.

[276] *Id.* at 81.

[277] *Id.* at 73 ("The question presented is whether the disparate treatment of dividends from foreign and from domestic subsidiaries violates the Foreign Commerce Clause.").

[278] *Id.* at 85 (Rehnquist, C.J., dissenting).

[279] The Court acknowledged the argument made by the United States as an amici that a foreign corporation might be doing business in the United States, "with its dividend payments reflecting domestic business operations." *Id.* at 75–76. *See also Mobil Oil*, 445 U.S. at 435 (noting that domestic corporations can sometimes "conduct all their operations, and hence earn their income,

For its conclusion that the dividends paid by the foreign subsidiaries represented foreign commerce, apart from any consideration of the underlying earnings, the Court cited no law, and did not cite to the evidentiary record, but rather cited to a transcript of the hearing.[280] At the hearing, the state's attorney was asked twice whether the mere issuance of the dividends by the foreign subsidiaries constituted foreign commerce.[281] Once the attorney responded "I don't believe the State of Iowa has ever argued that that is not part of commerce," and the second time she responded "we've never argued that it is not."[282] These oral responses, which do not make any affirmative statement that the payment of dividends by the foreign subsidiaries in fact represented foreign commerce, were cited by the Court as the predicate for its comparative analysis.[283] But these responses do not rise to the level of a factual stipulation. Even if they did, as Chief Justice Rehnquist noted in dissent, the issue as to whether a dividend paid by a foreign corporation equates to foreign commerce for purposes of the Court's discrimination analysis is a question of law.[284] Also, as Rehnquist further noted, it would not be appropriate for "a stipulation between [the] parties [to] bind this Court on a question of law."[285]

In his dissent, Chief Justice Rehnquist disagreed with the Court's conclusion that Iowa's statute would necessarily impact foreign commerce.

outside the United States"); Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 279–80 (1924) (concluding that a British corporation doing business in New York was subject to the state's corporate income tax apportionment rules).

[280] *See Kraft*, 505 U.S. at 76 and n.16.

[281] Transcript of Oral Argument at *22–23, *33, Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71 (1992) (No. 90-1918), 1992 U.S Trans. LEXIS 175, at *22-23, *33 (emphasis added).

[282] *Id.* at *23, *33.

[283] *Kraft*, 505 U.S. at 76 and n.16. *See also id.* at 85 (Rehnquist, C.J., dissenting).

[284] *See id.* at 85 (Rehnquist, C.J., dissenting).

[285] *Id.* Related to this point, the state made the argument that the purported preferential treatment accorded to dividends paid by domestic corporations was not discriminatory because domestic corporations are sometimes engaged in, and certainly can be engaged in, foreign commerce. *Id.* at 77–78. This meant that, among other things, *Kraft* could have avoided Iowa's tax on foreign dividends by conducting its foreign business through domestic corporations. *Id.* The Court responded "[t]his argument is not persuasive." *Id.* at 78. The Court suggested that this approach might not "be practical as a business matter" and could "generate adverse tax consequences in other jurisdictions." *Id*. It also noted that "we do not think that a State can force a taxpayer to conduct its foreign business through a domestic subsidiary in order to avoid discriminatory taxation of foreign commerce." *Id*.

He noted as a general matter that "foreign domiciled corporations may engage in little or even zero foreign activity," and therefore "the suggestion that Iowa's tax has any real effect on foreign commerce is absurd."[286] More specifically, Rehnquist disagreed that the mere payment of a dividend by a foreign corporation represented foreign commerce, because, as he noted, the payment of a dividend even from a foreign corporation does not necessarily imply any foreign commercial aspects.[287] Rehnquist noted that, for example, a foreign subsidiary could pay dividends with respect to wholly domestic earnings using a domestic bank.[288] This line of logic has greater force today because the significance of traditional banks as a means of making any form of payment has diminished, and payments can be effectuated using Internet banks or even crypto-currency in a manner that is effectively stateless.[289]

C. The nature of the state's "discrimination"

Iowa argued in *Kraft* that its statute could not be considered in violation of the discrimination standard as culled from the Court's dormant interstate Commerce Clause precedent because, even if the statute treated foreign and domestic commerce differently, it "[did] not favor local interests."[290] Iowa

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[286] *Id.* at 84 (Rehnquist, C.J., dissenting).

[287] Chief Justice Rehnquist stated in dissent:

> The Court suggests that, even if foreign domiciled corporations are involved in no foreign trade, the dividend payments from subsidiary to parent are themselves 'foreign commerce.' Again, this may be true in certain circumstances, as the payment of a dividend may represent a real flow of capital across international boundaries. But certainly there are other situations where the 'foreign' aspects of a transaction are extraordinarily attenuated, and any burdening of such transactions concomitantly would not raise Foreign Commerce Clause concerns. Consider, for example, the case of a 'foreign' subsidiary—i.e., one that is incorporated in a foreign country—but with operations exclusively in the United States. It has no assets in the foreign country, no operations, nothing of value whatsoever. The corporation declares a dividend payable to its United States parent. The payment in such circumstance may well be accomplished simply by debiting one New York bank account and crediting another. To characterize this as 'foreign commerce' seems to me to stretch that term beyond all recognition.

Id. at 85 (Rehnquist, C.J., dissenting).

[288] *Id.*

[289] *See supra* note 32 and accompanying text. *See also supra* notes 33–34 and accompanying text.

[290] *Kraft*, 505 U.S. at 78. Similarly, the Iowa Supreme Court in the proceedings below had rejected the taxpayer's Commerce Clause claim because it had failed to demonstrate "that Iowa

noted that all corporate businesses doing business in and therefore subject to tax in the state would be subject to tax on "an apportioned share of their entire corporate income," whereas "[i]n the case of a foreign subsidiary doing business abroad, Iowa would tax the dividends paid to the domestic parent [also on an apportioned basis], but would not tax the subsidiary's earnings [more generally]."[291] The tax burden of a corporation – either domestic or foreign – engaged in business in Iowa, would therefore be greater than that of a foreign corporation merely owned by a domestic corporation doing business in Iowa.[292] And, so, contrary to the taxpayer's claim, the statute actually disfavored local corporations.

The Court "agree[d] that the statute does not treat Iowa subsidiaries more favorably than subsidiaries located elsewhere."[293] It stated, however, that "[w]e are not persuaded . . . that such favoritism is an essential element of a violation of the Foreign Commerce Clause."[294] Effectively, the Court responded to the state by stating that, although it was applying the discrimination standard as derived from the Court's dormant interstate Commerce Clause cases, it was not also applying the rationale from those cases.[295]

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businesses receive a commercial advantage over foreign commerce due to Iowa's taxing scheme." Kraft, Inc. v. Iowa Dep't of Revenue and Fin., 465 N.W.2d 664, 668 (Iowa 1991), *rev'd*, 505 U.S. 71 (1992).

[291] *Kraft*, 505 U.S. at 78.

[292] *Id.* at 79. The Court noted the state's argument that "[m]ore earnings of the domestic subsidiary, which has income producing activities in Iowa, than earnings of the foreign subsidiary, which has no Iowa activities, are included in the pre-apportioned net income base for the unitary business as a whole." *Id.* (citing Brief for Respondent at 19). This meant that, "[f]ar from favoring local commerce . . . the [Iowa] tax system places additional burdens on Iowa businesses." *Id.*

[293] *Id.* at 79. *See id.* at 83–84 (Rehnquist, C.J., dissenting) ("The Court agrees that the Iowa tax involved here does not favor subsidiaries incorporated in Iowa over foreign subsidiaries, but points out that the tax does favor subsidiaries incorporated in other States over foreign subsidiaries."). Chief Justice Rehnquist noted that it was obvious that Iowa has "no selfish motive to accomplish such a result" and that therefore the Court's analysis was inconsistent with the thrust of the Court's dormant interstate Commerce Clause cases. *Id.* at 83–84.

[294] *Id.* at 79.

[295] *Cf.* Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 7 (1986) ("In cases involving the so-called dormant Commerce Clause, both interstate and foreign, the Federal Government has not affirmatively acted, and it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens *the values the Commerce Clause was intended to serve*.") (emphasis added).

Kraft cited *Japan Line* for the conclusion that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce in part because matters of concern to the entire Nation are implicated."[296] Then, it cited to the Import-Export Clause analysis in *Japan Line* for the proposition that "the Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole."[297] But the Court in *Kraft* failed to note that in *Japan Line* the first statement was made in the context of explaining the need for two new judicial tests – i.e., the multiple taxation and "one voice" tests that police the principles of the dormant foreign Commerce Clause – neither of which were relevant in *Kraft*.[298] Also, the Court failed to note that *Japan Line*'s reference to the Import-Export Clause focused almost entirely on the constitutional principle that the federal government be permitted to speak with one voice in international affairs – a principle that was not violated in *Kraft*.[299] Subsequent Supreme Court cases decided after *Japan Line* made clear that because Congress or the executive branch can address state taxes that adversely affect foreign commerce, the Court will generally refrain from injecting itself into such questions.[300] Those cases specifically evaluated, repeatedly, the two dormant foreign Commerce Clause tests alluded to in *Kraft*.[301] But *Kraft* did not acknowledge the thrust of those subsequent cases, nor did it even cite to them.

[296] 505 U.S. at 79 (citations omitted) (citing Japan Line, Ltd., v. County of Los Angeles*,* 441 U.S. 434, 445–46, 448–451 (1979)).

[297] *Id*. at 79 (citing *Japan Line*, 441 U.S. at 450). *See supra* notes 189–93 and accompanying text.

[298] *See Japan Line,* 441 U.S. at 445–56. These tests derived from the Court's conclusion that, "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Id.* at 446 (quoting U.S. CONST. art. I, § 8, cl. 3).

[299] *See generally Kraft*, 505 U.S. at 79 (referring to *Japan Line,* 441 U.S. at 448–51). On the cited pages, *Japan Line* refers repeatedly to the notion that the Import-Export Clause polices the "one voice" notion. *See Japan Line,* 441 U.S. at 449 and 449 n.14. *See also supra* notes 189–93 and accompanying text. *Kraft*, of course, did not apply the one voice test, and in any event, the state's tax was consistent with federal law, the Internal Revenue Code, and supported by the executive branch, which filed a supporting brief and argued on the state's behalf. *See supra* notes 260–62 and 270–76 accompanying text.

[300] *See supra* notes 203–34 and accompanying text.

[301] *See supra* notes 203–222 and 237 and accompanying text.

In rationalizing its conclusion, the *Kraft* Court made the unprecedented statement that "we think that a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination."[302] The Court stated further that "[a]s the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions."[303] This logic was not only unprecedented at that time of *Kraft*, it remains otherwise unsupported by Supreme Court precedent to this day.

The analysis in *Kraft* is also inconsistent with the Framers' intent. The Court has stated that "the concern in foreign Commerce Clause cases is . . . the policy of [federal] uniformity . . . ."[304] By ignoring the state's reliance on federal law and the supportive efforts of the U.S. Solicitor General, *Kraft's* holding effectively rejected that concern as insignificant. In *Barclays Bank*, the Court suggested that the federal government could even passively suggest that state law does not impair federal uniformity without conveying its intent with unmistakable clarity.[305] This suggestion could have been inferred in *Kraft* because eight years prior to the case a task force established by President Reagan – consisting of state representatives and private practitioners – specifically considered the states' practices with respect to taxing foreign-source dividends and offered no suggested changes.[306]

Further, *Kraft* is inconsistent with the Framers' intent as embodied in the dormant interstate Commerce Clause, from which the Court extracted the discrimination principle.[307] The purpose of this Clause is to police the circumstance where a state seeks commercial advantages for in-state commercial actors at the expense of the commercial actors from other states, not one where – as suggested by *Kraft* – the state purportedly secures advantages for commercial actors from those other states.[308] Consistent with

[302] 505 U.S. at 79.

[303] *Id.*

[304] Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 8 (1986).

[305] Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 323 (1994).

[306] *See* Final Report, *supra* note 60, at 27.

[307] *See* Japan Line, Ltd., v. County of Los Angeles, 441 U.S. 434, 444–46 (1979).

[308] Chief Justice Rehnquist concluded the Court's decision was based on the determination that Iowa conferred a benefit on "non-Iowa domestic 'commerce'" that was not similarly enjoyed by foreign commerce. *Kraft*, 505 U.S. at 84 (Rehnquist, C.J., dissenting). He added that even if this analysis made constitutional sense – something he disputed – "[no] such showing has been made in

this point, the only post-*Kraft* case to consider discrimination with respect to a tax in the context of the dormant foreign Commerce Clause suggested that the question is whether a state seeks benefits for its own commercial actors at the expense of those from another state.[309] The *Kraft* Court conflated principles developed in the context of two different components of the dormant Commerce Clause – foreign and domestic – for a rule that made no Commerce Clause sense in either instance. The Court's modern dormant Commerce Clause cases seek to apply that Clause consistent with the Framers' intent, recognizing that the application of the Clause outside that scope will result in an unjustified infringement upon state sovereignty. *Kraft*'s analysis resulted in just such an infringement.

D. The lack of actual discrimination

Although its conclusion was based in part on the potential "international implications" of the discrimination implicit in Iowa's statute as applied to a foreign-incorporated entity, *Kraft* did not consider the statute's potential or actual international effects.[310] Hence, the case was at odds with the very case

the present case." *Id. See supra* notes 134–60 and accompanying text (discussing the Court's Commerce Clause discrimination doctrine more generally). *Cf. Kraft*, 505 U.S. at 74 n.10 (Court states as an example of discrimination that Iowa's law would favor the situation where an Iowa-based corporation owned a Kentucky-based subsidiary over one where that same corporation owned a German-based subsidiary – effectively favoring the commercial interests of the state of Kentucky over those of the German nation).

[309] *See* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 313 (1994) (finding no discrimination with respect to a California law that allegedly imposed more onerous tax reporting requirements on foreign corporations, analogizing to a prior case where a North Carolina statute was infirm because it imposed higher costs on out-of-state apple producers "to shield the local apple industry from the competition of Washington apple growers") (citing Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350–51 (1977)). Similarly, in *Itel*, the Court accepted the lower court's "careful analysis" of the dormant interstate Commerce Clause principles as they applied in the context of a foreign Commerce Clause claim. Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 73 (1993) (citing *Itel Containers Intern'l Corp. v. Cardwell,* 814 S.W.2d 29, 36 (Tenn. 1991)). In that cited case, the lower court concluded that the sales tax in question was not discriminatory as applied to containers owned by a domestic company for use in international shipping because the tax "falls even-handedly on all leased personal property in the state." *See Itel Containers*, 814 S.W.2d at 35.

[310] *See* James R. Potts, *State Taxing Schemes Discriminating in Violation of the Foreign Commerce Clause: Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 46 TAX LAW. 555, 560–61 n.47 (1993) ("no evidence was presented by the taxpayer supporting any alleged

it relied upon, *Japan Line*,[311] and is at odds with the Court's modern dormant Commerce Clause discrimination cases, which generally consider a state statute's actual effects even when discrimination seems patent on the face of the statute.[312]

Iowa's rules taxing dividends followed those applied by the federal government, and, when the federal and state systems were considered together, U.S. companies with foreign incorporated subsidiaries were not necessarily disadvantaged.[313] For this reason, both Iowa and the federal

potentiality of international retaliation," and so "it seems odd that the Court put so much emphasis on international implications in justifying their [sic] disregard of the lack of local benefit").

[311] *See* 441 U.S. at 453 (concluding that "the risk of retaliation by Japan, under the circumstances, is acute").

[312] *See supra* notes 150–53 and accompanying text. The Court's internal consistency doctrine allows for the Court to strike down a statute as facially discriminatory absent a focus on actual effects, *see supra* notes 161–68 and accompanying text. But that doctrine makes no sense as applied to foreign income because it polices the prospect of multiple taxation and the federal tax system addresses multiple taxation in the foreign context. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 191 n.30 (1983) (noting that the federal government allows a credit for foreign taxes on intercorporate dividends thus rendering it illogical that "a State would have to grant another credit of its own, since the federal credit would have already vindicated the goal of not subjecting the taxpayer to a higher tax burden than it would have to bear if its subsidiary's income were not taxed abroad"); Brief for United States as Amicus Curiae, *supra* note 217, at *30–34 (noting the means by which the federal government seeks to address multiple taxation in the context of dividends paid by a foreign subsidiary to its domestic parent). *See also* Steiner v. Utah State Tax Comm'n, 449 P.3d 189, 199 (2019) (noting that it "is quite impossible to apply [the internal consistency test] in an international setting" because that test contemplates "only state-level taxes within a uniform federal system"). Also, there was no claim of multiple taxation in *Kraft* and no claim was made that Iowa's statute failed the Court's internal consistency test. *See generally Kraft*, 505 U.S. 71.

[313] The Court conceded that "if a subsidiary were located in another State, its earnings would be subject to taxation by the Federal Government and by the other State (assuming that the State was one of the great majority that impose a corporate income tax)" and that therefore "[t]his state and federal tax burden might exceed the sum of the foreign tax that a foreign subsidiary would pay and the tax that Iowa collects on dividends received from a foreign subsidiary." *Kraft*, 505 U.S. at 80. This was the argument on behalf of the state that the Court apparently considered the strongest. *See id.* at 80–81. *See also id.* at 86 (Rehnquist, C. J., dissenting) (noting that certainly "two Iowa corporations, one with a foreign subsidiary and one with a domestic non-Iowa subsidiary will in some cases pay a different total tax . . . [b]ut this does not constitute unconstitutional discrimination because, as far as the record demonstrates, Iowa's taxing scheme does not result in foreign commerce being systematically subject to higher tax burdens than domestic commerce"); Newman, *supra* note 47, at 714–20 (evaluating the two scenarios in detail and concluding that "[v]iewing the

government argued that the Iowa statute was not discriminatory.[314] In response, the Court conceded that the total state and federal tax burden of a non-Iowa domestic subsidiary might exceed the sum of the tax that a foreign subsidiary would pay.[315] But it concluded this point was irrelevant, because it found "no authority . . . for the principle that discrimination against foreign commerce can be justified if the benefit to domestic subsidiaries might happen to be offset by other taxes imposed not by Iowa, but by other States and by the Federal Government."[316] It is of course not surprising that the Court could not find specific supporting precedent because no prior case had considered the question whether a state statute was unconstitutionally discriminatory within the meaning of the foreign Commerce Clause. And, as noted, the one later case to consider the question instead suggested the only relevant consideration is whether the state's statute sought protectionist economic benefits on behalf of in-state commercial actors.[317]

Moreover, the Court's modern Commerce Clause cases eschew formalism in favor of an analysis of a state statute's practical effects[318] and *Kraft* is inconsistent with this approach. *Kraft* narrowly focused on the distinction in Iowa's legal treatment of dividends paid by a domestic corporation and a foreign corporation. While *Kraft* concluded that other aspects of Iowa's "tax system" could have validated the law, the Court's narrow focus on only the disparate treatment of dividend-payers effectively

case in terms of national and subnational taxation, the Iowa tax scheme is clearly not discriminatory").

[314] *Kraft*, 505 U.S. at 79–81. *See also supra* notes 267–76 and accompanying text. *Compare Itel,* 507 U.S. at 76 (finding it meaningful that, "[t]o the extent Itel is arguing that taxes like Tennessee's engender foreign policy concerns, the United States disagrees").

[315] *See supra* note 313 and accompanying text.

[316] *Kraft*, 505 U.S. at 81. Arguably, this statement was incorrect, as the Court had previously concluded, by way of analogy, that a federally-conferred foreign tax credit could suffice in lieu of a state-provided foreign tax credit. *See Container Corp.,* 463 U.S. at 191 n.30 and *supra* notes 218 and 312 and accompanying text. *See also* Newman, *supra* note 47, at 715–16 (noting that this statement in *Kraft* "plainly ignores the operation of the [federal foreign tax credit], which provides a credit not only for foreign national taxes paid, but also for foreign subnational taxes paid," and noting also that this statement in *Kraft* is inconsistent with *Container Corp.*'s analysis of the implications of the federal foreign tax credit for purposes of state tax law as evaluated by *Container Corp.,* 463 U.S. at 191 n.30).

[317] *See* Barclays Bank v. Franchise Tax Bd. of. Cal., 512 U.S. 298, 313 (1994); s*ee also supra* notes 237 and 309 and accompanying text (discussing this issue as addressed in *Barclays*).

[318] *See supra* notes 130–41 and accompanying text.

foreclosed this analysis.[319] Similarly, as Chief Justice Rehnquist noted in his dissent, because the Court improperly evaluated the Iowa statute against a claim of facial discrimination – as opposed to evaluating the statute "as applied" to the taxpayer – there was little "evidence to suggest that Iowa's taxing scheme systematically work[ed] to discourage foreign commerce to the advantage of its domestic counterpart."[320]

Kraft also considered the possibility that Iowa's statute could be justified as non-discriminatory because it served a non-discriminatory purpose. The Court noted that "Iowa insists that even if discrimination against foreign commerce does result, the statute is valid because it is intended to promote administrative convenience rather than economic protectionism."[321] Prior Court cases had concluded that a state could validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that "cannot be adequately served by reasonable nondiscriminatory alternatives."[322] This is because in such cases "what may appear to be a 'discriminatory provision . . . may on closer analysis not be so."[323] Iowa failed the Court's test in *Kraft* because the Court found the state's intended justification, which was to replicate federal practice – in its forms

[319] *See Kraft*, 505 U.S. at 79–80. As an example, *Kraft* gave no consideration to whether the apportionment rules that Iowa applied with respect to foreign dividends could ameliorate the purported discrimination – either as applied under the state's current law or as could have been applied through statutory amendments effected in response to the Court's holding. *See, e.g.,* Conoco, Inc. v. Taxation and Revenue Dep't, 931 P.2d 730, 735 (N.M. 1996) (noting the state's unsuccessful claim that the application of the relevant apportionment formula "remedies the differential treatment of domestic and foreign commerce under the New Mexico tax scheme by thus reducing the taxable income base"); E.I. Du Pont De Nemours & Co. v. State Tax Assessor, Civ. A. No. CV-93-566, 1995 Me. Super LEXIS 82, at *13–14 (Me. Super. Ct. Mar. 3, 1995) (noting that the taxpayer excluded foreign dividends and subpart F income from its apportionable income in accordance with its understanding of *Kraft*, but that the court concluded that the state could remedy any possible discrimination by providing the foreign dividends and subpart F income with appropriate apportionment relief). The Maine policy with respect to *Kraft* was later further clarified in E.I. Du Pont De Nemours & Co. v. State Tax Assessor, 675 A.2d 82 (Me. 1996). *See also infra* note 325 and accompanying text (discussing cases where, unlike in *Kraft*, *see* 505 U.S. at 74 n.9, the state taxed foreign dividends but also taxed the earnings of domestic subsidiaries on a combined basis with the income of the subsidiaries' parent corporation).

[320] *Kraft*, 505 U.S. at 84 (Rehnquist, C.J., dissenting).

[321] *Id.* at 81.

[322] *Id.* (citing New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)). *See also supra* note 160 and accompanying text.

[323] *New Energy Co.*, 486 U.S. at 278. *See also supra* note 160 and accompanying text.

and auditing procedures – was less than compelling, in part because the state's goals could have been served by nondiscriminatory alternatives.[324] Nonetheless, the Court's analysis suggests that a similar state law serving a more meaningful policy purpose might have withstood constitutional scrutiny.

VI. CURRENT ISSUES DERIVATIVE OF *KRAFT*; SUBPART F INCOME AND THE TAX CUTS AND JOBS ACT

A. Post-Kraft analysis of subpart F income

In the aftermath of *Kraft*, questions were raised as to the decision's possible application to other state statutes and other types of income.[325] These questions took on added significance when the Court held in *Harper v. Virginia Dep't of Taxation*[326] that where a state tax statute facially violates the U.S. Constitution, the state is obligated to provide a retroactive remedy to the taxpayer and all similarly situated taxpayers.[327] *Harper* resulted in Iowa paying refunds to Kraft and other taxpayers with similar facts that had timely filed claims.[328] Other states with statutes resembling Iowa's also paid

[324] *Kraft*, 505 U.S. at 80.

[325] *See, e.g.,* James A. Amdur, *State Corporate Income Taxation of Foreign Dividends*, 17 A.L.R. 6th 623, at *40–41 (2018) (citing cases finding for and against the states).

[326] Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993).

[327] *See id.* at 89–90, 97 (stating, *inter alia,* that, "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

[328] *See* Geoffrey L. Thorpe, *Idaho Taxation of Foreign Corporate Income After Kraft v. Iowa,* 39 IDAHO L. REV. 581, 593 (2001) ("Iowa subsequently granted tax refunds to corporations for all open years for which claims were filed, computed by excluding from income all foreign dividends to the same extent as if they were from U.S. incorporated companies."); Rick Phillips, *Iowa: DOR Says Kraft Will Cost $30 Million in Refunds*, 3 STATE TAX NOTES 884, 884 (1992). *See also* Eric Rakowski, *Harper and Its Aftermath*, 1 FLA. TAX REV. 445, 457–58 (1993) (noting that Iowa was required to pay retroactive refunds because of the result of the Court's determination in *Harper*, 509 U.S. 86, which was pending at the time of *Kraft*); Elizabeth C. Burton and Marilyn A. Wethekam, *How Far Can States Go in Taxing Dividends and Other Foreign-Source Income*, JOURNAL OF MULTISTATE TAXATION AND INCENTIVES, May/June, 1994, at *53–54 (similar).

refunds with respect to their treatment of dividends paid by foreign subsidiaries.[329]

Kraft only applied to a state's differential treatment of dividends paid by domestic as opposed to foreign subsidiaries.[330] But some tax commentators have asserted that the case was not "limited in its import to dividends per se."[331] For example, these commentators have concluded that, under *Kraft*, a state cannot treat foreign earnings less favorably than domestic earnings.[332] Significantly, *Kraft* also brought about questions concerning so-called subpart F income, which resembles deemed dividends constructively "paid" by foreign subsidiaries to their domestic parents.[333]

The Subpart F provisions of the Internal Revenue Code have served a remedial purpose. Subpart F addresses income of foreign subsidiaries that is deemed to be repatriated to U.S. shareholders as federal taxable income.[334] Subpart F income is generally income from assets such as passive investments that tends to be easily movable to low-tax countries, such as dividends, interest, rents, and royalties.[335] Prior to the enactment of Subpart F, many U.S. taxpayers effectively achieved deferral of U.S. tax on this income by purportedly "earning" it in foreign subsidiaries.[336] In addition, by

[329] *See* Thorpe, *supra* note 328, at 594 (noting action by Hawaii, Ohio and Arizona). Several states won judicial challenges that upheld their ability to tax foreign dividends when the state also taxed domestic subsidiaries with their parent corporation on a combined basis. *See* Fujitsu IT Holdings, Inc. v Franchise Tax Bd., 15 Cal.Rptr.3d 473, 481–84 (Cal. Ct. App. 2004) (discussing the cases). While these cases generally reach the correct result, the volume of these cases and the divergent analyses nonetheless suggests the inequitable ambiguity of *Kraft*. *See also supra* notes 319 and 325 and accompanying text.

[330] *See supra* notes 265–79 and accompanying text.

[331] Donovan et al., *supra* note 61, at 325.

[332] *See* Donavan et al., *supra* note 61, at 325 ("the [*Kraft*] governing principle [was] that a state may not in its income tax structure treat foreign operations less favorably than similarly situated domestic operations"). *See also* Kranz et al., *supra* note 61, at 1166 (similar).

[333] *See* William T. Diss and Robert M. Rosen, *Department: Tax Clinic,* THE TAX ADVISER, Jan. 1993, at 19 (encouraging taxpayers to challenge the validity of state dividend statutes resembling Iowa's and also state statutes that included subpart F income); K. Lawrence Gragg, *Kraft Should Help Resolve Florida Issue of Foreign-Source Income Deductions*, 5 TAX NOTES INT'L. 131, 131 (1992) (noting Florida's position prior to *Kraft* that subpart F income was not entitled to a deduction and suggesting that Florida taxpayers that had previously reported this income file refund claims because of the result in *Kraft*).

[334] *See* Internal Revenue Service, *supra* note 53.

[335] *See* Internal Revenue Service, *supra* note 53.

[336] Fishbien, *supra* note 55, at 16–20.

placing these subsidiaries in low- or no-tax jurisdictions, often considered tax havens, U.S. taxpayers ensured that this income was taxed at a very low rate – until it was repatriated to the U.S. – significantly reducing their overall tax liability.[337] Congress ultimately determined that this use of tax haven entities to achieve deferral of U.S. income was inappropriate and reacted by enacting Subpart F.[338]

Subsequent to *Kraft*, some tax commentators claimed – and various state revenue authorities ultimately concluded – that subpart F income was the equivalent of dividends paid by foreign subsidiaries within the meaning of *Kraft*.[339] The commentators and state personnel reached this conclusion in error because in the context of subpart F no dividend is actually paid, and therefore there is no foreign commerce as described by *Kraft*.[340] The state personnel may have also decided not to include subpart F income in their state's taxable income computation because they read *Kraft* broadly to prevent a state from favoring domestic over foreign earnings.[341] Possibly these persons were also taking a cautious approach in light of the possible need to provide a refund remedy under *Kraft*.[342] But, as the federal inclusion

[337] Fishbien, *supra* note 55, at 16–20. *See also supra* note 55 and accompanying text; Dep't of the Treasury, *supra* note 55 at 1–11.

[338] *See supra* note 55 and accompanying text.

[339] *See* Thorpe, *supra* note 328, at 593–94 (noting that Iowa paid refunds in connection with subpart F income after *Kraft*); *Id.* at 603 & n.132 (noting that Pennsylvania conceded that its law violated *Kraft* and issued a 1992 statement of policy to the effect that it would allow a dividends received deduction for foreign dividends and for subpart F income); *Important Developments During the Year*, 48 TAX LAW. 1322 (1995) (noting that in 1994 Florida and the District of Columbia both enacted statutes allowing for the deduction of subpart F income); Caterpillar Fin. Servs. Corp. v. Whitley, 680 N.E.2d 1082, 1084–85 (Ill. Ct. App. 1997), *appeal denied*, 686 N.E.2d 1158 (1997) (noting that the taxpayer sought to deduct its subpart F "dividends" in their entirety because of *Kraft* and that the state of Illinois did not contest this action). *See also* 2 TAXATION OF FINANCIAL INSTRUMENTS (2d ed. 2019), s. 25.02[4][e], Income Tax Base (stating that many states extended the treatment accorded to foreign dividends to subpart F income after *Kraft*). In *Conoco, Inc. v. State Taxation & Revenue Dep't*, 931 P.2d 739, 741 (Ct. App. N.M), a taxpayer sought a refund attributable to its exclusion from state taxable income of both foreign dividends and subpart F income, which the court denied – but on appeal the state's supreme court reversed the lower court and allowed the claim. *See Conoco*, 931 P.2d 730, 732, 739 (N.M. 1996), reversing 931 P.2d 739 (1995).

[340] *See supra* notes 277–79 and accompanying text.

[341] *See supra* note 332 and 339 and accompanying text.

[342] *See supra* notes 328–29 and accompanying text.

of subpart F income suggests, the underlying derivation of this passive/mobile income is not necessarily foreign.[343]

States that assumed that *Kraft* applied to subpart F income may have also struggled with a general conundrum. *Kraft* performed a simple, formalistic comparison between dividends as paid by domestic and foreign subsidiaries, and required that the foreign dividends be treated no less favorably than their domestic counterparts. But no state taxes a stream of domestic income that precisely equates to subpart F income because that classification of income is unique – it is remedial and intended to address a foreign circumstance that has no specific domestic analog. Hence, a simple domestic-foreign comparison might suggest that a state discriminates when taxing subpart F income for the very reason that this income is unique – while at the same time suggesting that a state would have no ability to remedy the "discrimination" by taxing equivalent domestic income.[344] Yet even the broadest possible reading of *Kraft* does not stand for the proposition that the states cannot adopt appropriate remedial measures, like the federal government, for purposes of addressing tax avoidance. *Kraft* itself suggested that the states might have bona-fide sovereign interests that could narrow the application of the Court's decision, and that logic is consistent with the Court's other cases.[345]

Treating subpart F income as the equivalent of foreign dividends for purposes of *Kraft* is also illogical because subpart F expresses a federal policy that is intended to avoid the shifting of income to low-tax jurisdictions and to incentivize U.S. parent corporations to repatriate the targeted income back to the U.S.[346] Construing *Kraft* to prevent a state from taxing subpart F income serves to undercut this policy because it incentivizes the very activity the federal government has acted to prevent. The foreign dormant Commerce Clause is intended to ensure that states act in unison with federal policy and presuming that *Kraft* applies to subpart F income has the contrary effect of

[343] *See supra* notes 334–38 and accompanying text.

[344] *See* Thorpe, *supra* note, at 603–04 (suggesting the notion that a state "discriminates against foreign commerce by taxing subpart F income . . . since there is no analogous provision in domestic taxation to subpart F").

[345] *See supra* notes 322–24; *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2086 (2018) (noting that constitutional rights for businesses are not to be founded on "practical opportunities for tax avoidance").

[346] *See supra* notes 334–38 and accompanying text. In contrast, a dividends-received deduction, like that at issue in *Kraft*, is intended to prevent double taxation. *See supra* notes 269–73 and accompanying text.

"turn[ing the] dormant Commerce Clause analysis entirely upside down."[347] This interpretation would serve to impact the states' taxing practices "where the Federal Government has acted, and . . . in such a way to reverse the policy that the Federal Government has elected to follow."[348]

B. The Tax Cuts and Jobs Act

In December of 2017, the President signed the TCJA into law.[349] One primary thrust of the TCJA was to shift the federal income taxation of U.S. multinationals to a quasi-territorial system that includes certain foreign income.[350] The TCJA was also in part the U.S. reaction to a multi-year international initiative by the Organization for Economic Cooperation and Development (OECD) that has focused on rampant tax avoidance engaged in by multinational corporations, the "base erosion and profit-shifting" or "BEPS" project.[351] In the U.S., BEPS served to expose some of the most conspicuous failures of subpart F, including the inability of the federal government to capture royalty income from the foreign exploitation of intangible property owned by U.S. multinationals.[352]

The TCJA's international provisions sought in part to address "the $2.4 trillion to $2.6 trillion of profits that U.S. multinational corporations . . . earned primarily in low-tax foreign countries

[347] Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 12 (1986).

[348] *Id.*; *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 74 (1993) ("the Foreign Commerce Clause cannot be interpreted to demand that a State refrain from taxing any business transaction that is also potentially subject to taxation by a foreign sovereign").

[349] Robert E. Holo et al., *Not So Fast: 163(j), 245A, and Leverage in the Post-TCJA World*, 128 YALE L.J. F. 383, 383 (2019) (referencing Pub. L. No. 115-97, 131 Stat. 2054 (2017)).

[350] *Id.* at 393. *See also* Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 YALE L.J. FORUM 339, 341–42 (2018).

[351] *See* H.R. Rep. No. 115-409, at 388–89 (2017) (stating in a section captioned "Prevention of Base Erosion" that multinational enterprises have the "flexibility to attribute profits to low-tax jurisdictions" because they "can structure transactions between affiliates in a manner that minimizes overall tax liability" and that present law does not "adequately address" the ability of these enterprises to transfer intellectual property from U.S. shareholders to their foreign subsidiaries). *See also* Stanley I. Langbein, *United States Policy and the Taxation of International Intangible Income,* 50 U. MIAMI INTER-AM. L. REV. 277, 280–85 (2019) (discussing the BEPS initiative and its impact on the TCJA).

[352] *See* Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 85 (2014).

and . . . accumulated offshore [such that it was not subject] to U.S. tax[.]"[353] Another goal was to address the tax planning that resulted in these offshore profits, and, as explained in the Conference Committee report, to impose "[l]imitations on income shifting through intangible property transfers."[354] In each instance, the TCJA sought to address in part the problem of what has been called "stateless income."[355] This is generally income of a U.S. multinational company that is mobile and, because of this characteristic, can be booked by the company in a foreign low-tax jurisdiction.[356]

The base erosion and profit shifting addressed by the BEPS project have also been issues at the state level since state corporate income tax generally conforms to the provisions of the Internal Revenue Code, including to the federal definition of taxable income.[357] Various statistical measures have suggested that the states have lost significant revenue from these problems

[353] *See* J. Clifton Fleming, Jr. et al., *Getting From Here to There: The Transition Tax Issue,* 155 TAX NOTES 69, 69 (2017) (noting this to be "a key transition issue for fundamental U.S. international tax reform"). *See also* Clausing, *supra* note 66, at 12.

[354] *See* H.R. Rep. No. 115-466, at 661 (2017). The Senate explanation for the bill noted it was a common practice of global enterprises to shift income from U.S. entities to foreign affiliates, explaining that "a large portion" of the income these enterprises ostensibly earn abroad is derived from intangible property, that this income is highly mobile, and that in the absence of new "base protection measures" U.S. corporations would have an incentive to "allocate income that would otherwise be subject to the full U.S. corporate tax rate to foreign affiliates operating in low- or zero-tax jurisdictions." *See* Senate Finance Committee Explanation of the Bill at 365 (Nov. 30, 2017), https://www.budget.senate.gov/imo/media/doc/SFC%20Explanation%20of%20the%20Bill.pdf. *See also* Jane G. Gravelle and Don Marples, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, Congressional Research Service, May 1, 2018, at 1 (stating that, "[o]ne of the major motivations for the 2017 tax revision was concern about the international tax system," and specifically "the loss of revenue due to the artificial shifting of profit out of the United States by multinational firms.").

[355] *See generally* Edward Kleinbard, *Stateless Income,* 11 FLA. TAX. REV. 699 (2011).

[356] *Id.* at 702. *See* Sheppard, *supra* note 27, at 439 ("the OECD base erosion and profit-shifting project identified and targeted companies' methods of offshoring income to tax havens. No income is really earned in a tax haven. There's no activity or markets in those places. Income booked in a tax haven was always earned somewhere else.").

[357] *See* James W. Wetzler, *State Responses to Tax Planning by Multinational Corporations,* 73 STATE TAX NOTES 149, 149 (2014) (noting "[b]ase erosion and profit shifting by multinational corporations [have] become an international scandal" and addressing its impact upon the states); Phillips et al., *supra* note 67, at 867 ("Offshore tax haven abuse has been a point of conflict in the debate over federal tax reform for years, but states are also affected because their tax codes are closely tethered to the federal one.").

due to their tie-in to specific features of the Code.[358] In the years preceding the TCJA, a common statutory fix proposed by some states to address this international tax planning was the enactment of so-called tax haven statutes, which attempt to add into the state income tax computation the income of entities set up by U.S. multinationals in foreign low-tax jurisdictions.[359] Those efforts were generally opposed by taxpayers making use of such havens.[360] One theory advanced by these taxpayers was that the problem the states were seeking to fix – inclusion of purportedly foreign income in the state tax base – was ultimately a problem to be addressed by the federal government.[361] The TCJA represented just such an effort.

To assist in effectuating its goals, the TCJA created two classifications of income that quickly provoked tax commentator comparisons to the foreign dividends at issue in *Kraft*. The first was the income accumulated in foreign subsidiaries in prior years that was not Subpart F income, which the TCJA caused to be subject to the new Code section 965 "transition tax."[362] This accumulated income is commonly referred to as deemed repatriation income ("DRI").[363] DRI included a substantial amount of stateless income stripped

[358] *See* Wetzler, *supra* note 357, at 149–50; Phillips et al., *supra* note 67, at 868; Sicilian, *supra* note 66, at 9–10.

[359] *See* Mark J. Cowan and Kathy Hurley, *Receding Water's Edge: State Efforts to Tax Corporations' Foreign Taxable Income*, 78 STATE TAX NOTES 403, 410–14 (2015). *See also* Sicilian, *supra* note 66, at 13–18.

[360] *See, e.g.*, Maria Koklanaris, *State Tax Haven Legislation Possibly Unconstitutional, Report Says*, 79 STATE TAX NOTES 704 (2016). There is a powerful predicate for these efforts as the Fortune 500 companies have used thousands of tax haven corporations in recent years. *See Offshore Shell Games, supra* note 66.

[361] *See* Karl Frieden, *COST'S Opposition to H. 2477 and S. 1524: "An Act Closing a Certain Corporate Tax Haven Loophole,* COST.ORG, June 8, 2015, https://www.cost.org/globalassets/cost/policy-toolkits/state-tax-haven-legislation-policy-toolkit/testimony-in-opposition-to-tax-haven-legislation-in-massachusetts.pdf (stating that "[state tax haven] legislation would infringe on the United States ability to . . . 'speak with one voice'" and that the tax haven designation "impacts fundamental decisions that should be made solely at the federal level"); Scott Schiefelbein, *State Tax Haven Laws – Expanding the Water's-Edge Group*, 78 STATE TAX NOTES 367, 374 (2015) (stating that the disparity in state tax haven laws creates compliance difficulties for businesses and that the better solution would be for the issue to be addressed by federal legislation).

[362] *See* Internal Revenue Service, *Section 965 Transition Tax*, https://www.irs.gov/businesses/section-965-transition-tax (last updated September 17, 2019).

[363] *See, e.g.*, Darien Shanske and David Gamage, *Why (and How) States Should Tax the Repatriation*, 88 STATE TAX NOTES 317, 318 (2018).

out of the domestic tax base and accumulated in foreign subsidiaries dating back to 1986.[364] DRI was to be taxed under the Code on a one-time basis as of a specific measuring date in late 2017.[365] Congress chose to tax DRI through amendments to the Code's pre-existent subpart F provisions, by causing U.S. parent corporations to receive mandatory deemed dividends from these subsidiaries.[366]

Many tax commentators were quick to equate DRI to subpart F income – and to dividends actually paid by foreign subsidiaries more generally – for purposes of arguing the application of *Kraft*.[367] Their argument was generally that because subpart F income cannot be taxed by a state, this same bar applies to the state taxation of DRI.[368] But, as has been noted, even if DRI was the equivalent of pre-TCJA subpart F income, *Kraft* should pose no obstacle to taxing this income.[369] The argument for state inclusion of DRI resembles that for the inclusion of subpart F income more generally, because a substantial portion of DRI represents domestic income that was improperly shifted outside the United States for the purpose of avoiding tax.[370]

[364] *See, e.g.*, *id.* at 318–19 (citing "overwhelming evidence that at least a substantial portion of the earnings parked abroad were, in fact, earned in the United States and should always have been part of the domestic corporate tax base" and also referencing a "huge pool of earnings that accumulated abroad through a quirk of the U.S. international tax system."). *See also supra* notes 66 and 337 and accompanying text.

[365] *See Section 965 Transition Tax, supra* note 362.

[366] *See* Jane G. Gravelle and Don Marples, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, Congressional Research Service, Updated Aug. 23, 2019, at 10–11.

[367] *See, e.g.*, Walter Hellerstein and Jon Sedon, *State Corporate Income Tax Consequences of Federal Tax Reform,* 88 STATE TAX NOTES 187, 196 (2018) ("To the extent that a state taxes unrealized income from foreign corporations while not taxing equivalent income from domestic corporations based on its conformity to the [repatriation transition tax], *Kraft* would appear to prohibit such discrimination."); Eric Solomon, *American Bar Association State and Local Tax Committee Publishes Report on Federal Tax Reform Provisions*, STATE TAX NOTES (Nov. 9, 2018), https://s3.amazonaws.com/pdfs.taxnotes.com/2018/2018-46843_STTdocs-ABA-Tax-Section-SALT-Committee-report-TCJA-PDF-ONLY.pdf (raising the question as to how the "*Kraft* prohibition on discrimination against foreign commerce" applies to the deemed repatriation income).

[368] *See* American Bar Association State and Local Tax Committee Publishes Report on Federal Tax Reform Provisions, STATE TAX NOTES (Nov. 9, 2018), at 3–4.

[369] *See supra* notes 339–48 and accompanying text.

[370] *See id. See also* Shanske and Gamage, *supra* note 363, at 321 (noting that deemed repatriation income as determined under the TCJA represented in substantial part domestic earnings

The second class of income that provoked tax commentator comparisons to *Kraft* was global intangible low-taxed intangible income, or GILTI.[371] The GILTI rules impose tax on U.S. corporations and other U.S. shareholders holding interests in foreign subsidiaries beginning on an annual basis with tax year 2018.[372] The provisions are directed at "the type of income that is most readily allocated to low- or zero-tax jurisdictions … income derived from intangible property, or intangible income."[373] The GILTI inclusion is at the shareholder level and therefore there is no arguable deemed dividend as in the case of subpart F income or in the instance of DRI.[374] The inclusion is effectuated using some of the same pre-existing federal rules that pertain to subpart F, but GILTI is specifically not subpart F income.[375] As the GILTI acronym suggests, the rules have a remedial purpose similar to subpart F.[376] The GILTI inclusion is intended to spur U.S. companies to repatriate intangible assets and other mobile assets and activities back to the United States.[377]

Although GILTI does not involve either the payment of an actual or constructive dividend, numerous tax commentators have claimed that the

that were "stripped out of the state's tax base by means of aggressive tax planning" and concluding that states are entitled to tax such income).

[371] *See* Richard C. Byrd et al., *State Responses to the Tax Cuts and Jobs Act: An Analysis from Indiana and Missouri,* 58 WASH. U. J.L. & POL'Y 231, 275 (2019). *See also id.* at 271–72, 283, nn.138, 216 (concluding that both DRI and GILTI can potentially be evaluated as dividends within the meaning of *Kraft*).

[372] *See generally* Senate Finance Committee Explanation of the Bill at 365–70 (November 30, 2017),
https://www.budget.senate.gov/imo/media/doc/SFC%20Explanation%20of%20the%20Bill.pdf.

[373] *See id.* at 365.

[374] *See id.* at 366.

[375] *See id.* at 368; H.R. 115-466, 115th Cong., 1st Sess., Conf. Rep. to Accompany H.R. 1, Dec. 15, 2017, at 642.

[376] *See generally* Sheppard, *supra* note 27; Darien Shanske and David Gamage, *Why States Should Tax the GILTI,* 91 STATE TAX NOTES 751 (2019); Brian Hamer, *States Should Embrace GILTI or Pursue an Alternative Path to Fairness*, 91 STATE TAX NOTES 475 (2019).

[377] *See* Senate Finance Committee Explanation, *supra* note 372, at 365–66 (stating that the GILTI provisions were intended to address a "possible source of erosion of the U.S. tax base, and the potential migration of economic activity from the United States to other countries"); Gravelle and Marples, *supra* note 366, at 23. *See also* H. & S. Conf. Comm., 115th Cong., Pol'y Highlights on Tax Cuts & Jobs Act (2017) (arguing that the TCJA "[p]revents American jobs, headquarters, and research from moving overseas by eliminating incentives that now reward companies for shifting jobs, profits, and manufacturing plants abroad.").

state taxation of GILTI is questionable under *Kraft*.[378] As was true after *Kraft*, when the states first wrestled with the application of *Kraft* to subpart F income, the argument has been made that the state taxation of GILTI is inherently discriminatory within the meaning of *Kraft* because there is no domestic equivalent to GILTI.[379] Commentators have also claimed that states should not tax GILTI because, despite its actual method of computation, GILTI, in their view, equates to foreign dividends or subpart F income, which the states generally did not tax prior to the enactment of the TCJA.[380] But, as argued above, that historic state tax treatment in turn was partially due to a misunderstanding of *Kraft*.[381]

As is true with respect to subpart F income more generally, treating either DRI or GILTI as the equivalent of foreign dividends for purposes of *Kraft* would be illogical. DRI represents, in substantial part, an attempt by the U.S. government to tax what were effectively domestic profits that were shifted abroad because of "flaws in national tax policy."[382] Because this is so, state taxation of this income cannot logically represent the discriminatory taxation of foreign dividends.[383] Similarly, GILTI represents income that the federal government has determined is effectively transplanted U.S. income.[384] The

[378] *See, e.g.,* Hellerstein and Sedon, *supra* note 367, at 201–02; American Bar Association State and Local Tax Committee Publishes Report on Federal Tax Reform Provisions, STATE TAX NOTES (Nov. 9, 2018), at 45 (available in LEXIS, 2018 STT 21-22); Donovan, *supra* note 61, at 325–31; Marilyn Wethekam, *Should States Embrace GILTI?*, 91 STATE TAX NOTES 935, 954 (2019); Keith Anderson, et al., *Federal Proposed Section 951A GILTI Regulations Have State Tax Implications,* 130 JOURNAL OF MULTISTATE TAXATION AND INCENTIVES 03, 15 (2019).

[379] Lee A. Sheppard, *News Analysis: GILTI State Tax Issues*, 90 TAX NOTES INT'L. 821, 826 (2018) (noting the argument that the states might not be able to tax GILTI given *Kraft* "because there is no domestic counterpart to GILTI."). *See also supra* note 344 and accompanying text.

[380] *See, e.g.,* Donovan, *supra* note 61, at 318, 321 (noting that only a "minority of states tax[] subpart income or foreign dividends at all" and that the state taxation of GILTI would "represent a sharp departure from the historic limited state taxation of foreign-source income").

[381] *See supra* notes 339–48 and accompanying text. *See also* Sheppard, *supra* note 27, at 440 (arguing that because of *Kraft* "before the TCJA was enacted, states were either uncertain about the extent to which they could reach nominally foreign income, or had capitulated to business demands not to touch it, or both.").

[382] Shanske and Gamage, *supra* note 363, at 319. Shanske and Gamage conclude that *Kraft* should not apply because "If the income in question had been earned by a domestic subsidiary it would have been taxed – and a long time ago – and thus there is no discrimination." *Id.*

[383] *See id. See also supra* notes 353–356 and accompanying text.

[384] *See* Sheppard, *supra* note 27, at 442 (characterizing GILTI as "mobile income" that the federal government has concluded "might just as easily be earned in the United States" and that

TCJA reflects a federal policy to tax this income, and more generally to domesticate the foreign activities that create this income. *Kraft* should not therefore be read to impede this federal policy; rather state taxation of GILTI should be construed to "reinforce the federal message not to offshore U.S. income."[385]

VII. CONCLUSION

The six-month period from late December 2017 through late June 2018 saw not one but two highly-significant events pertaining to state taxation. The first was the enactment of the TCJA,[386] which impacted the states through numerous changes made to the Internal Revenue Code that were then generally incorporated under the states' income tax laws through their conformity to the Code. The second was the decision of the Supreme Court in *South Dakota v. Wayfair, Inc*.[387] which pertained to the states' sales and use tax collection duty. The TCJA included a couple of very significant provisions pursuant to which the states became entitled to tax new categories of income booked by U.S. companies in foreign subsidiaries. Ironically, both events had state tax implications related to a Supreme Court decision construing the dormant Commerce Clause decided within one month of each other in 1992: *Quill Corp. v. North Dakota*[388] in the former instance and *Kraft General Foods, Inc., v. Iowa Department of Revenue and Finance*[389] in the latter.

In June of 2018 the Supreme Court decided *Wayfair*.[390] *Wayfair* overruled the Court's 1992 decision, *Quill*, which had created a physical presence jurisdiction rule for purposes of the states' sales and use tax collection duty.[391] *Wayfair* struck down the physical presence rule created

therefore "should be subject to U.S. tax jurisdiction"); Shanske and Gamage, *supra* note 376, at 969–70 ("the whole purpose of GILTI is to identify misrepresented income, a portion of which was actually earned within the United States rather than in the foreign jurisdictions in which it was reported to have been earned").

385 *See* Sheppard, *supra* note *27*, at 439. *See also supra* notes 353–356 and accompanying text.

386 Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

387 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

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

389 Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71 (1992).

390 138 S. Ct. at 2080.

391 *Id.* at 2099.

by *Quill* as "unsound and incorrect."[392] *Wayfair* determined that the *Quill* physical presence rule was: (1) wrong when the case was decided and an error that only became more egregious over time;[393] (2) inconsistent with the policy that underlies the dormant interstate Commerce Clause because the rule did not guard against economic protectionism but rather created "market distortions;"[394] and (3) could not be justified on the basis of stare decisis because it was not a "clear or easily applicable standard."[395]

Previously, in December of 2017, the President signed into law the TCJA, which included two new international tax law concepts with particularly large potential dollar consequences for the states. These provisions required, with respect to U.S. parent corporations owning interests in foreign subsidiaries: (1) immediate, mandatory "deemed repatriation" of certain previously-deferred earnings booked in the foreign subsidiaries[396] and (2) prospective taxation of certain income booked in the foreign subsidiaries on an annual basis, i.e., taxation of "global intangible low-taxed income" or GILTI.[397] The laws in many states conformed either in whole or part to one or both of these two new federal laws.[398] Tax commentators, however, frequently claimed that the states' were materially restricted in their ability to tax either deemed repatriation income or GILTI because of the application of *Kraft*.[399]

The Court's holding in *Kraft* is flawed for many of the same reasons *Quill* was. *Kraft* concluded that a state's distinction between the treatment of dividends paid by domestic and foreign subsidiaries was constitutionally discriminatory.[400] But *Kraft* was wrongly decided both because it was (1) predicated on the mistaken assumption that the payment of a dividend by a foreign subsidiary necessarily equates to foreign commerce irrespective of the source of the underlying earnings, and (2) a misguided construction of the Court's pre-existing doctrine pertaining to the dormant foreign Commerce Clause.[401] That latter doctrine posits as the most important

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[392] *Id.*

[393] *Id.* at 2097.

[394] *See id.* at 2092, 2094.

[395] *Id.* at 2098.

[396] *See supra* notes 362–66 and accompanying text.

[397] *See supra* notes 371–77 and accompanying text.

[398] *See* Byrd, *supra* note 371, at 264–68, 278–81.

[399] *See supra* notes 378–81 and accompanying text.

[400] *See* Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 77, 82 (1992).

[401] *See generally supra* note 290–324 and accompanying text.

consideration, whether the state action in some way inhibits the U.S. government from speaking with one voice, and the action taken by the state in *Kraft* did not violate this standard.[402] Further, the dormant foreign Commerce Clause had been construed by the Court to have minimal application as of the time of *Kraft.* Also, the Court has not subsequently applied the holding in *Kraft*, and since 1994 the Court has not applied the dormant foreign Commerce Clause.[403]

The discrimination standard as evaluated in *Kraft* derived not from the Court's cases under the dormant foreign Commerce Clause but from the Court's cases applying the dormant interstate Commerce Clause.[404] But *Kraft* was also inconsistent with the Court's modern doctrine policing discrimination in the latter context.[405] This is because, contrary to the Court's interstate doctrine, *Kraft* identified no actual discrimination on the part of Iowa, and applied its rule in a circumstance in which it served no logical constitutional purpose.[406] The Framers' conception of Commerce Clause discrimination was to prevent states from seeking competitive benefits for in-state commercial actors to the detriment of such actors based in other states;[407] *Kraft* instead concluded that the doctrine prevented Iowa from seeking competitive benefits on behalf of commercial actors in those other states vis-à-vis commercial actors engaged in foreign commerce.[408] The Court reached its conclusion despite the fact there was no intention on the part of Iowa to benefit other states,[409] and amidst general uncertainty as to whether other states were in fact benefited.[410] The Court's modern dormant Commerce Clause approach, as noted in *Wayfair*, focuses not on "formalistic distinctions" but rather on "purposes and effects."[411] *Kraft* violated these analytic precepts.

[402] *See generally supra* notes 180–234, 293–309 and accompanying text.
[403] *See supra* notes 74, 95 and accompanying text.
[404] *See supra* notes 254–58 and accompanying text.
[405] *See supra* notes 307–08 and accompanying text.
[406] *See supra* notes 290–95 and 304–20 and accompanying text.
[407] See generally *supra* notes 137–68 and accompanying text
[408] *See supra* notes 302–03 and accompanying text.
[409] *See supra* notes 265–76 and 290–295 accompanying text.
[410] *See supra* notes 313–16 and accompanying text.
[411] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2092, 2094 (2018).

Kraft also did not lay out a clear or easily applicable standard. The case led to numerous subsequent state court decisions with conflicting results.[412] But, perhaps more significantly, *Kraft* caused many states to refrain from taxing dividends paid by foreign subsidiaries and a distinct classification of income, subpart F income, merely because those states were unsure as to the meaning of *Kraft*.[413] The fact that *Kraft* could be read to suggest the states could not tax subpart F income in particular exposes the error of that case. Subpart F advances a federal policy that is intended to disincentivize U.S. companies from deferring certain mobile income in foreign subsidiaries – tax avoidance affected through the use of "tax havens."[414] By causing the states to act at odds with this policy *Kraft* impeded rather than advanced federal policy, in contrast to the goals of the dormant foreign Commerce Clause.[415]

Further, in causing the states to refrain from taxing subpart F income, *Kraft* created market distortions like those cited in *Wayfair*'s reversal of *Quill*. This is because that pull-back on the part of the states had the effect of providing a tax benefit to U.S. companies that utilize foreign subsidiaries, but small and midsize U.S. companies are unable to utilize such subsidiaries.[416] The general inadequacy of subpart F and the market distortions created by the proliferation of foreign tax haven subsidiaries were two of the rationales that eventually led to the enactment of the recent TCJA.[417]

The confusion wrought by *Kraft* was further enhanced by the TCJA. The rules that pertain to deemed repatriation income and GILTI were both directed at income booked by multinationals in foreign subsidiaries.[418] In each case, the income bears some resemblance to, though is not identical to, historic subpart F income.[419] The federal policy implicit in each of these two new laws is to require/encourage U.S. companies to bring back to the U.S. certain income and business operations.[420] Therefore, arguments based in

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[412] *See supra* notes 325 and 329 and accompanying text. *See also* note 319 and accompanying text.

[413] *See supra* notes 333 and 339 and accompanying text.

[414] *See supra* notes 54–56 and 334–338 and accompanying text.

[415] *See supra* notes 347–348 and accompanying text.

[416] *See supra* note 67 and accompanying text.

[417] *See supra* notes 350–55 and accompanying text.

[418] *See supra* notes 362–377 and accompanying text.

[419] *See supra* notes 362–377 and accompanying text.

[420] *See supra* notes 362–377 and accompanying text.

Kraft to the effect that the states cannot tax this income serve to inhibit federal policy, and to encourage further market distortions.

One consideration evaluated by *Wayfair* was whether the Court's pre-existing *Quill* decision should be retained – even if arguably incorrect – because it engendered "legitimate reliance interests."[421] But, as noted by *Wayfair*, reliance is not legitimate when the Court's rule has been used to avoid tax and to obtain market advantages. As the Court explained in *Wayfair*, "constitutional right[s]" do not logically follow from "practical opportunities [to engage in] tax avoidance."[422] Further, reliance interests are undercut when the relevant Court case stands as an "outlier" as measured against legal developments since the time of the decision.[423] Given that the Court has since *Kraft* effectively abandoned its approach to the dormant foreign Commerce Clause, *Kraft* is that outlier.

Wayfair overruled *Quill* in a 5-4 vote. That close vote, like the close vote in other recent Court cases overruling prior precedent, suggests that the principle of stare decisis is currently controversial at the Court.[424] That may mean that the Court will have no institutional will to revisit *Kraft* or, if it revisits *Kraft*, to overrule it.[425] But *Kraft* is nonetheless erroneous for many of the same reasons that *Quill* was. And if the Court is not to revisit *Kraft*, then the state courts should at least limit the case to its facts.[426] In either

[421] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).

[422] *See id.*

[423] Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019). *Hyatt* also concluded that stare decisis is "'not an inexorable command,'" and noted that the Court has held that the doctrine is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment." *Id*. The case also noted that prior Court decisions are more likely ripe to be overruled when there are difficulties with the "the quality of the decision's reasoning" and "its consistency with related decisions," *Id*. Both concerns are significant issues with respect to *Kraft*.

[424] *See* Janus v. Am. Fed'n of State, Cty. and Mun. Emps., 138 S. Ct. 2448 (2018) (5-4 decision overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)); *Hyatt*, 139 S. Ct. at 1485 (overruling Nevada v. Hall, 440 U.S. 410 (1979) by a 5-4 decision).

[425] *See* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 867 (2019) ("the destabilizing effects of doctrinal change will likely curb the enthusiasm for frequent overrulings").

[426] *See id. See also* Steiner v. Utah State Tax Comm'n, 449 P.3d 189, 193 (2019) (stating the court's reluctance to extend the dormant foreign Commerce Clause "in new directions not yet endorsed by the Supreme Court") (citation omitted); Helen Hecht, *Should States Embrace GILTI?,* 91 STATE TAX NOTES 935, 943 (2019) (stating that *Kraft* should be limited to its facts).

instance, similar to *Quill*, the longstanding error of *Kraft* should be revisited and rectified.