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INDIVIDUAL HOME-WORK ASSIGNMENTS FOR STATE TAXES

Hayes R. Holderness[*]

Abstract: The surge in work-from-home arrangements brought on by the COVID-19 pandemic threatens serious disruptions to state tax systems. Billions of dollars are at stake at this pivotal moment as states grapple with where to assign income earned through these remote work arrangements for tax purposes: the worker's home or the employer's location? Some states—intent on modernizing their income tax laws—have assigned such income to the employer's location, but have faced persistent challenges on both constitutional and policy grounds in response.

This Article provides a vigorous defense against such challenges. The Supreme Court has long interpreted the Constitution to be deferential to state tax actions; new laws for the age of remote work surely satisfy constitutional demands. Moreover, assigning income from remote work to the employer's location is more equitable than assigning the income to the worker's home, justifying modernization efforts from a policy perspective. The solution to this home-work assignment problem is evident: the states must revise their tax laws to face the evolving nature of work.

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INTRODUCTION

In 2020, the burgeoning COVID-19 pandemic drastically altered the daily lives of people around the world. The United States was no exception as shelter-in-place orders were issued by state and local governments in an attempt to stem the flow of the virus.[1] Under these orders, workers stopped physically commuting to the workplace and moved online en masse, becoming "remote workers" by delivering their services over the internet rather than in person.[2] Generally speaking, only those workers whose jobs were essential and demanded the workers' physical presence were permitted to physically commute into the

* Associate Professor, University of Richmond School of Law. For their helpful thoughts and comments, I thank Erin Collins, Christine Kim, Corinna Lain, Ruth Mason, John McGown, Luke Norris, Rick Pomp, Blaine Saito, Erin Scharff, Darien Shanske, Allison Tait, Adam Thimmesch, and Ed Zelinsky. I am grateful to the participants of the 2022 Junior Tax Scholars Workshop for their feedback and to the faculties at Wake Forest University School of Law and Northeastern University School of Law for their workshopping of this Article.

1. *See* Holly Elser, Mathew V. Kiang, Esther M. John, Julia F. Simard, Melissa Bondy, Lorene M. Nelson, Wei-ting Chen & Eleni Linos, *The Impact of the First COVID-19 Shelter-In-Place Announcement on Social Distancing, Difficulty in Daily Activities, and Levels of Concern in the San Francisco Bay Area: A Cross-Sectional Social Media Survey*, 16 PLOS ONE 1, 2 (2021).

2. *See, e.g.*, Alexander Bick, Adam Blandin & Karel Mertens, *Work from Home After the COVID-19 Outbreak*, (Fed. Reserve Bank of Dall., Working Paper No. 2017, 2020) (finding that of all workers commuting daily in February, only 43.7% continued doing so in May and that among workers who switched from daily commuting in February to working from home, almost 70% did not commute to work at all in May); BRENNAN KLEIN ET AL., NETWORK SCI. INST., RESHAPING A NATION: MOBILITY, COMMUTING, AND CONTACT PATTERNS DURING THE COVID-19 OUTBREAK 7 (2020) ("In general, by May 9, 2020, the average commuting volume—the total number of commutes within 24 hours in a given county—across United States has been reduced by approximately 65% of the typical daily values.").

workplace.[3] This shift to remote work impacted many aspects of public life, from workplace design to public transportation needs. One of the understudied impacts is how this shift from physical commuting to remote work threatens to upend state tax systems.

Under traditional tax systems, the state where the worker travels to work first taxes the worker's income earned in the state. The state where the worker resides then taxes the remainder of the worker's income.[4] Though income itself is intangible, having no geographic location,[5] the physical location of the worker is used as a proxy to assign—"source" in tax parlance—the income to the state of the workplace.[6] But remote work minimizes the importance of the physical location of the worker to earning income, potentially disrupting existing tax regimes. Continuing to rely on the physical location of the worker as a proxy for the location of income could upset the equity of those tax regimes by taxing the income of remote workers differently than that of their physically commuting counterparts.[7]

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3. *See COVID-19: Essential Workers in the States*, NAT'L CONF. OF STATE LEGISLATURES (May 21, 2020), https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx [https://perma.cc/3KGH-FUU2]. These essential workers were disproportionately low-income and of racial minorities, raising concerns about inequitable exposure to the risks of the virus. *See* Thomas M. Selden & Terceira A. Berdahl, *COVID-19 and Racial/Ethnic Disparities in Health Risk, Employment, and Household Composition*, 39 HEALTH AFFS. 1624, 1624–25 (2020).

4. *See infra* section I.A.2. Where the worker works and lives in the same state, that state would be both the home state and the workplace state. If the states differ, then the home state typically subjects the worker's entire income to tax and offers a credit for taxes the worker pays to the workplace state. *See infra* sections I.A.1, I.A.3.

5. *See* Hugh I. Ault & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises*, *in* TAX'N IN THE GLOB. ECON. 11, 30–31 (Assaf Razin & Joel Slemrod eds., 1990) (observing that income itself is not a geographic concept, thus sourcing to a geographic location is a challenge).

6. *See id.* at 31; *see also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.05 (3d ed. 2021).

7. *See* Darien Shanske, *Agglomeration and State Personal Income Taxes: Time to Apportion (with Critical Commentary on New Hampshire's Complaint Against Massachusetts)*, 48 FORDHAM URB. L.J. 949, 950 (2021) (observing that continuing to source income to the physical location of the employee in a world of remote work should be rejected "because it would be applying an old economy heuristic (you earn where you physically are) to a new economy problem (work can happen in many places)"). *Cf., e.g.*, David Elkins, *A Scalar Conception of Tax Residence for Individuals*, 41 VA. TAX REV. 149, 174–76 (2021) (observing that, in the international taxation context, which parallels the state taxation context, simple residence rules based on the physical location of the individual no longer reflect the reality of how people live and work); Michael S. Kirsch, *The Role of Physical Presence in the Taxation of Cross-Border Personal Services*, 51 B.C. L. REV. 993, 995, 1037–48 (2010) (highlighting that sourcing rules based on physical presence are becoming antiquated in the modern economy and arguing that, as a result, physical presence should no longer be the driving principle for income sourcing); John K. Sweet, *Formulating International Tax Laws in the Age of Electronic Commerce: The Possible Ascendancy of Residence-Based Taxation in an Era of Eroding Traditional Income Tax Principles*, 146 U. PA. L. REV. 1949, 1968–69 (1998) (observing that changes to conventional means of doing business resulting require policymakers to reevaluate tax sourcing rules as physical location of performance becomes less important to how income from services is earned).

Some states immediately responded to this shift in working norms and revised their rules for sourcing individual income to focus not on the physical location of the worker but rather on the location of the employer.[8] For example, Massachusetts issued temporary regulations that sourced the income of remote workers to the location of the employer where the workers had physically worked before the pandemic upended traditional work arrangements.[9] Pennsylvania adopted a similar approach.[10] In this way, these states continued taxing income earned from employment opportunities supported by the states' laws and services. Traditional sourcing rules would have located that income in the remote workers' home states, impeding the workplace states—when different from the home states—from taxing the income.[11]

Such modernizing revisions have been controversial, as the remote workers' home states were arguably providing those workers with increasing amounts of benefits and services as the workers spent more time in the state. Those home states believe the traditional income sourcing rules based on the worker's physical location should remain the sourcing standard.[12] This result would allow the home states to cover the costs of the additional benefits and services they allegedly provide to the remote workers, such as more police and fire protection. However, the result would deny workplace states the opportunity to tax that same income, hindering those states' ability to cover the costs of their services provided to remote workers, such as legal infrastructure protecting the employment opportunities. The conflict between these home states and workplace states is unavoidable and serious; billions of dollars of tax revenue are at stake.[13]

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8. New York famously already sourced certain individual income to the location of the employer under its controversial "convenience of the employer test." *See* N.Y. TAX LAW §§ 601(e)(1), 631(a)(1), 631(b)(1)(B); N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a). Under that test, if the worker was not physically in New York of their own accord, and not at the demand of the New York-based employer, the income would be sourced to New York. *See* 20 N.Y. CODES, RULES & REGS. § 132.18(a). The test has survived scrutiny in the New York court system, *e.g.*, Zelinsky v. Tax Appeals Tribunal, 1 N.Y.3d 85 (2003), and should survive scrutiny on constitutional and policy grounds for the reasons articulated in this Article.

9. *See* 830 MASS. CODE REGS. 62.5A.3 (2020).

10. *See Telework During the COVID-19 Pandemic*, PA. DEP'T OF REVENUE, https://www.revenue.pa.gov/COVID19/Telework/Pages/Telework-During-COVID19.aspx [https://perma.cc/T37Z-SYUQ] (last updated July 1, 2021).

11. *See infra* sections I.A–C (detailing traditional sourcing rules).

12. *See infra* section I.D (detailing New Hampshire's challenge to Massachusetts's change in sourcing rules).

13. *See* David G. Hitchcock, *Massachusetts and New York State Could Lose Billions of Income Tax Dollars If Lawsuit Challenging Remote Work Succeeds*, S&P GLOB. RATINGS REP. (Jan. 22, 2021),

New Hampshire is exemplary of one of these home states; many New Hampshirites that used to travel into Massachusetts to work shifted to remote work arrangements during the pandemic, connecting with their employers virtually instead of travelling into Massachusetts.[14] When Massachusetts changed its income sourcing rules, New Hampshire sued in the United States Supreme Court to stop Massachusetts's changes in one of the more high-profile conflicts to date.[15] New Hampshire claimed that Massachusetts's actions were unconstitutional, arguing that the Due Process Clause and Commerce Clause prohibit states from sourcing income to the location of the employer because the physical location of the worker must be taken into account.[16]

This Article offers a vigorous defense of state income sourcing rules that rely on the location of the employer rather than the physical location of the worker.[17] Part I provides an overview of state individual income taxation, particularly as it relates to cross-border work. This Part highlights the challenge that income from remote work poses for traditional state tax systems, concluding with a brief explanation of New Hampshire's suit against Massachusetts over Massachusetts's revised income sourcing rules. This case underscores the stakes for states seeking to modernize their rules.

After providing this important background, the Article then explains why constitutional doctrine regarding state taxation will not impede the adoption of new income sourcing rules. Part II establishes that current doctrine and historical trends do not support a reading of the Constitution that would restrict new income sourcing rules like Massachusetts's. There are not even niche pockets of doctrine that could protect remote workers from the application of these revised sourcing rules to their income. The Supreme Court has consistently read the Constitution to respect state sovereignty in matters of taxation, and this deferential approach is likely

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https://www.spglobal.com/ratings/en/research/articles/210122-massachusetts-and-new-york-state-could-lose-billions-of-income-tax-dollars-if-lawsuit-challenging-remote-work-11803863 [https://perma.cc/8R7D-ZZRJ] (noting that just two states, New York and Massachusetts, stand to lose billions of dollars of income tax revenues under traditional sourcing rules due to remote work arrangements).

14. *See American Community Survey, Table S0802: Means of Transportation to Work by Selected Characteristics*, U.S. CENSUS BUREAU (2019) https://data.census.gov/table?q=Maryland+Employment&g=0400000US24&tid=ACSST1Y2021.S0802 (last visited Jan. 21, 2023) (reporting that approximately 15% of New Hampshire residents commuted to work outside of the state in 2019).

15. *See* New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2021).

16. *See infra* section I.D.

17. *See infra* Part II.

to continue in the context of remote work.[18]

Finally, this Article articulates the strong policy reasons for Congress or state legislatures to adopt income sourcing rules based on the location of the employer in Part III. The world of work is changing, and multistate tax systems must keep pace; otherwise, opportunities for inequitable income taxation and for tax avoidance can arise. Sourcing individual income to the location of the employer is better able to address these concerns than is sourcing income to the physical location of the worker, and the administrative burdens that might accompany these revised sourcing rules are not serious enough to abandon the rules.[19] The traditional sourcing rules are stuck in the past, and this Article fully explains why those rules need not and should not be followed in a world of remote work. Individual income can and should be assigned to the workplace.

By introducing the robust constitutional and policy arguments supporting income sourcing rules that look to the location of the employer, this Article makes an important contribution at a pivotal moment for multistate tax systems. The content of sourcing rules has been studied and debated at the international tax level, primarily in the corporate income tax context,[20] but the scholarship concerning such rules at the state level in the United States and in the individual income tax context is nascent.[21] Others have defended the states' traditional sourcing rules for the age of remote work,[22] but those commentators have undertheorized the goals of state individual income taxation and the potential disruption of those goals triggered by remote workers. As the first to defend state individual income sourcing rules based on the location of the employer, this Article advances the literature on sourcing rules by filling these gaps in the scholarship.

Income sourcing rules may seem disconnected from some of the more

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18. *See infra* Part II.

19. *See infra* Part III.

20. *E.g.*, Mitchell A. Kane, *A Defense of Source Rules in International Taxation*, 32 YALE J. ON REGUL. 311 (2015); Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540 (2009); Stephen E. Shay, J. Clifton Fleming Jr. & Robert J. Peroni, *The David R. Tillinghast Lecture—What's Source Got to Do with It?—Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81 (2002); Sweet, *supra* note 7; Reuven S. Avi-Yonah, *Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301 (1996).

21. For literature regarding sourcing rules for individual income in the context of state taxation, see Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. DAVIS L. REV. 1149 (2021); Richard D. Pomp, New Hampshire v. Massachusetts: *Taxation Without Representation?*, 36 J. STATE TAX'N 19 (2021); Shanske, *supra* note 7; Edward A. Zelinsky, *Taxing Interstate Remote Workers After* New Hampshire v. Massachusetts: *The Current Status of the Debate*, 25 FLA. TAX REV. (forthcoming 2022) (manuscript at 27). For literature regarding international individual income taxation, see Elkins, *supra* note 7; Kirsch, *supra* note 7.

22. *See* Kim, *supra* note 21; Zelinsky, *supra* note 21.

pressing legal concerns produced by the COVID-19 pandemic, but tax rules impact how much revenue states can raise—and in turn spend—and the rules may also influence employers when the employers are considering how to run their workplaces. One major takeaway from the pandemic is that many people with the opportunity to engage in remote work prefer to do so rather than physically commuting into the workplace.[23] Looking forward, remote work is expected to continue being a major part of how Americans earn their income.[24] When people begin earning income in new ways, tax laws must adapt to apply equitably among taxpayers. Now is the time for states to evaluate their approach to individual income taxation and settle on tax rules that make sense for new modes of work that will only multiply in the coming years,[25] and the states should not be impeded in those efforts.

I. STATE TAX AUTHORITY OVER INDIVIDUAL INCOME

Forty-two states levy individual income taxes.[26] These states justify their authority to tax individuals' income on two bases: residence and source (or, more colloquially, home and workplace). The scope of the taxing authority differs depending on the base, however. Generally speaking, states that subject individuals to tax on a residence basis claim the authority to tax the individual's entire income;[27] states relying on the source basis claim only the authority to tax the individual's income earned in (i.e., sourced to) the state.[28] Thus, of the two, the residence state has a

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23. *See* Nicholas Bloom, *The Bright Future of Working from Home*, STAN. INST. FOR ECON. POL'Y RSCH. (May 2020), https://siepr.stanford.edu/research/publications/bright-future-working-home (last visited Feb. 2, 2023) (finding that working from home is becoming more popular and is likely to remain so); *see also* Hayes R. Holderness, *Changing Lanes: Tax Relief for Commuters*, 40 VA. TAX REV. 453, 466–68 (2021) (noting survey evidence demonstrating that most workers who are able would prefer to continue remote work arrangements at least to some degree).

24. *See, e.g.*, Holderness, *supra* note 23, at 466–67 (observing trends in remote work).

25. *See* Pomp, *supra* note 21, at 20; Amy Hodges, *Evolving Remote Workforce Brings Uncertainty, Practitioners Say*, TAXNOTES (Dec. 17, 2021), https://www.taxnotes.com/featured-news/evolving-remote-workforce-brings-uncertainty-practitioners-say/2021/12/16/7cpy6 [https://perma.cc/MT3D-QR6E]. *Cf.* Yariv Brauner, *Thinking Like a Source State in a Digital Economy*, 18 PITT. TAX REV. 225, 234 (2021) ("The international tax regime has been seriously challenged by the ascent of the digital economy, primarily because that regime generally relied upon physical presence for the establishment of tax jurisdiction."); Kirsch, *supra* note 7, at 994 ("Recent technological developments have placed a strain on the jurisdictional rules that the United States and other countries apply to tax income arising in cross-border settings."); Sweet, *supra* note 7, at 1950 (observing that the rise of electronic commerce poses challenges for traditional systems of taxation).

26. Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2021*, TAX FOUND. (Feb. 17, 2021), https://taxfoundation.org/publications/state-individual-income-tax-rates-and-brackets/ [https://perma.cc/7U2F-3JLV].

27. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 20.04.

28. *See id.* ¶ 20.05.

broader claim, which, if fully exercised, could result in multiple layers of tax on income a resident earns out-of-state. To mitigate this potential for multiple taxation, resident states credit individuals for taxes they pay to source states.[29]

The following sections provide more detailed information on residence-based taxation, source-based taxation, and the states' credit mechanisms. As will become evident, the physical location of the individual has been traditionally important in establishing both the individual's residence and the source of the individual's income. However, with the rise of remote work, the physical location of the worker is becoming less relevant to the individual's ability to earn income, and the suitability of traditional sourcing rules for source-based taxation are being called into question.[30] Even so, changing those traditional rules can generate friction for the current multistate tax system, as underscored by New Hampshire's suit against Massachusetts for changing its income sourcing rules,[31] which is detailed in the final section of this Part.

A. Residence-Based Income Taxation

At the most fundamental level, residence-based income taxation is justified as the means by which those who benefit from the taxing state's services, such as roads and fire protection, buy into the system.[32] State services cost money, so the state is justified in taxing those living in the state who benefit from those services in order to finance the services. However, this justification does not necessarily explain why a resident state should tax the resident's entire income; further justification is required.

The primary contemporary justification for taxing residents on their entire income is based in the idea that income taxes should be applied to taxpayers based on their ability to pay.[33] Members of society decide how to distribute the resources of that society through a combination of the benefits the state provides and the tax burdens those members face. In order to achieve what those members deem an equitable distribution of resources, the society must consider the relative need of each member for resources. With income being a rough measure of a person's need for resources (i.e., income indicating the person's ability to pay), the full

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29. *See id.* ¶ 20.04.

30. *See* authorities cited *supra* note 7.

31. New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2021).

32. *See* Mason, *supra* note 20, at 1554.

33. *See* Elkins, *supra* note 7, at 154; Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 L. & POL'Y INT'L BUS. 145, 152 (1998).

income of each member is considered regardless of the income's source.[34]

Though many criteria could be used to establish membership in a society,[35] those criteria often seek to capture people with continuous and meaningful interactions within the society.[36] Thus, for example, the ability to participate in political processes or to be physically present in a state for most of the year can indicate that a person is a member of the state's society.[37] Because residents often meet the criteria for being a member of the society, the ability-to-pay justification for including all of their income in the tax base is particularly strong.[38] Nonresidents, in contrast, often do not have the same quality of connections as residents; therefore, nonresidents are not considered members of the society, making the ability-to-pay justification weaker when considering the appropriate tax base for them.[39]

B. Source-Based Income Taxation

Residents are not the only people who benefit from a state's services, and "tangible" services like roads and emergency services are not the only services a state provides.[40] Nonresidents who earn income in a state benefit from the state's services, including both tangible services and intangible services—such as providing laws governing the workplace—that enable the income-producing activities (residents also benefit from

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34. Elkins, *supra* note 7, at 154.

35. *See* Mason, *supra* note 20, at 1588.

36. *See* Kane, *supra* note 20, at 314 ("However one defines residence, the basic idea captured by the residence principle is that the existence of some requisite threshold political connection between a *taxpayer* and a *state* justifies the state's tax claim over that individual."); *see generally* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169 (2016) (detailing taxation based on citizenship and arguing that the degree of connection to the national community should be reflected in determinations of tax residence); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443 (2007) (discussing tax jurisdiction based on citizenship).

37. *See* Mason, *supra* note 20, at 1564 (discussing the importance of the ability to participate in political processes for determining members of society); Avi-Yonah, *supra* note 20, at 1312 (similar); HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 20.03 (detailing residency tests based on number of days a person spends in the taxing state, among other tests).

38. Elkins, *supra* note 7, at 153–54 (noting the strength of this argument for residents, though noting that some would also apply it to nonresidents).

39. *See, e.g.*, Kane, *supra* note 20, at 314–15 (articulating the issues with applying the ability-to-pay justification when taxing nonresidents).

40. Professor Zelinsky seemingly would only consider physical services in the analysis of whether a state may tax remote work. *See* Zelinsky, *supra* note 21, at *27. This position may allow for a simplified analysis that could be beneficial for legislative efforts, but it is unsupported as a matter of constitutional law. *See infra* section II.A; *see also* John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax Nowhere Activity*, 33 VA. TAX REV. 209, 219 (2013) ("[T]he Court has taken a broad view of the 'benefit' principle.").

this infrastructure if they produce income in the state).[41] Therefore, fundamentally, the same justification exists for taxing nonresidents as for taxing residents; both benefit from the taxing state's services.[42]

However, as noted, nonresidents are typically not considered members of the taxing state's society, limiting the scope of the state's taxing authority. Instead of relying on the ability-to-pay principle to advance distributive justice goals as in the case of taxing residents, states instead rely only on the benefits justification when taxing nonresidents.[43] Essentially, income taxes levied on nonresidents are considered more like fees for the specific benefits provided by the taxing state to those nonresidents.[44] As a result, the state's claim to the nonresident's income is more targeted; the state only taxes that part of the income that is earned in the state, as that measure is deemed to reflect the state benefits that enabled the nonresident to earn that income.[45] In this way, the difference between residence-based tax jurisdiction and source-based tax jurisdiction mirrors the difference between general personal jurisdiction and specific personal jurisdiction: the former grants the state broad authority over a person integrated with the state, while the latter grants the state narrow authority over a person with targeted activities in the state.[46]

Determining where income is earned (i.e., assigning or sourcing the income) can be a challenge, and sourcing rules are at the core of the debate over state taxation of remote income. Due to the intangible nature of income and the various inputs that might contribute to the generation of income, proxies are necessary to assign it to a physical location.[47] In a world where most work was done at the location of the employer, the physical presence of the worker served as an easy and acceptable proxy

41. *See* Shanske, *supra* note 7, at 951–54 (detailing the benefits of agglomeration that local jurisdictions provide); Shay et al., *supra* note 20, at 90 (noting the plethora of benefits that nonresidents doing business in a jurisdiction receive from that jurisdiction); *see also* Elkins, *supra* note 7, at 155–156; Kaufman, *supra* note 33, at 187. The Supreme Court has recognized that people receive more than just physical benefits from states. *See* Swain & Hellerstein, *supra* note 40, at 219.

42. *See* Mason, *supra* note 20, at 1553–54; Shay et al., *supra* note 20, at 91.

43. Elkins, *supra* note 7, at 157–59; Kaufman, *supra* note 33, at 153; Shay et al., *supra* note 20, at 95.

44. Elkins, *supra* note 7, at 155–56.

45. This more targeted taxation under a source-based regime is compelled by the Due Process Clause. *See, e.g.*, Shaffer v. Carter, 252 U.S. 37, 57 (1920) ("As to nonresidents, the jurisdiction [to tax] extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.").

46. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., __ U.S. __, 141 S. Ct. 1017, 1024–26 (2021) (discussing general personal jurisdiction and specific jurisdiction).

47. *See* Ault & Bradford, *supra* note 5.

for the source of the worker's income.[48] That location captured both the location of the efforts of the worker and the location of the person receiving the value generated by those efforts, the employer.[49] Thus, when a Broadway performer performs in New York, the performer's efforts are located there as is the entity receiving the value of those efforts, the theatre company. New York could tax the income from that performance, even if the performer was a resident of New Jersey.

When the physical location of the worker and the employer become separated, the value of the physical location of the worker as the proxy for the location of the income erodes.[50] That physical location might demonstrate where the worker's effort is made, but it does not necessarily show where the value of that effort is received. Therefore, by driving a wedge between the physical location of the worker and the location of the employer, remote work challenges the proxies embedded in states' existing sourcing rules.[51]

States now must ask whether the physical location of the worker is still an appropriate proxy for the source of the worker's income or whether the rules must be adapted to changing practices. In other words, states must figure out whether they believe it more appropriate to source individual income based on the physical labor of the worker or on the market for that labor.[52] Though most states continue to source individual income to the physical location of the worker,[53] some states have begun to shift to sourcing income to the location of the employer, raising the legal and policy issues that are the subject of this Article.[54]

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48. *See* Kirsch, *supra* note 7, at 1037–38 (observing that, traditionally, one could locate the source of income for personal services by simply looking to the physical location of the worker because that location represented the place where the services were performed, where the benefit of the services was received, and where the benefit of the services was utilized).

49. *See id.*

50. *See* authorities cited *supra* note 7.

51. *See* Rita de la Feria & Giorgia Maffini, *The Impact of Digitalisation on Personal Income Taxes*, BRIT. TAX REV. 154, 155 (2021) (noting the impact of remote work on tax jurisdictions).

52. *See* Kirsch, *supra* note 7, at 1037–38 (discussing those options for sourcing the income of individuals).

53. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 20.05.

54. Some states, most notably New York, have adopted this kind of approach for some time under what is referred to as the "convenience of the employer" doctrine. *See* N.Y. TAX LAW §§ 601(e)(1), 631(a)(1), 631(b)(1)(B); N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a). This doctrine holds that a worker's income is sourced to the location of the employer regardless of where the work is done unless the worker is away from that location for the convenience of the employer rather than the worker. This approach was upheld by the New York Court of Appeals. *See* Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 285 (N.Y. 2005); Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840 (N.Y. 2003).

C. *Mitigating Multiple Income Tax Burdens*

All states with individual income taxes subject individuals to tax under both the residence and source bases to some degree,[55] though they are not required to do so. As a result, individuals that cross state lines to earn income are likely to face multiple layers of tax on the same income. For example, suppose our Broadway performer is taxed on all of their income in New Jersey on a residence basis and is taxed on their wages from the theatre in New York on a source basis. The performer's wages would be subject to tax both in New Jersey and in New York. While both states have sound theoretical justifications for subjecting that income to tax, as both states are providing the performer with services,[56] this situation presents problems for the taxpayer and interstate commerce.

To address the multiple taxation of the same income,[57] the residence state will typically provide the individual with tax credits for taxes paid to other states; these tax credits reduce the amount of tax owed to the residence state.[58] In this way, the residence state yields to source states to ensure that there are not multiple layers of tax on the same income. To return to our Broadway performer, New Jersey would provide a credit against the performer's New Jersey taxes for taxes paid to New York. Though these credits may not work perfectly in practice, they largely mitigate the effects of a taxpayer's income being subject to tax on both a residence and source basis.

Tax credits are not the only means by which multiple taxation could be mitigated. Alternatively, states could decline to tax income on both a residence and a source basis.[59] If only one basis were adopted, then there would be no risk of multiple taxation. For example, if New Jersey and New York both only taxed on a source basis, then the Broadway performer's Broadway income would only be taxed in New York; if the states only taxed on a residence basis, then the income would only be taxed in New Jersey. In other words, the reason that the risk of multiple taxation occurs, requiring the solution of tax credits, is because states have opted to impose their income taxes on both residence and source bases.[60]

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55. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶¶ 20.04–.05.

56. *See* authorities cited *supra* note 42.

57. It should be noted that multiple layers of taxation on the same income is not inherently problematic, though under the dormant Commerce Clause doctrine this type of multiple taxation could be unconstitutional, as explained in section II.A.2.ii, *supra*.

58. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 20.04. A similar approach is adopted at the international level. *See* Shay et al., *supra* note 20, at 83.

59. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 569 (2015) (discussing different approaches that could be taken to mitigate multiple taxation of an individual's income).

60. *See id.*; Swain & Hellerstein, *supra* note 40, at 223–25.

D. *Changing the Rules:* New Hampshire v. Massachusetts

In response to the remote work arrangements that arose as a result of stay-at-home orders during the COVID-19 pandemic, Massachusetts was one of the states that adjusted their sourcing rules for individual income taxation,[61] disrupting the existing paradigm for source-based taxation. And this disruption is serious, with billions of dollars in tax revenue at stake and many workers affected.[62] Instead of relying on the physical location of the worker, Massachusetts effectively looked to the location of the employer to source the worker's income.[63] This change meant that individuals who had physically commuted from other states into Massachusetts to work would continue to have their income sourced to Massachusetts when they worked remotely for their Massachusetts-based employers. One of those other states from which taxpayers were commuting was New Hampshire.

New Hampshire sued Massachusetts in an effort to prevent Massachusetts from subjecting New Hampshire residents to source-based taxation under the new sourcing rule.[64] Because the new sourcing rule abandoned the traditional reliance on the worker's physical location, New Hampshire argued that Massachusetts had unconstitutionally taxed New Hampshirites in violation of the Due Process and Commerce Clauses.[65] Consequentially, in New Hampshire's view, Massachusetts had infringed on New Hampshire's sovereignty by preventing New Hampshire from controlling the amount of tax levied on its residents who remain physically in the state.[66] The Supreme Court denied New Hampshire's request for an original jurisdiction hearing, sending the case to the Massachusetts judicial system for further proceedings.[67]

New Hampshire's claims highlight the potential challenge for states determined to change their sourcing rules for individual income. Though Massachusetts was adapting to changing business practices, that change introduced a risk of multiple taxation for many individuals working for Massachusetts employers if those individuals resided in other states.[68]

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61. 830 MASS. CODE REGS. 62.5A.3 (2020).

62. *See* authorities cited *supra* notes 13–14.

63. *See* 830 MASS. CODE REGS. 62.5A.3(3) (2020).

64. *See generally* New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2021). For more detailed discussion of the case, see Kim, *supra* note 21, at 1172–85.

65. Brief for Plaintiff, Motion for Leave to File Bill of Complaint at 1–4, New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2020) (No. 22O154).

66. *Id.*

67. *New Hampshire*, 141 S. Ct. 1262.

68. Under traditional rules, the resident would have no income taxed in Massachusetts (due to not

New Hampshire, like-minded states, and commentators thus have accused Massachusetts of committing serious constitutional violations and of adopting bad policy,[69] but the remainder of this Article demonstrates that Massachusetts and states contemplating similar modernizations to their sourcing rules have sound constitutional and policy grounds for their actions.

II. A DEFERENTIAL CONSTITUTION

Despite critics' arguments to the contrary,[70] Massachusetts's change to its sourcing rules and any other changes like it are unlikely to run afoul of the Constitution. Current doctrine in the state taxation area is state-friendly, respecting state sovereignty in matters of taxation.[71] Though the jurisprudence regarding constitutional restrictions on state taxation has ebbed and flowed in the past,[72] there is little reason to expect a flow in favor of restricting states in order to protect remote workers. Indeed, the jurisprudence is no longer merely ebbing, it is in a full rescission. Simply put, the Supreme Court has interpreted the Constitution to be quite deferential to states in the context of how states tax interstate commerce and should not be expected to change course.

This section first examines the current state of the doctrine, which does not support the position that income sourcing rules based on the location of the employer are unconstitutional. This section then explains why the doctrine is very unlikely to change in a way that would support that

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being physically located there) and no income taxed in New Hampshire (due to the state not having a general individual income tax). *See* 830 MASS. CODE REGS. 62.5A.1(5) (2008). Under the new rules, the resident would have some income taxed in Massachusetts and no income taxed in New Hampshire. *See* 830 MASS. CODE REGS. 62.5A.3 (2020). The resulting increased cumulative tax liability is at the core of New Hampshire's suit.

69. *See, e.g.*, Brief for Plaintiff, Motion for Leave to File Bill of Complaint, New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2020) (No. 22O154) (challenging Massachusetts's revised sourcing rules); Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, and Iowa in Support of Plaintiff, New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2020) (No. 22O154) (same); Kim, *supra* note 21, at 1172–85 (same); Zelinsky, *supra* note 21 (same).

70. *See* sources cited *supra* note 69.

71. *See, e.g.*, South Dakota v. Wayfair, Inc., __ U.S. __, 138 S. Ct. 2080, 2096 (2018) (rejecting reliance on stare decisis when the jurisprudence prevents states from exercising their sovereign powers, specifically their tax powers, before ultimately loosening constitutional restrictions on state taxation); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 624–25 (noting that once certain minimal requirements are met, a "state 'is free to pursue its own fiscal policies, unembarrassed by the Constitution'" (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

72. *See* RICHARD D. POMP, STATE & LOCAL TAXATION 1-4–1-21 (9th ed. 2019) (describing the development of the dormant Commerce Clause doctrine for state taxation over the course of the doctrine's history); *Wayfair*, 138 S. Ct. at 2089–91 (providing an overview of the dormant Commerce Clause doctrine).

position.

A. The State of Constitutional Restrictions on State Taxation

A number of constitutional provisions could affect how states tax individuals, particularly remote workers,[73] with the most important two being the Due Process Clause and the Commerce Clause. Therefore, this section will examine the state of the doctrine under these two provisions, detailing how the doctrine demonstrates the Supreme Court's respect for state sovereignty in taxation and thus how neither provision presents serious hurdles to actions like Massachusetts's.

1. Due Process Restrictions on State Taxation

The Due Process Clause requires many things of state tax systems, but the most important to the analysis of sourcing individual income are jurisdictional requirements.[74] For a state to claim jurisdiction to tax an individual, it must have what is colloquially referred to as "nexus" with the individual.[75] As explained by the Supreme Court, this means that "[t]he Due Process Clause demands that there exist 'some definite link, some minimum connection, between a state and the person . . . it seeks to tax.'"[76] In addition to this nexus, the Due Process Clause requires that there be "a rational relationship between the tax and the 'values connected with the taxing State.'"[77] By promoting values of "'notice' or 'fair warning' as the analytic touchstone of [the] due process . . . analysis,"[78] these dual requirements are meant to ensure that the state tax does not offend "traditional notions of fair play and substantial justice."[79] Neither requirement should inhibit states' ability to source remote income to the location of the employer.

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73. *See, e.g.*, Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMPAR. L. 641, 646–47 (2006) (discussing potential constitutional challenges to tax laws in the United States).

74. *See generally* Hayes R. Holderness, *Taking Tax Due Process Seriously: The Give and Take of State Taxation*, 20 FLA. TAX REV. 371 (2017) [hereinafter *Taxing Due Process*] (fully explaining the history and theory behind the due process standards for state taxation). While the basic jurisdictional question over the individual might be seen as technically irrelevant to sourcing rules, the state would not be able to collect taxes on income sourced to the state if the state did not have jurisdiction over the taxpayer.

75. Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 7–8 (2019) [hereinafter *21st Century Tax*].

76. MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008) (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 306 (1992)).

77. *Id.*

78. *Quill*, 504 U.S. at 312.

79. *Id.* at 307 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

a. The Nexus Requirement

The Supreme Court has explained that the due process nexus analysis—the "minimum connection" inquiry—is "comparable" to that used in personal jurisdiction cases, and that due process nexus is established when the taxpayer "purposefully avails itself of the benefits of an economic market in the forum State."[80] As established in 1985's *Burger King Corp. v. Rudzewicz*,[81] a personal jurisdiction case cited by the Supreme Court in its watershed discussion of the modern due process nexus requirement,[82] parties who "'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities."[83] Due process nexus thus does not require the taxpayer to have a physical presence in the taxing state, rather the taxpayer must direct its activities towards the state.[84]

Remote workers meet the standard for due process nexus.[85] These individuals contract with employers in the taxing state to provide services in return for income, creating continuing relationships and obligations with people in the state.[86] Though perhaps unpleasant, a foreseeable

80. *Quill*, 504 U.S. at 307.

81. 471 U.S. 462 (1985).

82. *Quill*, 504 U.S. at 308.

83. *Burger King*, 471 U.S. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

84. *Quill*, 504 U.S. at 308; *see also Burger King*, 471 U.S. at 476 (denying any requirement of a person's physical presence in a state to establish that state's jurisdiction over the person).

85. *See* Swain & Hellerstein, *supra* note 40, at 221 (discussing the due process standard for taxing income based on source).

86. *See* Kim, *supra* note 21, at 1178 (recognizing that remote workers purposefully avail themselves of the taxing state by entering into employment arrangements with people in that state). Some argue that *Shaffer v. Heitner*, 433 U.S. 186 (1977), indicates that holding a position within a business is not enough to establish personal jurisdiction over a person and that therefore the fact that a remote worker is an employee of someone in the taxing state is not enough to establish due process nexus. *See* Kim, *supra* note 21, at 1177. While the mere label of employee cannot create nexus on its own, this reading of *Heitner* is too formalistic. The due process nexus analysis requires an examination of the individual's activities related to the taxing state, not the labels attached to the individual. *See Burger King*, 471 U.S. at 478–79 (rejecting formalistic or "mechanical" tests for personal jurisdiction under the Due Process Clause in favor of examining the individual's actual activities directed towards the forum state (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945))).

In *Heitner*, Delaware, the state in which jurisdiction over corporate directors was sought, was the state of corporate charter but not the principal place of business. *Heitner*, 433 U.S. at 189. In other words, the business was not present in Delaware in any meaningful way, meaning that the directors of the corporation would not have fairly expected to be hailed into Delaware because none of their activities were directed towards that state. *Id.* at 216. Had jurisdiction been sought in the principal

consequence of these activities is that the workers must pay taxes to the state on their income. Arguments that individuals who are not physically present in the state cannot purposefully avail themselves of the state do not accord with the law.[87] New Hampshirites working remotely for Massachusetts employers thus have due process nexus with Massachusetts.[88]

b. The Rational Relationship Requirement

The second due process requirement—that there be a rational relationship between the tax and the values connected to the state—seeks to establish the state's jurisdiction over the income it subjects to tax, but the requirement is not demanding.[89] The core question is "whether the state has given anything for which it can ask return."[90] Importantly, there is no strong requirement that the amount of tax be related to the amount of benefits received by the taxpayer; the tax simply must not be "out of all appropriate proportion to the business transacted by the appellant in that State" or lead to "a grossly distorted result," standards that are quite forgiving to states in practice.[91]

With respect to remote workers, a rational relationship undoubtedly

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place of business, Arizona, those minimum connections surely would have been found. *See Burger King*, 471 U.S. at 478–82 (determining that a franchisee of Burger King had minimum connections with Florida, the state of Burger King's principal place of business, because of the franchisee's relationship with and activities directed towards Burger King). Thus, remote workers, whatever their label, establish due process nexus with the state of the employer by directing their activities towards their employers.

87. *See* Kim, *supra* note 21, at 1176–77 (articulating an argument that individuals unable to travel to the taxing state are not able to purposefully avail themselves of the state).

88. Particular to the New Hampshire case, those remote workers had been paying Massachusetts income taxes for their work for Massachusetts employers in the past, further emphasizing the foreseeability of the tax consequences of continuing to work for those employers. New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2021).

89. *See* Holderness, *Taxing Due Process*, *supra* note 74, at 385–87; Swain & Hellerstein, *supra* note 40, at 219 ("[T]he court has taken a broad view of the 'benefit' principle.").

90. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940); *see also* Swain & Hellerstein, *supra* note 40, at 219 ("In general, the Supreme Court has read the Due Process Clause as tying the states' taxing power to 'benefits' and 'protections' that they confer upon taxpayers.").

91. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169–70 (1983) (observing that under the Due Process and Commerce Clauses a tax cannot be "out of all appropriate proportion to the business transacted by the appellant in that State" or lead to "a grossly distorted result" (first quoting Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 135 (1931); and then quoting Norfolk & W. Ry. Co. v. State Tax Comm'n, 390 U.S. 317, 326 (1968))); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622 (1981) ("The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are 'unreasonable' or 'unduly burdensome.'"). The Supreme Court has indicated that a deviation of "approximately 14%" would not be "out of all appropriate proportion" whereas a deviation of "more than 250%" would be. *Container Corp.*, 463 U.S. at 184.

exists between the employer state's income tax and the income generated from the employment relationship. The state provides the remote worker with employment protections and other infrastructure making it possible for the worker to work and earn income; the state has asked for something for which it can ask return.[92] As long as the tax is only applied to income from the remote work, as is universally the case for source-based taxation,[93] there are no concerns that the tax would be out of all appropriate proportion to the remote worker's activities in the state.[94]

Given the permissiveness of the due process doctrine, there should not be much controversy over the conclusion that the Due Process Clause permits state efforts to source remote income to the location of the employer.[95] However, the debate ramps up regarding the dormant Commerce Clause restrictions on state taxation.

2. *Commerce Clause Restrictions on State Taxation*

In the world of state taxation, the Commerce Clause looms large through the demands of the dormant Commerce Clause doctrine. The idea behind the dormant Commerce Clause is that the Commerce Clause in affirmatively granting Congress the power to regulate interstate commerce implicitly places some limitations on how states may regulate that commerce.[96] The Supreme Court has assumed the role of articulating those implicit limitations, with the stated goal of preventing the "economic Balkanization" of the states.[97] Even casual observers of the Supreme Court are likely to know that the dormant Commerce Clause doctrine is controversial, though it has long survived criticism.[98]

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92. *See* authorities cited *supra* note 41.

93. *See supra* section I.A.2.

94. *See Commonwealth Edison*, 453 U.S. at 622–25 (noting that the Due Process Clause does not require that the amount of tax imposed on a particular activity be reasonably related to the value of the state services provided, instead it only requires that the tax be imposed on activity with some connection to the state).

95. *Cf.* Kim, *supra* note 21, at 1193–94 (suggesting that the Due Process Clause would present a hurdle to efforts like Massachusetts's to tax remote income).

96. *See* South Dakota v. Wayfair, Inc., __ U.S. __, 138 S. Ct. 2080, 2090–91 (2018) (providing an overview of the dormant Commerce Clause doctrine).

97. *Id.* at 2089, 2091(quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)); *e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 180 (1995).

98. *See* Michael S. Knoll & Ruth Mason, *The Dormant Foreign Commerce Clause After* Wynne, 39 VA. TAX REV. 357, 392 (2020) (noting the criticisms and viability of the dormant Commerce Clause doctrine). A recent dissent by Justice Scalia regarding the dormant Commerce Clause highlights the criticism the doctrine has been subject to (and one can easily find many more opinions from Justice Scalia deriding the doctrine). *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 572–77 (2015) (Scalia, J., dissenting) (detailing his objections to the existence of and incoherence of the dormant Commerce Clause doctrine).

State taxes have the potential to affect interstate commerce and are therefore subject to dormant Commerce Clause restrictions.[99] The modern era of dormant Commerce Clause jurisprudence for state taxation begins in 1977 with the case of *Complete Auto Transit Inc. v. Brady*.[100] From that case arose the four-pronged "*Complete Auto* test" that remains the stated standard today.[101] As recently articulated, the test provides that:

> The Court will sustain a tax [against a Commerce Clause challenge] so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the States provides.[102]

Over time, case law has developed the requirements of each of the four prongs, though often in ways that make the prongs seem complementary to each other or to other state tax standards such as those under the Due Process Clause.[103] Regardless of their value independent of each other, none of the prongs should prevent states from sourcing remote income to the location of the employer, as the following subsections explain.

a. The Substantial Nexus Prong

Prior to 2018, the first prong—the substantial nexus prong—served as a major restriction on state taxation because it required that a person have a physical presence in the taxing state before the state could impose tax on the person.[104] This physical presence rule was heavily criticized and

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99. *See Wayfair*, 138 S. Ct. at 2091 (observing that the dormant Commerce Clause doctrine "animate[s] the Court's Commerce Clause precedents addressing the validity of state taxes").

100. 430 U.S. 274, 279 (1977).

101. *See Wayfair*, 138 S. Ct. at 2091.

102. *Id.*

103. *See* Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 378–81 (2020) [hereinafter *Unified*] (arguing that the *Complete Auto* test has collapsed into the regulatory dormant Commerce Clause doctrine, which only seeks out discriminatory or burdensome state actions affecting interstate commerce); Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 578 (2015) (arguing that the *Complete Auto* test incorporates not only Commerce Clause ideals but Due Process Clause ideals as well).

104. *See Wayfair*, 138 S. Ct. at 2091–92 (describing the physical presence rule for substantial nexus articulated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)). Technically, the physical presence requirement had been constitutionalized explicitly only in the case of sales and use taxes. *See Quill*, 504 U.S. at 314. The Supreme Court cabined the physical presence requirement to sales and use taxes as a result of reluctant reliance on stare decisis in 1992's *Quill* case, challenging the requirement. *Id.* at 311 ("While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue [of the physical presence standard] to arise for the first time today . . . ."); *see* John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV.

eventually upended in *South Dakota v. Wayfair*.[105] After abandoning the physical presence rule in that case, the Supreme Court declared that the substantial nexus prong would be satisfied when the taxpayer "avail[s] itself of the substantial privilege of carrying on business [sic] in that jurisdiction."[106]

While this new standard remains undeveloped by the Court—other than the Court's observation that a company's sales into the taxing state totaling $100,000 or 200 transactions in a year would satisfy it[107]—the standard reads similarly to the due process nexus standard, and many commentators believe that it should not impose significantly more restrictions on states than that due process standard.[108]

The substantial nexus standard might differ from the due process nexus standard as a result of its goals, however. As noted, the due process nexus requirement is designed to ensure that taxpayers have fair notice that they might be subject to tax in the taxing state;[109] the substantial nexus requirement is designed to ensure that interstate commerce is not overly burdened by state taxes.[110] Thus, the substantial nexus requirement is primarily concerned with the compliance burdens that interstate taxpayers

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319, 343–44 (2003) (describing a Supreme Court reluctant to retain the physical presence requirement). Therefore, many commentators believed that the physical presence requirement did not apply to other types of taxation, specifically, income taxation. *See id.* at 372 ("The central conclusion of this Article is that physical presence is not an income tax nexus requirement."). The Supreme Court implicitly confirmed this belief as it declined to hear challenges to substantial nexus standards for income taxes that did not rely on the taxpayer's physical presence. *See* Hayes R. Holderness, *Questioning* Quill, 37 VA. TAX REV. 313, 315–16 (2018).

105. __ U.S. __, 138 S. Ct. 2080 (2018); *id.* at 2092–99 (recounting the many criticisms lobbied against the physical presence rule and overturning that rule).

106. *Id.* at 2099 (quoting Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)).

107. *Id.*

108. *E.g.*, Holderness, *21st Century Tax*, *supra* note 75, at 38–44; Richard D. Pomp, Wayfair*: Its Implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 13 (2019); Adam Thimmesch, Darien Shanske & David Gamage, Wayfair: *Substantial Nexus and Undue Burden*, 89 STATE TAX NOTES 447 (2018). Indeed, even prior to the *Wayfair* decision, commentators made similar arguments. *See, e.g.*, Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 630 (2014) ("If the Due Process Clause requires certain minimum contacts with a state, the Commerce Clause does not require a greater number of contacts."); Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 188–91 (2012) [hereinafter *Illusory Promise*] (discussing "The Gratuitous Elevation of the Commerce Clause over the Due Process Clause"); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 213 (1998) ("We do not interpret the Commerce Clause to require a separate nexus more stringent than that imposed by the Due Process Clause because that is not required to further protect interstate commerce against state taxes that accord a preference to local enterprises.").

109. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

110. *See id.* ("[T]he Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.").

face from the taxing state.[111] The "substantial" connection needed is one that ensures the compliance burdens placed on the taxpayer do not prevent the interstate commerce from occurring.[112]

A remote worker should have substantial nexus with the state of the employer because the compliance burden on the remote worker is unlikely to be substantial in many cases. Where the remote worker is an employee, employer tax withholding regimes greatly reduce any compliance costs that the worker would face under a state's income tax.[113] Instead of having to calculate taxes owed and ensure that they are paid, workers' taxes are withheld from their paychecks and remitted to the state.[114] Though the worker may later need to claim a refund if too much tax is withheld, the tax compliance burden is not consequential.

Where the remote worker is an independent contractor, compliance burdens rise somewhat as compared to the employee because the employer will not withhold taxes for the independent contractor. If these burdens rose significantly, such that the remote worker would not be able to justify the cost of working in the state, then the remote worker likely would lack a substantial nexus with the state.[115] However, in the context of individual income taxation, most states conform to the federal tax law on core tax provisions,[116] reducing the complexity and thus the compliance burdens of their income tax laws for all taxpayers.[117] The independent contractor with minimal remote work for people in the taxing state and the uniquely-situated employee might avoid establishing substantial nexus, but most remote workers should have that nexus as tax compliance burdens are unlikely to render their interstate work

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111. *See* Holderness, *21st Century Tax*, *supra* note 75, at 36–38 (detailing the substantial nexus requirement's concern for the compliance burdens of state taxes); David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 497–503 (2012) (arguing that the substantial nexus requirement is concerned about the excess burden placed on interstate taxpayers subject to multiple tax compliance regimes).

112. *See* Holderness, *21st Century Tax*, *supra* note 75, at 39; Gamage & Heckman, *supra* note 111, at 503–12.

113. The federal withholding regime is established in Internal Revenue Code section 3402. This regime is mirrored by the states. *See, e.g.*, N.C. GEN. STAT. § 105-163.2(a) (adopting a similar withholding regime for income taxes).

114. *See, e.g.*, N.C. GEN. STAT. § 105-163.6.

115. Holderness, *21st Century Tax*, *supra* note 75, at 39 (arguing that substantial nexus would not be established when the compliance costs of a tax prohibit the taxpayer from benefiting from their activities in the taxing state).

116. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, at ¶ 20.02.

117. *See* Amy B. Monahan, *State Individual Income Tax Conformity in Practice: Evidence from the Tax Cuts & Jobs Act*, 11 COLUM. J. TAX L. 57, 65 (2017) (detailing the benefits to state taxpayers of state conformity to federal income tax law); Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1279–88 (2013) (similar).

unprofitable.[118]

Some argue that, as between two potential taxing states, the state with "more" substantial nexus with a taxpayer should be able to tax the taxpayer and the other should not.[119] This argument misunderstands the substantial nexus requirement, which does not compare the taxpayer's relative connections with the various states to establish rules of taxing priority.[120] Instead, the substantial nexus prong focuses on the taxing state's connections with the taxpayer without looking to other states' connections with that same taxpayer; there is no such thing as "more" or "less" substantial nexus.[121] Once substantial nexus exists, as it likely does

118. Some commentators argue that the substantial nexus standard demands more than a mere consideration of compliance burdens, at least in the case of individual income taxation. *See* Kim, *supra* note 21, at 1174–75, 1186–88 (articulating an argument that the substantial nexus requirement requires a "significant level of activity" in the taxing state); Zelinsky, *supra* note 21, at *17–18 (arguing that even after *Wayfair* the physical presence of the taxpayer should be controlling for substantial nexus purposes in the case of individual taxation). These arguments are based in part on the position that, because *Wayfair* was a case about substantial nexus in the context of sales and use taxes, it should not apply in the case of individual income taxes. *See* Kim, *supra* note 21, at 1187; Zelinsky, *supra* note 21, at *19. This is an overly narrow reading of *Wayfair*. *See* Shanske, *supra* note 7, at 958–59 (explaining the proper scope of *Wayfair* and noting that the position of New Hampshire and its amici, including Professor Zelinsky, that physical presence is required for nexus is "mistaken"). *Wayfair* overturned the physical presence requirement that, as noted, had been constitutionalized only in the case of sales and use taxes. *See* authorities cited *supra* note 104. *Wayfair*, then, is appropriately read as bringing the sales and use tax standard for substantial nexus in line with the standard for other taxes by removing the archaic physical presence requirement, implicitly confirming that the physical presence of the taxpayer is not required for any taxes. *See, e.g.*, Shanske, *supra* note 7, at 954 ("[T]he post-*Wayfair* rule dictates that any business with a substantial economic presence in the state can be forced to collect the use tax. A similar standard should, and does, govern whether a state can impose an income tax.").

119. *See* Kim, *supra* note 21, at 1188 (claiming that because New Hampshire provides more services to remote workers employed by people in Massachusetts, Massachusetts "lacks a substantial nexus" with the workers); Zelinsky, *supra* note 21, at *17 (arguing that a remote worker does not have substantial nexus with the state where the employer is located because that state does not provide the remote worker with the same type or level of benefits as the state of residence). The policy side of these arguments is responded to in section III.C, *infra*.

120. The order of priority that exists today (i.e., the priority of the source state for income taxes) results from choices states have made in order to ensure that their taxes meet the demands of the fair apportionment requirement. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 560–61 (2015) (discussing the historical development of state practices to satisfy the fair apportionment requirement). This order is not constitutionally required. *See supra* section II.A.2.ii.

121. Because the standard for substantial nexus remains vague, states may take different views as to what is required to establish the nexus, so in this way some states may adopt a less demanding standard than others. Professor Pomp observes that expansive views of tax jurisdiction (i.e., less demanding views of the substantial nexus requirement) "serve the interests of residents—not those of nonresidents." Pomp, *supra* note 21, at 20. The reason is that nonresidents are not able to vote in the taxing state, and therefore may be able to offer less resistance to undue tax burdens. When a state applies the substantial nexus standard in a way as to bring more nonresidents into its tax jurisdiction, residents have the opportunity to shift tax burdens from themselves onto those nonresidents. *Id.* This line of argument is compelling but counsels only against an overly expansive view of tax jurisdiction.

for both residence and source states in the context of remote income, both states may impose tax, subject to other constitutional restrictions.[122] Out of respect for state sovereignty, comparative analysis between the states is not part of the dormant Commerce Clause analysis; not under the substantial nexus prong and, as detailed in the following discussion, not under the other prongs.[123]

b. The Fair Apportionment Prong

The second prong of the *Complete Auto* test, requiring fair apportionment, demands that when a state taxes interstate commerce, it only tax its fair share of that commerce in order to prevent overtaxation resulting from the taxpayer's decision to engage in interstate activities.[124] The Supreme Court has never required precision in determining that share,[125] nor has it sought to prioritize one state's taxing authority over another's.[126] Instead, the Court has adopted two tests for determining whether a state's tax meets the fair apportionment requirement. First, the regime must be internally consistent, and second, it must be externally consistent.[127]

The internal consistency test takes an objective look at the state's tax system to see if it inherently subjects too much of interstate taxpayer's tax base (income, in this context) to tax.[128] The test looks for such a result by

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Nonresidents are protected from overtaxation, at least in theory, by the antidiscrimination prong of the *Complete Auto* test, because it requires residents to treat nonresidents equally to themselves. Therefore, as Pomp articulates, the votes of residents indirectly also serve the interests of nonresidents in matters of taxation. *Id.* at 19–20.

122. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981) ("The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.") (quoting Ford Motor Corp. v. Beauchamp, 308 U.S. 331, 334–35 (1939)). Due process requirements might be particularly relevant here, as source states may not tax remote workers as broadly as residence states because source states have less substantial connections with the workers. *See supra* note 45.

123. *See* Holderness, *21st Century Tax*, *supra* note 75, at 36–38 (highlighting that the dormant Commerce Clause analysis of state taxation is not comparative in nature).

124. *See* Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 184–85 ("The difficult question in this case is whether the tax is properly apportioned within the meaning of the second prong of *Complete Auto*'s test, 'the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction.'" (quoting Goldberg v. Sweet, 488 U.S. 252, 260–61 (1989))).

125. *E.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278 (1978); *see* Swain & Hellerstein, *supra* note 40, at 223.

126. *E.g.*, *Moorman*, 437 U.S. at 279–80.

127. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169–70 (1983).

128. For a detailed analysis of the economic bona fides of the internal consistency test, *see generally* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309 (2017).

determining if more than 100% of the tax base would be subject to tax across the states if every state applied the same rules as the taxing state.[129] For instance, if New York imposed income tax on both a source and residence basis without a credit mechanism, that income tax would be internally inconsistent.[130] If every state did exactly as New York, then our Broadway performer resident in New Jersey would have more than 100% of her income subject to tax—both New York, on a source basis, and New Jersey, on a residence basis, would tax the Broadway income. Add in the credit for taxes paid to source states, and the income tax becomes internally consistent;[131] the performer would no longer be subject to multiple layers of tax on the Broadway income.

It is more appropriate to view the credit mechanism not as correcting an internally inconsistent apportionment regime after-the-fact but as *establishing* an internally consistent apportionment regime.[132] Under current residence- and source-based income taxes with credits, the taxpayer's income is apportioned based on where the work is performed. The source state claims its share of the income based on the work done in the state and the resident state claims the rest by taxing all of the worker's income but crediting the amount of tax paid to the other state, which could similarly be accomplished by not including the source income in the resident state tax base to begin with.[133] In other words, the source state gets taxing priority for income earned there, and the residence state taxes the remainder. Thus, credit mechanisms and the taxing priority rules they establish are a form of internally consistent apportionment, something the

129. *See Container Corp.*, 463 U.S. at 169.

130. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 564–65 (2015).

131. *Id.* at 568; *see* Swain & Hellerstein, *supra* note 40, at 224–25. Some argue that the credit mechanism cannot correct for the alleged internal inconsistency of an income tax relying on both residence and source bases. Kim, *supra* note 21, at 1188–98. However, this view is not supported by the theory of the test or the case law. *See Wynne*, 575 U.S. at 568 ("To be sure, Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States. If it did, Maryland's tax scheme would survive the internal consistency test . . . ."). The internal consistency test must look to all relevant parts of the tax law in question to determine if it overly burdens interstate commerce, so it would be incorrect to exclude the very provision of the law—the credit—designed to protect against such undue burdens. *See id.* at 564–68 (discussing the internal consistency test and applying it by considering all of the relevant portions of the Maryland income tax scheme, including the lack of a credit for taxes paid to other states).

132. Professor Zelinsky takes an opposite view, arguing that states like Massachusetts that source income from remote work to the location of the employer are failing to engage in apportionment. *See* Zelinsky, *supra* note 21, at *19–23. However, in making his argument, Zelinsky assumes the answer by claiming that states have a "constitutional responsibility to apportion on the basis of in-state physical presence." *See id.* at *20. As this subsection demonstrates, there is no support for that claimed constitutional responsibility in the case law. Apportioning on the basis of in-state physical presence is likely to satisfy the demands of the Constitution, but it is not required by those demands.

133. *See supra* section I.A.3.

Supreme Court has confirmed in multiple cases, including most recently in the 2015 *Comptroller of Treasury of Md. v. Wynne*[134] case regarding Maryland's individual income tax regime.[135]

Returning to the remote worker controversy, sourcing individual income to the location of the employer does not present an internal consistency problem. As long as the relevant credit mechanism exists in the taxing state's income tax (or, hypothetically, the state uses only one of the residence- or source-based approach for its income tax[136]), then more than 100% of the remote worker's income would not be subject to tax if every state did the exact same thing as the taxing state.[137] Instead, residence states would uniformly credit remote workers for taxes paid to source states; there could be no multiple layers of taxation.[138]

The external consistency test demands that the tax not be "out of all appropriate proportion" to the taxpayer's activities in the state or lead to a "grossly distorted result."[139] The external consistency test has never been particularly robust, and finds its roots in the due process requirement that a tax be rationally related to the taxpayer's activities in the state.[140] As such, the taxation of income derived from remote work is unlikely to fail the external consistency test for the same reasons it is unlikely to fail the due process requirement: unless the state claims a grossly inappropriate portion of the taxpayer's income, it will pass the test.[141] When the taxing state only claims income resulting from the remote work arrangement, there is no risk of an externally inconsistent apportionment.

By narrowly focusing on whether the taxing state satisfies the internal and external consistency tests, the Supreme Court has affirmed its respect for state sovereignty in this area by deliberately avoiding

134. 575 U.S. 542 (2015).

135. *Id.* at 568.

136. *See id.* at 561, 569 (observing that historical taxes of Massachusetts and Utah which taxed only the income of residents were internally consistent and positing that Maryland could remedy its internally inconsistent tax by ceasing to tax nonresidents); Swain & Hellerstein, *supra* note 40, at 223–25.

137. *See* Shanske, *supra* note 7, at 957. For its part, Massachusetts does provide such a credit. MASS. GEN. LAWS ch. 62, § 6(a).

138. The internal consistency test is a theoretical test. In practice, the constitutional apportionment standards leave room for state-by-state differences, which has created a web of overlapping and underlapping rules that do not perfectly divide the tax base, resulting in over- and under-taxation. *See* Cara Griffeth, *The Complexities of Apportionment and the Question of Uniformity*, 56 STATE TAX NOTES 725 (2010); *State Taxation: The Role of Congress in Developing Apportionment Standards: Hearing Before the Subcomm. on Com. and Admin. L. of the H. Comm. of the Judiciary*, 111th Cong. (2010) (statement of John A. Swain).

139. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983).

140. *Id.*

141. *See supra* section II.A.1.ii.

constitutionalizing the "fairest" overall method of apportionment among the various states.[142] Instead, the Court has consistently given states "wide latitude" to adopt a particular method of apportionment where acceptable alternatives exist.[143] The Court has even indicated that the impracticality of a theoretically-sound apportionment method permits a state to use what might be viewed as a less theoretically-sound apportionment method.[144]

Given this leeway, states are not required to continue sourcing individual income using the traditional method of looking to the physical location of the employee.[145] Therefore, even when a state like Massachusetts changes its sourcing rules from established rules, arguably creating a clear risk of multiple taxation for interstate taxpayers,[146] the Court will not hold that state responsible for any double taxation that results. Instead, the Court has recognized Congress as the appropriate institutional actor to impose uniform apportionment methods on the states.[147] A risk of multiple taxation may be concerning, but arguments that the second prong requires states to adopt any particular method of apportionment,[148] fairest or not, are flawed.

c. The Antidiscrimination Prong

The third prong of the *Complete Auto* test requires that state taxes not discriminate against interstate commerce. The goal of the prong is to

142. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 568 (2015) (noting that the Court was not establishing rules of taxing priority among the states that might claim some of the taxpayer's income by declaring Maryland's approach internally inconsistent); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276 (1978) (permitting Iowa to adopt a single sales factor apportionment formula despite concerns about fairness to taxpayers because the Iowa approach significantly deviated from the accepted practice of all the other states with income taxes).

143. *Moorman*, 437 U.S. at 274.

144. For example, the Court did not require a state to apportion the value of an interstate bus service based on miles travelled due to the administrative hassle of doing so and instead permitted the state to rely on a credit mechanism approach to ensure that the service was not subject to multiple layers of tax. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 195 (1995).

145. *See Moorman*, 437 U.S. at 276–80 (holding that the dormant Commerce Clause does not prohibit states from adopting otherwise constitutional methods of taxation when those methods deviate from the prevailing methods of other states). Interestingly, the apportionment formula used by Iowa and challenged in *Moorman* looked solely to customer base to source corporate income, similar in effect to sourcing individual income to the location of the employer. *See* Swain & Hellerstein, *supra* note 40, at 247 (observing that the single-sales factor apportionment formula that passed scrutiny in *Moorman* effectively disregards labor and capital as proxies for sourcing corporate income in favor of solely relying on the customer base proxy).

146. *See* Kim, *supra* note 21, at 1191 (arguing that Massachusetts's new sourcing rules create the risk of double taxation).

147. *Moorman*, 437 U.S. at 280.

148. *See* Kim, *supra* note 21, at 1175, 1192 (articulating an argument that the fair apportionment prong requires the fairer of two apportionment methods to be adopted by the states).

protect the national marketplace by ensuring that individuals engaged in interstate commerce are not subject to higher tax burdens by a state than those engaged in intrastate commerce alone.[149] Because interstate taxpayers are often not residents of the taxing state, the lure of shifting tax burdens to them as outsiders might be strong for state policymakers;[150] in theory, the antidiscrimination prong prohibits such shifts.[151]

The antidiscrimination prong expresses itself in two ways in the case law. First, taxes that are facially discriminatory are "per se illegal."[152] Second, when a tax is not facially discriminatory, it might still fail the analysis by imposing an undue burden on interstate commerce.[153]

Facially discriminatory taxes present the easy cases. These taxes directly impose higher tax burdens on interstate taxpayers than on intrastate taxpayers. Not even a compelling local interest can overcome the harm of a facially discriminatory tax and save the tax from being unconstitutional.[154]

Taxes that are not facially discriminatory will be found unconstitutional if they are deemed to place undue burdens on interstate commerce under the "*Pike* balancing test."[155] Under the *Pike* balancing test, an undue burden on interstate commerce would exist when the burden outweighs

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149. *E.g.*, Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 549 (2015) ("Under our precedents, the dormant Commerce Clause precludes States from 'discriminat[ing] between transactions on the basis of some interstate element.' This means, among other things, that a State 'may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" (first quoting Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 322, n.12 (1977); and then quoting Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984) (citations omitted))).

150. *See* authorities cited *supra* note 121; *see also* Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 51 (2008) (observing that "the temptation to tax nonvoters is politically irresistible"); Shay et al., *supra* note 20, at 89 (describing the same temptation to tax the outsider in the international context).

151. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994) ("Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'") (alteration in original); *see also* Holderness, *21st Century Tax*, *supra* note 75, at 30 (detailing how the antidiscrimination prong protects the interests of out-of-state taxpayers).

152. *Bos. Stock Exch.*, 429 U.S. at 335–36 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)).

153. *See* South Dakota v. Wayfair, Inc., __U.S. __, 138 S. Ct. 2080, 2090–91 (2018). Generally speaking, the Supreme Court has adopted "a two-tiered approach to analyzing state economic regulation under the Commerce Clause." Brown-Forman Distillers Corp. v. N.Y. Liquor Auth., 467 U.S. 573, 578–79 (1986). When a regulatory measure "has only indirect effects on interstate commerce and regulates evenhandedly," the Court applies a balancing analysis, looking to "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* at 579 (citing *Pike*, 397 U.S. at 142).

154. *Bos. Stock Exch.*, 429 U.S. at 335–36.

155. *E.g.*, *Wayfair*, 138 S. Ct. at 2090–91; *Bos. Stock Exch.*, 429 U.S. at 336.

the local benefit from imposing the tax or when there is a less burdensome way to advance the local interest.[156] The *Pike* balancing test is famously state-friendly and, given that taxation is clearly a compelling state interest,[157] is unlikely to render a state tax provision unconstitutional as long as there is not a clear less burdensome alternative for the taxing state to achieve its goals.[158]

Returning to the remote worker controversy, sourcing individual income to the location of the employer is unlikely to fail the antidiscrimination prong. Specifically targeting remote workers for special sourcing rules would raise discrimination concerns, but if the taxing state sources the income of all workers to the location of their employer, facial discrimination against interstate commerce would not exist. This appears to be the case under the Massachusetts temporary rule, because all workers' income is sourced to the state where their employer is situated.[159]

Nevertheless, sourcing individual income to the location of the employer may impose an undue burden on interstate commerce. The rule, though facially even-handed, should in practice affect those engaged in interstate commerce more than those engaged in solely intrastate commerce. Intrastate workers will have their income sourced to the state regardless, whereas remote workers—interstate by nature—might also have their remote income sourced to their physical location by other states using traditional sourcing rules. Because of the credit mechanisms of residence states,[160] the new sourcing rule might not adversely impact remote workers, but even assuming the rule does burden those workers, the *Pike* balancing test should favor states like Massachusetts.

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156. *Pike*, 397 U.S. at 142.

157. *E.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981) ("[T]his Court has acknowledged that 'a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government . . . .'" (quoting Wash. Revenue Dep't v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 748 (1978))); *see also* Holderness, *Taxing Due Process*, *supra* note 74, at 385 (observing that the state tax power is often described in such terms as "fundamental," "essential," and "basic").

158. *See* Adam B. Thimmesch, *A Unifying Approach To Nexus Under The Dormant Commerce Clause*, 116 MICH. L. REV. ONLINE 101, 109–10 (2018) [hereinafter *Unifying Approach*] (articulating the difficulty of measuring a state's interest in imposing taxes, which would render a successful *Pike* balancing challenge difficult); Michael T. Fatale, Wayfair*, What's Fair, and Undue Burden*, 90 STATE TAX NOTES 857, 873–74 (2018) (detailing the difficulty of applying the *Pike* balancing test to tax matters). Signaling the leeway for states to maneuver *Pike* balancing, the Supreme Court has blessed state efforts to structure their tax laws "to encourage the growth and development of intrastate commerce and industry" and "[to] compete with other States for a share of interstate commerce." *Bos. Stock Exch.*, 429 U.S. at 336–37.

159. *See* 830 MASS. CODE REGS. 62.5A.3 (2020).

160. *See supra* section I.C.

First, it is not immediately obvious that a state like Massachusetts would be imposing any burden on those individuals engaged in interstate commerce above the requirement to comply with the state's tax law, which is surely not an undue burden. Physical commuters face these burdens under traditional rules, and they go unchallenged. States like Massachusetts are not the source of the burden that interstate workers face when a state adopts a sourcing rule that conflicts with other states' rules; as discussed above, the interaction of the conflicting rules is the source of the burden, therefore it is difficult to assign the burden to either state as a constitutional matter.[161]

Second, assuming a tax with modified sourcing rules like Massachusetts's is imposing a larger burden on interstate commerce than just the compliance costs associated with the tax, simply recognizing that the tax burdens interstate commerce is not enough to cause it to fail under the *Pike* balancing test.[162] The burden placed on interstate commerce by Massachusetts's revised sourcing rule is unlikely to overcome the fundamental power of the state to tax as it sees fit,[163] and there does not appear to be a less burdensome way for Massachusetts to achieve its goal of taxing income earned through activities targeting the state. As discussed, the compliance burden on remote workers generally is low,[164] and the tax burden is relative to the income earned.[165] Alternative sourcing rules would not capture the income that the state is claiming; the whole point of changing the rules is that traditional sourcing rules fail in the face of remote work.[166]

Therefore, a change in sourcing rules is unlikely to fail the antidiscrimination prong, and in Massachusetts's case, the state should not be determined to have discriminated against interstate commerce.

d. The Fairly Related Prong

The fourth and final prong of the *Complete Auto* test—that the tax be fairly related to the services provided by the state—might have imposed significant restrictions on state taxation, but this is not the direction the

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161. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 562 (2015) (declaring that "tax schemes that create disparate 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" are not unconstitutional); *see also supra* notes 142–148 and accompanying text.

162. Professor Kim articulates such an argument. *See* Kim, *supra* note 21, at 1192.

163. *See* authorities cited *supra* note 157.

164. *See supra* notes 113–117 and accompanying text.

165. *See supra* sections I.A.2, II.A.1.ii.

166. *See* authorities cited *supra* note 7.

Supreme Court took the prong in.[167] In *Commonwealth Edison v. Montana*,[168] decided shortly after the *Complete Auto* case, the Court determined that the prong was not based in the proposition that state taxes were mere payments for services received, but rather supported the idea that taxes were for broader support of the government.[169] Therefore, the Court determined that the fourth prong only required that the measure of the tax (i.e., the tax base) be related to the taxpayer's activities in the state.[170] So, in *Commonwealth Edison*, Montana's coal severance tax survived a fourth prong challenge because the tax was sufficiently related to the taxpayer's coal mining activities in the state.[171] In effect, this reading of the fourth prong closely mirrors the due process requirement that the state offer the taxpayer something for which it can ask return, as the *Commonwealth Edison* Court alluded to.[172]

Frankly put, there is no way that an income tax levied on income derived from remote work sourced to the location of the employer could fail to meet the requirements of the fourth prong. As noted, the taxing state provides the remote worker with some benefits, and the income is directly related to the activities of the remote worker connected with the taxing state.[173] Some might argue that only state services received by individuals physically present should be considered in this context,[174] but that position is not supported by the law. The conclusion that the fourth prong does not impede state efforts to source income to the location of the employer does not appear controversial.[175]

One might be tempted to view the current state of the constitutional doctrines discussed above as an ebb in favor of state sovereignty in taxation. Informed by such a view, one might argue that the doctrine is primed to flow back in favor of higher protections for interstate taxpayers,

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167. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 199 (1995) ("The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event."); *see also* Edward A. Zelinsky & Brannon P. Denning, *Debate, The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. 196, 205 (2007) (Brandon P. Denning: "Courts have heretofore been so reluctant to [apply] . . . the 'fairly related' prong of *Complete Auto* [that it] has become a dead letter.").

168. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).

169. *Id.* at 622–24.

170. *Id.* at 626–27.

171. *Id.* at 626.

172. *Id.* at 622–24.

173. *See supra* sections I.A.2, II.A.1.ii.

174. *See* Kim, *supra* note 21, at 1176 (articulating an argument that only those benefits received by individuals physically present in the state should count for purposes of the fourth prong).

175. *Id.* at 1193 (noting that Massachusetts's sourcing rules likely satisfy the fairly related prong).

specifically remote workers. However, the next section debunks this view by establishing that the doctrine has long been receding in favor of imposing less restrictions on state taxation. As a result, those advancing New Hampshire's position that the Constitution should be read to restrict states' authority to tax remote workers are fighting an upstream battle, one that they are likely to lose.

B. The Ongoing Recession of Constitutional Restrictions on State Taxation

The current state of the law being what it is, the prospects for a court finding that sourcing the income of remote workers to the location of the employer is unconstitutional are minimal. However, the dormant Commerce Clause is a judicially-created doctrine, so it has been subject to changing interpretations over time.[176] The current doctrine may not remain stable in a future challenge. Indeed, in the state taxation context, the doctrine has ebbed and flowed between prioritizing state sovereignty in matters of taxation and protecting those engaged in interstate commerce from state taxation.[177] It might be argued that the doctrine is positioned for another flow in favor of such protections.[178]

Unfortunately for proponents of such a view, the doctrine is no longer ebbing and flowing in state taxation; it is in full recession in favor of state sovereignty and has been for some time. The historical trends with the doctrine since 1977's *Complete Auto* case indicate that the Supreme Court has moved away from robustly restricting the states' ability to tax interstate commerce. 2018's *Wayfair* case confirmed this recession.[179] Even in the face of this recession, one might expect there to be some eddies remaining in which remote workers might find protection from new sourcing rules. There are not.

1. Historical Trends in Favor of State Sovereignty in Interstate Taxation

After decades of shifting doctrine, *Complete Auto*—the case from which the four-prong test discussed above originated[180]—appeared to

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176. *See* South Dakota v. Wayfair, Inc., __ U.S. __, 138 S. Ct. 2080, 2089–91 (2018) (describing the evolution of the dormant Commerce Clause doctrine in matters of state taxation).

177. *See* authorities cited *supra* note 72.

178. Given the current state of the doctrine, Professors Kim and Zelinsky might be characterized as taking this position when arguing against the ability of states to source income to the location of the employer. *See generally* Kim, *supra* note 21; Zelinsky, *supra* note 21.

179. *See* Thimmesch, *Unified*, *supra* note 103, at 381.

180. *See supra* section II.A.2.

signal just another ebb for the dormant Commerce Clause doctrine in the direction of state sovereignty.[181] That rule declared that states could not tax the privilege of engaging in interstate commerce because they had not provided that privilege, but the states could reach the economically equivalent result by renaming their tax so as not to fall on that specific privilege.[182] Literally, states would revise otherwise-inconsequential language in their tax law to turn an unconstitutional tax into a constitutional one.[183] The rule, though favorable to interstate taxpayers, was a true "trap for the unwary draftsman."[184]

As it turns out, *Complete Auto* signaled not an ebb, but the beginning of a full recession in the doctrine in favor of fewer restrictions on the states. After *Complete Auto* no case ramped up the protections under either the Due Process Clause or the dormant Commerce Clause for individuals engaged in interstate commerce. Even when taxpayers won cases against the states, those cases did not fundamentally change the demands of the doctrine so as to provide more protections to individual taxpayers. A sampling of cases illustrates this recession over time.

As noted, 1981's *Commonwealth Edison* case eviscerated whatever the fourth prong of the test might have been.[185] The take down of the potential substance of the prong was so sweeping that Justice Blackmun, the author of *Complete Auto*, penned a dissent specifically to argue for a more robust fourth prong analysis.[186] Lamenting the Court's decision, Justice Blackmun concluded that their "interpretation emasculates the fourth prong."[187]

The introduction of the internal and external consistency tests in 1983's *Container Corp. of America v. Franchise Tax Board*[188] might be viewed as restricting states' ability to tax in new ways. However, as explained, those tests are not particularly restrictive.[189] The external consistency test lacks meaningful substance, and the internal consistency test captures nothing that that the antidiscrimination prong would not. Putting to rest

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181. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288–89 (1977) (rejecting the "*Spector*" rule that prohibited states from levying taxes on the privilege of conducting interstate business).

182. *Id.* at 288.

183. *Id.* at 284–85 (describing a Virginia tax that was struck down under *Spector*, relabeled by the state to avoid application of *Spector*, and upheld under its new label).

184. *Id.* at 279.

185. *See* authorities cited *supra* note 167 (detailing the state of the fourth prong after *Commonwealth Edison*).

186. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 638 (1981) (Blackmun, J., dissenting).

187. *Id.* at 645 (Blackmun, J., dissenting).

188. 463 U.S. 159 (1983).

189. *See supra* section II.B.2.

any contention that the fair apportionment standards are restrictive on states, Professors Hellerstein and Swain note that "the Court has *never* invalidated an apportionment formula on its face on constitutional grounds."[190]

The 1992 *Quill Corp. v. North Dakota*[191] decision did prop up the physical presence rule (derived from pre-*Complete Auto* precedent[192]) under the substantial nexus prong, but in the same breath it rescinded that rule from the due process nexus requirement.[193] The *Quill* Court specifically noted that it placed the physical presence rule under the dormant Commerce Clause analysis so that Congress could change the rule if Congress so desired, a power Congress would not have had if the rule was a matter of due process.[194] Thus, the reluctant affirmation of the physical presence rule under the dormant Commerce Clause was not a flow back towards individual protections from state taxation; it was a moment of setting past precedent up for legislative override as the Court ebbed further in favor of state sovereignty under the Due Process Clause.[195]

In 2005's *American Trucking Ass'n v. Michigan Public Service Commission*,[196] the Court appeared to admit that a Michigan flat fee on certain trucking activities in the state violated the internal consistency test.[197] Even so, the Court upheld the Michigan tax, leading Professor Hellerstein to reflect that the Court's decision marked "a clear retreat from the internal consistency doctrine as explicated in earlier cases."[198] Hellerstein continued, "In effect, the Court looked the implications of the internal consistency doctrine squarely in the eye and blinked."[199]

In 2015's *Wynne* case, the Court struck down a Maryland income tax

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190. Swain & Hellerstein, *supra* note 40, at 245.

191. 504 U.S. 298 (1992).

192. *Id.* at 311–12 (discussing the origins of the physical presence rule in the 1967 *Bellas Hess* case and then relying on that decision to justify retaining the rule).

193. *Id.* at 306–08 (observing that the due process jurisprudence had "evolved substantially in the 25 years since *Bellas Hess*" before declaring that a taxpayer's physical presence was not necessary to establish due process nexus).

194. *Id.* at 318.

195. *See* Swain, *supra* note 104, at 343–44.

196. 545 U.S. 429 (2005).

197. *Id.* at 437–38.

198. Walter Hellerstein, *Is Internal Consistency Dead: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1, 26–27 (2007). The Court had stuck down a similar flat fee on trucking for violating the internal consistency test in an earlier *American Trucking Association* case. *See* American Trucking Ass'n Inc. v. Scheiner, 483 U.S. 266, 284–87 (1987). The 2005 Court distinguished the two taxes by looking to the local activities that spurred the imposition of the taxes, a distinction questioned by Professor Hellerstein. *See* Hellerstein, *supra*, at 26.

199. Hellerstein, *supra* note 198, at 26.

that failed to provide full credit for income taxes paid to other states.[200] The Court determined that the tax was discriminatory against interstate commerce by applying the internal consistency test normally used in the context of the fair apportionment prong of the *Complete Auto* test,[201] seemingly confirming that unfair apportionment is a form of discrimination against interstate commerce. Some argued that *Wynne* represented a flow towards individual protections from state taxation of interstate commerce by extending those protections to state residents,[202] but the better view is that the decision merely clarified that the constitutional requirements apply to all state taxation affecting interstate commerce, regardless of who the taxpayer is.

Finally, in 2018's *Wayfair* case, the Court put to rest the idea that the dormant Commerce Clause would flow back to further protect individuals from state taxation. In *Wayfair*, the Court abandoned the physical presence nexus rule, overturning precedent that it had reaffirmed in *Quill* twenty-six years earlier.[203] In so doing, the Court loosened one of the major restrictions on state taxation and opened the door for states to begin to require remote vendors to collect sales and use taxes on sales made into the states.[204] The Court clearly understood that it was advancing state sovereignty in matters of interstate taxation by removing itself from policing those actions under the dormant Commerce Clause.[205] Though the Court gave a hat tip to the *Pike* balancing test as a remaining mechanism for policing state taxation of interstate commerce,[206] it explicitly put the onus on Congress to ramp up protections for individuals in this context.[207]

As these examples demonstrate, rather than ebbing and flowing between prioritizing state sovereignty and individual protections in matters of interstate taxation, the dormant Commerce Clause doctrine has been in full recession in favor of state sovereignty during the modern era. Many of the prongs of the test have been interpreted in ways that overlap

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200. Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 564 (2015).

201. *Id.* at 564–68.

202. *Id.* at 583–84 (Ginsberg, J., dissenting).

203. South Dakota v. Wayfair Inc., __ U.S. __, 138 S. Ct. 2080, 2099 (2018). In dissent, Chief Justice Roberts noted the strength one would have expected stare decisis to have with respect to the physical presence rule, making the Court's move even more exceptional. *See id.* at 2102 (Roberts, C.J., dissenting).

204. *Id.* at 2099.

205. *Id.* at 2096–97.

206. *Id.* at 2091, 2099.

207. *Id.* at 2098.

with or elide into other constitutional restrictions on state taxation.[208] The substantial nexus prong and the fairly related prong have come to mirror the due process nexus and rationally related requirements.[209] The external consistency test overlaps with the due process rationally related requirement.[210] The fair apportionment prong only targets a specialized form of discrimination against interstate commerce whereby a state claims too much of the interstate taxpayer's tax base.[211]

This recession has led Professor Thimmesch to make a compelling argument that, after *Wayfair*, the *Complete Auto* test itself exists only in name.[212] As a result, the true dormant Commerce Clause analysis of state taxation now resides solely in the *Pike* balancing test.[213] In other words, after the Supreme Court washed away outdated precedent, the dormant Commerce Clause standards for taxation are no different than those for other state actions affecting interstate commerce.[214]

As a result, it is short-sighted to believe that the Supreme Court would take up calls such as New Hampshire's to restrict another state's ability to determine how to source income in a world of remote work. Even if the Court did take up the call, it should be expected to continue to affirm the recession of constitutional protections for individuals in this area, not to strike down rules that currently satisfy the minimal constitutional requirements as outlined above. Given the historical trends in this area, confirmed and continued as recently as 2018, it would be stunning for the Court to change direction and restrict a state's ability to craft its tax rules for those engaged in interstate commerce. The onus to restrict state tax authority over interstate commerce is now squarely on Congress.

2. No Eddies Protecting Remote Workers from the Recession

Despite the ongoing recession of constitutional restrictions on state taxation of interstate commerce, one might claim that protective eddies exist in the doctrine that prohibit actions such as Massachusetts's. As this

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208. *See supra* section II.A.

209. *See, e.g.*, Fatale, *supra* note 103, at 577–78 (observing the similarities between the requirements of the Due Process Clause and those of the first and fourth prongs of the *Complete Auto* test in matters of state taxation); Andrea Muse, Wayfair *Blurred Line Between Due Process and Commerce Clause, Panel Says*, TAXNOTES (Dec. 17, 2021), https://www.taxnotes.com/tax-notes-today-federal/corporate-taxation/wayfair-blurred-line-between-due-process-and-commerce-clause-panel-says/2021/12/17/7cpx5 (last visited Jan. 19, 2023) (same).

210. *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165–66, 170 (1983).

211. *See* Holderness, *supra* note 74, at 32–33.

212. *See* Thimmesch, *supra* note 103, at 378–81.

213. *Id.*

214. *Id.*

subsection explains, these eddies likely do not exist, and even if they do, they should be expected to be washed away in any Supreme Court decision on the matter as part of the ongoing recession just discussed.

The most enticing potential eddy arises from the fact that corporate taxpayers are different from individual taxpayers in an important way. Corporate taxpayers lack true physical existence, whereas individuals have such existence.[215] If this difference is constitutionally meaningful, then perhaps the case law as described—which has focused primarily on corporate taxpayers—is inapplicable to individual taxpayers, who present a different set of challenges than corporations.[216]

This eddy is illusory. Individuals may present different facts and circumstances for the analysis, but they are subject to the same standards as corporations.[217] The Supreme Court affirmed this as recently as 2015 in the *Wynne* case, which was a case about individual taxpayers in which the Court applied the traditional dormant Commerce Clause analysis found in cases involving corporations.[218] This result makes sense because the analysis concerns restrictions on states; it does not change based on who the taxpayer is, rather it focuses on how the tax affects the taxpayer and the national marketplace.[219] As discussed above, it very well may be the case that the taxation of some remote workers is unconstitutional as applied,[220] but this would not be a broad indictment of the states' tax authority over individuals. There is no general comfort to be found in this line of argument for allies of New Hampshire.

Another eddy might be found in New Hampshire's claim that Massachusetts is infringing on New Hampshire's sovereignty by extending the Massachusetts tax system outside of Massachusetts's physical borders.[221] This eddy is fleeting. Sourcing individual income

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215. *See* Kim, *supra* note 21, at 1208–09.

216. *See id.*

217. *See* Shanske, *supra* note 7, at 959 (arguing that the differences between individuals and business do not rise to a constitutionally significant level in this context).

218. *See generally* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542 (2015) (applying traditional doctrine and citing to decisions involving corporate taxpayers when considering the taxpayers' constitutional claims against Maryland's individual income tax regime).

219. *See, e.g.*, South Dakota v. Wayfair Inc., __ U.S. __, 138 S. Ct. 2080, 2089 (2018) (describing the purpose of the Commerce Clause, and therefore the dormant Commerce Clause, as "avoid[ing] the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"); *Wynne*, 575 U.S. at 567 (describing the dormant Commerce Clause analysis as focused on whether the total tax burden on interstate commerce is unconstitutional).

220. *See supra* notes 115–117 and accompanying text speculating that the compliance burdens of state taxes on some remote workers may be so high as to be unconstitutional.

221. Complaint at 1–4, New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2020) (No. 22O154).

based on the location of the employer is a constitutionally acceptable method of sourcing.[222] It does not represent extraterritorial taxation any more than taxing sales made through the internet does;[223] the income has reasonably been determined to be in the state. As such, Massachusetts is free to adopt this sourcing method even if it results in New Hampshire collecting less revenue,[224] as the Court has recognized.[225] New Hampshire has its argument backwards; if it were to win, then the sovereignty of Massachusetts to adopt its preferred method of taxation would be restricted.

Finally, it might be claimed that the digital age requires new rules for state taxation, and thus an eddy protecting remote workers must exist.[226] The digital age and the rise of remote work does put stress on outdated tax laws,[227] but the Supreme Court is unlikely to articulate expanded constitutional restrictions on state taxation in response.[228] Ironically, the protections sought here would be the result of locking in old rules, inhibiting states' ability to adapt to the digital age.[229] Contrary to that

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222. *See supra* section II.A.

223. *See Wayfair*, 138 S. Ct. at 2099 (permitting states to tax remote sales into their state).

224. New Hampshire technically claims that the affront to its sovereignty results from the fact that it is proudly a no-income-tax state, and Massachusetts's actions cause its residents to be subject to income tax. Complaint at 1–4, New Hampshire v. Massachusetts, __ U.S. __, 141 S. Ct. 1262 (2020) (No. 22O154). This claim is also specious. First, New Hampshire hardly complained that its residents were subject to income tax when they physically commuted to Massachusetts, so the fact that those residents are paying income tax cannot be the source of the problem. If New Hampshire truly wanted its residents to not have to pay income tax, it could adopt refundable tax credits to offset the Massachusetts taxes owed. In other words, Massachusetts is not the source of the problem New Hampshire faces, rather the source is the residents that chose to work for Massachusetts-based employers. Massachusetts provides those New Hampshirites with services and therefore can ask for tax in return, just as New Hampshire can.

225. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 567 (2015) ("Petitioner and the principal dissent also note that by offering residents who earn income in interstate commerce a credit against the 'state' portion of the income tax, Maryland actually receives less tax revenue from residents who earn income from interstate commerce rather than intrastate commerce. This argument is a red herring. The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer." (citation omitted)).

226. *See* Kim, *supra* note 21, at 1207–08 (observing that the world is changing and that rules must be chosen to protect remote workers).

227. *See* authorities cited *supra* note 25.

228. *See* Shanske, *supra* note 7, at 959 (stressing the importance in a post-*Wayfair* world of ensuring that "tax nexus not be entwined with an outdated understanding of where and how work happens" and that therefore physical presence should not be made into a "constitutional bright line rule" once again).

229. *See* Elkins, *supra* note 7, at 180 (arguing that, in the international taxation context, using physical presence as the primary test for tax residency is of debatable normative value in the modern world where people may have personal, economic, and social attachments in multiple jurisdictions that are not dependent on physical presence); *see generally* Kirsch, *supra* note 7 (arguing for an abandoning physical presence as the driving criterion for income sourcing rules).

approach, in *Wayfair* the Court recognized the impact of the rise of digital commerce and responded by loosening restrictions on state taxation.[230] An about-face would be completely unexpected. Rather, if remote workers are looking for protection in a digital age, the place to look is Congress and state legislatures; the constitutional doctrine is simply too deferential to the states for those workers to prevail in court.

III. LEGISLATING INCOME SOURCING RULES FOR THE AGE OF REMOTE WORK

That the Supreme Court is unlikely to restrict states' authority to source remote income to the location of the employer may be a disappointment to remote workers and their advocates. The risk of multiple taxation for these workers as the result of conflicting income sourcing rules is obvious and should be concerning.[231] Of similar concern, residence states offering their residents tax credits for income taxes on their remote work may take a bigger hit to their fisc than they would prefer, as they potentially provide more services to those remote workers than they did in the past without collecting more revenue.[232] Therefore, to address these issues, state legislatures and Congress should undertake efforts to address remote work in a more uniform manner, a proposition with which most commentators agree.[233]

Though these legislative bodies have better institutional capabilities to address these issues than the Supreme Court has, each present their own benefits and drawbacks that are not the primary focus of this Article. For instance, Congress has authority under the Commerce Clause to require the states to tax interstate commerce in particular ways.[234] However,

230. *See supra* notes 200–207 and accompanying text.

231. *See* Kim, *supra* note 21, at 1156 (noting these double taxation concerns).

232. *See id.* at 1171 (articulating this issue).

233. *See id.* at 1218–21; *see* Zelinsky, *supra* note 21, at *5; Shanske, *supra* note 7, at 964.

234. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992). *Murphy v. NCAA*, __ U.S. __, 138 S. Ct. 1461 (2018), casts some doubt on how exactly Congress can dictate the parameters of state laws. *See, e.g.*, Daniel Hemel, *Murphy's Law and Economics*, MEDIUM (May 15, 2018), https://medium.com/whatever-source-derived/murphys-law-and-economics-3c0974e21ac8 [https://perma.cc/P3AB-Y9QS] (arguing that the *Murphy* decision could drastically restrict Congress' authority to regulate state taxation of interstate commerce). However, that case should not prevent Congress from addressing matters of state taxation of interstate commerce. Core to applying *Murphy* is the question of whether the "provision at issue [is] *best read* as one that regulates private actors." *Murphy*, 138 S. Ct. at 1479 (emphasis added). Asking for the best reading of each statute allows Congress to use whatever language it prefers to achieve its goals, and a statute requiring that income be sourced in a certain manner should easily be able to be read as regulating private actors by protecting their rights to have their income sourced in that manner and thereby avoid taxation. *See* Hayes R. Holderness, *Public Law 86-272 Should Withstand Anti-Commandeering Attacks*, 93 TAX NOTES STATE 837 (2019).

Congress has proven loathe to exercise that authority in the past,[235] and probably should not be expected to act in this context absent some highly motivating circumstances.[236] State legislatures on the other hand, are poised to act, but conflict and a lack of uniformity is likely to arise if each state acts independently.[237] The New Hampshire versus Massachusetts example is illuminating and prophetic.

If those legislative bodies do act, however, there are better policy reasons in the age of remote work to adopt uniform sourcing rules that source individual income to the location of the employer than to adopt other approaches such as the traditional one. The following sections articulate those policy reasons and respond to arguments made in favor of both the traditional sourcing rules and a revised approach to apportioning individual income among residence and source states.

A. Policy Reasons Supporting Sourcing Individual Income to the Location of the Employer

Because the physical location of the worker is becoming more easily detached from the location of the employer,[238] sourcing rules should be reevaluated to ensure that they function appropriately in light of the reality of modern working arrangements.[239] As detailed in this section, such a reevaluation will uncover strong policy reasons for sourcing individual income to the location of the employer.[240]

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235. *See* David R. Agrawal & William F. Fox, *Taxing Goods and Services in a Digital Era*, 74 NAT'L TAX J. 257, 296–97 (2021) (noting an imbalance of political costs for Congress with the political benefits of passing legislation regarding the states' ability to require remote vendors to collect sales and use taxes).

236. *See* Zelinsky, *supra* note 21, at *5. As Professor Zelinsky observes, federal legislation regarding state taxation of telecommuters has been regularly introduced in Congress but has not received a committee hearing. *See id.* at *9, *27–28.

237. There are nongovernmental entities that mitigate some of the lack of uniformity by assisting the states in crafting tax rules, but those entities do not have the power to bind states. For example, the Multistate Tax Commission is an entity that represents and provides guidance to state tax authorities on a range of tax issues. *See generally About Us*, MULTISTATE TAX COMM'N, https://www.mtc.gov/the-commission/about-us/ [https://perma.cc/M7NY-68S8]. Promoting uniformity in approaches to taxation is often a major goal of the Multistate Tax Commission, so it might be expected to assist in crafting income sourcing rules for the age of remote work.

238. *See* de la Feria & Maffini, *supra* note 51, at 155.

239. *See* authorities cited *supra* note 7. Throughout this discussion, it is important to recognize that the issue is where to source income, not whether a state should be taxing on a residence or source basis. In other words, it is assumed that a source-based regime is adopted and its primacy over residence-based regimes is respected. The question is how to best source income within that source-based regime if a uniform approach is adopted.

240. Paul Oosterhuis & Amanda Parsons, *Destination-Based Income Taxation: Neither Principled Nor Practical?*, 71 TAX L. REV. 515, 520 (2018) (observing that "granting the primary right to tax

To evaluate whether sourcing rules are functioning appropriately, the goal behind such rules must be understood. Though some claim that sourcing rules and source-based taxation generally lack normative content,[241] Professor Kane demonstrates that these claims are based on the incoherence of a geographic source of income from an economic perspective, in that economic values have no inherent physical—and thus geographic—location.[242] Turning from economics to law, sourcing rules have a demonstrable goal of determining the distribution of the income tax base across jurisdictions with legitimate claims of tax jurisdiction over the income.[243] As described, state-level income taxation, whether on a residence basis or a source basis, is fundamentally dependent on the benefits theory of taxation—each state bases its tax jurisdiction in that theory.[244] Thus, reducing to this common denominator, the goal behind uniform sourcing rules is here understood to be distributing the income tax base across jurisdictions providing benefits to the taxpayer.[245]

At a high level, then, sourcing rules should source some income to the location of the employer to support the system of source-based taxation

business income to the jurisdiction to which business activity in some way relates" is justifiable both from a conceptual and historical basis); Kirsch, *supra* note 7, at 995, 1037–48 (highlighting that sourcing rules based on physical presence are becoming antiquated in the modern economy and arguing that, as a result, physical presence should no longer be the driving principle for income sourcing).

241. *See, e.g.*, Shay et al., *supra* note 20, at 139 (claiming that sourcing rules lack "inherent normative content").

242. Kane, *supra* note 20, at 323.

243. *Id.* at 323–24.

244. *See supra* section I.A–B for a more thorough discussion of the theory.

245. States acting individually are likely to have other policy goals for their sourcing rules, such as economic development through tax competition. These considerations are not particularly relevant to the discussion of what uniform sourcing rules should look like, though they are addressed below as others have raised them to argue for the retention of traditional sourcing rules. *See infra* section III.B. Other distributional goals may exist for uniform sourcing rules, but those are not the primary goals of the current system of multistate taxation in the United States. For instance, certain theories of inter-nation equity dictate that, when multiple jurisdictions have jurisdiction to tax income, the income should be sourced in a manner to redistribute resources from high-income jurisdictions to low-income jurisdictions. *See, e.g.*, Ivan Ozai, *Inter-Nation Equity Revisited*, 12 COLUM. J. TAX L. 58, 68–69 (2020) (detailing an approach to taxation based in inter-nation equity). These theories depend on moral judgements about distributive justice among jurisdictions and have been developed in the context of international taxation, where there is no governing body like Congress. *See id.* at 77. While the issue of distributive justice among the states is important, that the federal government has the power to require such redistribution likely disincentivizes any state from acting independently to advance such goals. If Congress acts to impose uniform sourcing rules for state-level individual income taxes, then the issue of redistribution of resources among the states should be seriously considered when crafting those rules. *See* Kane, *supra* note 20, at 325 (observing that source rules could operate as "a second-best method of effecting the inter-nation distribution" of resources).

the states have adopted.[246] The state of the employer provides benefits to the remote worker, a point that is not in serious contention.[247] Failing to source any income to the location of the employer would deny that state the opportunity to tax the remote worker, breaking with the benefits theory of taxation that is embedded in state taxation of interstate commerce.[248]

This conclusion does not necessarily mean that all remote income should be sourced to the location of the employer. After all, the remote worker's home state might claim the income given that the worker's labor occurs in the state and the state provides benefits enabling the worker to perform that labor.[249] At best, this observation means that the income should be apportioned across the multiple states,[250] a point taken up further in section III.C below.[251] In this section, the administrative costs of an accurate apportionment system are presumed to outweigh the benefits,[252] so a binary comparison between sourcing to the physical location of the worker and sourcing to the location of the employer follows.

If the proposition is to adopt uniform sourcing rules that source income only to the physical location of the worker or only to the location of the employer, some further normative goals must be introduced to break the tie, as each state has a valid claim to tax the income under the benefits justification. Standard normative goals for tax laws are achieving tax

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246. *See* Kane, *supra* note 20, at 353 (claiming that sourcing rules should be crafted to achieve the normative justification for source taxation); Shay et al., *supra* note 20, at 138, 154 (arguing that the broader normative values underlying a source-based taxation regime must be used to determine the content of sourcing rules). Professor Rosenzweig observes that rules for establishing residence are subject to the same criticism of lacking normative value and thus a similar approach should be taken in determining their content. Adam H. Rosenzweig, *Source as a Solution to Residence*, 17 FLA. TAX REV. 471, 487–88 (2015).

247. *See* authorities cited *supra* note 41.

248. Many commentators make a similar argument in the context of international taxation to support sourcing rules that source income to the state providing benefits supporting the production of the taxpayer's income. *E.g.*, Rosenzweig, *supra* note 246, at 487–88; Kirsch, *supra* note 7, at 1041–42; Shay et al., *supra* note 20, at 137–46.

249. *See* Mason, *supra* note 20, at 1591 ("Sourcing personal services income to the performance state is relatively uncontroversial, although prominent commentators have argued that it may be inappropriate to do so when the human capital needed to provide the services was developed in another state."); Kaufman, *supra* note 33, at 185 (observing that the benefit approach to taxation would justify any state that has provided some benefit to the taxpayer to subject the taxpayer to tax).

250. *See* Swain & Hellerstein, *supra* note 40, at 249 (making a similar observation in the case of income arising from "situs-less" property).

251. *Infra* section III.C.

252. *Cf.* Kane, *supra* note 20, at 335–38, 346–48 (articulating similar administrative restraints when analyzing sourcing rules).

equity and avoiding unnecessary administrative costs.[253] Both of these goals are best achieved by sourcing income to the location of the employer, as the following subsections demonstrate.

1. Tax Equity Among Workers

When choosing among tax policies that are equally acceptable as a legal matter, policymakers often are guided by considerations of tax equity—of ensuring that the taxes they adopt treat taxpayers fairly.[254] Simply stated, similarly-situated taxpayers should be treated the same; the trick is in determining which taxpayers are similarly situated. Relevant to this discussion regarding multistate taxation, taxpayers earning the same income should be treated as similarly situated and taxed the same regardless of whether those taxpayers engage in interstate commerce or not. Efficiency considerations and constitutional case law support this measure of equity.[255]

Considerations of tax equity in the context of multijurisdictional individual income taxation favor sourcing such income to the location of the employer instead of the physical location of the taxpayer. In solo work

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253. Many commentators include efficiency as a third traditional tax policy metric, *see, e.g.*, Kirsch, *supra* note 7, at 1043, and thus, the discussion might be expected to include an efficiency analysis of sourcing rules. Efficiency refers to the principle that the tax system should achieve its goals in the least costly way possible, taking into consideration the unintended consequences that result from the rule. However, as Professor Buchanan demonstrates, efficiency analysis adds nothing to the conceptual debate about how to tax that equity and administrability analyses do not already add. *See* Neil H. Buchanan, *The Role of Economics in Tax Scholarship*, *in* BEYOND ECONOMIC EFFICIENCY IN UNITED STATES TAX LAWS 11, 11 (David A. Brennen et al. eds., 2013) ("Unfortunately, there is no substance underneath the often impressive superstructure of efficiency analysis. This makes it not just unwise, but affirmatively misleading, to base academic analysis of taxation—in whole or in part—on attempts to measure and maximize efficiency."). The reason that Buchanan describes efficiency as an "empty concept" is that what is efficient depends on normative judgements about appropriate baselines for efficiency analysis—for example, if one values a certain line of equity that line will inform what the efficient result is.

Given this "emptiness" of the efficiency metric, this discussion does not include an efficiency analysis, at least not directly. By analyzing the equity and administrability choices that policymakers face, the efficiency of those choices is baked into the discussion. In this way, this discussion adheres to calls to deemphasize efficiency analysis in legal scholarship in favor of a more holistic view of the impact of law. *See generally* Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471 (2022) (advocating for a renewed approach to tax scholarship based on the insights of the Law and Political Economy Framework that deemphasizes, without abandoning, the role of efficiency in legal analysis).

254. *See, e.g.*, Kaufman, *supra* note 33, at 156–57 (discussing tax equity).

255. The Supreme Court has often articulated the goal of the dormant Commerce Clause doctrine as preventing "economic Balkanization" among the states by protecting the "free flow of interstate commerce." South Dakota v. Wayfair Inc., __ U.S. __, 138 S. Ct. 2080, 2089–90 (2018) (quotation omitted). Through the anti-discrimination prong of the Compete Auto test in particular, this goal has required the even-handed tax treatment of multistate workers. *See supra* section II.A.2.c.

and work with Professor Knoll, Professor Mason provides a helpful frame for considering the equitable tax treatment of workers in a multijurisdictional tax context, highlighting four primary considerations based in efficiency (i.e., in ensuring that the tax does not have unintended consequences): 1) "locational neutrality," the idea that taxes should not affect where people choose to work; 2) "leisure neutrality," the idea that workers within a particular jurisdiction should face the same tax burdens on that work so as not to distort the choice between working or not; 3) "competitive neutrality," the idea that taxes should not affect whether a resident or nonresident works a particular job; and 4) "residence neutrality," the idea that taxes should not affect where a worker chooses to reside.[256] While locational neutrality and leisure neutrality provide little guidance on the content of sourcing rules for individual income, competitive neutrality and residence neutrality both favor sourcing income to the location of the employer.

The individual income tax regimes that the states have adopted advance locational neutrality.[257] The main measure of equity here is between residents—they should be treated the same regardless of whether they earn their income through intrastate or interstate commerce. The states achieve this treatment by taxing all of their residents the same, irrespective of where they earn their income, and providing tax credits for taxes paid to other jurisdictions.[258] Therefore, workers are not incentivized to work in low-tax jurisdictions or discouraged from working in high-tax jurisdictions because their residence state tax rate will apply regardless.[259] Whether remote income is sourced to the physical location of the worker or to the location of the employer would not change the advancement of

256. *See* Ruth Mason & Michael S. Knoll, *What Is Tax Discrimination*, 121 YALE L.J. 1014, 1043–72 (2012) (discussing all the neutralities other than residence neutrality); Mason, *supra* note 20, at 1574–78 (discussing all the neutralities and referring to them, respectively, as 1) "labor export neutrality," 2) "labor import neutrality," 3) "labor ownership neutrality," and 4) "labor residence neutrality").

257. *See* Mason & Knoll, *supra* note 256, at 1043–47; Mason, *supra* note 20, at 1574–75; Swain & Hellerstein, *supra* note 40, at 216–17.

258. This may not work perfectly in practice if the residence state's tax credit for taxes paid to other states is not refundable. In such a case, workers would be discouraged from working in higher tax jurisdictions because they would not be made whole by the resident state. The New Hampshire experience with Massachusetts is a prime example of this phenomenon. New Hampshirites working in Massachusetts could be subject to cumulative zero income tax rates if only New Hampshire would provide a refundable credit for taxes paid to other states; then the state would effectively pay residents back for the taxes they paid to Massachusetts.

259. *See* Kirsch, *supra* note 7, at 1050 (describing the potential adverse effects of failing to achieve locational neutrality).

locational neutrality under current regimes;[260] the important part of the tax regime in this context is not the sourcing rules but residence-based taxation with relevant tax credits.[261]

If states wanted to fully promote leisure neutrality, ensuring that cross-border taxation does not distort individuals' choices between labor and leisure,[262] they would need to move to tax regimes that only tax on a source basis.[263] Income taxes increase the cost of earning income, and as such, marginally disincentivize people from working.[264] Recognizing this effect of income taxes, leisure neutrality advises that workers should face the same effect regardless of their residence, meaning they should face the same tax rates for income from the same source.[265] Leisure neutrality thus results when each state only taxes source income because each worker earning income in a state would be subject to the same tax rates; residence-based taxes would not achieve leisure neutrality because a residence state could tax income earned in a source state if the residence state has higher tax rates.

For example, a single taxpayer with $80,000 of income in 2022 would be subject to a marginal tax rate of 6.37% in New Jersey but a rate of only 5.85% in New York.[266] Suppose our Broadway performer earned $80,000 in 2022 from their performances. If New Jersey were to tax the performer on a residence basis and New York on a source basis, the performer would be taxed at the marginal rate of 6.37% on their Broadway income because New York would tax at 5.85%, and New Jersey would tax at 6.37% with a credit for the taxes paid to New York. The New Jersey resident would be incentivized to work less than a resident of New York who is also performing on Broadway because that New York resident would only be subject to the 5.85% rate. This situation would violate leisure neutrality. If, however, each state adopted only source-based taxation, the performer would be subject to New York's 5.85% tax rate regardless of where they reside, promoting leisure neutrality.

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260. *See, e.g.*, Shay et al., *supra* note 20, at 108 (coming to a similar conclusion regarding capital export neutrality, an analog to locational neutrality).

261. Mason & Knoll, *supra* note 256, at 1047. Conflicting sourcing rules could detract from locational neutrality if the resident state sourced income to a state that does not also source that income to it or if the resident state refused to provide a credit for taxes paid to a state it did not consider the source of the income. However, this discussion assumes that the sourcing rule adopted would be uniform.

262. Mason, *supra* note 20, at 1575–76.

263. Mason & Knoll, *supra* note 256, at 1051; Mason, *supra* note 20, at 1576.

264. Mason & Knoll, *supra* note 256, at 1047.

265. *Id.* at 1048.

266. N.J. STAT. ANN. § 54A:2-1(b)(7) (West 2020); N.Y. TAX LAW § 601(c)(1)(B)(v) (McKinney 2022).

Though leisure neutrality elevates source-based taxation, it does not offer clear prescriptions for the content of sourcing rules.[267] Any uniform sourcing rule should achieve leisure neutrality because any worker earning income at that source would be subject to the same tax rates. Return again to the Broadway example. Sourcing income to the location of the employer would ensure that all Broadway performers are subject only to New York's tax rates, achieving leisure neutrality. Sourcing income to the physical location of the worker would do the same; the residence of the worker would not change the tax rates. However, because remote work erodes the connection between the physical location of the worker and the location of the employer, remote work may appear to complicate this conclusion about leisure neutrality. But the conclusion technically holds.

In the context of remote work, sourcing income to the location of the employer intuitively does not violate leisure neutrality. Under such a rule, resident and non-resident workers would be subject to the same tax rates on income from the same employment, and thus would be faced with the same incentives to work or not. In turn, sourcing income to the physical location of the worker might appear to violate leisure neutrality because resident and non-resident workers could face different tax rates. The New York-resident IT consultant for a Broadway show would be taxed at New York rates, while the New Jersey-resident remote IT consultant would be taxed at New Jersey rates. However, leisure neutrality advises that work done in a certain location be subject to the same tax rates regardless of whether the worker is a resident or non-resident of that location. If income is sourced to the physical location of the worker, then the correct comparators are the resident remote worker and the non-resident remote worker temporarily in the state (technically, any other worker physically working in the state), both of whom would be subject to the same tax rates for the work.[268] The tax rates of the New Jersey-resident remote IT consultant would be compared to the tax rates of a Pennsylvania-resident remote IT consultant physically in New Jersey at the time of work, and leisure neutrality would not be violated.

The conclusion that leisure neutrality does not offer clear prescriptions for the content of sourcing rules for the world of remote work thus rests on a somewhat-circular technicality. Fortunately, the prescriptions of

267. *See, e.g.*, Shay et al., *supra* note 20, at 108 (coming to a similar conclusion regarding capital import neutrality, an analog to leisure neutrality, also referred to as labor import neutrality); *see also* Mason & Knoll, *supra* note 256, at 1051 (concluding that labor import neutrality requires nondiscrimination source-only taxation or worldwide residence taxation with unlimited credits).

268. The non-resident remote worker might be a worker who does remote work while on vacation in a state other than the worker's residence state.

competitive neutrality and residence neutrality confirm the intuition that sourcing rules that rely on the location of the employer are better suited for the challenges presented by remote work than sourcing rules that rely on the physical presence of the worker.

The idea behind competitive neutrality is to remove tax as a factor in competition among resident and nonresident workers for jobs.[269] The main measure of equity here is also between workers—they should be taxed the same regardless of whether they are residents or nonresidents. However, the concern is not whether residents and nonresidents face the same incentives to work or not, but rather it is whether residents and nonresidents face the same incentives to work for the same employer.[270] Competitive neutrality is achieved at a high level by ensuring that all workers are subject to the same level of taxation, meaning that states should adopt source-only tax regimes, similar to those advancing leisure neutrality.

Turning to the content of the sourcing rules under such a regime, competitive neutrality counsels consideration of where taxpayers are in competition with one another for work.[271] This inquiry is best answered by looking to where the customer base (in this context the employer seeking out the employee's services) is located.[272] When a remote worker provides personal services to an employer, other workers are prevented from targeting their economic activities to the same employer. A remote worker physically located in New Jersey working for an employer in New York does not take opportunities from fellow New Jerseyans to also perform remote work, but the worker does prevent others from targeting that same employer in New York.[273] To ensure that all workers, remote or not, are on equal footing tax-wise with respect to a job, and thus achieve competitive neutrality, income must be sourced to the location of the employer.[274]

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269. Mason & Knoll, *supra* note 256, at 1051–72; Mason, *supra* note 20, at 1577.

270. *See* Mason & Knoll, *supra* note 256, at 1051–72 (describing this neutrality benchmark in terms of matching the jobs with the most productive worker); Mason, *supra* note 20, at 1576–77.

271. *See* Mason & Knoll, *supra* note 256, at 1051–72; Mason, *supra* note 20, at 1576–77.

272. *Cf.* Mason, *supra* note 20, at 1589 (noting that "the entitlement of a source state to tax a nonresident derives from the state's connection to her income, not its connection to the taxpayer herself").

273. *See* Mason & Knoll, *supra* note 256, at 1054 (demonstrating this point with a financial investment metaphor).

274. Others have argued for the advancement of this kind of equity between residents and nonresidents in the international taxation context. *E.g.*, Kirsch, *supra* note 7, at 1049 ("Although one could argue that the U.S. and foreign [workers] are not similarly situated given their different locations, the relevant focus for U.S. tax policy purposes should be their similarity with respect to the income in question.").

To emphasize the soundness of this conclusion, consider the alternative. Sourcing income to the physical location of the employee would result in different taxation of workers' income from the same work. A remote worker physically in New Hampshire would pay no income tax on their remote work for the New York employer, whereas a remote worker physically in New Jersey could pay up to a 10.75% tax on their income from the same work.[275] Competition between those nonresidents would be drastically affected by taxes because the New Hampshirite could demand less base pay to get to the same after-tax result as the New Jerseyan, violating competitive neutrality. Even a resident New Yorker who might work the same job would face competition for the job from nonresidents in states with lower tax rates. Sourcing income to the physical location of the employee would violate the competitive neutrality principle; sourcing income to the location of the employer does not.

Finally, to promote residence neutrality, states must ensure that individuals do not have tax incentives to reside in certain locations.[276] The main measure of equity here is again between workers—they should be taxed the same regardless of whether they are residents or nonresidents. However, the concern is different from those under leisure neutrality and competitive neutrality; the concern is whether residents and nonresidents face the same incentives to physically reside in a state. The basic idea is to avoid incentivizing individuals to move to low-tax jurisdictions to earn their income.[277] Not only would such incentives create economic distortions, they might also cut against significant personal preferences of people to locate in particular jurisdictions, which could further harm overall welfare.[278] Sourcing income based on the physical location of the worker is an easy way to fail to promote residence neutrality for the reasons just discussed; remote workers would be incentivized to physically locate in low-tax states. To avoid this result and promote residence neutrality, individual income should be sourced to the location of the employer.

Promoting residence neutrality in this way will also prevent states from exacerbating socioeconomic and racial differences in taxation. Remote work has become widely available but is likely to remain unavailable for certain jobs—those deemed "essential" during the COVID-19 pandemic because they require the physical presence of the taxpayer.[279] Low-income

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275. N.J. STAT. ANN. § 54A:2-1(b)(7) (West 2020).

276. *See* Mason, *supra* note 20, at 1577–78.

277. *See id.* at 1577.

278. *See* Kirsch, *supra* note 7, at 1045.

279. *See* Selden & Berdahl, *supra* note 3, at 1624–25.

individuals and people of color disproportionately work these jobs,[280] highlighting that the ability to work remotely is not evenly distributed across workers. Retaining traditional sourcing rules would grant those with access to remote work arrangements much more freedom to pick their tax rate than those physical commuters who are more geographically tied to their jobs.[281]

While policymakers are under no obligation to adopt sourcing rules advancing competitive neutrality or residence neutrality, two points merit consideration. First, sourcing income to the location of the employer would not necessarily undermine locational neutrality or leisure neutrality goals but would advance competitive neutrality and residence neutrality goals. Sourcing income to the physical location of the worker, on the other hand, also would not undermine locational neutrality or leisure neutrality goals but would likely undermine competitive neutrality and residence neutrality goals. Thus, all else being equal, sourcing income to the location of the employer should be preferrable to ensure equity between workers.

Second, the constitutional law requirements discussed earlier favor principles of competitive neutrality and residence neutrality over principles of locational neutrality or leisure neutrality. The dormant Commerce Clause, and the antidiscrimination prong of the *Complete Auto* test in particular, are concerned with ensuring that state taxes do not disrupt interstate commerce.[282] In other words, the constitutional principles in this area seek to ensure that state taxes do not discourage people from crossing state lines, whether to work or to reside[283]—the very goals of competitive neutrality and residence neutrality. The doctrine is much less concerned with how residents are taxed or whether taxpayers are encouraged to engage in leisure or labor, the goals of locational neutrality and leisure neutrality. Therefore, policymakers should take competitive neutrality and residence neutrality seriously as they develop tax laws.

2. *Administration of Individual Income Taxation*

When crafting tax regimes, policymakers also consider how the laws

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280. *Id.*

281. *See* de la Feria & Maffini, *supra* note 51, at 156, 162 (observing that higher-income individuals are the most likely to be able to work remotely).

282. *See supra* section II.A.2 for a more detailed discussion of the dormant Commerce Clause and the *Complete Auto* test.

283. *See supra* section II.A.2; *see also* Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 901–02 (1986) (describing the constitutional right to travel among the states and covering the rights of U.S. citizens to enter and abide in the states).

will be administered to avoid imposing unnecessary costs on society. This subsection addresses three primary concerns that exist on the administrative side of sourcing rules: reducing enforcement and compliance costs, combatting tax avoidance, and mitigating transition costs. Uniform multistate tax laws should take into consideration the burden taxpayers and tax authorities might bear in determining and collecting tax due, should not enable tax avoidance if possible, and should take into account which state is best able to bear the effects of changing practices. While both the traditional approach to sourcing individual income and the revised approach raise administrative issues, sourcing individual income to the location of the employer fares better on these grounds in the world of remote work than the traditional rules do.

a. Enforcement and Compliance Concerns

With respect to the enforcement and compliance costs of income sourcing rules, the primary questions are how difficult it is for the taxing state to collect taxes and for the taxpayer to determine their tax obligations.[284] The state where the employer is located has a potentially serious advantage over other states with respect to these costs. Because the employer is located in the state, that state has jurisdiction over the employer in a way the worker's residence state might not.[285] As a result, that state can more easily extract information from the employer about the income earned by the worker and require the employer to withhold the worker's income taxes, negating the need to rely on self-reporting and payment by the worker.[286] In practice, these concerns could be mitigated by information sharing between the states and state-level withholding

284. *See* Hayes R. Holderness, *Crack Taxes and the Dangers of Insidious Regulatory Taxes*, 95 S. CAL. L. REV. 483, 512–15 (2022) (detailing administrative costs of tax enforcement).

285. Due process considerations of personal jurisdiction may limit the reach of the state of the worker's physical location to the out-of-state company.

286. *See* de la Feria & Maffini, *supra* note 51, at 162 (observing the administrative advantages associated with employer withholding regimes for personal income taxes); Kirsch, *supra* note 7, at 1052–53. Professor Kane makes a similar argument regarding labor income, but comes to the conclusion that the state of physical location of the worker should have the informational advantage because it may audit that individual more easily. *See* Kane, *supra* note 20, at 336–37. Professor Kane's argument is made in the context of international taxation where the ability of the state of employer to get accurate information on the income of the worker is more limited than in the state context, but in any event Professor Kane does not address the role of the employer in withholding taxes for the state of the employer.

regimes,[287] but without such arrangements,[288] sourcing workers' income to the state where the employer is located would ease collective enforcement and compliance costs.[289]

However, administrative difficulties in locating the employer may give one pause when considering sourcing rules that look to the location of the employer.[290] The physical location of a worker is easily identified,[291] but the location of a business entity might not be.[292] Indeed, commentators have criticized market-based sourcing regimes in the corporate income and sales and use tax areas for the complexity of determining customer location in difficult cases.[293]

In the context of remote work, however, many cases are likely to be straightforward, as the worker is contracting with and directing activities at a specific employer, making it easier to locate that specific employer than perhaps it would be to locate multiple customers.[294] Additionally, any complexity brought by sourcing income to the location of the employer would not affect those who continue to work at the location of their employer; it would only affect remote workers, limiting additional compliance and enforcement costs that would result from adopting the new sourcing rules.

However, more difficult cases can be expected and should not be downplayed, particularly as physical presence becomes less relevant to

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287. *See* Avi-Yonah, *supra* note 20, at 1337 (discussing information sharing in the international context); Shay et al., *supra* note 20, at 120–28, 132–36 (detailing withholding and information sharing arrangements in the international context as solutions to difficulties with enforcing tax laws over taxpayers the taxing state does not have jurisdiction over).

288. Some states do engage in reciprocity agreements with each other under which they withhold taxes for each other, though these agreements are very widespread in scope. *See* Kim, *supra* note 21, at 1166 (describing state reciprocity agreements).

289. *See* Avi-Yonah, *supra* note 20, at 1336 (articulating a similar justification for source-based taxation of passive income).

290. *See* Zelinsky, *supra* note 21, at *23–24 (highlighting the potential difficulties of determining the location of the employer, which might lead to a remote worker having income sourced to multiple states).

291. *See* Avi-Yonah, *supra* note 20, at 1311 (arguing for residence-based taxation of individuals instead of source-based taxation because of the administrative ease in locating residence of physical beings).

292. *See* Kim, *supra* note 21, at 1208–09.

293. *See, e.g.*, Catherine A. Battin, Maria P. Eberle & Lindsay M. LaCava, *Demystifying the Sales Factor: Market-Based Sourcing*, 72 STATE TAX NOTES 403, 403 (2014) ("The key problem faced by most service providers is determining where the market for their services is located. Depending on the state, the market may be where the benefit of the service is received by the customer, where the service is received, where the customer is located, or where the service is delivered. Those varying interpretations of the market may produce dramatically different results and create complexities and uncertainties.").

294. *See* Kirsch, *supra* note 7, at 1054–55 (making a similar observation in the context of international taxation).

employers and employees. For example, an employer might have multiple locations, and the worker might provide the employer with services at more than one location, leading to the difficult question of where exactly the employer's location is. This type of complexity is overcome in other contexts through the use of reasonable proxies for determining an entity's location,[295] and similar proxies should be used to determine the location of the employer for sourcing individual income. States might look to things like where the worker's supervisors are located, where the worker's work product is delivered, where the worker draws resources from, or where the worker's principal place of responsibility is located as proxies for the location of the employer. Such proxies should not be expected to work perfectly, but would allow for more equitable sourcing regimes in a world where the physical location of the worker is not important to the work.

On a final note, the day may come that fully digital employers who are impossible to locate geographically dominate the job market, and new approaches would be needed. Perhaps these proposed proxies would continue to work, or perhaps not. But this does not detract from the reevaluation of traditional sourcing rules proposed by this Article. This Article's central claim is that these rules must be reconsidered when circumstances change, and this claim holds today and would hold in the future. In today's world, policymakers are increasingly accepting of the administrative costs associated with market-based sourcing in the corporate income tax and sales tax contexts as these policymakers conclude that the benefits of cutting down on tax avoidance and more accurately locating corporate income and sales transactions outweigh the costs.[296] The same tradeoff can be expected to be worthwhile in the context of sourcing individual income to the location of the employer.[297]

b. Tax Avoidance Concerns

To prevent erosion of state tax bases, policymakers should strive to

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295. *See, e.g.*, 830 MASS. CODE REGS. 63.38.1(9)(d)(4)(b)(ii) (2022) (adopting proxies for sourcing sales of services in the corporate income tax context); Rosenzweig, *supra* note 246, at 479–80 (highlighting some proxies used to determine corporate presence).

296. *See* Oosterhuis & Parsons, *supra* note 240, at 540 (highlighting that, in the context of corporate income taxation, many commentators have concluded that the rise of digital commerce has made taxation using traditional sourcing rules based on physical presence too susceptible to manipulation, justifying the costs of adopting new sourcing rules).

297. *Cf.* Elkins, *supra* note 7, at 188–91 (addressing and dismissing concerns about the complexity of revising residency rules in the international tax context to better reflect the realities of the modern world). In 2015, Professor Kane presciently observed that new sourcing rules to achieve a better distribution of tax revenue could be adopted if remote work became pervasive. *See* Kane, *supra* note 20, at 337.

adopt rules that do not provide taxpayers with opportunities to avoid tax obligations.[298] As remote work becomes more available to workers and the physical location of the worker consequently becomes less important to earning income, traditional sourcing rules based on the physical location of the worker raise tax avoidance concerns because those rules may be manipulated as part of strategic tax planning for individuals.[299] In theory, an individual could physically locate anywhere, including in states that impose low individual income taxes.[300] Other states may follow, eviscerating state income tax bases, particularly given the reality that higher-income individuals are more likely to be able to change their residence than lower-income individuals (the inequities of which are discussed above[301]).[302]

Of course, sourcing income to the location of the employer could also present opportunities for tax avoidance once remote work is the norm. Employers might locate to states with low individual income taxes, thus offering their employees the opportunity to reduce the amount of income tax they pay. Anti-abuse rules might be required under either sourcing regime for extreme cases, but there should be less concern about individual income tax avoidance under a regime that sources income to the location of the employer because there are more coordination costs.

With multiple parties, there are more potential conflicts that would inhibit the successful implementation of the plan. Thus, as a general matter, less tax avoidance should be expected when sourcing to the location of the employer rather than that of the worker because of the

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298. *See* Elkins, *supra* note 7, at 177 ("[I]t is almost axiomatic that, all else being equal, a rule that is less manipulable is preferable to one that is more so.").

299. *See* Swain & Hellerstein, *supra* note 40, at 249–50 (discussing concerns about the manipulation of sourcing rules based on residence in the context of taxing the income from mobile property and business entities); Rosenzweig, *supra* note 246, at 506 (observing how past sourcing practices no longer hold in the modern economy). The incentive to move to low-tax jurisdictions is the concern under labor residence neutrality, as discussed above. *See supra* notes 276–278 and accompanying text for a more thorough discussion of these points.

300. Of course, real circumstances may prevent individuals from relocating to their preferred location. *See* David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 111–32 (cataloging various such reasons). Even so, "the tax system itself may spur the expansion of cross-border remote professional services to the extent that the system provides tax incentives for performing these activities remotely." Kirsch, *supra* note 7, at 996. Additionally, labor mobility is higher than in the past, particularly among high-income workers, *see id.* at 1045–46, and the U.S. Constitution smooths labor mobility across states by removing states' authority to restrict travel in a way that does not have an international analog, *see, e.g.*, Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 901–02 (1986) (describing the constitutional right to travel among the states). Therefore, concerns about incentives for individuals to move among the states to avoid taxation should be taken seriously.

301. *See supra* notes 279–280 and accompanying text.

302. *See* Kirsch, *supra* note 7, at 1045–46.

increased cost of coordination among workers and employers. For instance, the employer may have other incentives to locate in states that do not have low individual income taxes,[303] and the worker may prefer to work for employers in certain lines of business that are not located in low-tax states. Further, the worker would still need to physically locate in a low-tax state to avoid their remote income being subject to higher tax rates due to the residence approach to taxation.

This observation can be stated even simpler: there are more costs to tax avoidance under a regime that sources income to the location of the employer because both the employer and the worker must act. The employer must locate in a state with a low individual income tax, and the worker must seek out the work with that employer and also locate in a low-tax state. In contrast, if the physical location of the worker is used to source the worker's income, that worker can unilaterally engage in tax planning by simply locating in a low-tax state; the location and nature of the employer would not matter and would thus not serve as a counterweight to tax planning opportunities.[304]

c. Transition Concerns

A final administrative concern is what might be termed transition costs. Policymakers must consider how to best respond to the effects on state tax systems caused by the rise of remote work.[305] On the one hand, applying the traditional income sourcing rules to remote workers would shift income, and thus taxes, from traditional source states (i.e., the states where employers are located) to traditional residence states. On the other hand, when a worker is physically located in their residence state, that state may have to provide more services to the worker than it did when the worker physically commuted out of the state for work, but the residence state is not collecting more tax revenue if the remote worker's income is sourced to the location of the employer.[306] In other words, the cost of providing certain services related to the individual's physical location would shift from the traditional source state to the residence state if sourcing rules

303. *See* Oosterhuis & Parsons, *supra* note 240, at 515 (noting the abilities of multijurisdictional entities to use residence-based sourcing rules to avoid taxation).

304. *See id.* at 518 (noting that the location of the customer is typically thought to be less mobile and manipulable than the location of residence, though this immobility might not always be the case with respect to business transactions).

305. *See supra* note 7 and authorities cited.

306. *See generally* Mason, *supra* note 20 (discussing the equities of providing state benefits, specifically tax expenditures, to individuals involved in cross-border commerce).

were revised to depend on the location of the employer.[307]

Assuming individual income will continue to be apportioned under the traditional residence state credit method,[308] one state must bear these transition costs associated with the rise of remote work. Either the traditional source state will bear the costs by losing tax revenue or the residence state will bear the costs by providing more services without more revenue.[309] Between the two, the residence state is better situated to bear the additional costs, supporting a shift to sourcing income to the location of the employer.

The residence state is the better state to bear these costs because it has more potential tax bases to tap into than the traditional source state to cover the costs, as a practical and constitutional matter.[310] For instance, the residence state could tax the consumption of remote workers (more of which might be expected to occur in the state once the worker is physically working from there) through sales and use taxes. The residence state may also claim the worker's entire income for its income tax base, subject to credits for taxes paid elsewhere, allowing the residence state to increase tax rates to cover shortfalls resulting from having to provide more services to the remote workers.

In contrast, because a source state may only tax remote workers in a manner targeted to their income-producing activities in the state,[311] there are not similar opportunities for the source state to make up the tax lost if their income is no longer sourced to the state.[312] Instead, the state would have to increase taxes on its residents to cover shortfalls resulting from providing services to the remote workers.[313] Concerns that the source state would inappropriately shift tax burdens from residents to nonresidents

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307. Further empirical studies would be needed to determine the burden placed on either state by losing tax revenue or providing additional services.

308. See *supra* notes 132–135 and accompanying text for a description of the current apportionment scheme for individual income.

309. *See* Kim, *supra* note 21, at 1212.

310. *See supra* note 46 and accompanying text.

311. *See supra* note 45 and accompanying text.

312. For instance, the New York City Comptroller issued a report projecting lost sales tax revenue of approximately $111 million per year if traditional commuters into the city turned to remote work for just two days a week. SCOTT M. STRINGER, N.Y. CITY OFF. OF THE COMPTROLLER, THE IMPACT OF HYBRID WORK ON COMMUTERS AND NYC SALES TAX 7 (2021), https://comptroller.nyc.gov/wp-content/uploads/documents/The-impact-of-hybrid-work-on-commuters-and-NYC-Sales-Tax.pdf [https://perma.cc/S44J-4T3R].

313. Because of the political power of residents vis-à-vis non-residents, it might be argued that it would be more appropriate to cabin state tax bases to residents alone. *See* Pomp, *supra* note 21, at 20 (alluding to such concerns). However, such an approach would run counter to the accepted rational for source-state taxation: that the source state is providing some services or benefits for which it can ask return. *See* authorities cited *supra* note 41.

under the revised sourcing rules are ill-founded due to the protections of the antidiscrimination prong of the *Complete Auto* test and the limited scope of taxation allowed under source-based regimes.[314] To meaningfully shift tax burdens in this way, the source state would have to increase income tax rates on nonresidents (which it cannot do without also increasing the tax rates on residents[315]) or increase the relative percentage of nonresident to resident taxpayers (which would be difficult to achieve in practice; even a shift to taxing only on the basis of source would likely still capture most residents). Thus, the relative inflexibility of source states to tax remote workers for the benefits provided to them counsels in favor of sourcing individual income to the location of the employer.

B. The Flaws in Additional Arguments for Sourcing Income to the Physical Location of the Worker

Some commentators argue that individual income in a world of remote work should continue to be sourced to the state of the physical location of the worker for reasons not fully captured in the discussion above.[316] This subsection responds to those arguments, demonstrating that they are flawed. As noted above, the state of the worker's physical location certainly has jurisdiction to tax the income under the benefits justification.[317] The question presented is whether that state should have exclusive jurisdiction to tax individual income, and remote income in particular, by adopting uniform sourcing rules based on the physical location of the worker.

It is argued that sourcing income to the state where the worker is physically located should be the preferred approach because that state provides the worker with the most benefits as a result of the worker's physical presence there.[318] This argument fails for a number of reasons. First, the benefits justification for income taxation offers a fundamental

314. See *supra* notes 150–151 for a discussion of these concerns.

315. *See* Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 335–36 (1977) (discussing the constitutional prohibition against taxes that discriminate against interstate actors vis-à-vis intrastate actors).

316. Professor Kim posits that the best justification for the recently adopted rules sourcing the income of remote workers to the location of the employer is that the rules are temporary. *See* Kim, *supra* note 21, at 1204–05. Kim argues that because remote workers might be expected to physically return to the locations of their employers after the pandemic ends, then temporary rules reflect a practical understanding of the results of the unexpected COVID-19 crisis. *Id.* at 1202–04. While such practical reasoning might help to justify new sourcing rules such as Massachusetts's issued during the pandemic, sourcing income to the location of the employer has much stronger justifications, as explored in the previous section.

317. *Supra* section I.A.

318. *See* Kim, *supra* note 21, at 1215–16.

justification to impose an income tax, but it does not offer strong guidance for determining the appropriate amount of tax.[319] In other words, the benefits justification does not justify a comparative approach to determine ability to tax; any state that provides services to an individual has tax jurisdiction over them.[320] Other justifications, such as ability-to-pay, guide policymakers in determining the appropriate amount of tax to levy.[321] Therefore, even if the state where the remote worker is physically located provides that worker with more benefits than the state of the employer's location,[322] that fact would not require all income to be sourced to the state any more than the benefits justification would require all income from physical commuters to be sourced to their state of residence over the state of the location of their employer. In either case, the state of residence provides some benefits to the worker, yet that fact is not a reason to deny the state of the employer a claim over the income related to that employment.[323]

Second, relying on services related to a person's physical presence as the rationale for sourcing income solely to the physical location of the worker depends on the assumption that only individuals with physical presence in a state receive meaningful benefits from the state, an assumption not supported in reality.[324] Source states are justified in levying income taxes on source income because they provide services that allow taxpayers to generate value, such as legal infrastructure. Just as states that provide legal protections for intangible property are justified in sourcing income from that property to the state,[325] states that provide legal protections for workers are also justified in sourcing income from that

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319. *See* Kaufman, *supra* note 33, at 158 ("A decision to implement a tax based on benefit theory does not mandate the selection of a specific tax base or a particular rate structure.").

320. Rosenzweig, *supra* note 246, at 480 (highlighting that the benefits justification prescribes who the state may tax, but offers little useful guidance on the composition of the tax base (i.e., how much a person should be taxed), in contrast to the ability to pay justification, which prescribes the composition of the tax base but provides little guidance on who may be taxed). *Cf.* Swain & Hellerstein, *supra* note 40, at 221 (observing that the Due Process Clause, which relies on the benefits principle to establish tax jurisdiction, does not forbid double taxation when multiple states have tax jurisdiction).

321. *See* Mason, *supra* note 20, at 1585–86 (observing that the benefits justification "does not accord with modern understandings of income taxation" and that the ability to pay justification "generally dominates modern equity discussions"); Rosenzweig, *supra* note 246, at 480 (highlighting that the ability to pay justification prescribes what, but not who the state can tax).

322. Professors Agrawal and Fox challenge this assumption in the case of sales and use taxes. *See* Agrawal & Fox, *supra* note 235, at 259 (noting that destination-based taxation in the sales and use tax context is more likely to reflect the provision of state services).

323. *See* authorities cited *supra* note 249.

324. *See* authorities cited *supra* note 41 and accompanying text.

325. *See* Oosterhuis & Parsons, *supra* note 240, at 520–24 (discussing the sourcing rules for income derived from intangible property).

employment to the state.[326] Those states should not be denied the opportunity to tax that income because the individual receives more services dependent on their physical presence in the state where they are physically present.

In related lines of argument, Professor Kim claims that the consent and social obligation theories of tax jurisdiction support sourcing income solely to the physical location of the worker.[327] As with the benefits theory of tax jurisdiction, these other theories admittedly support sourcing income to the physical location of the worker, but they also support sourcing income to the location of the employer. These theories are not designed to establish rules of taxing priority between conflicting jurisdictions; an individual does not avoid tax in one jurisdiction because the individual has consented to being taxed in another or has social connections in another. At best, these theories support both states having a right to tax the remote worker who consents to tax and has social obligations in the residence state by physically being there, and who consents to tax and has social obligations in the state where the employer is located by targeting their economic activities at that state.[328]

Professor Kim also argues that the Tiebout model supports sourcing income to the physical location of the worker.[329] The Tiebout model is a highly theoretical economic model that suggests that people's preferences regarding the optimal amount of public services can be determined where there are low costs to moving among local jurisdictions providing different levels of services at different costs (i.e., levels of tax).[330] The core idea driving the model is that uninhibited people will locate in a jurisdiction with their preferred balance of services and taxes, thereby honestly demonstrating their preferences for public goods.[331] In short, to understand what people really want from government, watch what they do, not what they say.[332]

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326. *See* Kaufman, *supra* note 33, at 169 (observing that under a benefits-based system of taxation, the right to tax follows the income, not the taxpayer, so the source state's claim to tax jurisdiction is dependent on the services it provides in order for the income to be generated, not necessarily on services it provides to the taxpayer itself).

327. *See* Kim, *supra* note 21, at 1213–18.

328. *Cf.* Elkins, *supra* note 7, at 180–81 (offering critiques of such theories when based solely on physical presence, demonstrating that they could also justify taxation in the absence of physical presence).

329. *See* Kim, *supra* note 21, at 1210–12.

330. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1954).

331. *Id.* at 420.

332. People might be incentivized to lie about their preferred levels of public services and taxes

Professor Kim claims that the Tiebout model supports sourcing income to the physical location of the worker because it is that locality in which the worker has decided to live, and denying that location the primary right to tax the income would disrupt the balance of services and taxation that the person has opted into.[333] However, the Tiebout model cannot be extended far enough to support this claim.

First, the model assumes away the possibility of cross-border income and taxation.[334] However, even on relaxing that assumption, the model has little to say about the source of revenue for the chosen locality; the only important factor is that the people choosing to locate there are all subject to the same balance of taxes and local services.[335] The model thus would not require that the locality have a right to a particular tax base or even that the locality be the one subjecting the person to tax; to claim that the locality of residence must have the primary right to tax individual income to achieve the right balance of local services and taxation assumes the answer.

In addition, the model does not require that a locality provide the same balance of taxation and services to a person ad infinitum once the person locates there; the model fully anticipates that people would move when that balance changes.[336] Thus, there is no need under the model to preserve a locality's ability to provide the same services indefinitely and disruptions to that locality's offerings are not problematic. The model assumes that people are highly mobile and that there are many localities with different offerings for people to choose from, so when one locality no longer accurately reflects the person's preferences, the person is expected to move. Localities are not expected to remain static in their offerings.[337]

Finally, the model explicitly assumes away the need for people to be employed,[338] which could profoundly affect their preferred localities and their ability to move freely. An individual may prefer to live in Utah rather than California when they can live off of dividend income, but that calculus could change if they need a job with a Silicon Valley firm. The rise of remote work may permit that individual to remain physically in Utah if the person is willing to bear the costs of working for a California-

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because they could free-ride on other taxpayers if they believe that the services will be provided to them regardless of whether they pay taxes. *See id.* at 417.

333. *See* Kim, *supra* note 21, at 1211–12.

334. *See* Tiebout, *supra* note 330, at 419.

335. *Id.* at 418.

336. *Id.* at 419–20.

337. *Id.* at 420.

338. *Id.* at 419.

based employer—costs that very well may include owing taxes to California.[339] The Tiebout model simply does not provide any conclusion about how to allocate taxing rights among localities, particularly as its assumptions are relaxed and the inputs become more realistic.[340]

That said, Professor Kim's core claim remains regardless of whether the Tiebout model supports it—individual income should be sourced to the physical location of the worker because denying that location the primary right to tax the income would disrupt the balance of services and taxation that the person has opted into by locating in that locality. The problem with this claim, as detailed above, is that it ignores the balance of services and taxation that the person has opted into by targeting activities towards the location of the employer.[341] Therefore, Professor Kim's argument does not support sourcing income to the physical location of the worker to the exclusion of sourcing income to the location of the employer.

Finally, Professor Kim argues that sourcing income to the physical location of the worker will allow for "economic dynamism," and thus should be supported.[342] She argues that remote work opportunities permit individuals to move from traditional metropolitan areas to more rural jurisdictions without sacrificing employment opportunities.[343] Allowing those rural jurisdictions to tax the income of the remote worker would increase their tax bases, stimulating development in those areas.[344]

This conclusion may be true, and economic dynamism may be a valuable policy goal,[345] but these increased economic opportunities for rural areas would come at the expense of the former hubs of physical employment. It would also potentially come at the expense of low-income workers and workers of color who may be capable of engaging in remote work but face systemic barriers to doing so.[346] It is not clear that this

339. Because of the system of residence state tax credits for taxes paid to source states currently in existence, it is also not necessarily clear that the individual locating in Utah would be subject to different considerations under the Tiebout Model by paying taxes to California. If the individual is subject to the same cumulative tax burdens as other Utahans, then the individual should be expressing their preferences in the same manner.

340. *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1611 (2000) (observing that when the assumptions underlying the Tiebout Model are relaxed, the analysis becomes less accurate).

341. Professor Shanske offers a much more refined articulation of this position by detailing the agglomeration effects of localities that draw people to live near, and direct their activities towards, those locations. *See* Shanske, *supra* note 7, at 951–54.

342. *See* Kim, *supra* note 21, at 1212.

343. *Id.*

344. *Id.*

345. *See* authorities cited *supra* note 245.

346. *See supra* notes 279–280 and accompanying text.

tradeoff would be the most beneficial, and this sort of redistribution based on economic development goals could cut either way in the debate over sourcing remote income. More empirical work is likely needed to prove either case. Finally, economic dynamism might also be achieved by more employers locating to underdeveloped areas, as might be expected to occur under new sourcing rules,[347] so it is unclear that retaining the traditional sourcing rules would be the only means of achieving these goals in any event.

On the whole, these arguments do not support sourcing individual income exclusively to the physical location of the worker, but they do offer support for sourcing some income to that location. Though the above discussion has focused on a binary approach to sourcing individual income, the next section addresses a possible alternative approach of adopting sourcing rules that apportion the income among multiple states.

C. Formulary Apportionment of Remote Income

Apportioning individual income among the states by formula could present a potential middle ground in a world of remote work. Under such formulary apportionment, some set of proxies would be used to divide remote workers' income among the state where the remote worker is physically located and the state where the employer is located.[348] This method of apportionment would be better than continuing to rely on traditional sourcing rules alone but would not fully realize the policy advantages of shifting to sourcing rules based solely on the location of the employer.

Formulary apportionment has been a staple of state taxation of corporate income.[349] Corporations being legal fictions, proxies are used to approximate where their income is. Corporate income is produced through the efforts of labor and capital, and a customer is needed to realize the income. The states thus have used corporate payroll, property, and sales as measures to assign the corporation's income to each state.[350] For example, if a corporation had payroll of $1,000,000, $500,000 of which was paid to employees in New Jersey, $1,000,000 of capital, $500,000 of which was also in New Jersey, and sales of $2,000,000, $500,000 of which

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347. *See supra* section III.A.2.b.

348. Individuals who physically commute would presumably not be affected by such an apportionment regime because the state of their physical location and the state of their employer's location would be the same.

349. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 8.06.

350. *See id*. As the national economy has shifted from a goods-based one to a services-based one, states have shifted their apportionment methods to focus more on the sales factor, typically by double-weighting it or considering it solely. *Id.*

were made to customers in New Jersey, New Jersey might claim 45% of the corporation's income for its tax base in New Jersey.[351]

Formulary apportionment has not been a staple of individual income taxation, likely because there was historically no need to apportion most individuals' income in this way. The individual is a real being, and the labor and customer locations for the individual's work were usually in the same place.[352] Apportionment of individual income has thus instead been accomplished through credit mechanisms establishing ordering rules for taxing priority, as discussed.[353]

Looking forward, formulary apportionment for individual income is likely to remain illusory; instead, the resident credit mechanism form of apportionment should be expected to continue. Unlike in the corporate context, there are not clearly administrable proxies for formulary apportionment of individual income. One can look through the fictional corporate entity to see where the parts of the entity are, such as labor, capital, and sales. Individuals cannot be looked through in the same way. One could stipulate that in the world of remote work, the labor of the individual and the sales of the individual represent the two factors that would comprise an apportionment formula, but it is not clear how one would value those different amounts. There is no separate payroll or sales figures for individuals; there is simply the income generated. Therefore, at best, a formulary approach to apportioning remote income should be expected to arbitrarily split the income evenly among the states connected with the remote work.[354]

Such a rough approximation, while likely constitutional,[355] would not be an upgrade over the current system of apportioning individual income, which sources income based on one criterion alone. For the reasons discussed above, sourcing individual income to the physical location of the worker fails to advance equity and administrative goals that sourcing the income to the location of the employer advances.[356] While not a

351. Evenly weighting the three factors, the apportionment formula would reach 45% by comparing the factors in New Jersey to those in total: (($500,000/$1,000,000 in payroll) + ($500,000/$1,000,000 in property) + ($500,000/$2,000,000 in sales)) / 3 = 0.45. Alternatively, if New Jersey adopted sales factor only apportionment, it would claim only 25% of the corporation's income as its tax base: $500,000 / $2,000,000 = 0.25.

352. *Id.*; *see* Kirsch, *supra* note 7, at 1037–38.

353. See *supra* notes 132–135 and accompanying text for a description of the current apportionment scheme for individual income.

354. *See* Kirsch, *supra* note 7, at 1024 (describing such a split as arbitrary).

355. This form of apportionment would be internally consistent and likely would be externally consistent, meaning it would survive the fair apportionment prong of the *Complete Auto* test. *See supra* section II.A.2.b.

356. *See supra* section III.B.

completely accurate sourcing of income given that the state of physical location of the worker does provide the worker with some benefits related to the work, trading this inaccuracy for another is ill-advised considering the policy gains realized from sourcing the income solely to the location of the employer and considering that the state of residence has many options to make up any potential shortfalls in revenue.

That said, apportionment of income among the states connected to the work the income is derived from is not inherently objectionable and may be the preferred approach from a uniformity standpoint because it would represent more of a compromise between states where remote workers are physically located and the states where employers are located.[357] Adopting such apportionment at least recognizes the need to source income to the state where the employer is located, and as such addresses a flaw of the traditional income sourcing rules considering only the physical location of the work. That physical location no longer accurately reflects where the values generated by the individual exist and should not remain the standard for sourcing individual income.[358]

CONCLUSION

Whenever new technologies or business practices develop, state tax systems must adapt or risk becoming obsolete and inequitable. The accelerated rise of remote work spurred by the COVID-19 pandemic challenges states to modernize their individual income tax regimes, particularly their rules for sourcing individual income in a multistate context. Traditional rules that depend on the physical location of the worker are quickly becoming antiquated as that physical location has less relevance to the worker's ability to earn income. In contrast, rules that source income to the location of the employer are sounder as a policy matter and face no serious legal hurdles under the deferential state of the constitutional doctrine. As the nature of work evolves, the tax law must as well; the states cannot afford to fail this homework assignment problem.

357. The widely-adopted, three-factor payroll, property, and sales apportionment formula used in the corporate income tax area was itself a compromise between production states where labor and capital were situated and market states where sales occurred. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 6, ¶ 8.06.

358. *See* authorities cited *supra* note 7 and accompanying text.