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Taking Tax Due Process Seriously: The Give and Take of State Taxation

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TAKING TAX DUE PROCESS SERIOUSLY: THE GIVE AND TAKE OF STATE TAXATION

by

*Hayes R. Holderness**

ABSTRACT

As the Internet has increased the ease and amount of interstate transactions, the states have struggled to require "remote vendors"—vendors without a physical presence in the taxing state—to collect or pay taxes. The states are attempting to overcome these struggles by lowering Commerce Clause limitations on their jurisdiction to tax, but meaningful limitations on such jurisdiction imposed by the Due Process Clause await the states. The Due Process Clause requires that state actions be fundamentally fair, and to meet this standard a state must provide a person with a benefit and the person must indicate acceptance of that benefit before the state can require the person to collect or pay taxes. These requirements limit the states' jurisdiction to tax certain remote vendors; thus, the states must take the Due Process Clause seriously if they wish to fully solve their remote vendor issues.

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"One of the best things about buying through Wayfair is that we do not have to charge sales tax, with a few notable exceptions . . . ."[1]

I. INTRODUCTION

Only the most extreme Luddite is likely to be unaware that sales taxes are absent on many online purchases like those made from Wayfair, but many consumers may not have considered why this absence is—or should be—so. Many more consumers may be unaware that when they do not pay sales taxes on their online purchases they may owe use taxes to their home state instead.[2]

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1. *Ordering Information*, WAYFAIR LLC, http://www.wayfair.com/customerservice/ordering_info.php (last visited Apr. 1, 2017). Those "notable exceptions" cover "orders shipping to Kentucky, Massachusetts, New York, Utah, California, and all Canadian provinces . . . (however, in Massachusetts, sales tax does not apply to purchases of gun safes and shoes)." *Id.*

2. A use tax is a complementary tax to a sales tax. RICHARD D. POMP, STATE & LOCAL TAXATION 6-39 (8th ed. 2015) (describing the role of use taxes). If sales tax does not apply to a consumer's purchase at the time of sale—as might occur

According to a recent study, the lack of sales taxes and nonpayment of use taxes on online purchases resulted in the non-collection of $11.4 billion in sales and use tax revenues in 2012.[3] Not surprisingly, the states would like to close this sales and use tax gap, primarily by requiring "remote vendors"—vendors with no physical presence in the taxing state, like Wayfair in many states—to collect and remit use taxes owed by their residents on goods sold by the remote vendors.[4] Not only that, many states would also like to subject

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when a good is purchased over the Internet, then the consumer is typically legally obligated to pay a use tax when she first uses the purchased property in the state. *Id.* Compliance with such use tax obligations is dismal. *See* authorities cited *infra* note 123.

3. *See* Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Sales Tax Revenue Losses from E-Commerce*, 52 ST. TAX NOTES 537 (May 18, 2009) [hereinafter Bruce et al., *Losses*]. The uncollected amount represented 3.8% of total sales tax liabilities for 2012. Projected revenue loses for individual states can be found in Table 5 of the study. The researchers expect that such revenue losses "will likely continue to grow rapidly, at least for the next several years." Donald Bruce, William F. Fox & LeAnn Luna, *E-tailer Sales Tax Nexus and State Tax Policies*, 68 NAT'L TAX J. 735, 736 (2015) [hereinafter Bruce et al., *E-tailer*]. However, some have questioned the accuracy of this estimate. *See* Noah Aldonas, *DOR Disputes E-Commerce Sales Tax Loss Estimates*, 65 ST. TAX NOTES 576 (Aug. 21, 2012); Billy Hamilton, *Fox and Friends: The Rest of the Story on E-Commerce Tax Loss Estimates*, 68 ST. TAX NOTES 535 (May 13, 2013); Joseph Henchman, *The Marketplace Fairness Act: A Primer* (Tax Found. Background Paper No. 69, 2014), http://www.taxfoundation.org/article/marketplace-fairness-act-primer. Sales and use taxes made up a substantial portion—31.3% in 2014—of total state tax revenues, second only to property taxes. *2014 Annual Survey of State Government Tax Collections*, U.S. CENSUS BUREAU (2015), https://www.census.gov/govs/statetax/historical_data_2014.html.

4. Under Supreme Court precedent, a state cannot apply a sales tax to a sale made outside of the state. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944) (considering whether Arkansas could impose sales tax on property sold to an Arkansas resident in Tennessee and observing that "[w]e would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."). However, the state can apply a use tax to property sold outside of the state but used in the state. *See* Gen. Trading Co. v. State Tax Comm'n, 322 U.S. 335, 338 (1944).

remote vendors to income tax[5] based on their sales to the states' residents. Unfortunately for the states' aspirations, the U.S. Constitution—as interpreted by the Supreme Court—stands in their way.

Many commentators argue that the states could overcome their constitutional hurdles if only Congress or the Supreme Court would remove certain Commerce Clause limitations on the states' jurisdiction to tax.[6] This argument is undoubtedly correct in the case of many remote vendors but, by

5. "Income tax" is used in this Article as an umbrella term covering direct taxes on a business's income.

6. *See, e.g.*, Christina R. Edson, Quill*'s Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 TAX LAW. 893, 897–905 (1996); Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565 (2015); Megan E. Groves, *Tolling the Information Superhighway: State Sales and Use Taxation of Electronic Commerce*, 13 HARV. J. L. & TECH. 619, 624–28 (2000); Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 631–44 (2014); Paul J. Hartman, *Collection of the Use Tax on Out-of-State Mail-Order Sales*, 39 VAND. L. REV. 993, 1009–11 (1986); Walter Hellerstein, *Deconstructing the Debate over State Taxation of Electronic Commerce*, 13 HARV. J. L. & TECH. 549, 563–65 (2000) [hereinafter Hellerstein, *Deconstructing*]; Walter Hellerstein, *State Taxation of Electronic Commerce*, 52 TAX L. REV. 425, 450–56 (1997) [hereinafter Hellerstein, *Electronic Commerce*]; Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109, 120–21 (2005); Catherine V. Lane, National Bellas Hess, Inc.*: Obsolescent Precedent or Good Law After* Quill Corp. v. North Dakota*?*, 49 WASH. & LEE L. REV. 1183, 1199–1217 (1992); Sandra B. McCray, *Overturning* Bellas Hess*: Due Process Considerations*, 1985 BYU L. REV. 265 (1985); Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269, 323–25 (1997); Paull Mines, *Commentary: Conversing With Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 TAX L. REV. 581, 613–16 (1997); John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 356–57 (2004); Natasha Varyani, *Taxing Electronic Commerce: The Efforts of Sales and Use Tax to Evolve with Technology*, 39 OKLA. CITY U. L. REV. 151, 157–59 (2014); Anna M. Hoti, Comment, *Finishing What* Quill *Started: The Transactional Nexus Test for State Use Tax Collection*, 59 ALB. L. REV. 1449, 1453–61 (1996); Mary Benton & Clark Calhoun, *Has the Due Process Clause Gotten Its Groove Back?*, 64 ST. TAX NOTES 721 (Jun. 4, 2012); Paul H. Frankel, Craig B. Fields, & Richard C. Call, *The Due Process Clause as a Bar to State Tax Nexus*, 66 ST. TAX NOTES 343 (Oct. 29, 2012); Stephanie Anne Lipinski Galland, *Preliminary Thoughts on Nexus: Is There a New Frontier?*, 40 ST. TAX NOTES 859 (Jun. 12, 2006).

failing to fully consider the limitations imposed by the Due Process Clause[7] on states' jurisdiction to tax, is wrong in the case of others.

When a state has the ability to require a person to collect or pay a tax, the state has what is termed "enforcement jurisdiction" over the person.[8] Understanding the requirements of the Due Process Clause for enforcement jurisdiction is critical to understanding when a state may require a remote vendor to collect and remit a use tax or pay an income tax. However, existing analyses of enforcement jurisdiction tend to bypass one of the Due Process Clause's requirements for such jurisdiction over a person—that a state give the person something for which it can ask return[9]—in favor of focusing on the person's activities directed towards the state or on administrative solutions to the states' jurisdictional issues.[10]

This Article explores the something-for-which-it-can-ask-return requirement and its relationship to other Due Process Clause requirements for enforcement jurisdiction, arguing that a transactional theory of enforcement jurisdiction underlies the due process jurisprudence in this area. This theory requires both the state and the person it wishes to tax to do something before the state has enforcement jurisdiction over the person—the state must provide the person with some benefit[11] and the person has to direct gain-seeking activities towards the state, thereby indicating acceptance of the state-provided

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7. "Due Process Clause" refers to the Due Process Clause of the Fourteenth Amendment, unless otherwise noted.

8. Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 3 (2003); *accord* Arthur R. Rosen & Marc D. Bernstein, *State Taxation of Corporations: The Evolving Danger of Attributional Nexus*, 41 TAX EXECUTIVE 533, 534 (1989) ("Viewing the Commerce and Due Process requirements together, two different nexus requirements can be discerned. First, there must be adequate connection between the state and the corporation upon which a tax or a tax collection requirement is being imposed. This may be called the 'presence nexus' requirement because the focus is whether the foreign corporation can, in some sense, be said to be present within the taxing state. Second, there must be adequate connection between the state and the transaction, income, or property being taxed. This may be called the 'transactional nexus' requirement.").

9. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

10. *See* authorities cited *supra* note 6. *But see* John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity*, 33 VA. TAX REV. 209 (2013).

11. This Article will use the term "benefit" generally to refer to benefits, protections, services, etc., that a state might provide to a person.

benefit. The transactional theory of enforcement jurisdiction in turn informs the application of the something-for-which-it-can-ask-return requirement by establishing how a state must provide that benefit. Due to the transactional nature of enforcement jurisdiction, a state actor must provide the person with the benefit supporting such jurisdiction over the person; a state cannot exercise enforcement jurisdiction over a person who has only been affected by a benefit the state provided to someone else. This conclusion is noteworthy because many existing analyses take the position that the Due Process Clause imposes no meaningful limitations on a state's enforcement jurisdiction.[12]

To illustrate the effect of this analysis, take the cases of three different vendors—the first is a traditional brick-and-mortar vendor who owns a store and has employees in the taxing state; the second is a remote vendor who actively advertises in the taxing state; and the third is a remote vendor whose only connection with the state is making sales to the state's residents that approach the vendor on their own. The brick-and-mortar vendor clearly receives benefits from the state in the form of fire and police protection, roads, and the like. The Due Process Clause would not impede the state from exercising enforcement jurisdiction over that vendor. The second vendor likely receives benefits from the taxing state in the form of legal protections for its advertising activities; thus the state also should have enforcement jurisdiction over this vendor under the Due Process Clause. However, the final vendor receives no benefits from the state; the only benefits it receives—namely, the liquefaction of the value of its assets (i.e., money for sales)—are provided by the states' residents. As there is always a non-state intermediary between benefits the state provides and the final vendor, the Due Process Clause would prevent the state from exercising enforcement jurisdiction over the vendor.

Thus, taking the due process limitations on enforcement jurisdiction seriously demonstrates that merely removing Commerce Clause limitations will not fully solve the states' issues; additional action will be required. This Article proceeds in five Parts. The following Part II explores the current landscape of state enforcement jurisdiction under the Due Process Clause and develops the Due Process Clause's something-for-which-it-can-ask-return requirement for enforcement jurisdiction. Part III examines how the transactional theory of enforcement jurisdiction materializes from the due process jurisprudence and explores potential justifications for and issues with the theory. Part IV then homes in on how the transactional theory informs the application of the something-for-which-it-can-ask-return requirement. Part V demonstrates the impact of the Article's earlier analysis on the states' efforts to exercise enforcement jurisdiction over remote vendors. This discussion

12. *See* authorities cited *supra* note 6.

illustrates the shortcomings of the states' efforts in this area, revealing the need for alternative approaches to their enforcement jurisdiction issues. Finally, Part VI concludes.

II. ENFORCEMENT JURISDICTION UNDER THE DUE PROCESS CLAUSE

The relative ease with which transactions can be initiated and completed over the Internet has contributed to, and likely accelerated, the growth of interstate transactions in the United States.[13] This growth is presumably good for the economy but presents challenges for many states as they struggle to apply their tax laws to these interstate transactions.[14] For

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13. *See* OFFICE OF TAX POLICY, DEP'T OF THE TREASURY, SELECTED TAX POLICY IMPLICATIONS OF GLOBAL ELECTRONIC COMMERCE 1–3 (1996), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Global-Electronic-Commerce-1996.pdf; Bruce et al., *E-tailer*, *supra* note 3, at 736; Arthur J. Cockfield, *Jurisdiction to Tax: A Law and Technology Perspective*, 38 GA. L. REV. 85, 85 (2004) ("The past several decades have witnessed a dramatic increase in cross-border trade and investment, partly in response to a reduction in legal barriers (e.g., tariffs and capital controls) and technological improvements that lower transportation, distribution and communication costs. This trend has been accelerated by the advent of the Internet and related information technologies, as well as the proliferation of digital goods and services."); Groves, *supra* note 6, at 621 ("A brief perusal of the Internet demonstrates that practically any product may be purchased online."); Edward A. Morse, *State Taxation of Internet Commerce: Something New Under the Sun?*, 30 CREIGHTON L. REV. 1113, 1128–29 (1997).

14. *See, e.g.*, Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet Is Changing Tax Laws*, 34 CONN. L. REV. 333, 363–367 (2002) (discussing difficulties that Internet-based commerce poses for traditional state tax systems); Joondeph, *supra* note 6, at 110 ("[S]ales consummated over the Internet—more broadly, sales consummated with out-of-state sellers through whatever means—have contributed to a substantial and growing gap in the sales and use tax structure."); Charles E. McLure, Jr., *Sales and Use Taxes on Electronic Commerce: Legal, Economic, Administrative, and Political Issues*, 34 URB. LAW. 487, 487 (2002) ("Being designed for a world of tangible products, the tax systems employed by the states are ill suited for a world of electronic commerce."); Swain, *supra* note 6, at 392–93 (observing that state tax codes are out of date); Varyani, *supra* note 6, at 152, 155 n.24 ("As the way individuals in the United States make and consume goods has changed, the system of imposing a tax on those transactions has struggled to keep pace. . . . Note that the growth in the mail-order industry from 1967 to 1989 is dwarfed by the growth in online sales from 1992 to present day. The difference in lost sales-tax revenue to states is accordingly large, meaning there is

example, one recent study found that the states' struggles resulted in the non-collection of $11.4 billion in sales and use tax revenues from sales made through e-commerce in 2012.[15] In large part, these struggles are the result of an incompletely answered fundamental question of jurisdiction to tax: when may a state compel a person to collect or pay a tax? In the literature, this question is referred to as the "enforcement jurisdiction" question.[16]

In many ways, enforcement jurisdiction is straightforward and uncontroversial. When a state has jurisdiction to tax the subject matter of a tax—referred to as "substantive jurisdiction"[17]—it likely has enforcement jurisdiction over some person as well. After all, people earn income and engage in consumption in the state, so if a state has substantive jurisdiction to tax such income or consumption, it stands to reason that a person exists over which the state also has enforcement jurisdiction.[18] However, such a person

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more at stake in the current debate than ever. With the continued growth of online sales, states that collect sales tax will realize an increasing loss of revenue.") (internal citations omitted); *see also* Edson, *supra* note 6, at 893; Hellerstein, *Electronic Commerce*, *supra* note 6, at 426–27; Kendall L. Houghton & Walter Hellerstein, *State Taxation of Electronic Commerce: Perspectives on Proposals for Change and Their Constitutionality*, 2000 BYU L. REV. 9, 11–12 (2000); Michael J. McIntyre, *Commentary: Taxing Electronic Commerce Fairly and Efficiently*, 52 TAX L. REV. 625, 628 (1997); Morse, *supra* note, 13, at 1114–15. For a detailed look at e-commerce and its growth, see McLure, Jr., *supra* note 6, at 281–321.

15. *See* Bruce et al., *Losses*, *supra* note 3. This conclusion is not without debate. *See* authorities cited *supra* note 3.

16. *See, e.g.*, Hellerstein, *supra* note 8, at 3.

17. *See, e.g.*, *id.*

18. *See id.* at 3–4 (arguing that a state must have both "substantive jurisdiction" and "enforcement jurisdiction" in order to collect a tax and observing that "the criteria that are employed for determining the existence of substantive tax jurisdiction may be the same as those employed for determining the existence of enforcement jurisdiction."); *accord* Rosen & Bernstein, *supra* note 8, at 534. The idea that a state must have nexus with both the transaction it seeks to tax (i.e., substantive jurisdiction) and the person collecting or paying the tax (i.e., enforcement jurisdiction) derives from Supreme Court precedent. See, for example, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 778 (1992), and *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989), though some commentators have questioned the scope of the concept. *See* Mines, *supra* note 6, at 591–99 (taking issue with the concept that both nexus with the person and nexus with the transaction are required, at least with respect to sales and use tax actions); David F. Shores, *State Taxation of Interstate Commerce:* Quill*,* Allied Signal *and a Proposal*, 72 NEB. L. REV. 682, 719–21 (1993) (arguing that the Due Process Clause should not require nexus with each of the person's activities; rather, only the Commerce Clause should impose such a requirement).

does not always exist, and the controversial issues arise when a state seeks to exercise enforcement jurisdiction over an out-of-state person.[19]

Few doubt that a state has substantive jurisdiction over the objects of interstate transactions when those objects are connected to the state, but it is far from clear that the state has enforcement jurisdiction over out-of-state people involved in those transactions. For example, consider Massachusetts-based Wayfair selling tableware to Floridians. Florida uncontroversially would have substantive jurisdiction to impose use taxes on its residents' consumption (use) of the tableware and in theory would have enforcement jurisdiction over those residents. However, practical limitations—such as the state's lack of information about the use and the residents' lack of will to voluntarily pay the use taxes—prevent Florida from exercising enforcement jurisdiction over its residents,[20] so instead the state turns its attention towards Wayfair. The same practical limitations to having Wayfair collect the use taxes might not exist, but does Florida have the legal basis for enforcement jurisdiction over Wayfair?

The answer to this question depends on the theory at the root of enforcement jurisdiction. By engaging in a close examination of the Due Process Clause limitations on enforcement jurisdiction, this Article develops the "transactional theory" of enforcement jurisdiction that drives the state taxation jurisprudence. As further explained in Part III, this theory demands that both the state and the person engage in certain activities directed towards the other before the state may exercise enforcement jurisdiction over the person.

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19. *Cf.* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) ("The justifications suggested by . . . theorists should shed some light on the issue of coercive power over nonresidents and interstate disputes. These issues of interstate power are far more attenuated than simple justification of the exercise of domestic power."); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 387 (1998) ("It is long-arm jurisdiction, based on the acts and omissions of nonconsenting, nonresident defendants, that has given courts and litigants the most difficulty.").

20. *See* Hellerstein, *supra* note 8, at 8 (observing that enforcement jurisdiction has "both theoretical and practical aspects. A State may have the theoretical power to enforce a tax but nevertheless lack an effective enforcement mechanism because the theoretically sound path to tax collection is administratively or economically impractical.").

Due process may be a vague concept,[21] even so, it has teeth: it asks whether a state is acting in a manner that society finds acceptable according to legal norms[22]—whether a state action offends "traditional notions of fair play and substantial justice."[23] In the context of enforcement jurisdiction, the Supreme Court has "often identified 'notice' or 'fair warning' as the analytic touchstone of due process . . . analysis."[24] The hallmark of "notice" or "fair warning" is that a reasonable person could know that a certain legal effect would occur from certain actions.[25] To ensure that people have appropriate

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21. *See* Hannah v. Larche, 363 U.S. 420, 442 (1960) ("'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."); Rochin v. California, 342 U.S. 165, 172 (1952) ("The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed.").

22. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' that direct and restrain our exposition of the Due Process Clause.") (internal citations omitted); Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring) (concluding that a practice that "was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today" does not violate "fundamental fairness"); *Rochin*, 342 U.S. at 169 ("Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'") (internal citations omitted); Hurtado v. California, 110 U.S. 516, 535 (1884) ("Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure."); *see also* A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1118–23 (2006) (discussing the meaning of due process and observing that it originates in the "law of the land" and protects "deeply rooted" rights and liberties).

23. Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

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

25. *See, e.g.*, Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 592 (1998) ("The notice requirement is understood to be a matter of fundamental fairness: Citizens must be informed of their legal obligations lest they unwittingly find themselves in violation of the law and subject to

notice or fair warning of a state's enforcement jurisdiction over them, the Court has held that the Due Process Clause has its own "nexus" inquiry:[26] "[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,' as well as a rational relationship between the tax and the 'values connected with

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criminal punishment."); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205–12 (1985) (discussing the notice concept in the context of penal statutes and noting that "[t]he concern is . . . whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law"); Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991 (2003) (exploring the fair notice requirement for civil regulations and proposing a clear standard relying on the notion that a reasonable person would understand their affect); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 669–70 (1996) (describing the notice requirement in the context of agency rules as requiring that "legal rules must give persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly.'"); Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 455 (2001) ("The 'fair warning requirement' implicit in the Due Process Clause demands that criminal statutes provide 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'") (internal citations omitted); Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1175–79 (2013) (describing "the most familiar aspect" of the due process notice doctrine as addressing whether reasonable people could understand the law's meaning and application); *see also, e.g.*, United States v. Lanier, 520 U.S. 259, 266–67 (1997) ("In each of these guises [of the fair warning requirement for criminal laws], the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

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

the taxing State.'"[27] The following Sections more closely examine these two aspects.[28]

A. The Minimum-Connection Aspect

The first aspect of the due process nexus inquiry—the "minimum connection" aspect—focuses on the person's actions; it is satisfied when the person "purposefully avails itself of the benefits of an economic market in the forum State."[29] Expanding on this standard, the *Quill* Court concluded that the Due Process Clause does not require a person to have a physical presence in a state in order to have the appropriate nexus with that state.[30] Relying on "comparable reasoning" to that used in personal jurisdiction cases, which also consider whether a person has a minimum connection with a state,[31] the Court

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27. MeadWestvaco Corp. v. Ill. Dep't of Rev., 553 U.S. 16, 24 (2008) (quoting *Quill*, 504 U.S. at 306).

28. The Appendix, *infra*, contains a chart providing an overview of the constitutional restrictions on enforcement jurisdiction, including both the Due Process Clause limitations and the Commerce Clause limitations discussed *infra* Part V.

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

30. *Id.* at 308.

31. Personal jurisdiction refers to a state's ability to subject a person to its adjudicatory authority; that ability is controlled by the Due Process Clause. *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 753–58 (2014). The modern standard for personal jurisdiction is rooted in a 1945 Supreme Court case involving the collection of state unemployment taxes imposed on a foreign entity. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). In that case, the Court determined that Washington State had the power to subject a foreign corporation, International Shoe, to its authority—and thus collect unemployment taxes from International Shoe—based on International Shoe's activities in the State. *Id.* at 321–22. International Shoe manufactured and sold shoes across the nation but did not have any offices or stores in Washington. *Id.* at 313–14. International Shoe's contacts with Washington were limited to employing "eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales." *Id.* at 313. Any orders received by the salesmen were transmitted to International Shoe's Missouri office for acceptance, and "when accepted the merchandise for filling the orders [was] shipped f.o.b. from points outside Washington to the purchasers within the state." *Id.* at 314. Having determined that International Shoe was subject to the Washington courts' jurisdiction in a suit for the taxes owed, the Court also found that Washington had the ability to impose the tax in the first place:

> Appellant having rendered itself amenable to suit upon obligations arising out of the activities of its salesmen in Washington, the state

instead looked to whether the person—Quill Corporation—had "purposefully directed [commercial or business] activities at [the state's] residents."[32] Requiring such purposeful direction ensures that the person has notice or fair warning that she may be subject to the state's enforcement jurisdiction.[33]

B. The Something-for-Which-It-Can-Ask-Return Aspect

The second aspect of the due process nexus inquiry examines the state's actions and requires that a state's exercise of enforcement jurisdiction over a person be rationally related to values connected with the taxing state or, as more colloquially put, "whether the State has given anything for which it can ask return."[34] This aspect has not been deeply explored in the context of

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> may maintain the present suit *in personam* to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the state. For Washington has made one of those activities, which taken together establish appellant's "presence" there for purposes of suit, the taxable event by which the state brings appellant within the reach of its taxing power. The state thus has constitutional power to lay the tax and to subject appellant to a suit to recover it. The activities which establish its "presence" subject it alike to taxation by the state and to suit to recover the tax.

Id. at 321. Rejecting a long-standing physical presence standard, the Supreme Court declared that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

32. *Quill*, 504 U.S. at 308 (citing Burger King Corp. v. Rudzewicz, 471 U. S. 462 (1985)); *see also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev., 483 U.S. 232, 250 (1987) ("[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.") (internal citations omitted).

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

34. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940); *see also* Swain & Hellerstein, *supra* note 10, at 219 ("In general, the Supreme Court has read

enforcement jurisdiction, and one may fairly question whether the "rationally related" requirement translates so cleanly to the question of whether a state has given anything for which it can ask return; however, the jurisprudence demonstrates that this is the case. In *Wisconsin v. J.C. Penney Co.*,[35] the Supreme Court presented perhaps its clearest expression of what the second aspect of the due process analysis means for enforcement jurisdiction. *J.C. Penney* presented the question of whether Wisconsin could require J.C. Penney, a company with stores in Wisconsin, to withhold a tax levied on its non-Wisconsin-resident shareholders and measured by dividends derived from Wisconsin-source income despite the fact that the dividends were declared and paid outside of the state.[36] The Court found that Wisconsin did have the authority to impose such an obligation on J.C. Penney, which had received benefits from the state, noting that:

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *The simple but controlling question is whether the state has given anything for which it can ask return.*[37]

Other cases also support the something-for-which-it-can-ask-return characterization of the second aspect. In a recent case, the Supreme Court noted that "[t]he 'broad inquiry' subsumed in [the Due Process Clause] requirements is . . . 'whether the state has given anything for which it can ask return,'" before concluding that once that question is answered "the inquiry shifts from whether the State may tax to what it may tax."[38] In *National Geographic Society v. California Equalization Board*,[39] the Supreme Court

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the Due Process Clause as tying the states' taxing power to 'benefits' and 'protections' that they confer upon taxpayers.").

35. 311 U.S. at 435.

36. *Id.* at 441–43.

37. *Id.* at 444–45 (emphasis added).

38 . MeadWestvaco Corp. v. Ill. Dep't of Rev., 553 U.S. 16, 24–25 (2008) (internal citations omitted).

39. 430 U.S. 551 (1977).

held that the Due Process Clause did not bar California from taxing transactions of a person that bore no relation to the activities of the person in the state because the person had a minimum connection with the state and received benefits from the state ("fire and police protection, and the like").[40] Finally, indicating the meaning of the second aspect for enforcement jurisdiction, the Supreme Court has clarified that taxes are "a means of distributing the burden of the cost of government";[41] thus anyone who receives a benefit from the state is subject to the state's enforcement jurisdiction, regardless of the size or substance of that benefit.

Thus, no meaningful limitation on the substance of the benefit provided by a state to a person justifying enforcement jurisdiction over that person arises in the jurisprudence, a result that is not particularly surprising. After all, a state's power to levy and collect taxes is considered "fundamental," "essential," and "basic,"[42] and there appears to be little reason to require the

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40. *Id.* at 558–61; *see* Hartman, *supra* note 6, at 1000 ("*National Geographic* thus adopts the rule that a transactional nexus between the out-of-state mail-order sales and the taxing state is not essential. The nexus linchpin for use tax collection by the seller is that a connection need not be established for the particular activity. Nexus depends upon the totality of the out-of-state seller's activities within the taxing state. . . . The *National Geographic* Court noted that the Society's offices had the 'advantage of the same municipal services—fire and police protection, and the like—as they would have had if their activities, as in Sears and Montgomery Ward, included assistance to the mail-order operations that generated the use taxes.'").

41. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 623 (1981) (quoting Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 522 (1937)).

42. *See, e.g.*, Arkansas v. Farm Credit Servs., 520 U.S. 821, 826 (1997) ("The power to tax is basic to the power of the State to exist."); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (referring to taxation as "the most basic power of government"); State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931) ("The power of taxation is fundamental to the very existence of the government of the states."); Tyler v. United States, 281 U.S. 497, 503 (1930) ("The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions."); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905) ("The power of taxation, indispensable to the existence of every civilized government . . . ."); Providence Bank v. Billings, 29 U.S. (4. Pet.) 514, 561 (1830) ("That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm."); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448 (1827) ("We admit this power [of state taxation] to be sacred . . . ."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824) ("The power of taxation is indispensable to [the states'] existence . . . ."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819) ("That the power of taxation is one

states to give certain types of benefits in order to justify that power. However, one may find the idea of a large tax bill for a small, state-provided benefit unsettling and question this approach. Such concerns are justified but are within the scope of substantive jurisdiction, not enforcement jurisdiction.

Enforcement jurisdiction concerns a person's obligation to collect or pay an otherwise legitimate tax. Substantive jurisdiction addresses the legitimacy of the tax, including whether the tax is unconstitutionally unreasonable when compared to the amount of taxed activity in the state.[43] Thus, though there may be room for a de minimis exemption from enforcement jurisdiction when the person receives a very small benefit from a state, concerns about the substance of the benefit received by the person are properly in the realm of substantive jurisdiction issues and outside the scope of this Article. There is no requirement of proportionality between the benefit provided to the person by the state and the obligation imposed on the person through the state's exercise of enforcement jurisdiction, and for good reason. Unlike the actual tax itself, the amount of which can be proportioned to the benefits a person receives from the state, an enforcement obligation is all-or-nothing—either the person must collect or pay the tax or not. It would be nonsensical to attempt to proportion such an obligation. Indeed, in determining whether North Dakota had enforcement jurisdiction—substantive jurisdiction was not at issue—over Quill Corporation, the *Quill* Court observed that Quill Corporation had a minimum connection with North Dakota and that the tax collection obligation in question was "related to the benefits Quill receives from access to the State";[44] the Court did not reference the amount of benefits

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of vital importance . . . [is a truth] which [has] never been denied."); *see also* DAVID AMES WELLS, THE THEORY AND PRACTICE OF TAXATION 197 (1900) (observing that "the matter of taxation . . . is a fundamental necessity for the maintenance not only of all government, but of civilization").

43. *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"). This requirement may only be imposed by the Commerce Clause under current jurisprudence. *See Commonwealth Edison*, 453 U.S. at 622 ("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. Query how one would determine the appropriate baseline against which to make such a comparison; the Court has not provided clear guidance other than to say that using the accounting method of the taxpayer will not suffice on its own. *Id.* at 182–84.

44. Quill Corp. v. North Dakota, 504 U.S. 298, 307–08 (1992).

Quill received or the proportionality of Quill's collection obligation to that amount.

So does the something-for-which-it-can-ask-return aspect impose any meaningful limitation on a state's exercise of enforcement jurisdiction? Many commentators appear to conclude that it does not;[45] however, exploring the relationship of the two aspects of the Due Process Clause limitations on enforcement jurisdiction reveals the transactional theory of enforcement jurisdiction underlying the jurisprudence, which in turn informs the application of the aspect. As developed in the following Parts, the transactional theory requires that the state itself provide the benefit justifying enforcement jurisdiction to the person in question; benefits received from non-state actors will not suffice. Thus, the Due Process Clause imposes a meaningful limitation on how the state must provide a person with something for which it can ask return.

III. The Transactional Theory of Enforcement Jurisdiction

Perhaps because a state's power to levy and collect taxes is considered so fundamental, essential, and basic, little attention has been given to the theory underlying that power. However, understanding this theory is essential to understanding when a state may subject an out-of-state person to enforcement jurisdiction, particularly to understanding the limitations the something-for-which-it-can-ask-return aspect imposes on enforcement jurisdiction. Exploring the relationship between the two aspects of the Due Process Clause limitations on enforcement jurisdiction leads to the conclusion that a transactional theory of enforcement jurisdiction drives the jurisprudence. Under this theory, enforcement jurisdiction derives from an implied transaction between the taxing state and the person whereby each party must purposefully act towards the other before the state has enforcement jurisdiction over the person—the state must provide a benefit to the person and the person must indicate acceptance of that benefit.[46] This implied transaction

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45. *See* authorities cited *supra* note 6.

46. The transactional theory of enforcement jurisdiction has an analogue in the contract theory of state power, which typically addresses why a state has power over in-state people. *See* RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE 63 (1959) ("Taxation as a price for services rendered seemed a natural complement to the contract theory of the state."); *cf.* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536–46 (1991) (analyzing and critiquing contract theory approaches to personal jurisdiction); Allen R. Stein, *Styles*

might best be viewed as a transaction for which the Due Process Clause is an escrow agent and the state's enforcement jurisdiction is the thing held in escrow. Once both parties have fulfilled their obligations, the Due Process Clause "releases" the enforcement jurisdiction—it permits the state to compel the person to collect or pay its taxes. The person does not necessarily collect or pay a tax in exchange for the state-provided benefits; the bargain is for the state's authority to compel the person to collect or pay taxes.[47] This Part further explains the transactional theory as it manifests in the state taxation jurisprudence before examining the strength of the theory.

A. *The Relationship of the Two Aspects of the Due Process Nexus Inquiry*

As observed above, one of the purposes of the Due Process Clause is to ensure that a state acts in a manner that society finds acceptable according to legal norms. Thus, the requirements of the Due Process Clause for enforcement jurisdiction should comport with an underlying norm, or theory, regarding the appropriate exercise of enforcement jurisdiction. Assuming that the two aspects of the due process nexus inquiry are appropriate (i.e., taking the Supreme Court at its word), they should provide insight into the theory of enforcement jurisdiction underlying the jurisprudence. Indeed, the transactional theory of enforcement jurisdiction follows from considering the relationship of the two aspects.

Two characteristics of the two due process aspects' relationship in particular illuminate the transactional theory of enforcement jurisdiction. First, the two aspects establish two separate parties to the implied transaction, each

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of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 TEX. L. REV. 689, 714–38 (1987) (reviewing the history of and critiquing the contract theory for personal jurisdiction). For an in-depth critique of contract or transactional theories of state power, see Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989). This Article avoids using the "contract theory" terminology because the Article is primarily concerned with jurisdiction over out-of-state people.

47. This transactional theory should not be confused with the benefit theory of taxation, which generally provides that a person's tax burden should be in some way proportionate to the amount of benefits the person receives from the taxing government. *See, e.g.*, Graeme S. Cooper, *The Benefit Theory of Taxation*, 11 AUSTL. TAX F. 397 (1994) (describing and analyzing the benefit theory of taxation); McLure, Jr., *supra* note 6, at 381–82 (discussing the benefit theory with respect to e-commerce). The benefit theory is concerned with how to determine a person's tax burden. The transactional theory is not concerned with the actual tax burden placed on the person; it is only concerned with whether the state has the jurisdiction to place a tax burden on the person as a primary matter.

with separate obligations.[48] These parties are the person and the state; the first aspect establishes the person's obligations, and the second establishes the state's.[49] Without both parties' obligations being satisfied, the state has no enforcement jurisdiction over the person. This demonstrates that enforcement jurisdiction is a derivative power but one that cannot arise from the unilateral actions of either the person or the state.

Second, the two aspects establish that each party's obligation involves engaging in actions purposefully directed towards the other. The something-for-which-it-can-ask-return aspect asks what the state has done for the person; has the state given the person some benefit? The minimum-connection aspect asks whether the person has indicated acceptance of that benefit. By purposefully availing herself of the state's economic market, a person demonstrates her intention to gain from interacting with the state and her acceptance of state-provided benefits can be inferred. The interaction of the two aspects thus demonstrates that a state's enforcement jurisdiction over a person is derived from reciprocal actions between the state and the person—the implied transaction.[50]

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48. *See* Edson, *supra* note 6, at 908 ("Quill appears to have established two requirements for satisfying the due process inquiry: i) sufficient and purposeful direction of the taxpayer's activities at a state's residents; and ii) rational relationship between the tax imposed and the benefits the taxpayer received by virtue of being allowed access to the state's market."); Jeffrey Friedman, *Consumption Tax Nexus: The Connection with the Transaction to Be Taxed*, 38 GA. L. REV. 119, 123 (2004) (noting the dual aspects of the due process nexus inquiry as announced in *Quill*).

49. *See* Joseph W. Blackburn, *Due Process and States' Attempts to Tax Nonresident Limited Partners*, J. MULTIST. TAX. & INCENTIVES, Sept. 2009, at 20, 22 (2009) ("Some state court decisions have mistakenly treated the 'rational connection' between state-provided values and a commercial actor's activities as establishing, by itself, due process nexus. Such an approach fails to consider the essential due process requirement that a commercial actor must initially direct its activities at a state, thereby 'purposefully availing' itself of the related benefits and protections of the state's laws.").

50. *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION INCLUDING THE LAW OF LOCAL ASSESSMENTS 1–2 (1876) ("The justification of the [tax] demand is to be found in the reciprocal duties of protection and support between the state and its citizens, and the exclusive sovereignty and jurisdiction of the state over the persons and property within its territory."); 1 ROBERT DESTY, THE AMERICAN LAW OF TAXATION: AS DETERMINED IN THE COURTS OF LAST RESORT IN THE UNITED STATES 53–54 (1884) (discussing the reciprocal nature of taxation); WELLS, *supra* note 42, at 315–18 (same); Hartman, *supra* note 6, at 1000 ("When the state provides

B. Justifying the Transactional Theory of Enforcement Jurisdiction

As the primary focus of this Article is to demonstrate how the transactional theory of enforcement jurisdiction informs the application of the something-for-which-it-can-ask-return aspect, it is assumed that the theory meets the Due Process Clause's fundamental fairness concerns. This assumption appears warranted, as there are a number of potential grounds for justifying the adoption of the theory. First, the transactional theory is deeply rooted. Expressions supporting the theory can be found over the course of the Supreme Court's state taxation jurisprudence in which the Court indicates that jurisdiction to tax depends on the state's provision of benefits to the taxed person and the taxed person's acceptance of those benefits;[51] similar theories

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a substantial economic benefit to the production of income for the out-of-state seller, the taxing state should be able to demand a tithe from the seller."); Swain & Hellerstein, *supra* note 10, at 266 ("[I]f '[t]axes are what we pay for a civilized society,' it makes sense to attribute the taxable base only to those states that are providing enough 'civilized society' to warrant their exercise of jurisdiction over a taxpayer."). Perhaps the most well-known and one of the simplest expressions of this idea comes from Justice Oliver Wendell Holmes, "Taxes are what we pay for civilized society." Compania Gen. de Tabacos de Filipinas v. Collector of Internal Rev., 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). For an argument against the reciprocity of taxes, see RICHARD T. ELY & JOHN H. FINLEY, TAXATION IN AMERICAN STATES AND CITIES 13–18 (1888).

51. *See, e.g.*, Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 25 (2009); MeadWestvaco Corp. v. Ill. Dep't of Rev., 553 U.S. 16, 24–25 (2008); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 199–200 (1995); Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992); Goldberg v. Sweet, 488 U.S. 252, 266–67 (1989); Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622–25 (1981); Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108–09 (1975); Standard Pressed Steel Co. v. Dep't of Rev., 419 U.S. 560, 562 (1975); Nat'l Bellas Hess Inc. v. Dep't of Rev., 386 U.S. 753, 756 (1967); GMC v. Washington, 377 U.S. 436, 441 (1964); Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 465 (1959); Treichler v. Wisconsin, 338 U.S. 251, 256–57 (1949); Int'l Harvester Co. v. Wis. Dep't of Tax'n, 322 U.S. 435, 441–42 (1944); State Tax Comm'n v. Aldrich, 316 U.S. 174, 180 (1942); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940); Michigan v. Mich. Trust Co., 286 U.S. 334, 344 (1932); Lawrence v. State Tax Comm'n, 286 U.S. 276, 279–81 (1932); New York v. Latrobe, 279 U.S. 421, 427–28 (1929); Frick v. Pennsylvania, 268 U.S. 473, 490–91 (1925); Mo. Pac. R.R. Co. v. W. Crawford Rd. Improvement Dist., 266 U.S. 187, 190 (1924); Texas Co. v. Brown, 258 U.S. 466, 475–76 (1922); Maguire v. Trefry, 253 U.S. 12, 14, 17 (1920); Shaffer v. Carter, 252 U.S. 37, 51 (1920); Jones v. Portland, 245 U.S. 217, 224 (1917); Equitable Life Assurance Soc'y of U.S. v. Pennsylvania, 238 U.S. 143, 147 (1915); Susquehanna Coal Co. v. Mayor of S. Amboy, 228 U.S. 665, 670

have been relied on over the course of American and European theoretical works on taxation.[52] From one point of view, these roots indicate a general acceptance of the fairness of the theory—it leads to the "right" result.[53] Taxes have long been considered the taxpayer's obligation for government benefits, and a tax enforcement obligation is akin to a tax itself—the person is compelled to contribute to the state, though through service instead of money.[54] Therefore, once a benefit provided by a state is accepted by the person, the person is made better off by the state so the state should be able to also be made better off by having the person collect or pay the state's taxes. The actual amount of tax can be determined based on substantive jurisdiction principles.

(1913); S. Pac. Co. v. Kentucky, 222 U.S. 63, 76 (1911); Gen. Oil Co. v. Crain, 209 U.S. 211, 230 (1908); New York *ex rel.* Edward & John Burke, Ltd. v. Wells, 208 U.S. 14, 23 (1908); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 202 (1905); Am. Steel & Wire Co. v. Speed, 192 U.S. 500, 521 (1904); Diamond Match Co. v. Ontonagon, 188 U.S. 82, 90 (1903); Bristol v. Wash. Cty., 177 U.S. 133, 144 (1900); Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 615–16, 618–19 (1899); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 220 (1897); Postal Tel. Cable Co. v. Adams, 155 U.S. 688, 696 (1895); Clev., Cin., Chi. & St. Louis Ry. Co. v. Backus, 154 U.S. 439, 446–47 (1894); Robbins v. Shelby Cty. Taxing Dist., 120 U.S. 489, 493–94 (1887); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 214–15 (1885); *In re* State Tax on Foreign-Held Bonds, 82 U.S. (15 Wall.) 300, 322 (1872).

52. *See generally, e.g.*, HAROLD M. GROVES, TAX PHILOSOPHERS: TWO HUNDRED YEARS OF THOUGHT IN GREAT BRITAIN AND THE UNITED STATES (Donald J. Curran ed., 1974) (describing various theoretical approaches to taxation, most of which fundamentally accept that the government's initial right to tax derives from providing a benefit to the taxed); CLASSICS IN THE THEORY OF PUBLIC FINANCE (Richard A. Musgrave & Alan Peacock eds., 1958) (same).

53. *Cf.* Brilmayer, *supra* note 46, at 20 ("When the analysis involves an exchange, both parties to the exchange must bring something to the bargaining table."); Perdue, *supra* note 46, at 541 ("[I]t is deeply disturbing to suggest that as long as government provides you with something of objective value (that you may not want), it can legitimately extract something from you (that you do not want to give up).").

54. *See* EDWIN R. A. SELIGMAN, ESSAYS IN TAXATION 3 (9th ed. 1921) (discussing the historical development of taxation and observing that, in early stages of taxation, "compulsory contributions are still largely personal services" and that "[t]he first forced contribution of the individual to the maintenance of the common welfare is always seen in this rude attempt to assess every one according to his ability to bear the common burden—his faculty").

The transactional theory might also be justified from an ex ante perspective when the following goals are adopted: first, people should have the right not to be subject to enforcement jurisdiction without justification;[55] second, people should have notice or fair warning that they are subject to enforcement jurisdiction in a state; and third, erosion of the states' fiscal bases should be avoided. Accepting these goals—the first two of which track the requirements of the Due Process Clause—and adopting a Rawlsian veil of ignorance regarding the location, type, and amount of people's activities,[56] people designing the principles of enforcement jurisdiction might initially conclude that only one state—perhaps their state of residence or citizenship—should be able to exercise enforcement jurisdiction over them, imposing a meaningful limitation on the number of states able to exercise enforcement jurisdiction over them and giving them clear notice of such jurisdiction. Something like a strict physical presence or residence-based theory of enforcement jurisdiction would arise under this approach.

However, assuming the taxing state provides benefits to out-of-state people, then under this "one-state" approach the in-state people must either bear the burden of collecting and paying taxes to finance those benefits or the state must face fiscal shortfalls, being unable to compel the out-of-state people to pay taxes. On the one hand, the in-state people might be comfortable with bearing the burden of the benefits provided to out-of-state people on the assumption that the burden of those benefits would approximate the burden of benefits they receive from other states (for which they would have no obligations). However, since the people are unaware of how much and what type of out-of-state activity they and others will engage in, relying on this

55. In a sense, this goal expresses a concern about the possibility of "double taxation." Double taxation in this context refers to two (or more) separate taxing jurisdictions levying tax on the same taxable thing, such as income or a sale. In other words, as a result of taxes being imposed by multiple taxing jurisdictions, more than 100% of the taxable thing would be subject to tax when double taxation occurs. One may be inclined to think that double taxation is solely a Commerce Clause issue that has no bearing on the due process analysis. While it is true that the Commerce Clause has strong prohibitions against theoretical double taxation with the goal of preventing the economic Balkanization of the states (*see Quill*, 504 U.S. at 312), the due process jurisprudence also expresses a preference against double taxation to avoid excessive tax burdens on a person by requiring some basic level of connection between a state and the person before it is permitted to tax that person (*see id.* at 307–08). Allowing a state with no connection to a person to exercise enforcement jurisdiction over the person could arguably result in double taxation that may be classified as unfair even if the burden is relatively small in amount.

56. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

"wash" assumption would be unappealing; the third goal of protecting the states' fiscal bases would not be fulfilled.

Thus, the people might conclude that the one-state approach is not acceptable. The first goal would prevent them from simply allowing all states to exercise enforcement jurisdiction over them. Their concern about the burden of benefits provided to out-of-state people might then lead to an approach allowing any state that provides an out-of-state person with some amount of benefits to subject that person to enforcement jurisdiction. Since they would not be sure how many benefits any person might receive from a state, they would prefer only a minimum amount be necessary in order to prevent the free-riding issue underlying their concerns with the one-state approach. Under this benefits-provided theory of enforcement jurisdiction the states' fiscal bases would not be eroded by providing benefits to out-of-state people, but states might provide subtle benefits to anyone, potentially depriving people of notice or fair warning that they are subject to enforcement jurisdiction. Recognizing this danger, the people would conclude that only those out-of-state people who agree to receive the benefits from the state should be subject to the state's enforcement jurisdiction, ensuring the requisite notice or fair warning.

However, the people would soon discover that this agreement principle, if not properly calibrated, would swing the pendulum too far in the opposite direction and fail to address the third goal—if an out-of-state person can merely state whether or not it agrees to receive benefits, the person could effectively prevent a state's enforcement jurisdiction. Thus, the people would need to establish when an out-of-state person would be deemed to have agreed to receive the benefits based on the person's actions, elevating substance over form. Relying solely on explicit consent would grant too much power to the out-of-state person, so adopting an implicit consent approach based on the out-of-state person's actions would be the necessary alternative. Since the people would be unsure what their out-of-state activities will be, they will want to ensure that the standard for implicit consent is one that guarantees they will understand that by their actions they will be deemed to have accepted the benefits of the state. Therefore, not every action directed towards a state should establish this implied consent; only those actions that demonstrate an intention to actively gain (i.e., to benefit) from interacting with the state should count. The resulting standard would look quite similar to the purposeful availment standard currently adopted under the minimum-connection aspect.

By requiring the purposeful direction of actions towards the state with the intention of benefiting in order to establish a person's implied consent to

receive benefits from the state, the people ensure that they will not be subject to every state's enforcement jurisdiction. They will have notice and fair warning of the potential consequences of their actions and largely prevent the free-riding problem underlying the third goal. Along with the requirement that they actually receive benefits from the state before they are subject to its enforcement jurisdiction, this purposeful direction requirement establishes the transactional theory. This discussion is not meant to provide the sole justification for the transactional theory; rather, it is meant to demonstrate how it might be justified. However, that the transactional theory can be justified does not imply that it is without issues.

C. Issues with the Transactional Theory of Enforcement Jurisdiction

The primary issues with the transactional theory arise from considering the two requirements of the theory—the state's provision of benefits and the person's implicit acceptance of those benefits—in isolation. First, the benefits-provided requirement may appear to be a non-requirement in action because it requires such a minimal effort from the state. Second, if the purpose of the implied consent requirement is to give the person notice that she might be subject to the state's enforcement jurisdiction, then it may not be immediately obvious that purposeful availment of the state's economic market is the appropriate way to satisfy that requirement.[57]

Perhaps the biggest concern with the transactional theory is that the benefits-provided requirement is a mirage, hiding what is in essence only a consent theory of enforcement jurisdiction.[58] States provide a number of tangible benefits such as roads and fire and police protection virtually indiscriminately to all who are within the state. Non-tangible benefits such as legal protections and civilized society are also broadly provided, and one suspects that states could articulate any number of benefits that they might provide to out-of-state people. If such is the case, then the benefits-provided requirement becomes no real requirement at all; it could always be met.

However, this concern is overblown. As an initial matter, it should be recognized that states can and do provide a vast array of benefits. As the benefits-provided requirement is concerned with ensuring that at a basic level a state actually provides some benefit to people over which it seeks to exercise authority, there is no compelling reason to restrict the substance or breadth of the benefits the state chooses to provide. However, the state must act within

57. *See, e.g.*, Brilmayer, *supra* note 46 (discussing and critiquing consent theories of jurisdiction); Brilmayer, *supra* note 19 (same); Perdue, *supra* note 46 (same); Stein, *supra* note 46 (same).

58. *See* authorities cited *supra* note 57 for descriptions and critiques of consent theories of state power.

its authority when providing that benefit, imposing a meaningful limitation on the state. Though a state's authority to act outside of its territory may be unsettled,[59] it is not unrestricted; namely, the U.S. Constitution places limitations on state actions. Of primary importance here is the limitation that a state generally may not prohibit an out-of-state person engaged in interstate commerce from accessing the state's market or its residents; such access is a federally provided benefit.[60] Thus, as a state has no authority to control access to its market or residents in the context of interstate commerce, such access alone cannot justify the state's enforcement jurisdiction under the transactional theory.

Further, the benefits-provided requirement frames the implied consent requirement, addressing the second issue with the transactional theory. By indicating what the out-of-state person is impliedly consenting to—the receipt of a benefit from the state—how the person might demonstrate that consent becomes evident. Where a person is purposefully acting in a way as to gain

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59. *See* Section IV.B, *infra*.

60. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 472 (2005) ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."); Shaffer v. Carter, 252 U.S. 37, 52–53 (1920) ("That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted . . . ."); *see also* Maine v. Taylor, 477 U.S. 131, 151 (1986) ("The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.") (internal citations omitted). Though *Maine v. Taylor* may appear to grant a state the authority to exclude out-of-state people from engaging in interstate commerce connected to the state, it is unlikely that excluding a person because it refuses to or is not required to pay the state's taxes would be determined to be protecting the health and safety of the state's citizens. It is also unlikely that there would not be "available nondiscriminatory alternatives" in the case of state taxation.

from the state, then it is reasonable to conclude that she has implicitly consented to receive benefits from the state. She has notice that she might be required to compensate the state for those benefits—that she could be subject to the state's enforcement jurisdiction. Thus, a state could not arbitrarily define what types of actions would indicate consent and hypothetically make all out-of-state people aware of its approach, satisfying the notice requirement;[61] the actions implying consent must relate to benefiting from the state. That the jurisprudence appears to focus only on commercial gains may be unnecessarily restrictive, but that focus represents a reasonably clear way to determine when a person is trying to benefit from interactions with the state.

A final issue with the transactional theory arises from its source. Certainly, there is no reason to believe that the Supreme Court's jurisprudence is the end-all-be-all for establishing a theory of enforcement jurisdiction, and alternative theories of enforcement jurisdiction may be formulated—for example, a state could be viewed as possessing an inherent right to tax people with some connection to its territory, thus not requiring the state to provide the person with some benefit first. However, it is not the goal of this Article to evaluate competing theories of enforcement jurisdiction; this Article is concerned with how the something-for-which-it-can-ask-return aspect operates under current jurisprudence. That jurisprudence leads to the transactional theory, which the Article now uses to illuminate the Due Process Clause's requirements for enforcement jurisdiction.

IV. The Fundamentally Fair Exercise of Enforcement Jurisdiction

To satisfy the Due Process Clause, a state's exercise of enforcement jurisdiction must be fundamentally fair; a reasonable person should have knowledge that the state may legitimately exercise enforcement jurisdiction over her.[62] Under the transactional theory, two things are necessary for a state's enforcement jurisdiction over a person to exist: the state must provide her with a benefit and the person must indicate acceptance of that benefit. Thus, a reasonable person should have knowledge of both things' occurrences in order for the state's exercise of enforcement jurisdiction over the person to be fundamentally fair. The *Quill* Court explained that the purposeful availment standard under the minimum-connection aspect ensures that

61. *See* Brilmayer, *supra* note 19, at 308–09.

62. Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

a person has notice or fair warning that she has acted in such a way as to implicitly accept the state-provided benefit.[63] For the Due Process Clause to be completely satisfied, the person must also have knowledge of having received a benefit from the state. The following discussion describes how the prohibition of "extra-contact" enforcement jurisdiction that arises from the transactional theory ensures such notice; the discussion also explores the relationship of the extra-contact prohibition to the prohibition of extraterritorial taxation.

A. The Something-for-Which-It-Can-Ask-Return Aspect's Prohibition Against Extra-Contact Enforcement Jurisdiction

The derivative and reciprocal nature of enforcement jurisdiction under the transactional theory illuminates how the something-for-which-it-can-ask-return aspect addresses the due process notice or fair warning concern: the aspect prohibits a state from exercising extra-contact enforcement jurisdiction—the state may not exercise enforcement jurisdiction over a person who has only been affected by a state-provided benefit through his or her interactions with a non-state actor.[64] Unlike analyses that dismiss the significance of the something-for-which-it-can-ask-return aspect by focusing on what the state must provide to the person—a benefit, an admittedly broad thing—applying the transactional theory demonstrates a meaningful restriction on enforcement jurisdiction by considering how the state provides that benefit.

For example, suppose that a resident of Texas received a top-notch public education from Texas schools and then married a resident of Minnesota who had no personal connection with Texas. Texas provided the Texan with the benefit of an education and would thus have enforcement jurisdiction over the Texan (assuming other requirements for such jurisdiction were met). However, the state-provided benefit does not extend to the Minnesotan;

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63. *Quill*, 504 U.S. at 307–08.

64. *Cf.* COOLEY, *supra* note 50, at 184 ("Taxation is an act of government. Government can only perform its functions by means of officers, and must make all its demands upon its citizens through the medium of official action. . . . No individual as such, or by virtue of his citizenship, can compel another to perform his duty to the state."); DESTY, *supra* note 50, at 25 ("Incidental benefits to the public which might be derived from private business enterprises will not justify taxation for the purpose of raising money from the public . . . .").

though the Minnesotan's quality of life is arguably improved because of the quality of her spouse's education,[65] the Minnesotan only receives that improvement because of the Texan's actions. Thus, the extra-contact restriction would prohibit Texas from exercising enforcement jurisdiction over the Minnesotan as a result of having provided the educational benefits to the Minnesotan's spouse. Though this example may seem a bit strange from a tax perspective, it demonstrates how one can think about how and to whom a state provides a particular benefit.

The derivative nature of enforcement jurisdiction provides the initial basis for the extra-contact restriction. Because enforcement jurisdiction is derived in part from the state's actions, it is tied to the original state-provided benefit from which the jurisdiction arises. Thus, the reach of that original benefit defines the reach of the state's enforcement jurisdiction; the state's power may not be extended by the actions of non-state actors who have received the benefit.[66] The extra-contact restriction is reinforced by the reciprocal nature of enforcement jurisdiction: the state must do something for the person for enforcement jurisdiction over the person to arise; if the state only provides a benefit to someone else, enforcement jurisdiction over the person cannot arise, even if the third-party benefit-recipient later provides a benefit to the person.[67] Basic principles of contract law support this conclusion; parties to a contract have no ability to demand something from third-party beneficiaries of the parties' actions—the reciprocity of the deal is only between the parties to the contract.[68] To allow a state to derive power over a person from benefits the state provided to a different person would

65. Good-humored friends of the Texan might disagree.

66. Two state supreme courts have reached a similar conclusion, albeit in the context of the minimum-connection aspect of the due process nexus inquiry. *See* Scioto Ins. Co. v. Okla. Tax Comm'n, 279 P.3d 782, 784 (Okla. 2012) ("In the case at hand, due process is offended by Oklahoma's attempt to tax an out of state corporation that has no contact with Oklahoma other than receiving payments from an Oklahoma taxpayer (Wendy's International) who has a bona fide obligation to do so under a contract not made in Oklahoma."); Griffith v. ConAgra Brands, Inc., 728 S.E.2d 74, 84 (W. Va. 2012) (failing to find due process nexus over an out-of-state person as the result of the person licensing trademarks to a licensor who then sold products with those trademarks to wholesalers and retailers in West Virginia).

67. *Cf.* Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 412 (1987) ("When an individual receives the benefits of a cooperative scheme, he or she ought to help bear the costs. As with the doctrinal argument, this basis for state coercion is absent when the state refuses to extend such benefits to outsiders.").

68. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) (observing that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange").

violate the transactional theory of enforcement jurisdiction;[69] exercises of enforcement jurisdiction in such a situation would be unjust.[70] The restriction against extra-contact enforcement jurisdiction thus guarantees the fundamental fairness of state exercises of enforcement jurisdiction by ensuring that a reasonable person has knowledge that she has received something from the state that could justify the state's enforcement jurisdiction over her.

Further, in its personal jurisdiction cases, the Supreme Court has recognized the principle that the defendant in question must by its own actions purposefully avail itself of the privilege of conducting activities in the forum state; merely causing an effect in the state by actions not directed towards it does not create enough of a connection to the state.[71] This direct interaction

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69. The extra-contact restriction does not entail a rejection of traditional agency principles. If another person is serving as an agent or representative of the potential taxpayer, then it should be reasonable to conclude that any benefit provided by a state actor to the other person is received by that person on behalf of the potential taxpayer. *See* Handel, *supra* note 6, at 629 (discussing the application of agency and affiliation nexus standards and arguing for broad application of these standards); McLure, Jr., *supra* note 6, at 402–03 (approving of "nexus by agency" and "nexus by affiliation" approaches).

70. *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 342 (1954) ("It is a venerable if trite observation that seizure of property by the state under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."); WELLS, *supra* note 42, at 72 (observing that the biblical phrase "render unto Caesar the things that are Caesar's" recognizes that a government "can find no justification, in virtue of power to compel the payment of tribute or taxes, to appropriate property (of the people) under circumstances in which similar action on the part of a private citizen would be considered robbery"); Edson, *supra* note 6, at 905 ("A state should not be allowed to exercise jurisdiction over a party merely because the party received accidental and unintentional economic and regulatory benefits from a state. This is especially true when the party is unaware that it is receiving such benefits and cannot conduct the appropriate business and tax planning and compliance for its operations in that state to insure it conducts cost-effective business, an economic interest shared by both the state and the taxpayer.").

71. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1122–23 (2014) ("[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State. . . . Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State."); Kulko v. Superior Court *ex rel.* City of S.F., 436 U.S. 84, 96 (1978) ("In light of our conclusion that appellant did not purposefully derive benefit from any activities

between the defendant and the state is essential to ensure that the defendant has notice or fair warning that its actions might subject it to the jurisdiction of the state.[72] Likewise, only a state's own actions towards a person should be able to establish and provide notice or fair warning that the state has provided the person with a benefit that might justify the state's enforcement jurisdiction over her. Failing to recognize the extra-contact restriction could lead to the absurd result that the supplier of a supplier of a supplier, et cetera, of an in-state vendor could be subject to the state's enforcement jurisdiction because the state's provision of benefits to the in-state vendor trickled down to the ultimate supplier.[73] Taking the Wayfair example from earlier,[74] Florida could be said to have enforcement jurisdiction not only over Wayfair but also over Wayfair's Virginia-based supplier of tableware and her North Carolina-based supplier of clay because Florida provides benefits to its residents which in turn affect Wayfair, the tableware maker, and the clay supplier when a Floridian buys the tableware. A reasonable person down the chain would not have knowledge that she had received something from the state that might justify the state's enforcement jurisdiction over her.

Requiring the state itself to provide the benefit in question to the person it wishes to exercise enforcement jurisdiction over admittedly necessitates a degree of formalism in the Due Process Clause's limitations on enforcement jurisdiction, particularly when viewed from the standpoint of the person; after all she is better off regardless of whether the effect of a state-provided benefit reaches her through a state actor or a non-state actor. After some waffling, the Supreme Court rejected a formalistic approach to determining whether a state had substantive jurisdiction to tax the "privilege of doing business" in interstate commerce,[75] observing that "[t]here is no

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relating to the State of California, it is apparent that the California Supreme Court's reliance on appellant's having caused an 'effect' in California was misplaced.").

72. *See* Burger King Corp. v. Rudzewicz, 471 U. S. 462, 471–73 (1985) (discussing the fair warning requirement).

73. *Cf.* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 92 (1980) ("Causation in fact is not sufficient reason for placing the jurisdictional burden upon the defendant, any more than causation in fact is sufficient in the substantive context. As Prosser notes in the substantive context: 'In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond . . . . some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.'").

74. *See supra* Part II.

75. The approach was a *per se* rule against taxes levied on the privilege of doing business in interstate commerce. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288–89 (1977).

economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect."[76] However, "not all formalism is alike,"[77] and unlike the formalism introduced by the "use of magic words or labels"[78] rejected in *Complete Auto*, the degree of formalism here results from considering what types of actions by the state would give a person the notice or fair warning of the state's enforcement jurisdiction over the person necessary to satisfy the Due Process Clause. Though the value of a benefit received may be the same regardless of who delivers it, the state/non-state actor distinction addresses those due process concerns, and thus its degree of formalism is meaningful and appropriate.

The extra-contact restriction may be analytically approached by asking whether the state could hypothetically take the benefit in question away from the person (or prevent the person from receiving it), placing aside concerns about the public nature of state benefits and other limitations on state actions. That is to ask, could the state continue to engage in the same actions generally but prevent the person from receiving the benefit in question? If so, then the state is providing the person with the benefit; if not, the state is not providing the person with the benefit. In the Texas example above, Texas could not continue to educate its residents and at the same time take away the Minnesotan's benefit of an improved quality of life resulting from an educated spouse—either her spouse would remain educated or she could find another educated Texan to marry—demonstrating that that benefit is provided to the Minnesotan by her spouse, not by Texas. Texas only provided benefits to the spouse, which it could take away by denying the spouse an education while still educating its residents generally. Many states already engage in this sort of behavior—denying benefits to specific people—when they deny access to state court systems due to the failure of an out-of-state corporation to register with the state.[79]

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76. *Id.*

77. Quill Corp. v. North Dakota, 504 U.S. 298, 314–15 (1992) (noting that "not all formalism is alike" before approving the formalistic bright-line physical presence rule for substantial nexus for sales and use taxes).

78. *Complete Auto,* 430 U.S. at 284.

79. *See* Carol Andrews, *Another Look at General Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1074–75 (2012) ("Registration statutes . . . remain coercive and punish nonregistration through fines and forfeiture of the right to bring suit in local courts."); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1365–66 (2015) ("Each of the states

B. The Prohibition of Extraterritorial Taxation

The prohibition of extraterritorial taxation has been a staple of the Supreme Court's state taxation jurisprudence.[80] This prohibition has roots in fundamental theories of legitimate taxation and surfaces in both Commerce Clause and Due Process Clause analyses of state tax actions.[81] As a theoretical matter, the transactional theory and the something-for-which-it-can-ask-return aspect do not appear to contain any limitation against extraterritorial enforcement jurisdiction. After all, the aspect only demands that the state provide the person with a benefit. Practically though, to the extent that the prohibition against extraterritorial taxation is based on a general prohibition against extraterritorial state actions,[82] a state's authority to provide a benefit justifying enforcement jurisdiction may be limited to its territory.[83] This

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also codifies the penalties for non-registration in circumstances where a corporation should have registered pursuant to the statute. These generally include an inability of the defendant to sue in the state's courts, the payment of a fine, and the tolling of the statute of limitations against the corporation.").

80. *See, e.g.*, Joondeph, *supra* note 6, at 122–23 ("This prohibition on extraterritorial taxes is a foundational principle of state taxation, a limit on state authority that has been recognized by the Supreme Court since the mid-1800s.").

81. *See, e.g.*, MeadWestvaco Corp. v. Ill. Dep't of Rev., 553 U.S. 16, 19 (2008); Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992); *Quill*, 504 U.S. at 311–14; Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 164 (1983); Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 441–42 (1980); Miller Bros. Co. v. Maryland, 347 U.S. 340, 342 (1954); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428–30 (1819); *see also* COOLEY, *supra* note 50, at 42–44, 121–23; DESTY, *supra* note 50, at 55–67; FREDERICK N. JUDSON, A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL IN THE UNITED STATES 499 (1903) ("This limitation of the taxing power of the State to its lawful jurisdiction obviously does not depend upon the Fourteenth Amendment. Like the limitation which requires that the tax shall be levied for a public purpose, this also is inherent in the conception of a tax."); WELLS, *supra* note 42, at 310–14; Joondeph, *supra* note 6, at 128–32 (discussing the role of the prohibition against extraterritorial taxation in defining a state's jurisdiction to tax).

82. *See* Joondeph, *supra* note 6, at 114 ("In our federal system, states generally can legislate only with respect to those activities that occur within their borders. This territorial limit on states' legislative jurisdiction is a basic, unstated premise of our constitutional structure. Thus, although states generally are prohibited from taxing values or activities occurring in other states, this restraint exists independent of the dormant Commerce Clause.").

83. *See* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 385 (1985) ("If territorial limitations on the reach of state sovereignty actually exist, then any particular aspect of state power, such as judicial jurisdiction, must necessarily be subject to those limits.").

practical limitation would arise from the derivative nature of enforcement jurisdiction—to ensure that the derivative enforcement jurisdiction is legitimate, the action from which it derives must be legitimate.[84] If a state's power to act was limited by its territorial borders, then the state would have to provide a benefit to a person within those borders in order to derive enforcement jurisdiction over that person.[85]

Therefore, not only would the state have to act within its borders in providing the benefit, the benefit would also have to be received within the borders; otherwise the state could impermissibly extend its powers past its borders. In other words, spillover benefits from in-state activities would not be sufficient for deriving enforcement jurisdiction over an out-of-state person.[86] For example, suppose Wisconsin engaged in efforts to clean up Lake Michigan in the state and as a result some of the benefits of the cleaned lake, such as having a safe place for recreation, spilled over to Michigan residents enjoying watersports in Traverse City, Michigan. Wisconsin would certainly derive enforcement jurisdiction over its own residents for these cleanup efforts. However, Wisconsin would not derive enforcement jurisdiction over the Michigan residents for its cleanup efforts because Wisconsin has no

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84. *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1296 (1989) ("It is unfair (and thus a violation of individual rights) for a state to exceed the legitimate scope of its sovereign power."); Weisburd, *supra* note 83, at 385 ("[S]tate action is more than an effort to provide a forum for dispute resolution; it is an exercise of governmental power. Assertions of jurisdiction, therefore, must be subject to the same limitations that exist for exercise of government power generally.").

85. *See* Stein, *supra* note 46, at 743 ("Although the state may demand obedience from its absent citizens, it has no corresponding right to act as sovereign to other persons outside of its borders absent a connection to its internal regulatory authority.").

86. Joondeph, *supra* note 6, at 123 ("While the federal government has the authority to regulate conduct throughout the Nation, the legislative jurisdictions of the states are generally confined to those activities occurring within their borders. As the Supreme Court concisely stated in the 1905 case of *Union Refrigerator Transit Co. v. Kentucky*, 'the operation of state laws [is] limited to persons and property within the boundaries of the State.'") (footnote omitted); *cf.* Int'l Harvester Co. v. Wis. Dep't of Tax'n, 322 U.S. 435, 441–42 (1944) ("A state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers.").

extraterritorial power over those people. If a Michigan resident were to sail across the lake into Wisconsin waters, then Wisconsin could provide the Michigan resident with a benefit relating to those sailing activities sufficient to justify enforcement jurisdiction over the resident (though the minimum-connection aspect of due process might not be met).

There is much debate concerning the validity of extraterritorial exercises of state powers, particularly in the areas of personal jurisdiction and conflict of laws.[87] However, what this debate means for the something-for-which-it-can-ask-return aspect and the practical limitations on enforcement jurisdiction are questions for another day. As it stands, the prohibition of extraterritorial taxation would prevent a state from exercising enforcement jurisdiction over an out-of-state person who has no connection to the state. The minimum-connection aspect of the due process nexus analysis defines when such a connection exists, so even if a state does have the ability to provide an extraterritorial benefit, the state would not have enforcement jurisdiction over a person receiving that benefit until the person purposefully avails herself of the state's economic market.

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87. *See generally* Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41 (2012) (analyzing recent developments in personal jurisdiction law); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 172 (2004) (arguing that that the "basic territorial framework of the limitations on state court jurisdiction stems not from the Due Process Clause, or any other provision protecting individuals from untoward assertions of state power, but from federal common law rules developed under the influence of the Full Faith and Credit Clause to allocate judicial power among the states"). *See also* Brilmayer, *supra* note 84 (describing and analyzing disagreements regarding the proper approach to choice of law issues); Brilmayer, *supra* note 19, at 295 (arguing that due process jurisdiction should be "based upon a political theory consistent with the norms underlying the American Constitution, and should reflect the criteria of justification that such underlying political norms implicitly incorporate"); Paul D. Carrington & James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967) (analyzing various approaches to justifying state exercises of power); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983) (describing and critiquing various approaches to choice of law theory); Perdue, *supra* note 46 (analyzing and critiquing various conceptions of the limits of personal jurisdiction); Sheehan, *supra* note 19, at 387 (analyzing approaches to personal jurisdiction); Stein, *supra* note 46 (arguing that "assertions of jurisdiction, as exercises of power, ought to reflect the general limits on state sovereignty inherent in a federal system"); Weisburd, *supra* note 83, at 385 (analyzing the role of territoriality in exercises of personal jurisdiction).

C. Evaluating the Something-for-Which-It-Can-Ask-Return Aspect's Limitations on Enforcement Jurisdiction

Reflecting a principled approach towards the analysis of enforcement jurisdiction standards, Professor Walter Hellerstein urges that three lessons inform such analysis:

> First, the issue is one of enforcement jurisdiction, not substantive jurisdiction, and the question is whether the tax can or should be enforced, not on whether it can or should be imposed. Second, there is no reason as a matter of principle why the jurisdictional standards for enforcement jurisdiction should be the same as the jurisdictional standards for substantive tax jurisdiction. And third, because the key issue is one of enforcement, practical rather than theoretical concerns should be paramount in resolving it.[88]

Applying these three lessons to the something-for-which-it-can-ask-return aspect's limitations on enforcement jurisdiction yields three fundamental questions about the limitations. First, should a state have to provide a person with a benefit before the state can compel the person to collect and remit a tax? Second, is there a reason that due process should require a state to provide a benefit in order to justify both substantive jurisdiction and enforcement jurisdiction? And third, should the underpinnings of the something-for-which-it-can-ask-return aspect trump the practical concerns regarding a state's ability to enforce its tax laws?

The third question is the most fundamental, and reasonable minds can disagree about its answer. For instance, with respect to use taxes, some have argued that because a vendor is in the most administratively practical position to collect the taxes the vendor should collect and remit them as long as the administrative costs do not outweigh the tax.[89] However, this pressure to require vendors to collect and remit tax for the benefit of the state indicates a need to take theoretical due process limitations on enforcement jurisdiction

88. Hellerstein, *supra* note 8, at 58–59.

89. *See, e.g.*, Swain, *supra* note 6, at 345 ("As between collecting tax from each individual consumer or from the seller, it is more administratively practical to collect the tax from the seller. Thus, anyone making taxable sales to consumers within the taxing jurisdiction should have a collection obligation, subject to a *de minimis* threshold below which the cost of collection exceeds the benefit.").

seriously. The power to impose tax or a tax collection obligation is vast and liable to abuse;[90] failure to apply the due process limitations rigorously may result in the violation of a vendor's rights. As it stands, the jurisprudence establishes the right not to be subject to enforcement jurisdiction until one receives and accepts a benefit from the state.

The first two questions are answered by observing that enforcement jurisdiction has a substantive element to it—a person subjected to it has a substantive obligation to do something for the benefit of the state, to collect or pay a tax.[91] As such, an enforcement obligation is akin to a tax itself, as noted above,[92] and thus there must be some substantive justification for the collection obligation.[93] This characteristic makes enforcement jurisdiction inherently different from personal jurisdiction, under which a state has the authority to determine the person's substantive obligations to the state or someone else; a person subject to personal jurisdiction has no definite obligation to act for the benefit of the state.[94] Thus, it is improper to fully

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90. *See* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875) ("Of all the powers conferred upon government that of taxation is most liable to abuse."); COOLEY, *supra* note 50, at iv ("[W]hen one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and to what incompetent hands its execution is usually committed, it seems unreasonable to treat as unimportant, any stretch of power—even the slightest—whether it be on the part of the legislature which orders the tax, or of any of the officers who undertake to give effect to the order.").

91. This substantive element is perhaps more evident in the case of a requirement to collect tax from another person, as in the case of a vendor collecting a sales or use tax from its customer, but in theory the substantive element is no less present in the case of collecting a tax from oneself, as in the case of self-reported and paid income taxes.

92. *See supra* note 54.

93 *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 342 (1954) ("It would be a strange law that would make appellant more vulnerable to liability for another's tax than to a tax on itself."). This observation directly contradicts the assertions of some commentators that there is no reason for a person to argue that it should not be subject to enforcement jurisdiction because it does not receive a benefit from the state. *See, e.g.*, John A. Swain, *Misalignment of Substantive and Enforcement Tax Jurisdiction in a Mobile Economy: Causes and Strategies for Realignment*, 63 NAT'L TAX J. 925, 927–28 (2010) ("Hellerstein (2003) cautions that the question of whether an item is subject to a state's substantive jurisdiction is not the same question as whether a person fairly may be asked to assist the state in collecting and remitting a tax on that item. Thus, it is a *non sequitur*, for example, for a remote seller to argue that it should not be subject to a use tax collection obligation because the seller does not benefit from in-state government services.").

94. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 879–80 (2011) (discussing standards for personal jurisdiction and observing that "[t]he Due

equate enforcement jurisdiction with personal jurisdiction;[95] there must be something more for enforcement jurisdiction, some reason that the state may compel a person to collect or pay a tax. That "something more" is contained in the requirements of the something-for-which-it-can-ask-return aspect and provides the reason that, at a basic level, a state must provide a benefit in order to justify both substantive jurisdiction and enforcement jurisdiction.

Further, as alluded to earlier,[96] the state's obligation to provide a benefit to a person is not illusory in the face of the minimum-connection aspect; the requirements of both aspects must be satisfied to ensure that the state's exercise of enforcement jurisdiction is fundamentally fair. An alternative approach to this concern is asking whether the extra-contact restriction is necessary in light of the prohibition against extraterritorial taxation. At first blush, it appears that the extraterritorial prohibition encompasses all that is needed to define the scope of state enforcement jurisdiction. After all, if a state cannot derive enforcement jurisdiction over an out-of-state person having no connection with the state, it is true that it should not matter if the effects of a state-provided benefit reach the person through a state actor or through a non-state intermediary.

However, the extra-contact restriction serves an important role: it clarifies that a state cannot provide a sufficient benefit to an out-of-state person solely through the person's interactions with non-state actors. In other words, the restriction clarifies that interactions with non-state actors, even if such actors are residents of the state, outside of the state are not activities of a person

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Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.") (internal citations omitted); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–20 (1945) (discussing the connections necessary to bestow a state with the authority to adjudicate a claim against an out-of-state person); *see also* Sheehan, *supra* note 19, at 387 ("Personal jurisdiction is a court's power to make a binding adjudication of a person's rights and obligations."). Such adjudicatory authority might result in a default judgment against the person if the authority is ignored, but this potential does not transform the state's personal jurisdiction over the person into a substantive obligation to contribute to the state or other person; rather, a default judgment is more properly viewed as a decision on the person's substantive obligations.

95. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992) (invoking "comparable reasoning" rather than identical reasoning to that used in the personal jurisdiction context when considering standards for enforcement jurisdiction).

96. *See supra* Section III.C.

within the reach of the state's authority. This is the case even if such interactions could serve as the basis for satisfying the minimum-connection aspect. Thus, though the same facts may satisfy both the minimum-connection and something-for-which-it-can-ask-return aspects in a significant number of cases,[97] there are times when one aspect could be satisfied but the other not.[98] One of the biggest current areas of frustration in taxation for the states is the difficulty of exercising enforcement jurisdiction over remote vendors. The following Part explores this situation regarding remote vendors, providing an example of when a person might purposefully avail herself of the state's economic market but not receive benefits from the state.

V. Enforcement Jurisdiction over Remote Vendors

Beyond the intellectual exercise of exploring an undeveloped area of doctrine, what is the importance of understanding the transactional theory of enforcement jurisdiction and the resulting due process limitations on such jurisdiction? Under the state taxation jurisprudence, the Due Process Clause is not the sole source of constitutional limitations on enforcement jurisdiction;

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97. *See, e.g.*, Handel, *supra* note 6, at 711 (arguing that one receives benefits from the state by purposefully availing herself of the state's economic market and concluding, tentatively, that "Due Process nexus is the equivalent of *in personam* specific jurisdiction over the person that is required to account for and pay over the tax"); Hellerstein, *Electronic Commerce*, *supra* note 6, at 434 ("It is a 'fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax."' This so-called 'nexus' requirement derives from the virtually axiomatic proposition that the exercise of a state's tax power over a taxpayer or its activities is justified by the 'protection, opportunities and benefits' the state confers upon the taxpayer or its activities. If the state lacks the definite link or minimum connection with the taxpayer or its activities, it has not 'given anything for which it can ask return.'") (footnotes omitted); *see also Quill*, 504 U.S. at 308 ("In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State.").

98. As an example of the inverse situation where the something-for-which-it-can-ask-return aspect is satisfied but the minimum-connection aspect is not, consider a person recreationally driving through a state, thereby receiving benefits from the state at least in the form of useable roads but not directing commercial activities at the state's residents. The implied transaction under the transactional theory would not be complete because the person would not have fulfilled her obligation, and the state would not have enforcement jurisdiction over her.

the Commerce Clause imposes its own limitations,[99] which are widely presumed to set a higher bar to state action than the due process limitations.[100] However, the states and their allies are undertaking efforts to weaken the Commerce Clause limitations, particularly with respect to remote vendors. These efforts have—in the case of income taxes—and will (if successful)—in the case of sales and use taxes—thrust the Due Process Clause limitations on enforcement jurisdiction into the spotlight as the primary limitations on enforcement jurisdiction. This Part describes the Commerce Clause limitations on enforcement jurisdiction and the efforts to remove them before demonstrating how the Due Process Clause—particularly, the something-for-which-it-can-ask-return aspect—will limit the effectiveness of those efforts. Many remote vendors will remain beyond the states' enforcement jurisdiction

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99. The Appendix, *infra*, contains a chart providing an overview of the constitutional restrictions on enforcement jurisdiction, including both the Due Process Clause limitations and the Commerce Clause limitations.

100. Fatale, *supra* note 6, at 565 ("The 1992 U.S. Supreme Court case, *Quill v. North Dakota*, suggested that the Due Process Clause was to play second fiddle to the Commerce Clause in such tax matters, and would not typically be relevant given the more likely, more rigorous application of the latter clause."); Handel, *supra* note 6, at 629; McLure, Jr., *supra* note 14, at 490 ("The Due Process Clause . . . provides remote vendors little protection from a duty to collect use tax. The Commerce Clause provides out-of-state vendors substantially more protection from a duty to collect use tax."); Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 188 (2012) ("[T]he courts that have evaluated the scope of their states' economic nexus formulations have indicated that those formulations provide heightened jurisdictional bars that are more onerous than that provided by the Due Process Clause."). *But see* Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 213 (1998) ("Note that our approach differs slightly here from *Complete Auto*. 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."); Handel, *supra* note 6, at 630 ("If the Due Process Clause requires certain minimum contacts with a state, the Commerce Clause does not require a greater number of contacts."); John A. Swain, *State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective*, 45 WM. & MARY L. REV. 319, 372 (2003) ("The central conclusion of this Article is that physical presence is not an income tax nexus requirement. Accordingly, substantial nexus for income taxes may approach the due process minimum contacts standard."); Thimmesch, *supra*, at 88–91 (section discussing the "Gratuitous Elevation of the Commerce Clause over the Due Process Clause").

when Commerce Clause limitations are removed; federal intervention may be necessary to fully solve the states' remote vendor issues.

A. Commerce Clause Limitations on Enforcement Jurisdiction

The Commerce Clause imposes limitations on state jurisdiction to tax to ensure that the national economy is not unduly burdened by any one state's actions.[101] In other words, the Commerce Clause protects the states against each other's nationally-economically harmful actions. To this end, the Supreme Court has articulated the following "*Complete Auto* test"[102] for determining whether a state satisfies the jurisdiction-to-tax requirements of the Commerce Clause:

> [W]e will sustain a tax against a Commerce Clause challenge so long as the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State."[103]

The first prong of this test—that the tax be applied to an activity with a substantial nexus with the taxing state—establishes the primary limitation on a state's enforcement jurisdiction.[104] The *Quill* Court clarified that this

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101. *Quill*, 504 U.S. at 312 ("[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.").

102. The test derives from the 1977 case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and is thus commonly referred to as the "*Complete Auto* test." *See, e.g.*, Swain, *supra* note 100, at 328.

103. *Quill*, 504 U.S. at 311 (quoting *Complete Auto*, 430 U.S., at 279). Whether this test achieves the Commerce Clause's goal of protecting the workings of the national economy has been the subject of much debate (*see, e.g.*, Joondeph, *supra* note 6, at 114, 133–39 (discussing potential inefficiencies of the Commerce Clause standard); Thimmesch, *supra* note 100, at 196–97 (critiquing the Commerce Clause standards)), but that question is outside of the scope of this Article. Many observe that the *Complete Auto* test incorporates not only Commerce Clause ideals but Due Process Clause ideals as well. *See, e.g.*, Fatale, *supra* note 6, at 578.

104. The fourth prong of the *Complete Auto* test mirrors the something-for-which-it-can-ask-return aspect of the Due Process Clause, and the Supreme Court has examined both in conjunction. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 622–24 (1981). As such, the fourth prong may also impose limitations on enforcement jurisdiction, though some commentators view the prong as "dead." *See,*

prong not only looks to the activity taxed but also requires that a person have a substantial nexus with a state before she is subject to the state's enforcement jurisdiction.[105] In the context of sales and use taxes, *Quill* confirmed that "substantial nexus" for purposes of this prong requires a physical presence in the taxing state.[106] The Supreme Court has not articulated whether a physical presence is necessary to satisfy the first prong of the *Complete Auto* test in the context of other types of taxes,[107] leaving the door open for the states to significantly limit the Commerce Clause restrictions on enforcement jurisdiction for income taxes.

1. *Income Taxes—State Economic Nexus Standards*

In the face of the Supreme Court's silence, many state courts have considered whether the Commerce Clause's physical presence rule for sales and use tax enforcement jurisdiction carries over to income taxes and have found that the answer is "no."[108] These courts instead have found a substantial

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e.g., 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. PENNUMBRA 196, 205 (2007) ("Courts have heretofore been so reluctant to . . . apply the 'fairly related' prong of *Complete Auto* [that it] has become a dead letter.") (comments of Brannon P. Denning). A greater understanding of the something-for-which-it-can-ask-return aspect could lead to a revival and strengthening of the fourth prong in this area. *See* Sylvia Dennen, *The Fourth Prong—The Court's Neglected Stepchild?*, 33 ST. TAX NOTES 743 (Sept. 6, 2004) ("The fourth prong has often been considered to closely resemble the Due Process Clause regarding the state's ability to take without giving value in return."); Michael M. Giovannini & Matthew P. Hedstrom, *The Fairly Related Prong: Back From the Dead or Flash in the Pan?*, 78 ST. TAX NOTES 127 (Oct. 12, 2015) (discussing the relationship between and current developments regarding the fourth prong and the Due Process Clause).

105. *Quill*, 504 U.S. at 311 (referring to *Nat'l Bellas Hess v. Dep't of Rev.*, 386 U.S. 753 (1967), and applying the first prong to the person).

106. *Id.* at 317.

107. *Id.* at 314 ("[W]e have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes . . . ."); *see also* Swain, *supra* note 100, at 321–23 (discussing the absence of a clear substantial nexus standard for non-sales and use taxes); Thimmesch, *supra* note 100, at 165 ("However, despite the Court's affirmation of the physical presence rule, there has been considerable conflict regarding whether this rule applies to taxes other than sales and use taxes.").

108. Borden Chems. & Plastics, L.P. v. Zehnder, 726 N.E.2d 73 (Ill. App. Ct. 2000); MBNA Am. Bank, N.A. v. Ind. Dep't of State Rev., 895 N.E.2d 140 (Ind.

nexus when the person earns income from intangible property used in the state, such as trademarks, franchises, or credit card accounts, or when the person has a substantial economic presence in the state, which may be demonstrated by deriving a certain amount of income from transactions with residents of the state.[109] Though the standards developed in these state court decisions differ from each other, they are commonly lumped together under the term "economic nexus."[110] However, as Professor Adam Thimmesch has observed, "most state courts adopting the economic nexus standard have failed to provide any formulation for how that test is to be applied";[111] this makes it likely that those standards will impose little meaningful burden on the states.[112]

The Supreme Court has denied certiorari in all of the economic nexus cases that have come before it.[113] Presumably, one of the reasons that the Supreme Court has declined to weigh in on these economic nexus cases is that it views Congress as the appropriate federal entity to define the enforcement jurisdiction requirements imposed by the Commerce Clause.[114] In fact, the

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Tax Ct. 2008); KFC Corp. v. Iowa Dep't of Rev., 792 N.W.2d 308 (Iowa 2010); Bridges v. Geoffrey, Inc., 984 So. 2d 115 (La. Ct. App. 1 Cir. 2008); Geoffrey, Inc. v. Comm'r of Rev., 899 N.E.2d 87 (Mass. 2009); Capital One Bank v. Comm'r of Rev., 899 N.E.2d 76 (Mass. 2009); Lanco, Inc. v. Dir., Div. of Tax'n, 908 A.2d 176 (N.J. 2006); Kmart Props., Inc. v. Tax'n & Rev. Dept., 131 P.3d 27 (N.M. Ct. App. 2001), *rev'd*, 131 P.3d 22 (N.M. 2005); A&F Trademark, Inc. v. Tolson, 605 S.E.2d 187 (N.C. Ct. App. 2004); Geoffrey, Inc. v. Okla. Tax Comm'n, 132 P.3d 632 (Okla. Civ. App. 2005); Geoffrey Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13 (S.C. 1993); *see also* Swain, *supra* note 100, at 358–62; Thimmesch, *supra* note 100, at 173–81.

109. *See, e.g.*, *Geoffrey*, 437 S.E.2d at 13 (finding Commerce Clause nexus as the result of earning income from intellectual property used in the state); Tax Comm'r v. MBNA Am. Bank, N.A., 640 S.E. 2d 226, 232 (W. Va. 2006) (finding Commerce Clause nexus as the result of having a substantial economic presence in the state).

110. *See generally* Thimmesch, *supra* note 100 (analyzing various economic nexus standards).

111. *Id.* at 181.

112. *See id.* at 188–91.

113. *See* authorities cited *supra* note 108.

114. Quill Corp. v. North Dakota, 504 U.S. 298, 318 (1992) ("[The Commerce Clause] aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."); *see also* Nat'l Bellas Hess v. Dep't of Rev., 386 U.S. 753, 760 (1967) ("The very purpose of the Commerce Clause was to ensure a national economy

Quill Court appeared almost reluctant to endorse the physical presence rule for sales and use taxes, relying heavily on stare decisis and the settled expectations of people in the sales and use tax area.[115]

Emboldened by their states' courts' decisions and the Supreme Court's denials of certiorari, many state legislatures have enacted so-called "economic nexus" or "factor presence" statutes, which provide that a person will be subject to the state's income tax if it has a certain amount of property, payroll, or sales in the state.[116] For example, California's factor presence statute provides that a person will be subject to the California Corporation Franchise Tax, an income tax, if that person has sales in the state of at least $500,000, real and tangible personal property in the state worth at least $50,000, or compensation paid in the state of at least $50,000.[117] The Multistate Tax Commission, a consortium of state tax administrators which provides guidance and assistance to the states in an effort to promote uniformity and best tax practices, has published a model factor presence statute, which the California approach tracks.[118] As of 2015, at least 28 states

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free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.").

115. *Quill*, 504 U.S. at 311, 318 ("While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases. . . . [T]he continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law.").

116. *See, e.g.*, CAL. REV. & TAX. CODE § 23101(b) (Westlaw 2017) ($500,000 in sales, $50,000 in property, $50,000 in payroll); CONN. GEN. STAT. ANN. § 12-216a (Westlaw 2017); MICH. COMP. LAWS ANN. § 206.621 (Westlaw 2017) ($350,000 in sales); OHIO REV. CODE ANN. § 5751.01(H)–(I) (Westlaw 2017) ($500,000 in sales, $50,000 in property, $50,000 in payroll); OKLA. STAT. tit. 68, § 1218(H)(3)–(6) (2012) (repealed 2015) ($500,000 in sales, $50,000 in property, $50,000 in payroll); WASH. REV. CODE ANN. § 82.04.067(1) (Westlaw 2017) ($250,000 in sales, $50,000 in property, $50,000 in payroll); COLO. CODE REGS. § 201-2:39-22-301.1 (2)(b) (Westlaw 2017) ($500,000 in sales, $50,000 in property, $50,000 in payroll); CONN. DEP'T OF REV. SERVS., INFORMATION PUB. 2010(29.1), Q & A ON ECONOMIC NEXUS ($500,000 in sales).

117. CAL. REV. & TAX. § 23101(b). These values are indexed for inflation. Additionally, if 25% of a person's sales, property, or payroll occur in the state, then the person will be subject to the Corporation Franchise Tax.

118. *See* Dan Bucks & Frank Katz, *Explanation of the Multistate Tax Commission's Proposed Factor Presence Nexus Standard*, 25 ST. TAX NOTES 1037

have adopted some sort of economic nexus standard, including seven states that have adopted factor presence statutes.[119] Under such a statutory scheme or under judicial formulations of the economic nexus standard, a state might attempt to subject a remote vendor to its enforcement jurisdiction based solely on the fact that residents of the state made a certain amount of purchases from the remote vendor.[120]

2. *Sales and Use Taxes—Overturning* Quill

Efforts to overcome Commerce Clause limitations on enforcement jurisdiction over remote vendors carry over to the sales and use tax area, despite the bright-line physical presence rule announced in *Quill*.[121] *Quill* is the primary thorn in a state's side when it comes to efforts to require a remote vendor to collect use taxes on its sales to residents of the state. And it is a potentially big thorn—as noted, an estimated $11.4 billion in sales and use tax revenues went uncollected in 2012 in large part as the result of the states' inability to require remote vendors to collect such taxes under the *Quill* rule.[122]

(Sept. 30, 2002); Multistate Tax Commission, *Factor Presence Nexus Standard*, 25 ST. TAX NOTES 1035, 1035 (Sept. 30, 2002).

119. *See* authorities cited *supra* note 116; *see also* Shirley Sicilian, *Dormant Commerce Clause and Due Process Nexus: A Recent History and Some Developing Issues*, J. MULTIST. TAX. & INCENTIVES, June 2015, at 40, 41 (2015).

120. It would be incorrect to say that the remote vendor has Commerce Clause or Due Process Clause nexus with the state as a result of the operation of the factor presence standard. Nexus is a constitutional concept, and the nexus standard cannot be set by statute. Rather, the statute embodies the state's belief as to what types of activities would meet the nexus standard of either the Commerce Clause or the Due Process Clause. Thus, states with factor presence statutes presumably believe that making a certain amount of sales attributed to the state is sufficient to meet the constitutional nexus standards.

121. *See, e.g.*, Handel, *supra* note 6, at 623 ("The controversy is also currently represented by general interest in the collection of use taxes on internet purchases, proposed federal legislation, and proposed and recently enacted state legislation, the agendas of state and local tax professional meetings, and the prediction by a Bureau of National Affairs article that nexus will be among the most active topics this year."); Mines, *supra* note 6, at 583 ("[M]y comments are limited to sales and use taxes. I focus on them because they have drawn the most attention with respect to electronic commerce. . . .'"); *see also* Groves, *supra* note 6; Hartman, *supra* note 6; Hellerstein, *Deconstructing*, *supra* note 6, at 564; McLure, Jr., *supra* note 14; Charles E. McLure, Jr., *Radical Reform of the State Sales and Use Tax: Achieving Simplicity, Economic Neutrality, and Fairness*, 13 HARV. J.L. & TECH. 567 (2000); Morse, *supra* note 13; Swain, *supra* note 6; Hal R. Varian, *Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 639 (2000).

122. *See* authorities cited *supra* note 3.

Many remote vendors have used the fact that they cannot be required to collect taxes in certain states to gain a competitive advantage over vendors with a physical presence in those states.[123]

Given the states' dissatisfaction with the burden *Quill* imposes on them, many have called for Congress or the Supreme Court to remove the *Quill* physical presence rule.[124] Legislation to repeal the rule has consistently been

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123. Swain, *supra* note 93, at 933–34 (addressing efforts of online retailers to avoid tax collection obligations); Varyani, *supra* note 6, at 169–75 (discussing advantages remote vendors might receive from the physical presence rule); *Small Business Panel Reviews Mail Order Use Tax Issue*, 55 ST. TAX REV. (CCH), Oct. 3, 1994, at 2–3 (noting the competitive advantage that mail-order companies have over local retailers). That such a competitive advantage exists demonstrates the second side of the states' inability to collect use taxes on sales made by remote vendors—difficulties collecting the taxes from the actual consumers. The effects of the *Quill* decision have arguably led to the somewhat common belief among consumers that they do not or should not owe sales or use taxes on purchases made through the Internet. *See* Varian, *supra* note 121, at 641 ("Since use taxes are so difficult to enforce, most people regard out-of-state purchases as being effectively tax free."). However, if a vendor is not subject to the state's enforcement jurisdiction and thus does not collect use tax from its customer at the time of sale, the consumer is legally obligated to report and pay the use tax to the state. *See* POMP, *supra* note 2, at 6-40 to 6-42. Unfortunately for the states, use tax compliance among individual consumers is dismally low. *See* NINA MANZI, RESEARCH DEP'T MINN. HOUSE OF REPS., USE TAX COLLECTION ON INCOME TAX RETURNS IN OTHER STATES (2015), http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf (noting that the percentage of taxpayers who report use tax in states where that tax can be reported on income-tax returns is approximately 1.9%). Administrative burdens and political concerns prevent the states from enforcing such compliance as a practical matter. *See, e.g.*, Hellerstein, *supra* note 8, at 23–24 (discussing administrative problems states face in collecting use taxes from individual consumers); Swain, *supra* note 6, at 353 ("Sales made by remote sellers are subject to a de facto exemption. . . . [T]he Supreme Court has required that a seller be physically present in a state before the state can impose its use tax collection obligation, and it is administratively impractical for a state to directly collect use taxes against individual consumers. Individual consumers seldom self-assess use tax, and so the tax goes unpaid."); Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147, 151–60 (2015) (noting difficulties creating the current "use tax gap").

124. *See, e.g.*, Brian Bardwell, *Council of State Governments Asks Congress to Act on E-Commerce Taxation*, 79 ST. TAX NOTES 27 (Dec. 21, 2016); David Brunori, *MTC Market-Based Sourcing Efforts Are Good*, 78 ST. TAX NOTES 915 (Dec. 21, 2015) ("[I]f Congress does not act, there is a good possibility that the Supreme Court will overturn *Quill*. States are getting very aggressive regarding sales tax nexus.

introduced in Congress since *Quill* was decided but has struggled to gain traction.[125] However, buoyed by support from commentators and the business community, including Amazon.com,[126] the Marketplace Fairness Act (MFA)

More litigation is coming."); Jennifer DePaul, *Task Force Promises Legislation Designed to Overturn* Quill, 79 ST. TAX NOTES 185 (Jan. 18, 2016) [hereinafter DePaul, *Task Force*]; Jennifer DePaul, *Congressional Supporters Tried to Get E-Fairness into Spending Bill*, 79 ST. TAX NOTES 26 (Jan. 4, 2016); Jennifer DePaul, *Governors Press for Passage of MFA*, 75 ST. TAX NOTES 79 (Jan. 7, 2015) [hereinafter DePaul, *Governors*]; Jennifer DePaul, *States Ready to Explore Other Options for Remote Sales Tax Legislation*, 78 ST. TAX NOTES 648 (Nov. 24, 2015) (same) [hereinafter DePaul, *States*]; Maria Koklanaris, *Governors: States Will Act on Their Own for E-Fairness*, 79 ST. TAX NOTES 119 (Jan. 11, 2016); Annette Nellen, *Still Seeking Digital Direction*, 78 ST. TAX NOTES 797 (Dec. 14, 2015).

125. Hartman, *supra* note 6, at 1015–17 (discussing possible congressional actions to overturn the holding of *National Bellas Hess*, from which the *Quill* physical presence rule derives); Swain, *supra* note 6, at 370 ("Unfortunately, Congress has not proven to be an effective forum for state tax reform. Ever since *Bellas Hess* was decided in 1967, legislation that would 'overrule' the physical presence test has been introduced, only to flounder."); Adam B. Thimmesch, *The Fading Bright Line of Physical Presence: Did* KFC Corporation v. Iowa Department of Revenue *Give States the Secret Recipe for Repudiating* Quill*?*, 100 KY. L.J. 339, 340 (2012) ("States have responded to these losses by aggressively and continuously lobbying Congress to legislatively overturn the physical-presence rule. Despite those efforts, however, Congress has not yet given states the reprieve that they seek.").

126. *See, e.g.*, *Marketplace Fairness: Leveling the Playing Field for Small Business*: *Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 112th Cong. (2012); Swain, *supra* note 93, at 940–41 (arguing for various solutions to jurisdictional misalignment issues, including overturning *Quill*); Varyani, *supra* note 6, at 173–76; Robert D. Plattner, Quill*: Ten Years After*, 25 ST. TAX NOTES 1017, 1017 (Sept. 30, 2002) ("[T]he Quill decision qualifies as a blunder of major proportions by the Court. . . . [T]he states should push the Supreme Court to reexamine *Quill* by bringing a new test case that seeks to change not only the outcome in *Quill* but also the framework of Supreme Court decisionmaking in state tax nexus cases. While it may be naive to think that the Court would abandon *Quill*, it is hard to believe that the Supreme Court is satisfied with the anachronistic, illogical state of constitutional doctrine embodied in *Quill*. Perhaps, given another opportunity to do better, the Court would seize on it."). Amazon.com's support of the states' efforts to require remote vendors to collect their taxes is likely explained by an apparent shift in business model from "sales-tax-free" shopping to quick delivery of products ordered online. Quick delivery requires having fulfillment centers in many states, meaning that Amazon.com's physical presence footprint today is much larger than it was 15 years ago. Therefore, Amazon.com is no longer a remote vendor in many states. It makes sense that if it is required to collect state taxes that it would want its online competitors to also be required to collect those taxes. *See* POMP, *supra* note 2, at 6-41; Andrew Ross Sorkin, *In Tax Fight, Amazon Hands Baton to eBay,* N.Y. TIMES: DEALBOOK (Apr. 22, 2013, 9:49 PM),

passed the Senate in 2013 before stalling in the House of Representatives.[127] The MFA would discard the *Quill* physical presence rule for a state wishing to impose use tax collection obligations on remote vendors as long as the state enacts certain safeguards and tax simplification measures.[128] Though the MFA has not yet been passed, support for it and similar measures among states remains strong.[129]

In addition, there are rumblings that the Supreme Court should reconsider and overturn *Quill*'s physical presence rule.[130] In a recent case not involving the rule, Justice Kennedy, who concurred with the *Quill* majority on stare decisis grounds,[131] noted that "it is unwise to delay any longer a

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http://dealbook.nytimes.com/2013/04/22/in-tax-fight-amazon-hands-baton-to-ebay/ ("So what about Amazon? Why did it abandon the fight? Not because it felt altruistic. It was a business decision. As Amazon has grown, it has become better positioned to handle the tax hit. And perhaps more important, it is moving to build physical warehouse and shipping centers in many states so that it can offer faster delivery services, in some cases within 24 hours. That means it would most likely have had to collect sales tax anyway.").

127. 160 CONG. REC. S597 (daily ed. Jan. 29, 2014) (tabling "a resolution adopted by the House of Representatives of the Commonwealth of Pennsylvania memorializing the Congress of the United States to pass and the President of the United States to sign the Marketplace Fairness Act of 2013"); Harry J. Reske, *U.S Senate Approves Marketplace Fairness Act*, 68 ST. TAX NOTES 499 (May 13, 2013) (noting the U.S. Senate's passage of the S.743 by a 69-27 vote "[a]fter more than a decade of deliberation"). For a discussion of the MFA and the issues surrounding it, see Henchman, *supra* note 3.

128. Marketplace Fairness Act of 2015, S. 698, 114th Congress (2015). For analysis of how the MFA might affect one state, see James Bull Sterling, *Remote Seller Sales and Use Tax Law: How Proposed Law Will Impact South Carolina*, 65 S.C. L. REV. 827 (2014).

129. *See, e.g.*, DePaul, *Governors*, *supra* note 124 (reporting on efforts to pass MFA); Nellen, *supra* note 124 (discussing states efforts to overturn *Quill*). *But see* No Regulation Without Representation Act, H.R. 5893, 114th Cong. (2016) (codifying the *Quill* physical presence rule); Jennifer DePaul, *Republican Senators Urge Congress to Reject MFA*, 78 ST. TAX NOTES 711 (Dec. 7, 2015) (reporting on opposition to MFA).

130. *See* DePaul, *Task Force*, *supra* note 124 (reporting on efforts to get the Supreme Court to reconsider *Quill*); DePaul, *States*, *supra* note 124 (same); *see also* David Brunori, *It's Time to Overturn* Quill, 55 ST. TAX NOTES 497 (Feb. 15, 2010) (advocating for the overturning of *Quill*); Plattner, *supra* note 126, at 1017 (same).

131. Quill Corp. v. North Dakota, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) ("I also agree that the Commerce Clause holding of *Bellas Hess* should

reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms states to a degree far greater than could have been anticipated earlier."[132] Justice Kennedy's concurrence—which no other Justice joined—harmonizes with the feelings of many commentators,[133] though others observe that *Quill*'s endorsement of the physical presence rule was primarily based on stare decisis grounds and that little has changed of importance since that decision that should lead the Court to change its position.[134] Even so, given Justice Kennedy's sentiments, a direct challenge to the physical presence rule might win the attention of the Court and could lead to the judicial discarding of the rule, despite the fact that the Court clearly views Congress as the most appropriate actor.[135] Recognizing this, South Dakota has passed a law requiring a remote vendor to collect the state's sales and use taxes if the vendor has over $100,000 in sales of goods or services delivered into the state or over 200 transactions for goods or services delivered into the state,[136] and the Alabama Department of Revenue has issued a regulation effective January 1, 2016, which requires certain remote vendors with more than $250,000 of sales into the state to collect and remit use taxes

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not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*.") (citation omitted); *see also* Direct Marketing Ass'n v. Brohl, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J. concurring) ("Three Justices concurred in the judgment, stating their votes to uphold the rule of *Bellas Hess* were based on *stare decisis* alone.").

132. *Direct Marketing Ass'n*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

133. *See, e.g.*, McLure, Jr., *supra* note 6, at 394–95; Plattner, *supra* note 126, at 1017 (encouraging states to "push the Supreme Court" to overturn the "blunder of major proportions" that is the *Quill* decision); Shores, *supra* note 18, at 683 (asserting that *Quill* is "a short-sighted, poorly reasoned decision likely to create more problems than it solves"); Swain, *supra* note 6, at 355–70 (discussing the perceived short-fallings of the *Quill* decision and means of overturning it); *see also* Hartman, *supra* note 6, at 1006–08 (discussing the need to overturn the *Bellas Hess* ruling from which the *Quill* physical presence rule derived).

134. *See* Arthur R. Rosen & Hayes R. Holderness, Quill *Is Still Relevant*, 65 ST. TAX NOTES 285 (July 23, 2012); Arthur R. Rosen & Matthew P. Hedstrom, Quill—*Stare at the Decisision*, 60 ST. TAX NOTES 931 (June 27, 2011).

135. *See Quill*, 504 U.S. at 318; Nat'l Bellas Hess v. Dep't of Rev., 386 U.S. 753, 760 (1967).

136. S.D. CODIFIED LAWS §§ 10-64-1 to 10-64-9 (2017).

to the state.[137] Both of these actions have produced legal challenges,[138] priming the pump for potential Supreme Court action.[139]

B. Benefits Provided to Remote Vendors

Though the Commerce Clause has traditionally dominated the analysis of enforcement jurisdiction,[140] the states' efforts described above demonstrate that the Commerce Clause's time in the spotlight is waning.[141]

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137. ALA. ADMIN. CODE r. 810-6-2-.90.03 (2016). Tennessee and Massachusetts also took administrative actions to disregard the physical presence rule, but so far litigation has not begun against these actions. *See* TENN. COMP. R. & REGS. 1320-05-01-.129 (2017); Mass. Dep't of Rev. Directive 17-1 (Apr. 3, 2017).

138. *See* Answer to Notice of Appeal, Newegg Inc. v. Dep't of Rev., No. S. 16-613 (Ala. Tax Trib. Aug. 26, 2016); Notice of Appeal, South Dakota v. Wayfair, Inc., No. 32 Civ. 16-000092 (S.D. 6th Cir. Mar. 8, 2017); *see also* Stephanie Cummings, *Parties Eager for Ruling on Removal in South Dakota* Quill *Challenge*, 2016 ST. TAX NOTES 122-2 (June 24, 2016); Maria Koklanaris, *Retailer Challenges Alabama's Economic Nexus Rule*, 80 ST. TAX NOTES 918 (June 20, 2016); Maria Koklanaris, *South Dakota Sues to Enforce Nexus Law and Is Sued to Block It*, 2016 ST. TAX NOTES 84-1 (May 2, 2016).

139. *See* Maria Koklanaris, *Both Sides Pleased With Court Ruling Striking Down South Dakota Remote Sales Tax Law*, 2017 ST. TAX TODAY 44-2 (Mar. 8, 2017) (noting South Dakota representatives' desire to take their case to the US Supreme Court); DePaul, *Task Force*, *supra* note 124; Nellen, *supra* note 124 ("At least one state took action in 2015 to help the Court revisit *Quill*. Alabama issued a new rule that requires sellers with a 'substantial economic presence' to register and collect sales and use tax, effective for transactions occurring on January 1, 2016."). In addition, the National Conference of State Legislatures Executive Committee Task Force on State and Local Taxation is undertaking an effort to draft model legislation that could lead to a legal challenge to *Quill*.

140. Fatale, *supra* note 6, at 566; Sicilian, *supra* note 119, at 40 ("For the 20 or so years after *Quill*, a major focus of state tax litigation then became whether the dormant commerce clause also required a physical presence for state imposition of corporate income or franchise tax. Due process 'minimum' contacts seemed to take a back seat to dormant commerce clause 'substantial' nexus."); *see also Quill*, 504 U.S. at 313 (noting that a person "may have the 'minimum contacts' with a taxing state as required by the Due Process Clause, and yet lack the 'substantial nexus' with that state as required by the Commerce Clause").

141. *See* David Brunori, *The End of* Quill, 67 ST. TAX NOTES 591 (Feb. 25, 2013) (anticipating the imminent overturning of the *Quill* decision (though ultimately

This decline provides an occasion to illuminate the effect of the Due Process Clause limitations on enforcement jurisdiction by applying them to situations involving remote vendors.[142] Many argue that by making sales to a state's residents, a remote vendor has purposefully availed itself of the benefits of the state's economic market, thus satisfying the due process nexus inquiry.[143] Assuming this purposeful availment argument is correct and the minimum-connection aspect is satisfied, the Due Process Clause will still prevent a state that does not provide the remote vendor with constitutionally sufficient benefits from exercising enforcement jurisdiction over that remote vendor. Those remote vendors who do not have property or conduct activities in the taxing state will not receive such benefits, even if they sell to the state's residents that approach them though a website, telephone call, or even a physical visit.

The question of whether a state provides a remote vendor with a benefit sufficient to justify the state's enforcement jurisdiction over the vendor is more complex than it first appears. This Section considers three illustrative examples of vendors, all of which sell to the taxing state's residents that approach the vendors with orders, to demonstrate the application of the something-for-which-it-can-ask-return aspect of the due process nexus inquiry. The first type of vendor is a traditional "brick-and-mortar" vendor with a store and employees in the taxing state. The second type of vendor is a

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proving incorrect by basing the overturning on the Marketplace Fairness Act of 2013, the piece's sentiments are informative)).

142. *See* Fatale, *supra* note 6, at 567–68 (noting the renewed significance of the Due Process Clause in matters of state taxation); Sterling, *supra* note 128, at 850–51 (observing that even if the MFA passes Commerce Clause scrutiny, it would still be subject to Due Process Clause challenges); Benton & Calhoun, *supra* note 6 ("Now, in light of states' increasing aggressiveness in asserting economic nexus theories for income tax purposes—and state courts' acceptance of those theories—there is much less justification for the reduced reliance on the due process clause in state income tax cases . . . ."); Amy Hamilton, *Due Process Nexus Questions Would Follow* Quill *Reversal*, 62 ST. TAX NOTES 361 (Nov. 11, 2011) (reporting on potential due process concerns following an overturning of *Quill*).

143. *See* Fatale, *supra* note 6, at 629; Handel, *supra* note 6, at 640–42; Mines, *supra* note 6, at 614–16; *accord Quill*, 504 U.S. at 307–08; Burger King Corp. v. Rudzewicz, 471 U. S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."). *But see* Edson, *supra* note 6, at 939–40 (arguing that a "taxpayer who receives unsolicited orders" from a state's residents and fulfills those orders has purposefully directed its activities towards the state for purposes of sales and use tax actions but not for income and other direct tax action purposes).

remote vendor that advertises in the state, and the third type is a remote vendor whose only connection to the state is that it sells to the state's residents.

1. *The Traditional Brick-and-Mortar Vendor*

As a result of a traditional brick-and-mortar vendor's physical presence in the state, the state provides the vendor with many of the benefits that traditionally justify enforcement jurisdiction, such as fire and police protection and a legal system providing a civilized society.[144] Enforcement jurisdiction based on these benefits does not run afoul of either the extraterritorial prohibition on taxation or the extra-contact restriction. Thus, if you are a Florida-based vendor, Florida has enforcement jurisdiction over you. Though the case of the brick-and-mortar vendor is uncontroversial, such a vendor provides a baseline against which to compare remote vendors.

By definition, a remote vendor does not have a physical presence in the taxing state. Therefore, unlike a traditional brick-and-mortar vendor, the state could not provide the remote vendor with many of the traditionally noted benefits since they relate to the person's physical presence in the state. Because a remote vendor is unlikely to receive many traditionally noted benefits, alternative types of benefits must be considered.

2. *The Remote Vendor Advertising in the State*

The second type of vendor to consider is a remote vendor that contracts for—or does its own—advertising in the taxing state.[145] Here the state potentially provides the remote vendor with a number of benefits relating to its advertising activities, such as the creation of a legal and technical infrastructure through which the advertising can occur and, if in-state advertising firms or media providers are used for the advertising, the legal infrastructure for engaging in business with those firms or providers. Like the traditionally noted state-provided benefits, these benefits should justify

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144. *See, e.g.*, Comptroller of Treasury v. Wynne, 135 S. Ct. 1787, 1797 (2015); Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 25 (2009); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 200 (1995); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 624–29 (1981); Nat'l Geographic Soc'y v. Cal. Bd. of Equalization, 430 U.S. 551, 558–61 (1977).

145. The question of where email or Internet advertising takes place is an important question, but one outside the scope of this Article.

enforcement jurisdiction under the something-for-which-it-can-ask-return aspect.

As an initial matter, the prohibition against extraterritorial taxation would not prevent the exercise of enforcement jurisdiction over this type of remote vendor as the vendor establishes a presence in the state's territory by advertising in the state and receives benefits as a result. For example, if the remote vendor engages in transactions in the state, then it has received a benefit from the state's infrastructure for conducting such transactions. The state's legal system might facilitate the remote vendor's ability to contract with a media provider to provide advertising in the state, thus benefitting the vendor. If the media provider failed to keep its end of the bargain, then the remote vendor presumably would have the capability to sue in the state courts on its contract.

Further, the extra-contact restriction also would not prevent the exercise of enforcement jurisdiction over this type of remote vendor because the benefits in question are provided to the remote vendor by state actors, be they courts, regulators, or enforcement agents. For instance, if the remote vendor engages in a transaction with a media provider in the state, then the vendor has received the benefits of the state's legal infrastructure supporting that transaction through the state's courts or agents. That the state itself is providing the benefits is demonstrated by observing that the state could hypothetically continue to provide that infrastructure generally but deny its benefits to the vendor by forbidding it from invoking its protections. Many states do just this—deny benefits to specific people—for businesses that have not registered with the state.[146]

3. *The Remote Vendor Only Selling to State Residents*

The final type of vendor under consideration is the remote vendor whose only connection with the taxing state is selling to residents of the state who order from the vendor. Because such a remote vendor has no intangible property in the taxing state and conducts no activities in the taxing state, the prohibition against extraterritorial taxation would appear to limit the state's ability to exercise enforcement jurisdiction over the vendor. Even so, many argue that, by selling to the state's residents, a remote vendor establishes a connection with the state (i.e., satisfies the minimum-connection aspect) and that the state provides such a remote vendor with the benefits of a consumer base, roads allowing the shipment of products to the resident customers, and a

146. *See* authorities cited *supra* note 79.

legal infrastructure that allows for transactions to occur.[147] Given that a state has no basic authority to grant or deny an out-of-state person market access,[148] the argument must be that selling to a resident of a state and shipping products to the resident should be considered activities of a remote vendor within the state for which the state provides benefits. Though these arguments may have initial appeal, the extra-contact restriction would prevent the exercise of enforcement jurisdiction based on such benefits. The remote vendor is only affected by the state's provision of benefits to other people with whom the vendor interacts; the state could not hypothetically continue to act as it does generally but take away any benefit received by the remote vendor. Alternatively stated, selling and shipping to a resident from outside a state are not activities in the state for which the state can provide a sufficient benefit, and the state would not be able to compel a remote vendor engaged only in those activities to collect or pay a tax.

For example, take the case of a Florida consumer base. Florida-provided infrastructure and legal protections are benefits that serve to create the consumer base—Floridians are placed in a position to consume. However, the benefit that Wayfair, a remote vendor with respect to Florida, receives from Florida's consumer base is money for tableware sold; Wayfair is able to liquefy the value of its assets. That money/ability is not provided through a

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147. *See* Handel, *supra* note 6, at 699–701; Hartman, *supra* note 6, at 1009 ("The government of the taxing state conferred benefits and gave support, protection, and opportunities in the development of the consumer market."); Swain, *supra* note 100, at 378–79 & n.331 ("[T]he out-of-state seller receives benefits in excess of what is provided to its delivery media. For example, not only does the state protect the trucks, it protects the remote seller's goods. Further, the state provides a legal system that allows the remote seller to enforce the trucking company's obligation to deliver goods rather than abscond with them. This same legal system protects the seller's right to enforce the obligations of its customers. Numerous other protections and benefits could be identified that extend beyond mere delivery of the product. . . . Taxes are what we pay to live in a society that allows a market to operate in the first instance. Like it or not, the government is a 'silent partner' in the economy (one that often is not appreciated until it ceases to function). . . . Simply put, a remote seller could not do business in a lawless society. Indeed, a seller in a lawless society would be compelled to be physically present to enforce the obligations of the buyer and to ensure the safe delivery of its product. Remote commerce can only exist in an orderly society in which government has undertaken these functions on behalf of all beneficiaries of that orderly society, including remote sellers."); Bucks & Katz, *supra* note 118 (arguing that a market state provides benefits to a remote vendor).

148. *See supra* note 60.

state actor, but through a non-state intermediary, the customer. Florida could not continue to provide the benefits that create a consumer base generally, but remove Wayfair's monetary benefit. Instead, Florida would have to remove the consumer base altogether to deny the monetary benefits to Wayfair, demonstrating that Wayfair's customers provide it with the benefits, not the state. Other constitutional concerns aside, the state could attempt to forbid its residents from conducting business with Wayfair, but such actions would offer no guarantee that the consumers actually would stop buying from Wayfair, especially since the sales are taking place in another state. Thus, Florida cannot derive enforcement jurisdiction over Wayfair from the fact that it received money from a customer that Florida put in a position to consume; the extra-contact restriction prevents it.

Similarly, the state's provision of roads allowing a remote vendor's products to reach the resident consumers does not represent a benefit provided to the remote vendor through a state actor, assuming that the remote vendor uses a common carrier to deliver the products and does not deliver them itself or through an agent.[149] The remote vendor receives the benefit of having its

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149. Common carriers have occupied a unique position in state taxation jurisprudence—unlike other businesses, such as the advertising firms discussed above, which might create nexus for an out-of-state person, common carriers have been deemed not to establish jurisdictional hooks on their customers for the states. *See* Nat'l Bellas Hess v. Dep't of Rev., 386 U.S. 753, 758 (1967) ("[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail. Indeed, in the *Sears, Roebuck* case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that 'those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price.'"). *Quill* overruled *Nat'l Bellas Hess* to the extent it required a physical presence for the minimum-connection aspect of due process nexus inquiry to be met, Quill Corp. v. North Dakota, 504 U.S. 298, 308 (1992), but it is unclear if *Quill* changed the status of common carriers with respect to the benefits-received question. *See* AT&T Commc'ns of Md., Inc. v. Comptroller of Treasury, 950 A.2d 86 (Md. 2008) (agreeing with the taxpayer that "[a]n unspoken, but necessary, corollary [of the *Quill* and *Nat'l Bellas Hess* decisions] . . . is that a common carrier cannot be deemed to be the agent of the out-of-state seller for the purpose of creating a nexus and permitting state taxation of the interstate sale (or use in the state)."). If the status of common carriers for the benefits-received question changes such that they can be considered agents of the vendor, then the conclusions herein may depend on whether the vendor retains title to the property sold after delivering it to the common carrier. Though the Court rejected formalist approaches to the constitutionality of state tax actions in *Complete Auto*, cases adopting formalist approaches towards sales and use taxes often considered where title passed and have not been overruled. *See, e.g.*, Gen.

goods delivered to its customers because the common carrier can and is willing to ship its products to the state's residents using the state-provided roads. Thus, as long as the state continues to maintain the roads and engage in other actions that allow for the common carrier to engage in shipping, it could not deny the remote vendor the benefit of having its goods delivered to its customers that it enjoys as a result of using the common carrier—the remote vendor's benefit is provided by the common carrier, not a state actor. If the state denied the one common carrier access to the state's roads, the remote vendor could find another.

Finally, the establishment of a legal infrastructure that allows for transactions to occur is a benefit provided by state actors, but one that is irrelevant to the remote vendor. If the remote vendor accepts orders—thereby making sales—at its location, the transactions in question would occur outside of the taxing state,[150] unlike the transaction for advertising services in the state discussed above. Thus, there is no transaction involving the remote vendor for which the state can provide the benefit of a legal infrastructure. This conclusion admittedly may depend on where passage of title to the goods sold occurs.[151] However, the sale is for property that originates outside of the taxing state, so the state cannot provide sufficient benefits under the transactional theory until at least the time when the property enters the state. If the state then provides benefits that might reach the remote vendor for the goods in transit, it might have enforcement jurisdiction over the vendor, but if the vendor is not registered with the state and thus is denied access to the state's courts,[152] then the state would not have provided the vendor with any benefit from the in-state legal infrastructure and that infrastructure could not serve as the basis for the state's enforcement jurisdiction over the vendor.

C. The Future of Enforcement Jurisdiction: Federal Action

Given the above analysis, the states' current efforts to remove *Quill*'s physical presence rule for sales and use taxes and to adopt economic nexus standards for other taxes will not grant the states enforcement jurisdiction over all remote vendors making sales to their residents. Under the something-for-which-it-can-ask-return aspect of the due process nexus inquiry, there is a set

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Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944); McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944).

150. *See* J.E. Dilworth Co., 322 U.S. at 330.

151. *See, e.g.*, U.C.C. § 2-401 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

152. *See* authorities cited *supra* note 79.

of remote vendors over which the states do not have enforcement jurisdiction: those whose only connection to a state is selling to residents of that state that approach the vendors with orders. If history has any lesson here, it is that people will model their practices in order to avoid a state's jurisdiction to tax if possible and efficient for them.[153] Once the dominance of the Commerce Clause limitations on enforcement jurisdiction is undermined, people should be expected to change their behavior in response to the Due Process Clause limitations. As the states' current issues with remote vendors demonstrate, these limitations can have a serious economic impact.[154]

The potential "jurisdictional misalignment"[155] arising from a state having substantive jurisdiction over its residents' use of goods sold by a remote vendor but not having enforcement jurisdiction as a practical matter over the residents or as a legal matter over the remote vendor demonstrates the need to redefine the relationship between the federal government and the states with respect to state jurisdiction to tax if the states wish to fully solve their remote vendor issues. As others have argued, limitations on state-level enforcement jurisdiction may indicate the need to impose state tax collection obligations at the federal level.[156] Understanding the something-for-which-it-can-ask-return aspect confirms the need to think beyond state-level enforcement jurisdiction (barring a judicial refining of the due process limitations on state jurisdiction to tax, which may itself be due[157]).

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153. *See* Swain, *supra* note 100, at 373 ("[I]f tax rules allow us to structure our affairs to achieve the same economic result at a lower tax cost, we generally will do so.").

154. *See* authorities cited *supra* note 3.

155. *See* Hellerstein, *supra* note 8, at 43–45 (discussing jurisdictional misalignment); Swain, *supra* note 93 (addressing the problem of "jurisdictional misalignment," "a situation in which there is substantive jurisdiction to impose a tax but no enforcement jurisdiction to compel a person to remit the tax.").

156. *See* Hartman, *supra* note 6, at 1025–26; Hellerstein, *supra* note 8, at 48–49; Hellerstein, *Deconstructing*, *supra* note 6, at 564; Swain, *supra* note 93, at 939–40 (addressing tax assignment solutions to jurisdictional misalignment).

157. Hellerstein, *Electronic Commerce*, *supra* note 6, at 482 ("There is widespread recognition that traditional nexus criteria are ill-suited to the creation of sensible and administrable rules for determining the taxability of taxpayers or transactions in electronic commerce. Traditional tax jurisdiction or nexus principles, after all, are rooted in concepts of territoriality, and the physical presence of the taxpayer in the state. . . . [I]n any event, whether one is talking about traditional concepts of jurisdiction to tax based on physical presence or more 'modern' concepts of jurisdiction to tax based on 'economic' presence, the fact remains that one is still, in the end, counting contacts—be they tangible or intangible. But such an approach makes little sense in cyberspace."); Swain, *supra* note 6, at 393 ("If the world has

Though Congress has no authority to directly override the Due Process Clause's limitations on enforcement jurisdiction,[158] a federal obligation for remote vendors to collect taxes on the states' terms may offer a complete solution to the states' current remote vendor issues.[159] The Due Process Clause acts as a check on actions of the states, not the federal government;[160] however, the Due Process Clause of the Fifth Amendment does apply to the federal government and similar to that of the Fourteenth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[161] The ultimate constitutionality of a federal approach in this area is beyond the scope of this Article,[162] but

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changed, then state and local tax systems must change with it. For sales and use taxes, this means jurisdiction to tax should be predicated on economic activity.").

158. Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) ("Moreover, while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.") (internal citation omitted); *see also* Edson, *supra* note 6, at 897 ("Conversely, Congress may not regulate state taxes held unconstitutional under the Due Process Clause. Therefore, a thorough understanding of due process considerations underlying taxing jurisdiction jurisprudence is of paramount importance as it is the only absolute bar to a state's assertion of taxing jurisdiction."). *But see* Hellerstein, *Deconstructing*, *supra* note 6, at 564 ("Nevertheless, a strong case can be made that Congress has power to consent to violations of the Due Process Clause so long as they are not restraints by which Congress itself is bound. Under this theory, Congress can authorize what would otherwise be federalism-based violations of the Due Process Clause but not Due Process violations of individual rights.") (internal citations omitted); Hellerstein, *Electronic Commerce*, *supra* note 6, at 504–05 (noting that there are decent arguments for Congress being able to authorize certain violations of the Due Process Clause of the Fourteenth Amendment where Congress has authority under the Due Process Clause of the Fifth Amendment).

159. *See, e.g.*, Swain, *supra* note 93, at 931 (describing potential federal solutions to a lack of state enforcement jurisdiction); Varian, *supra* note 121, at 646 (discussing clearinghouse option for collecting and distributing use taxes on sales by remote vendors).

160. U.S. CONST. amend. XIV, § 1 ("[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law . . . .") (emphasis added); *see also* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543 n.21 (1987).

161. U.S. CONST. amend. V.

162. A D.C. Circuit Court of Appeals decision, considering a federal obligation placed on vendors to collect taxes on cigarettes regardless of whether the

assuming that the same nexus standards would apply to the federal government for purposes of taxation as apply to the states, the federal government could require any vendor that has a minimum connection with the United States and receives benefits from the United States to comply with the tax laws of any state in which it is a remote vendor (or a brick-and-mortar vendor for that matter).[163] State fears of federal encroachment into issues of state taxation are likely to lead to objections to a broad federal solution,[164] but a better understanding of the due process limitations on enforcement jurisdiction demonstrates that the states must give up the goal of subjecting all remote vendors to their enforcement jurisdiction if they wish to shun federal assistance.

VI. CONCLUSION

The Commerce Clause's days of dominating the field of state taxation appear numbered. Certainly the Commerce Clause will remain important, but with the demise of physical presence as the rule for enforcement jurisdiction, the Due Process Clause is primed to take on a larger role in determining proper

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vendors are present in the taxing state and discussing due process concerns, observed that "[e]ven national legislation—which can permissibly sanction burdens on interstate commerce—cannot violate the Due Process principles of 'fair play and substantial justice.' Although *Quill* did not deal with excise taxes, there remains an open question whether a national authorization of disparate state levies on e-commerce renders concerns about presence and burden obsolete; *Quill*'s analytical approach is instructive." Gordon v. Holder, 632 F. 3d 722, 726 (D.C. Cir. 2011) (internal citations omitted).

163. *See* Hartman, *supra* note 6, at 1026–27 (discussing the possibility of the federal government acting under the Due Process Clause of the Fifth Amendment to bypass the limitations of the Due Process Clause of the Fourteenth Amendment); Hellerstein, *Deconstructing*, *supra* note 6, at 564 ("[A] strong case can be made that Congress has power to consent to violations of the Due Process Clause so long as they are not restraints by which Congress itself is bound. Under this theory, Congress can authorize what would otherwise be federalism-based violations of the Due Process Clause but not Due Process violations of individual rights.") (internal citations omitted); Hellerstein, *Electronic Commerce*, *supra* note 6, at 504–05; *see also* Sicilian, *supra* note 119, at 42 (discussing constitutionality of potential federal actions to overcome due process limitations on the states).

164. *See, e.g.*, Traci Gleason Wright & Jesse Rothstein, *Taxes and the Internet: Updating Tax Structures for a Wired World*, 17 ST. TAX NOTES 491 (Aug. 23, 1999) ("States fear that if the federal government is given control over any sales tax administration or funds, Congress will begin to appropriate it for its own purposes, either by keeping some of the funds that pass through federal government hands or by imposing conditions on their disbursement. States do not see federal allocations as reliable enough to take the place of tax revenues under state control.").

exercises of state jurisdiction to tax. An understanding of the something-for-which-it-can-ask-return aspect of the due process nexus inquiry demonstrates the need to elevate enforcement jurisdiction issues to the federal level to accomplish complete solutions to those issues. In addition, many commentators observe that the prongs of the *Complete Auto* test for whether a state tax action satisfies the requirements of the Commerce Clause incorporate Due Process Clause ideals as well, particularly the first and fourth prongs of the test—whether the state has a substantial nexus with the person and whether the tax is fairly related to services provided by the state.[165] In the same way that the minimum-connection aspect of the due process nexus inquiry may inform the substantial nexus prong of the *Complete Auto* test if the physical presence rule is abandoned,[166] a better understood something-for-which-it-can-ask-return aspect has the potential to revive the "dead" fourth prong.[167] The Commerce Clause might have more to demand of states attempting to exercise enforcement jurisdiction over a person than just a substantial nexus with the person. Thus, despite the states' best efforts, plenty of hurdles remain for the states' attempts to bring remote vendors under their jurisdiction to tax.

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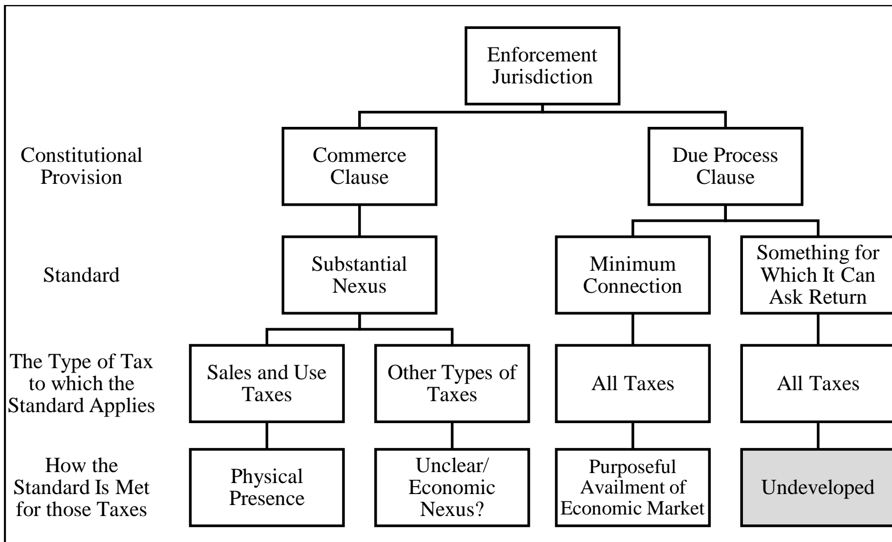
165. *See, e.g.*, Fatale, *supra* note 6, at 578.

166. *See* Thimmesch, *supra* note 100, at 188–91 (arguing that in a post-*Quill* physical presence rule world, the Commerce Clause substantial nexus standard should approach the Due Process Clause minimum connection standard).

167. *See* Dennen, *supra* note 104 ("The fourth prong has often been considered to closely resemble the Due Process Clause regarding the state's ability to take without giving value in return."); Giovannini & Hedstrom, *supra* note 104 (discussing the relationship between and current developments regarding the fourth prong and the Due Process Clause).

APPENDIX

The following chart summarizes the current state of Commerce Clause and Due Process Clause limitations on enforcement jurisdiction and the standards for their application.[168] The shaded box represents the area this Article develops.



168. The author is grateful to Arthur Rosen for the conceptualization of this chart.