REMOTE WORK AND THE STATE TAXATION OF NONRESIDENT EMPLOYEES

BRADLEY W. JOONDEPH*

The onset of the COVID-19 pandemic caused millions of Americans to suddenly begin telecommuting across state lines. In response, several states deemed the salaries of employees who had previously worked at workplaces in the taxing state to be "sourced" temporarily to that state. Some rival states contended this was unconstitutionally extraterritorial, but the Supreme Court ultimately declined to hear their complaint. This Article explains why these sourcing rules were constitutional. The Constitution only requires a state's method for sourcing income to be "fair" or "rational." Given the indispensable role of employers in generating an employee's salary—and that the state of the workplace is the labor market into which the employee has purposefully sold their services—these rules met this standard. Indeed, nearly all existing state income-attribution rules (including New York's controversial "convenience of the employer" regulation) are constitutional. The production of income involves the contribution of several activities, so assigning it to a particular location depends on value and policy judgments about the significance of those contributions—as well as the governmental services supporting those activities. These rules might be controversial as a matter of policy, but there is little doubt they are rational and reasonable. More importantly, the judiciary's deference to these sorts of state judgments abides the Constitution's deeper norms about the proper judicial role. Exacting judicial review of these types of rules would risk ensnaring the courts in an endless series of problems they lack the institutional competence to solve.

Introduction 874
I. The States' Jurisdiction to Tax Nonresidents' Income 878
II. COVID-19, Remote Work, and the Sourcing of Salary Income 882
  A. Pandemic-Related Attribution Rules for Employee Salaries 884
  B. "Convenience of the Employer" Regulations 888
III. Why (Nearly All) State Income-Attribution Rules Are Constitutional 890
  A. The Constitutional Constraints on State Income-Attribution Rules 891

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* Jerry A. Kasner Professor of Law, Santa Clara University. I am grateful to Michael Asimow, David Ball, Pat Cain, Taylor Dalton, Michael Flynn, Eric Goldman, Kyle Graham, Deep Gulasekaram, David Hasen, Hayes Holderness, Michelle Layser, Susie Morse, Darien Shanske, David Sloss, John Swain, David Yosifon, and Edward Zelinsky for generous feedback at various stages of this project.

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B. The Constitutionality of Massachusetts's and New York's Rules 898
C. An Important Caveat: *Central Greyhound* 906
IV. The Deeper Barriers to More Exacting Constitutional Review 910
Conclusion 916

INTRODUCTION

COVID-19 altered the physical place from which most Americans work. In response to various stay-at-home orders, millions of employees—at least temporarily—performed their jobs from home. For employees whose commutes had previously crossed state lines, this meant performing services in a different state than their regular workplace. Likewise, the freedom of remote work arrangements induced many employees to relocate their residences—again, at least temporarily—to new states.[1] Suddenly, millions of Americans were telecommuting across state lines, physically located in states other than their pre-pandemic workplaces.[2]

This scrambling of work geography presented state tax administrators with a quandary. The Constitution permits states to impose personal income taxes on nonresidents but only on income "derived from" the taxing state.[3] Thus, prior to the pandemic, if a taxpayer resided in State B and worked on her employer's premises in State A, State A would tax that taxpayer on her salary income.[4] But how was State A supposed to administer its tax during the public health emergency, when thousands of nonresident employees who had previously commuted into

1. *See, e.g.*, Jacey Fortin, *New Data Sheds Light on Who Is Moving Because of the Pandemic*, N.Y. TIMES (July 7, 2020), https://www.nytimes.com/2020/07/07/us/pew-survey-coronavirus-relocation.html.

2. *See* Emma Goldberg, *A Two-Year, 50-Million-Person Experiment in Changing How We Work*, N.Y. TIMES, https://www.nytimes.com/2022/03/10/business/remote-work-office-life.html (Apr. 13, 2022).

3. *See Shaffer v. Carter*, 252 U.S. 37, 57 (1920). Regarding nonresidents, a state's "jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources." *Id.*; *see also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.05[1] (3d ed. 2022); Bradley W. Joondeph, *The States' Multiple Taxation of Personal Income*, 71 CASE W. RSRV. L. REV. 121, 131 (2020) ("[A] state's source-based jurisdiction to tax the income of nonresidents only extends to the income derived from the taxpayer's activities in the taxing state (i.e., the income reasonably determined to have been earned within that state).").

4. State A would not tax a nonresident on any income properly sourced to other states, such as their income from passive investments or business activities taking place in other states.

the state were now working from their homes in States B, C, and D, for an uncertain duration?

Faced with this conundrum, several states (including Massachusetts) quickly declared that the salaries of employees who had previously performed their work at workplaces within the state would temporarily be "sourced" to that state.[5] Thus, if a Rhode Island resident had been commuting to their employer's office in Boston before being ordered to stay at home, Massachusetts would continue to treat their salary as being derived from Massachusetts. Alabama, Georgia, Maine, Mississippi, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina did the same,[6] and several other states did so on a more limited basis.[7] But did the Constitution permit these states to tax telecommuting nonresident employees' salaries—employees who, at least for the time being, were no longer setting foot in the taxing state?

A rival group of states asserted they did not. Specifically, the State of New Hampshire (supported by fourteen states as *amici curiae*) sought leave to file an original complaint in the Supreme Court, which challenged the constitutionality of the Massachusetts regulation.[8] The crux of its argument was that the Massachusetts scheme was impermissibly extraterritorial: the affected nonresidents were earning their salaries entirely outside Massachusetts, beyond the commonwealth's taxing jurisdiction.[9] Several prominent scholars agreed, arguing that Massachusetts's rule violated both the Dormant Commerce Clause and the Fourteenth Amendment's Due Process Clause.[10]

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5. *See, e.g.*, MASS. DEP'T OF REV., TIR 20-5, MASSACHUSETTS TAX IMPLICATIONS OF AN EMPLOYEE WORKING REMOTELY DUE TO THE COVID-19 PANDEMIC (2020), https://www.mass.gov/technical-information-release/tir-20-5-massachusetts-tax-implications-of-an-employee-working-remotely-due-to-the-covid-19-pandemic [https://perma.cc/BA8L-AWKW].

6. *See* Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. DAVIS L. REV. 1149, 1167, 1169 (2021).

7. *See id.* at 1169–70.

8. Motion for Leave to File Bill of Complaint, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154) [hereinafter Motion for Leave]; Brief of Amici Curiae States of Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, and Utah in Support of New Hampshire's Motion for Leave to File Bill of Complaint, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154) [hereinafter States' Amicus Brief in Support of New Hampshire]; Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, and Iowa in Support of Plaintiff, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154) [hereinafter States' Amicus Brief in Support of Plaintiff].

9. Motion for Leave, *supra* note 8, at 2–3.

10. *See, e.g.*, Kim, *supra* note 6, at 1173–74, 1176–77; Richard D. Pomp, New Hampshire v. Massachusetts*: Taxation Without Representation?*, 39 J. STATE TAX'N 19, 19–20 (2021); Edward Zelinsky, *Taxing Interstate Remote Workers After* New

Alas, New Hampshire's complaint soon fizzled out. In June 2021, the Supreme Court denied the state's motion to file a complaint and declined to hear the case,[11] leaving the matter to be litigated by individual taxpayers whose tax liabilities were affected by Massachusetts's rule.

This Article explains why the substance of New Hampshire's positions—and the arguments of those scholars who have endorsed it—are misguided. While others have capably defended rules like Massachusetts's (particularly as a matter of tax policy),[12] this Article offers a comprehensive, detailed defense of these rules' constitutionality. Critically, those attacking regulations like Massachusetts's have failed to fully appreciate the Constitution's flexibility (or "forgivingness")[13] regarding state approaches to the attribution of income for tax purposes. Though the Constitution categorically forbids the states from taxing nonresidents on income earned outside their borders, it grants them "wide latitude" in determining the geographic source of income subject to taxation.[14] Constitutionally, a state's method for sourcing income stemming from interstate activity need only be "fair" or "rational;" the value the state reaches must "reasonably reflect[] the in-state component of the activity being taxed."[15] Given the employer's indispensable role in the generation of an employee's salary—and that the location of the workplace is the state of the labor market into which these employees have purposefully sold their services—a rule like Massachusetts's meets this standard, especially since it only applied to employees whose jobs had a demonstrated, tight connection to their workplaces. And that is all the Due Process Clause and Commerce Clause require.

Indeed, nearly all existing state income-attribution rules are likely constitutional, and for the same reasons. This includes New York's long-

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Hampshire v. Massachusetts*: The Current Status of the Debate*, 25 FLA. TAX REV. 767, 767, 774–75 (2022).

11. *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021).

12. Professors Hayes Holderness and Darien Shanske have done so incisively. *See* Hayes R. Holderness, *Individual Home-Work Assignments for State Taxes*, 98 WASH. L. REV. (forthcoming 2023) (manuscript at 1, 4–6), https://ssrn.com/abstract=4009277; Darien Shanske, *Agglomeration and State Personal Income Taxes: Time to Apportion (with Critical Commentary on New Hampshire's Complaint Against Massachusetts)*, 48 FORDHAM URB. L.J. 949, 950 (2021).

13. Professor Holderness has made the point that the Constitution is quite "forgiving" in this respect to states. *See* Holderness, *supra* note 12, at 16.

14. *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 784 (1992) ("[O]ur cases give States wide latitude to fashion formulae designed to approximate the in-state portion of value produced by a corporation's truly multistate activity."); John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity*, 33 VA. TAX REV. 209, 244 (2013) ("[D]espite what might otherwise be considered stern admonitions against the taxation of extraterritorial values, the [Supreme] Court has given states 'wide latitude' in selecting apportionment formulas that fairly divide values among them.").

15. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989).

contested "convenience of the employer" regulation, which attributes the entirety of an employee's salary to the state of their workplace, except when their employer requires them to work outside the state.[16] The creation of income involves the contribution of several activities, so assigning it to a particular location necessarily depends on value or policy judgments about the significance of those contributions (and the governmental services supporting those income-generating activities). There are no "correct" answers about the geographic source of various increments of income when they are produced by activities occurring in multiple states.[17] Instead, as the Supreme Court has acknowledged, the task is akin "to slicing a shadow."[18] Thus, while rules like New York's might be controversial as a matter of policy,[19] there is little doubt they comport with the Constitution.

One might respond that, if the constitutional constraints on states are this flimsy, they warrant reconsideration; constitutional doctrine that affords states this much leeway just invites them to overreach. But there is a broader, deeper constitutional principle that has long shaped the field of state and local taxation, one the Supreme Court has emphasized on several occasions: exacting judicial review of state approaches to taxing income derived from activities occurring across multiple states would take the courts beyond their proper role in policing the boundaries of fiscal federalism. Intervening in cases like *New Hampshire v. Massachusetts*[20] to constitutionalize state income-attribution rules in finer detail would risk ensnaring the judiciary in an endless series of problems it lacks the institutional competence to solve. The justices have stared into this abyss before, and they have sensibly concluded that the Constitution assigns this responsibility to Congress, not the courts.[21]

Complaints like New Hampshire's can be intuitively appealing. In a certain way, the taxation of nonresident employees by Massachusetts and other states during the public health emergency *felt* extraterritorial. But such feelings are superficial; they play on our attachment to the significance of a taxpayer's physical location. Whatever the policy merits

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16. Pennsylvania, Nebraska, and Delaware have adopted similar rules. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05 n.323.

17. *See* Julie Roin, *Duplicative Taxation Among the States: A Problem Not Worth Solving?*, 25 FLA. TAX REV. 656 (2022) ("Although economists do not agree on many issues, they are united in disparaging the belief that income has a 'source.'").

18. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 192 (1983).

19. *But see* Holderness, *supra* note 12, at 4 ("[I]n a world of remote work, the policy arguments in favor of income sourcing rules based on the location of the employer are stronger than those for the traditional rules based on the physical location of the worker.").

20. 141 S. Ct. 2848 (2021).

21. *See* Holderness, *supra* note 12, at 25.

of Massachusetts's regulation—or of similar approaches to income attribution, like New York's "convenience of the employer" rule—these sorts of rules are consistent with current constitutional law. Perhaps more importantly, the judiciary's deference to these sorts of state judgments abides the Constitution's deeper norms about the judiciary's role in policing this corner of "Our Federalism." And staying mindful of these norms will only grow more significant if, as expected, an increasing proportion of Americans choose to work remotely across state lines, long after the pandemic is behind us.[22]

I. THE STATES' JURISDICTION TO TAX NONRESIDENTS' INCOME

Over the past century, personal income taxes have become the single most significant source of tax revenue for state governments, accounting for approximately $550 billion in 2021.[23] In fiscal year 2020, they comprised 36.5 percent of state tax revenues, just exceeding the proportion raised through general sales and gross receipts taxes (32.2 percent).[24] At present, forty-one states and the District of Columbia impose broad-based personal income taxes, and each imposes its tax on residents and nonresidents alike.[25]

The scope of the states' constitutional authority to impose personal income taxes is well-settled, at least in its broad outlines. States can tax a resident's entire income, regardless of where that income was earned. It has been "universally recognized" for nearly a century that "the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event," such that "[domicile] itself" grants a state a sufficient basis to tax the entirety of a resident's income.[26] With respect to nonresidents,

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22. *See* Nora Walsh, *So You Want to Work Remotely: A Guide*, N.Y. TIMES, https://www.nytimes.com/2022/10/07/travel/remote-work-guide.html (Oct. 11, 2022).

23. KATHERINE LOUGHEAD, JARED WALCZAK & EDDIE KORANYI, TAX FOUND., UNPACKING THE STATE AND LOCAL TAX TOOLKIT: SOURCES OF STATE AND LOCAL TAX COLLECTIONS (FY 2020), at 1 (2020), https://files.taxfoundation.org/20220825103108/Unpacking-the-State-and-Local-Tax-Toolkit-Sources-of-State-and-Local-Tax-Collections-FY-2020.pdf [https://perma.cc/8H6Q-5X55]; *see also* U.S. CENSUS BUREAU, NATIONAL TOTALS OF STATE TAX REVENUE, BY TYPE OF TAX (2021), https://www2.census.gov/programs-surveys/qtax/tables/2021/q4t2.xls.

24. LOUGHEAD, WALCZAK & KORANYI, *supra* note 23, at 7–8.

25. *State and Local Backgrounders*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/individual-income-taxes [https://perma.cc/4VNW-66JD] (last visited Mar. 14, 2023); WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 373 (11th ed. 2020).

26. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312–13 (1937). The justification for this residence-based jurisdiction stems from the special relationship a

however, a state's power is more constrained.[27] As the Supreme Court explained more than a century ago in *Shaffer v. Carter*,[28] the Constitution generally deprives states of the "power to tax non-residents with respect to income derived from property or business beyond the borders of the State."[29] Instead, they may only impose taxes "upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein."[30]

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state shares with its residents. *Id.* ("A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits."). States provide residents with a wide variety of public services, the staples of the modern welfare state: public schools and universities, health insurance, anti-poverty programs, unemployment insurance, state parks, vehicle licensing, and the like. These benefits are quite expensive (at least in the aggregate), and most are available exclusively to a state's residents. Moreover, though U.S. citizens can choose their state of residence, states confer on their residents the privileges of state citizenship, which include political participation rights (*e.g.*, to vote and hold public office). Finally, and perhaps most importantly, states provide their residents with the basic elements of civil society—a functioning judicial system, police and fire protection, the enforcement of the state's criminal and civil laws—that enable inhabitants to enjoy the fruits of their labor. As the Court explained in *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932), residence-based income taxation "is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received," which "are rights and privileges incident to his domicile in the state." *Id.* at 281.

27. As far back as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court recognized that a state's "power of taxation is not confined to the people and property [domiciled in] a State," but "may be exercised upon every object brought within its jurisdiction." *Id.* at 429. In the early 1900s, as states began adopting the first modern state income taxes, the Supreme Court cited these passages from *McCulloch* in recognizing states' authority to require "contributions from those who realize current pecuniary benefits under the protection of the government." *Shaffer v. Carter*, 252 U.S. 37, 51 (1920). By this, the Court meant that states could tax income "where it is earned," regardless of where the earner of that income resides. *Curry v. McCanless*, 307 U.S. 357, 368 (1939).

28. 252 U.S. 37.

29. *Id.* at 53.

30. *Id.* at 52; *see also id.* at 57 ("As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.").

Because states can tax income based on both residence and source—and because state tax schemes are not identical—taxpayers earning income in more than one state are subject to the possibility of overlapping (or multiple) state taxation: two states simultaneously taxing the same increment of income. It is well established that such multiple taxation, in itself, does not offend the Constitution. *See* Joondeph, *supra* note 3, at 126–44. But if a state wishes to tax its residents on all their income *and* tax nonresidents on income derived within the state, the Constitution requires that state to offer its residents a credit for any tax they pay on income sourced to other states. *See Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542 (2015) (invalidating an aspect of Maryland's personal income tax for this precise reason). This is necessary to ensure that the state's scheme is "internally consistent," and thus does not discriminate against interstate

The justification for states' authority to tax nonresidents on income derived from the taxing state is plain enough. If a state provides the physical and legal infrastructure to sustain a functioning market for goods or services (of which the taxpayer avails themself to earn income), the state is entitled to ask for a contribution to the public treasury in return.[31] Or, from a more territorial perspective, income generated inside a state's boundaries metaphorically lies "within" its geographic jurisdiction, wholly independent of who earned that income. (This is only metaphorical because income is intangible; while the activities contributing to the generation of income occur in geographic space, income itself lacks any physical existence.) In this way, a state's source-based jurisdiction to tax income is analogous to specific (or case-linked) adjudicatory jurisdiction. When a defendant has "minimum contacts" with a state—when it "purposefully avails itself of the privilege of conducting activities within" that state[32]—that state's courts may assert *in personam* jurisdiction over the defendant.[33] But specific adjudicatory jurisdiction does not extend to all possible claims against that defendant, only to those claims "arising out of or related to the defendant's contacts" in the forum state.[34] Similarly, a state's source-based jurisdiction to tax the income of nonresidents only extends to that income "derived from" the taxing state.

These constitutional constraints on the states' taxation of nonresidents' income are grounded in the Dormant Commerce Clause and the Fourteenth Amendment's Due Process Clause. The Supreme

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commerce. *See infra* text accompanying note 54. Every state with a broad-based personal income tax offers such credits, and these credits generally protect taxpayers from multiple taxation—at least when it would stem from this overlap of residence- and source-based jurisdiction. But the same increment of income might still be taxed by more than one state—*e.g.*, when two states have differing (but reasonable) source rules and both attribute the same bit of income to themselves. This non-systematic, "internally consistent" form of multiple taxation is entirely constitutional—an incidental cost of the states' autonomy to enact nonuniform tax schemes within our federal system.

31. *See 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 non-resident 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."). As the Supreme Court explained in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), the relevant "test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." *Id.* at 444.

32. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

33. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 283–86 (2014); *Daimler AG v. Bauman*, 571 U.S. 117, 128 & n.6 (2014).

34. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15 (1985); *Helicopteros Nacionales de Colomb., S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).

Court has long held that, for a state tax to comport with due process, "there must be some definite link, some minimum connection, between [the taxing] state and the person, property or transaction it seeks to tax,"[35] and "the income attributed to the State for tax purposes must be rationally related to the values connected to the taxing State."[36] And under the four-part test first articulated by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*,[37] the Dormant Commerce Clause requires that state taxes (1) apply to taxpayers or activities "with a substantial nexus with the taxing state," (2) be "fairly apportioned," (3) "not discriminate against interstate commerce," and (4) be "fairly related to the services that the State provides."[38]

Were a state to tax a nonresident on income derived from elsewhere, the levy would deny the taxpayer due process because it would seek to tax values not "rationally related to the values connected to the taxing State."[39] Likewise, such a tax would violate the Dormant Commerce Clause because the state would lack a "substantial nexus" with the income it sought to tax, and the tax would not be "fairly apportioned" to the relevant activities occurring in the taxing state.[40]

As a practical matter, when a taxpayer alleges that a state has taxed a value over which it lacks jurisdiction, there is only one constitutional question: whether the tax is fairly apportioned to the relevant activities occurring in the taxing state. This is for two reasons: *First*, the due process question—whether the tax is "rationally related to values connected to the taxing State"—is subsumed within the Commerce Clause's requirement of fair apportionment: that the tax not "reach[] beyond that portion of value that is fairly attributable to [the taxpayer's] economic activity within the taxing State."[41] *Second*, at least when the question is whether the tax is impermissibly extraterritorial, the two relevant Dormant Commerce Clause requirements—"substantial nexus" and "fair apportionment"—are redundant.[42] That is, if a state's tax is fairly apportioned, such that it only taxes that income fairly attributable

35. *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2220 (2019) (cleaned up).

36. *Id.* (cleaned up).

37. 430 U.S. 274 (1977).

38. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018).

39. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978).

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

41. *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2220 (2019) (quotation marks omitted) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

42. *See* Bradley W. Joondeph, *The Meaning of Fair Appointment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 150–51 (2002).

to the taxing state, then it will necessarily only reach that income with which the state has a "substantial nexus."[43]

Thus, in ascertaining whether a state's income tax scheme unconstitutionally reaches extraterritorial values, we ultimately have just one question to ask: is the tax fairly apportioned to the relevant activities occurring in the taxing state?[44]

II. COVID-19, REMOTE WORK, AND THE SOURCING OF SALARY INCOME

Again, every state that currently imposes a broad-based personal income tax applies its scheme to nonresidents.[45] And consistent with the constitutional framework outlined above, these states, at least nominally, limit such taxation to the income nonresidents "derive from" the taxing state.[46] For many income increments, discerning the state of its source is relatively straightforward. For example, if a Pennsylvania resident works as an employee each day while physically situated at their employer's workplace in Philadelphia, dealing face-to-face with customers at that workplace, it would be difficult to conclude that any state other than Pennsylvania was the source of their salary.

But often the issue is more complicated. When income is produced by activities occurring in multiple states, making judgments about its geographic source can be confounding. To get a sense of the potential complexities, consider the following examples:

* An employee lives and works in New York for several years, accumulating millions of dollars in investments within a

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43. The "substantial nexus" requirement would have independent force to the extent a taxpayer claimed the taxing state lacked a sufficient connection with the *taxpayer* to require the taxpayer to remit a tax to the state—what has been termed "enforcement jurisdiction." *See* Walter Hellerstein & Andrew Appleby, *Substantive and Enforcement Jurisdiction in a Post-*Wayfair *World*, 2018 STATE TAX NOTES 283 (describing this jurisdictional distinction). But the question posed by cases like *New Hampshire v. Massachusetts* and *Zelinsky v. Tax Appeals Tribunal* concerns the state's *substantive* jurisdiction: whether it has a sufficient connection to the income it seeks to tax. Because the taxpayers affected by Massachusetts's emergency regulation and New York's "convenience of the employer" rule have "purposefully availed themselves" of the opportunity to do business in the taxing state (by selling their labor to employers and commuting to their workplaces in that state), enforcement jurisdiction over the taxpayers is not at issue. *See infra* text accompanying notes 165–172.

44. In this sort of circumstance, there is no contention that the state's tax scheme discriminates against interstate commerce, as its sourcing rule applies identically to resident and nonresident taxpayers.

45. *See supra* text accompanying note 25.

46. *See* Walter Hellerstein, *Reconsidering the Constitutionality of the 'Convenience of the Employer' Doctrine*, 2003 STATE TAX NOTES 535.

qualified retirement account. The value of the account constitutes a combination of deferred compensation and investment income—all of which accrued while the employee was a New York resident. But none of it has yet been taxed by New York because, housed within a qualified retirement account, it is exempt from taxation until it is withdrawn by the taxpayer. Suppose the taxpayer then retires to Florida, a state without a personal income tax. Could New York tax the income that accrued while the taxpayer was a New York resident as it is withdrawn in Florida, even though the taxpayer is now a Florida resident?[47]

* A Nevada taxpayer sells their stock in Apple, realizing a $10 million gain on the sale. Can California tax that gain on the ground Apple is headquartered in California, rendering California the source of this appreciation in value? If not, can California at least tax a portion of the taxpayer's $10 million gain, based on the percentage of Apple's revenue that is attributable to its California operations? Or is Nevada the sole source of this income because the income is derived from the sale of property, and intangible property (such as stock) only "exists" in the owner's state of residence?
* A Texas taxpayer operates a business as a sole proprietorship, and they have several customers in Illinois. They invest the cash reserves for their business—reserves they routinely use in the business's regular operations—in a money market account at a bank in Texas. If the account generates $10,000 in income, is a ratable portion of this income attributable to Illinois on the ground it was earned in operating the taxpayer's business, a part of which they operate in Illinois? Or can this $10,000 only be sourced to Texas, the location of the bank?
* A Maine taxpayer earns their income operating a tugboat in state coastal waters and on the high seas (which lie outside any state's jurisdiction). The taxpayer spends a quarter of their working days on their boat in New York waters, a quarter in Florida waters, and half on the high seas (mostly just commuting between tugging jobs). Can New York attribute 50 percent of the taxpayer's income to itself—because this represents a fair share of the taxpayer's income subject to any

47. Presently, only Florida could tax this income but that is by direction of a federal statute. *See* 4 U.S.C. § 114. The Supreme Court has not squarely addressed whether the Constitution would permit New York to assert the jurisdiction to tax this income.

> state's taxing jurisdiction, or because a tugboat's only meaningful income-earning activity occurs in coastal waters? Or does such an apportionment reach more than New York's fair share?[48]

The disputes presented by *New Hampshire v. Massachusetts* and state "convenience of the employer" rules differ from these examples, in that they concern locating the source of an employee's salary. But the essence of the problem is the same: When a person's income-generating activity is connected to more than one state, how should states determine what income has been "derived from" which states? More precisely, what limits does the Constitution impose on states in attributing the income of multistate taxpayers?

A. Pandemic-Related Attribution Rules for Employee Salaries

Generally, states attribute income from personal services to the state in which those services were performed.[49] Indeed, Massachusetts's law dictates as much in "normal" times. A Massachusetts Department of Revenue regulation provides that, for nonresidents who work in Massachusetts, "the income of employees who are compensated on an hourly, daily, weekly or monthly basis must be apportioned to Massachusetts by multiplying the gross income, wherever earned, by a fraction, the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days."[50] Nearly every state imposing a personal income tax has adopted a similar rule.

The COVID-19 pandemic, however, produced circumstances that were anything but normal. With most nonessential employees ordered to shelter in place, millions of employees who had previously commuted to work in one state began working remotely from a different state, creating complications for states in applying their income taxes to nonresidents.[51] In reaction, several states scrambled to adjust their tax schemes, deviating from their normal sourcing rules. On April 21, 2020—roughly a month after Massachusetts Governor Charlie Baker had issued the commonwealth's first stay-at-home advisory for nonessential employees—the Massachusetts Department of Revenue announced a

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48. *Cf.* Swain & Hellerstein, *supra* note 14, at 236–38 (exploring similar questions with respect to oil tankers and cruise ships).

49. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[4][a]; Holderness, *supra* note 12, at 2.

50. 830 MASS. CODE REGS. 62.5A.1(5)(a) (2022).

51. *See* Holderness, *supra* note 12, at 2.

temporary variance from the state's regular approach to the sourcing of compensation for personal services. Its emergency regulation provided:

> all compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax.[52]

Notably, Massachusetts's emergency rule applied equally to taxpayers whose pre-pandemic workplaces were located inside and outside the commonwealth, to residents and nonresidents alike. Thus, just as the commonwealth treated the salary of a New Hampshire resident working at home for a Massachusetts employer as "Massachusetts source income," it likewise deemed a Massachusetts resident's salary who worked at home for a New York employer as having its source in New York. And this mattered. Massachusetts, like all other states, extends a credit to its residents for any income taxes paid to other states. But that credit only applies to taxes paid on income deemed to have its source in those other states.[53] Thus, by sourcing the salaries of these stay-at-home Massachusetts residents to the state of the workplace, Massachusetts effectively surrendered millions of dollars in tax revenue through the credits it granted these residents.[54]

When the reality of the pandemic's duration began to set in, Massachusetts codified its emergency rule in a formal regulation.[55] That regulation was subsequently extended so as to remain in effect "until 90 days after the Governor [gave] notice of the emergency's end."[56] And Massachusetts was not alone; Alabama, Georgia, Maine, Mississippi,

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52. 830 MASS. CODE REGS. 62.5A.3(3)(a).

53. *See* Brief in Opposition to Motion for Leave to File Complaint at 5, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154) [hereinafter Brief in Opposition].

54. To be sure, as explained in greater detail below, Massachusetts was almost certainly required by the Constitution to apply its rule symmetrically to residents and nonresidents. The failure to do so would have rendered its regulation "internally inconsistent," and thus a violation of the Dormant Commerce Clause. Moreover, Massachusetts—because it is probably a net importer of commuters—likely ended up ahead in the bargain; that is, it probably gained more in tax revenue through its emergency regulation than it lost. My only point here is that Massachusetts's application of this regulation to its own residents was not an empty gesture lacking practical consequences.

55. *See* 830 MASS. CODE REGS. 62.5A.3(1)(b).

56. Brief in Opposition, *supra* note 53, at 7.

Nebraska, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina adopted the same basic approach to sourcing employees' income for the duration of the public health emergency.[57] Pennsylvania's rule, for instance, specified that "[i]f an employee is working from home temporarily due to the COVID-19 pandemic, the Department does not consider that as a change to the sourcing of the employee's compensation," such that if a nonresident employee had worked "in Pennsylvania before the pandemic, their compensation would remain Pennsylvania-sourced income for all tax purposes."[58]

No doubt, the immediate reason states adopted these regulations was to protect their budgets, particularly given the expected explosion of pandemic-related public expenditures. But the jurisdictional *rationale* for these rules was that the source of this income remained the state of the employee's workplace—at least for employees who had physically commuted to that workplace immediately prior to the pandemic. Regardless of an employee's location while sheltering in place, their employer was continuing to provide the locus of connections (with customers and fellow employees) that rendered the production of their salary possible. In this sense, at least for taxpayers whose jobs had a tight relationship to their workplaces before the stay-at-home orders (as evidenced by their commuting to their employer's premises prior to the lock-down), the principal location for the generation of this income—its *source*—remained the workplace.

Roughly 100,000 of the taxpayers affected by Massachusetts's emergency regulation were New Hampshire residents.[59] And the State of New Hampshire—which imposes no tax on income from personal services—took exception to Massachusetts's rule, contending it interfered with New Hampshire's "sovereign policy choice" to "reject a broad-based personal earned income tax."[60] Thus, on October 19, 2020, New Hampshire filed a motion in the Supreme Court for leave to file an original complaint contending that Massachusetts's rule was unconstitutional.[61] Its application was supported by fourteen other states, which joined two *amicus curiae* briefs urging the Court to hear the complaint.[62]

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57. Kim, *supra* note 6, at 1167, 1169.

58. *See* Paul Morcom, *PA Department of Revenue Guidance on Telecommuting Due to COVID-19.*, MCNEES PA TAX BLOG (Nov. 11, 2020), https://www.mcneesstateandlocaltax.com/2020/11/pa-department-of-revenue-guidance-on-telecommuting-due-to-covid-19 [https://perma.cc/T79V-N9LP].

59. Motion for Leave, *supra* note 8, at 18, 21.

60. *Id.* at 1.

61. *See generally id.*

62. States' Amicus Brief in Support of New Hampshire, *supra* note 8, at 1; States' Amicus Brief in Support of Plaintiff, *supra* note 8, at 1.

The crux of New Hampshire's argument was that Massachusetts was taxing income over which it lacked jurisdiction: "Under both the Commerce Clause and the Due Process Clause, a State has no authority to 'tax value earned outside its borders.'"[63] And according to New Hampshire, with respect to New Hampshire residents working from home for Massachusetts employers, Massachusetts's regulation violated this principle; it dictated that a New Hampshire resident's "income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income."[64]

By its terms, Massachusetts's sourcing rule was temporary—keyed to the duration of the public health emergency.[65] On May 28, 2021, Governor Charlie Baker declared that the commonwealth's state of emergency concerning COVID-19 would officially end on June 15.[66] This, in turn, meant that Massachusetts's sourcing regulation would expire ninety days later, on September 13, at which point Massachusetts would revert back to its regular income-attribution rules.[67] Perhaps seeing that the regulation would soon expire—and that New Hampshire likely lacked standing to litigate the tax liabilities of private citizens in federal court regardless[68]—the Supreme Court denied New Hampshire's motion, ending the matter without a decision on the merits.[69]

Nonetheless, the constitutionality of Massachusetts's regulation could still come before the courts, and even the Supreme Court. Any taxpayer whose Massachusetts tax liability was affected by the regulation could challenge their assessment in Massachusetts—first through the established administrative process, and then in court. And the same is true with respect to the similar regulations promulgated by Alabama, Georgia, Maine, Mississippi, Nebraska, New York,[70] Ohio,

63. Motion for Leave, *supra* note 8, at 6–7 (quoting *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 777 (1992)).

64. *Id.* at 21.

65. *See* 830 MASS. CODE REGS. 62.5A.3(1)(d) (2022).

66. *See* Office of Governor Charles D. Baker & Lt. Governor Karyn Polito, COVID-19 Order No. 69 (May 28, 2021), https://www.mass.gov/doc/covid-19-order-69/download [https://perma.cc/G52L-87PW].

67. *See* Supplemental Brief in Opposition at 1–2, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154).

68. *See* Brief for the United States as Amicus Curiae at 8, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021) (No. 154) ("Although New Hampshire might prefer that its residents not pay personal income taxes to any government, an independent tax obligation falling on a State's residents generally is not an injury to that State's own sovereign prerogatives."); Shanske, *supra* note 12, at 951.

69. *New Hampshire v. Massachusetts*, 141 S. Ct. 2848 (2021).

70. In fact, litigation over New York's rule is underway. *See* Lynn A. Gandhi, Zelinsky: *Round 2 of the Convenience of the Employer Test*, 101 STATE TAX NOTES 1301 (2021).

Pennsylvania, Rhode Island, and South Carolina. Indeed, a state trial court in Ohio recently declared that Cleveland's city income tax—as applied to a Pennsylvania resident who worked remotely for most of 2020 for a Cleveland employer (to whose workplace she had previously commuted)—violated the Due Process Clause, concluding "[t]here is no case law that suggests that the legislature can expand the taxing power of a municipality to non-Ohio residents on work performed outside of the state."[71]

B. "Convenience of the Employer" Regulations

While the dispute over Massachusetts's approach to sourcing nonresident employees' salaries is quite recent, the similar controversy surrounding New York's "convenience of the employer" regulation is longstanding. To ensure it only taxes nonresidents on income derived from the state, New York (like Massachusetts and effectively every other state with a personal income tax) permits nonresidents to apportion their personal services income based on the days worked inside and outside the state.[72] But in calculating this ratio, New York mandates that "any allowance claimed for days worked outside New York State" by an employee "be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer."[73] Thus, days count as worked outside New York only when the employer has *required* as much. When a nonresident employee works outside New York for her own convenience, those days are treated as having been worked in New York.

Other states have taken the same approach. A Nebraska Department of Revenue regulation provides that when a nonresident performs services outside the state "for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident's convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income."[74] Delaware and Pennsylvania have adopted similar rules.[75]

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71. *Morsy v. Dumas*, No. CV 21 946057, 1–2, 4 (Cuyahoga Cnty. Ct. of Common Pleas Sept. 26, 2022); *see* Christopher Jardine, *Ohio Court Finds for Nonresident in Cleveland Remote Tax Challenge*, 106 STATE TAX NOTES 60 (2022).

72. NY COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2021).

73. *Id.*

74. 316 NEB. ADMIN. CODE § 22-003.01C(1) (2022).

75. *See* 61 PA. CODE § 109.8 (2000). New Jersey Governor Phil Murphy recently proposed legislation that would adopt a "convenience of the employer" attribution rule for sourcing the income of taxpayers who work for New Jersey employers. *See* Benjamin Valdez, *New Jersey Governor Proposes Changes to Remote*

Since the 1960s, several taxpayers have challenged New York's regulation on grounds largely indistinguishable from those pressed by New Hampshire in its dispute with Massachusetts.[76] In one well-publicized case, Professor Edward Zelinsky—a faculty member at Cardozo Law School in New York City and a resident of Connecticut—contested his New York state tax assessments for 1994 and 1995.[77] Zelinsky typically commuted to Cardozo three days a week to teach his classes, meet with students, and attend meetings, but he worked the other days from home in Connecticut.[78] Applying its "convenience of the employer" rule, New York sourced all of Zelinsky's Cardozo salary to New York.[79] Zelinsky contended this attempt to tax the portion of his salary apportionable to days he worked while physically in Connecticut was unconstitutionally extraterritorial, beyond the state's jurisdiction.[80]

The New York Court of Appeals upheld the constitutionality of New York's regulation:

> [Zelinsky was] able to earn his salary—all of it—because of the benefits he receives every day from New York. He benefits directly from an employment opportunity and an office here. . . . [E]ven his scholarly writings, drafted at home, attach prominence to his position as a professor at Cardozo Law School. New York thus provides a host of tangible and intangible protections, benefits and values to the taxpayer and his employer, including police, fire and emergency health services, and public utilities. Petitioner's election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income.[81]

According to the court, New York's taxation of Zelinsky's entire salary was fairly apportioned (and thus consistent with the dormant Commerce Clause) because the state had validly concluded that all of it

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Worker Taxation, TAX NOTES TODAY STATE (Sept. 7, 2022), https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/new-jersey-governor-proposes-changes-remote-worker-taxation/2022/09/07/7f205 [https://perma.cc/DH3Z-5B8L].

76. *See, e.g.*, *Speno v. Gallman*, 319 N.E.2d 180, 181 (N.Y. 1974); *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843–44 (2003); *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 277–78, 281–82, 284 (N.Y. 2005).

77. *Zelinsky*, 801 N.E.2d at 843–44.

78. *Id.* at 843.

79. *Id.* at 844.

80. *Id.*

81. *Id.* at 848.

had its source in New York.[82] And the tax did not deprive Zelinsky of due process because the income attributed to New York was "rationally related to values connected with the taxing state."[83] Specifically, New York had "an ample foundation to justify the tax" through its provision of "the host of tangible and intangible benefits flowing directly and indirectly to [Zelinsky] from New York, the location of the law school that supplies his total relevant income."[84]

Zelinsky is one of several New York state court decisions upholding the state's "convenience of the employer" rule.[85] And no court has yet found a constitutional defect in the similar regulations adopted by Delaware, Nebraska, and Pennsylvania.

III. Why (Nearly All) State Income-Attribution Rules Are Constitutional

Several prominent scholars have argued that income-attribution rules like Massachusetts's emergency regulation and New York's "convenience of the employer" rule are unconstitutional because they exceed the taxing state's jurisdiction.[86] For example, Professor Christine Kim contends that Massachusetts's rule violated both the Due Process and Commerce Clauses because the income it reached was "not fairly apportioned between source and residence states" and "it taxe[d] activities not fairly related to the services provided by Massachusetts."[87]

This Part explains why—under constitutional law as it now stands (and as it should remain)—such arguments are misguided. Critically, these scholars misapprehend the "wide latitude" the Constitution grants states in devising approaches to income attribution for tax purposes. Because income is intangible, there are no objectively "correct" ways of locating its source in physical space (even if some sourcing rules are surely more defensible than others). Indeed, whenever income is produced through activities occurring in more than one state, there will be multiple "source states." As a result, decisions about how to attribute that income are inevitably subjective, implicating policy or value

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82. *Id.* at 847–49.

83. *Id.* at 849 (quotation marks omitted) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

84. *Id.*

85. *See, e.g.*, *Speno v. Gallman*, 319 N.E.2d 180, 182 (N.Y. 1974); *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 282–85 (N.Y. 2005); *Phillips v. N.Y. State Dep't of Tax'n & Fin.*, 700 N.Y.S.2d 566, 568–69 (App. Div. 1999), *appeal denied*, 729 N.E.2d 709 (N.Y. 2000).

86. *See, e.g.*, HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[4][e][ii]; Kim, *supra* note 6, at 1158; Pomp, *supra* note 10, at 19–20;

87. Zelinsky, *supra* note 10, at 769–70.

judgments about the relative significance of the different inputs, and the services provided by the governments facilitating those income-earning activities. The Constitution grants states broad discretion in making these decisions, provided they are "reasonable" and "rational." Though it is plausible the Massachusetts and New York regulations are unwise as a matter of policy, they also seem reasonable and rational—and therefore constitutional.

A. The Constitutional Constraints on State Income-Attribution Rules

Again, when the question is whether a state is impermissibly taxing income extraterritorially, the constitutional inquiry effectively reduces to whether the tax is fairly apportioned to the income-producing activities occurring in the taxing state.[88] By definition, a fairly apportioned levy only reaches those values a state is entitled to tax, thus comporting with the limits on a state's jurisdiction imposed by the Due Process and Commerce Clauses.[89]

For many years, the Supreme Court has held that a state tax is fairly apportioned if it is both "internally consistent" and "externally consistent."[90] A tax scheme is internally consistent if, were the same scheme adopted by all fifty states, commercial activity crossing state lines would face no disadvantage compared to activity staying entirely within one state.[91] Internal consistency "simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union

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88. *See supra* text accompanying notes 39–44.

89. *See* Bradley W. Joondeph, *supra* note 42, at 151. Importantly, this is true *even if* the tax results in the overlapping (or multiple) taxation of the same increment of income. *See* Joondeph, *supra* note 3, at 129–44. There is no constitutional bar to multiple taxation as such, under the Due Process Clause or the Commerce Clause. No doubt, multiple taxation *may* point to an underlying constitutional problem. Again, an exaction is unquestionably impermissible when it projects the state's taxing authority beyond its lawful jurisdiction, or when it discriminates against interstate commerce. And a tax that violates one of these foundational prohibitions will often result in duplicative tax burdens. But multiple taxation itself only indicates that a constitutional violation may be afoot, not that one necessarily exists.

90. *See, e.g.*, *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *see also* Michael S. Knoll & Ruth Mason, Comptroller v. Wynne*: Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax*, 163 UNIV. PA. L. REV. ONLINE 267, 268–70, 272–73 (2015); Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988); Joondeph, *supra* note 42, at 156–57.

91. *See* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 312 (2017). Knoll and Mason elaborate a deep theoretical basis for the internal consistency test, explaining how it fulfills the core purposes of the dormant Commerce Clause. *Id.* at 313–14.

would place interstate commerce at a disadvantage as compared with commerce intrastate."[92] It ensures a tax is structurally fair:

> [a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.[93]

States might differ in their judgments about where various types of income are generated, but an internally inconsistent approach—one that systematically steers more income towards the taxing state—is "inherently" unfair.[94]

For example, a state might reasonably source all of a taxpayer's passive investment income—items like stock dividends, accrued interest, and capital gains—to the taxpayer's state of residence. Under the ancient maxim *mobilia sequuntur personam* ("movables follow the person") such a rule is defensible as reaching income derived from property plausibly deemed to be "located" in the taxing state.[95] Alternatively, a state might source such income to the various locations where the investee conducted its business. For example, if an individual received dividend payments from Microsoft, a state might determine the source of those payments based on where Microsoft had earned its income, perhaps by using the location of Microsoft's property, payroll, and sales. But a state could not reasonably source to itself passive investment income that was earned *either* while the taxpayer was a resident *or* based on the investee company's activities in the taxing state.[96] There simply is no rational theory about the "location" of passive investment income that could accommodate both rules simultaneously. The internal consistency test precludes this sort of structural unfairness; whatever value or policy judgments a state might make concerning the source of certain forms of income, the command of internal consistency prevents states from having their cake and eating it, too.

External consistency, by contrast, concerns "the degree of economic reality reflected by the tax."[97] It looks beyond the tax's structure and

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92. *Jefferson Lines*, 514 U.S. at 185.

93. *Id.*

94. *See Comptroller of Treasury v. Wynne*, 575 U.S. 542, 562 (2015).

95. *See* Walter Hellerstein, *State Taxation of Corporate Income from Intangibles:* Allied-Signal *and Beyond*, 48 TAX L. REV. 739, 774–75 (1993).

96. By unfairly apportioning income in this way, the state would also systematically disadvantage interstate commerce—the core evil the Dormant Commerce Clause is intended to forbid. *See* Knoll & Mason, *supra* note 91, at 318.

97. *See Jefferson Lines*, 514 U.S. at 185.

"asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[98] Stated slightly differently, the state's method of apportioning the income of multistate taxpayers "must actually reflect a reasonable sense of how income is generated."[99] Again, this standard encompasses the oft-stated due process requirement that "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State."[100]

Crucially, the Supreme Court's decisions underscore that the Constitution grants states "wide latitude" in devising their approaches to sourcing income generated by activities that span state borders.[101] As Professor Walter Hellerstein (the dean of state and local tax scholars) has written, "[i]t is important to recognize that the states' power to tax nonresidents' income is not limited by a narrow or technical view of 'source' that requires identification of specific in-state activities that produce particular streams of income that may be said to have their 'source' in the state."[102]

This principle is most evident in the Court's several decisions addressing the constitutionality of various state corporate income taxes—and specifically, those addressing the states' use of "formulary

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98. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989).

99. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). To be clear, a state's method of attributing income could be internally consistent and nonetheless unreasonable (and thus "unfair"). Suppose, for example, Massachusetts had adopted a regulation that determined the income a taxpayer earned in the state based on the number of days she worked in the state next in the alphabet. (Massachusetts would then attribute to itself all the income earned by taxpayers in Michigan.) Were every state to adopt an identical regulation, no taxpayer's income would be taxed more than once (assuming Wyoming attributed to itself the income earned in Alabama), thus satisfying the test of internal consistency. But it would be entirely unreasonable and irrational, a decidedly *unfair* measure of where the income had physically been earned, and, thus, flunk the external consistency requirement.

100. *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2220 (2019) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)).

101. *See, e.g.*, *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 784 (1992) ("Our cases give States wide latitude to fashion formulae designed to approximate the in-state portion of value produced by a corporation's truly multistate activity."); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) ("[T]he States have wide latitude in the selection of apportionment formulas."); Swain & Hellerstein, *supra* note 14, at 223 ("Like the Due Process Clause, the Commerce Clause has been read to embrace a forgiving standard of source, requiring only that the income be reasonably attributable to in-state activities."); Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 362 (2020) ("[E]xternal consistency really provides no independent limitation on state taxing power.").

102. HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[1].

apportionment" to attribute taxpayers' income.[103] Many decades ago, states quit using methods of separate accounting to geographically trace the income of multistate corporations.[104] Instead, they borrowed a methodology first developed for taxing the property of interstate railroad, telegraph, and express companies: apportionment by formula.[105] Under this approach, one first calculates the taxpayer's apportionable tax base, which consists of *all* the taxpayer's income, wherever earned (so long as it was earned as part of the same "unitary business" the taxpayer operates in the taxing state). Second, this apportionable tax base is multiplied by a ratio intended to reflect the proportion of the taxpayer's income-generating activity in the taxing state. The product constitutes the taxpayer's income attributable to the taxing state.

By its terms, formulary apportionment only seeks to produce a "rough approximation" of the income a taxpayer derives from the taxing state.[106] Still, going back more than a century, the Court has expressed no hesitation in upholding its constitutionality.[107] As the Court observed in 1983, it had "long ago upheld the constitutionality of the unitary business/formula apportionment method" of attributing the income of multistate businesses—citing decisions from 1931, 1924, and 1920[108]—as "arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice."[109]

Further, the Constitution grants the states "wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income," and thus broad discretion in fashioning the details of their apportionment schemes.[110] As the Court emphasized in *Container Corp.*

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103. *See id.* ¶ 20.05[3][b][i] ("The U.S. Supreme Court has consistently approved different state methods for determining the source of income in the context of state corporate income taxation, and there is no reason why the rule would or should be any different in the context of personal income taxation.").

104. *Id.* ¶ 8.07[1].

105. *See* Hellerstein, *supra* note 95, at 746–47; Shanske, *supra* note 12, at 955.

106. *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 223 (1980); *Moorman*, 437 U.S. at 273; *see also* Darien Shanske, *How the States Can Tax Shifted Corporate Profits: An Application of Strategic Conformity*, 94 S. CAL. L. REV. 251, 284 (2021) ("As the Supreme Court has recognized since the late nineteenth century, such formulas can only ever be reasonable surmises.").

107. *See Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 119–21 (1920).

108. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983) (first citing *Hans Rees' Sons, Inc. v. N.C. ex rel. Maxwell*, 283 U.S. 123 (1931); then citing *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924); and then citing *Underwood Typewriter Co.*, 254 U.S. 113).

109. *Container Corp.*, 463 U.S. at 164.

110. *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 780 (1992); *see also* Swain & Hellerstein, *supra* note 14, at 245 ("[T]he Court has *never* invalidated an apportionment formula on its face on constitutional grounds.").

of America v. Franchise Tax Board,[111] "the Constitution imposes no single formula on the States."[112] Instead, they enjoy "wide latitude to fashion formulae designed to approximate the in-state portion of value produced by a corporation's truly multistate activity."[113] A state's approach to sourcing income is constitutionally sufficient so long as it does not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State;"[114] a lack of "mathematical exactitude is certainly not a constitutional defect."[115]

To be clear, the relevant question in this context is *not* whether the state's method of attribution has produced "a grossly distorted result"[116] or one that is "out of all appropriate proportion to the business transacted by the [taxpayer] in that State."[117] These phrases capture the proper standard for evaluating an *as-applied* challenge to a state's apportionment of income, where the taxpayer claims a valid attribution scheme has produced a fundamentally unfair result in its particular case.[118] But this standard is inapt for determining whether a state's income-attribution rule is constitutionally valid *on its face*, the principal question posed by both New Hampshire's emergency regulation and New York's "convenience of the employer" rule.[119] In these sorts of disputes, the pertinent question is whether the state's rule is inherently unfair, regardless of the result it might produce for any particular taxpayer.[120] Again, the Court's

111. 463 U.S. 159 (1983).

112. *Id.* at 164.

113. *Allied-Signal*, 504 U.S. at 784; *see also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) ("[T]he States have wide latitude in the selection of apportionment formulas.")

114. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

115. *Ill. Cent. R.R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940).

116. *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 227 (1980).

117. *Hans Rees' Sons, Inc. v. N.C. ex rel. Maxwell*, 283 U.S. 123, 135 (1931).

118. *See Moorman*, 437 U.S. at 274 ("In individual cases, . . . the Court has found that the *application* of a single-factor formula to a particular taxpayer violated due process."); Swain & Hellerstein, *supra* note 14, at 251 (observing that "it is always open to the taxpayer to demonstrate that the presumptively reasonable rule for assigning the values to the state in fact creates a 'grossly distorted result' inconsistent with the Due Process or Commerce Clause").

119. That is not to say that a taxpayer could not also challenge Massachusetts's regulation or New York's "convenience of the employer" rule in its application, contending that the state's attribution rule—though permissible on its face—was unconstitutional as applied to them. This is, indeed, what Professor Zelinsky contended in *Zelinsky v. Tax Appeals Tribunal*, and what he is arguing in his current litigation against New York regarding its taxation of his salary for the duration of the stay-at-home orders. 801 N.E.2d 840, 843–44 (N.Y. 2003); *In re Zelinsky*, Nos. 830517, 830681 (N.Y. Div. Tax App. Nov. 17, 2022) (consolidation order).

120. Of course, a taxpayer disputing the constitutionality of a state's income-apportionment rule would need to show they were injured by the rule's application to

decisions make clear that a state's scheme is inherently fair (and thus facially constitutional) when it is internally and externally consistent.[121]

And with respect to external consistency, one observation bears special emphasis: Supreme Court precedent firmly establishes that the test is quite lenient, affording states substantial leeway in how they determine which values are attributable to which states. As an illustration, consider the Court's decision in *Moorman Manufacturing v. Bair*.[122] Moorman was an agricultural-feed manufacturer headquartered in Illinois (which was also the location of its manufacturing operations).[123] During the tax years at issue, Moorman made between 18 and 22 percent of its sales to customers in Iowa.[124] Like other states, Iowa determined a corporation's taxable income through formulary apportionment.[125] But unlike other states at that time, Iowa's income-attribution formula was based exclusively on the taxpayer's percentage of sales to Iowa customers.[126] Thus, Iowa attributed roughly twenty percent of Moorman's income to itself, though a much smaller percentage of the taxpayer's total economic activity (considering such factors as the location of its property and its workforce) occurred there.[127]

In effect, Iowa's scheme treated the *entirety* of the taxpayer's income as being generated where its sales occurred, regardless of the activities occurring elsewhere that also contributed to the production of that income. For instance, suppose a taxpayer's operations were located exclusively in Omaha, Nebraska—its headquarters, its manufacturing, and all of its employees—but it sold all of its merchandise to Iowa customers. Iowa's scheme would attribute the entirety of the taxpayer's income to Iowa, ignoring the taxpayer's activities in Nebraska. Moorman thus argued that Iowa's scheme was inescapably extraterritorial: some of the income generated from the taxpayer's sales in Iowa (and arguably most of it) was attributable to activities occurring in Illinois, such that Iowa's attribution of 100 percent of that income to itself exceeded its jurisdiction.[128]

The Supreme Court was unmoved. Writing for the Court, Justice Stevens explained that Moorman's "claim that the Constitution invalidates an apportionment formula whenever it may result in taxation

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them—even if they were challenging the rule on its face—to have standing to litigate the claim in federal court.

121. *See supra* text accompanying notes 89–100.

122. 437 U.S. 267 (1978).

123. *Id.* at 269.

124. *Id.* at 271 n.4.

125. *Id.* at 269–70.

126. *Id.* at 270.

127. *See id.* at 271 n.4.

128. *Id.* at 271–72.

of some income that did not have its source in the taxing State is incorrect."[129] Iowa's approach did "not purport to identify the precise geographical source of a corporation's profits."[130] Instead, the state's scheme was only designed to produce "a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing state,"[131] which proved constitutionally sufficient. The fact that other attribution rules might have better reflected the various activities responsible for generating the taxpayer's income did not mean Iowa's approach was unfair, unreasonable, or irrational. As the Court explained, the Constitution simply does not "impose strict constitutional restraints on a State's selection of a particular formula."[132]

Or consider *Container Corp. of America v. Franchise Tax Board*.[133] There, California had determined that the taxpayer's foreign subsidiaries were part of the "unitary business" it was operating within the state, and thus—by applying its formulary apportionment method for determining a corporation's California income—included the taxpayer's income from these subsidiaries in its apportionable tax base.[134] The constitutional question was whether the subsidiaries' operations were sufficiently connected to the taxpayer's business in California, such that California's inclusion of this income in the apportionable base was "a reasonable method" of calculating the income the taxpayer derived from California.[135]

The Court upheld California's assessment, but the details of that holding are unimportant here. What matters is the Court's description of the states' discretion in devising income-attribution rules. Specifically, the Court explained that "arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice."[136] More colorfully, the Court observed that "[a]llocating income among various taxing jurisdictions bears some resemblance . . . to slicing a shadow."[137] Thus, the Court has "long held that the Constitution imposes no single formula on the States."[138] To be sure, the Due Process and Commerce Clauses both require a state's formula to "be fair:"[139] it "must actually

129. *Id.* at 272.
130. *Id.* at 273.
131. *Id.*
132. *Id.*
133. 463 U.S. 159 (1983).
134. *Id.* at 174.
135. *Id.* at 166, 177–79; *see also* Hellerstein, *supra* note 95, at 768.
136. *Container Corp.*, 463 U.S. at 164.
137. *Id.* at 192.
138. *Id.* at 164.
139. *Id.* at 169.

reflect a reasonable sense of how income is generated."[140] But the "Constitution does not invalidate an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State."[141] Instead, it allows a "substantial margin of error."[142]

In short, while the Constitution's bar to states' taxing nonresidents on income they derive from locations outside the state is categorical, the standard it sets for *how* states source the income of multistate taxpayers is decidedly forgiving.[143] A state's attribution scheme need only produce a "rough approximation" of the income taxpayers have earned in the state; the scheme can produce results falling within a "substantial margin of error," meaning "mathematical exactitude is certainly not a constitutional defect;" and the state can ignore significant aspects of a taxpayer's out-of-state activities (like Moorman's manufacturing operations in Illinois) that contribute to the production of the taxpayer's income.[144] A state's approach need only be internally and externally consistent: "fair," "reasonable," and "rational"—no more than that.[145]

B. The Constitutionality of Massachusetts's and New York's Rules

Given this standard, Massachusetts's emergency regulation was almost certainly constitutional. First, no one has seriously contended the Massachusetts rule was internally inconsistent.[146] If every state attributed employees' salaries to the location of their principal workplaces prior to the pandemic—at least for the duration of the public health emergency—taxpayers whose activities crossed state borders would face no disadvantage—every employee's salary would be sourced to exactly one state. Just as the salary of a New Hampshire resident who had commuted to Boston each day before the stay-at-home orders would be sourced to Massachusetts, the salaries of Maine, Vermont, and Massachusetts

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140. *Id.*

141. *Id.* at 169–70 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978)).

142. *Id.* at 184.

143. *See* Holderness, *supra* note 12, at 16 (describing the standard as "not demanding" and "forgiving").

144. *Ill. Cent. R.R. Co. v. Minnesota*, 309 U.S. 157, 161 (1940); *Container Corp.*, 463 U.S. at 184.

145. *See supra* text accompanying notes 90–100.

146. New Hampshire asserted that Massachusetts's tax was internally inconsistent in its motion for leave to file a complaint. *See* Motion for Leave *supra* note 8, at 28–29. But it is difficult to take that claim seriously; it seems to have been based on a misunderstanding of the Massachusetts regulation. So long as Massachusetts applied its sourcing rule to residents and nonresidents alike, and granted residents a credit for taxes they paid other states on income sourced to those states, the scheme was internally consistent. *See* Brief in Opposition *supra* note 53, at 32–33.

residents who had previously commuted to Manchester would be sourced to New Hampshire. Universally implemented, the regulation would treat interstate and intrastate commerce identically, the *sine qua non* of internal consistency.

The real dispute concerns whether Massachusetts's regulation was externally consistent: whether it only reached "that portion of value that is fairly attributable to economic activity within the taxing state."[147] Here, too, Massachusetts's rule seemed fully compliant.

When employees perform services for employers, their activities are hardly the only input contributing to the creation of their salaries. Their employers provide the platform—both physically and metaphorically—that renders their services valuable in that specific context.[148] These elements of connective tissue—the organizational and management structure, the back-office financial operations, the cultivation of paying customers, the physical and IT infrastructure, to name a few—are necessary ingredients to the generation of their salary income. (This may have been particularly true during the public health emergency, when most employees were earning their salaries almost entirely by virtue of their employer's IT systems.) And all these inputs may rationally be understood to "exist" at the place of the employer.

To be sure, the income at issue is that of the *employee*. But the relevant question concerns the source of the employee's salary, where it "comes into being." More precisely, the question is where a state might reasonably deem that salary to have its metaphorical wellspring. As this income can only emerge from the interaction of the employee's services with these various employer-provided inputs, the location of the employee's principal workplace—at least under most circumstances—seems to meet this standard.[149] That is, it seems just as logical to conceptualize employees as "deriving" their salaries from where their services create value for their employers as from where they are physically situated while performing those services. Indeed, several scholars believe, as a matter of tax policy, it is considerably *more* rational to source employees' salaries to the states of their employers than to the states in which they are located.[150]

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147. *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

148. *See* Shanske, *supra* note 12, at 953.

149. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶20.05[3][b][i] (noting that "the state with which the person is in constant telephone and Internet contact when he or she is traveling in other states, and the situs of the communications network and databases that are essential to the out-of-state performance of the individual's personal service," due to being the location of these activities, can "reasonably" tax at least a portion of the income produced by those services).

150. *See* Holderness, *supra* note 12, at 38–53; Shanske, *supra* note 12, at 951–54.

Or to view the matter more specifically through the lens of Supreme Court precedent, the state of the workplace is the destination (or "market state") for an employee's sale of their personal services to their employer.[151] In the transaction between the employer and employee, the workplace is where the sale of labor occurs—at least under the general rule that sales are "located" where the customer receives the purchased item.[152] One might argue that not all the income generated by an item of value should be sourced to the state of the ultimate sale; indeed, that is precisely what the taxpayer in *Moorman* contended.[153] But the Supreme Court squarely rejected that position, at least as a matter of constitutional law. Whatever the merits as a matter of tax policy, *Moorman* conclusively held that a state's attribution of income *entirely* to the state into which the taxpayer sells the item at issue—regardless of the taxpayer's income-generating activities in other states—is constitutionally "fair."[154]

Moreover, Massachusetts's regulation only applied to employees whose jobs had a tight connection to Massachusetts—employees who had commuted into the commonwealth immediately prior to the stay-at-home orders and who were working remotely only temporarily due to the public health emergency. Thus, Massachusetts's rule did not depend on the broader claim that an employee's income should *always* be sourced to the physical location of her employer, even if she never physically visits that workplace.[155] Instead, Massachusetts's jurisdictional rationale was more modest: the source of the salary income of these particular employees did not change during their temporary stints working from home, at least until the end of the emergency.[156] In this sense, the generation of their salaries remained grounded in their regular (pre-pandemic) physical workplaces in Massachusetts. Given all these considerations, it seems difficult to conclude that "the income attributed

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151. *Jefferson Lines*, 514 U.S. at 188.

152. As the Supreme Court observed in a case challenging the fair apportionment of a sales tax, "[a] sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery." *Id.*

153. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978).

154. *Id.* at 273–74, 281.

155. *See* Brief in Opposition, *supra* note 53, at 8–9. Were a state to attribute to itself the income of employees who had been hired from day one to work exclusively remotely—and who were simply deemed by their employers to have their workplace in the taxing state, such that there was no other reason for concluding the income had its source there—the constitutional question would be much closer. Indeed, this might well cross the line.

156. *Id.* at 4.

to the State for tax purposes" under Massachusetts's regulation was not "rationally related to the values connected to the taxing State."[157]

The same is true for the "convenience of the employer" regulations adopted by New York and other states—and for the same reasons. First, such regulations are internally consistent. If every state attributed an employee's salary to the state of her workplace (except when her employer required her to work outside the state), each increment of a taxpayer's salary would be sourced to exactly one state; there would be no disadvantage to taxpayers whose activities cross state lines. "Convenience of the employer" rules are also externally consistent because, again, they reflect "a reasonable sense of how income is generated."[158] If anything, the constitutional basis for such rules is stronger than that for Massachusetts's emergency regulation: when an employee has a regular workplace in the taxing state but works from home some days for her own convenience, the connection between her salary and her workplace (on the days she works from home) is even tighter than it was for remote workers who stayed at home for months on end during the health emergency. Were New York to source *all* an employee's salary to the state of her workplace no matter what—regardless of her connection to that workplace and even when her employer requires her to work elsewhere—the question would be more difficult. But that is not what New York (or Delaware, Nebraska, or Pennsylvania) has done. Its rules are far more constrained.

Of course, a state's sourcing each bit of an employee's salary to the state where they are physically located while performing the compensated services would *also* be reasonable. Such a rule might even be superior—after all, most governments follow this practice, for both national and subnational taxes.[159] But that is beside the point. All the Constitution requires is that a state's scheme attribute income in a manner that is "rationally related to the values connected to the taxing State."[160] Given all the reasons one could fairly deem the workplace to be the location where this income comes into being—at least in circumstances when "convenience of the employer" rules apply—such rules seem to meet this lenient standard.

Again, several scholars disagree with this analysis. Professor Kim has argued that Massachusetts's emergency regulation was

157. *Moorman Mfg. Co.*, 437 U.S. at 272.

158. *See* Shanske, *supra* note 12, at 957, 960–61.

159. *Id.* at 961–62, 964; *Implications of "Work from Anywhere"—When Remote Workers Cross State Lines*, ADP: SPARK, https://www.adp.com/spark/articles/2022/06/implications-of-work-from-anywhere-when-remote-workers-cross-state-lines.aspx [https://perma.cc/FTE3-CRVZ] (Jan. 26, 2022).

160. Shanske, *supra* note 12, at 954.

unconstitutional because it "reache[d] beyond its borders and directly taxe[d] individuals working entirely from their homes outside of Massachusetts."[161] In her view, Massachusetts's tax was unfairly apportioned, as nonresidents who worked from home during the public health emergency had "100 percent of their activities occur" outside the commonwealth, such that "Massachusetts' 'fair share'" of their salaries "should be zero."[162] Similarly, Professor Richard Pomp (with co-author Jeffrey Friedman) has called Massachusetts's rule "constitutionally defective," as "[t]reating a remote worker's income as having a source at the worker's former office location when that worker is prohibited from working there cannot be described as minimally connected (or connected at all) to the taxing state."[163] And Professor Zelinsky—the individual who challenged New York's "convenience of the employer" rule—contends the Constitution requires that "income earned by telecommuters at their out-of-state homes should only be taxed by their states of residence—that is, the states in which they live, work and receive their principal public services."[164]

The essential problem with these arguments is that they presume the only jurisdictionally relevant activity is the taxpayer's performance of services, such that the only state with a constitutionally sufficient connection to an employee's salary is that in which the employee is physically situated.[165] But this premise does not withstand scrutiny.

To clarify, the relevant question does not concern the taxing state's connection to the *taxpayer*. A state plainly has a "substantial nexus" with an employee who earns their salary from an employer in the taxing state and who regularly commutes to that employer's premises in the state (or did so immediately prior to the pandemic).[166] The constitutional standard

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161. Kim, *supra* note 6, at 1176.

162. *Id.* at 1175.

163. Richard D. Pomp & Jeffrey A. Friedman, *Why More Employers Are Getting SALT-y on Remote Work Arrangements*, 97 TAX NOTES STATE, 1343, 1351 (2020).

164. Zelinsky, *supra* note 10, at 796.

165. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[3][b][i] ("The argument rests on the premise that the state in which a nonresident actually performs his or her services is the *only* state that can legitimately claim to provide sufficient benefits and protections to the nonresident to justify its taxation of the income derived from such services.").

166. *See* Shanske, *supra* note 12, at 954, 958 ("It is hard to understand why an employee who formerly worked full-time out of an office in Boston does not continue to have nexus with Massachusetts sufficient to pay a tax if that employee is working remotely for a Massachusetts employer on account of a public health emergency."). *But see* Zelinsky, *supra* note 10, at 17 ("While she works at her out-of-state home, the interstate remote working employee does not have substantial nexus to the state in which her employer is located.").

for such nexus is satisfied when the taxpayer has "availed [them]self of the substantial privilege of carrying on business in" the taxing state.[167] And employees affected by rules like Massachusetts's and New York's—who purposefully sell their personal services in the taxing state's labor market—have plainly done so. Indeed, the Court's recent decision in *South Dakota v. Wayfair, Inc.*[168] makes clear that a state can have jurisdiction to impose tax compliance obligations on persons who have *never* been physically present in the taxing state.[169] But the taxpayers affected by rules like Massachusetts's and New York's have necessarily been physically present in the taxing state—on the days they commuted to their employer's premises. More importantly, in addition to their physical presence, they have intentionally directed their activities into that state for the purpose of generating income.

Further, it cannot be the rule that a taxpayer's "purposeful availment" of the taxing state—and thus her "substantial nexus" with that state—is assessed on a day-by-day basis, such that the state would have jurisdiction over the taxpayer on some days of the week (or months of the year) but not others. (For instance, it is inconceivable South Dakota would have lacked jurisdiction to require Wayfair to collect sales taxes on the days it happened not to sell any merchandise to South Dakota customers.) "Purposeful availment," as nearly a century of jurisprudence concerning adjudicatory jurisdiction under *International Shoe Co. v. Washington*[170] attests, is an ongoing state of being. So long as a taxpayer maintains an employment relationship with an employer in the taxing state—from which the taxpayer derives a significant portion of their income, and whose workplace they have presumably visited on several occasions—they are "purposefully availing themself of the substantial privilege of carrying on business" in the taxing state.[171] Thus, the taxing states have connections with these nonresident employees sufficient to impose tax compliance obligations on them—that is, they have jurisdiction over the *taxpayers* consistent with due process and the Dormant Commerce Clause.[172]

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167. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

168. 138 S. Ct. 2080 (2018).

169. *See id.* at 2092–99. *See generally* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[1][a][i] (discussing the distinction between a state's enforcement jurisdiction over a taxpayer and its substantive jurisdiction over the taxpayer's income).

170. 326 U.S. 310 (1945).

171. *Id.* at 319–21.

172. Following *Wayfair*, there appears to be no difference in the standards for a state to establish jurisdiction over a taxpayer (to impose a tax compliance obligation) under the Due Process and Commerce Clauses. *See* HELLERSTEIN, STARK, SWAIN & YOUNGMAN, *supra* note 25, at 57 ("[I]t would appear that the Court has returned to the

Instead, the pertinent jurisdictional question concerns the taxing state's connection to the employee's *salary*, the value the state seeks to tax. And that salary, like all income, is intangible: it lacks any physical existence.[173] To "locate" the source of that income in geographic space—to denominate a place from which it has been "derived"—we can only look at where the activities occur that combine to generate that income. As discussed above, the employer is responsible for a great deal of the activity that ultimately generates an employee's salary—it creates the environment that vests the employee's labor with much (if not most) of its value.[174] It is only when the employee's services interact with the inputs provided by the employer—an interaction one can logically deem to "take place" at the employee's principal workplace—that the employee's salary comes into being. No doubt, the employee's activities *also* contribute to the creation of this income, but they cannot fairly be described as the *only* relevant contribution.[175]

At a minimum, then, *some* of the activities contributing to the production of an employee's salary occur in the state of the workplace, even when the employee is working remotely from another state.[176] The constitutional question thus becomes whether these activities are sufficient to justify a state's attributing to itself *all* the employee's salary on these days, despite the employee's physical absence from the taxing state. One might argue that, while it is reasonable for a state to tax a portion of the salary an employee earns on these days (given the employer's contribution to the creation of this income), it is unreasonable to tax all of it.

This is the point Professor Hellerstein pressed in his critique of New York's "convenience of the employer" rule.[177] Hellerstein "would not go so far as to say that the state where an employee's base of operations is located has no claim whatsoever . . . to a portion of the income that a

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pre-*Quill status quo ante* when there was little, if any, distinction between Due Process nexus and Commerce Clause nexus.").

173. *See* Holderness, *supra* note 12, at 2; *see also* Hugh J. Ault & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises*, *in* TAXATION IN THE GLOBAL ECONOMY 11, 30–31 (Assaf Razin & Joel Slemrod eds., 1990).

174. Shanske, *supra* note 12, at 950.

175. *See* Roin, *supra* note 17, at 656–57 ("When income generating activities are spread over several jurisdictions (the only time source becomes relevant), every part of the enterprise plays some role in the generation of the resulting income.").

176. *Cf.* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[3][b][i] ("[A]rgument rests on the premise that the state in which a nonresident actually performs his or her services is the *only* state that can legitimately claim to provide sufficient benefits and protections to the nonresident to justify its taxation of the income derived from such services").

177. *See id.* ¶ 20.05[4][e][i]; Hellerstein, *supra* note 46, at 537–38.

nonresident employee derives from services performed outside the state."[178] Nonetheless, he asserted, "the Constitution forbids a state from taxing *all* of a nonresident's income derived from personal services performed outside the state, whether performed out of 'convenience' or 'necessity.'"[179] To Hellerstein,

> New York's claim that it is the source of *all* of a nonresident employee's income derived from personal services performed outside the state is difficult to reconcile with the fundamental due process principle that a state's power to tax a nonresident's income extends only to income derived from services "*carried on therein.*"[180]

Professors Kim and Zelinsky have made a similar argument regarding Massachusetts's emergency regulation, contending it was unconstitutional because—as applied to nonresident employees working from home—it was entirely "unapportioned."[181]

Whatever the merits of this argument as an original matter, it seems conclusively foreclosed by the Supreme Court's decision in *Moorman*. Again, the taxpayer there contended that, by attributing a corporation's income based entirely on where its sales were consummated—and ignoring all the other activities that contributed to the creation of that income—the state's scheme "result[ed] in extraterritorial taxation."[182] But the Court reasoned that, even if out-of-state "activities made some contribution to the profitability of the Iowa sales, [the taxpayer's] claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State is incorrect."[183] *Any* method of income attribution for multistate taxpayers "will occasionally over-reflect or under-reflect income attributable to the taxing State."[184] All the Constitution requires is that "the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'"[185]

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178. HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.05[4][e][i].

179. *Id.*

180. *Id.* (quoting *Shaffer v. Carter*, 252 U.S. 37, 57 (1920)) (emphasis added by Hellerstein); *see also* Walter Hellerstein, *Where Does a Telecommuter Work?*, 96 TAX NOTES STATE 1405, 1406 (2020) (expressing "doubt[] that a state may constitutionally tax *all* of a nonresident's income derived from personal services performed outside the state").

181. *See* Kim, *supra* note 6, at 1188–89; Zelinsky, *supra* note 10, at 770.

182. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 271 (1978).

183. *Id.* at 272.

184. *Id.* at 273.

185. *Id.* (quoting *Norfolk & W. R. Co. v. State Tax Comm'n*, 390 U.S. 317, 325 (1968)).

Crucially, then, *Moorman* establishes that a state income-attribution scheme that completely ignores some of the activity contributing to the creation of the income at issue—and instead focuses exclusively on the state of sale—is constitutionally valid.[186] In the Court's words, such a rule represents a permissible "approximation of a [taxpayer's] income that is reasonably related to the activities conducted within the taxing State."[187] Thus, the fact that Massachusetts's emergency regulation ignored the employee's activities in her state of residence—or that New York's "convenience of the employer" rule does the same on days an employee works from home for her own convenience—is constitutionally unproblematic. If Iowa's scheme in *Moorman* comported with the Due Process and Commerce Clauses, then the constitutionality of rules like Massachusetts's and New York's should follow *a fortiori*.

C. An Important Caveat: Central Greyhound

The one possible snag in my position is how it can be reconciled with a handful of Supreme Court decisions from the 1930s and 1940s that invalidated state taxes on the ground they were unfairly apportioned. Most prominent among them is *Central Greyhound Lines, Inc. v. Mealy*,[188] which involved a gross receipts tax New York had imposed on "utilities" doing business in the state, including bus companies.[189] In determining the taxpayer's revenue derived from the state, New York attributed to itself one hundred percent of the receipts from tickets for travel between two points within New York, even if the route traversed highways in other states.[190] Specifically, New York taxed all of Greyhound's revenue for routes between New York City and western New York, despite roughly 43 percent of the mileage on those routes falling within New Jersey or Pennsylvania.[191] (New York did not tax any of Greyhound's receipts on tickets for travel on routes that began or ended outside the state.)[192]

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186. *See* Swain & Hellerstein, *supra* note 14, at 247 (noting that *Moorman* upheld Iowa's attribution scheme despite its having "the effect of treating . . . out-of-state factories and employees as making *no* contribution to corporate income"); *id.* at 257 ("[T]he Court has routinely sustained formulas that fail to reflect significant out-of-state factors that plainly contribute to a taxpayer's income.").

187. *Moorman Mfg.*, 437 U.S. at 273.

188. 334 U.S. 653 (1948).

189. The other two decisions in a similar vein are *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). Neither of these decisions raises a challenge distinct from that posed by *Central Greyhound*, so a discussion of that decision should suffice for present purposes.

190. *Central Greyhound*, 334 U.S. at 654.

191. *Id.* at 660.

192. *Id.* at 665 (Murphy, J., dissenting).

In an opinion by Justice Frankfurter, the Supreme Court invalidated New York's tax because it was "unapportioned."[193] "Transactions which to such a substantial extent actually take place in New Jersey and Pennsylvania," Frankfurter wrote, "cannot be deemed legally to take place in New York."[194] Thus, "to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give protection to those portions, as well as to a State which does not."[195] "By its very nature," said the Court, such "an unapportioned gross receipts tax" reaches more of the taxpayer's revenue than the state's "fair share."[196]

Standing alone, *Central Greyhound* dictates that, whenever "substantial" activities that "cannot be deemed legally" to have occurred in the taxing state contribute to the creation of a value (such as income or gross receipts), the state can only tax a *portion* of that value, at least when the state is relying on its source-based jurisdiction. But there are several reasons to doubt *Central Greyhound* means this much, at least today.

First, *Central Greyhound* predates *Moorman* by thirty years, which (again) squarely held that a state's attribution scheme can completely ignore activities occurring in other states that contribute to the value the state seeks to tax, provided the scheme, considered as a whole, is fair and reasonable. *Moorman* did not even mention *Central Greyhound*, so we have no insight as to how that Court might have distinguished it. But a reading of *Central Greyhound* that mandates the apportionment of every increment of income produced through "substantial" multistate activity is incompatible with *Moorman*'s central holding. Such a reading is also difficult to square with some of the Court's more recent decisions upholding unapportioned gross receipts taxes[197] and sales taxes on interstate transactions[198]—especially *Oklahoma Tax Commission v.*

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193. *Id.* at 663–64.

194. *Id.* at 660.

195. *Id.* at 662.

196. *Id.* at 663.

197. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't. of Rev.*, 483 U.S. 232, 251 (1987) (upholding a completely unapportioned gross receipts tax on wholesales to customers in the state, "even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State").

198. *See Goldberg v. Sweet*, 488 U.S. 252 (1989) (upholding an Illinois tax on the full value of any telecommunication that originated or terminated in Illinois and was billed to an Illinois service address); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (upholding the imposition of a use tax as "fairly apportioned" on the ground that there was no possibility the activity would be subject to multiple taxation). *See generally* Joondeph, *supra* note 42, at 161–71.

Jefferson Lines, Inc.,[199] which upheld an unapportioned tax on the sale of tickets for interstate bus travel.[200]

Second, the Court handed down *Central Greyhound* only ten years after its landmark decision in *Western Live Stock v. Bureau of Revenue*,[201] which initiated the Court's move to discard the rule that "interstate commerce" is immune from "direct burdens" imposed by state taxes.[202] And the Court did not really abandon this rule until its 1959 decision in *Northwestern States Portland Cement Co. v. Minnesota*,[203] a judgment from which Justice Frankfurter dissented. Thus, *Central Greyhound*'s more stringent demand for apportionment might be, at least in part, a vestige of a bygone era. (Indeed, Frankfurter's majority opinion in *Central Greyhound* specifically labeled "[t]he vice" of New York's tax to be its "*direct burden* upon every transaction in (interstate) commerce.")[204] Further, *Central Greyhound*'s rationale seemed to rely, at least in part, on the notion that the Dormant Commerce Clause forbids state taxes that create a *risk* of multiple taxation for interstate taxpayers[205]—a notion the Court has since rejected, at least as a categorical matter.[206]

Finally, *Central Greyhound* relied in part on the fact that there was "no dispute as to feasibility in apportioning this tax."[207] It would have been relatively easy for New York to apportion the taxpayer's revenue from these routes based on "the mileage within the State."[208] Thus, *Central Greyhound* may just mean that a state's attribution scheme is more vulnerable to a charge of external inconsistency when a clear, practically feasible alternative exists that would take into account the value-generating activities occurring in other states—that the "fairness"

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199. 514 U.S. 175 (1995).

200. *Id.* at 175.

201. 303 U.S. 250 (1938).

202. *See Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1796 (2015) (discussing the Court's discarding of the test of whether a state tax imposed a "direct" burden on interstate commerce).

203. 358 U.S. 450 (1959).

204. *Cent. Greyhound Lines, Inc. v. Mealy*, 334 U.S. 653, 663 (1948) (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297 (1917)) (emphasis added).

205. *Id.* at 662–63.

206. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278 (1978) (rejecting a Commerce Clause challenge to Iowa's apportionment formula on the ground it subjected the taxpayer to multiple taxation, explaining that "some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income"); *see also* Joondeph, *supra* note 3, at 124, 129–44 (explaining that "multiple taxation only indicates that a constitutional violation *may* be afoot, not that one necessarily exists"); Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 123 J. TAX'N 4, 6–12 (2015).

207. *Central Greyhound*, 334 U.S. at 663.

208. *Id.*

of a state's attribution scheme can depend on the availability of clearly superior, practicable alternatives.

Truth be told, fully reconciling *Central Greyhound* with everything the Court has decided and written since is challenging. Moreover, thinking seriously about *Central Greyhound* highlights an uncomfortable truth about my argument: there is no clear way to discern when a state's internally consistent income-attribution scheme crosses the relevant constitutional line. The test of external consistency, as I have painted it, lacks an easily identifiable point at which one can confidently conclude the state has sought to tax a value that, in all fairness, belongs to another state. "Fairness," "reasonableness," and "rationality" are hardly self-administering standards.

Still, trite as it sounds, "we must never forget that it is a constitution we are expounding."[209] It is a feature (rather than a bug) that, with respect to most issues, the Constitution merely sets down the outer bounds of decency, leaving political institutions to fill in the details. Deferential standards are ubiquitous, particularly in those areas where the Constitution privileges the policy judgments of elected officials. Assessing legislation for its fairness or reasonableness is standard practice in constitutional law, from the Fourth Amendment to the Necessary and Proper Clause. The judiciary has exercised so-called "rational basis" review in resolving hundreds of constitutional questions for more than a century. And that standard seems to have worked tolerably well, at least as a matter of institutional practice.

Assuming *Central Greyhound* remains good law, the best explanation is that New York simply lacked a reasonable basis for deeming the taxpayer to have earned *all* its receipts from tickets sold for these routes within New York, especially when there existed an easily administrable means of apportioning those receipts to multiple states. If one instead reads *Central Greyhound* as standing for something stronger—namely, that a state *must* apportion every increment of value attributable (at least in part) to *any* non-trivial activity occurring outside the state—it is simply incompatible with decisions like *Moorman.* The proposition that the Constitution demands such an exacting form of external consistency has been overruled, at least implicitly. The Court's last half-century of state and local tax jurisprudence grants states far more leeway in how they determine where certain values have been created.

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In short, current constitutional law dictates that income-attribution rules like Massachusetts's and New York's are consistent with the Due

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209. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Process Clause and the Dormant Commerce Clause. That is not to say these rules necessarily produce the most "accurate" determinations of where employees have earned their salaries (if "accuracy" is even a coherent concept in this context). But that is not the relevant question. The only question the Constitution poses is whether rules like these "reflect[] a reasonable sense of how income is generated"—whether they fall within the "wide latitude" the Constitution affords states in devising their tax schemes.[210]

To be sure, while this standard is generous, there is a limit. For instance, had Massachusetts sought to attribute to itself the salaries of nonresident employees who had *never* previously commuted to a workplace in the state—or if New York were to tax nonresident employees' salaries on days they were required by their employers to work outside the state—there would be a serious question as to whether the constitutional line had been crossed. But the attribution rules Massachusetts and New York actually adopted, and the similar regulations promulgated by many other states, are fair and reasonable. And that is all the Constitution requires.

IV. THE DEEPER BARRIERS TO MORE EXACTING CONSTITUTIONAL REVIEW

So that is why income-attribution approaches like those codified in Massachusetts's emergency regulation and New York's "convenience of the employer" rule are consistent with the best understanding of the Constitution. The constitutional constraints on such rules are forgiving, and these regulations fit comfortably within those limits.

If this is right, a natural response might be that the constitutional rules need changing. That is, if Supreme Court precedent grants the states this much latitude in how they source multistate taxpayers' income, that precedent warrants reconsideration. After all, state governments will always have an incentive to foist their tax burdens on out-of-state taxpayers (while retaining the revenue for themselves). The problem is endemic to every federal system and as old as the Republic. (It is precisely what Maryland sought to accomplish through its tax on the Bank of the United States in *McCulloch v. Maryland*.)[211] If the Court's opinions in cases like *Moorman* and *Container Corp.* have granted states the leeway to adopt sourcing rules like Massachusetts's and New York's, perhaps those decisions should be overruled.

There are two important responses to this line of argument. *First*, it is critical to recall that, no matter how lenient the constitutional test for

210. Hellerstein, *supra* note 95, at 749, 789.

211. 17 U.S. (4 Wheat.) 316 (1819).

whether a state's income-attribution scheme "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State," every scheme must still be *internally* consistent. This is an essential aspect of the "fairness" and "rationality" the Due Process and Dormant Commerce Clauses demand. So even when states push the envelope and attempt to tax income with which they have only an attenuated connection, they still must apply their schemes evenhandedly. And just as a state's internally consistent attribution rule might work to its favor as applied to some taxpayers, it will work against the state as applied to others. For example, Massachusetts's emergency regulation, as applied to nonresidents, augmented the commonwealth's revenue by taxing income that otherwise would have been sourced to other states (like New Hampshire). But the rule's application to Massachusetts residents simultaneously imposed a significant cost on the commonwealth, as it necessitated granting those taxpayers millions of dollars in credits for taxes those residents paid to the states of their regular workplaces. The command of internal consistency means there will always be a fiscal downside to a state's adopting a particular attribution rule, not just an upside. It therefore operates as a structural brake on the states' tendency to overreach.

Second, the problem with heightening the stringency of the constitutional constraints on states in this area—in ratcheting up the exactingness of judicial review of a state tax scheme's external consistency—is more fundamental: the Constitution assigns the principal responsibility for devising the limits on state and local tax systems to Congress, not the courts. As the Court's jurisprudence outlines, the function of the Constitution is to set the outer boundaries on how state and local governments deploy their taxing powers. The role of the courts is to police those outer boundaries, principally to protect interstate commerce from being disadvantaged relative to intrastate commerce. Working out the finer details of how state and local tax schemes should be constrained (so as to protect the interests of other states and the Nation as a whole) is not part of the courts' role in preserving the Constitution's system of fiscal federalism.

Consider the important decision of *Commonwealth Edison Co. v. Montana*.[212] Montana had imposed a coal severance tax that—depending on the value, energy content, and method of extraction—reached a rate of thirty percent of the coal's "contract sales price."[213] A group of Montana coal producers and out-of-state utilities challenged the tax, largely on the ground it was not "fairly related to the services provided by" Montana (the fourth prong of the *Complete Auto* test for compliance

212. 453 U.S. 609 (1981).

213. *Id.* at 613 (quoting MONT. CODE ANN. § 15-35-103 (1979)).

with the Dormant Commerce Clause).[214] Specifically, the coal producers asserted "the *amount* the State receives in taxes far exceeds the *value* of the services provided to the coal mining industry."[215]

The Supreme Court rejected the claim rather dismissively, explaining that the challengers had "completely misunderstood" the relevant constitutional requirements.[216] A state tax is "fairly related to the services provided by the State," said the Court, so long as the *measure* of the tax is "reasonably related to the extent of" the taxpayer's contact with the state.[217] As Montana's severance tax was "measured as a percentage of the value of the coal taken," it was "in proper proportion to [the taxpayers'] activities within the State," and thus constitutional.[218] (As Justice Blackmun explained in his dissent, this holding largely "emasculate[d]" the "fairly related" requirement, rendering it redundant with the command of fair apportionment.)[219]

Commonwealth Edison's specific holding (as deferential to state taxing power as it was) is beside the point here. What matters is what the Court said about the separation-of-powers principles at play. In essence, the challengers asked the Court to exercise more exacting judicial review: to dig into the details of whether Montana's relatively steep tax on coal producers was roughly commensurate with the public services the producers received from the taxing state.[220] Much like New Hampshire in *New Hampshire v. Massachusetts* (or Professor Zelinsky in *Zelinsky v. Tax Appeals Tribunal*), they sought the Court's intervention to articulate and enforce a rule requiring that state taxes have more than just a "rational basis."[221]

But the Court firmly rejected the invitation—and in rather sweeping terms—holding that such review of state tax schemes would force the courts to undertake inquiries for which they are institutionally ill-suited, well beyond their constitutionally assigned role:

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a

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214. *Id.* at 620.
215. *Id.* at 621.
216. *Id.*
217. *Id.* at 620, 626.
218. *Id.* at 626 (cleaned up).
219. *Id.* at 645 (Blackmun, J., dissenting).
220. *Id.* at 627.
221. Reply Brief of Appellants, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (No. 80-581), 1981 WL 389872, at *8.

> wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. Under our federal system, the determination is to be made by state legislatures in the first instance and, if necessary, by Congress, when particular state taxes are thought to be contrary to federal interests.[222]

Or consider once more the Court's decision in *Moorman*. There, too, the taxpayer asked the Court to exercise more searching judicial scrutiny—in particular, to require greater accuracy in the attribution of income than that produced by Iowa's single-factor apportionment formula.[223] As in *Commonwealth Edison*, the Court flatly rejected the invitation. "If the Constitution were read to mandate such precision in interstate taxation," the Court reasoned, "the consequences would extend far beyond this particular case."[224] The proper construction of an apportionment formula is only one of scores of questions surrounding the attribution of income for tax purposes.[225] So if the Court were to constitutionalize such details, "a host of other division-of-income problems . . . would similarly rise to constitutional proportions."[226] More exacting review would inevitably force the Court—in the guise of interpreting the Due Process and Commerce Clauses—to choose among various approaches, requiring the justices to make "policy decision[s] based on political and economic considerations that vary from State to State."[227] But the Constitution, the Court explained, "is neutral with respect to the content of any uniform rule."[228]

For instance, suppose the Court were to decide (as New Hampshire urged) that Massachusetts's sourcing of nonresidents' salaries to the commonwealth while those taxpayers worked from home was unconstitutionally extraterritorial. Again, given the contributions of these taxpayers' employers to the generation of their salaries, surely *some* of the activity contributing to the generation of this income occurred in Massachusetts, entitling Massachusetts to tax a portion of this income. So, the Court would next need to answer: at what point would the fraction

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222. *Commonwealth Edison*, 453 U.S. at 628.

223. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 267 (1978).

224. *Id.* at 278.

225. *Id.*

226. *Id.*

227. *Id.* at 279.

228. *Id.*; *see also* Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 372–73 (2020).

exceed the state's jurisdiction? Conceptually, how would the Court approach this question? Going forward, would states also lack jurisdiction to tax the portion of a nonresident's salary the taxpayer claims is attributable to hours worked at home in evenings, over weekends, or during their commute on the train once the train crossed the state border? If the Constitution indeed *requires* states to source salaries to the state in which the employee performs the compensated services, it is difficult to see why not. And if states lacked such jurisdiction, would they be required to treat the hours an employee worked outside the office as being just as productive as those worked on the employer's premises, weighting them accordingly? If states could "discount" the productivity of these hours, what would be the constitutional limit? These questions only scratch the surface. And they would all "rise to constitutional proportions."[229]

The Supreme Court has sensibly understood the Constitution as not licensing the judiciary to resolve these sorts of detailed division-of-income issues, matters that necessarily involve policy judgments about the contributions of different activities to the creation of income.[230] Once a state's rule crosses the threshold of "reasonableness" or "rationality," a court's constitutional review is complete. As the Court explained in *Moorman*, any finer tuning of these constraints is a job for Congress:

> While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.[231]

229. Perhaps more significantly, would state single-sales-factor apportionment formulae for the attribution of corporate income still be constitutional? If so, how exactly could that be justified? And if not, what weight would states then be permitted to place on sales in their formulae? How would any of these various lines be drawn in the name of constitutional law?

230. *See* Hellerstein, *supra* note 95, at 807 (characterizing the Court's precedents in this area as "establish[ing] workable, if imperfect, guidelines governing state tax apportionment and to limit its own role in this area").

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

Indeed, the issue of the external consistency of state income-attribution rules is hardly the only constitutional question in this field for which the Constitution prescribes deferential judicial review. In addition to the matter of whether a tax is "fairly related" to the taxpayer's activities in the taxing state (addressed in *Commonwealth Edison*), consider state determinations of a taxpayer's residence. Again, an individual's state of residence is crucial to the scope of a state's constitutional authority to tax their income; states can tax nonresidents only on the income derived from within their borders, while they can tax *all* of a resident's income, wherever earned worldwide.[232] But the Supreme Court has never understood the Constitution to dictate a particular definition of state residence for tax purposes.[233] Instead, states have adopted a variety of approaches—some focusing on the traditional concept of "domicile" (*i.e.*, physical presence in the state with the intent to remain indefinitely), others concentrating on the proportion of days an individual spends in the state (while maintaining a permanent abode therein).[234] Thus, while the relevant jurisdictional boundary is categorical (resident versus nonresident), the Court has largely deferred to how states have chosen to implement that boundary in practice. At least implicitly, the justices have understood the Constitution to repose the responsibility for policing these details in the political process—presumably subject to the same due process and Commerce Clause requirements of fairness, reasonableness, and rationality.[235]

Of course, doctrinal lines can simply be drawn in the sand—even arbitrary ones—that effectively say, "this far and no further." Thus, as a purely practical matter, the Court could hold (as Professors Kim, Pomp, and Zelinsky urge) that the Constitution requires states to source

232. *See* text accompanying notes 26–30.

233. *See Worcester Cnty. Tr. Co. v. Riley*, 302 U.S. 292, 299 (1937) ("Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil[e], where the exertion of state power is dependent upon domicil[e] within its boundaries.").

234. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.03.

235. Hence, internally inconsistent definitions of state residence—for instance, those deeming individuals to be residents if they are *either* domiciled *or* live in the state for at least 183 days during the tax year and maintain a permanent abode there—appear vulnerable to constitutional challenge. *See* Hellerstein, *supra* note 206, at 15–16; Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 STATE TAX NOTES 707, 708 (2017); Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 563–72 (2014). Determining an individual's residence is the first step in calculating what income is within the state's jurisdiction—what constitutes its "fair share"—and thus cannot be extricated from questions of fair apportionment. Moreover, the Court has made clear that internally inconsistent state tax schemes unconstitutionally discriminate against interstate commerce. *See Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1801–03 (2015).

employees' salaries to the state in which they are physically located when they perform the compensated services, full stop—and that no other attribution rule can "actually reflect a reasonable sense of how income is generated."[236]

But even if the Court were convinced this is the "best" sourcing rule—again, a point that is highly contestable—it is difficult to discern any *principled* basis for the Court to draw this line without transgressing the deeper separation-of-powers principles reflected in *Commonwealth Edison* and *Moorman*. Such a ruling would arrogate to the Court an authority that, as the justices themselves have acknowledged, the Constitution assigns principally to Congress.[237] And it is hard to see how the Court could set down any such rule without enmeshing itself in scores of other questions about how states attribute income from activities crossing state lines, forcing the judiciary to make value and policy judgments for which it seems ill-suited.

CONCLUSION

Those who have challenged Massachusetts's emergency regulation and New York's "convenience of the employer" rule are correct that the Constitution forbids states from taxing the income nonresidents "derive from" other states. But their arguments fail to appreciate the degree to which the Constitution also grants states broad discretion in determining the source of income earned through activities occurring in multiple states. Approaches to income attribution like Massachusetts's and New York's fall within these forgiving boundaries. Given the role employers play in the creation of an employee's salary—not to mention the fairness of conceptualizing these employees as selling their labor into the state of the workplace—these rules "reflect a reasonable sense of how income is generated." More fundamentally, the judiciary's second-guessing of such regulations would violate separation-of-powers principles that have governed state and local taxation for decades.

It might seem that the constitutional questions posed by these rules are not terribly significant. After all, the various state regulations addressing remote work during the initial stages of the pandemic have now expired, and the four states' "convenience of the employer" rules only affect a limited number of taxpayers. But defining the scope of states' constitutional authority to tax nonresident employees is bound to become more important over time. The number of American employees working remotely across state lines is sure to grow, long after the health

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236. Hellerstein, *supra* note 95, at 749.

237. *See, e.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981).

risks of COVID-19 have dissipated. Moreover, the essential questions posed by these disputes are not confined to personal income taxes; the states' authority to determine the location of the values they seek to tax affects every sort of levy, from property and sales taxes to estate and gift exactions.

As states adapt their tax systems to the evolving realities of where people choose to live and work, we would do well to bear two important principles in mind: that the Constitution grants states substantial leeway in determining the source of multistate values, and that it confines the judiciary to a modest role in policing the details of how states do so.

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