The Kaestner Trust Case:
Due Process and State Taxation of Non-resident Trustees

Scott J. Lee
Georgetown University Law Center
Advisor: Prof. Philip Tatarowicz
Updated September 26, 2019

TABLE OF CONTENTS

I. INTRODUCTION

The Due Process and Commerce Clauses of the U.S. Constitution impose distinct limits on the taxing powers of states.[1] In the 1992 case *Quill Corp. v. North Dakota,*[2] the Supreme Court announced that due process requires a taxpayer to have a "minimum connection" with the taxing state.[3] Also under *Quill*, the Commerce Clause prohibited states from requiring retailers to collect and remit sales and use taxes unless the seller had a physical presence in the state.[4]

In 2018, the Court brought its Commerce Clause into the internet age through its decision in *South Dakota v. Wayfair.*[5] *Wayfair* overruled the physical presence requirement, clearing the way for states to begin taxing out-of-state vendors. It left untouched, however, *Quill's* due process analysis.

One year later, the Court modernized its due process jurisprudence by way of a trust tax case called *Kimberley Rice Kaestner 1992 Family Trust v. Department of Revenue.*[6] In contrast to *Wayfair*, *Kaestner* is a case about a constitutional limitation on a state's taxing power. In a narrowly drawn ruling delivered by Justice Sonia Sotomayor, the Court held that North Carolina could not tax the undistributed income of an out-of-state trust based solely on the in-state presence of a discretionary beneficiary.[7]

This paper was written after *Kaestner* was argued and submitted to the Court on April 16, but before the opinion was issued on June 21, 2019. It advocates for the position ultimately adopted by the Court: that taxation of a trust's undistributed income based *solely* upon the in-state presence of a discretionary beneficiary violates due process.

The argument is based primarily on the parties' briefs, briefs of amici curiae, the questions asked during oral argument, treatises, and practitioner commentary. It does not incorporate reasoning or language from the Court's actual opinion.

A. Summary of the Kaestner Trust Case

The Joseph Lee Rice, III Family 1992 Trust was created in New York under an agreement dated December 30, 1992 and was governed by New York Law.[8] The trust was later divided into three separate trusts, including the trust at issue in this case: The Kimberley Rice Kaestner 1992 Family Trust ("Kaestner Trust" or "the Trust").[9]

During the tax years at issue, the Kaestner Trust's assets consisted of various financial investments, and the custodians of those assets were located in Massachusetts.[10] Documents related to the Kaestner Trust, such as ownership documents, financial books and records, and legal records were kept in New York.[11] All of the Kaestner Trust's tax returns and accountings were prepared in New York.[12]

The beneficiaries of the Kaestner Trust are Kimberley Rice Kaestner and her three children.[13] Kaestner and her children were residents of North Carolina during the tax years at issue.[14] While she was a resident of North Carolina, Kaestner earned a master's degree at the University of North Carolina at Chapel Hill and sent her children to state public schools.[15]

At all times, the trustee had sole discretion to make distributions to Kaestner. In trust parlance, Kaestner is known as a "discretionary beneficiary"[16], which means she did not have an absolute right to the trust assets or income.[17]

The Kaestner Trust was initially administered by a trustee in New York, and later, by a trustee in Connecticut.[18] The trustee provided Kaestner with accountings of trust assets, and Kaestner received legal advice about the trust from the trustee and his firm.[19] Kaestner also met with the trustee in New York to discuss investment opportunities for the Trust.[20]

For tax years 2005 through 2008, North Carolina's Department of Revenue ("DOR") taxed the undistributed income of the Kaestner Trust.[21] The Kaestner Trust sought a refund of

those taxes totaling more than $1.3 million, but the DOR denied the request.[22] In its refund lawsuit, the Trust alleged that the state's collection of the taxes violated the Due Process Clause and the Commerce Clause of the U.S. Constitution.[23]

The state trial court held in favor of the Kaestner Trust on due process grounds, finding that the Trust did not "purposefully avail" itself of the benefits of the taxing state based solely on the beneficiary's residence.[24] The trial court also concluded that the state's taxation of the trust income did not satisfy the four-pronged analysis for determining the constitutionality of a tax under the Commerce Clause as set forth in *Complete Auto Transit, Inc. v. Brady*.[25]

On appeal, the North Carolina supreme court did not reach the Commerce Clause argument and affirmed on due process grounds. The court's holding rested on two related premises: first, the court described the trust as having a corporate-like status as an independent taxpayer separate from its beneficiaries: "[A]t least for tax purposes . . . a trust is a separate entity to which income is separately attributed.[26] Second, this separate identity was relevant because due process requires a "minimum connection" between a state seeking to impose a tax and the person the state wants to tax – i.e., a minimum connection between the state and the trust itself.[27] Such a minimum connection exists only when the taxpayer "purposefully avails itself of the benefits of an economic market" in the taxing state.[28] The North Carolina supreme court held that although the beneficiaries lived in-state, the Trust itself did not purposefully avail itself of North Carolina's laws.

The DOR appealed the decision to the U.S. Supreme Court. Oral argument in the case was held on April 16, 2019, and the decision announced on June 21, 2019.

B. Overview of Argument

This paper argues that taxation of a trust's undistributed income based *solely* upon the presence of an in-state beneficiary violates due process.

Under the *Quill* test, North Carolina's taxation of the Kaestner Trust's undistributed income was unconstitutional because: (i) legally, it is the trustee and not the "trust" itself that pays a fiduciary income tax on trust assets; (ii) the trustee is therefore the party that must establish a minimum connection with the taxing state; and (iii) neither the trustee nor the beneficiary (under the DOR's theory) purposefully availed themselves of North Carolina's benefits.

Section II of this paper provides an overview of the trust, tax, and constitutional law concepts at the core of this case. The background provided includes an overview of: (a) types of trusts relevant to this case; (b) the fiduciary income tax as the mechanism by which trust income is taxed; (c) how different states generally tax trust income; and (d) the constitutional framework courts apply in assessing the validity of a state tax.

Section III.A, the Discussion section, argues that the Supreme Court should affirm the North Carolina supreme court's due process holding. It sets forth four analytical inquiries that clarify the confusion courts have faced in analyzing the taxation of trust income. These questions are:

(i) Is a trust a separate legal person from the trust constituents (i.e., the trustee, grantor, and beneficiary)?

(ii) Which trust constituent must 'purposefully avail' itself of the taxing state's benefits to support a 'minimum connection' to the state?

(iii) Did the trust constituents have the required 'minimum connection' to North Carolina to justify state taxation under the Due Process Clause?

(iv) Was the income attributed to North Carolina 'rationally related' to values connected with the taxing state?

Section III.B then addresses policy arguments raised by the DOR. It further argues that a holding for the Trust would be consistent with principles of federalism and due process.

Section IV offers concluding remarks.

II. BACKGROUND

A. Types of Trusts

A trust is a legal arrangement created by a person (the settlor, usually known in the tax context as the grantor[29]) who transfers property to another person (the trustee) to hold and administer for the benefit of another person (the beneficiary).[30] The hallmark characteristic of a common law trust is the division of legal and equitable title to the trust assets: the trustee holds legal title to the trust property, while the beneficiary has equitable or beneficial ownership.[31]

Trusts are created for many purposes and can be subdivided based on numerous criteria. The permutations that exist are many and idiosyncratic. For the purposes of this paper, the most important distinctions to draw are between: (i) living and testamentary trusts; and between (ii) grantor and non-grantor trusts. A trust may combine both of these features[32]: for example, the Kaestner Trust is a non-grantor living trust. For this reason, authority that discusses grantor trusts or testamentary trusts, although relevant, is not directly on point.[33]

1. Testamentary and Living Trusts

A trust may be testamentary or living. A testamentary trust is established after the grantor's death under the provisions of the grantor's will.[34] Testamentary trusts owe their existence to the laws and probate courts of the state where the grantor was domiciled at death.[35] State probate courts exercise continuing jurisdiction to resolve testamentary trust disputes.[36] By

their nature, testamentary trusts must "purposefully avail" themselves of the state's protections to a greater extent than living trusts.

In contrast, a living trust (also known as an inter vivos trust) is created during the grantor's lifetime and represents a legal agreement between private persons.[37] The Kaestner Trust is a living trust.

2. Grantor and Non-Grantor Trusts

Trusts can also be subdivided into grantor and non-grantor trusts (also known as revocable or irrevocable trusts respectively). The terms grantor and non-grantor are income tax terms that describe the tax liability of the trust.

In a grantor trust, the grantor reserves the legal right to make changes in the trust or abolish the trust at any time during the grantor's lifetime.[38] The trust is treated as an extension of the grantor. For federal income tax purposes, all income of a grantor trust is taxed to the grantor.

In a non-grantor trust, the grantor cannot revoke or abolish the trust, and ordinarily has no right to withdraw principal except as expressly reserved in the trust instrument.[39] How a non-grantor trust is taxed depends on whether the trust distributes the income it has earned. The Kaestner Trust is a non-grantor trust.[40]

B. Mechanics of Taxing Non-Grantor Trust Income

It is a something of a misnomer to refer to the taxation of a trust. As discussed below in Section III.A.1, a trust is not a legal person or entity, but rather a fiduciary relationship. Taxes imposed on a "trust" are in reality fiduciary income taxes imposed on the fiduciary person – i.e., the trustee – in that person's capacity as a fiduciary.[41]

Non-grantor trusts are conduits of the income that they distribute or are required to distribute. Trust income is taxed only once, either to the trustee or to the beneficiary.[42] If the trustee accumulates the income in the trust and makes no distributions, it is taxable to her as trustee. This tax on undistributed earnings, known as a fiduciary income tax, is imposed on a trustee and not the trust itself. It is the responsibility of the trustee to calculate the tax liability, file the fiduciary income tax return, and pay the tax on undistributed trust income.[43] Unless the beneficiary has an unrestricted right to the income, undistributed income is taxable to the trust – and therefore, paid by the trustee.[44]

If the trustee distributes or is required to distribute the income to the beneficiary, the trust takes a distribution deduction. The income is then taxed to the beneficiary.[45] In the simplest example, a trust may be set up to distribute all of its income to a beneficiary. The trust will get a full deduction for the income generated, and the beneficiary will then pay taxes on the income.[46]

C. State Taxation of Trust Income

States that impose a fiduciary income tax generally impose the tax on undistributed income of "resident trusts" with certain defined connections to the state. States define these connections for resident trusts in different ways, leading to inconsistent state fiduciary income tax treatment of the same trustees and sometimes subjecting the same income to different states' income tax two or more times.[47]

As of this writing, eight states do not tax the income of non-grantor trusts.[48] The remaining 43 taxing states, including the District of Columbia, classify a non-grantor trust as a resident trust and tax the income based on one or more of the following five criteria:

(i) the trust was created under the will of a testator who was domiciled or lived in the state;

(ii) a living trust was created or funded by grantor who was domiciled or lived in the state;[49]

(iii) the trust is administered in the state;

(iv) a trustee lives in the state; or

(v) a beneficiary lives in the state.[50]

Of the five resident trust criteria outlined above, the fifth – in-state residency of a beneficiary – is at the heart of the *Kaestner* case. In total, eleven states tax trust income on the basis of a beneficiary's in-state residency.[51] Of these eleven states, 2-4 states (counts vary) including North Carolina assess taxes *solely* on the basis of an in-state beneficiary.[52]

D. Constitutional Framework

States apply one or more of the above criteria in determining whether a trust is a resident trust. If a trust is deemed a resident trust, the state's tax regime generally subjects the trustee of the trust to tax in that state on its worldwide income, regardless of where the income is derived.[53]

The Supreme Court and decisions of other federal and state courts have primarily focused on two constitutional restraints on states' ability to impose tax on trustees: the Due Process Clause and the Commerce Clause. The North Carolina supreme court struck down the state's fiduciary income tax statute on due process grounds and did not reach the Commerce Clause question.[54]

Under the Supreme Court's ruling in *Quill*, when a state seeks to impose a tax, due process requires: (1) "some definite link, some minimum connection, between a state and a person, property, or transaction it seeks to tax"; and (2) "that the income attributed to the State for tax purposes . . . be rationally related to values connected with the taxing state."[55]

When analyzing the first prong of the due process requirement, courts consider whether a taxpayer's "connections with a State are substantial enough to legitimize the State's exercise of

power over" it.[56] When a taxpayer has no physical presence in the state, the taxpayer must "purposefully avail itself of the benefits of an economic market in the forum state."[57] This focus provides the taxpayer with "fair warning that its activity may subject it to the jurisdiction of a foreign sovereign."[58] The second prong of the due process requirement focuses on "whether the taxing power exerted by the state bears fiscal relation to the protection, opportunities and benefits given by the state".[59]

As set forth below, North Carolina's taxation of the Kaestner Trust was unconstitutional because: (i) legally, it is the trustee and not the "trust" itself that pays a fiduciary income tax on trust assets; (ii) the trustee is therefore the party that must establish a minimum connection with the taxing state; and (iii) neither the trustee nor the beneficiary (under the DOR's theory) purposefully availed themselves of North Carolina's benefits.

III. DISCUSSION

North Carolina cannot tax the undistributed income of the Kaestner Trust because the trustee did not have sufficient minimum connections with the state to establish nexus under the Due Process Clause.

What follows in Section III.A below is a series of logical inquires that, when taken together, show North Carolina unconstitutionally imposed a fiduciary income tax on an out-of-state trustee based solely on the presence of a discretionary in-state beneficiary. Additionally, III.B argues that the policy arguments made by the DOR are unavailing, and that a holding in favor of the Trust would be consistent with the Court's due process jurisprudence and basic principles of federalism.

A. Relevant Inquiries

1. Is a trust a separate legal person from the trust constituents?

The artificial nature of trusts complicates the analysis of whether a state may assert taxing jurisdiction over the trust. A diversity of commentary exists in older Supreme Court jurisprudence, lower court opinions, and even pleadings in the instant case, that incorrectly describe a trust as a separate taxpaying entity. A trust is a legal fiction – the mere abstraction of a fiduciary relationship. Understanding what a trust is and what it is not is essential in determining which legal person must "purposefully avail" itself of the taxing state's laws.

Separate Entity Theory

On one side of the spectrum is the misguided belief that a trust itself is an independent legal and taxable entity. This line of thinking suggests that a trust is like a corporation, existing separate and apart from its constituents: the trustee, grantor, and beneficiary.

Certainly, older Supreme Court jurisprudence and the North Carolina supreme court that decided the *Kaestner* case lean heavily on this assumption. The supreme court's holding in favor of the Kaestner Trust centered on the Trust's separate legal and taxable existence apart from the beneficiaries. The court cited *Brooke v. City of Norfolk*, a 1928 case in which the U.S. Supreme Court held that the City of Norfolk and Virginia had violated the Due Process Clause by taxing the corpus of a Maryland trust when none of the trust assets had ever been present in Virginia.[60] There, the Supreme Court "recognized that a trust and its beneficiary are legally independent entities when it observed that property held by the trust 'is not within the State, does not belong to the [beneficiary] and is not within her possession or control'".[61]

In addition, the North Carolina court observed that federal tax law regularly treats the income of trusts as separate from the income of the beneficiary. In a 1933 case, the Supreme Court recognized that a trust has a separate existence for income tax purposes.[62] Today, the "Internal Revenue Code imposes a separate tax on the income of trusts, *see 26 U.S.C. § 1(e)*,

implicitly recognizing, at least for tax purposes, that a trust is a separate entity to which income is separately attributed".[63]

The North Carolina court then combined its separate entity theory with more recent Supreme Court case law. In *Walden v. Fiore*, two Nevada-based plaintiffs brought a tort suit in federal district court in Nevada against a Georgia law enforcement officer who seized their gambling winnings in Georgia. The Supreme Court held that the Nevada district court lacked jurisdiction over the defendant officer because jurisdiction must be analyzed with regard to the defendant's contacts with the forum itself, not with the plaintiffs who reside there.[64] In the Court's words, "the unilateral activity of another party or a third person [the plaintiffs] is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state."[65] Here, North Carolina's taxation of the Kaestner Trust based on the presence of an in-state beneficiary would be analogous to haling a Georgia-based defendant into a Nevada court based upon the mere presence of the Nevada plaintiffs. Both cases would base jurisdiction over a defendant (the taxpayer) based on the unilateral presence of the third party (i.e., the beneficiary).

The Trust As An Abstraction

This separate entity theory notwithstanding, the Trust, the DOR and the modern Supreme Court do not regard a trust as a legal person or distinct legal entity.[66]

The term "trust" refers to "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person".[67] The trust is not a legal entity or person, but merely the abstraction of a fiduciary relationship whereby the trustee, a legal person, owns property subject to the duty to administer it on behalf of the beneficiary, a separate legal person. The property

and associated income subject to this fiduciary duty belong to the fiduciary – i.e., the trustee. Such property and associated income is not held by any separate, distinct legal entity referred to as "the trust", and not by the beneficiary.[68]

As an abstraction, a trust may not sue or be sued, or hold and transfer title to property in its own name.[69] Instead, a trustee can sue or be sued based on the trustee's actions or to determine issues pertaining to property held in the trustee's name.[70] The trustee need not sue in his name as trustee but solely in the trustee's own name without reference to the trust relationship.[71] The trustee is personally liable for the payment of the trust's income tax liability up to and after his discharge from fiduciary duties.[72] Additionally, the trustee's fiduciary duties are owed to the beneficiaries rather than the trust.[73] In contrast, the directors of a corporation owe their duties directly to the corporation itself.

Consequently, a trust itself cannot "purposefully avail" itself of the state's protections because a trust is merely a legal fiction, an abstraction of the fiduciary relationship between multiple legal persons.

2. Which trust constituent must 'purposefully avail' itself of the benefits of the taxing state?

It follows that the next inquiry is *which* legal person's contacts with the taxing state must be analyzed for due process purposes.

The DOR argues that because a trust has no "self", the only way a trust can make contact with a state is through the trust's constituents – the grantor, the trustee, and the beneficiary.[74] Among these, the DOR argues, the trust beneficiaries have the most important jurisdictional contacts with the state for the following reasons:

First, the DOR argues that the trust beneficiary is the most important constituent because the beneficiary "is a trust's reason for being. Under settled principles of trust law, a trust exists

solely for the benefit of its beneficiaries".[75] A trust cannot exist without beneficiaries, even though a trust can be created in the absence of a trustee.[76] Second, the DOR argues that only a trust beneficiary has an ownership interest in the property, whereas a trustee's interest in the trust property is "merely nominal".[77]

The premise of this argument should be rejected. It is irrelevant who the "most important" trust constituent is. Due process requires a minimum connection "between a state and *a person, property, or transaction it seeks to tax*".[78] The "person" the state "seeks to tax" is therefore the trustee, as it is the trustee who pays the fiduciary tax.[79] Therefore, it is the trustee who must have a minimum connection to the taxing state.

But even taking the DOR's "most important constituent" argument on its own terms, there are many reasons why the trustee's jurisdictional contacts are more important. It is a fundamental principle of trust law that when the grantor places assets in a trust, she severs benefit from control, conferring the benefit in the property to the trust beneficiary, but granting exclusive legal rights and control over that trust property to the trustee.[80] The beneficiary does not have any legal title to trust assets, as the trustee is the legal owner.[81] As discussed above, it is also the trustee who maintains lawsuits[82], enters into contracts, files tax returns, and who pays the tax liability on behalf of the trust.[83] The trustee is clearly the 'most important' constituent for determining the trust's nexus to a state.

The beneficiary cannot be the trust constituent whose nexus matters for due process purposes. This is especially true here because the Kaestner Trust is a discretionary trust – and Ms. Kaestner is therefore a discretionary beneficiary.[84] A discretionary trust is one in which the grantor gives the trustee discretion with respect to the beneficiary's rights to trust benefits.

Crucially, this includes discretion over distributions to beneficiaries, including the time, manner, and amount of distributions, or whether even to make a distribution at all.[85]

Many areas of law recognize a discretionary beneficiary's lack of property interest in trust assets. For example, the creditors of a discretionary beneficiary cannot reach the assets of a discretionary trust.[86] Under bankruptcy law, Kaestner's interest in the trust would not even constitute property in a bankruptcy estate because her discretionary interest in the trust is not transferable.[87] During the *Kaestner* oral argument, Justice Kagan tested the limits of this theory with her line of questioning:

> **Justice Kagan**
> Well, she's seeing a substantial asset of hers increase in value in the bank, and even if she can't touch it right now, she's getting richer and richer because of it, and that's influencing her life choices because she knows she's eventually going to enjoy that money. And if you compare her to -- I mean, where -- who are the three states that could tax this? One is the state where the trustee lives[88], one is the state where the trust administration is, and one is the state where the beneficiary is. The person who is getting the benefit of this increase in the asset is only the beneficiary.
>
> **David A. O'Neil**
> Justice Kagan, the premise of the question is that this is a source of wealth for her. That is not known at this point. She does not have a current interest in this trust asset.
>
> . . .
>
> **Justice Ginsburg**
> What -- what is the uncertainty, other than she has to stay alive?
>
> **David A. O'Neil**
> She has to stay alive. The assets could be dissipated because of poor investments. The trustee could decide that she's not ready to receive the money. The trustee could decide that the money should go to some other beneficiary.[89]

As the Trust's counsel rightly responds, a discretionary beneficiary has no current interest in trust property. Thus, North Carolina should not be able to tax trust income based solely on an

in-state residence of a beneficiary who has no property interest in that income. Put another way, North Carolina should not be able to tax another person (the trustee) based on the trust's incidental and not purposefully directed relationship with a third party (the beneficiary). This would be consistent with the Court's holding in *Walden v. Fiore* that "the unilateral activity of another party or a third person [here, the beneficiary] is not an appropriate consideration when determining whether a defendant [the trustee-taxpayer] has sufficient contacts with a forum state."[90]

Nor would it make sense for the grantor to be the lynchpin of the due process analysis. State courts in New York, Missouri and New Jersey have ruled that the domicile of a trust's grantor, standing alone, was an insufficient basis for a state to have taxing jurisdiction over a nonresident trustee.[91]

3. Did the trust constituents have the required minimum connection to North Carolina?

Neither the trustee nor the beneficiary purposefully availed themselves of North Carolina's benefits in a way that supports the minimum connection required by the Due Process Clause.

The trustee clearly did not have a minimum connection with North Carolina. The North Carolina supreme court correctly held that the trustee's periodic communications with Kaestner were insufficient to rise to the level of purposeful availment. The record showed that "contact between the trustee and Kaestner regarding administration of the trust was infrequent –consisting of only two meetings during the tax years in question, both of which occurred in New York."[92] It would vitiate the legal distinction between the trustee and the beneficiary if routine communication, by itself, constituted "minimum contact" with the states in which those

stakeholders live.[93] Conversely, the state of North Carolina did not provide any benefits to the trust or the trust assets.

As for the beneficiary, the DOR argues that Ms. Kaestner purposefully availed herself of the "benefits and protections" of the state.[94] As examples, the DOR cites Kaestner's enjoyment of police and fire systems, sound banking institutions, and the education system (Kaestner received a master's degree from UNC and her children attended state public schools).[95] The DOR's brief also argues that the state provided for the beneficiaries' health and welfare. In doing so, the state "relieved the Trust of the enormous expense that equivalent services would have required".[96] This argument is unpersuasive. Kaestner, like all residents of North Carolina, is entitled to these state benefits by virtue of paying individual state income taxes, not because she is a trust beneficiary. And even if it were true that Kaestner purposefully availed herself of the state's protections, this still does not justify the state's taxation of *another* person, the trustee.

The grantor was the trust constituent most far removed from North Carolina. Nothing in the record suggests he had a minimum connection with the state.

In summary, none of the trust constituents purposefully availed themselves of the taxing state. As a result, North Carolina cannot tax the trust income because there is no definite link, no minimum connection "between a state and a person, property, or transaction it seeks to tax".

4. Was the taxed income rationally related to North Carolina's fiscal values?

Quill establishes a two-part test for determining when a state tax survives due process analysis.[97] The second prong of the test requires "that the income attributed to the State for tax purposes . . . be rationally related to values connected with the taxing state."[98] A state satisfies this prong "when the state taxes only the portion of a trust's income that is held for the benefit of

in-state beneficiaries."[99] This issue is not squarely before the Supreme Court in the *Kaestner* case. Even so, the North Carolina tax would not meet this test.

The DOR argues it was right to tax 100% of the undistributed trust income. North Carolina's fiduciary tax statute taxes trustees on "the amount of the taxable income of the estate or trust that is *for the benefit of a resident*" of the state.[100] Under the DOR's theory, 100% of the Trust's income during the years at issue was earned *for the benefit of North Carolinians* – and therefore 100% of the Trust's income that was connected with North Carolinians.[101]

But as discussed above in Section III.A.2, a discretionary beneficiary does not have a legal interest in the trust assets and may in fact never receive them. The sole basis of the state's attribution of 100% of the Trust's income to North Carolina was the possibility that a discretionary beneficiary might someday receive it in North Carolina. Such a speculative basis does not satisfy *Quill's* due process test.[102]

During oral argument, some members of the Court highlighted the practical difficulties of determining what portion of the trust income could be taxed under the DOR's theory. Justice Sotomayor asked questions that displayed her grasp of the trust constituent relationship:

> **Justice Sotomayor**
> But it still begs the question, what makes it your right under any circumstance to tax all of the trust income when there's no guarantee that she is going to receive all of it at any point?
>
> **Matthew W. Sawchak**
> Several points. One is, during the entire period when the income is accumulating, the state is providing her with protection and benefits --
>
> **Justice Sotomayor**
> But the trustee doesn't have to pay for that. He's not required to. The trust doesn't require it. It gives him discretion to pay for some of her expenses, but nothing in the trust says that she has to pay for the benefits that you're giving her as a state.

> **Matthew W. Sawchak**
> But it is the very fact that those benefits and protections are being extended that enables the trustee to not give distributions.
>
> **Justice Sotomayor**
> Now he has absolute discretion. Whether she had a need or not, he doesn't have to fulfill it.[103]

Justice Breyer suggested that states would have difficulty quantifying the present value of future trust income to a discretionary beneficiary:

> **Justice Breyer**
> And I'd only add to this that, by the way, if the trust has a million dollars extra income in year 4, and if you say [the beneficiary] is entitled to that, [but] she isn't going to get it 'til year 14, at most, do you discount the increased value of the trust by the time she has to wait? Because she has nothing that increased in value more than the million discounted by the probability that she will ever get it and when.[104]

Basic principles of trust law illuminate why the DOR's taxation on the world-wide income of an out-of-state trustee, based alone on the presence of an in-state beneficiary, was unconstitutional.

B. Reflection on Policy, Federalism, and Due Process

The DOR advances a series of policy arguments centered on the concern that a holding for the Trust would endorse a "judicially created tax shelter" similar to the one struck down in *Wayfair*.[105] In 2014, trusts filed more than 2.7 million federal tax returns.[106] Collectively, those trusts reported income of more than 120 billion dollars.[107] The DOR argues that a ruling in favor of the Trust leaves states exposed to "hundreds of millions of dollars of potential claims for tax refunds".[108] Such a policy would presumably offer taxpayers an opportunity for tax avoidance. For example: a beneficiary could enjoy the protection of a state for most of her life, then avoid taxation by relocating to a non-taxing state before taking distributions.[109]

These arguments are overstated. A holding for the Trust would not bring about the fiscal doom predicted by North Carolina. On the contrary, holding for the trust would be consistent with principles of federalism and the Court's due process jurisprudence.

1. Policy Arguments and State Choice

With respect to the tax avoidance argument, the fact that a beneficiary who anticipates receiving accumulated income might escape state taxation by changing her state of residence before the receipt of the accumulated income, creates no different a problem than the possibility that individual taxpayers may avoid state taxation by changing residency before any other type of income is received.[110] For example, a shareholder who anticipates receiving a substantial dividend can change residency before the dividend is received by moving to a state with a lower income tax on dividends. The result should be no different for trust distributions of accumulated trust income.[111]

Additionally, this situation can be addressed through the application of conventional anti-abuse tax doctrines. For example, the move to another state could be ignored for tax purposes on the ground it is not a bona fide change in residence.[112] A corresponding problem exists in federal taxation of foreign trust income. The federal government imposes a throwback tax on the income of foreign trusts so that when the beneficiary receives the distribution, she is taxed on the distribution plus any accumulated income that the trustee did not pay taxes on.[113] States like Pennsylvania, California, and New York have already imposed throwback regimes on trusts,[114] and there is no reason other states cannot follow suit.

In contrast, a ruling for the DOR would vastly expand state tax jurisdiction in trust taxation, and taken to its logical conclusion, might even affect state tax considerations for individuals, corporations, partnerships, and LLCs and their owners. A ruling for the DOR might

encourage state taxing authorities to expand their tax bases to include non-resident corporations, based on the residency of a corporate shareholder.[115]

What is more, North Carolina's taxing statute is uncommon in the United States. According to the American College of Trust and Estate Counsel, only three states (North Carolina, Tennessee, and Georgia) tax out-of-state trustees on undistributed income solely on the basis that the income might be distributed to a resident discretionary beneficiary.[116]

States have the power to levy taxes in order to raise their own revenue, independent of the federal government.[117] North Carolina's choice in enacting this type of fiduciary income tax reflects the choice of its voters. The Trust's argument on this point is most suggestive: "North Carolina itself has decided not to tax trust income on the ground that a trustee or other fiduciary, as opposed to a beneficiary, resides in the State. Nor does North Carolina tax on the ground that the trust is administered there. That choice, which aligns with the State's concerted efforts to court a thriving bank industry, is within the State's sovereign right to formulate tax policy."[118]

These differences in state tax laws do not amount to a "judicially created tax shelter". Rather, they are a consequence of federalism.

2. The Due Process Clause and Federalism

A ruling in favor of the Kaestner Trust would be consistent with existing due process jurisprudence. In the seminal case *International Shoe Co. v. Washington*, the Supreme Court discarded the physical presence and implied consent fictions underlying personal jurisdiction during the *Pennoyver v. Neff* era,[119] and substituted it for a more pragmatic evaluation of the defendant's activities in relation to the forum state.[120] Today, *International Shoe* stands for the proposition that a state's exercise of jurisdiction must be fundamentally fair to the defendant, consistent with "traditional notions of fair play and substantial justice".[121]

In addition to its focus on fundamental fairness, *International Shoe* and its progeny suggest a strong connection between due process, jurisdiction, and federalism. In his *International Shoe* opinion, Chief Justice Stone wrote that the demands of due process "may be met by such [minimum] contacts of the corporation with the state of the forum as make it reasonable, in the context of our *federal* system of government, to require the corporation to defend the particular suit which is brought there".[122] Recognizing that this new test would not admit of "simply mechanical or quantitative" application, Chief Justice Stone added that whether due process is satisfied depends upon the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[123] *International Shoe* recognized that the Due Process Clause acts as an instrument of federalism by ensuring the "orderly administration of the laws" among co-equal states. In the personal jurisdiction context, this means allocating disputes among the often-conflicting jurisdictions of state courts.[124]

Thirteen years later, Chief Justice Warren's opinion in *Hanson v. Denckla* (a case with similar facts to *Kaestner*) was based explicitly on the notion that due process-based limits on personal jurisdiction of the states "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of respective States".[125]

This emphasis on federalism continued in *World-Wide Volkswagen Corp v. Woodson*, in which Justice White wrote:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[126]

The same is true in the tax context as it is in the personal jurisdiction context. Affirming a constitutional limit on state's ability to tax does not "infringe on a state's valid exercise of sovereign power; rather, it gives effect to the boundary between the outer limit of state sovereignty and the constitutional guarantees of the due process clause".[127]

Since the *Wayfair* decision, dozens of state legislatures have enacted laws aimed at expanding their economic nexus thresholds. In this environment, the due process focus on purposeful availment is an especially important federalism-based limitation on state taxation. Ultimately, state legislatures cannot legislate around a constitutional ceiling.

3. Consistency with Due Process Precedent

During oral argument, several members of the Court expressed concern that holding for the DOR would conflict with the Court's existing due process precedent.

Justices Sotomayor, Gorsuch, and Ginsburg asked counsel for the DOR how their preferred ruling would square with the canonical personal jurisdiction case *Hanson v. Denckla*. In *Hanson*, the Court held that a Florida court could not establish jurisdiction over a Delaware trustee based on the presence of in-state Florida beneficiaries, as the Delaware trustee did not purposefully avail itself of Florida.[128] Justice Sotomayor posited that these facts were indistinguishable from *Kaestner*:

> **Justice Sotomayor**
> *Hanson*, you would be asking us to overrule, because I don't know how you can tax somebody you have no jurisdiction over, especially if they haven't done anything like pay any money over or have no contacts with the person in your state. All the meetings [between the trustee and beneficiary] were in New York. So add a third case you want to overrule.[129]
>
> **Matthew W. Sawchak**
> Certainly, there's no need to overrule *Hanson* here for two --

> **Justice Sotomayor**
> Why? So how do you -- the trustee is responsible for paying this tax. You're dragging the trustee into your court.
> . . .
> You're doing exactly what happened in *Hanson*.[130]

Counsel's response was that the *Hanson* case itself distinguishes between adjudicative jurisdiction and tax jurisdiction. Justice Gorsuch did not find this response persuasive:

> **Justice Gorsuch**
> Well, we've never suggested, though, that tax jurisdiction exceeds adjudicative jurisdiction, have we? It's usually the other way around.
>
> …
>
> Are you aware of a case where we've said that tax jurisdiction is broader than adjudicative jurisdiction?
>
> **Matthew W. Sawchak**
> I'm not.[131]

Counsel's inability to name a case in which taxing jurisdiction exceeded adjudicative jurisdiction is telling. Were the Court to rule in favor of the DOR in the *Kaestner* case, the ultimate impact would be to permit a state taxing jurisdiction over an out-of-state party that has not purposefully availed itself of the state. A state's taxing jurisdiction should be consistent with – and certainly not exceed – its adjudicative jurisdiction. A ruling in favor of the DOR would mean upsetting settled precedent in another area of law.

IV. CONCLUSION

The emphasis of the Due Process Clause is on the fundamental fairness of government activity. Fairness in the taxation context requires that the taxpayer purposefully avail itself of the state's laws and protections. It would be fundamentally unfair for North Carolina to tax an out-of-state trustee based solely on the presence of an in-state beneficiary. A ruling for the Trust

comports with basic principles of trust law and tax law and reaffirms the Court's due process precedent and fundamental principles of federalism.

[1] The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Commerce Clause provides in relevant part that Congress shall have power "To regulate Commerce . . . among the several States". U.S. Const. Art. 1, § 8, cl. 3.
[2] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
[3] *Id.* at 306.
[4] *Id*. at 311.
[5] *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).
[6] *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue*, 588 U.S. ___, 131 S.Ct. 2213 (2019).
[7] *Id.* at 2221.
[8] *Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue*, 814 S.E.2d 43, 45 (N.C. 2017).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Petitioner's Brief In Support of Certiorari at 35.
[16] *Id.* The term "discretionary beneficiary" is distinguished from the terms "primary" and "contingent beneficiary". A primary beneficiary is the first in line to receive trust assets. A contingent or secondary beneficiary is entitled to receive trust assets only if the primary beneficiary is unable or chooses not to. However, in a discretionary trust, the trustee has discretion over distributions to the discretionary beneficiary. *See generally* Restatement (Third) of Trusts § 50.
[17] Restatement (Third) of Trusts § 50.
[18] *Kaestner*, 814 S.E.2d at 45.
[19] *Id.*
[20] *Id.*
[21] *Id*.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 46.
[25] 430 U.S. 274 (1977)
[26] *Kaestner*, 814 S.E.2d at 48.
[27] *Quill*, 504 U.S. at 306.
[28] *Id.*
[29] The terms trustor or testator are also interchangeable with grantor. *See* Restatement 3d of Trusts § 3(a) (2003).
[30] Restatement 3d of Trusts § 2.
[31] Robert H. Sitkoff & Jesse Dukeminier, *Wills, Trusts and Estates*, 10th Ed. (2017).
[32] 1 Living Trusts: Forms and Practice § 1.04 (2019).

[33] *See, e.g., In re Swift*, 727 S.W.2d 880 (Mo. 1987) (en banc); *Westfall v. Director of Revenue*, 812 S.W.2d 513 (Mo. 1991); *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. 1997); *Residuary Trust A v. Director, Division of Taxation*, 27 N.J. Tax 68 (2013).
[34] *See* Restatement (Third) of Trusts §§ 17, 19.
[35] *Id.*
[36] *Id.*
[37] 1 Living Trusts: Forms and Practice § 1.04 (2019).
[38] Restatement (Third) of Trusts §§ 17, 25.
[39] *See generally* Restatement (Third) of Trusts §§ 12, 21, 62, 63, 66.
[40] Brief for Respondent at 3.
[41] I.R.C. § 641(b); *McCauley v. Commissioner*, 44 F.2d 919 (5th Cir. 1930).
[42] 2 Jerome Hellerstein & Walter Hellerstein, State Taxation § 20.09, 20-148 (3d ed. 2003).
[43] *Id.*
[44] If the beneficiary has an absolute right to the income, the beneficiary's state of residence may tax her on trust income whether or not the income was distributed. *See* I.R.C. §§ 652, 661, 662, 671, 678(a).
[45] Bradley E.S. Fogel, *What Have You Done For Me Lately? Constitutional Limitations on State Taxation of Trusts*, 32 U. Rich. L. Rev. 165, 165 n. 4 (Jan. 1998).
[46] Many cases are more complicated. For example, so-called complex trusts allow for accumulation of income, permit distributions of trust principal, or provide for charitable beneficiaries. No matter the complexity, however, beneficiaries are never taxable on more than their share of the "distributable net income" (DNI) of the trust. DNI serves as the maximum amount of taxable income for which the fiduciary can claim as an income distribution deduction, and the maximum amount required to be included in gross income of the beneficiary. Distributions in excess of DNI are generally treated as principal and are not taxable to the beneficiary. *See generally* I.R.C. §§ 661, 662, 671
[47] Bloomberg Tax 2018 Trust Nexus Survey at 7.
[48] Richard W. Nenno, *Minimizing or Eliminating State Income Taxes on Trusts*, West's Estate, Tax, and Personal Financial Planning 6 (May 2018).
[49] A law classifying a trust as a resident trust based on whether the grantor was an in-state resident at the time the trust became irrevocable is called a grantor-domicile rule. The validity of grantor-domicile rules as a means of establishing state taxing nexus under the Due Process Clause is the subject of another trust taxation case recently appealed to the Supreme Court, *Fielding v. Comm'r of Revenue*, 916 N.W.2d 323 (Minn. 2018), *petition for cert. filed sub nom Bauerly v. Fielding* (No. 18-664). The Minnesota Supreme Court, along with a number of other state courts, have held that grantor-domicile rules present an even greater due process infirmity because they tie state tax nexus to a specific point in time, rather than an analysis of whether the taxpayer's actions create a "minimum connection" to the taxing state.
[50] Bloomberg Tax 2018 Trust Nexus Survey at 7.
[51] *Id.* at 10.
[52] *Id.*
[53] Brief Amicus Curiae for the American College of Trust and Estate Counsel In Support of Neither Party at 19. If a state deems a trust a nonresident trust, its tax will be applied only against income derived from sources within the state's jurisdiction. 2018 Trust Nexus Survey at 7, Bloomberg Tax.

[54] In *Complete Auto*, the Supreme Court articulated a four-part test to determine if a state tax violates the Commerce Clause: (1) nexus: there must be a sufficient connection between the taxpayer and the state to warrant the imposition of state tax authority; (2) fairly apportioned: the state must not tax more than its fair share of the taxpayer's income; (3) non-discriminatory: the state must not treat out-of-state taxpayers differently from in-state taxpayers; and (4) fairly related to services: the tax must be fairly related to services the state provides to its taxpayers. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).
[55] *Quill*, 504 U.S. at 306. The North Carolina Supreme Court did not reach this second prong of this test.
[56] *Id.* at 312.
[57] *Id.* at 307.
[58] *Id.* at 308.
[59] *Id.*
[60] 277 U.S. 27, 28 (1928).
[61] *Kaestner*, 814 S.E.2d at 49, *quoting Brooke v. City of Norfolk*, 277 U.S. at 29.
[62] *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) ("[T]he law has seen fit to deal with this abstraction [i.e., a trust] for income tax purposes as a separate existence.").
[63] *Kaestner,* 814 S.E.2d at 48.
[64] *Walden v. Fiore*, 571 U.S. 277, 277 (2014).
[65] *Id.* at 284.
[66] *See, e.g., Americold Realty Tr. v. ConAgra Foods, Inc.*, 577 U.S. __, 136 S. Ct. 1012, 1016 (2016); Petitioner's Brief at 16; *see also* ACTEC Brief at 28.
[67] Restatement (Second) of Trusts § 2.
[68] Joseph W. Blackburn, *Constitutional Limits on State Taxation of a Nonresident Trustee: Gavin Misinterprets and Misapplies Both Quill and McCulloch*, 76 Miss. L.J. 1, 4-5 (2006).
[69] Restatement (Second) of Trusts § 280.
[70] *Id.*
[71] *Id*.
[72] *See* Rev. Rule. 66-43.
[73] Restatement (Third) of Trusts § 78(1).
[74] Petitioner's Brief at 16.
[75] *Id.* at 29, *quoting* Unif. Trust Code § 404 (Unif. Law Comm'n 2000).
[76] *See* Restatement (Third) of Trusts § 66.
[77] Petitioner's Brief at 29-30.
[78] *Quill*, 504 U.S. at 306 (emphasis added).
[79] Indeed, the North Carolina statute at the center of this controversy specifically directs that the trustee "shall pay the tax" imposed on a trust. N.C. Gen. Stat. § 10.160.2.
[80] *Greenough v. Tax Assessors of Newport*, 331 U.S. 486, 494 (1947); *see also* Restatement (Third) of Trusts § 2;
[81] *See Anderson v. Wilson*, 289 U.S. at 24.
[82] When a trustee files a lawsuit or is sued in her own name, the trustee's citizenship is what matters for diversity purposes. *Americold Realty Trust*, 136 at 1016.
[83] 76 Am. Jur. 2d Trusts § 2.
[84] Petitioner's Brief at 3. The term "discretionary beneficiary" is distinguished from the terms "primary" and "contingent beneficiary". A primary beneficiary is the first in line to receive trust assets. Kaestner and her children are all primary beneficiaries. A contingent or secondary

beneficiary is entitled to receive trust assets only if the primary beneficiary is unable or chooses not to. However, in a discretionary trust, the trustee has discretion over distributions. *See generally* Restatement (Third) of Trusts § 50.
[85] *See* Restatement (Third) of Trusts § 50.
[86] Restatement (Second) of Trusts §155(1); N.C. Gen. Stat. § 36C-5-504(b) (2018).
[87] A debtor's bankruptcy estate is comprised of "all legal and equitable interests of the debtor in property at the commencement of the case." 11 U.S.C. §§ 541(a); 541(c)(2).
[88] The states in which the trustee is located and in which the trust is administered have a stronger claim to tax jurisdiction because they protect the trustee's ownership of the property by providing the trustee access to the courts. Transcript of Oral Argument at 00:53:46-00:54:39, *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, Oyez, https://www.oyez.org/cases/2018/18-457 (last visited May 11, 2019).
[89] Oral Argument Transcript at 00:30:46-00:42:13.
[90] *Walden v. Fiore*, 571 U.S. at 284.
[91] *See, e.g., Blue v. Dep't of Treasury*, 462 N.W.2d 762 (Mich. Ct. App. 1990); *Mercantile-Safe Deposit & Trust Co. v. Murphy*, 203 N.E.2d 490 (N.Y. 1964); *Pennoyer v. Taxation Division Director*, 5 N.J. Tax 386 (N.J. Tax Ct. 1983); *Potter v. Taxation Div. Dir.*, 5 N.J. Tax 399 (N.J. Tax Ct. 1983).
[92] *Kaestner*, 814 S.E.2d at 51.
[93] Zelinsky, *High Court Should Affirm Kaestner State Trust Tax Case*, Law360 Tax Authority (Mar. 5, 2019).
[94] Petitioner's Brief at 30.
[95] *Id.* at 31-32.
[96] Petitioner's Brief at 35.
[97] The state supreme court did not reach this issue.
[98] *Quill*, 504 U.S. at 306.
[99] Brief of Tax Law Professors As Amici Curiae In Support of Petitioner 10; *See also Quill*, 504 U.S. at 306.
[100] N.C. Gen. Stat. § 105-160.2 (emphasis added).
[101] *See* Petitioner's Brief at 37.
[102] Respondent's Brief at 35.
[103] Oral Argument Transcript at 00:02:52-00:03:53.
[104] *Id.* at 00:06:50-00:07:25.
[105] *Wayfair*, 138 S. Ct. at 2094.
[106] *See* Internal Revenue Service, SOI Tax Stats—Fiduciary Returns—Sources of Income, Deductions, and Tax Liability— Type of Entity: 2014, available at https://www.irs.gov/statistics/soi-tax-stats-fiduciary-returns-sources-of-income-deductions-andtax-liability-by-type-of-entity ..
[107] *Id.*
[108] Petition for Writ of Certiorari at 4; *see also* Jeffrey Schoenbum, *Strange Bedfellows: The Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 Vand. L. Rev. 1945, 1997 (2014).
[109] Petitioner's Brief at 41. In a twist of irony, Kaestner later moved to California, a state whose supreme court has upheld taxation of resident trusts based on in-state beneficiaries. *See McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186 (1964).
[110] *See* ACTC Brief at 18.
[111] *Id.*

[112] *Id.* at 19.
[113] Oral Argument Transcript at 00:43:43-00:44:22.
[114] *See, e.g.*, 61 Pa. Code § 105.5(c); Ca. Rev. & Tax Code § 17745(b); N.Y. Tax Law § 612(b)(40).
[115] David Herzig, *Another State Tax Trust Nexus Case – Both States Can't Be Right (Or Can They)?*, Forbes (Mar. 11, 2019).
[116] *See* ACTEC Brief at 11. In Tennessee, the entire income tax is being phased out and will be fully repealed as of January 1, 2021. *See* Tenn. Dep. Revenue, 2018 Guidance for Tennessee's Hall Income Tax Return, July 12, 2017.
[117] *Dows v. Chicago*, 78 U.S. 108, 110 (1870).
[118] Respondent's Brief at 54 (internal quotations omitted).
[119] *See Pennoyver v. Neff*, 95 U.S. 714 (1878).
[120] Glenn B. Manishin, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp v. Woodson*, 80 Colum. L. Rev. 1341, 1343 (Oct. 1980).
[121] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
[122] *Id.* at 317 (emphasis added).
[123] *Id.* at 319.
[124] *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp v. Woodson*, 80 Colum. L. Rev. 1341, 1347.
[125] *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).
[126] *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 291-92 (1980).
[127] Brief for Certain State Trust and Bank Associations As Amici Curiae In Support of Respondent at 22.
[128] *Hanson v. Denckla*, 357 U.S. 235 (1958).
[129] Justice Sotomayor is referring to two Supreme Court cases invalidating on due process grounds state taxation on an out-of-state trust: *Safe Deposit & Tr. Co v. Commonwealth of Va.*, 280 U.S. 83 (1929) (holding Virginia could not assess property tax on trust corpus held in Maryland for a Virginia beneficiary) and *Brooke v. City of Norfolk*, 277 U.S. 27 (1928) (holding Virginia could not tax the corpus of a Maryland trust based on a Virginia beneficiary). Both cases held in favor of the taxpayer, but are not discussed in this paper because they rely on physical presence-oriented reasoning that predates *International Shoe*.
[130] Oral Argument Transcript at 00:23:42-00:27:10.
[131] *Id.* at 01:00:18-01:00:36.