Taxing Teleworkers

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Since COVID-19 has forced many governments to restrict travel and impose quarantine requirements, telework has become a way of life. The shift towards teleworking is raising tax concerns for workers who work for employers located in another state than where they live. Most source states where these employers are located could not have taxed income of out-of-state teleworkers under the pre-pandemic tax rules. However, several source states have unilaterally extended their sourcing rule on these teleworkers, resulting in unwarranted risk of double taxation — once by the residence state and again by the source state. At this time, there is no uniform guideline by state or federal governments.

Recently, New Hampshire, supported by fourteen other states, asked the U.S. Supreme Court to exercise its original jurisdiction challenging Massachusetts' telecommuting taxes of nonresident teleworkers. Tax commentators believed this case would be one of the most significant tax decisions in recent years, but the Supreme Court declined to hear it. New Jersey also opposes New York's long-standing telecommuting taxes under the "convenience of the employer" rule. This Article examines the constitutional challenges of maintaining pre-pandemic work arrangements for tax purposes, arguing that a source state's extraterritorial assertion to tax nonresident teleworkers' income likely violates the Dormant Commerce and Due Process Clauses. Also, this Article finds the Supreme Court's

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decision not to exercise original jurisdiction dissatisfying in light of the substantial increase in remote work.

The problem of taxing teleworkers is not temporary because the pandemic drastically reshaped where and how people work. Recognizing the need for a uniform long-term solution, this Article argues Congress should enact federal law to preempt conflicting state law positions and enforce the primacy of residence-based taxation on teleworkers' income. This proposal would reduce the impact various source states' tax laws have on interstate commerce, preserve due process, and bolster policy rationales, such as taxpayers' choice in where they reside and pay taxes as their social obligation to the community.

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Introduction

Sam is an associate attorney at a law firm in Boston, Massachusetts. Sam lives in New Hampshire and, pre-COVID-19, Sam would commute to her office in Boston. Since COVID-19 swept the country in early 2020, Sam has been working remotely from her home. When stay-at-home orders were issued by the Governors of Massachusetts and New Hampshire in March of 2020,[1] Sam no longer had the option to commute to her office in Boston but was forced to work from home. Over time, the shutdown orders have operated like a light switch, on and off again. Sam chose the stability of working from home with permission from her law firm; while working from home, Sam relied on New Hampshire's infrastructure, including its electricity, internet, access to local stores through roadways, and other services. When Sam

[1] *COVID-19 State of Emergency*, Mass.gov, https://www.mass.gov/info-details/covid-19-state-of-emergency (last visited Sept. 10, 2021) [https://perma.cc/FCQ7-2TZ3]; U.S. Dep't of State, Notice, New Hampshire "Stay Home" Order (Mar. 29, 2020), www.state.gov/wp-content/uploads/2020/03/2020-03-29-Notice-New-Hampshire-Stay-Home-Order.pdf [https://perma.cc/74CJ-9RXE].

tested positive for COVID-19 in September 2020, she also depended on New Hampshire's ambulance and hospital services.

Now Sam is preparing to file her state tax returns for 2020. Because she lives in New Hampshire and worked in Massachusetts, both New Hampshire and Massachusetts can exercise a taxing right over Sam — the former under residence state taxation, and the latter under source state taxation. Generally, residence states, like New Hampshire, exercise the power to tax the personal income of their residents regardless of where the income is sourced.[2] In contrast, source states, like Massachusetts, impose taxes on nonresidents' income only for the work they performed while physically within the source states.[3] If a person earns income from working remotely for a firm in the source state, such income may only be taxed by the residence state. When an individual is subject to both resident and source taxation, their income is taxed twice, also known as double taxation, pitting residence and source taxation against each other (unless tax credits are offered by the residence state).

Of the competing taxing rights, which state ought to have the priority over teleworkers' incomes? In this example, Sam is a resident of New Hampshire, worked entirely from her home for more than nine months, and used public services, "including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more,"[4] offered by New Hampshire. Thus, under the general rule explained above, New Hampshire, the residence state, should have the priority. Nevertheless, Massachusetts, the source state, taxes Sam's salary and has priority over New Hampshire because it adopted a temporary emergency regulation declaring that nonresident income received for services performed outside Massachusetts would still be subject to Massachusetts' income tax.

Here, Sam is subject to the risk of double taxation — once by the residence state, and then a second time by the source state. The latter

[2] *See* WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 379 (11th ed. 2020); John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity*, 33 VA. TAX REV. 209, 212, 221 (2013).

[3] *See* Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1554 (2009). There is an important exception to this rule, called the "convenience of the employer" rule, adopted by New York, Arkansas, Connecticut, Delaware, Nebraska, and Pennsylvania, which will be discussed *infra* Parts I.B.2, II.B.

[4] Motion for Leave to File Bill of Complaint at 19, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Oct. 19, 2020) (No. 22O154), https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/nh-v-ma-action.pdf [https://perma.cc/UKC8-SXJP].

tax would not apply to Sam if she did not earn interstate income from her remote work. Further, another issue arises if the residence state offers credits for taxes paid by its residents to other states[5] because this means the residence state foregoes collecting taxes from its residents despite all the public services it has offered. The result of this double taxation is a reduction in revenue for the residence state.

Note that Sam's example would be more accurate by replacing New Hampshire with another state with a positive tax rate. New Hampshire may not be a good example to explain the risk of double taxation and the tax credit issue because New Hampshire has an individual income tax rate of zero.[6] This unique feature also worked against New Hampshire in the Supreme Court's decision in *New Hampshire v. Massachusetts*,[7] discussed below. Having noted this problem, this Article offers Sam's case by referring to the conflict between New Hampshire and Massachusetts as a stylized and intuitive example that shows the additional layer of taxation by source state that would not have been imposed on teleworkers on top of the residence taxation. A more thorough analysis is provided later in this Article.

Now, consider Chris, who has a similar problem with a slightly different fact pattern. Chris is a software engineer for a technology company in California's Silicon Valley. When the company allowed employees to work remotely beginning in February 2020 due to COVID-19, Chris moved out of his expensive apartment in the San Francisco Bay Area and relocated to Salt Lake City, Utah, where his parents live. Chris rented an apartment in Salt Lake City, changed his mailing and billing addresses to Utah, selected a local family doctor, and lived there for more than 183 days in 2020, which is a rule of thumb to determine Chris's residence state.[8] Does that mean that Utah becomes the residence state and California the source state, so that California can

[5] All states with broad-based personal income taxes provide credit for taxes paid to other states to mitigate the double taxation issue. *See Credit for Taxes Paid to Another State*, 0130 REGSURVEYS 37 (2021).

[6] N.H. REV. STAT. ANN. § 77:4 (2020). Massachusetts has a minimum income tax rate of five percent. MASS. GEN. LAWS ch. 62, § 4 (2020).

[7] New Hampshire v. Massachusetts, 141 S. Ct. 1262 (2021) (denying motion for leave to file a bill of complaint). Justices Thomas and Alito would have granted the motion. *Id.*

[8] The 183-day rule means that if a person spends more than half of the year (183 days) in a single state, then this person will become a tax resident of that state. However, each state may have various qualifiers to this rule. For example, for federal income tax purposes in international tax context, the Internal Revenue Code uses a more complicated formula, including a portion of days from the previous two years as well as the current year. *See infra* Part I.C.

collect tax on Chris's income only for the days Chris physically worked in California?

The answer is unclear because the definition of "resident" includes not only the 183-day rule but also other fuzzier factors, such as the place where a permanent home is located, the place that is the center of one's life, the place where one's car is registered, where one's children go to school, and where one goes to see a family doctor.[9] If a person relocates from one state to another state for a temporary or transitory purpose, the person may still be a resident of the former state.[10] This would especially be the case if Chris did not change his driver's license from California to Utah because of difficulties getting an appointment at the DMV due to social distancing rules.

Hence, it is possible that California would insist that Chris's relocation is merely temporary or transitory due to the COVID-19 pandemic. Thus, California remains Chris's residence state and can exercise its taxing right on the entire amount of Chris's yearly income as the residence state. If Utah also argues that it is Chris's residence state under the 183-day rule, Chris will be double taxed. This would not occur if Chris were not engaged in cross-border activities. Additionally, Utah would offer a tax credit for income taxes paid to California because California is the source state as well. Then, despite the public services provided to Chris for the majority of 2020, Utah would collect no tax from Chris because Utah's income tax rate is lower than California's.[11] In these circumstances, Chris might have to pay a higher tax rate than his parents who live down the street, even though they all live in Utah and receive the same public services from Utah. Here, both Utah and Chris bear a loss with California not paying for Utah's services while also taking income from Chris.

These two examples illustrate that the age of telecommuting has introduced new concerns to the tax concepts of source of income and residence of taxpayers. Sam's example demonstrates the ambiguities as to what it means to earn income "in" a source state, because

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9 *See infra* Part I.A.1.

10 HELLERSTEIN ET AL., *supra* note 2, at 379-80. A classic example would be college students, relocating temporarily for educational purposes.

11 Currently, Utah has a flat income tax rate of 4.95 percent while California has a top marginal individual income tax rate of 12.3 percent. UTAH CODE ANN. § 59-10-104 (2020); *Standard Deductions, Exemption Amounts, and Tax Rates for 2020 Tax Year*, CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/about-ftb/newsroom/tax-news/november-2020/standard-deductions-exemption-amounts-and-tax-rates-for-2020-tax-year.html [https://perma.cc/6RCG-F7FC]. California is a source state from Utah's perspective, and thus Utah may have to offer tax credits for foreign state taxes on out-of-state source income. *See* UTAH CODE ANN. § 59-10-1003 (2021).

Massachusetts, potentially losing its source state status over nonresident Sam's income, attempts to extend its source status. Chris's example shows the confusion as to which state ought to be considered the residence state because California, which could have been switched from residence to source state, attempts to maintain the status of residence state.

However, both examples share the same problem — that is, source states pursue extraterritorial taxing rights by arguing that the work and residence arrangements before the pandemic should remain the status quo. This pursuit renders taxpayers' adjustments to their new work environments and residence as immaterial. Moreover, these states do this at the cost of residence states and cross-border taxpayers. This raises constitutional issues under the Dormant Commerce Clause[12] and the Due Process Clause[13] on whether the source state's assertion of a taxing right imposes an undue burden on interstate commerce. It also raises theoretical questions regarding whether a state's tax nexus on its constituents may justify the source state's aggressive approach.

Sam and Chris embraced their new telework arrangements because of COVID-19. But by all indications, shifts like Sam and Chris's are not temporary, but part of a broader and more dramatic reshaping of the American workforce. However, as illustrated above, the COVID-19 pandemic has influenced many governments to attempt to freeze reality to the pre-pandemic era by adopting "anti-catastrophe" tax law and regulatory guidance.[14] Most issued guidance relies on methods of disregarding specific time-frames, considering pre-pandemic practices, or assessing public health directives and travel restrictions in addressing the tax consequences of remote workers.[15] These temporary responses treat the changes brought on by the pandemic as *force majeure* and try to mold pandemic-era changes into the pre-pandemic status quo as if the pandemic is only temporary and has not accelerated the shift to a remote workforce and digital economy.[16]

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[12] U.S. CONST. art. I, § 8; *see infra* Part II.A.4.

[13] U.S. CONST. amend. XIV, § 1; *see infra* Part II.A.1.b.

[14] Andres Baez Moreno, *Unnecessary and Yet Harmful: Some Critical Remarks to the OECD Note on the Impact of the COVID-19 Crisis on Tax Treaties*, 48 INTERTAX: EUR. TAX REV. 814, 829 (2020).

[15] *See, e.g.*, OECD, UPDATED GUIDANCE ON TAX TREATIES AND THE IMPACT OF THE COVID-19 PANDEMIC 3-6 (Jan. 21, 2021), https://www.oecd.org/coronavirus/policy-responses/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic-df42be07/) [https://perma.cc/EQJ3-EQRX] (providing examples of COVID-19 guidance issued by various jurisdictions regarding the creation of permanent establishments by resident and the possible factors that affect such creation).

[16] *See id.* at 9, 12.

In ignoring the new reality, residence states now bear heavier burdens to support their residents amid the COVID-19 pandemic, and yet those states cannot collect their fair share of tax. Holding to the status quo also disrupts many Americans who find themselves teleworking from home in one state for an employer in another state and, as a result, are now subject to the risk of double taxation.

Problems concerning the taxation of income earned by teleworkers and dual residents are not novel.[17] Over the past decade, Americans have steadily increased telecommuting and working from home.[18] Even without the pandemic, these numbers would likely have continued increasing, eventually prompting a more precise government response to the changing workforce. But the pandemic has accelerated the time frame for needed change. Where before thirty-one percent of workers teleworked from home at least once a week, suddenly eighty-eight percent are now doing so.[19] These problems will not disappear as the waves from the pandemic recede. Instead, these problems will remain even after travel disruptions and worker standardization caused by COVID-19 dissipates.[20]

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[17] *Cf.* 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 FL. TAX REV. 533 (2014) (noting that dual residents also face similar questions of taxation with teleworkers).

[18] *Compare Census Bureau Report Shows Steady Increase in Home-Based Workers Since 1999*, U.S. CENSUS BUREAU (Oct. 4, 2012), https://www.census.gov/newsroom/releases/archives/employment_occupations/cb12-188.html [https://perma.cc/KJ5Z-5YGK], *with* Kimberly Mlitz, *Remote Work Frequency Before and After COVID-19 in the United States 2020*, STATISTA (Apr. 9, 2021), https://www.statista.com/statistics/1122987/change-in-remote-work-trends-after-covid-in-usa/ [https://perma.cc/7LUQ-SVCE] (indicating an increase in remote work from seven percent to nine percent from 1999 to 2010 from the Census Bureau and comparing the two sources indicates an increase from nine percent in 2010 to seventeen percent, telecommuted five days or more per week, in 2020 prior to COVID-19).

[19] Michael J. Bologna, *Employers Lean on Congress to Solve Work-From-Home Tax Dilemma*, BLOOMBERG TAX (Aug. 25, 2020, 1:46 AM), https://news.bloombergtax.com/daily-tax-report-state/employers-lean-on-congress-to-solve-work-from-home-tax-dilemma [https://perma.cc/5674-YD4U] (indicating that thirty-one percent of workers telecommuted, or worked from home, between one and five days each week).

[20] *See* Mark Klein, Joseph Endres & Katherine Piazza, *Tax Implications of COVID-19 Telecommuting and Beyond*, CPA J. (July 2021), https://www.cpajournal.com/2021/07/16/tax-implications-of-covid-19-telecommuting-and-beyond/ [https://perma.cc/56UX-WEVC] (indicating that "[g]iven the prolonged length of the pandemic and the adjustment to remote work for both employers and employees, remote work may very well become a regular part of business operating and hiring models for the foreseeable future . . ."); *infra* Part III.A.1.

New Hampshire's request for the Supreme Court to exercise its original jurisdiction demonstrates the need to resolve the issue of taxing teleworkers.[21] The challenge of *New Hampshire*[22] lies at the intersection of Congress' commerce powers and a state's right to tax out-of-state workers. The core issue in *New Hampshire* revolves around Massachusetts' announcement that the state was changing its tax policy for tax nonresidents who, prior to COVID-19, were employees engaged in business in Massachusetts and had stopped commuting to the commonwealth. Now Massachusetts will treat these nonresidents' income as Massachusetts' source income. In response, New Hampshire filed a Motion to Leave to File Bill of Complaint against Massachusetts, arguing that Massachusetts' new rule violates the Dormant Commerce Clause as enunciated in *Complete Auto*[23] and the Due Process Clause.[24] Massachusetts responded that its tax rule does not violate those clauses and challenged the Supreme Court's original jurisdiction over this case as well as New Hampshire's standing.[25]

Various other states — Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, Utah, New Jersey, Connecticut, Hawaii, and Iowa — as well as organizations and individuals filed Amicus Briefs in support of New Hampshire concerning the motion or the merits.[26] On January 25, 2021, the Supreme Court invited the Acting Solicitor General to file a brief expressing the views of the United States federal government in this rare

[21] *See* New Hampshire v. Massachusetts, 141 S. Ct. 1262, 1262 (2021).

[22] *New Hampshire*, 141 S. Ct. 1262.

[23] Brief for Plaintiff, Motion For Leave to File Bill of Complaint at 25-30, *New Hampshire*, 141 S. Ct. 1262 (Oct. 19, 2020) (No. 22O154) [hereinafter Brief for Plaintiff]; *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (providing that courts will "[sustain] a tax against Commerce Clause challenge[s] when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State").

[24] Brief for Plaintiff, *supra* note 23, at 30-32.

[25] *See infra* Part II.A.

[26] To be clear, Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, and Utah argue that the Supreme Court should be mandated to review this case. *See* Brief for States of Ohio et al. as Amici Curiae Supporting New Hampshire's Motion for Leave To File Bill of Complaint at 1, *New Hampshire*, 141 S. Ct. 1262 (Dec. 21, 2020) (No. 22O154) [hereinafter Amici Curiae Brief for States of Ohio et al.]. The other states argue that not only should the case be reviewed, but that the case should be decided in New Hampshire's favor. *See* Brief for States of New Jersey et al. as Amici Curiae Supporting Plaintiff at 1-3, *New Hampshire*, 141 S. Ct. 1262 (Dec. 22, 2020) (No. 22O154) [hereinafter Amici Curiae Brief for States of New Jersey et al.].

original jurisdiction case.[27] The Acting Solicitor General's responded to this in the negative.[28] On June 28, 2021, the Supreme Court declined to hear this case.[29]

This Article offers the following contributions regarding this timely topic. First, by reviewing the arguments of both residence and source states, this Article contributes to the discussion by demonstrating the constitutional problems of maintaining pre-pandemic work arrangements as the status quo for tax purposes. This Article argues that Massachusetts' tax rule emulates New York's long-standing "convenience of the employer" rule that has been criticized as an unconstitutional extraterritorial assertion of taxing right of a source state. Both *New Hampshire* and New York's rule raise the question of whether a state can tax a nonresident not performing services within the state but working for a company that resides in that state. This issue can be framed as one regarding residence versus source taxation and whether source taxation supersedes a residence state's taxing power.

This Article argues Massachusetts' tax rule violates the Dormant Commerce Clause under the *Complete Auto* test[30] as well as the Due Process Clause because (1) nonresident teleworkers' activity lacks substantial nexus with Massachusetts, (2) the income is not fairly apportioned between source and residence states, (3) Massachusetts' tax rule discriminates against multistate teleworkers and burdens interstate commerce, and (4) it taxes activities not fairly related to the services provided by Massachusetts.

In addition, because the Supreme Court declined to hear this case as a matter of original jurisdiction, this Article reviews the relevant cases and jurisprudence of original jurisdiction and laments the Supreme Court's decision in light of the substantial increase in remote work.[31]

Second, in addition to the constitutional analysis, this Article presents more fundamental and theoretical problems of the extraterritorial assertion of the taxing right from source states.[32] Such theoretical analysis may offer insights for the Court and policymakers where it is easy to digress from the real problem by being overwhelmed from the technical and doctrinal legal analysis of the facts and laws at issue.

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27 *See New Hampshire*, 141 S. Ct. 1262 (mem.).

28 *See* Brief for the United States as Amicus Curiae at 1, *New Hampshire*, 141 S. Ct. 1262 (May 25, 2021) (No. 154) [hereinafter Brief for the United States as Amicus Curiae].

29 *New Hampshire*, 141 S. Ct. 1262 (mem.).

30 *See infra* Part II.A.1.a.

31 *See infra* Part II.A.

32 *See infra* Parts III.B–C.

Instead of governments viewing the rise of teleworkers as a temporary transition, states need to view this as an accelerated shift into a new era of teleworkers. This Article addresses the issues of maintaining the pre-COVID status quo and encourages a shift to adapt to permanent changes.[33] The importance of physical presence would be diminished for business entities, while still being important for individuals. This is perhaps even more meaningful in the digitalized economy where only natural persons can have physical presence.[34] Additionally, the source states' aggressive actions violate taxpayer agency and due process while burdening interstate commerce. Hence, this Article supports residence-based taxation for nonresident teleworkers' income. Establishing residence-based taxation could result in increased compliance and is supported by consent, benefit, and social obligation theories, which are foundational for any tax policy.[35]

Third, this Article suggests a long-term solution for taxing teleworkers based on residence taxation.[36] A state's ability to implement its own tax policy is within its sovereign right. However, when a state implements source taxation on teleworkers, it can trigger additional concerns regarding the sovereignty of other states as seen in *New Hampshire*.[37] Notably, Congress can create a lasting solution on the issue of multistate taxation. However, since Congress has not established a uniform tax policy, the courts have been left to navigate this murky area that Congress has failed to address. Congress has the ability and authority to enact legislation to provide a long-term solution to the current questions surrounding a state's ability to tax teleworkers, and this Article presents various justifications for the use of federal preemption on this issue.[38]

However, even before any legislative action, this Article rues that the Supreme Court decided not to hear *New Hampshire*. It is a rare original jurisdiction case with a third of states already involved. Many practitioners and scholars anticipated that *New Hampshire* would have been the most important tax case in recent years.[39] The Supreme Court hearing this case would have accomplished two goals. First, the Court's

[33] *See infra* Part III.

[34] *See infra* Part III.B.

[35] *See infra* Parts III.B–C.

[36] *See infra* Part IV.A.

[37] *See infra* Part II.A.

[38] *See infra* Part IV.B.

[39] Matthew C. Boch, Open Weaver Banks, Lynn A. Gandhi & Dirk Giseburt, Remarks at the American Bar Association Tax Section Virtual 2021 Midyear Tax Meeting (Jan. 26, 2021).

decision could clarify the quagmire of current Dormant Commerce Clause taxation doctrines by providing clear borders for states to operate within. Second, it would signal Congress to exercise its authority to regulate commerce between the states.

While teleworking numbers may subside after the COVID-19 pandemic, the teleworking revolution has begun. Work will continue to grow more remote and be conducted from one's home. Without clear guidance, discriminatory double and over-taxation of interstate teleworkers will also continue to increase. Considering that the overarching problem involves interstate commerce and multistate taxation, the Article urges the federal government, Congress, and the Supreme Court to offer a solution. These efforts will shed light on another tax problem of teleworking — that is, the taxation of *business entities* with cross-border employees in multiple states. The analysis of this Article offers insights to a broader audience beyond teleworkers including those reviewing the potential state corporate tax competition on teleworking businesses.

The remainder of this Article proceeds as follows. Part I overviews the rules governing the taxation of teleworkers, how states have taxed teleworkers, and how states have responded to the rise of teleworkers due to COVID-19 work-from-home orders. Part II discusses the battle between the residence states and the source states over taxing teleworkers' income. This Part examines the constitutionality of Massachusetts' new tax in *New Hampshire* and New York's convenience of the employer rule under the Dormant Commerce Clause and Due Process Clause. Part III explores the recommendation and rationale for giving primacy to residence taxation over source taxation in the case of teleworkers and discusses social theories that align with resident taxation. Part IV presents Congress's constitutional authority to create a uniform tax structure that preempts certain state nonresident taxing laws. The Article then concludes by emphasizing the need for judicial and legislative action.

I. RULES FOR TAXING TELEWORKERS

This Part reviews the basic rules already at play for taxing teleworkers discussing how states determine whether an individual is a "resident" or not and then distinguishes how teleworkers present unique challenges versus other types of interstate workers (such as mobile workers). It finishes by discussing the guidance states have provided concerning how they will tax teleworkers during the COVID-19 pandemic period.

A. State Income Tax Rules

States in the United States have the power to exercise both residence and source-based taxation over individuals.[40] If a person is a *resident* of a state, the state exercises residence-based taxation, meaning that the state can tax the personal income of that person, regardless of its source.[41] Conversely, when a *nonresident* earns income within that state, the source state may tax the worker subject to Constitutional restraints, namely the Commerce Clause and Due Process Clause. The source state can tax the nonresident's income only for income derived from sources in the state.[42]

In short, residence-based taxation applies to residents' income, whereas source-based taxation applies to nonresidents' income. The preliminary question then is how states determine whether an individual is a resident or not. This Subpart explains the rules determining residence and then discusses the difference between resident and source-based taxation.

1. Determining Residence

Establishing residence for tax purposes varies from jurisdiction to jurisdiction.[43] In addition, many states employ multiple tests for determining residency. Some tests are more circumstantial, using fact-based determinations, while others use more objective factors.

For the more circumstantial, fact-based determination for residency, most states define a "resident" for income tax purposes as someone who is "domiciled" in the state.[44] Generally, domicile is defined as the place an individual considers to be their *home*. A home is a place to which an

[40] *See, e.g.*, Shaffer v. Carter, 252 U.S. 37, 52 (1920) (stating "just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may . . . levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein").

[41] N.Y. *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) (holding that determination of residency allows a jurisdiction to tax the taxpayer's income regardless of source); *see also* HELLERSTEIN ET AL., *supra* note 2, at 379.

[42] *See* HELLERSTEIN ET AL., *supra* note 2, at 379.

[43] *Id.* at 380; Scott R. Thomas, *Domicile in Multistate Personal Income Tax Residency Matters: Enter the Swamp at Your Own Peril*, 39 PACE L. REV. 875, 876 (2019); Lee Allison, Kathleen Saunders Gregor & Andrew Yarrows, *When Down the Hall Becomes Across State Lines-Part 1 (1)*, BLOOMBERG TAX (Oct. 23, 2020, 7:56 AM), https://news.bloomberglaw.com/daily-tax-report/when-down-the-hall-becomes-across-state-lines-part-1 [https://perma.cc/9TZ6-4LKX].

[44] *E.g.*, OR. REV. STAT. § 316.027(1)(a)(A) (2021).

individual intends to return when absent from a state for a period of time. Many states also provide that a person may only have one domicile at any given time.[45] Once an individual has established a domicile, that domicile continues until the individual abandons it, acquires a new domicile, and resides in that new domicile.[46] States consider many factors when making this domicile determination because evaluating an individual's intent is a fact-based inquiry.

In addition to the "domicile" test, many states also apply more objective tests for determining an individual's residency status. One common test is the 183-day rule.[47] If an individual spends in the aggregate 183 days or more of the taxable year in a given state, they are considered residents of that state for income tax purposes.[48] Generally, those days may include whole or part days.[49]

Other factors are also considered. Some include a subjective factor, such as whether the presence in the state is for anything other than a temporary or transitory purpose,[50] and where an individual keeps "near and dear" items.[51] Some include more objective factors, such as whether an individual votes in a state for an election, whether an individual obtains a driver license in the state, or whether an individual or their spouse lists an address within the state on a tax return or paper filed with a court or other governmental entity.[52] Under these more mechanical approaches, if an individual meets these tests they are treated as a resident for income tax purposes.

This is not an exhaustive list of the rules that states use when determining residency. Instead, they are a sampling. However an individual's residency is established by a state, the residence state can then tax the entirety of that resident's income.[53]

2. Residence v. Source Taxation

Residence-based taxation is only one way a state may exercise its taxing power. Relevant to teleworkers is the second form of income tax

[45] *E.g.*, OR. ADMIN. R. 150-316.0025(1)(a) (2021).

[46] *Id.*

[47] *See* Thomas, *supra* note 43, at 884-85.

[48] *See* GA. CODE ANN. § 48-7-1(10)(A)(iii) (2011); MICH. COMP. LAWS § 206.18(1)(a) (2021); UTAH CODE ANN. § 59-10-136(3)(b)(xiii) (2021).

[49] *See* GA. CODE ANN. § 48-7-1(10)(A)(iii).

[50] HELLERSTEIN ET AL., *supra* note 2, at 380; *see also* CAL. CODE REGS. tit. 18, § 17014(b) (2021).

[51] N.Y. TAX LAW § 605(b) (2021).

[52] *See, e.g.*, UTAH CODE ANN. § 59-10-136(3)(b) (2021).

[53] *See* Shaffer v. Carter, 252 U.S. 37, 52 (1920).

through source taxation. Many states exercise both residency and source taxation powers for income tax purposes.[54]

Residence states may tax the income of their residents regardless of its source, including income from sources outside of the state. The justification for the residence tax is that individuals should contribute to the state they live in since it is that state which provides them with public services.[55] Source taxation is different because it is based on where an individual's income is generated rather than where the individual is domiciled.[56] Generally, source taxation for teleworkers means a state imposes taxes on a nonresidents' income only for the work performed while physically within that state.[57] Source taxation is justified partially by the theory that the state providing the opportunity for an individual to generate income should have the right to tax that income even if that individual does not live in that state.

Consider Sam's example, who lives in New Hampshire but telecommutes for work to Massachusetts where her employer is located. For Sam, New Hampshire is the residence state since that is where she lives, and Massachusetts is the source state since Sam derives her income there. Because Sam is subject to two states' taxing powers, she may be subject to the risk of *double taxation* of the same income — once under residence and again under source. Indeed, anytime an individual is subject to the competing rights of source and residence states, double taxation may occur.

Under the United States Supreme Court's jurisprudence, double taxation is not inherently unconstitutional.[58] However, to avoid double taxation, most resident states provide a credit for taxes paid by their residents to other source states.[59] This double taxation problem is further discussed in the context of teleworkers below.

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[54] Curry v. McCanless, 307 U.S. 357, 368 (1939).

[55] Maryland v. Wynne, 75 U.S. 542, 582-83 (2015) (Ginsburg, J., dissenting).

[56] Shaffer v. Carter, 252 U.S. 37, 52 (1920).

[57] *See, e.g.*, HELLERSTEIN ET AL., *supra* note 2, at 401 (providing an example that a nonresident traveling salesman attached to a New York office who spends virtually all their time in other states would only be taxed in New York for their entire salary).

[58] *See, e.g.*, *Curry*, 307 U.S. at 357 (finding the Due Process Clause of the U.S. Constitution does not bar multiple taxation); *see also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 267-68 (1978) ("[A]n apportionment formula that is necessarily only a rough approximation of the income properly attributable to the taxing State is not subject to constitutional attack unless the taxpayer proves that the formula has produced an income attribution 'out of all proportion to the business transacted' within the State."); Guar. Tr. Co. v. Virginia, 305 U.S. 19, 22-23 (1948).

[59] HELLERSTEIN ET AL., *supra* note 2, at 386.

B. Teleworkers

1. Distinguishing Teleworkers from Mobile Workers

Before addressing double taxation, it is important to note that teleworkers present different dilemmas under double taxation than mobile workers. Although both teleworkers and mobile workers are particularly susceptible to the risk of double taxation, there are key differences to the risks each face.[60]

A teleworker is someone who works for an employer in a state they do not live in and lacks physical presence but earns income from their employer in that state. The teleworker "commutes" to work through electronic means. Common examples of teleworkers include web developers, computer programmers, and software engineers. With the increase in internet-based technologies, individuals in other professions are finding it easier to "telecommute" and not work in the confines of their employer's state. The growth in teleworking includes academic tutors, interpreters, and even attorneys during the COVID-19 pandemic as people work from home.

Mobile workers are different. A mobile worker is someone who produces income from multiple states because they have a physical presence in each state during a taxable year. As a result, states can tax a mobile worker for the days where the mobile worker is physically present in the state performing work. In essence, a mobile worker's income is apportioned according to their physical presence in a given state.[61] Examples of mobile workers include professional athletes, traveling salespersons, lawyers, and those in the transportation industry.

Of course, an individual may touch both categories. Nevertheless, those who purely telework present an interesting dilemma since they only have a physical presence in their resident state.

[60] *See generally* Edward A. Zelinsky, *The Proper State Income Taxation of Remote and Mobile Workers*, COLUM. J. TAX L. (2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/8XV6-3443] (providing that mobile workers' key issue is taxation by multiple states based on physical presence in those states, while remote workers' key issue is the potential claim of an employer's state to tax the remote worker's income despite having no physical presence in the state).

[61] A caveat to this statement is that most states consider the mobile worker present in the state for that day if they spend any amount of time there. So, if a mobile worker worked in two states in the same day, each state would assert that that day's income is "sourced" to their state.

2. The Risk of Double Taxation of Teleworkers

In many cases, if teleworkers are considered nonresidents of a source state, then the source state imposes taxes on that nonresident's income only for work performed while physically in the source state. Contrastingly, residence states exercise their power to tax the personal income of residents regardless of its source. In theory, teleworkers should not need to worry about double taxation since they do not have a physical presence in the source state, disqualifying source taxation of their income. But as discussed below, teleworkers do find themselves subject to the risk of double taxation even when they lack physical contact with the taxing source state.

Note that the term "double taxation" of teleworkers in this Article targets source taxation (in addition to the residence taxation) that is imposed on teleworkers despite their lack of physical presence in the source state. Admittedly, if the residence state does not impose individual income tax, like New Hampshire, teleworkers may still face a source taxation problem, but not the double taxation problem, to be precise. However, the essence of the problem that this Article targets is the same, regardless of the residence state tax policy is — teleworkers confront an extra-layer of taxation by source state.[62] This Article suggests readers take the term "double taxation" with a grain of salt in this context.

Even though many residence states offer credits to teleworkers to remedy double taxation, such credits do not eliminate the problem altogether. Most states offer credits only to the amount of income taxes that their resident would have paid to the resident state if they had earned their income there rather than abroad. Often, the credits a state issues are lower than the tax on that income that the residence state already imposes. Take Alabama as an example. Alabama offers credits to its residents for taxes paid on income to another jurisdiction, and it issues a credit for the lesser of one of two ways. Alabama either issues a credit for (1) the actual income tax paid to another state or (2) the tax computed on the same taxable income in the other state using Alabama tax rates.[63] As a result, a resident of Alabama with income from another state will always pay the higher of the two tax rates on their income from outside Alabama.

[62] The only difference is whether teleworkers face double taxation, which should have been the residence taxation only, or single taxation, which should have been no taxation at all.

[63] ALA. ADMIN. CODE r. 810-3-21.01(3) (1999).

Moreover, not all states that levy income taxes offer credits for teleworkers working for out-of-state firms. For example, Arizona does not provide a tax credit for teleworkers' income taxes assessed by other states, such as New York, because Arizona does not respect New York as a source state.[64] Tax agreements may indeed exist between some states for matters of double taxation. For example, reciprocal tax agreements permit residents of one state to work in another state without filing nonresident state tax returns in that second state. Arizona has reciprocity agreements with several states — California, Indiana, Oregon, and Virginia.[65] However, Delaware does not have reciprocal tax agreements.[66] Nor does Missouri. Nor do most states. Besides Arizona, only fifteen states and the District of Columbia have reciprocity agreements.[67] And those agreements do not cover every relationship between the states. In addition, some states have rejected such agreements.[68] As a result, teleworkers may be subject to double taxation.

Not only is teleworking generally being attacked by post-COVID state mandates, but states are applying other doctrines, such as the convenience of the employer doctrine, to tax teleworkers. This special doctrine and its impact on teleworkers are reviewed in more detail in Part II.B.

While the COVID-19 pandemic did not create double taxation issues for teleworkers, it has exacerbated them. And in turn, so has the response to the pandemic from other states. This is because temporary guidance adopted by states aim to maintain the pre-COVID-19 work arrangements to determine the source of income and residence of teleworkers. The states' guidance in effect emulates the convenience of the employer doctrine as a way to become the source of income, exacerbating the double taxation problem of teleworkers. The next

[64] *See* ARIZ. REV. STAT. § 43-1071(A)(1) (2017) (granting residents an Arizona income tax credit "only for taxes paid to the other state . . . on income that is derived from sources within that state"); Edward A. Zelinsky, *Coronavirus, Telecommuting, and the 'Employer Convenience' Rule*, 95 TAX NOTES STATE 1101, 1102 (2020) [hereinafter *Coronavirus*].

[65] *Withholding Exceptions*, ARIZ. DEP'T. OF REVENUE, https://azdor.gov/businesses-arizona/withholding-tax/withholding-exceptions (last visited Sept. 10, 2021) [https://perma.cc/RFW5-T6WN].

[66] Tonya Moreno, *Reciprocity: States that Don't Tax Nonresident Workers*, BALANCE (Mar. 31, 2021), https://www.thebalance.com/state-with-reciprocal-agreements-3193329 [https://perma.cc/C7AL-W5QZ].

[67] *Id.*

[68] Bologna, *supra* note 19.

Subpart surveys the guidance of various states and reveals the resulting problem.

C. Guidance During COVID-19

When it comes to issuing guidance on taxing teleworkers in response to the pandemic, states have reacted in varying manners.

1. The States' Responses

As of June 2021, many states have not issued guidance regarding taxing teleworkers during the pandemic. These states include Arizona, D.C., Hawaii, Indiana, Louisiana, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Utah, Virginia, and West Virginia.[69]

However, some states have issued guidance. One group of states maintains the location of the source before the pandemic, effectively allowing extraterritorial taxation on teleworkers' income by source state. For example, Alabama states that an employee's regular place of work is the state that will get to tax the employee's income.[70] For teleworkers, this means if they worked in a particular state before the pandemic, then that state would get to continue taxing the teleworker's income. Other states adopting this policy include Georgia, Maine, Massachusetts, Mississippi, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, and South Carolina.[71] In essence, these states seek to maintain the status quo that existed before the COVID-19 pandemic.

Other states have issued contrary guidance, allowing the primary taxing power of teleworkers' residence state. For example, California issued guidance stating that the state from where an employee telecommutes is the state that gets to tax the income of that teleworker.[72] Other states treating teleworkers similarly are Colorado, Iowa, Kentucky, Maryland, Minnesota, Montana, Oregon, and

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69 HODGSON RUSS LLP, STATE GUIDANCE RELATED TO COVID-19, https://www.hodgsonruss.com/assets/htmldocuments/Telecommuting_5.22.20.pdf (last updated June 9, 2021) [https://perma.cc/E9TB-RTJ6].

70 *Id.* (indicating Alabama will not consider temporary changes in an employee's physical work location due to COVID-19).

71 *Id.*

72 *See generally COVID-19 Frequently Asked Questions for Tax Relief and Assistance*, CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/about-ftb/newsroom/covid-19/help-with-covid-19.html#Teleworking-and-the-Stay-at-Home-order (last visited Sept. 10, 2021) [https://perma.cc/2EGJ-KJF6] (providing information in a "FAQ" format regarding tax relief and assistance policies and program taken by California during the COVID-19 pandemic).

Wisconsin.[73] However, consider Chris's example who relocated from California to Utah during the pandemic. Which state is his residence state? Both California and Utah may insist that they are Chris's residence state — California based on Chris's relocation being temporary, and Utah based on the 183-day rule.[74] Chris would still be worried about the double taxation issue.

Last, a third group of states have issued their own specific responses. For example, Illinois issued guidance stating that if a teleworker has telecommuted from Illinois for more than thirty days, the teleworker's income will be subject to Illinois income tax and income tax withholding.[75] Kansas has adopted a mixed policy, providing that an employee's regular place of work may continue taxing the employee's income between March 13, 2020, to December 31, 2020.[76] Thereafter, the state from where an employee telecommutes will be the one that gets to tax the teleworker.[77] Missouri allows certain employees to be taxed from where they are telecommuting while for others it allows them to elect if they want the state where the employee regularly worked before the pandemic to be able to continue taxing them.[78] And Vermont stated that an employee's home state will be allowed to tax the income of a telecommuter.[79]

[73] *See* HODGSON RUSS LLP, *supra* note 69.

[74] UTAH CODE ANN. § 59-10-136(3)(b)(xiii) (2021); *see COVID-19 Frequently Asked Questions for Tax Relief and Assistance*, *supra* note 72.

[75] DAVID HARRIS, ILL. DEP'T OF REVENUE, ILLINOIS WITHHOLDING REQUIREMENTS FOR OUT-OF-STATE EMPLOYERS WHO EMPLOY ILLINOIS RESIDENTS WORKING FROM HOME DUE TO COVID-19 VIRUS OUTBREAK 1 (May 2020), https://www2.illinois.gov/rev/research/publications/bulletins/Documents/2020/FY2020-29.pdf [https://perma.cc/P8R9-2XEC].

[76] Kan. Exec. Order No. 21-01 (Jan. 26, 2021).

[77] *Id.*

[78] MO. CODE REGS. ANN. tit. 12, § 10-2.019 (2021).

[79] *Relocated and Remote Workers: Guidance for Employers and Employees*, AGENCY OF ADMIN. DEPT. OF TAXES, https://tax.vermont.gov/coronavirus/working-remotely (last visited Feb. 18, 2021) [https://perma.cc/LKJ7-244N]; *see* STATE OF VT. DEPT. OF TAXES, 2021 INCOME TAX WITHHOLDING INSTRUCTIONS, TABLES, AND CHARTS 2 (2021).

Table 1. State Guidance on Teleworkers' Income[80]

Guidance on what state gets to tax teleworkers' income	**States**
Source state to maintain the status quo of source	Alabama, Georgia, Maine, Massachusetts, Mississippi, Nebraska, New York, Ohio, Pennsylvania, Rhode Island, South Carolina
Residence state	California, Colorado, Iowa, Kentucky, Maryland, Minnesota, Montana, Oregon, Wisconsin.
Individual guidance	• Arkansas: Employee's regular place of work (employer's home state) until Dec. 31, 2020. As of Jan. 1, 2021, the state from where employee is telecommuting. • Connecticut: State from where employee is telecommuting (i.e., employee's home state) and a credit may be allowed for CT residents for 2020. • Delaware: through May 31, 2020, and for after June 1, 2020, if employee is not permitted to work in the office. • Illinois: Illinois gets to tax teleworker if employee is telecommuting from there for more than thirty days. • Kansas: State from where employee is telecommuting (i.e., employee's home state) or employee's regular place of work (i.e., the employer's home state) for period of March 13, 2020, to December 31, 2022. • Michigan: Per informal email from Tax Policy Division, if a Michigan resident works remotely for a New York employer and that state taxes the wages, Michigan will give the resident a credit against the tax.[81]

80 Table 1 was created by the author, based on HODGSON RUSS LLP, *supra* note 69.
81 *Id.* at 21. This may be considered no guidance.

	• Missouri: State from where employee is telecommuting (i.e., employee's home state) or, for certain employers, employee's regular place of work (i.e., the employer's home state) if elected. • New Jersey: The employer's home state's rules dictate which state gets the tax (i.e., NJ employer with nonresident employee working from home, withholding based on NJ rule of sourcing to where work is performed). Pre-pandemic sourcing rule applies as of October 1, 2021. • Vermont: Employee's home state may tax.
No guidance	Arizona, D.C., Hawaii, Idaho, Indiana, Louisiana, New Mexico, North Carolina, North Dakota, Oklahoma, Utah, Virginia, West Virginia
No state income tax	Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, Wyoming

2. A Most Troubling Response

Of the states that have issued guidance, the most problematic is that of the states who decided to maintain the status quo prior to the COVID-19 pandemic. Although many of these states' guidance are temporary measures, they still extend a source state's taxing powers beyond what might be constitutionally allowed. The United States Supreme Court has held:

> [J]ust as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may . . . levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the state, or their occupations carried on therein . . . .[82]

So, a state is limited to taxing a nonresident's income to only the income derived from sources within the state.[83] Over time, the Supreme Court

[82] Shaffer v. Carter, 252 U.S. 37, 52 (1920).
[83] *Id.* at 57.

has taken a broad view of what may be "source." Indeed, the Supreme Court has ruled:

> [a] [S]tate is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.[84]

Still, when it comes to interstate activities, the Supreme Court has declared "[t]he Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation."[85] As discussed later in this Article, states seeking to maintain the status quo by extending source states' taxation powers may violate the Constitution.

Whatever the constitutionality, allowing states to maintain the status quo by extending source states' taxation powers results in two primary problems. First, by states extending their source taxing power, residence states cannot collect a fair share of revenue while providing public services to their residents. Second, this situation exacerbates the long-standing problem of double taxation on multistate income. These issues are explored in greater detail in Part II.

II. THE BATTLE OVER TAXING TELEWORKERS

The problems of the states being unable to collect their fair share of revenue and its concurrent challenge, the risk of double taxation, are now manifesting in Supreme Court litigation in *New Hampshire*.[86] Massachusetts seeks to tax New Hampshire residents who once worked in Massachusetts, but now because of the COVID-19 pandemic, neither work physically nor live in the commonwealth. New Hampshire has sued, arguing that the taxation of their residents is unconstitutional for various reasons. In contrast, Massachusetts argues it is both appropriate and merely an extension of traditional tax law.

Although the Supreme Court declined to hear this case as a matter of original jurisdiction, *New Hampshire* presented important issues in

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

[85] MeadWestvaco Corp. *ex rel.* Mead Corp. v. Illinois Dep't of Revenue, 553 U.S. 16, 24 (2008).

[86] New Hampshire v. Massachusetts, 141 S. Ct. 1262 (2021) (mem.) (denying motion for leave to file a bill of complaint). Justices Thomas and Alito would have granted the motion. *Id.*

multistate taxation for remote workers. This Part reviews the arguments presented by both parties and offers constitutional analysis of both arguments and of maintaining pre-pandemic work arrangements as the status quo for tax purposes. It also revisits New York's long-standing "convenience of the employer" rule, which Massachusetts' tax rule has emulated.

A. New Hampshire v. Massachusetts

New Hampshire v. Massachusetts represented the long-awaited (and inevitable) conflict between teleworkers' residence and source taxation in the United States.[87] On April 21, 2020, Massachusetts adopted an emergency tax regulation that applied retroactively to March 10, 2020, which changed Massachusetts' tax policy to tax nonresidents who, prior to COVID-19, were employees engaged in business in Massachusetts and had changed their residence outside of the commonwealth, being treated for tax purposes as "source income subject to personal income tax."[88] Massachusetts then extended the emergency regulation and adopted it as a final rule. Initially, it was set to expire on the earlier of December 31, 2020, or 90 days after the Governor ends the state of emergency.[89]

In response to Massachusetts' regulation, New Hampshire Governor Chris Sununu publicly announced that the regulation is an unconstitutional attack on New Hampshire's sovereignty and its citizens, indicating that New Hampshire would challenge the regulation with the Supreme Court.[90] Shortly after, the New Hampshire Attorney General filed a Motion for Leave to File a Bill of Complaint with the Court.

Massachusetts filed a Reply Brief in Opposition to New Hampshire's initial motion. Considering the litigation's potentially enormous

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87 *See New Hampshire v. Massachusetts*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/new-hampshire-v-massachusetts (last updated June 28, 2021) [https://perma.cc/2Y94-NL67] (noting that this dispute focuses on whether Massachusetts' tax rule constitutes unconstitutional confiscation).

88 Mass. Dep't of Revenue, *TIR 20-5: Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic*, MASS.GOV (Apr. 21, 2020), https://www.mass.gov/technical-information-release/tir-20-5-massachusetts-tax-implications-of-an-employee-working [https://perma.cc/QMB6-X9VY].

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

90 Governor Chris Sununu, BREAKING: the New Hampshire Department of Justice is Filing a Lawsuit in the United States Supreme Court Against the Commonwealth of Massachusetts, FACEBOOK (Oct. 19, 2020), https://www.facebook.com/GovernorChrisSununu/videos/3465352176887977 [https://perma.cc/XT6G-J9TW].

impact, various other states, organizations, and individuals filed Amicus Briefs concerning the matter.[91] On January 25, 2021, the Supreme Court invited the acting Solicitor General to file a brief in this case to express the views of the United States federal government.[92] The acting Solicitor General Elizabeth B. Prelogar responded that this case did not merit the Court's original jurisdiction and suggested that any potential harm upon New Hampshire residents could be sufficiently litigated in Massachusetts courts.[93] After the supplemental briefs by New Hampshire and Massachusetts, the Supreme Court declined to hear this case on June 28, 2021.[94]

On review of *New Hampshire*, this Article supports New Hampshire and argues that Massachusetts' actions are likely unconstitutional. Massachusetts' law is bad tax policy and does not accurately reflect the modern marketplace that exists post-COVID. Downplaying the importance of the issue by referring to Massachusetts' tax rule as "idiosyncratic and temporary"[95] is an incorrect assessment that misses the opportunity to modernize the multistate tax rules for increasing number of remote workers.

To adequately explain this analysis, this section proceeds as follows: (1) pro-New Hampshire arguments supporting residence states, (2) pro-Massachusetts arguments supporting source states, (3) jurisdiction and standing, and (4) the problem with maintaining the pre-pandemic status quo in a post-pandemic world is unpacked illustrating the author's perspective.

1. Arguments Supporting Residence States

a. Commerce Clause

New Hampshire's first argument is that Massachusetts' rule violates the Commerce Clause as an undue burden on interstate commerce.[96] Article I of the United States Constitution grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[97] While first granting an express

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91 *New Hampshire v. Massachusetts*, *supra* note 87.

92 *See* Brief for the United States as Amicus Curiae, *supra* note 28, at 4.

93 *New Hampshire v. Massachusetts*, supra note 87; *see* Brief for the United States as Amicus Curiae, *supra* note 28, at 4.

94 *New Hampshire v. Massachusetts*, *supra* note 87.

95 Brief for the United States as Amicus Curiae, *supra* note 28, at 21.

96 Brief for Plaintiff, *supra* note 23, at 25-30.

97 U.S. CONST. art. I, § 8, cl. 3.

authority to Congress, this clause also has been read to restrict regulatory authority of the states that discriminates against or excessively burdens interstate commerce.[98] This second inference is referred to by many as the "Dormant Commerce Clause" and is characterized by the United States Supreme Court as a "tangled underbrush," or a "quagmire."[99]

Despite the doctrine being a quagmire, the following is clear: a state's taxation of nonresidents may survive scrutiny under the Commerce Clause only if it meets four requirements. These four requirements established in *Complete Auto Transit, Inc. v. Brady*[100] are that the state's tax must be: (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned" to activity occurring within the taxing jurisdiction; (3) nondiscriminatory "against interstate commerce"; and (4) "fairly related to the services provided by the State."[101] Since the test is conjunctive, failure to meet all four prongs spells doom for Massachusetts' tax rule. Below is a short description of the arguments that are, or can be, made by New Hampshire and Massachusetts. Each prong will be further critically assessed in turn in Part II.A.4.

i. Substantial Nexus

From the perspective of New Hampshire, the entirety of the taxed activity occurs in New Hampshire, not in Massachusetts. The Massachusetts tax rule taxes the income of individuals living and working wholly within New Hampshire because those individuals provided services in Massachusetts prior to the pandemic. Even though the activities of these specific teleworkers used to be in Massachusetts, the fact is that many of these teleworkers no longer do so. As such, if the taxpayer is no longer performing activities within Massachusetts, then the taxpayer seems to lack a current nexus with Massachusetts. Indeed, it seems but for Massachusetts' tax rule mandatorily extending

[98] *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (noting that the Commerce Clause "prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988))).

[99] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959).

[100] 430 U.S. 274 (1977).

[101] *Id.* at 279; *cf.* Adam Timmesch, *The Unified Dormant Commerce Clause*, 92 TEMPLE L. REV. 331 (2020) (arguing that *Complete Auto* is a combination of already existing tests provided through *Pike*'s Dormant Commerce Clause test, that there is no significant difference between the two tests since Wayfair, and that the court should apply the Pike balancing test for tax cases).

and maintaining the taxpayer's prior nexus, there is no current nexus with Massachusetts at all.

Conversely, when it comes to businesses, tax nexus typically only lasts for "just [a] taxable year."[102] Without a significant level of activity occurring during the taxable year within Massachusetts, extending nexus for indefinite periods of times through this tax rule would be unsound and difficult to prove that taxpayers have actually "retained" nexus with Massachusetts. Accordingly, New Hampshire teleworkers likely would lack nexus with Massachusetts but for this extraterritorial tax rule.

ii. Fair Apportionment

The Massachusetts tax rule taxes New Hampshire teleworkers' activities which they perform wholly within New Hampshire.[103] So, where 100 percent of their activities occur in New Hampshire, Massachusetts' "fair share" should be zero. Under this theory, not only is New Hampshire the *residence* state of the taxpayer, but it is also the *source* state of the taxpayer since it is within New Hampshire that the taxpayer generates their income. Accordingly, New Hampshire and other residence states have a stronger claim to tax a teleworker's income.

Although a teleworker's employer may still be conducting activities in Massachusetts, the teleworker is not. This is an important distinction because the teleworker's income is taxed, not the employer's. As such, the Supreme Court should find that it is fairer to apportion all the teleworker's activities to New Hampshire, i.e., the teleworker's residence state.

iii. Nondiscrimination

On its face, the Massachusetts extraterritorial tax rule does not seem to discriminate against interstate commerce as the rule taxes residents and nonresidents of Massachusetts at the same rates.

In application though, the Massachusetts tax rule does discourage individuals from working in Massachusetts if they do not also live in Massachusetts. It also discourages individuals from leaving Massachusetts because, they will still be subject to Massachusetts' income tax even if they do leave. The rule then would discourage the

102 Brief for National Taxpayers Union Foundation et al. as Amici Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 14, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Dec. 22, 2020) (No. 22O154).

103 *See* Brief for Plaintiff, *supra* note 23, at 11, ¶ 38.

free flow of workers in interstate commerce to some degree, even though the rule itself does not discriminate on the basis of residence. However, the weight of that burden would be hard to measure.

iv. Fair Relationship to Services Provided by the State

While Massachusetts' income tax system may have been fairly related to the services Massachusetts provided to a taxpayer pre-pandemic, the tax rule at issue does not *currently* "reasonably relate[] to . . . the activities or presence of the taxpayer"[104] within Massachusetts. At this point, New Hampshire is providing firefighter, police, government, health, and the like benefits to the taxpayers at issue.[105] As such, New Hampshire is footing the bill to provide New Hampshire teleworkers government services, not Massachusetts.[106]

b. Due Process Clause

New Hampshire's second argument is that taxing these teleworkers also likely violates the Due Process Clause. The Due Process Clause[107] of the Constitution prohibits a state from taxing value earned outside its borders because a seizure by the state where there is no jurisdiction is a denial of due process of law.[108] Under *Allied-Signal, Inc. v. Director, Div. of Taxation*,[109] for a tax rule to survive a Due Process Clause challenge, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[110] Further, when an activity is taxed, "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."[111]

First, Massachusetts law reaches beyond its borders and directly taxes individuals working entirely from their homes outside of Massachusetts. From a residence state's point of view, a tax rule like this seemingly allows Massachusetts to tax a nonresident of Massachusetts merely because the individual's employer has an address in Massachusetts. That fact alone does not seem to be linked to the activity

[104] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981).
[105] Brief for Plaintiff, *supra* note 23, at 10, ¶ 33.
[106] *Cf. id.* at 11, ¶ 34 (noting that because New Hampshire does not have an income tax, the state pays for government services through various revenue sources).
[107] U.S. CONST. amend. XIV, § 1.
[108] *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 n.11 (1995).
[109] 504 U.S. 768 (1992).
[110] *Id.* at 777 (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954)).
[111] *Id.* at 778.

that a teleworker performs herself, especially since Massachusetts banned individual taxpayers from physically traveling to and working in Massachusetts because of the pandemic. Such travel restrictions prevent the teleworkers at issue from purposefully availing themselves of the benefits of Massachusetts.[112] Accordingly, the Massachusetts tax rule appears to violate the Due Process Clause on its face.

Importantly, the Supreme Court has previously held that a Delaware court lacked jurisdiction over individuals in a derivative action when those individuals merely held the role of officers and directors for a Delaware corporation.[113] By merely accepting those roles in Delaware, the individuals had not availed themselves of the privilege of conducting activities within that forum state.[114] As a result, the individuals were not found to be within the jurisdiction of the Delaware court.

Similarly, as is the case in *New Hampshire*, an individual who merely travels into a state to secure a role at a company arguably does not travel into that state for the privilege of conducting activities within that state. If that individual proceeds to telework from a different state after accepting the job, it seems under the Due Process Clause that teleworker would lack minimum contacts with the state where their employer is located.

2. Arguments Supporting Source States

For this specific case, Massachusetts and other source states can pressure the Supreme Court to invoke either one of two excuses for denying acceptance of this case in arguing their below points. This Section briefly lays out the arguments not just for Massachusetts, but for source states generally.

The Massachusetts tax rule was passed to help maintain the status quo from before the pandemic.[115] Further, the rule is temporary. Before, Massachusetts' income tax system allowed it to "source" income to Massachusetts in a way that reflected the geographical location of a taxpayer's income. If a taxpayer performed income-earning activities in

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112 *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (discussing that "minimum contacts" exists in other contacts only when the defendant has "purposefully avail[ed] itself of the privilege[s] of conducting activities within the forum . . .").

113 Shaffer v. Heitner, 433 U.S. 186, 216-17 (1977).

114 *Id.*

115 Greg Stohr, *High Court Rejects State's Challenge to Work-from-Home Taxes*, BLOOMBERG (June 28, 2021, 6:31 AM PDT), https://www.bloomberg.com/news/articles/2021-06-28/high-court-rejects-new-hampshire-suit-over-work-from-home-taxes [https://perma.cc/PSA7-S8GW].

Massachusetts, then they would be taxed in Massachusetts for those activities. But for the pandemic, the New Hampshire teleworkers likely would have continued their income-producing activities in Massachusetts. So, the tax rule at issue simply allows Massachusetts to hold onto income tax revenue that it otherwise would likely not have lost without the pandemic occurring.

Relatedly, the New Hampshire teleworkers at issue chose to work for a Massachusetts employer before the pandemic, arguably creating a substantial connection with Massachusetts. The New Hampshire teleworkers had the opportunity to work outside Massachusetts before the pandemic. Instead, they purposely availed themselves in Massachusetts to receive the benefits of working a job in Massachusetts. So, for the privilege of working for a Massachusetts employer, those taxpayers choose to have minimum contacts with Massachusetts by deciding to work for an employer there rather than in another jurisdiction, thereby justifying the temporary tax rule.

Additionally, the Massachusetts tax rule does not impose different rates on nonresidents than it does on residents. Instead, it taxes those individuals who were working in Massachusetts before the pandemic and who have continued performing the same activities, albeit now in New Hampshire. And it taxes them the same as those who work and live in Massachusetts.

Last, Massachusetts' tax rule does not *per se* bar states like New Hampshire from adapting or setting up their own tax policies. So long as New Hampshire and other states pass laws conforming with the Constitution, they are free to do so. In this case, Massachusetts is doing as it has always done: taxing the Massachusetts source income of nonresidents who work for Massachusetts businesses. Other states do similarly.[116]

3. Original Jurisdiction and Standing

Although this case presents the chance to resolve the long struggle over the issue concerning taxation of teleworkers, there were two preliminary issues that would permit the Supreme Court to avoid reviewing the case. The first is the Supreme Court's discretion over whether to exercise its original jurisdiction and the second concerns New Hampshire's standing.

[116] *See, e.g.*, *In re* Manohar & Asha Kakar, DTA No. 820440, 2006 WL 721643 (N.Y. Div. Tax App. Feb. 16, 2006) (indicating examples such as New York taxing non-residents from New Jersey and even Arizona).

a. Original Jurisdiction

Article III of the Constitution gives the Supreme Court "original Jurisdiction" over cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[117] In addition, the Supreme Court has "appellate Jurisdiction" in all other cases "with such Exceptions . . . as the Congress shall make."[118] While Congress can limit the Supreme Court's appellate jurisdiction, the Supreme Court has found that Congress may not limit the Court's original jurisdiction.[119]

The Supreme Court retains discretion over exercising its original jurisdiction.[120] In part, this is because the Supreme Court believes it is "structured to perform as an appellate tribunal [and] ill equipped for the task of factfinding[.]"[121] In this same vein, the Supreme Court is leery of taking cases that might intrude on its chief role as "the supreme federal appellate court."[122] Because of the breadth of the type of cases the Constitution grants the Supreme Court original jurisdiction to hear, the Supreme Court has held that the Constitution gives them authority to exercise discretion.[123] Otherwise, the Supreme Court's ability to administer their docket might be impaired.[124]

This reasoning worked in favor of Massachusetts' position. In fact, Massachusetts rightly noted in their reply that original jurisdiction should be invoked only "when the necessity [i]s absolute and the matter itself properly justiciable."[125] As such the *necessity* for the Supreme Court to review this case may be questionable. The tax rule affects particular teleworkers, and those teleworkers chose to work in Massachusetts rather than New Hampshire. If those individuals wish to challenge the Massachusetts tax law, they may do so without the Supreme Court's deliberation. Indeed, those individuals can challenge the Massachusetts tax rule by going through the long-established process of Massachusetts state taxation review.[126] Because any

[117] U.S. CONST. art. III, § 2, cl. 2.

[118] *Id.*

[119] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 332-33 (1816).

[120] *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 497 (1971).

[121] *Id.* at 498.

[122] *Id.* at 505.

[123] *See* Washington v. Gen. Motors Corp., 406 U.S. 109, 113 (1972).

[124] *Id.*

[125] Brief in Opposition to Motion for Leave to File Complaint at 11, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Dec. 11, 2020) (No. 22O154) [hereinafter Brief for Defendant] (quoting Louisiana v. Texas, 176 U.S. 1, 15 (1900)).

[126] *See e.g.*, *id.* at 22-24 (noting that individuals can seek relief from Massachusetts's Commissioner of Revenue, Appellate Tax Board, and Appeals Court); Brief for the

potentially aggrieved teleworkers can litigate their claims through the Massachusetts state taxation review system, original jurisdiction is not necessary to resolve their claims and thus, arguably, should not be invoked.

While this argument is technically sound, it has flaws. Aggrieved taxpayers can indeed challenge the Massachusetts tax rule through Massachusetts' state taxation review system. But as pointed out by Edward Zelinsky in his brief to the Supreme Court, the Tax Injunction Act[127] requires taxpayers contesting a state tax law to exhaust the taxing state's administrative remedies rather than going to federal court.[128] Usually, this means the taxpayer must initiate their case in a state tax tribunal.[129] However, "[t]hese tribunals are typically unsympathetic to nonresidents' constitutional rights," the primary concern at issue in this case.[130] Further, even if a taxpayer exhausts their administrative remedies, the taxpayer is then left with the Massachusetts state courts to continue challenging the tax rule.[131] Even for taxpayers with abundant financial resources, the cost and time involved in litigating such a claim that far is not practical. In addition, many states offer credits to their residents for income taxes paid to other states. That fact lessens the incentives for taxpayers to challenge tax rules like Massachusetts'.[132] Supposing the tax rule is unconstitutional, allowing it to stand only because no one has the resources or time enough to challenge it seems hardly equitable.

There is some push back on the Supreme Court's right to retain discretion over whether to decline jurisdiction over interstate disputes. In this case, "Justice Thomas and Justice Alito would grant the motion."[133] They made the same point in *Arizona v. California* in 2020 and *Nebraska v. Colorado* in 2016, opining that "we likely do not have

United States as Amicus Curiae, *supra* note 28, at 11 ("[I]ndividual taxpayers' challenges to the tax could be raised through Massachusetts's procedure for challenging tax assessments.").

127 28 U.S.C. § 1341 (2018).

128 Brief for Professor Edward A. Zelinsky as Amicus Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 18, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Dec. 10, 2020) (No. 22O154).

129 *Id.*

130 *Id.*

131 *Id.* at 19.

132 Although New Hampshire does not offer such credits to its residents, most other states do.

133 New Hampshire v. Massachusetts, 141 S. Ct. 1262 (2021) (mem.) (denying motion for leave to file a bill of complaint). Justices Thomas and Alito would have granted the motion. *Id.*

discretion to decline review in cases within our original jurisdiction that arise between two or more States."[134] In addition, ten states filed an amicus brief in this case arguing that such cases should be mandatorily reviewed by the Supreme Court.[135] Their argument stems from a reading of the Constitution and 28 U.S.C. § 1251(a), passed by Congress, which does not state the jurisdiction it confers to the Supreme Court for original disputes between two or more states is discretionary.[136] Contrastingly, other similar statutes passed along with this one do give discretion to the Supreme Court for other cases.[137] As such, they argue that since the Supreme Court has exclusive jurisdiction over original disputes between the states, the Court should be required to review those cases. Otherwise, states with original disputes might be left without judicial recourse.

This argument for a mandatory review of original disputes between the states suffers from two main ailments. First, the States' construction of both the Constitution and cited statutes rely on several inferential leaps. No language explicitly supports their position. Instead, the argument relies on what is *not* said. In that way, their argument seems like the famous one made by Sherlock Holmes of the dog that did not bark.[138] While not damning, the Supreme Court may be reluctant to buy into this argument, especially considering the second ailment. For the Supreme Court to adopt this argument, they would need to overturn decades of precedent where they have held that they do retain discretion.[139] The Supreme Court reads the Constitution as already inferring discretion to hear cases of original jurisdiction.[140] Asking the Supreme Court to give up that power seems like an unlikely argument

[134] Arizona v. California, 140 S. Ct. 684, 684 (2020) (Thomas, J. dissenting); *see also* Nebraska v. Colorado, 136 S. Ct. 1034, 1034 (2016) (Thomas, J. dissenting) ("Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction.").

[135] *See* Brief of Amici Curiae States of Ohio et al. in Support of New Hampshire's Motion for Leave to File Bill of Complaint at 1, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Dec. 21, 2020) (No. 22O154).

[136] *Id.* at 8.

[137] *Id.* at 8-9.

[138] SIR ARTHUR CONAN DOYLE, 1 SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES 540 (Bantam Books 2003) (1892).

[139] Nebraska v. Colorado, 136 S. Ct. 1034, 1034 (2016) (Thomas, J. dissenting) ("[T]he Court has long exercised such discretion [over Original Jurisdiction cases], and does so again today in denying, without explanation, Nebraska and Oklahoma's motion for leave to file a complaint against Colorado.").

[140] *See* Vincent L. McKusick, *Discretionary Gatekeeping: The US Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 *passim* (2018).

to prevail given that the Supreme Court retains this discretion as a means to maintain their supreme appellate court role.

While not all agree that the Supreme Court should be mandated to review this issue, most agree that this is an important case of great consequence that the Court should have decided. For one, the dispute between Massachusetts and New Hampshire is not an isolated affair. Rather, it represents a larger, older, national issue. To date, five other states besides Massachusetts have similar laws that directly tax out-of-state residents on the income they earn working remotely from their states of residence. Take New York, for example. Not only does it regularly tax the income of remote workers in neighboring states like Connecticut and New Jersey, it even taxes nonresidents in states as distant as Arizona.[141] In addition, other states have passed tax laws like Massachusetts' in response to the pandemic. For example, Ohio passed H.B. 197 in 2020, similar to the Massachusetts tax rule, the bill designed to address the COVID-19 crisis.[142] It allows municipalities in Ohio to tax employees working from home during the pandemic and for thirty days afterwards as if they were still working as they were before the pandemic. While this does not allow the state of Ohio itself to act as the state of Massachusetts is allowed to under its rule, it does allow an Ohio municipality to tax income of workers who neither live nor work within the taxing jurisdiction of that municipality. That could include individuals who now live outside of Ohio altogether. Laws like these would result in billions of dollars of fiscal confusion and losses for many states since they end up crediting their residents for taxes paid to these other states. Accordingly, the profound economic consequences of these laws warrant review by the Supreme Court. If the Supreme Court had resolved this case, the decision could have determined how similar issues throughout the country should be resolved.

Last, if the Supreme Court is concerned about maintaining its role as an appellate court, it may appoint a Special Master to take evidence and present a ruling.[143] This would allow the Supreme Court to maintain its appellate role and review the special master's finding should there be

141 *In re* Manohar & Asha Kakar, DTA No. 820440, 2006 WL 721643 (N.Y. Div. Tax App. Feb. 16, 2006).

142 H.B. 197, 133d Gen. Assemb., Reg. Sess. (Ohio 2020).

143 Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017, 11:36 AM EDT), https://www.jamsadr.com/files/uploads/documents/articles/scheindlin-law360-the-use-of-special-masters-in-complex-cases-2017-08-15.pdf [https://perma.cc/HZ3P-FEBR] (noting how, with the parties' consent, a special master can perform a variety of special duties including "mak[ing] or recommend[ing] findings of fact").

any intensive fact-finding. That seems unlikely though since the issue in *New Hampshire* was a question of law: that being whether the Massachusetts' tax rule amounts to an unconstitutional confiscation of nonresident income. Still, the ability to appoint a Special Master undermines the notion that the Supreme Court is "illequipped" for fact finding.[144]

b. Standing

Also at issue is whether New Hampshire has standing to bring this case. Under Massachusetts' theory, New Hampshire is merely grafting its aggrieved citizens' claims onto itself and claiming that New Hampshire itself is threatened. If so, this likely would not be enough for New Hampshire to have standing.[145] Instead, New Hampshire must bear its own injuries. And those injuries must be serious.[146]

This argument is fairly sound. In many ways, New Hampshire appears to lack standing. Arguably, Massachusetts' tax rule does not deter businesses or persons from moving into New Hampshire. If a business or person moves to New Hampshire to both live and work there, that business or person will not trigger Massachusetts' tax rule. That rule may discourage persons from living in New Hampshire and working in Massachusetts, but again, the challenged tax rule does not discourage the movement of people and businesses into New Hampshire outright. Further, Massachusetts argues that its tax rule is temporary and was passed in response to a state of emergency.[147]

Nevertheless, "[e]mergency does not create power."[148] As for the temporariness of this rule, Massachusetts has extended its effect repeatedly.[149] It does not follow that because a State had nexus with an

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[144] Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 498 (1971).

[145] *See, e.g.*, Kansas v. Colorado, 533 U.S. 1, 8 (2001) ("[I]n order to invoke . . . original jurisdiction, 'the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.'" (quoting Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387, 396 (1938))).

[146] *See* North Dakota v. Minnesota, 263 U.S. 365, 374 (1923).

[147] *Cf.* Brief in Opposition to Motion for Leave to File Bill of Complaint at 7 ¶ 2, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (Dec. 11, 2020) (No. 22O154) (indicating the April 21 emergency regulation maintained the status quo for personal income tax).

[148] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

[149] 830 MASS. CODE REGS. 62.5A.3 (2021) (first promulgated on October 16, 2020; re-promulgated on March 5, 2021); *TIR 20-15: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic*, MASS.GOV (Dec. 8, 2020), https://www.mass.gov/technical-information-release/tir-20-15-revised-guidance-on-the-massachusetts-tax-implications-of [https://perma.cc/GR7C-Z633] [hereinafter *TIR 20-15*] (indicating extension until ninety days after the state of

individual before the pandemic that it maintains that nexus so long as there is a pandemic. Afterall, a tax nexus can expire if not maintained. To allow otherwise is to permit "trailing nexus on steroids[.]"[150] The fact that this law attempts to continue the status quo from before the pandemic does lean in favor of Massachusetts, yet for the reasons discussed below, there are drawbacks to preserving that status quo.

Declining to hear this case, the Supreme Court may have thought that New Hampshire did not have standing to bring this suit. New Hampshire's chief claimed injury in this case is the invasion of its sovereignty. This theory relies on the assumption that by Massachusetts taxing a New Hampshire resident's income, Massachusetts strips New Hampshire of its power to tax or not tax its residents living and working wholly within the state as it sees fit. Granted, tax nexus is more complicated than that, but consider the problem from the view of a different body of law; one generally would not expect an individual living and working wholly within State A would be subject to the criminal laws of another state, State B, by committing a crime in State A. But that is what Massachusetts' tax rule does — not just figuratively, but literally. If a New Hampshire resident at issue fails to comply with Massachusetts' tax rule despite working and living wholly within New Hampshire, they may be subject to both civil and criminal penalties in Massachusetts. In that way, Massachusetts steps over the border and places more than just tax jurisdiction over a New Hampshire resident. And from New Hampshire's end, it could not remedy this situation even if it changed its tax policies. Accordingly, this further indicates that Massachusetts' tax rule undermines New Hampshire's sovereignty over its citizens. For those reasons, this case is not merely one where New Hampshire is standing in the shoes of its citizens; it brings its own issues.

Even if New Hampshire is not itself harmed by these laws, arguably the state can assert *parens patriae* standing because it has a quasi-sovereign interest in protecting the "health and well-being — both physical and economic — of its residents."[151] Regardless, even if New Hampshire lacked these above means of standing, other States are harmed by these laws. As discussed above, five other States besides Massachusetts have tax rules that tax remote workers outside of their

emergency in Massachusetts has been lifted); *see also* HODGSON RUSS LLP, *supra* note 69 (indicating original applicability between March 10, 2020 and December 31, 2020).

150 Paul Williams, *Justices Should Block Mass. Telework Tax Rule, Prof Says*, LAW360 (Dec. 2, 2020, 8:25 PM EST), https://www.law360.com/tax-authority/articles/1332419/justices-should-block-mass-telework-tax-rule-prof-says [https://perma.cc/3AB2-YL6K].

151 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

borders. This results in the risk of double taxation of interstate telecommuters while the States also suffer fiscally by giving credits to their taxpayers to alleviate undesirable conditions. Further, it is typically the teleworker's home state that provides them with public services. So, not only is a teleworker's home state providing them with public services, it also in a sense subsidizes the other source state by providing them with tax credits. As a result, the teleworker's home state suffers a concrete, fiscal loss.

In sum, this Article argues that New Hampshire does, in fact, have standing to bring suit. Or if not New Hampshire, then other similarly aggrieved States. It is regrettable that the Supreme Court did not accept this case to resolve the issue concerning the taxation of teleworkers post-pandemic.

4. Constitutional Challenges in Maintaining Pre-COVID Work Arrangements for Tax Purposes

Built on the various arguments of the residence and source states introduced in the previous Subparts, and despite the Supreme Court's decision not to hear this case, this Subpart addresses the author's view of the merits of New Hampshire's constitutional claims as well as its standing issue.

The question is whether Massachusetts may continue to tax the income of a nonresident worker who once worked physically in Massachusetts but now, because of the COVID-19 pandemic, does not live in or work physically in the taxing state. This problem originates from Massachusetts' attempt to maintain pre-COVID work arrangements as the status quo and as it tries to exercise its extraterritorial taxing right as a source state on nonresident's income. As explained in Part II.B. below, Massachusetts' new rule emulates New York's "convenience of the employer" rule, which treats out-of-state telecommuters' income as always sourced in New York unless the remote work is performed for the necessity of the employer. Projecting a source state's taxing power extraterritorially on nonresidents' income even if they are not physically present in the source state has been seriously criticized by many scholars.[152]

[152] *See, e.g.*, Meredith A. Bentley, Huckaby v. New York State Division of Tax Appeals*: In Upholding the Current Tax Treatment of Telecommuters, the Court of Appeals Demonstrates the Need for Legislative Action*, 80 ST. JOHN'S L. REV. 1147, 1152-53 (2006) (describing the negative impact of New York's rule that taxes telecommuters); *see also* Brian C. Borie, *The Convenience of the Employer Test: Why We Should Reconsider the Critique of New York's Tax Apportionment Scheme*, 72 ALB. L. REV. 789, 790 (2009) (noting the criticism New York's rule has experienced).

Hence, although the problem in *New Hampshire* has occurred in the wake of COVID-19, the issue is not new. The primary concern addressed herein is whether a source state's extraterritorial taxation of nonresident teleworkers' income is constitutional, especially when teleworkers are not physically present in the source state. This requires Dormant Commerce Clause analysis because the aggressive source taxation may harm free movement across states and adversely impact interstate commerce.[153]

Again, for Massachusetts to pass the Dormant Commerce Clause test, its new law must be (1) applied to an activity with a substantial nexus within the taxing state; (2) fairly apportioned; (3) nondiscriminatory — i.e., does it discriminate against interstate commerce; and (4) fairly related to the services provided by the state.[154] If Massachusetts fails on any one of these four prongs in the *Complete Auto* test, then the entire tax rule fails. This Article argues that the Massachusetts tax rule fails this test and is unconstitutional.

(1) Substantial Nexus. Currently, the substantial nexus standard is in a state of flux as the Court reconciles traditional tax systems with a changing global economy that operates primarily online.[155] To justify Massachusetts' tax rule at issue, Massachusetts must have a substantial nexus to the individual taxpayers to justify the income tax.[156]

In expanding the nexus definition in *South Dakota v. Wayfair*, the Court held that $100,000 in annual online sales in the state constitutes a substantial nexus because "the seller availed itself of the substantial privilege of carrying on business in South Dakota."[157] Some commentators might argue that because the Supreme Court scrapped the physical presence requirement for the substantial nexus prong in *Wayfair*, the virtual connection between the remote workers and Massachusetts would be enough to satisfy the substantial nexus

153 *See* MeadWestvaco Corp. v. Ill. Dep't of Rev., 553 U.S. 16, 24 (2008) (indicating that the Constitution forbids states from imposing taxes that burden or discriminate interstate commerce, including burdening interstate commerce through multiple or unfairly apportioned taxation). Here, Dormant Commerce Clause analysis is required to determine whether a state's extraterritorial taxation of nonresidents burdens interstate commerce and is therefore unconstitutional.

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

155 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018) (noting a "dramatic" change in technology and commerce and how the Court "should not maintain a rule that ignores" [the virtual connection retail companies have to states] in overturning Quill Corp. v. North Dakota, 504 U.S. 298 (1992)).

156 *See id.* at 2099.

157 *Id.*

prong.[158] However, this Article argues that it might satisfy some degree of connection, but it does not automatically satisfy "substantial" connection. We still must examine whether that connection constitutes "substantial" nexus.[159] In addition, *Wayfair* is a sales tax case, whereas *New Hampshire* deals with income tax issues. So, the threshold for substantial nexus is likely different, but the question remains the same: at what point has a nonresident created a substantial nexus that triggers the application of Massachusetts' tax?

Massachusetts once had a substantial nexus on workers who worked physically in Massachusetts. However, since the pandemic, it now seems to lack this substantial nexus. Even before the pandemic, Massachusetts did not exercise taxing right as a source state for nonresident teleworkers who were not physically present there.[160] However, it extended its tax jurisdiction to workers who are now teleworking. The only justification offered by Massachusetts is that the rule is temporary.[161]

Such argument would be more persuasive if Massachusetts' tax rule was genuinely temporary. Although remote working began primarily for public health purposes, lifestyle have changed, and accordingly, Massachusetts' nexus has decreased significantly. Massachusetts' claim that its rule is temporary is not supported by fact as it ignores permanent

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[158] *See, e.g.*, Darien Shanske, *Remote Workforce Doctrine and Policy: Short-Term and Long-Term Considerations*, COLUM. J. TAX L. (Oct. 21, 2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/Z259-Z6MJ] (noting courts' recognition of the declining meaningfulness of physical presence as it relates to economic activity); Hayes Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 3-4 (2019) (recognizing that *Wayfair* eliminated the physical presence requirement, although presenting larger issues over the Dormant Commerce Clause nexus requirement).

[159] *See, e.g.*, Edward Zelinsky, *Taxing Interstate Remote Workers After* New Hampshire v. Massachusetts*: The Current Status of the Debate* 3-4 (Cardozo Sch. of L. Jacob Burns Inst. for Advanced Legal Stud., Faculty Research Paper No. 656, 2021) [hereinafter *Current Status*].

[160] *See, e.g.*, 830 MASS. CODE REGS. 62.5A.1(5)(a) (2008) ("When a non-resident employee is able to establish the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income."); MASS. DEP'T OF REVENUE, LETTER RULING 84-57, WITHHOLDING FOR NON-RESIDENT EMPLOYEES (Aug. 2, 1984), https://www.mass.gov/letter-ruling/letter-ruling-84-57-withholding-for-non-resident-employees [https://perma.cc/NN3P-DSQQ] ("Compensation . . . rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax.").

[161] Brief for Defendant, *supra* note 125, *passim* (in defending the rule, Massachusetts continually refers to the rule as temporary throughout the brief); *see also* Brief for the United States as Amicus Curiae, *supra* note 28, at 21.

shifts to teleworking and has extended this rule twice.[162] Nobody truly knew when this "temporary" rule would cease to exist until Massachusetts conveniently ended the state of emergency right before the Supreme Court decision on June 28, 2021.[163]

However, Massachusetts may still have some nexus as a state that offers employment opportunities, but it is far less substantial compared to the services provided by New Hampshire amid COVID-19. Nonresident workers being taxed do not receive the services of the Massachusetts police, fire services, road or highway construction, water systems, or utilities. Further, teleworkers are not relying on Massachusetts' systems or government; instead, New Hampshire provides all of these services and has the governmental structure in place to support their lifestyle during this difficult time. Despite this, their income is being taxed not by New Hampshire, but Massachusetts which lacks a substantial nexus.

(2) Fair Apportionment. The new Massachusetts tax rule lacks fair apportionment. Massachusetts' pre-pandemic tax rule applicable to teleworkers correctly apportioned its tax between source and residence states because Massachusetts only taxed nonresident's income for days they were physically present in Massachusetts. Income for days they telecommuted from home would only be taxed by the residence state. However, the temporary rule lacks apportionment for telecommuters by treating all working days sourced in Massachusetts, regardless of the worker's physical presence.

Although a residence state may offer a tax credit for taxes paid to another state, this should not be considered in determining the fair apportionment issue because the critical question is whether Massachusetts' tax rule is being apportioned correctly, not if the residence state's tax rules reduce harm to the individual. In the end the residence state is harmed by unconstitutional overreaching. A residence state's tax rule may remedy double taxation, but this does not equate to fair apportionment. The broader principles of apportionment require a source state's tax rule exercising extraterritorial taxing power to account for the general burden on the tax system itself.

[162] *See* 830 MASS. CODE REGS. 62.5A.3 (2020) (first promulgated on October 16, 2020; re-promulgated on March 5, 2021); *TIR 20-15*, *supra* note 149 (indicating extension until 90 days after the state of emergency in Massachusetts has been lifted).

[163] Mass. Exec. Order No. 69 (May 28, 2021), https://www.mass.gov/doc/covid-19-order-69/download [https://perma.cc/PJT8-KJPR] (ending COVID-19 emergency effective June 15, 2021).

In *Allied Signal, Inc. v. Director, Division of Taxation*,[164] the Court held that a New Jersey tax on all of a corporation's out-of-state activities, irrespective of its actual connection to New Jersey, was unconstitutional because it was not apportioned correctly and to adopt New Jersey's rule would disrupt much of the nation's tax system and was "certain to result in double taxation"[165] Likewise, Massachusetts is seeking to tax 100 percent of a nonresident teleworker's income that is earned entirely out-of-state, irrespective of its actual connection to Massachusetts, based on the premise that the nonresident teleworker had once chosen to commute to Massachusetts physically. This premise violates "the basic proposition that a State may not tax value earned outside its borders."[166]

Similarly, in *J.D. Adams Mfg. Co. v. Storen*,[167] the Supreme Court found that an Indiana tax that taxed gross receipts of income of nonresidents originally sourced in Indiana was unconstitutional because it did so without apportionment.[168] More specifically, Indiana was taxing one percent of sales made to out-of-state customers, resulting in double taxation of Indiana's sales outside of the state.[169] This rule was too broad and lacked the required apportionment to pass constitutional muster and not burden interstate commerce. Similarly, Massachusetts' law is too broad as it seeks to tax 100 percent of the income earned by nonresidents who neither work physically nor live in Massachusetts.

(3) Discrimination against Interstate Commerce. The risk of a state instituting a taxing policy that would burden interstate commerce through double taxation is not a new problem. In *Comptroller of Treasury of Maryland v. Wynne*,[170] the Court addressed Maryland's policy of not extending a tax credit to state residents who paid taxes in another state, thereby having a portion of the taxpayers income taxed twice.[171] The Court noted that a state under the Dormant Commerce Clause must not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local

[164] 504 U.S. 768, 784-85 (1992).
[165] *Id.* at 785.
[166] *Id.* at 784.
[167] 304 U.S. 307, 311-12 (1938).
[168] *Id.* at 310-11.
[169] *Id.* at 311.
[170] 575 U.S. 542, 549-51 (2015).
[171] *Id.* at 545.

business, or by subjecting interstate commerce to the burden of multiple taxation."[172]

Although double taxation itself does not necessarily violate the Dormant Commerce Clause, double taxation due to a discriminatory tax does.[173] The Court has repeatedly held, including in *Wynne*, that state tax law must be internally consistent to comply with the Dormant Commerce Clause. With internal consistency, the court considers if taxpayers would face a higher tax burden if they engaged in interstate commerce versus intrastate commerce. This test assumes the challenged state law is universally employed by every state law and then assesses the burden between the two hypothetical states.[174] If the burden is greater for interstate commerce, then it is not fairly apportioned and nondiscriminatory.

In applying the internal consistency test, the income tax consequences of the following four taxpayers are compared: (i) a resident of Massachusetts with source income from Massachusetts, (ii) a nonresident of Massachusetts with source income from Massachusetts, (iii) a resident of Massachusetts with source income from another state, and (iv) a nonresident of Massachusetts with source income from another state. Also consider that when applying this test, the results must be different and less burdensome for nonresidents because a source state's taxing power upon a nonresident is constitutionally restrained.[175] However, before applying the test, it is important to note that the specific application of the internal consistency test would be different from that in *Wynne*, because the contested rules are different. In *Wynne*, the overall tax rates and tax credit policy of the residence state (Maryland) were at issue, whereas in *New Hampshire*, the "sourcing rule" for nonresidents' income by the source state (Massachusetts) is at issue. Hence, Massachusetts' tax credit rules should not get to the internal consistency test in this case. Applying the internal consistency test to the sourcing rule as well as the tax credits rule would trap the analysis into such circular logic that Massachusetts would be able to expand its sourcing rule for nonresidents' income without any constraint as long as it offered tax

[172] *Id.* at 549-50 (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)) (internal quotation marks omitted).

[173] Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 STATE TAX NOTES 707, 710 (2017).

[174] Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMPLE L. REV. 331, 362-64 (2020).

[175] HELLERSTEIN ET AL., *supra* note 2, at 391.

credits, because such tax credits would arguably make the rule internally consistent, which is not correct.

The hypothetical assumption of the internal consistency test continues with every state that universally adopts Massachusetts' temporary sourcing rule and then the above four situations are compared with the burden placed on interstate taxation. However, the internal consistency test should not just compare the impact on the absolute tax rates of resident and nonresident individuals,[176] but should consider the impact of each state unconstitutionally extending its sourcing rule, and thus taxing right, and the impact that would have on interstate commerce.

Before the pandemic, a Massachusetts resident teleworker paid Massachusetts income tax on all income, including that from Massachusetts source. A nonresident teleworker paid Massachusetts income tax only if the income was sourced from Massachusetts and only for days the person was physically present — the teleworking days did not count as being physically present in Massachusetts. A state like Connecticut would then provide a tax credit for taxes paid to Massachusetts in a fair apportionment.[177] Thus, there was likely a low chance of double taxation for nonresident teleworkers.

In contrast, Massachusetts' new tax rule shows internal inconsistency. The tax consequences of the Massachusetts resident teleworker remain the same. However, if a nonresident starts teleworking, the person is now subject to the risk of double taxation because Massachusetts can reach beyond its borders to tax a nonresident not working in Massachusetts. This is true even under the hypothetical assumption of fifty state adoption of the Massachusetts tax rule. Although the residence state might offer a tax credit, do not let that masquerade the unconstitutionality of the realities of the sourcing state that should be the absolute consideration of the internal consistency test.

The application of the internal consistency test should not just consider a numerical tax rate but rather the newly created double taxation risk on nonresident teleworkers by ignoring the changed fact that the person is no longer physically commuting to Massachusetts. The internal consistency test needs to review the impact on interstate commerce as if every state could tax nonresidents without a proper apportionment. This would expose a nonresident interstate teleworker

[176] Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 321, 329 (2017) [hereinafter *DCC*].

[177] *See* CONN. AGENCIES REGS. §§ 12-704(a)-1, 12-704(c)-1 (1994).

to the very risk of double taxation expressly banned under the Dormant Commerce Clause in *Wynne*.

Massachusetts hopes that a residence state's tax credit remedies this issue. Those who remember that *Wynne* took into consideration tax rates under the source state and the residence state tax, as well as Maryland's tax credit rules, might be distracted by this argument and ask, "if every state offers tax credits for other states' taxes, the double taxation risk would be relieved. Then is it not internally consistent?" The answer should be no. Again, the issue in *New Hampshire* is the constitutionality of the sourcing rule of the source state. Double tax relief is offered by the residence state. When the issue is the overall tax rates and tax credits as in *Wynne*, comparing the end result after the tax credits would be the right approach for the internal consistency test. However, when the issue is the sourcing rule of the source state, justifying the extraterritorial sourcing rule at the expense of tax credits offered by the residence state is clearly wrong. That is not how the internal consistency test was devised to be used. As Michael Knoll and Ruth Mason, the leading scholars of internal consistency test, emphasize, the double taxation issue must be distinguished from the discrimination issue.[178] "[W]hether a state tax regime violates the dormant Commerce Clause depends on its impact on cross-border commerce, not on whether it generates double taxation."[179] Although the result of double taxation might be mitigated by some measure offered by the residence state, that does not make a challenged source state's discriminatory rule constitutional.

The taxing of out-of-state residents, irrespective of where they move to, ignores the burden this potentially places on the moving of taxpayers from state to state. Taxpayers should have the freedom to move from a less desirable state to a more desirable state without the risk of a state where they no longer live or work pursuing them for tax purposes. To allow this burden harms states like New Hampshire, Florida, and Texas disproportionately more than states like California or Illinois, because New Hampshire, Florida, and Texas have no income tax. With Massachusetts' rule, Massachusetts' residents have little incentive to move to those states for the tax advantage — the express reason these states do not have an income tax — thereby burdening interstate commerce and discriminating against the new residents of other states. This is a clear burden on interstate commerce.

[178] Knoll & Mason, *DCC*, *supra* note 176, at 314, 331; *see also* Michael S. Knoll & Ruth Mason, Comptroller v. Wynne: *Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax*, 163 U. PENN. L. REV. ONLINE 267, 281 (2015).

[179] Knoll & Mason, *DCC*, *supra* note 176, at 331.

(4) Fair Relationship to the Services. Last, the tax must be fairly related to the services provided by Massachusetts. On one hand, New Hampshire argues that Massachusetts is taxing activity that is not happening in its state at all. This argument is persuasive but goes more to the issue of substantial nexus prong — not the fairly related prong. The question here asks whether the tax in question is "fairly related to the services provided by the State."[180] This prong may be satisfied by Massachusetts.

The employment laws of Massachusetts protect nonresident taxpayers. If a nonresident employee experienced discrimination by their out-of-state employer or if their out-of-state employer stopped paying their salary, it would be in a Massachusetts court and under Massachusetts law that the dispute would be resolved. This likely constitutes as being fairly related and this prong seems to be satisfied.

Nonetheless, the fourth prong of *Complete Auto* test must be satisfied in conjunction with the remaining three prongs. In fact, the Court has found that a tax violated the fourth prong in only one case, where the Court also found that the tax violated the second and third prongs as well.[181] Hence, it is expected that the Court would offer a less apparent view on the fourth prong or blend the analysis with the other prongs of the *Complete Auto* test.

In sum, the Supreme Court may likely find that Massachusetts' tax rule violates the Dormant Commerce Clause because the teleworkers' activity does not have a substantial nexus to Massachusetts, Massachusetts' tax rule lacks fair apportionment, and it discriminates among interstate commerce by creating the unjustifiable double taxation of nonresident teleworkers' income.

Now, in relation to the Due Process Clause, the Court's analysis would be similar to its analysis on Commerce Clause, as Justice Stewart emphasized that "[t]hese two claims are closely related."[182] However, the critical difference between the two clauses concerns which branch has the final say on the clause.[183] As to the Commerce Clause, Congress has the power to enact legislation that might have a different approach

180 Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S 175, 197 (1995) (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

181 *See* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 291 (1987).

182 Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967). When the Supreme Court revisited *National Bellas Hess* in *Quill*, it did not use Due Process Clause but rested the tax nexus analysis entirely on the Commerce Clause. However, this position in *Quill* was overruled in *Wayfair*, where the Court consider the tax nexus issue under both the Commerce Clause and Due Process Clause.

183 HELLERSTEIN ET AL., *supra* note 2, at 34-35.

from the Court's holdings on the Commerce Clause.[184] Conversely, the Supreme Court has generally had the final say on the Due Process Clause.[185] Under either clause though, the Supreme Court should find strong reasons to find the Massachusetts rule unconstitutional.

Any hesitation for the Supreme Court to take this case was based on the preliminary issues, presented in Part II.A.3. New Hampshire has a policy position of having no income tax to attract businesses and people to live there.[186] This creates a standing issue because New Hampshire may be considered not bearing any injuries on its own because the Massachusetts tax rule causes no foregone tax revenue. In addition, the Supreme Court retains discretion over whether to exercise its original jurisdiction. If the Court thinks that a judicial solution to the interstate commerce tax problem would be inadequate, it may not exercise its original jurisdiction; and it did. Many scholars, including the author, agree that Congress would be the best candidate to resolve the interstate commerce tax problem, such as the taxing of teleworkers' income.[187] However, mandating a uniform tax rule for teleworkers by federal legislation has various paths, and it could take some time for policymakers to take one. In the meantime, teleworkers will suffer from the double taxation that results from so-called "temporary" rules adopted by source states. Invalidating those temporary rules projecting a source state's taxing power extraterritorially can still resolve the issue because the existing rule on source and residence would then be applied and that does not create a discriminatory double tax problem.

For these reasons, this Article regrets that the Supreme Court decided not to review this case. The fact that the Justices asked the Acting Solicitor General to express the federal government's views might have implied that the Court wanted to punt the issue to the legislative body. Part IV discusses the legislative solution in greater details.[188]

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184 *See* Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 154-55 (2005).

185 *See id.* at 169.

186 Motion for Leave to File Bill of Complaint, *supra* note 23, at 1, ¶ 1-2.

187 *See, e.g.*, Richard D. Pomp, New Hampshire v. Massachusetts*: Taxation Without Representation?*, 39 J. STATE TAX'N 19, 21 n.9 (2021) ("Congress is the best suited institution to develop a systemic solution to the taxation of nonresidents."); 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, 964 (2021) ("[T]he Court needs to . . . prompt congressional action."); Zelinsky, *Coronavirus*, *supra* note 64, at 1102 ("If the governor won't stop New York's irrational income tax penalty for nonresident telecommuters on the days they work at home, Congress should.").

188 *See infra* Part IV.

B. *Old Battles Against New York*

1. New York's "Convenience of the Employer" Rule

COVID-19 has reignited the debate about New York, and a handful of other states', taxation of nonresidents' income through the convenience of the employer rule.[189] For New York to implement a taxation of nonresidents, it must follow the same requirements every other state in the United States must follow: a nonresident tax must abide by the constitutional limitations under the Dormant Commerce Clause and Due Process Clause. For example, New York adheres to these limitations by only taxing nonresidents on the taxable income derived from sources in New York.[190] If nonresident employees perform services for employers both in and outside of New York, then income derived from New York sources is based on a ratio of working days in New York to total working days.[191] This tax is essentially a fraction, where the employee's total working days in New York (D_{in}) are divided by the employee's total number of working days (D_{total}).[192] This fraction is then multiplied by the individual's wages earned from that New York employer (W_{NY}) to determine tentative taxable income.[193] The equation is as follows:

[189] To date, six states employ this test: Arkansas, Connecticut, Delaware, Nebraska, New York, and Pennsylvania. *See* Jared Walczak, Teleworking Employees Face Double Taxation Due to Aggressive "Convenience Rule" Policies in Seven States, TAX FOUND. (Aug. 13, 2020), https://taxfoundation.org/remote-work-from-home-teleworking [https://perma.cc/R4BE-DH9V]; *see also* ARK. CODE ANN. §§ 26-51-202, 26-51-435 (2021); DEL. CODE ANN. tit. 30, § 1124(b)(1)(b) (2021); 316 NEB. ADMIN. CODE § 003.01C(1) (2021); N.Y. TAX LAW §§ 601(e)(1), 631(a)(1), 631(b)(1)(B) (2021); N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2021); 61 PA. CODE § 109.8 (2021); STATE OF CONN., DEP'T OF REVENUE SERVS., 2019 LEGISLATIVE CHANGES AFFECTING THE INCOME TAX AND THE INCOME TAX WITHHOLDING 4 (2020), https://portal.ct.gov/-/media/DRS/Publications/pubssn/2019/SN-2019(12).pdf [https://perma.cc/K7SE-9GGM] (eventually, Connecticut intends to adopt this rule by amending Connecticut General Statutes section 12-711(b)(2)); Letter from John Theis, Revenue Legal Couns., State of Ark., Dep't of Fin. & Admin., to redacted party seeking legal opinion (Feb. 20, 2020), https://www.ark.org/dfa-act896/index.php/api/document/download/20200203.pdf [https://perma.cc/Z4HB-MQUZ].

[190] N.Y. TAX LAW § 601(e) (2021); Edward A. Zelinsky, *New York's Ill-Advised Taxation of Nonresidents During COVID-19*, 2020 TAX NOTES 1001, 1002 [hereinafter Zelinsky, *Ill-Advised Taxation*].

[191] N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2021).

[192] Memorandum from the N.Y. State Dep't of Tax'n & Fin., Off. of Tax Pol'y Analysis, Tech. Servs. Div. (May 15, 2006), https://www.tax.ny.gov/pdf/memos/income/m06_5i.pdf [https://perma.cc/GUK2-H2YT].

[193] *Id.*

$(D_{in}/D_{total}) \times W_{NY}$ = New York Tentative Taxable Income

Thus, only a part of the income earned by nonresident employees is attributed to New York. But New York's taxation might not be as innocent or straightforward as one would think. When determining D_{in}, New York includes the number of days working out-of-state as being "in New York" if the employee works out-of-state for the *employee's or employer's convenience*, such as deciding to work from home or telecommuting. This doctrine only counts days worked not in New York if the employee worked out of state due to the *employer's necessity*.[194] Under the convenience of the employer rule, if an individual is telecommuting for the *employer's necessity*, then New York would consider it as out-of-state source income and not include these days in D_{in}.[195] Conversely, if telecommuting is for the *employee's or employer's convenience* rather than the employer's necessity, then the days worked are counted in D_{in}, and the income is deemed as New York source income and taxed by New York.[196] This doctrine is experiencing additional scrutiny and animosity due to the rise of teleworkers brought about by the COVID-19 pandemic.

2. Extension to Teleworkers

The convenience of the employer rule is probably one of the most controversial tax issues faced today due to New York's stance that "telecommuting is for the employee's convenience" and is not for the convenience or necessity of the employer.[197] Hence, New York exercises its tax jurisdiction extraterritorially and taxes income earned outside its borders by nonresidents who telecommute from their out-of-state homes.

Following New York's lead, Arkansas, Connecticut, Delaware, Nebraska, and Pennsylvania have mirrored New York's convenience of the employer doctrine.[198] Further, Massachusetts' emergency regulation

[194] NY COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2021); Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1002.

[195] § 132.18(a); Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1002.

[196] § 132.18(a); Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1003.

[197] Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1003.

[198] 316 NEB. ADMIN. CODE § 003.01C(1) (2021); 61 PA. CODE § 109.8 (1999); *see, e.g.*, STATE OF CONN., DEP'T OF REVENUE SERV., *supra* note 189, at 4 (eventually, Connecticut intends to adopt this rule by amending Connecticut General Statutes section 12-711(b)(2)); DELAWARE SCHEDULE W: APPORTIONMENT WORKSHEET (2017), https://revenuefiles.delaware.gov/docs/TY17_schedulewe.pdf [https://perma.cc/U2X3-FZE4] (a worksheet for a nonresident who performs services for an employer both in and outside Delaware to apportion compensation based on the ratio that compares the

taxing telecommuters who are displaced due to the COVID-19 pandemic emulates New York's approach.[199]

As demonstrated by the growth of similar rules, the convenience of the employer rule can be seen as taxing certain intangibles that justify this sort of taxation. Some may argue the tax is justified because of the increased salary, reputational recognition, or access to clients that rely on New York companies. Although some of these benefits can be captured at the entity level, others cannot. By using the convenience of the employer rule, New York can capture gains from individuals who experience particular benefits that can only be derived from working at a New York firm.

This concept is furthered by comparing it to a "classic local government finance issue as to cities and suburbs. If a big portion of a city's tax as moves to the lower tax suburbs around the city, then the city is going to have a harder time providing the amenities that made it a city worth living near to begin with."[200] New York maintains a reputation that benefits those who are tied to it. The convenience of the employer rule can be viewed as a tax that prevents individuals from taking advantage of the benefits derived from working for a New York firm and as creating solidarity for all New York workers.

Nonetheless, many commentators criticize this rule as unconstitutional and poor tax policy, especially when it extends to taxing telecommuters.[201] In 2005, a majority of the Court of Appeals of

total number of days worked in Delaware and the total number of days worked outside Delaware); Letter from John Theis, *supra* note 189 (providing a legal opinion that a client is required to file Arkansas income tax returns and pay tax on that portion of their income from their Arkansas employment).

199 Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1003.

200 Shanske, *supra* note 158.

201 *See, e.g.*, HELLERSTEIN ET AL., *supra* note 2, at 391-402 (discussing cases and issues arising from the application of this and similar rules to the personal income of nonresidents); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX REV. 885 (2008) (criticizing "the double taxation that can occur when two states claim to be the source of income"); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash from Nonresidents, Part 2*, 42 STATE TAX NOTES 229, 238 (2006) (arguing that the employer convenience doctrine flunks the external consistency requirement for a properly apportioned tax); Zelinsky, *Coronavirus*, *supra* note 64 ("If the governor won't stop New York's irrational income tax penalty for nonresident telecommuters on the days they work at home, Congress should."); *see also* Bentley, *supra* note 152, at 1166; Walter Hellerstein, Letter to the Editor, *Nonresident NY Employees Are Not Currently Working at Home for Their 'Convenience'*, STATE TAX NOTES (Apr. 2, 2020), https://www.taxnotes.com/featured-analysis/nonresident-ny-employees-are-not-currently-working-home-their-convenience/2020/04/02/2cbx8 [https://perma.cc/7MQA-GENL]; William V. Vetter, *A Critique of the*

New York upheld this rule as constitutional when taxing 100 percent of a ten year Tennessee resident who only spent twenty-five percent of his time in New York; however, in the dissent, it emphasized that the application of the law had gone too far and is unconstitutional.[202] Professor Edward A. Zelinsky at Cardozo Law School, a critic of the "convenience of the employer" rule, even filed a lawsuit in the early 2000s to challenge the rule. The next Subpart briefly introduces and discusses this case.

3. *Zelinsky*

The facts of *Zelinsky* are as follows: Professor Zelinsky commuted three days a week to Cardozo Law School in New York from his home in Connecticut. When he did not commute to New York, he worked at his Connecticut home preparing lessons, exams, and conducting scholarly research and writing.[203] When school was not in session and during the entire 1995 fall semester, Zelinsky worked exclusively from home.[204] However, under the convenience of the employer rule, when Zelinsky worked from home, his time was counted as if he were working in New York. This meant that all of his income was considered to be sourced from New York, which subjected his wages to New York's income tax. Due to this, Zelinsky's income from Cardozo Law School was taxed twice, once as a resident of Connecticut and a second time under New York's convenience of the employer rule.

In *Zelinsky v. Tax Appeals Tribunal of the State of New York*, Zelinsky challenged the rule's broad application of being "in New York" as unconstitutional because it unnecessarily burdened interstate commerce, violating the Dormant Commerce Clause.[205] He stated that under the second prong of the *Complete Auto* test, the tax was not constitutional and was being unfairly apportioned between New York and Connecticut.[206] Under the Dormant Commerce Clause, a state may only tax source income earned by nonresidents as long as it taxes its "fair share of an interstate transaction . . . to 'minimize the likelihood

Empire State's "New" Convenience of the Employer Rule, 2007 J. MULTISTATE TAX'N & INCENTIVES 14, 23.

202 Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 285 (N.Y. 2005).

203 Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 843 (N.Y. 2003).

204 *Id.*

205 *See id.* at 844-45.

206 *Id.* at 845. He also challenged the rule under the Due Process Clause, but the court recognized the minimum connection to New York. *Id.*

that an interstate transaction will be improperly burdened by multiple taxation.'"[207]

The Court of Appeals of New York found Zelinsky's case did not impact interstate commerce and was constitutional. Assessing only the second prong of the test, the court found this prong was met because, first, the convenience of the employer rule was internally consistent by applying the internal consistency test.[208] Second, the rule was externally consistent because it had an "economic justification for the State's claim upon the value taxed."[209]

In determining that the rule was externally consistent, the Court adopted the view that because "many busy professionals, at the conclusion of a full day, routinely bring work home for the evenings or weekends . . . this work cannot transform employment that takes place wholly within New York into an interstate business activity subject to the Commerce Clause."[210] Thus, the work Zelinsky performed at home equated to bringing work home at the end of a full day, "the convenience of the employer test neither unfairly burdens interstate commerce nor discriminates against the free flow of goods in the marketplace."[211]

The Court's rationale considered Zelinsky's at-home research, writing, exam development, and lesson preparation to be in New York because "all of petitioner's teaching is accomplished in New York and his voluntary choice to bring auxiliary work home to Connecticut cannot transform him into an interstate actor."[212] Treating professors' scholarly and other non-teaching responsibilities as "auxiliary" and "ancillary," draws this professor's ire, and would draw objections from many professors. More importantly, the Court's finding relies on an unwise policy rationale. Drawing a line between primary and auxiliary work responsibilities when evaluating the impact of interstate commerce creates ambiguity and invites additional adjudication. Such reasoning only opens the possibility for teleworkers to rechallenge the rule, especially in situations if the tasks performed out-of-state are more important or essential than those performed at the in-state office. This creates ambiguity and will be further challenged as many teleworkers,

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207 *Id.* (quoting Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989) and Tenn. Gas Pipeline Co. v. Urbach, 750 N.E.2d 52, 58 (2001)).

208 *Id.*

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

210 *Id.* at 846.

211 *Id.* at 847.

212 *Id.*

in the wake of COVID-19, are doing more than just ancillary work from home.

Further, the Court continued that even if working from home impacted interstate commerce, which would implicate the Dormant Commerce Clause, apportioning Zelinsky's entire salary to New York was fair because he receives benefits from New York every day, including those days working from home, thanks to his employment opportunity in New York.[213] However, this is merely a tautology because every multistate activity, regardless of whether it impacts interstate commerce, benefits from the source state thanks to the work and business opportunity there. The court merely evaded the real issue: what the fair apportionment of multistate income would be if the activity impacts interstate commerce. In the end, the court avoided the real issue leaving unanswered, "when do these types of taxes violate the constitution?" This may be an area that the Courts are leaving to Congress to resolve while taxpayers have both unanswered questions and uncertainty.

Professor Zelinsky has again challenged New York's convenience of the employer rule for his 2019 state income tax return.[214] If Zelinsky's new case works its way through the courts, it may offer yet another opportunity for the Supreme Court to review the taxation of teleworkers without the preliminary issues of original jurisdiction and standing, or temporary nature of the rule.

4. New Jersey's Attack Amid COVID-19

Despite this Article's critical view of New York's convenience of the employer rule, plausible arguments could be made to defend it before COVID-19. One such argument is that the employee, who ultimately chooses where they will live, was generally expected to work in person on the business premises. An employee who was telecommuting was generally doing it for their own convenience and not for the employer's necessity.

However, the COVID-19 crisis has changed the analysis and rationale behind the rule. The State of New York and many of the businesses therein now encourage, and may even mandate, that employees work from home.[215] Therefore, during the COVID-19 crisis, a good argument

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213 *Id.*

214 Petition at 4, Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840 (N.Y. 2003) (No. DTA 830517).

215 Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1003.

can be made that these telecommuters are working at home for the necessity of the employer rather than for their own convenience.

As a result, New Jersey and other states are attacking New York's taxation of nonresident telecommuters arguing that at least during the duration of the pandemic, New York is disregarding constitutional limitations by taxing nonresident telecommuters on income earned at their out-of-state homes during the coronavirus emergency.[216] Opponents of New York ask that the state suspend its taxation of nonresident telecommuters for the days they work from their out-of-state homes.[217]

In fact, New Jersey is advancing a bill (S-3064) that directs the state treasurer to "examine legal efforts to thwart New York from taxing New Jersey residents from working from home."[218] This bill was passed unanimously by the New Jersey Senate on October 29, 2020, and is in the process of becoming law.[219] New Jersey would like to analyze the potential revenue that New Jersey could bring in if it were to collect those taxes itself.[220] New Jersey residents who telecommute to New York are currently offset by New Jersey with a tax credit to avoid double taxation.[221] This means that New Jersey has been foregoing its revenue as a credit to its residents due to the New York tax. It is estimated that before the pandemic over 300,000 New Jersey residents commuted to New York every day and subsequently paid taxes on income earned from commuting.[222] State Senator Steven Oroho stated that "[i]f New York were prevented from taxing New Jersey residents who no longer go to work across the Hudson, we could generate hundreds of millions — perhaps billions — of dollars for New Jersey."[223]

III. IN SUPPORT OF RESIDENCE-BASED TAXATION FOR TELEWORKERS

COVID-19 has exacerbated state battles over teleworker income. The unfortunate confusion and compliance burdens on teleworkers in this

216 *See* Zelinsky, *Coronavirus, supra* note 64, at 1102.

217 *See* Zelinsky, *Ill-Advised Taxation, supra* note 190, at 1003.

218 Sam McQuillan, *N.J. Fight Against New York's Telecommuting Taxes Advances*, BLOOMBERG DAILY TAX REP. (Oct. 22, 2020, 1:46 PM), https://news.bloombergtax.com/daily-tax-report-state/n-j-fight-against-new-yorks-telecommuting-taxes-advances [https://perma.cc/NP8X-67C5].

219 *NJ S3064*, BILL TRACK 50, https://www.billtrack50.com/billdetail/1245262 (last visited Sept. 8, 2021) [https://perma.cc/RP3F-633H].

220 McQuillan, *supra* note 218.

221 *Id.*

222 *Id.*

223 *Id.*

country can and should be resolved. Between the source-based taxation and residence-based taxation of teleworkers' income, this Article supports a residence-based taxation system for several reasons.

This Part moves beyond constitutional concerns and reveals the fundamental problems with source-based taxation that attempts to maintain the pre-COVID-19 work arrangements. It then explores important theories that justify a state's taxing right over its constituents to show that all theories support residence-based taxation for teleworkers.

A. Are Pre-COVID Arrangements Still the Status Quo?

Much of the justification for states that promote source-based taxation, like Massachusetts, is based on the premise that teleworking is a temporary symptom and reflection of the COVID-19 pandemic.[224] Early on, policymakers believed the pandemic and its impact would be temporary in nature and that life would soon return to normal.[225] That assumption turned out to be incorrect. In fact, cities in America,[226] across the globe,[227] and corporations from coast-to-coast[228] now recognize that teleworking is no longer a temporary oddity of the

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224 *See* Geoffrey E. Snyder, *TIR 20-15: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic*, MASS.GOV (Dec. 8, 2020), https://www.mass.gov/technical-information-release/tir-20-15-revised-guidance-on-the-massachusetts-tax-implications-of [https://perma.cc/ABZ9-CQT7] (describing how the tax policy is "temporary" and that is came as a result of the "temporary social-distancing measures and other restrictions").

225 John Bacon, *Could the Coronavirus Outbreak Be Gone by Summer? What We Don't Know Is 'Epic*,*'* USA TODAY (Mar. 15, 2020, 1:28 PM ET), https://www.usatoday.com/story/news/health/2020/03/15/coronavirus-crisis-end-summer-experts-odds-what-we-dont-know-epic/5053876002/ [https://perma.cc/F6DU-E2FX] (citing a "member of the World Health Organization's executive council" and "Italian health ministry consultant" that said "life could return to 'normal' this summer [2020]").

226 Jared Lindzon, *Cities Offer Cash as They Compete for New Residents Amid Remote Work Boom*, FAST CO. (June 22, 2020), https://www.fastcompany.com/90517270/cities-offer-cash-as-they-compete-for-new-residents-amid-remote-work-boom [https://perma.cc/J9UA-SHBU].

227 *E.g.*, Tim Lai, *Finland's Attractive Enticement for U.S. Workers*, FORBES (Nov. 9, 2020, 3:52 PM EST), https://www.forbes.com/sites/timlai/2020/11/09/finlands-attractive-enticement-for-us-tech-workers/?sh=49745cb6481f [https://perma.cc/65D2-U93V].

228 Henry, *Every Company Going Remote Permanently: Aug 13, 2021 Update*, BUILD REMOTE (Aug. 3, 2021), https://buildremote.co/companies/companies-going-remote-permanently/ [https://perma.cc/8659-GEMH] (noting sixty-five large companies that are going remote permanently, including Google, Salesforce, State Farm, Microsoft and Coca-Cola India, among many others).

pandemic but is the new normal for how Americans choose where to live and work.

Though there may have been a point where scholars and tax authorities realistically believed mass teleworking was temporary, it seems clear now that mass teleworking will be the new normal for millions of Americans. As such, the taxing principles for individual income tax should reflect the new status quo and allow states where individuals choose to live and work to be the source state for taxation purposes. This is the best position moving forward because: (1) this "temporary" work environment has no end in sight; (2) extending Massachusetts' 2020 "temporary" tax order into 2021 likely lacks a statutory basis and continues to lose its legitimacy the longer the state's "temporary" emergency order remains in place; and (3) not applying residence-based taxation for teleworking income ignores the evolution and inevitable development of post-COVID commerce by taxing employees as if they still work in a pre-COVID world.

1. Teleworking Is No Longer Temporary

When the COVID-19 pandemic started, there was a general belief that things would return to normal after a few months.[229] Once normal, teleworkers who had left their work-states would justifiably be taxed as before by the temporary emergency orders enacted merely to maintain the status quo. But the old normal has yet to return. The effects of the pandemic continue in many parts of the United States,[230] and while some sections of the economy are returning to work, many work environments are permanently shifting to remote models[231]

Because millions of Americans are shifting to more permanent remote work, the United States is seeing a nationwide migration as residents choose to live in and work in states that better reflect their lifestyles,[232]

229 Shawn Plank, *Will We Ever Get 'Back to Normal' After COVID-19?*, DES MOINES REG. (Dec. 1, 2020, 8:52 AM CT), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/12/01/after-covid-19-we-ever-really-get-back-normal/6468744002/ [https://perma.cc/MAZ2-J5HT] (describing the position of millions of Americans who believed the social distancing guidelines would operate for several months, but then life would go back to normal).

230 *See* Amanda Morris, *Families of High-Risk Children Despair Over Covid Resurgence*, N.Y. TIMES (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/us/high-risk-children-covid.html [https://perma.cc/A55N-S9DA] (indicating that the Delta variant has led to increased COVID-19 cases throughout the United States).

231 Henry, *supra* note 228.

232 Anne Kadet, *Manhattan Couple Ditch Apartment, Buy RV. Was It Worth It?*, WALL ST. J. (Feb. 16, 2021, 10:00 AM ET), https://www.wsj.com/articles/manhattan-couple-ditch-apartment-buy-rv-was-it-worth-it-11613487600 [https://perma.cc/6JJ4-NSCV]

or that have a lower cost-of-living.[233] Companies are aware of this change and are instituting permanent policies allowing workers to choose whether they want to work in an office or work from home.[234] Indeed, some companies have benefited so much from teleworking, they are choosing to permanently reduce their office space consumption by up to 100 percent.[235]

The new normal manifesting from the "temporary" teleworking phenomena is not just affecting our workplaces, but it is shifting the fabric of our schools,[236] the political make-up of the states,[237] and even the family and home structure.[238] Some scholars believe the impact of COVID-19 may be the most significant economic and cultural impact since the "oil shock and energy crisis during the 1970s and early 1980s."[239] As such, American culture and society are shifting to adapt. However, one of the few segments of American society to resist the new status quo is the unique relationship between state tax policy and the taxation of teleworker income.

For states to be the source tax state teleworkers who neither live in nor work in their states, the best argument to justify the lack of tax nexus is that the 2020 teleworking phenomena is temporary. After all, if things are temporary, then those teleworkers would likely return to

(describing how a couple started living cross-country in an RV instead of in their high-rent home in New York because of the pandemic and flexible teleworking).

233 Hugh Son, *Leaving New York: High Earners in Finance and Tech Explain Why They Left the 'World's Greatest City'*, CNBC (Oct. 31, 2020, 10:53 AM EDT), https://www.cnbc.com/2020/10/31/why-high-earners-in-finance-and-tech-left-new-york-city.html [https://perma.cc/6V7M-X32T].

234 *See* Henry, *supra* note 228.

235 Jackie Crosby, *Why Some Minnesota Companies Are Ditching the Office and Going Remote, Forever*, STARTRIBUNE (Jan. 30, 2021, 2:39 PM), https://www.startribune.com/why-some-minnesota-companies-are-ditching-the-office-and-going-remote-forever/600017018/ [https://perma.cc/9RHK-TGVV].

236 Mark Sheehan, *Families Move to Get Their Kids the Ultimate Education: An In-Person One*, THE CHRISTIAN SCI. MONITOR (Nov. 18, 2020), https://www.csmonitor.com/USA/Education/2020/1118/Families-move-to-get-their-kids-the-ultimate-education-an-in-person-one [https://perma.cc/5GYM-AZTT] (describing family that moved from California to Utah so their kids could get in-person learning).

237 Sarah Holder, *Is the 'California Exodus' Turning Arizona Blue?*, BLOOMBERG CITYLAB (Nov. 2, 2020, 2:43 PM PST), https://www.bloomberg.com/news/articles/2020-11-02/how-covid-migration-may-change-the-political-map [https://perma.cc/LZ5R-TU5U].

238 Peggy Spear, *Pandemic Changing Family Dynamics*, THE PIONEER, https://pioneerpublishers.com/pandemic-changing-family-dynamics/ (last visited July 25, 2021) [https://perma.cc/R74Y-VZCM].

239 *Covid-19's Historic Economic Impact, in the U.S. and Abroad*, JOHNS HOPKINS UNIV.: HUB (Apr. 16, 2020), https://hub.jhu.edu/2020/04/16/coronavirus-impact-on-european-american-economies/ [https://perma.cc/3B6Y-WTD9].

the source state soon. But for things to be temporary, there must be an end in sight.[240] And the end of teleworking is nowhere in sight.

Instead, COVID-19 has permanently altered the American working system and our tax structure. Each state is experiencing this differently. States like New York are experiencing a severe drop in residents as workers seek larger homes, more flexible lifestyles, and locations where the expected timeline for recovery from the pandemic is not as long.[241] Other states like Utah are experiencing a surge in residents, and the shock the local economy felt from the pandemic is quickly fading.[242] But even as the effects of the pandemic begin to end in some states, those states' workplaces are not returning to pre-COVID work environments. Rather, they are adapting to the post-COVID expectations of workers and companies — those expectations being that workers should be able to work for their employers where they like and companies should be able to reduce their overhead by reducing office space.[243] Therefore, teleworking is better viewed as an adaption for larger, more flexible, and more effective business, and not as a temporary solution to weather COVID-19. Teleworking is the new normal for American business. The nation's tax law should reflect that fact by allowing the states where teleworkers live and work to be their primary tax state.

[240] *Temporary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/temporary (last visited Aug. 8, 2021) [https://perma.cc/7F3D-E29A] (defining "temporary" as "lasting for a limited time").

[241] Anna Bahney, *Lots of People Moved Out of New York and California in 2020. Here's Where They Went*, CNN BUS. (Feb. 1, 2021, 2:10 PM ET), https://www.cnn.com/2021/02/01/success/new-york-california-exodus-2020-pandemic/index.html [https://perma.cc/M2KH-RCMA]; *see also* Patrick McGeehan, *Why N.Y.C.'s Economic Recovery May Lag the Rest of the Country's*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/nyregion/nyc-unemployment.html [https://perma.cc/9RXN-23HJ] (estimating that New York's recovery will last two years longer than the rest of the country).

[242] *Two Utah Cities Identified as Being Best Poised to Recover From COVID-19*, UTAH GOVERNOR'S OFF. ECON. OPPORTUNITY (May 15, 2020), https://business.utah.gov/news/two-utah-cities-identified-as-being-best-poised-to-recover-from-covid-19/ [https://perma.cc/F9NM-2SGW] (noting how Provo and Salt Lake City are two cities expected to have strong recovery post-pandemic).

[243] *See* MCKINSEY, THE FUTURE OF WORK AFTER COVID-19, at 37 (2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19 [https://perma.cc/FJA2-K6S5]; Bryan Robinson, *Future of Work: What the Post-Pandemic Workplace Holds for Remote Workers' Careers*, FORBES (May 2, 2021), https://www.forbes.com/sites/bryanrobinson/2021/05/02/future-of-work-what-the-post-pandemic-workplace-holds-for-remote-workers-careers/?sh=619690ab7f5b [https://perma.cc/HB9W-6NX6].

2. The Unpersuasive Extension

Massachusetts' emergency tax order was termed as temporary and was scheduled to end at the end of 2020, or "until the state of emergency expires."[244] However, the state did not end the state of emergency for more than sixteen months after March 10, 2020, when the "temporary" tax order first took effect. On June 15, 2021, Massachusetts finally ended its state of emergency — conveniently right before the Supreme Court decision on *New Hampshire*.[245] Still, for over sixteen months, Massachusetts had taxed nonresident teleworkers who received no support, benefit, or representation from Massachusetts' government.[246]

Massachusetts' position is already subject to scrutiny. Extending the taxation of teleworkers beyond 2020 and for more than sixteen months stretches what already likely surpasses Massachusetts' taxing authority. As discussed above, the very premise of "temporary" is that there would be an end date — it has been over sixteen months since Massachusetts extended its state of emergency, and it seems likely to continue for much of 2021. As of August 2021, the United States has entered the fourth wave of the pandemic,[247] and it might not be surprising if Massachusetts reinstates the emergency tax rule. As this continues, at some point the executive order may shift from a temporary edict to simply a permanent executive order taxing workers who neither work in, live in, or even visit, the state. This was all instituted on the basis that teleworkers worked in Massachusetts at one point (but no longer). The tenuous authority Massachusetts relies on to be the source taxing state on individuals who have an almost non-existent connection weakens the longer the pandemic continues.

[244] Elaine S. Povich, *Remote Work Boom Complicates State Income Taxes*, PEW (Oct. 2, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/02/remote-work-boom-complicates-state-income-taxes [https://perma.cc/969N-ESLG].

[245] Mass. COVID-19 Order No. 69, *supra* note 163 (indicating the COVID-19 state of emergency was terminated on June 15, 2021).

[246] Abraham Gross, *Mass. Agency Says Teleworkers Must Source Income to State*, LAW360 (Feb. 12, 2021, 12:54 PM EST), https://www.law360.com/tax-authority/articles/1354869/mass-agency-says-teleworkers-must-source-income-to-state [https://perma.cc/9MFK-SU8D].

[247] Karen Weintraub, *The Fourth Wave of COVID-19 Cases Is Here. Will We Escape the UK's Fate? It's Too Soon to Know*, USA TODAY (July 16, 2021, 1:20 PM ET), https://www.usatoday.com/story/news/health/2021/07/16/covid-19-fourth-wave-pandemic-surge-deaths-hospitalizations/7976034002/ [https://perma.cc/A9H6-7HVW].

B. A Solution for the Future

Teleworking is only likely to increase in the future, not decrease. Taxing remote workers as if they live and work in states they neither live nor work in impedes interstate commerce and extends a state's taxing authority well beyond traditional tax law parameters. Continuing this type of taxation lacks meaning for personal income tax, and, through increased complications tied to filing taxes in source states, likely reduces compliance.[248] Alternatively, taxing teleworkers in the state they reside where they can see their tax dollars at work, may positively effect compliance.

1. People as Physical Being in the Digital Economy

Since the COVID pandemic, sixty-six percent of Americans telework at least part time and forty-four percent telework five days a week.[249] This trend seems likely to continue for many types of businesses that have no need for a physical workspace, including specialty service professions like legal or accounting services, customer service, technology, and other businesses representing tens of millions of working Americans. As teleworking continues to develop, eventually the question of whether there is a sufficient nexus for taxation will become increasingly muddy. To avoid confusion, the most meaningful way to determine a taxpayer's individual income tax nexus should be the teleworker's residence. The alternative, taxing an individual's income based on the location of the business and where the employee "works," is subject to manipulation,[250] can constantly trigger Dormant Commerce Clause concerns, and seems to lack the due process required under the Constitution.[251]

[248] *See, e.g.*, Holderness, *supra* note 158, at 5 (arguing for considering compliance burden when determining Dormant Commerce Clause nexus requirement).

[249] *66% of U.S. Employees Are Working Remotely at Least Part-Time During the COVID-19 Pandemic*, CISION (Apr. 16, 2020, 7:53 ET), https://www.prnewswire.com/news-releases/66-of-us-employees-are-working-remotely-at-least-part-time-during-the-covid-19-pandemic-301041859.html [https://perma.cc/HE82-KNRC].

[250] *E.g.*, Chris Mathews, *California Invasion: Houston Sees Big Business Gains from Coastal Corporate Exodus*, HOUS. BUS. J. (Feb. 12, 2021, 6:00 AM EST), https://www.bizjournals.com/houston/news/2021/02/12/houston-sees-big-gains-from-california-exodus.html [https://perma.cc/73E8-LFUF] (discussing the example of HP moving headquarters to Houston, TX while maintaining their operations in California, but still being able to shift some of their tax burden from California's twenty-eight percent rate to Texas's twenty-one percent corporate rate).

[251] *See supra* Part II.A.

Hence, this Article supports residence-based taxation for teleworkers' income. It is worth emphasizing that this position does not make the argument that 100 percent of teleworkers' income should always be taxed by the residence state. Workers' income earned by remote work should be taxed by the residence state, whereas income earned by (physical) commute should be taxed by the source state provided that the number of days working in the source state exceeds certain thresholds. Considering that many teleworkers may have a hybrid arrangement — sometimes they commute, and sometimes they work from home — income from the former would be taxed by the source state and income from the latter would be taxed by the residence state. This has been the norm of state income tax law since before the pandemic, except in those states with the convenience of the employer rule. This norm is likely more reasonable than the Massachusetts' pandemic tax rule and the convenience of the employer rule, because it apportions the tax base of teleworkers' and hybrid-workers' income more fairly between source and residence states.

This argument regards the physical presence of individual workers as an important factor to decide which state ought to tax their income. A potential pushback might arise if one considers the recent development in *Wayfair*, where the Supreme Court held that physical presence is no longer required for the substantial nexus prong in the *Complete Auto* test.[252] Instead, a substantial economic nexus would be sufficient to require remote venders to collect sales tax on behalf of the state. However, this Article believes that interpreting *Wayfair* in such a fashion that limits the residence-based taxation of individuals' income is flawed for the following reasons.[253]

First, physical presence is important for *individuals*, as opposed to business entities, and perhaps even more meaningful for *natural persons* as the economy is digitalized and goes virtual. The author agrees that the physical presence requirement for *business* taxation is outdated in the digitalized economy.[254] Worse, the physical presence or residence

[252] *See supra* note 158.

[253] *See, e.g.*, Zelinsky, *Current Status*, *supra* note 159, at 3-4 ("*Wayfair* does not hold that physical presence (or its absence) is never relevant under the Due Process and Commerce Clauses. In the context of nonresident telecommuting employees, it is.").

[254] *See, e.g.*, ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: STATEMENT ON A TWO-PILLAR SOLUTION TO ADDRESS THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY (2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf [https://perma.cc/H4A9-VKR4] [hereinafter OECD/G20, TWO-PILLAR] (agreement to abandon physical presence requirement for international corporate income tax); Young

of a business is easy to manipulate and has been susceptible to aggressive tax planning of multinational enterprises in international tax.[255] In that context, the critique's reading of *Wayfair* is agreeable. However, people are physical; companies are not. In the digital world, the workplace of businesses and natural persons may vary, and even be virtual; but human beings always have a physical presence in a certain space. So, it is reasonable for physical presence to count more for natural persons. Because of such differences, the author supports a two-track approach to international tax: residence-based taxation for individuals and source-based taxation for businesses.[256]

To demonstrate the author's position in the teleworkers' multistate income tax, this Article supports the residence-based taxation for *individuals*, as opposed to businesses, especially the *nonresident individuals* of the source state. The nonresidents' income earned while *physically present* in the source state still ought to be taxed by the source state. However, extending the source taxation for nonresidents' *remote* work would be overreaching.

Second, the issue of the physical presence requirement in *Wayfair* was about the tax nexus — that is, a minimum threshold question. However, states can set stricter requirements to establish source- or residence-based taxation. Even *Wayfair* admitted those additional requirements for source taxation, such as certain amount of revenue and/or certain number of transactions in a source state for imposing collection obligation of sales tax to remove venders. International tax has a similar norm and developments. Currently, global leaders are negotiating a new international tax system to remove physical presence requirement for business taxation; instead, it sets other requirements for source-based taxation, such as global and local revenue thresholds, profits threshold, and revenue allocation formulae between source and residence

Ran (Christine) Kim, *Digital Services Tax: A Cross-border Variation of the Consumption Tax Debate*, 72 ALA. L. REV. 131, 133 (2020) (arguing conventional rules about physical presence do not work effectively in the new digital economy).

255 *See, e.g.*, Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. REV. 1613 (2013) (explaining that corporate tax residence is meaningless and proposing a functional approach to find proper jurisdiction to tax corporations' income).

256 *See, e.g.*, Young Ran (Christine) Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 FLA. TAX REV. 335 (2017) [hereinafter *Considering Citizenship Taxation*] (endorsing citizenship taxation as a variation of residence-based taxation for individual income tax); Young Ran (Christine) Kim, *Carried Interest and Beyond: The Nature of Private Equity Investment and Its International Tax Implications*, 37 VA. TAX REV. 421 (2018) (supporting source-based taxation for business profits earned by pass-through business entities).

countries.[257] Applying it to teleworkers' income, the source state may have minimum nexus for remote workers' income. However, that may not be sufficient to justify any kind of source-based taxation of remote workers' income that does not involve revenue split between source and residence states. *Wayfair* does prevent a policy that this Article proposes — that is, a source state may need to establish requirements other than the minimum nexus, such as certain number of days working in state.

2. Teleworkers and the Modern Tiebout Model

Taxing teleworkers' individual incomes based on where they live and work reflects not just the reality of the situation, it also honors the choice of individual taxpayers. For example, Chris who chooses to live and work in Utah when his employer is based in San Francisco may do so because Chris enjoys Utah's weather, its outdoor recreational activities, being closer to family, or other reasons. But whatever the reason, allowing Chris's income to be taxed by Utah as the residence state best reflects the taxpayer's personal choice. Indeed, that choice by the teleworker to avail himself of the benefits of Utah vests Utah with the strongest claim to tax that teleworker. So long as a teleworker chooses to derive social benefits from one state, that state should be entitled to derive revenue from that teleworker.

In the same vein, taxing teleworkers based on their choice of residence may also be prudent tax policy. Research done in 2014 suggests that a taxpayer's ability to demonstrate preference on government spending increases tax compliance.[258] So, just as providing taxpayers more agency through "eliciting tax spending preferences" might be an effective tool in helping taxpayers to better understand the services they receive from the government and further engage them from being "passive" taxpayers to engaged citizens, so also perhaps could engaging the taxpayer's agency in allowing their tax consequences reflect their choice of residence.[259] In turn, this could increase tax compliance. To be sure, tax compliance is influenced by numerous factors.[260] But implementing a policy that better allows teleworkers to

[257] *See, e.g.*, OECD/G20, TWO-PILLAR, *supra* note 254 (addressing tax challenges arising from the digitalization of the economy).

[258] Cait Lamberton, Jan-Emmanuel De Neve & Michael I. Norton, *Eliciting Taxpayer Preferences Increases Tax Compliance* 6-10 (Harv. Bus. Sch., Working Paper No. 14-106, 2014).

[259] *Id.* at 2-3.

[260] *Id.* at 3 (listing some factors like "trust in government and tax fairness, tax code uncertainty, taxpayer socio-demographics, and numerous cultural and normative factors").

demonstrate their preference on how they are taxed by choosing to live in their community would likely increase tax compliance more than a system where the teleworker's funds go out of their resident state to a state they neither live no work in. Recognizing that many taxpayers are likely frustrated already with nonresident states taxing their income when they have no physical presence there, this proposed policy could well increase compliance.

Teleworkers' frustration regarding nonresident taxation is not just limited to having a voice in taxpayer agency and freedom of choice; taxed teleworkers are generally subject to increased taxation and potential double taxation as demonstrated in the example relating to Chris. States that fight to maintain the pre-pandemic work arrangements as the status quo are essentially maintaining the double and over-taxation of interstate, telecommuter income. Unless telecommuters are taxed on a uniform basis throughout the United States, double and over-taxation issues will remain.

The increasing trend of teleworking sheds new light on the merits of the Tiebout Model in the digitalized economy. The Tiebout Model emphasizes the right of voice and exit to the individuals when choosing their community.[261] If municipalities offer public goods and services at different prices — that is, tax rates — people with different valuations for those goods and services would choose a community that maximizes their personal utility. Thus, tax competition among municipalities would enhance the efficiency of allocating public goods and population.

However, the Tiebout Model does not fully explain the benefits of metropolitan areas.[262] People are willing to pay expensive rent and high income taxes to live near Manhattan or in the Bay Area. New Hampshire residents commuting to Boston are also clustered near Massachusetts. That is because such agglomeration provides huge benefits in terms of job opportunities, higher compensation, advanced skills, networking, and so on. Emphasizing people's choice under the Tiebout Model and the residence-based taxation for teleworkers' income does not fully appreciate the benefits of agglomeration, and thus is less convincing under agglomeration economics.

The above is true, or at least it was before the pandemic, when typical teleworking would have been done at home in the metropolitan area. However, teleworking since the pandemic shows a new pattern. People

[261] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956).

[262] *See, e.g.*, Shanske, *supra* note 158 (noting more, but not necessarily most, individuals and firms learned they can relocate with the help of modern technology to find optimal tax and public services packages).

like Chris have not teleworked in their apartment in the Bay Area, but rather moved to Utah or Florida. The agglomeration economics that supports source states' position loses its strength under this new trend. Instead, the Tiebout Model that values the individuals' choice is worth revisiting under post-pandemic patterns.

In a similar vein, the remote work revolution offers the chance for "economic dynamism."[263] For one, it tasks states to adapt their tax systems to the evolving work landscape. Employees now recognize that to be successful in a major tech career, an individual no longer needs to live in San Francisco. This recognition is extending beyond the idea that only tech-based jobs align with telecommuting. Many fields are recognizing adaptability to telecommuting. Employees realize they can work from a home office in Duluth, Minnesota or Wauchula, Florida, provided there is an internet connection. So, failure by a state to experiment and evolve along with the nature of work will have fiscal consequences.

In response, some States will lose income tax revenue while others will gain it. An additional silver lining of the COVID-19 pandemic is that it has enabled high-income earners from major metropolitan areas and cities to move and work remotely in more rural settings. This has the potential to stimulate these more rural settings with increased income tax revenues and give them new fiscal possibilities.

C. Tax Nexus Theories Support Residence-Based Taxation for Teleworkers

Next, consider the taxation of teleworkers based on theories. While a state may declare sovereignty and argue that this implies the power to tax its constituents, the state must also "offer some prior normative justification for claiming those it seeks to regulate through taxation."[264] This Subpart analyzes three representative theories on the justification of states' taxing right, or tax nexus: (1) consent theory (or vote with your feet theory); (2) benefits theory; and (3) social obligation theory. Applying those theories to teleworking offers insights on which state, between source and residence states, ought to exercise primary taxing right on teleworkers' incomes.

[263] Brief of Amicus Curiae The Buckeye Institute in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 21, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (2020) (No. 22O154).

[264] Allison Christians, *Human Rights at the Borders of Tax Sovereignty* 11 (N.Y.U., Working Draft, 2017), https://www.law.nyu.edu/sites/default/files/upload_documents/Allison%20Christians.pdf [https://perma.cc/W7E2-GN4A].

1. Consent Theory: Vote with Your Feet

The consent theory is often described as "vote by feet."[265] This idea is centered around the concept of a *democracy*.[266] A democracy is "modeled primarily on membership combined with empowered voice."[267] Members of a democracy appoint representatives "to work out the details of democracy because people are too busy earning a living and dealing with their own problems to actively participate in the government."[268] Thus, because the people have voices and ultimately determine the level of taxes through their appointed representatives, a state is justified in taxing its residents.

Dissatisfied members may choose to "exit" collectivity as an alternative rather than seeking to reform or respond by voicing their dissatisfaction.[269] Therefore, individuals who purposefully choose to reside in a specific state are voting with their feet regarding that sovereignty's powers, including the right to tax. In essence, they are entering into an implied contract with the state they reside in. If a resident is dissatisfied with the state's powers, including that right to tax, the dissatisfied resident may choose to exit the state. Professor Hirschman describes this "voice" and "exit" concept as a "taxpayers' ability to resist taxation through the political process of the taxing state and to depart the taxing state for a more favorable tax environment."[270]

There are some criticisms of the consent theory. First, the implied contract as part of a democracy can be questioned because a democracy's voice only follows the majority's opinion and does not necessarily consider minority views.[271] Thus, the consent theory may lack merit because there is no real consent from all residents for a certain level of taxation.

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[265] Mark E. Warren, *Voting with Your Feet: Exit-based Empowerment in Democratic Theory*, 105 AM. POL. SCI. REV. 683, 683 (2011).

[266] In this context, this theory is different from the Tiebout Model that seeks equilibrium provision of public goods and services and efficient allocation of population.

[267] Warren, *supra* note 265.

[268] Robert W. McGee, *Three Views on the Ethics of Tax Evasion*, 67 J. BUS. ETHICS 15, 17 (2006).

[269] *See* Warren, *supra* note 265.

[270] Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 3 (2008) (stating "Professor Hirschman famously called the 'voice' and 'exit' options, i.e., taxpayers' ability to resist taxation through the political process of the taxing state and to depart the taxing state for a more favorable tax environment").

[271] McGee, *supra* note 268, at 21.

Ruth Mason addresses this criticism by finding that for the consent theory to have real merit, two conditions must be present: (1) "the governed person must understand that continued residence means consent" and (2) "she must have a genuine alternative to remaining."[272] Thus, if the governed resident, even if having a minority opinion, understands that continued residence in the state is implied consent to be subject to the majority's decision of the level of taxation, then the first criticism of the consent theory regarding minorities lack of consent becomes less convincing. By remaining in the state or voting with their feet, a minority group is practically consenting to follow the majority's decision. The benefit of having a democracy is that in return, the minority taxpayer has the opportunity to advance their opinion on a certain matter in the next election.

As to Mason's second point, some might argue that "even if it is theoretically possible to move" to another state, "it may not be practically possible or feasible" to do so because there are many barriers to freedom of movement.[273] However, if it can be found that the barriers to the movement of a resident are insufficient to prevent the finding of a genuine alternative to remaining, then the second criticism about the impracticability of the exit option fails as well. Teleworking is a good example of people seeking an alternative to remaining.

Another criticism of the consent theory is from the perspective of anarchists, arguing that future generations cannot be bound to the implied contract made by the original generation.[274] Anarchists may argue that "laws, once passed, remain binding on all who live within the jurisdiction as long as the law exists" and "governments are like corporations" where they "continue to exist independently of their owners."[275] However, Thomas Jefferson responded to this, stating "[w]e may consider each generation as a distinct nation, with a right, by the will of its majority, to bind themselves, but none to bind the succeeding generation, more than the inhabitants of another country."[276] Some argue that Jefferson believed "laws have a natural expiration date as members of the generation who were of the age of majority when the law was passed start to die" and "one generation cannot bind another

[272] Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 188 (2016).

[273] McGee, *supra* note 268, at 18.

[274] *Id.* at 21-22.

[275] *Id.* at 22.

[276] Letter from Thomas Jefferson to John Wayles Eppes (June 24, 1813), https://founders.archives.gov/documents/Jefferson/03-06-02-0200 [https://perma.cc/Y6HW-UNFW].

generation."[277] Inspired by Jefferson's position, it would make more sense to understand that each generation renews their implied contract with the government by voting with their feet through continued residence in the state and by electing the next generation of representatives.

How can the consent theory justify taxation in the realm of teleworking? Put differently, in Chris's example, which state between Utah or California ought to have the primary power to tax Chris? Consent theory would support residence-based taxation rather than source-based taxation. When Chris relocated from California to Utah, Chris has consented to be taxed according to the laws of Utah by voting with his feet.

In Sam's example, there is an explicit or implied contract between New Hampshire and Sam on New Hampshire's taxing right. Sam has not consented through "vote by feet" to be taxed by Massachusetts by locating her residence in New Hampshire rather than Massachusetts. Moreover, there is no implied consent by Sam about Massachusetts' attempt to project extraterritorial taxing right to her as a telecommuter. Hence, consent theory would uphold the residence-based taxation of teleworkers.

2. Benefits Theory

Under the benefits theory recognized by the Supreme Court in *Cook v. Tait*,[278] individuals who enjoy the benefits provided by the taxing government should "bear the corresponding burdens — in particular, the payment of taxes."[279] Michael Kirsch notes at least four benefits that justify a state's taxation of a resident: personal protection, property protection, the right to vote, and the right to enter the state.[280] First, individuals often rely upon governments for personal protection, particularly in times of crisis. Second, individuals benefit from "the protection of personal property . . ." provided by the government.[281] Third, individuals benefit from the right to vote.[282] Fourth, individuals benefit from the ability to enter the territory "at any time."[283] In sum,

[277] McGee, *supra* note 268, at 22.

[278] 265 U.S. 47 (1924).

[279] Michael Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 470 (2007).

[280] *Id.* at 470-76.

[281] *Id.* at 473.

[282] *Id.* at 474-76.

[283] *Id.* at 476.

governments are justified in taxing individuals when those governments provide benefits to the taxed individuals — whether through protection, civil liberties, or other benefits.

However, as a theory, the benefits theory has been criticized from modern welfarism because the relationship between government benefits and taxation is more than a mere matter of quid pro quo.[284] Modern income taxes calculate the amount of tax by the taxpayers' ability to pay, not by the benefits they receive.[285] As Edward Zelinsky notes, "minimal benefits do not justify maximal taxation."[286] With this regard, the social obligation theory below accords better to the modern welfare state.

Nonetheless, benefits theory is the most intuitively appealing to explain the government's taxing right over constituents. Coming back to the example of teleworkers: under the benefits theory, which states have justification to tax teleworkers? Extrapolating from the crux of the theory, individual income taxes should focus on the physical presence or residence, and not source-based taxation because the physical presence of individuals indicates the locale in which they benefit from government services.

In Chris's example, Utah is justified to tax Chris. Chris lives in Utah and works from home for a business in California — he derives far more benefit from the government in Utah than in California. If Chris were to be confronted by danger, emergency services from Utah would be provided. If Chris were to go to their local park, the park would be maintained by Utah's government; so too would be the roads near Chris's home; Chris's utilities are provided for by Utah; public education for Chris's children is largely run by Utah. Contrastingly, Chris derives little benefit from California. Although Chris works for a business located in California, Chris benefits little from the state outside of being employed in it. Therefore, if the government of Utah provides a majority of the services enjoyed by Chris, then Utah is justified to tax Chris, and Chris in return has a duty to contribute taxes to Utah that provides benefits to him and his community.

Sam's example is even more salient because New Hampshire (not Massachusetts) provides benefits of medical services, among others, in the difficult time when Sam tested positive. Therefore, like the consent theory, the benefit theory supports residence-based taxation for teleworkers.

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[284] Kim, *Considering Citizenship Taxation*, *supra* note 256, at 338.

[285] Mason, *supra* note 272, at 196.

[286] Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1309 (2011).

3. Social Obligation Theory

The social obligation theory justifies a state's taxing right over its constituents because members of society have social obligations to support those in their society.[287] This theory is built upon the moral-philosophical idea that "people have a moral obligation to support fellow members of their own society."[288] Members of society only have social obligations to other members in their community and do not have social obligations to support people everywhere.[289] Thus, under this theory, a government is justified in taxing individuals who belong to the jurisdiction's community, and correspondingly individual members of the community have obligations to pay taxes to the government supporting the community.

The question may arise whether residence is a good predictor of one's community.[290] As much as the social obligation theory is based on moral philosophy, it can also be criticized from a moral philosophical perspective.[291] Social obligation theory hinges on the idea that there is a general obligation to obey the government's laws for the social good.[292] While there may be a social obligation under normal circumstances, what if the community at issue is corrupt or involved in ethically and morally bad behaviors? Can taxation still be justified? Consider a Jewish community in Germany during World War II. It would be hard to argue that "Jews have an obligation to obey all the laws of the country, and to pay all the taxes they legally owe, if Hitler were the tax collector."[293] Nor since, during that time, no other German taxpayers would have owed any obligations to Jews. For those reasons, it would be problematic to consider the Jews' residence as their community for the basis of their tax nexus. The point of this criticism is that the residence proxy for community standard may have issues when governments are discriminating against a certain group of residents in the state.

Nevertheless, while residence is not a perfect proxy for community, residence is generally where most people consider their community to be. Using residence to predict community is practical and administratively feasible. More importantly, when applying social obligation theory to the world of teleworking, it is obvious which state

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287 Mason, *supra* note 272, at 196-97.

288 *Id.*

289 *Id.*

290 *Id.* at 211.

291 *See* McGee, *supra* note 268, at 17.

292 *See id.* at 18.

293 *Id.*

between residence and source states individuals would consider the community to which they belong. The idea of a community encompasses much more than employment — it includes culture, customs, norms, values, all often located within a geographic area. So, an individual who works from home for a company located in a different state often belongs to the community where they live, not where they work.[294] As such, the social obligation theory supports residence-based taxation over source-based taxation.

IV. FEDERALISM AND A CONGRESSIONAL SOLUTION

To offer a standardized and harmonized solution for the taxation of the multistate income of teleworkers, Congress should create federal law that enforces a residence-based approach for teleworking. This Part demonstrates that Congress maintains broad power to preempt state tax laws that currently prevent residence states from taxing teleworkers who live in their state.

A. A Congressional Solution for the Interstate Commerce Tax Problem

When it comes to conflicts with taxing multistate income, Congress has been notoriously passive in exercising their constitutional power, generally neglecting to offer a harmonized solution.[295] Instead, the Supreme Court has created and relied on various jurisprudence on the issue based mainly on the Dormant Commerce Clause and Due Process Clause as a stop-gap until Congress decides to enact national legislation.[296] However, the judicial solutions are inherently limited because the Court can only invalidate unconstitutional state tax rules and is incapable of reconciling the states' competing interests.[297] Many Justices over the years, including Justices Black, Frankfurter, and Douglas, have expressed views in dissenting opinions to leave the tax at issue for the consideration of Congress, allowing them to create a concrete solution because exploring "the problem of the taxing freedom

[294] Some may argue that in Sam's example, at least part of Sam's community should be considered to be in Massachusetts, depending on the amount of time spent teleworking to Massachusetts and the degree of interactions with other Massachusetts residents. However, remote relationships through teleworking can be viewed as superficial when compared to those face-to-face relationships that Sam likely has with other New Hampshire residents.

[295] HELLERSTEIN ET AL., *supra* note 2, at 214.

[296] *Id.*

[297] *See* Thomas R. Powell, *Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, 31 HARV. L. REV. 321, 324-26 (1918).

of the States and the needed limits on such state taxing power" is Congress' job.[298]

Despite the increasing number of teleworkers who are puzzled with their multistate income tax, there is no official guidance by the federal government on the matter. As discussed in Part I.C, only a quarter of the states have issued tax guidance, raising the prospect of double taxation for some teleworkers because states are taking different and conflicting positions on how the worker's incomes displaced by the pandemic should be taxed.

The multistate tax obligations associated with working, even temporarily, in another state have long been a point of contention. Long pending federal legislation, called the bipartisan Mobile Workforce State Income Tax Simplification Act, would establish a uniform thirty-day threshold before employees are required to comply with the income taxes of a state other than their state of residence.[299] But for now, that is not the law — yet many employees are working in another state for extended periods.

Recognizing the need for federal preemption, the Senate offered a solution (Remote and Mobile Worker Relief Act, S. 3995) as a part of the pandemic relief package in August 2020;[300] this was later reintroduced in April 2021 (S. 1274).[301] The solution that emerged in the Senate is a pandemic-specific version of a bipartisan mobile workforce relief measure that Sens. John Thune (R-S.D.) and Sherrod Brown (D-Ohio) have promoted for several years.[302] Key features

298 Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting) ("The problem calls for solution by devising a congressional policy."); *see also* McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 183-84 (1940) (Black, J., dissenting) (discussing the power of Congress to legislate in the area of gasoline taxes); *cf.* Murphy v. NCAA, 138 S. Ct. 1461 (2018) (holding that the federal Professional and Amateur Sports Protection Act ("PASPA") provision prohibiting state authorization of sports gambling violates the anti-commandeering doctrine because the PASPA provision dictates what a state legislature may and may not do).

299 *See* Press Release, Hank Johnson, Rep. Johnson Introduces Bipartisan Mobile Workforce State Income Tax Simplification Act of 2020 (Jan. 24, 2020), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-introduces-bipartisan-mobile-workforce-state-income-tax-0 [https://perma.cc/9BKK-GZWS] (indicating that the bipartisan Mobile Workforce State Income Tax Simplification Act was reintroduced in 2020 aiming to simplify the tax system).

300 *Cf.* Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong. (2020) (limiting the source taxation only to days when nonresident taxpayers are physically present in the source state, but without containing a minimum day threshold).

301 Remote and Mobile Worker Relief Act of 2021, S. 1274, 117th Cong. (2021).

302 *Senate Introduces Modified Mobile Worker Relief Bill to Protect Workers Temporarily Working in States Due to COVID-19*, ERNST & YOUNG (June 19, 2020),

include a thirty day trigger before states are permitted to impose income taxes, extending to ninety days during 2020 and 2021.[303] Additionally, employers would treat their workers' income as earned at its normal work location in 2020 and 2021.[304]

This Article does not fully support the Senate proposal because it presupposes the pre-pandemic work arrangements when determining the source of teleworkers' incomes. Nonetheless, this Article welcomes the concept of a federal solution, even if temporary. Despite the recent proposal, negotiations on virus relief have experienced a deadlock in Congress, and it is not apparent whether the challenge of taxing teleworkers will advance on its own. Further, state tax officials oppose the idea of the federal government interfering with their policies and regulations, arguing that a state is free to pursue its own fiscal policies.[305]

This Article argues that to redress the income tax problems of teleworkers, Congress is the ideal candidate rather than the judiciary or the states. Congress' decision should clarify to what extent source states can tax income from nonresidents, not just during the pandemic but also long-term. For the reasons discussed above, this Article proposes a residence-based taxation for individual taxpayers with a certain threshold. Specifically, it supports the approach taken by the Mobile Workforce State Income Tax Simplification Act that establishes a uniform threshold where workers could be required to file and businesses to withhold tax only after an employee has worked more than thirty days in a state.[306]

Such a congressional uniform solution may offer the following benefits. First, it provides a bright-line rule applicable nationally resulting in increased compliance, where tax complexity can reduce taxpayer compliance. Currently, taxpayers are perplexed by a bevy of conflicting state rules and a lack of guidance. This burdens an individual's ability to pay taxes which in turn reduces both compliance and revenues.

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https://taxnews.ey.com/news/2020-1619-senate-introduces-modified-mobile-worker-relief-bill-to-protect-workers-temporarily-working-in-states-due-to-covid-19 [https://perma.cc/N3T4-89W4].

303 *Id.*

304 S. 1274, §§ 3(a)(1), (c)(5).

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

306 *Cf.* Zelinsky, *Current Status*, *supra* note 159, at 6 (supporting residence-based taxation of remote workers' income, but going farther than the author's proposal by preventing source-based taxation even if the workers commute to the source state).

Second, establishing a clear approach to taxation reduces the country's reliance on judicial intervention. Current tax cases are complicated and require significant analysis in constitutional gray areas searching out potential violations of the Dormant Commerce Clause or Due Process Clause. States passing tax laws are subject to expensive and lengthy adjudication, reducing the very purpose of the tax — to raise revenues.

Currently, there are various state tax laws preventing these goals. The goal of federal law would then not only be the standardization of tax law and administration regarding virtual teleworkers, but it also would focus on preempting state law that is an obstacle to these goals.

In the absence of federal legislation, the alternative solution would be to allow all fifty states to adopt supporting tax laws individually. This alternative is less preferable because many states are not incentivized to apply a rule that would reduce their tax revenue (such as New York) while at the same time, it would be less efficient and lack consistency making it more difficult for individual taxpayers to comply.

B. Federal Preemption and the States Powers to Tax

Each state is sovereign and has the ability to establish its own method and procedure for tax administration.[307] This power has been termed as "unlimited," but only "so far as it has been surrendered to the Federal government, either expressly or by necessary implication."[308] In other words, "[f]ederal law may preempt state law under the Supremacy Clause[309] of the Constitution."[310]

Next, the question is whether congressional legislation preempting state tax law would be valid and enforceable in the context of the taxation of teleworkers. The answer is yes.

When discussing preemption, the "presumption" when interpreting a federal law is that "Congress does not intend to supplant state law."[311] This presumption may be overcome in three ways. First, state law can

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[307] *See* Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 826 (1997) (noting that "[t]he power to tax is basic to the power of the States to exist").

[308] Union Pac. R.R. Co. v. Peniston, 85 U.S. 5, 29 (1873).

[309] U.S. CONST. art. VI, § 2, cl. 2. (reading "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land").

[310] United States v. 4,432 Mastercases of Cigarettes, More or Less, 448 F.3d 1168, 1189 (2006).

[311] N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995).

be preempted by conflict preemption when Congress "explicitly" preempts state law "through explicit statutory language."[312] Second is field preemption which is when the federal government "regulates conduct in a field" so "pervasive[ly]" that courts will assume "Congress left no room for the States to supplement it."[313] Field preemption is applied when a state enacts a law in an area the federal government has traditionally managed, such as immigration[314] or foreign relations.[315] Last, conflict preemption preempts state law when it "conflicts with federal law."[316] Conflict preemption can happen either when "it is impossible for a private party to comply with both state and federal requirements" or when the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[317]

In the context of taxing teleworkers, because tax law is an area that has traditionally been dominated concurrently both by state and federal governments, it seems likely that field preemption is unavailable. Therefore, Congress' best path to preempt state tax law and doctrine is either by express preemption or conflict preemption supported via the Supremacy Clause and Commerce Clause.[318]

Some scholarship argues that there should be significant limits on the federal government's power to preempt state tax law.[319] Opponents of the federal preemption of state tax law point to Alexander Hamilton's statement in the Federalist Papers that a state's power to tax should "retain an independent and uncontrollable authority to raise revenue to any extent of which they may need, by every kind of taxation, except duties on imports and exports."[320] The scope of those limitations

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312 English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).

313 *Id.* at 79.

314 Arizona v. United States, 567 U.S. 387, 403 (2012).

315 Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (noting how the "treaty-making power is independent of and superior to the legislative power of the states . . . and when [conflict is] ascertained [the federal law] must prevail over inconsistent state enactments").

316 *English*, 496 U.S. at 79.

317 *Id.* (citations omitted).

318 *See* U.S. CONST. art. I, § 8 (providing Congress may "regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes").

319 *See* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State* Tax, 2012 MICH. STATE L. REV. 41, 43-45 (2012).

320 *Id.* at 44. (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 33, at 173 (Clinton Rossiter ed., 1961)).

remains uncertain, but one school of thought is that the preemption of any non-discriminatory state tax laws would be unconstitutional.[321]

Despite some scholars' argument that state tax law may be uniquely resistant to the federal government's preemption power, this Article argues that the federal government retains the power to preempt state tax law by standardizing the taxation of teleworkers.[322] In discussing why Congress likely can preempt state tax law for teleworking, four issues that are helpful to discuss briefly. First, the foundational constitutional framework that allows the federal government to preempt state tax law. Second, an overview of the various constitutional powers Congress has relied on to preempt state tax law. Third, the federal government's history of preempting many different forms of state tax laws. Last, and most persuasively, the Supreme Court's recent case law on this question directly invites Congress to legislate on this specific question.

First, *M'Culloch v. Maryland* firmly establishes that federal law may preempt state tax law.[323] In holding that Maryland's tax law was preempted, the Supreme Court noted that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress into execution the powers vested in the general government."[324] In doing so, the *M'Culloch* court recognized that the states' "absolute" power to tax remains "subordinate to, and may be controlled by the constitution of the United States."[325]

Second, federal law will preempt state law "in any area" where Congress has authority.[326] In practice, this often happens in areas where both the federal and state governments operate, such as tax law.[327] Some examples of the types of constitutional authority that has been used to preempt state tax law include (1) the federal government's power to

[321] *Id.* at 72-73 (discussing how Congress had not preempted a non-discriminatory tax and arguing that the Commerce Clause would not do so).

[322] *E.g.*, David Gamage & Darien Shanske, *The Federal Government's Power to Restrict State Taxation*, 81 STATE TAX NOTES 547, 551 (2016) (giving the examples of ERISA and certain provisions within the Affordable Care Act).

[323] *See* M'Culloch v. Maryland, 17 U.S. 316, 435 (1819) (holding that Maryland's tax on a federal bank located in Maryland was unconstitutional despite both federal and state governments having "concurrent" power to tax).

[324] *Id.* at 436.

[325] *Id.* at 427.

[326] *When Does Federal Law Preempt State Law?*, BONALAW PC, https://www.businessjustice.com/when-does-federal-law-preempt-state-law.html (last visited Jan. 27, 2021) [https://perma.cc/XK8T-NJVR].

[327] *Id.*

regulate Native American reservations,[328] (2) Congress's power to interact with other foreign powers,[329] (3) federal law that requires a state to not apply discriminatory taxes against another state's residents or against federal employees,[330] and (4) most importantly, through Congress' authority to regulate interstate commerce.[331] Because this Article focuses on the multistate taxation of teleworkers working for out-of-state employers, the Dormant Commerce Clause seems to be the most effective tool to preempt state tax doctrines.

Third, historically, the federal government has had the freedom to preempt most forms of state tax laws.[332] Influential portions of the legal community support the premise that federal law likely only "lacks the power to abolish state-level corporate income taxes," but otherwise can preempt almost all other forms of state tax law, examples including the "retirement income of nonresidents, internet access, or interstate businesses with limited nexus."[333]

Last but not least, the Supreme Court has repeatedly conceded that Congress may step in and regulate state tax law when it relates to interstate commerce. In *South Dakota v. Wayfair*, where the Court discussed the intersection of the Dormant Commerce Clause and tax law, the majority "conceded that Congress has the authority to change the physical presence rule."[334] Importantly, not only has the Supreme Court expressly noted that Congress has the ability to standardize the rules of state tax and the physical presence of taxpayers, but the Court has also consistently upheld federal law that preempts state tax law which burdens interstate commerce.[335]

For the foregoing reasons, federal law allows the preemption of state tax law that stands as an obstacle to the enforcement of residence-based taxation for teleworkers' multistate income. This seems likely to be the case in light of the Supreme Court's express endorsement for Congress

328 *See* Seminole Tribe of Fla. v. Stranburg, 799 F.3d 1324, 1335 (11th Cir. 2015) (stating that the federal regulations that govern "the leasing of Indian land-including a regulation that prohibits rental taxes" preempt the state's rental tax).

329 *See* Nielsen v. Johnson, 279 U.S. 47, 52 (1929).

330 *See* Davis v. Mich. Dep't. of Treasury, 489 U.S. 803, 817-18 (1989); Ariz. Pub. Serv. Co. v. Snead, 441 U.S. 141, 148 (1979).

331 *See* Exxon Corp. v. Eagerton, 462 U.S. 176, 184 (1983).

332 *See* Gamage & Shanske, *supra* note 322, at 551-52.

333 *Id.* at 547.

334 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018).

335 *See, e.g.*, Aloha Airlines, Inc. v. Dir. of Tax'n of Haw., 464 U.S. 7, 9, 11, 12 (1983) (invalidating a Hawaii state tax on gross receipts of airlines because a federal statute preempted gross receipts of taxes on the sale of air transportation or travel in air commerce).

to legislate in this area, legal scholarship's support for the federal preemption of state tax laws, and because of the long history of the federal preemption of state tax laws under the Dormant Commerce Clause as well as through other various congressional powers. Though the power of the federal preemption of state tax law is not limitless, federal preemption in this area would succeed under a Dormant Commerce Clause analysis as a burden on interstate commerce.

CONCLUSION

There is no doubt that the risk of double taxation arises when one state taxes an individual based on resident status and another taxes this same individual based on their source of income. The ideal solution is to adopt a uniform measure to relieve double taxation. However, the lack of uniformity among the states is allowing some states to exercise aggressive source-based taxation on remote workers.

This problem has been exacerbated in the wake of COVID-19, where the majority of Americans now work remotely. Many states have issued either no guidance for the taxation of teleworkers' state income tax or have only issued temporary guidance maintaining the pre-pandemic situation as the status quo. The interim guidance in effect intrusively extends source-based taxation at the cost of residence taxation. This raises concerns under the Commerce Clause and Due Process Clause, which in turn emphasizes that a state cannot place an undue burden on interstate commerce by taxing out of state residents at a higher rate than in state residents.

Congress should act by establishing laws that govern the states' ability to tax cross-border activities. Specifically, Congress should enact a long-term solution where a source state may only tax a nonresident's income on the days where the taxpayer is physically present for a certain number of days (for example, thirty days). This proposal can act as a threshold to trigger the compliance obligation and provide that teleworking does not count as physical presence in the source state.

Besides Congressional action, the Supreme Court should have heard *New Hampshire* and decided that extraterritorial source taxation over nonresident teleworkers by maintaining the pre-pandemic work arrangement, because the status quo violates both the Commerce Clause and Due Process Clause. This would have promoted greater efficiency among the states and signaled Congress that they should act to create clearer guidance for the multistate taxation of teleworkers.

Both employers and employees will welcome a judicial or congressional solution for taxing teleworkers. Obviously, employers will expect clear guidance on how to process employees' individual tax documents. However, there is another reason why many businesses pay close attention to teleworkers' individual tax problems. When a business has cross-border employees stranded in different taxing jurisdictions, this may trigger tax nexus for the business in each jurisdiction where a certain number of employees are located. And with a tax nexus, these different states may attempt to assess corporate income taxes on the business.[336] The potential tax competition on such businesses is a hidden million-dollar question behind taxing teleworkers. That question is beyond the scope of this Article, but will be explored in the author's future projects.

336 *See* Bologna, *supra* note 19.