POST-PANDEMIC STATE TAXATION OF NONRESIDENT TELECOMMUTER WAGES

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Abstract: Increased remote work has become a phenomenon in the aftermath of the COVID-19 pandemic. This has raised questions about the constitutional limitations that apply, or the congressional restrictions that should be applied, to state laws imposing an income tax on nonresident employees who telecommute from another state for an in-state employer. The state laws that tax nonresident teleworkers vary, leading to the prospect that some such employees could be double taxed by both the state of their employer and the state in which they are physically working, or taxed by their employer state when the state in which they are physically working does not itself impose a tax. Most outstanding scholarship has argued in favor of intervention by the Supreme Court or Congress to prevent states from imposing tax on employees who are physically working from another state. The Supreme Court has not considered the constitutionality of these taxes and denied a petition for certiorari of *New Hampshire v. Massachusetts*, a 2020 case that would have raised this issue. The Court's precedent, however, makes clear that such state taxes should be upheld as constitutional. Two congressional bills proposed in 2020 and 2021 would have preempted state laws imposing a tax on employees physically working in another state, but these bills were not enacted. The decision to not enact the bills was appropriate because, if passed, such legislation would have created significant administrative issues, represented poor tax policy, and likely been found unconstitutional. The questions that have been raised by the state taxation of nonresident employees who telework from a state that is different from the state of their employer are complex and cannot be adequately addressed by either the Supreme Court or Congress—such questions are best left to the states' political processes.

INTRODUCTION

The COVID-19 pandemic raised a state tax issue that previously had been of lesser consequence—taxability of wages earned by a nonresident employee telecommuting from another state. Telecommuting is when an employer pays an employee for work performed at a location other than the office of the em-

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ployer and, consequently, the employee's commute time is reduced.[1] Telecommuting had been common prior to the pandemic, but COVID-19 increased its popularity by forcing millions of workers to work from out-of-state locations.[2] Post-pandemic, telecommuting continues to be a much bigger occurrence than it once was.[3]

Historically, states have generally looked to where an employee physically performs work for purposes of determining what state can tax that employee's resulting wages.[4] Most employees previously worked primarily at the site

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[1] *See* Meredith A. Bentley, *Recent Development in New York Law:* 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, 1147 (2006) (defining telecommuting). For purposes of this Article, "telecommuting" includes situations where the employee either does or does not have a designated office at the location of his or her employer, and generally refers to the circumstance where an employee is telecommuting for the employer from a second state. *See infra* note 48 and accompanying text (discussing different types of telecommuting). Further, this Article will sometimes refer to telecommuting as "remote work." *See Telework, Hiring, and Vacancies News Release*, U.S. BUREAU LAB. STAT. (Mar. 22, 2023), https://www.bls.gov/news.release/brs1.htm [https://perma.cc/Z4R4-GFPT] (defining "telework" as "a work arrangement that allows an employee to work at home, or from another remote location, by using the internet or a computer linked to one's place of employment, as well as digital communications such as email and phone").

[2] *See* Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. DAVIS L. REV. 1149, 1156 (2021) (noting that prior to the pandemic, 31% of U.S. workers telecommuted one or more days a week, but during the pandemic, that number increased to 88%); Hayes R. Holderness, *Individual Home-Work Assignments for State Taxes*, 98 WASH. L. REV. 53, 54–55, 54 n.2 (2023) (describing this phenomenon, and citing similar statistics). There are generally no state income tax issues when an employee telecommutes from within the same state. *See infra* note 48 and accompanying text.

[3] *See, e.g.*, Jeanne Sahadi, *Summer Is Over. And the Battle to Get Workers Back to the Office Is Heating Up*, CNN BUS. (Sept. 7, 2022), https://www.cnn.com/2022/09/06/success/return-to-office-hybrid-mandates [https://perma.cc/LGZ9-VFHH] (noting data showing, inter alia, that 31% of medium to large-sized employers do not have a minimum requirement for employees to be on-site); Josh Mitchell, *Red States Are Winning the Post-Pandemic Economy*, WALL ST. J. (July 5, 2022), https://www.wsj.com/articles/red-states-winning-post-pandemic-economy-migration-11657030536 [https://perma.cc/MT26-8DQP] (citing a recent survey from researchers at Stanford, the University of Chicago, and ITAM, a Mexican university, that "about 16% of workers said they plan to stay fully remote, and another 31% plan to adopt a 'hybrid' schedule of working in the office part-time and at home the rest"); Paul Jones, *Remote Work Complicates Employer Tax Compliance, Pressures States to Revise Rules*, TAX NOTES (Apr. 5, 2022), https://www.taxnotes.com/tax-notes-today-federal/corporate-taxation/remote-work-complicates-employer-tax-compliance-pressures-states-revise-rules/2022/04/05/7db5p [https://perma.cc/RLF6-N28E] (referencing survey results and corporate policies that suggest that, post-pandemic, a large segment of U.S. companies plan to continue to allow flexible remote work arrangements).

[4] *See* Holderness, *supra* note 2, at 62–63 (noting that "[i]n a world where most work was done at the location of the employer, the physical presence of the worker served as an easy and acceptable proxy for the source of the worker's income"); Charlie Kearns, *Give Me Convenience or Give Me Federal Preemption*, 30 J. MULTISTATE TAX'N & INCENTIVES 24, 24 (Oct. 2020) ("Under ordinary circumstances, the 'source' of taxable wages is the location where the employee physically works, i.e., performs employment services to earn such wages."); *see also* Speno v. Gallman, 319 N.E.2d 180, 181 (N.Y. 1974) (noting that the state of New York originally applied a "place of performance doc-

of their employer, therefore diminishing the importance of whether a state could tax the wages of nonresident telecommuters. The general practice of telecommuting did not develop into a phenomenon until the late twentieth century.[5]

Some states, most notably New York, responded to the early onset of remote work by adopting special rules that impose a tax on a telecommuter's wages when that employee works from another state for personal, nonbusiness reasons.[6] The New York test is referred to as the "convenience of the employer" rule.[7] In upholding the convenience of the employer rule, the Court of Appeals of New York, the highest court of the state, concluded that the state is not required to subsidize an individual's "personal convenience, while at the same time discouraging commuting into the state and facilitating erosion of the tax base."[8]

The pandemic brought about new rules that resemble the convenience of the employer rule. In general, taxation of employee wages has two components. In the states that tax personal income, employees owe tax on their wages and account for this tax at the time of their annual tax filing. But employers must first withhold tax from their employees' wages because the employer remits the tax to the state on behalf of their employees. Just as employees can be penalized for failing to properly account for and pay tax on their personal income, employers can be penalized for not properly withholding.[9] Prior to the

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trine"). For purposes of this Article, the term "wages" generally includes all compensation paid by an employer to an employee for services performed.

[5] *See* Bentley, *supra* note 1, at 1147–48 (stating that the concept of telecommuting arose in the 1980s with the growing use of internet and laptop computers); *see also* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 291 (2003) (noting that the number of workers with computers at home who reported using their computers for work increased from the 1980s to 1990s); David Schultz, *State Taxation of Interstate Commuters: Constitutional Doctrine in Search of Empirical Analysis*, 16 TOURO L. REV. 435, 435, 456–57 (2000) (discussing how an increase in the use of computers and the Internet shifted work patterns in the late part of the twentieth century); Joan T.A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as It Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL'Y 233, 234–35 (noting the increase in telecommuters from 10,000 to 9.9 million persons between 1983 and 1998).

[6] *See* Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 844, 846 (N.Y. 2003) (noting New York's rule and its early function of addressing the circumstance where employees worked at home on weekends).

[7] *See id.* at 844 (explaining the application of New York's rule).

[8] *Id.* at 847.

[9] *See, e.g.*, Sarah Shannonhouse & Eileen Sherr, *The Cross-Border Tax Peaks and Valleys of Working from Anywhere*, BLOOMBERG TAX (July 7, 2022), https://news.bloomberglaw.com/tax-insights-and-commentary/the-cross-border-tax-peaks-and-valleys-of-working-from-anywhere [https://perma.cc/275M-MUV7] ("The failure of employers to properly withhold state and local income taxes from employee pay can result in liabilities on behalf of both the employer and the employee."). As an example, in New York, an employer who under-withholds tax from taxable wages is liable for the under-withheld tax, i.e., the tax becomes the employer's tax liability. *See* N.Y. TAX LAW § 675 (McKinney 2023).

pandemic, most employers were only required to apply the withholding rules of the employer's state—rules with which they were familiar—because most employees did not telecommute at that time.[10]

The pandemic introduced emergency declarations and stay-at-home orders that effectively shut down business locations, though not necessarily the businesses themselves.[11] As a result, many, if not most, employees suddenly began to telecommute, frequently for months. These persons began working at their places of residence, second homes, vacation properties, and family members' homes—locations that were often in other states.[12] This immediate dispersal of the nation's workforce left many employers uncertain as to how to modify their employees' withholding, while simultaneously grappling with the other serious implications of the pandemic.[13] As a consequence, some employers requested that the states issue revised rules that retained the same pre-pandemic withholding rules for telecommuting workers.[14] In response, many states issued "status quo" income tax reporting rules that effectively required employees to remain accountable for tax in the state of their employers, not the location from which these employees suddenly were telecommuting.[15] By ap-

[10] *Cf.* Shannonhouse & Sherr, *supra* note 9 ("When workers live in the same state in which they work, the overall [withholding] compliance obligation is simple."). "Employer state," as that term is used in this Article, refers to the state in which an employee would be working if that employee was not telecommuting but rather working at the location of his or her employer.

[11] *See COVID-19 Impact on Remote Work and State Tax Policy*, GRANT THORNTON (Nov. 30, 2020), https://www.grantthornton.com/insights/alerts/tax/2020/salt/general/covid-19-impact-remote-work-state-tax-policy-11-30 [https://perma.cc/B3HH-MMV8] (describing how stay-at-home orders prompted many businesses to set up work-from-home systems to keep themselves from shutting down).

[12] *See infra* notes 222–223 and accompanying text (noting how employees relocated in a variety of manners).

[13] *See infra* note 224 and accompanying text (describing how the relocation of most employees created tax-withholding difficulties for businesses).

[14] *See* Jamie Yesnowitz, Eileen Reichenberg Sherr & Mo Bell-Jacobs, *AICPA Focuses Advocacy Efforts on Mobile Workforce Legislation*, TAX ADVISER (Jan. 1, 2021), https://www.thetaxadviser.com/issues/2021/jan/aicpa-advocacy-mobile-workforce-legislation.html [https://perma.cc/ZYQ4-75U9] ("With respect to recommendations on withholding, the [American Institute of Certified Public Accountants] suggested states allow businesses to continue to withhold income tax (and the employee income tax liability) based on the location of the employer for newly remote workers sheltering in place instead of the employee's shelter-in-place location."); Michael D. Sontag, Stephen J. Jasper & Michael A. Cottone, *Common-Sense Solutions for COVID-19 State Tax Relief*, 96 TAX NOTES STATE 853, 855 (May 18, 2020) (suggesting that states "immediately adopt legislation or regulations that preserve the status quo by clarifying that an employee's and employer's personal income tax or withholding obligations continue to exist only in states where the employee had income tax liability before the COVID-19 outbreak," and noting that these rules would "benefit taxpayers by reducing compliance burdens on individuals and employers who have more pressing issues to address").

[15] *See infra* notes 221–232 and accompanying text (describing how states allowed businesses to withhold taxes as if their employees were not working remotely as a result of the pandemic); *see also* Yesnowitz et al., *supra* note 14 (noting that numerous states adopted rules in response to such requests). The significance of the issue also resulted in proposed federal legislation to the same effect. *See* Amy Hamilton, *COVID-19 Sparks Activity on Traditional Mobile Workforce Issues*, TAX NOTES,

plying the tax of the employer state, not the employee state, these rules operated similarly to the convenience of the employer rule.[16]

In the aftermath of the pandemic, remote work remains common. Employees have become accustomed to working at home or other remote sites, and generally have demanded the ability to retain this work flexibility.[17] Employers frequently have acceded to part or all of these demands.[18] The continued prevalence of these employment practices has raised questions about the future taxation of remote workers, either under the convenience of the employer rule or under the states' taxing rules more generally. Some of those issues center on public policy questions, whereas others revolve around the legality of different possible rules.

The permissibility of a state tax is generally determined by whether the approach is consistent with state law and within the limits prescribed under the U.S. Constitution. As to the latter requirement, a state tax imposed with respect to interstate commerce is generally subject to the strictures of both the Due Process Clause and the Commerce Clause, which have similar application in the context of personal income tax.[19] The constitutional doctrine that generally applies to determine whether a nonresident is taxable in a state focuses on whether that nonresident derives income from a source in the state, and wheth-

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https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/covid-19-sparks-activity-traditional-mobile-workforce-issues/2020/12/22/2dbgt?highlight=COVID-19%20Sparks%20Activity%20on%20Traditional%20Mobile%20Workforce%20Issues [https://perma.cc/B38T-HPYC] (Jan. 4, 2021) (noting comments made by the bill's co-sponsor, Senator John Thune, that the bill "would preempt state income tax nexus issues raised by workers telecommuting from another state under stay-at-home orders 'by codifying the pre-pandemic status quo'"). Senator Thune explained:

> Under my bill, if you planned to work in North Carolina but had to work from home in South Carolina during the pandemic, your income would still be taxed as if you were going in to the office in North Carolina, just as it would have been if the pandemic had never happened.

Id.

[16] *See* Kearns, *supra* note 4, at 25 ("This Covid-19 guidance resembles the convenience test because it disregards the physical location of the nonresident teleworker by sourcing wages earned during the pandemic period to the ordinary work location of the nonresident employee.").

[17] *See, e.g.*, Emma Goldberg, *The Office's Last Stand*, N.Y. TIMES (Aug. 28, 2022), https://www.nytimes.com/2022/08/28/business/the-offices-last-stand.html [https://perma.cc/DY89-YYNY]; Hanna Ingber, *Forget Free Coffee. What Matters Is if Workers Feel Returning Is Worth It.*, N.Y. TIMES (Oct. 29, 2022), https://www.nytimes.com/2022/10/29/technology/return-to-office-employee-satisfaction.html [https://perma.cc/X7EY-JQ7K].

[18] *See, e.g.*, Goldberg, *supra* note 17 (showing how employers have listened to their employees' complaints and changing needs); Ingber, *supra* note 17 (noting how employers have shown flexibility and empathy in response to employees' demands).

[19] *See infra* notes 124–127 and accompanying text (describing the application of the Commerce Clause and the Due Process Clause in the context of state tax).

er the income that the state seeks to tax is fairly apportioned.[20] States have considerable discretion in setting tax policies for nonresidents because of the dual sovereignty principle that underlies the U.S. Constitution.[21]

The constitutional doctrine concerning source income allows a state to tax income if it has provided "protections, opportunities and benefits" with respect to that income.[22] In the case of telecommuters, the states traditionally have considered the source of the wage income to be the location where the employee physically performs the work. But when the employee does not work at the location of the employer, it is reasonable to posit the state of the employer as the source of the income. This is because that state affords the employer with the opportunities, benefits, and protections that enable the employer to generate income and pay wages to its employees; an employee, including one who telecommutes, shares in these same rewards.[23] In addition, employees, even if working from a location outside the state, benefit from the state's employment laws, such as sick time or paid family and medical leave.[24]

A rule that sources an employee's income to the state of the employer, not the employee, could conflict with the employee-state's rule imposing tax on that same income, thereby resulting in potential double tax. Nonetheless, the U.S. Supreme Court has recognized that double tax can result when two states impose different, albeit reasonable, taxation rules. Further, the Court has concluded that the Constitution will not proscribe a state's taxation approach merely on this basis.[25] Also, state tax credits provided to residents for income taxed by another state usually operate to ameliorate this concern.[26]

The Commerce Clause prevents the states from discriminating against nonresident commercial actors, and state taxation of telecommuters potentially implicates this concern.[27] The taxation of income that has its source within a state is, however, almost by definition not discriminatory because Supreme Court

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[20] *See infra* notes 44–123 and accompanying text (discussing various cases that have considered the state tax source income and fair apportionment principles).

[21] *See infra* notes 44–123 and accompanying text (describing the tax power retained by the states).

[22] Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003); *see infra* notes 64–66 and accompanying text (noting the legal standard used to determine source income).

[23] *See infra* notes 64–70 and accompanying text (evaluating how the source income legal standard applies to telecommuting).

[24] *See infra* notes 68–70 and accompanying text (describing how out-of-state employees benefit from the laws of the employer's state).

[25] *See infra* notes 133–137 and accompanying text (noting the potential for double taxation is not determinative when evaluating the constitutionality of different state tax policies).

[26] *See generally infra* notes 282–369 and accompanying text (describing how states mitigate the double tax concern with tax credits).

[27] *See infra* notes 128–137 and accompanying text (evaluating the discrimination concern raised by the Commerce Clause in the personal income tax context).

precedent specifically sanctions this taxation.[28] Further, to the extent a state imposes the same tax on all persons working for in-state employers—resident or nonresident—that uniform treatment will generally not be discriminatory.[29]

Recognizing that telecommuting will likely remain widespread post-pandemic, some persons have assumed that more states will adopt standards like the convenience of the employer rule and, thus, have sought congressional intervention to preempt these statutes.[30] One proposed federal bill would require the states to tax telecommuter income based upon the physical location of the employee.[31] But this proposed legislation is problematic for various reasons. First, it would create significant administrative challenges and represent poor tax policy, in part because it would incentivize tax avoidance.[32] Second, and more fundamentally, it is unlikely that Congress has the constitutional authority to preempt a state's non-discriminatory assertion of personal income tax with respect to fairly apportioned in-state source income.[33] In fact, recent Supreme Court precedent suggests that such legislation would result in an unconstitutional violation of state sovereignty.[34]

This Article proceeds in four Parts. Part I evaluates the Due Process Clause and Commerce Clause limitations that apply in the context of the state taxation of source income.[35] Part I evaluates in particular the constitutional principles of state tax jurisdiction, fair apportionment, and state tax discrimination. Part I applies these limitations to the circumstance where an employer state imposes a tax on the wage income of a nonresident telecommuter, and concludes that the taxation of this income will generally comply with the constitutional tests.

Part II of this Article first considers the state rules that impose tax or recently have imposed tax on the wage income of employees telecommuting from out of state, and reviews the cases that have evaluated the constitutionali-

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[28] *See infra* notes 50–75 and accompanying text (discussing the case law that established the states' capacity to tax in-state source income).

[29] *See infra* notes 131–132 and accompanying text (noting that as long as a state treats all employees of similar status the same, courts will not view the taxing practices as discriminatory).

[30] *See infra* notes 375–380 and accompanying text (discussing the political movement to fight state convenience rules through Congress).

[31] *See infra* notes 378–380 and accompanying text (describing generally the bill and its intended application).

[32] *See infra* notes 384–415 and accompanying text (discussing the shortcomings of the proposed congressional bill).

[33] *See infra* notes 416–441 and accompanying text (noting the potential constitutional shortcomings in Congress's power to enact this legislation).

[34] *See infra* notes 416–441 and accompanying text (discussing recent cases suggesting that Congress indeed lacks this power).

[35] *See infra* notes 41–154 and accompanying text (discussing the constitutional concerns that apply to state taxation of source income).

ty of these rules.[36] Part II evaluates the convenience of the employer rule, including its application in New York. Part II then discusses recent rules regarding telecommuter taxation that states and cities issued during the early period of the pandemic, most of which have expired. Part II further analyzes the state rules that would confer a credit to a resident for taxes paid to another jurisdiction. Part II explains how these credit rules frequently determine the economic implications of the states' telecommuter tax rules, for both employees and the states that provide such credits. Last, Part II also considers the states' related reciprocity agreements and reverse credit arrangements.

Part III evaluates a proposed bill, which Congress introduced in both 2020 and 2021, that would preempt wage taxes imposed by a state upon nonresidents working from another state.[37] Part III considers the administrative challenges that this bill would create and explains why the bill, if enacted, would constitute poor tax policy. Further, Part III discusses the Supreme Court's current jurisprudence with respect to when Congress can preempt a state tax. Part III concludes that this federal preemption bill would likely be held unconstitutional if passed.

This Article concludes by considering some of the policy issues that states may face in future years regarding the taxation of employees who telecommute. This Article maintains that the states should be permitted to determine their rules, generally unencumbered by constitutional and congressional restrictions, through the means of the political process.[38]

Prior articles addressing the same general issues as those discussed here have mostly argued that the U.S. Constitution prohibits a state from taxing nonresident employees telecommuting from outside the state.[39] Alternatively, a

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[36] *See infra* notes 155–369 and accompanying text (describing case law, state rules, and applications of source income principle to nonresident teleworkers).

[37] *See infra* notes 370–441 and accompanying text (critiquing the proposed congressional bill).

[38] *See infra* notes 442–459 and accompanying text (arguing that states should maintain their independence in creating their tax systems).

[39] *See, e.g.*, Kim, *supra* note 2, at 1158 (arguing that the convenience of the employer rule offends the dormant Commerce Clause); Edward Zelinsky, *Taxing Interstate Remote Workers After* New Hampshire v. Massachusetts*: The Current Status of the Debate*, 25 FLA. TAX REV. 767, 767 (2022) (arguing that Massachusetts and New York, among other states, have violated the dormant Commerce Clause and Due Process Clause by taxing nonresident telecommuters); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.05[4][e][iii] (3d ed. 2010) (noting that New York's convenience rule poses constitutional concerns); Richard D. Pomp, New Hampshire v. Massachusetts*: Taxation Without Representation?*, 39 J. STATE TAX'N 19, 20 (2021) (critiquing Massachusetts' taxing rule with respect to New Hampshire residents who telecommute). *But see* Bradley W. Joondeph, *Remote Work and the State Taxation of Nonresident Employees*, 2023 WIS. L. REV. 873, 902 (noting that the fundamental problem with scholarly claims that these states' laws are unconstitutional "is that they presume the only jurisdictionally relevant activity is the taxpayer's performance of services, such that the only state with a constitutionally sufficient connection to an employee's salary is that in which the employee is physically situated," a "premise [that] does not withstand scrutiny").

few articles have claimed that these state laws are constitutionally permissible, but that the underlying issues can and should be addressed by Congress.[40] This Article debunks both of these contentions.

I. Constitutional Limitations on State Taxation of Nonresident Telecommuter Wages

Sections A and B of this Part provide a threshold understanding of the constitutional rules that govern personal income tax jurisdiction and fair apportionment of multistate income.[41] Section C addresses the constitutional principles that determine whether a state has discriminated against interstate commerce.[42] Section D concludes that the states have broad general power under the Constitution to tax wages of nonresident telecommuting employees.[43]

A. Personal Income Tax Jurisdiction

Under the U.S. Constitution, the states can tax a resident's income irrespective of its source.[44] This is because an individual's enjoyment of the privileges of state residence and the related right to seek protection under that state's laws are intertwined with personal responsibility for sharing government costs.[45] This rule applies whether the individual is domiciled in the state or is a "statutory resident," i.e., where state statutory law treats the individual as a resident.[46]

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[40] *See* Darien Shanske, *Agglomeration and State Personal Income Taxes: Time to Apportion (with Critical Commentary on New Hampshire's Complaint Against Massachusetts)*, 48 Fordham Urb. L.J. 949, 964 (2021) (arguing that this issue should be addressed by apportionment rules created by Congress); Holderness, *supra* note 2, at 90–91 (suggesting that Congress should address this taxation issue in part to prevent nonresidents from being double taxed); Joondeph, *supra* note 39, at 916 (arguing that the Court has acknowledged that this authority rests with Congress).

[41] *See infra* notes 44–123 and accompanying text (providing a background to the constitutional principles that govern these issues).

[42] *See infra* notes 124–149 and accompanying text (addressing the nondiscrimination principle).

[43] *See infra* notes 150–154 and accompanying text (arguing that states have a high degree of freedom under the U.S. Constitution when choosing how to tax their citizens).

[44] *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995) (stating that states may tax all of the residents' income, regardless of source); New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) (same); Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 279 (1932) (same).

[45] *Cohn*, 300 U.S. at 313.

[46] Domicile, a common-law concept, is generally the place a person considers to be his or her home. *See, e.g.*, Texas v. Florida, 306 U.S. 398, 408 (1939) (discussing the determination of domicile); Commonwealth v. Davis, 187 N.E. 33, 37 (Mass. 1933) (defining the meaning of domicile). The statutory residence rules vary among states, but generally consider the number of days within a year that an individual is present in the state and whether he or she has a principal place of abode there. *See, e.g.*, Tamagni v. Tax Appeals Tribunal, 695 N.E.2d 1125, 1127–28 (N.Y. 1998); *see also* Mass. Gen. Laws ch. 62, § 1(f) (2023) (defining a "[r]esident" as "(1) any natural person domiciled in the

Supreme Court precedent analyzing the tax implications of nonresidents who derive certain income from a state is pertinent to the taxation of telecommuters.[47] Resident employees who telecommute for an in-state employer do not pose difficult state tax questions given the breadth of a state's taxing powers with respect to residents.[48] The relevant precedent with respect to nonresidents dates back just over one hundred years, to a time when the states' personal income tax statutes were recent.[49]

On the same day in 1920, in *Travis v. Yale & Towne Manufacturing Co.* and *Shaffer v. Carter*, the U.S. Supreme Court announced the principle that a state can tax a nonresident's income when its source is within the state.[50] Both cases evaluated state statutes that specifically imposed a tax on nonresidents' in-state source income. *Travis* noted that a state "has jurisdiction to impose a tax . . . upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders . . . ."[51] *Shaffer* observed that the individual states have "complete dominion over all persons, property, and business transactions within their borders," which they preserve and protect.[52] Consequently, each state retains the traditional power of governments to reasonably tax such persons, property, and business transactions to fund governmental expenses.[53]

In the 1940s, in *Wisconsin v. J.C. Penney Co.* and *International Harvester Co. v. Wisconsin Department of Taxation*, the Supreme Court revisited its

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commonwealth, or (2) any natural person who is not domiciled in the commonwealth but who maintains a permanent place of abode in the commonwealth and spends in the aggregate more than one hundred eighty-three days of the taxable year in the commonwealth").

[47] *See* Curry v. McCanless, 307 U.S. 357, 368 (1939) (indicating that "income may be taxed both by the state where it is earned and by the state of the recipient's domicile").

[48] *See supra* notes 44–46 and accompanying text. Relatedly, it is possible for a nonresident to telecommute for an employer within the employer state, i.e., not from that person's resident state, but this situation does not raise any difficult state tax questions. *See infra* notes 50–53 and accompanying text (affirming the state's ability to tax nonresident telecommuters). Consequently, the focus of this Article is the situation when a nonresident telecommutes for an employer from outside the employer state, whether or not that second state is the employee's state of residence.

[49] *See* Erika Janik, *Wisconsin and the Creation of the Modern Income Tax*, WIS. PUB. RADIO (Apr. 11, 2016), https://www.wpr.org/wisconsin-and-creation-modern-income-tax#:~:text=In%2019 11%2C%20Wisconsin%20became%20the,July%2014%20of%20that%20year. [https://perma.cc/G3FF-BXHF] (discussing the origins of the personal income tax in the early 1910s).

[50] *See* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920) (holding that a nonresident company was required to withhold taxes on wages of employees engaged in business in the state); Shaffer v. Carter, 252 U.S. 37, 59 (1920) (involving a nonresident individual subject to tax on income generated from his in-state ownership interests in land, gas and oil mining leaseholds, and other property used to produce gas and oil).

[51] *Travis*, 252 U.S. at 75.

[52] *Shaffer*, 252 U.S. at 50.

[53] *Id.*

source income doctrine.[54] The two cases evaluated the constitutionality of a Wisconsin tax imposed upon dividends that a corporation doing business in the state distributed to nonresident individual shareholders. The Court in *J.C. Penney* upheld the tax and stated two principles to evaluate a state's jurisdictional claim, standards that are frequently cited to this day.[55] First, *J.C. Penney* stated that the test for determining the constitutionality of the tax was "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state."[56] Second, the Court noted that "[t]he simple but controlling question is whether the state has given anything for which it can ask return."[57]

J.C. Penney affirmed the constitutionality of the tax on the assumption that the tax was imposed on the in-state corporation.[58] Subsequently, on remand, the Wisconsin Supreme Court held that the tax was not in fact imposed on the corporation, but rather was a tax imposed on the corporation's stockholders.[59] Four years later, the U.S. Supreme Court revisited the same fact pattern in *International Harvester*. There, the Court expressly recognized that the tax at issue was, "in point of substance, laid upon and paid by the stockholders," the majority of whom were not Wisconsin residents.[60] But the Court once again upheld the tax.[61] *International Harvester* specifically cited *Travis* and *Shaffer* for the proposition that a nonresident's income may be taxed when it can be fairly sourced to a property within the state or to an in-state event or transaction for which the state provides protections and benefits.[62] Applying that principle, the Supreme Court upheld the Wisconsin tax as imposed on the nonresident shareholders with respect to the dividends.[63]

The state collected the tax at issue in *J.C. Penney* and *International Harvester* by imposing withholding on the in-state corporation, similar to the withholding applied in the case of employee wages.[64] When there is such intermediary withholding, there is no due process concern as to whether the tax-

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[54] *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (discussing the constitutional taxation power); Int'l Harvester Co. v. Wis. Dep't of Tax'n, 322 U.S. 435, 441–42 (1944) (analyzing the state's power to tax).

[55] *J.C. Penney*, 311 U.S. at 444.

[56] *Id.*

[57] *Id.*

[58] *Int'l Harvester*, 322 U.S. at 438 (citing *J.C. Penney*, 311 U.S. at 442).

[59] *See id.* at 438–39 (citing intervening Wisconsin Supreme Court cases).

[60] *Id.* at 440. The second decision was necessary because of the Court's mistaken assumption in the earlier case that the incident of the tax was on the corporation, not the corporation's shareholders. *See id.* at 438–40 (explaining this history).

[61] *Id.* at 442.

[62] *Id.* at 441–42.

[63] *Id.* at 442.

[64] *Id.* at 443–45.

payer is aware of the tax reporting obligation. The Court in *International Harvester* noted that the physical presence of the stockholder-taxpayers in Wisconsin was not necessary to the constitutionality of the tax because the in-state corporation paid the tax for these persons out of the corporation's Wisconsin earnings, distributed to them as dividends.[65] The Court concluded that the tax was appropriate because the state afforded protection and benefits to the in-state corporate payer's activities and transactions, including its dividend payments.[66] This same logic would apparently apply to employee withholding where the employer is in one state and the employee is telecommuting from a second state. The similarity is that in each case the state tax is imposed with respect to company income or other assets paid to company persons with a stake in the company's operations.

As in *International Harvester*, state protection and benefits are accorded to the actions of an employer who pays employee wages. Those state benefits and protections—including, for example, police and fire protection, various forms of infrastructure, and a judicial system—enable the employer to generate income.[67] Company employees reap the rewards of this state activity through the opportunity to work for the company, their remuneration, and other benefits that they receive.[68] These benefits accrue to these employees even if they

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[65] *Id.* at 441.

[66] *Id.* at 442. Specifically, the Court stated:

> We think that Wisconsin may constitutionally tax the Wisconsin earnings distributed as dividends to the stockholders. It has afforded protection and benefits to appellants' corporate activities and transactions within the state. These activities have given rise to the dividend income of appellants' stockholders and this income fairly measures the benefits they have derived from these Wisconsin activities.

Id.

[67] *See* Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 848 (N.Y. 2003) (noting that "New York . . . provides a host of tangible and intangible protections, benefits and values to the taxpayer and his employer, including police, fire and emergency health services, and public utilities," and reasoning that the taxpayer's decision "to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income"); Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 283 (N.Y. 2005) (noting that the state provided "protections, benefits and values" to the employer and that the telecommuter employee derived economic benefits from such provisions); Buckeye Inst. v. Kilgore, 181 N.E.3d 1272, 1286 (Ohio Ct. App. 2021) (indicating that a municipality affords "protection against fire, theft, et cetera, to the place of business of [the] plaintiff's employer and the operation thereof without which [the] plaintiff's employer could not as readily run its business and employ help" and therefore affords the employee "not only a place to work but a place to work protected by the municipal government" (quoting Angell v. City of Toledo, 91 N.E.2d 250, 253 (Ohio 1950))).

[68] *See supra* note 67 and accompanying text; *see also* Brief for the United States as Amicus Curiae at 20–21, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 22O154) (noting that a telecommuter "may continue to depend on and benefit from services provided by [the employer state] . . . such as computer servers that enable and store the employee's work product, courts that enforce contracts, and financial institutions and transactions necessary to the work"); Brief in Opposi-

never step foot in the state.[69] As an example, the types of jobs available in an urban center do not necessarily exist at the locations in other states from which employees may telecommute, nor do those remote jobs, when they exist, typically offer comparable benefits.[70]

International Harvester makes clear that a nonresident individual can be taxed on source income derived from a state even where that person lacks an in-state physical presence. Other U.S. Supreme Court cases also support this point. For example, in 1937, in *New York ex rel. Whitney v. Graves*,[71] the Supreme Court upheld New York's imposition of income tax on a nonresident's capital gain derived from the sale of his seat on the New York stock exchange—even though that nonresident himself conducted no business in the state.[72] Similarly, in 1939, in *Curry v. McCanless*,[73] the Supreme Court upheld

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tion to Motion for Leave to File Complaint at 30–31, *New Hampshire*, 141 S. Ct. 2848 (No. 22O154) (noting that the employer state, Massachusetts, "provides protections benefiting employees regardless of [the telecommuter's] state of residence, such as its high minimum wage, its Earned Sick Time and Paid Family and Medical Leave laws, and the most generous unemployment benefits in the Nation" and that "non-resident employees also enjoy greater job security as a result of the public services provided by Massachusetts that support and promote the businesses in which those non-residents are employed, including Massachusetts's legal system, its roads and infrastructure, and its police and fire protection of Massachusetts workplaces"); Elaine S. Povich, *Remote Work Boom Complicates State Income Taxes*, STATELINE (Oct. 2, 2020), https://stateline.org/2020/10/02/remote-work-boom-complicates-state-income-taxes/ [https://perma.cc/E8T5-ZWGV] (discussing worker's compensation as a benefit that the employer state may provide to nonresident workers who telecommute from another state).

[69] *See, e.g.*, *Huckaby*, 829 N.E.2d at 283 (stating that the plaintiff benefitted from the laws of New York regardless of whether he set foot in the state); *see also* Joondeph, *supra* note 39, at 899 (concluding that the location of the employer can be said to be the "metaphorical wellspring" of the income of the employee who is telecommuting from another state).

[70] *See* Brief in Opposition to Motion, *supra* note 68, at 30 (noting that Massachusetts, the employer state, "supports major urban centers that offer employment opportunities and wages on a scale not generally available elsewhere"); Garry Canepa, Comment, *Who Can Tax Telecommuters?: A Case for an Economic Presence Regime*, 1 U. CHI. BUS. L. REV. 441, 460 & nn.111–12 (2022) (citing authorities that have identified an "urban wage premium," a benefit that a telecommuter will pay for only through a tax imposed by the employer state).

[71] 299 U.S. 366 (1937).

[72] *Id.* at 371–74. A seat on the New York stock exchange represents the right to engage in trading activities. *See id*. at 372–73. More recent state cases applying the Supreme Court's precedent have upheld the constitutionality of a tax imposed on a non-domiciliary corporation with respect to dividends derived from the ownership of, or capital gain derived from the sale of, an ownership interest in a corporation doing business in the state when the corporate owner itself was not engaged in that business. *See* Allied-Signal Inc. v. Comm'r of Fin., 588 N.E.2d 731, 736–38 (N.Y. 1991) (finding a city tax permissible with respect to the dividends from, and capital gain from the sale of, a corporate subsidiary doing business in the city where the gain was apportioned based on the location of the subsidiary's business attributes); Allied-Signal Inc. v. Tax Appeals Tribunal of Dep't of Tax'n & Fin., 645 N.Y.S.2d 895, 898 (App. Div. 1996) (coming to the same conclusion with respect to a state tax that apportioned the gain based on the location of the subsidiary's business attributes); *see also* Goldman Sachs Petershill Fund Offshore Holdings (Del.) Corp. v. N.Y.C. Tax Appeals Tribunal, 167 N.Y.S.3d 458, 459 (App. Div. 2022) (offering a similar holding and analysis in the context of a tax imposed upon the sale of a partnership interest).

a state tax imposed on income derived from intangible assets held in a trust administered in the state for the benefit of a nonresident beneficiary.[74] It was not relevant in that case that the income also was taxable by the resident state of the beneficiary because the state of the trustee had conferred benefits and protections to the trust.[75]

The U.S. Supreme Court has analogized the state tax jurisdiction standard to the adjudicative jurisdiction standard.[76] In the adjudicative context, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities."[77] This jurisdiction does not require that the person have a physical presence in the state—only that the person direct his or her activities toward the state.[78] A nonresident employee who works through a telecommuting arrangement for an employer in another state will meet this standard. This individual contracts for work with the employer to provide services in return for income. That contract creates a continuing relationship with, and obligations to, the employer—thereby creating jurisdiction despite the lack of an in-state physical presence.[79]

More recently in 2018, in *South Dakota v. Wayfair, Inc.*,[80] the U.S. Supreme Court determined that there is no physical presence nexus requirement that applies to the states' sales and use tax collection duties—the one area of

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[73] *See generally* 307 U.S. 357 (1939) (questioning whether the states of Alabama and Tennessee could each constitutionally impose death taxes upon the transfer of an interest in intangible property held in trust by an Alabama trustee, but passing under the will of a beneficiary decedent domiciled in Tennessee).

[74] *Id.* at 373–74.

[75] *Id.* at 368.

[76] *See* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 307–08 (1992) (noting that in both instances the issue is whether a person has "fair warning" that its activity may subject it to the jurisdiction of the foreign sovereign), *overruled on other grounds by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); *see also Quill*, 504 U.S. at 319 (Scalia, J., concurring) ("It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax.").

[77] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 647 (1950)).

[78] *Quill*, 504 U.S. at 307–08; *see also Burger King*, 471 U.S. at 476 (concluding that there is no requirement that a person have a physical presence in a state for adjudicative jurisdiction purposes).

[79] *See, e.g.*, Bollinger v. Dep't of Revenue, No. 22-390-LP, 2023 WL 2576634, at *4 (Ala. Tax Tribunal, Mar. 8. 2023) (relying on *Burger King* for the conclusion that the wages paid to an employee working from home, outside his employer's state, were taxable as source income by the employer state, as determined under that state's law); *see also* Holderness, *supra* note 2, at 68–69 (suggesting that remote workers meet the nexus standard because they "contract with employers in the taxing state to provide services in return for income, creating continuous relationships and obligations with people in the state").

[80] 138 S. Ct. at 2080.

taxation where there was such a nexus requirement in prior years.[81] In lieu of that requirement, the Court's precedent makes clear that tax jurisdiction is established when a taxpayer "purposefully avails itself of the benefits of an economic market in the forum State."[82] By way of analogy, there is little question that nonresident employees who telecommute from another state meet this standard because the employees receive payment from their employers for their services from that state.[83]

The *Wayfair* case is instructive for its conception of virtual presence. The hypothetical notion that personal income tax must be applied with respect to an employee's in-state physical activities implicitly suggests that such persons cannot be present in a state in any other way. *Wayfair* addressed this claim in the sales and use tax collection context by noting that vendors are present in the states of their customers through Internet websites, where they exhibit "virtual showroom[s]" and maintain other "virtual contacts."[84] Company employees may be similarly "present" in a state when they log on to their employer's computer networks and otherwise make remote use of their employer's in-state technology.[85]

As noted, the Supreme Court's cases make clear that physical presence is not necessary to assert state tax jurisdiction over a nonresident employee who telecommutes. Nonetheless, nonresident employees who telecommute from outside a state likely will be physically present in the employer state for at least some period of time. New York's convenience of the employer rule requires this limited presence as a precondition for the application of the rule.[86]

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[81] *See id.* at 2092 (reasoning that physical presence is not necessary for nexus when determining source income); *see also* Michael T. Fatale, *The Evolution of Due Process and State Tax Jurisdiction*, 55 SANTA CLARA L. REV. 565, 581–83 (2015) (noting that the Supreme Court's physical presence nexus requirement only applied to the states' sales and use tax collection duty). For more on the history and application of the Court's "substantial nexus" requirement, see generally Julie Roman Lackner, Note, *The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income*, 48 B.C. L. REV. 1387, 1391–407 (2007).

[82] *Quill*, 504 U.S. at 307.

[83] *See* Shanske, *supra* note 40, at 954 (equating the fact pattern evaluated in *Wayfair* to the circumstance where employees telework for their employer from another state).

[84] 138 S. Ct. at 2094–95, 2099.

[85] *See* Shanske, *supra* note 40, at 960–61 (arguing that employees working for an employer in another state can nonetheless be taxable by the employer state by reason of their "substantial virtual presence"); Merit Brief of Appellee Karen Alder, as Director of Finance of the City of Cincinnati at 25–26, Schaad v. Alder, No. 2022-0316 (Ohio Oct. 4, 2022) (arguing that it was appropriate to tax employees teleworking outside cities where their employers were based because the employees "continued to be virtually connected to those cities after the pivot to remote work and continued to benefit by receiving services from those cities even during the times when their link was virtual," including by reason of "access [to] email servers, file servers, and voicemail systems maintained in those offices").

[86] *See infra* note 167 and accompanying text (suggesting that many, if not most, telecommuter work arrangements may require this presence).

This condition was likely met by all persons forced to telecommute during the 2020–2021 period of the COVID-19 pandemic. The pandemic began several months into 2020, and employees most likely were working at their employers' locations until that time.[87] Further, states generally rescinded their emergency pandemic rules either prior to or sometime in 2021, so employees likely returned to their employers' offices in 2021, at least in part.[88]

A significant component of tax jurisdiction is that taxpayers must be on notice as to their tax reporting obligation. The Supreme Court has said that "notice" or "fair warning" is the "touchstone" of state tax jurisdiction.[89] Certainly, taxpayers should be informed about their tax responsibility and not be required effectively to volunteer a tax payment if there is reasonable uncertainty about their need to pay the tax. A notice issue, however, does not exist when a state adopts a rule that imposes a tax on nonresident teleworkers.[90] In such cases, the employee will have contracted for work with the employer, and this relationship itself confers taxing notice. The employer will provide specific notice to the employee of the tax responsibility by requiring the completion of wage-reporting paperwork and by withholding tax upon wage payments. If the employee is to report to the work location of the employer, even upon occasion, this would further provide notice with respect to the tax requirement.[91]

B. Fair Apportionment

The early twentieth century Supreme Court cases addressed not only a state's capacity to tax a nonresident's source income, but also the circumstance where multiple states had the constitutional right to impose tax. In 1920, in *Underwood Typewriter Co. v. Chamberlain*,[92] the Supreme Court addressed a fact pattern where a corporation, which manufactured, distributed, and sold

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[87] *See infra* notes 221–222, 272–273 and accompanying text (discussing work patterns for employees both before and during the pandemic).

[88] *See infra* notes 232, 255, 274–275 and accompanying text (noting some pandemic rules that were rescinded).

[89] Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 312 (1992), *overruled on other grounds by Wayfair*, 138 S. Ct. 2080.

[90] *See* Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 283 (N.Y. 2005) (concluding that due process, "a proxy for notice," is easily satisfied when the employer state seeks to tax an out-of-state telecommuting employee (first citing Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); and then citing *Quill*, 504 U.S. 298)).

[91] *See* Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003) (holding that the professor had the minimum connection necessary to subject him to a New York tax—he was both physically present and purposefully directed his activities toward the benefits of New York's economic market (citing *Quill*, 504 U.S. at 307)); *Huckaby*, 829 N.E.2d at 283 (indicating that the minimal connection required by due process plainly existed where the taxpayer voluntarily worked for a New York employer and did so in the employer's New York office about 25% of each year).

[92] 254 U.S. 113 (1920).

typewriters, argued that Connecticut apportioned its income in violation of the U.S. Constitution.[93] The taxpayer argued, in part, that Connecticut should have apportioned its income based upon the location of its sales, which were almost entirely outside the state.[94] Connecticut, however, instead applied a formula that apportioned the company's income based upon the location of its property, which was largely in Connecticut.[95] The Court concluded that when a business operates across state lines, it would be impossible for a state to account for the specific profits earned by the activities occurring within the state.[96] It deferred to Connecticut's methodology, not on the theory that it was correct, but because nothing in the record established that the formula was "inherently arbitrary" or produced an unreasonable outcome.[97]

In subsequent years, the Court repeatedly and almost universally reaffirmed the fair apportionment principle first stated in *Underwood Typewriter*.[98] In so doing, the Court continued to emphasize the states' discretion to choose an income apportionment methodology. For example, the Court later proclaimed that a taxpayer seeking to challenge a state's methodology must show "clear and cogent evidence" that the state's approach results in the taxation of "extraterritorial values."[99] Also, the Court concluded that a taxpayer's claim would need to show that the state's method resulted in the taxation of income that was disproportionate to the amount of business the taxpayer conducted in the state[100] or that there was "no rational relationship between the income attributed to the State and the intrastate values of the enterprise."[101] The Court has also stated that a state's apportionment methodology can meet the constitu-

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[93] *Id.* at 117.

[94] *Id.* at 120.

[95] *Id.* at 117–19.

[96] *See id.* at 120–21 (noting that in such cases, the state is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders").

[97] *Id.* at 121.

[98] *See infra* notes 99–114 and accompanying text. *But see* Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123, 134–35 (1931) (concluding that the state apportionment formula is "fair on its face," but invalid as applied where that formula only evaluated the percentage in-state value of a corporation's property and, applying that formula, the state apportioned 80% of the corporation's income to the state despite the fact that the corporation made a large volume of sales outside the state).

[99] Butler Bros. v. McColgan, 315 U.S. 501, 507 (1942).

[100] *See* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983) (stating that the Court "will strike down the application of an apportionment formula if the taxpayer can prove 'by "clear and cogent evidence" that the income attributed to the State is in fact "out of all appropriate proportions to the business transacted . . . in that State," or has "led to a grossly distorted result"'" (citations omitted)).

[101] *See id*. at 180 (quoting Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 220 (1980)).

tional standard even if the state taxes only a "rough, practical approximation" of the corporation's in-state business income.[102]

Inevitably, the discretion afforded to the states to apportion multistate income resulted in state tax methodologies that varied—with the potential consequence that two states might seek to tax the same income. In 1977, in *Moorman Manufacturing Co. v. Bair*,[103] the U.S. Supreme Court finally considered a case that included these facts. Prior to *Moorman*, almost all of the states had abandoned their earlier inconsistent approaches to corporate income apportionment and settled upon a single general approach.[104] Iowa, however, was an outlier.[105] The taxpayer corporation in *Moorman* noted that most of its income was taxable in the state of Illinois, which apportioned its income using a three-factor apportionment formula, consisting of property, payroll, and sales—a methodology used by forty-three other states.[106] Iowa, in contrast, apportioned multistate income based solely upon a corporation's percentage of in-state sales.[107] The taxpayer noted that the confluence of the two states' taxing methods sub-

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[102] Gen. Motors Corp. v. District of Columbia, 380 U.S. 553, 561 (1965).

> [T]he [Supreme] Court has declined repeatedly to prescribe a particular formula for State taxation, admonishing that "[n]othing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the [S]tates and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the [S]tates within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

VAS Holdings & Invs. LLC v. Comm'r of Revenue, 186 N.E.3d 1240, 1253 (Mass. 2022) (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 445 (1940)); *see* Holderness, *supra* note 2, at 77–78 (suggesting that the Court has "deliberately avoid[ed] constitutionalizing the 'fairest' overall method of apportionment" and instead "has consistently given states 'wide latitude' to adopt a particular method of apportionment where acceptable alternatives exist" (footnotes omitted)); Joondeph, *supra* note 39, at 898 (concluding that the constitutional standard that governs how states source the income of employees working across state lines is "decidedly forgiving").

[103] 437 U.S. 267 (1978).

[104] *Id.* at 282–83 (Blackmun, J., dissenting); *see id.* at 283 n.1 (Powell, J., dissenting) (listing the forty-four out of forty-five states that adopted this approach). For more discussion on the states' movement towards a uniform corporate income tax apportionment formula in the 1960s and 70s, see generally John A. Swain, *A Brief History of UDITPA and the Corporate Income Tax Uniformity Movement*, 49 STATE TAX NOTES 759 (2008).

[105] *Moorman*, 437 U.S. at 282–83 (Blackmun, J., dissenting); *id.* at 283 & n.1 (Powell, J., dissenting).

[106] *See id.* at 276 (majority opinion) ("Since most States use the three-factor formula that Illinois adopted in 1970, appellant argues that Iowa's longstanding single-factor formula must be held responsible for the alleged duplication and declared unconstitutional."); *id.* at 296 (Powell J., dissenting) ("Forty-four of the forty-five States (including the District of Columbia), other than Iowa, that impose a corporate income tax utilize a similar three-factor apportionment formula.").

[107] *See id*. at 269–70 (majority opinion) (explaining Iowa's apportionment method).

jected it to potential double taxation.[108] It argued that Iowa's law was unconstitutional because its approach varied from that of every other state, thus exposing the taxpayer to double tax.[109]

The *Moorman* Court responded to the taxpayer's claim by stating that even if the Court were to assume that the two states' statutes acting together imposed a double tax, "[it] could not accept appellant's argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense."[110] The Court stated that "[i]t is, of course, true that if Iowa had used Illinois' three-factor formula, a risk of duplication in the figures computed by the two States might have been avoided. But the same would be true had Illinois used the Iowa formula."[111] The Court in *Moorman* made clear that a more prevalent apportionment method is not more constitutionally sound than a less common one. The Court stated that "[t]he Constitution . . . is neutral with respect to the content of any uniform rule."[112] It noted also that if the Court were to "constitutionalize[]" the more common method, the resulting rule would only be a rough blend of independent state decisions reflecting those states' particular needs.[113] The national interest would not be served because the interests of other states would be ignored "in the quest for uniformity."[114]

The Court's deference to the states' rules with respect to the division of income in the corporate income tax context, as discussed above, also logically applies to personal income tax.[115] When taxing nonresident employees, most states limit the imposition of tax to circumstances where the employee is physically working in the state.[116] Effectively, these states take the position that the source of the income is the place where the work is performed.[117] In these

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[108] *Id.* at 276–78.

[109] *Id.*

[110] *Id.* at 277.

[111] *Id.*

[112] *Id.* at 279.

[113] *Id*.

[114] *Id.* at 279–80.

[115] The Court's seminal corporate apportionment case, *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920), *supra* notes 92–97, relied upon the Court's seminal personal income tax sourcing case, *Shaffer v. Carter*, 252 U.S. 37 (1920), *supra* notes 50–53. *Underwood Typewriter*, 254 U.S. at 120; *see also* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 554 (2015) (indicating that "disparate treatment of corporate and personal income cannot be justified based on the state services enjoyed by these two groups of taxpayers"); Julie Roin, *Duplicative Taxation Among the States: A Problem Not Worth Solving?*, 25 FLA. TAX REV. 607, 645 (2022) (noting that the principle underlying the convenience of the employer rule is consistent with that of the single sales factor apportionment method, as used by numerous states in the corporate income tax context).

[116] *See* Holderness, *supra* note 2, at 63 (indicating that "most states continue to source individual income to the physical location of the worker").

[117] *See id.* at 62–63 (concluding that these states use physical work location as a proxy for the harder question of where income is earned).

states, if the employee were to telecommute from a different state, the employer state would not tax the resulting income. These rules, of course, date back to a time when people did not telecommute regularly, and employees typically worked at the same location as their employer.[118] In contrast, a handful of states use a different approach—a convenience of the employer rule, like that used by New York.[119] This method concludes that the source of the income will remain the employer state when a nonresident employee telecommutes from another state, unless the employer requires the remote work.[120] A large number of states adopted a similar approach in 2020–2021 as a response to the COVID-19 pandemic.[121]

There is a potential conflict between the application of two states' tax laws where an employee resides in and telecommutes from one state with a physical work standard, whereas the second state, where the telecommuter's employer is located, applies a convenience of the employer test. In these cases, the employee would be double taxed by the employer state and the resident state unless the resident state provides the employee with a credit for taxes paid to the employer state.[122] Neither state's approach is inherently wrong, however, and a rule that assigns a nonresident telecommuter's income to the location of his or her employer can be legally justified.[123] Therefore, in such cases, there is no basis under the Supreme Court's constitutional doctrine to conclude that it is the convenience of the employer rule that must yield to the physical work rule.

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[118] *See supra* note 4 and accompanying text (discussing the states' historical focus on the physical location of the work).

[119] *See infra* note 158 and accompanying text (noting five states, including New York, that use the convenience of the employer rule).

[120] *See infra* notes 162–166 and accompanying text (noting that working in another state for personal convenience triggers this rule).

[121] *See infra* notes 220–232 and accompanying text (demonstrating that several states adopted such rules during the pandemic).

[122] *See infra* notes 283–289 and accompanying text (explaining how the applicable law permits double tax).

[123] *See supra* notes 64–91and accompanying text (arguing that the states can source a nonresident telecommuter's wages to the employer state under the Constitution); *see also* Roin, *supra* note 115, at 667 (noting that there is more than one plausible rule for determining the source of personal services income that individual taxpayers earn); Joondeph, *supra* note 39, at 890–91 (stating that there is no "objectively 'correct' way[]" to source telecommuter wage income and that sourcing such income to the location of the employer meets the constitutional test that the sourcing must be reasonable); Brief for the United States, *supra* note 68, at 20 (noting that a New Hampshire resident who works from home will rely on New Hampshire services like police and fire protection, but that the "resident's work also may continue to depend on and benefit from services provided by [the state where his or her employer is located]").

C. Discrimination

The Court's references to jurisdiction and apportionment criteria discussed in the prior Sections sometimes reflect either a Commerce Clause or Due Process Clause requirement, and, in some cases, both.[124] In part, this is because the Court has recognized that the two constitutional clauses "impose distinct but parallel limitations on a State's power to tax out-of-state activities."[125] Due process requires that the state tax meets certain standards of fundamental fairness, including that taxpayers have fair notice of their tax responsibilities.[126] The Commerce Clause restrictions on state law focus on how these laws impact the national economy.[127] The Court's holdings have repeatedly equated the two standards and reflect the view that state taxes that violate due process may intrinsically raise potential Commerce Clause concerns.

There is overlap in the Court's analyses of limitations imposed under the Due Process and Commerce Clauses, as noted. Nevertheless, the Commerce Clause embodies the unique requirement that a state tax must not discriminate against interstate commerce.[128] The Framers intended the Commerce Clause to

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[124] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (finding that the Commerce Clause's "[substantial] nexus requirement is 'closely related' to the due process requirement that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'" (citations omitted)); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 164 (1983) ("Under both the Due Process and the Commerce Clauses of the Constitution, a state may not, when imposing an income–based tax, 'tax value earned outside its borders.'" (citation omitted)); *id.* at 165–66 (adding that states may not tax income from interstate activities "unless there is a '"minimal connection" or "nexus" between the interstate activities and the taxing State, and "a rational relationship between the income attributed to the State and the intrastate values of the enterprise"'" (citation omitted)); U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate [c]ommerce . . . among the several States"); *id.* amend. XIV (barring states from depriving persons "of life, liberty, or property, without due process of law"). *Compare* Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977) (positing nexus and apportionment as Commerce Clause inquiries), *with* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 373 (1991) ("The *Complete Auto* test[s], while responsive to Commerce Clause dictates, encompass[] as well the due process requirement that there be 'a "minimal connection" between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" (citation omitted)).

[125] MeadWestvaco Corp. *ex rel.* Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008) (first citing Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 305–06 (1992), *overruled on other grounds by Wayfair*, 138 S. Ct. 2080; then citing Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 451 n.4 (1982) (Stevens, J., dissenting); and then citing Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317, 325 n.5 (1968)).

[126] *Quill*, 504 U.S. at 312.

[127] *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019) ("'This "negative" aspect of the Commerce Clause' prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." (citation omitted)).

[128] *See id.* (noting that the Commerce Clause does not allow the states to use protectionist policies); *see also* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (defining economic protectionism as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," and explaining that the thrust of the dormant Commerce Clause "is to 'ef-

address this concern.[129] A state's imposition of a personal income tax can be discriminatory in certain instances.[130] There typically will not be discrimination, however, when an employer state imposes its generic income tax on a nonresident employee who telecommutes from a different state. The Court has stated that the original intent of the Commerce Clause was to prevent the states from favoring in-state commercial actors over out-of-state commercial actors.[131] The paradigm situation of such discrimination would be where a state imposes a tax on nonresident employees that is not similarly imposed on resident employees or, alternatively, that taxes such nonresident employees more heavily.[132] Nevertheless, there is no such discrimination when a state imposes an identical tax on both groups of comparable employees.

Discrimination might seem to be apparent where nonresident telecommuters are taxed by both the state of their employer and their state of residence. For example, if an employer state were to impose an income tax on nonresident telecommuters by applying a convenience of the employer-type rule, the result could be that the nonresidents would be taxable on such income in both their state of residence and the state of their employer—assuming that the residence state does not offer a credit for the taxes due in the employer

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fectuate the Framers' purpose to "prevent a State from retreating into the economic isolation,'" 'that had plagued relations among the Colonies and later among the States under the Articles of Confederation'" (citations and brackets omitted)); Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 377, 390 (2023) (indicating that the Court's "antidiscrimination rule . . . lies at the core of [its] dormant Commerce Clause jurisprudence" and its "core dormant Commerce Clause teachings focus[] on discriminatory state legislation"). In the 1920 case, *Shaffer v. Carter*, which helped established the Court's source income state tax doctrine, the Court noted that the states have broad discretion with respect to taxing "persons, property, and business transaction within their borders" as a means to defray governmental expenses, "saving as restricted by particular provisions of the federal Constitution"). 252 U.S. 37, 50 (1920)); *see supra* notes 50–53 and accompanying text (discussing *Shaffer* in greater depth).

[129] *See* Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 53–55 (noting that a modern, literal interpretation of the Commerce Clause would not lead to this conclusion, but that it would have been clear when it was drafted); *see also Tenn. Wine*, 139 S. Ct. at 2459–61 (reviewing the constitutional history, and concluding that "the Commerce Clause [is] the primary safeguard against state protectionism"); *infra* note 427 and accompanying text (noting that the Court has consistently repeated this notion).

[130] *See, e.g.*, *Wynne*, 575 U.S. at 562 (noting the potential for discriminatory tax schemes); City of New York v. State, 730 N.E.2d 920, 928 (N.Y. 2000) (addressing the Supreme Court's "discriminatory tax" jurisprudence).

[131] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 487 (2005) (stating this concern).

[132] *See* Austin v. New Hampshire, 420 U.S. 656, 666–67 (1975) (holding that a New Hampshire personal income tax imposed on nonresidents working in New Hampshire, but not on New Hampshire residents similarly working in New Hampshire, was unconstitutionally discriminatory under the Privileges and Immunities Clause); *cf. City of New York*, 730 N.E.2d at 930 (invalidating a discriminatory tax imposed on out-of-state commuters but not in-state commuters under both the Commerce Clause and the Privileges and Immunities Clause).

state.[133] In such cases, the employees in question could be subject to greater tax than an employee who merely resides and works in the employer state simply because they work across state lines. Although a nonresident could be subject to greater tax in this situation, *Moorman* dispenses with the idea that it is the employer state that is responsible for the double tax:

> The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter.[134]

As *Moorman* notes, when two states apply a fair taxing methodology and the result is double tax, the outcome is simply the result of the application of the different approaches.[135] One state's method may be less prevalent than the other, as was Iowa's apportionment approach in *Moorman*; however, this does not mean that the outlier state is at constitutional fault for the possible double-tax outcome.[136] Relatedly, *Moorman*—and other Supreme Court precedents—reject the claim that the mere existence of double tax calls into question the constitutionality of one of the two taxes imposed.[137]

In the personal income tax context, the Court has used an "internal consistency" test to determine whether a state's statutory scheme inherently discriminates against interstate commerce.[138] This test assumes that every state follows the same tax structure and hypothetically asks whether as a result interstate commerce would be disadvantaged.[139] If so, the Court will conclude that the state tax inherently discriminates against interstate commerce without regard to the taxing policies of the other states.[140]

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[133] *See infra* notes 283–289 and accompanying text (explaining the constitutional rules that allow for this result).

[134] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277 n.12 (1978).

[135] *Id.* at 276–77.

[136] *Id.* at 276–78.

[137] *Id.* at 277; *see* Goldberg v. Sweet, 488 U.S. 252, 263–64 (1989) (holding that the possibility of double taxation is not enough to invalidate a tax policy); *cf.* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170–71 (1983) (suggesting that fair apportionment generally dispenses with the question as to discrimination). An earlier Supreme Court case to the same effect is *Curry v. McCanless*, 307 U.S. 357 (1939), discussed *supra* notes 74–75 and accompanying test. *See also* Bradley W. Joondeph, *The States' Multiple Taxation of Personal Income*, 71 CASE W. RSRV. L. REV. 121, 124 (2020) ("[T]he proposition that a state personal income tax that exposes taxpayers to multiple taxation is unconstitutional *for that reason* is untenable.").

[138] *Wynne*, 575 U.S. at 561–62.

[139] *Id.* at 562.

[140] *Id.* at 563.

In 2015, in *Comptroller of Treasury of Maryland v. Wynne*, the U.S. Supreme Court applied these rules and held that Maryland's personal income tax was not internally consistent because the state taxed (1) residents on one hundred percent of their income and (2) nonresidents on their in-state source income, but (3) did not offer a full credit to residents for income that had its source in and was taxable by another state.[141] The Court determined that if the Maryland statute were applied by every state, the statute would fail internal consistency.[142]

The income at issue in *Wynne* was derived from the ownership of an interest in an S corporation,[143] but assume that the relevant income derived from the sale of real estate for an easier illustrative example. Assume also that the state taxed residents on one hundred percent of their income, including income from the sale of in-state real estate, and also taxed nonresidents on their sales of in-state real estate because the sale would result in state source income. Further, assume that the state did not provide a full credit to residents for income tax imposed by another state on the sale of out-of-state real estate. If every state had a similar rule, real estate sales would be taxed more heavily when they occurred outside the taxing state and the rule would contravene the internal consistency test. A sale of in-state real estate by a state resident would be taxed only once, i.e., by the resident state. In contrast, an out-of-state sale by that same resident would be taxed by both the state where the real estate was located, i.e., as source income in that state, and also would be taxed by the resident state.[144]

The taxation of nonresident telecommuters under a convenience of the employer-type standard, where telecommuters would be taxed in the state of their employer, not the state where they physically work, raises no internal

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[141] *Id.* at 564–65.

[142] *Id.* at 545–48, 564–66.

[143] *Id.* at 546–47. Some corporations may elect to be treated as S corporations under the Internal Revenue Code and thereby be taxed under a "pass-through" tax system where income is subject to only one level of tax. *Id.* at 546 n.1. "The corporation's profits pass through directly to its shareholders on a pro rata basis and are reported on the shareholders' individual tax returns." *Id.*

[144] *See id.* at 564–65 (providing a hypothetical explanatory situation). *Wynne* assumed, in its example, that every state imposed: "(1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State." *Id.* The case further assumed that the "two taxpayers, April and Bob, both live[d] in State A, but that April earn[ed] her income in State A whereas Bob earn[ed] his income in State B." *Id.* at 565. Given these circumstances, the Court concluded:

> Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Id.

consistency concerns. Effectively, this methodology sources certain wage income to the location of the employer, not the employee, under certain circumstances. If every state applied a similar standard in these situations, no more than one hundred percent of such employees' income would be subject to tax. Under this hypothetical test, the specific wage income in question would always be taxed by the state of the employer and never by the state in which the employee is physically working.

Wynne specifically requires a state that taxes nonresidents on certain source income to provide a full credit to residents with respect to that same type of income when that income has its source in another state.[145] This specific principle does not apply in the context of the convenience of the employer rule, however, because the tax applied under that rule is on nonresidents. Moreover, *Wynne* does not purport to determine when certain income, such as wage income, has its source in a state—the case assumes that every state applies the same sourcing rule as the state in question.[146] *Moorman*, as discussed previously, stands for the additional proposition that the states have broad discretion with respect to sourcing determinations.[147] Double taxation becomes a possibility when the states of the employer and the telecommuting employee have conflicting approaches—but the internal consistency standard does not consider the divergent approaches that two states may apply in actual practice.[148] As noted, the rule applied by the Supreme Court will not strike a state's

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[145] *Id.* at 568.

[146] *See* Joondeph, *supra* note 39, at 899–900 (concluding that convenience of the employer rules raise no internal consistency concerns); *cf.* Edelman v. N.Y. State Dep't of Tax'n & Fin., 80 N.Y.S.3d 241, 242 (App. Div. 2018) (concluding that *Wynne* does not apply when the income in question cannot be conclusively traced to an out-of-state source); Chamberlain v. N.Y. State Dep't of Tax'n & Fin., 88 N.Y.S.3d 257, 259 (App. Div. 2018) (resolving a similar fact pattern based on the analysis in *Edelman*).

[147] *See supra* notes 103–114 and accompanying text (showing that states have a high degree of freedom when choosing their income apportionment methodology). But where a state applies a convenience of the employer rule, thereby concluding that the wage income of a nonresident teleworker working for an in-state employer is state source income, that state presumably must also offer an income tax credit to an in-state resident who telecommutes on behalf of an out-of-state employer when that employee is taxed on his or her wages by such other state, i.e., where that other state also applies a convenience of the employer rule. The state of Connecticut has apparently concluded as much, as evidenced by its conferral of a credit in the context of its application of the convenience rule. *See infra* notes 328–331 and accompanying text (discussing Connecticut's decision to provide a tax credit); *see also* N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON NEW YORK PERSONAL INCOME TAX ISSUES ARISING FROM REMOTE WORK AND TELECOMMUTING 11 & nn.32–33 (Sept. 29, 2022), https://nysba.org/app/uploads/2022/09/1468-Report-on-New-York-Personal-Income-Tax-Issues-Arising-from-Remote-Work-and-Telecommuting.pdf. [https://perma.cc/3JYY-YNRU] (same).

[148] *Wynne*, 575 U.S. at 562. The internal consistency test "hypothetically assum[es] that every State has the same tax structure . . . allow[ing] courts to isolate the effect of a defendant State's tax scheme." *Id.*

reasonable income-sourcing methodology even where that methodology results in double taxation.[149]

D. Conclusion

In 2006, in *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Department of Revenue*,[150] the U.S. Supreme Court stated that "[t]he Due Process Clause demands that there exist 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' as well as a rational relationship between the tax and the 'values connected with the taxing State.'"[151] It also stated that "[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."[152] The Court then concluded, echoing *J.C. Penney Co.*, that "[t]he 'broad inquiry' subsumed in both constitutional requirements is 'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'—that is, 'whether the state has given anything for which it can ask return.'"[153] For all the reasons previously noted, that inquiry generally will be met when the employer state imposes tax on the wage income of a nonresident employee who is telecommuting from another state.[154]

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[149] *See supra* note 137 and accompanying text (noting that the existence of double taxation will not be determinative when evaluating the constitutionality of a state tax system).

[150] 553 U.S. 16 (2008).

[151] *Id.* at 24 (quoting Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 306 (1992) (citations omitted), *overruled on other grounds by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)).

[152] *Id.* (first citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170–71 (1983); and then citing Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984)); *see also* Joondeph, *supra* note 137, at 148 ("In short, there are two basic structural constraints on the states' taxation of income: they can only tax income within their source-based or residence-based jurisdiction, and they cannot discriminate against interstate commerce.").

[153] *MeadWestvaco*, 553 U.S. at 24–25 (quoting ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982) (citation omitted)); *see also* N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2219–20 (2019) (quoting similar language).

[154] *See generally supra* notes 47–149 and accompanying text (supporting this assertion). An additional standard the Court has posited to evaluate the constitutionality of state taxes is whether the tax is fairly related to services provided by the state. Complete Auto Transit v. Brady, 430 U.S. 274, 279, 287 (1977). This standard, however, has fallen into disuse because the Court has concluded that it is generally redundant with respect to the other constitutional standards. *See* Roin, *supra* note 115, at 648–49, 648 n.126 (noting that the "fairly related" factor fell out of use after *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)). As the Court noted in *Edison*, the fairly related test does not probe "the *amount* of the tax of the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test," which evaluates jurisdiction, i.e., "substantial nexus." 453 U.S. at 625–26. Beyond that threshold requirement, the Court has said there is simply "the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is

II. TAXATION OF A NONRESIDENT TELECOMMUTER'S WAGES UNDER STATE LAW

The states recently have applied two general approaches whereby an employer state imposes tax on nonresident telecommuter wages. This Part of the Article considers those approaches. First, Section A discusses the convenience of the employer rule, focusing on the standard applied under New York law and two relatively recent New York cases.[155] Next, Section B examines special emergency wage tax rules put in place in 2020–2021 during the COVID-19 pandemic, including a regulation that Massachusetts adopted and New Hampshire later challenged at the U.S. Supreme Court.[156] Section C considers the state rules that would apply in either circumstance to determine the availability of a resident credit for taxes paid to another state.[157] Section C also discusses state reciprocity agreements and reverse credit arrangements that address the personal income tax consequences when employees work across state lines.

A. Convenience of the Employer Test

Five states apply the convenience of the employer rule—New York, Delaware, Pennsylvania, Nebraska, and Connecticut.[158] Of these, New York is the

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the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" *Id.* at 626 (citation omitted). The Court has noted that the fairly related standard was derived in part from *Wisconsin v. J.C. Penney Co. See id.* at 625–26, 625 n.14 (citing *J.C. Penney* for the rule that "the incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes"); *see also* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 446 (1940).

[155] *See infra* notes 162–219 (discussing the convenience of the employer rule as applied by New York).

[156] *See infra* notes 220–281 (discussing special telecommuter state and city income tax rules that were put in place during the pandemic).

[157] *See infra* notes 282–369 (discussing when tax credits would apply and their significance to the questions pertaining to the taxation of teleccommuters).

[158] *See* N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2023); CONN. GEN. STAT. § 12-711(b)(2)(C) (2023); DEL. CODE ANN. tit. 30, § 1124(b)(1)(b) (2023); 316 NEB. ADMIN. CODE § 22-003.01C(1) (2023); 61 PA. CODE § 109.8 (2023). The Connecticut rule applies only with respect to nonresident employees who telecommute on behalf of employers based in Connecticut from a location in another state where that other state applies a convenience of the employer rule. *See infra* notes 328–331 and accompanying text (discussing this rule in greater depth). In 2022, New Jersey has proposed a similar "reverse" convenience rule. Benjamin Valdez, *New Jersey Governor Proposes Changes to Remote Worker Taxation*, TAX NOTES TODAY STATE (Sept. 7, 2022), https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/new-jersey-governor-proposes-changes-remote-worker-taxation/2022/09/07/7f205 [https://perma.cc/X9NJ-8UKG]. At least one city, Philadelphia, Pennsylvania, has also applied a convenience rule since before the pandemic. *See* Wendi Kotzen & Christopher Jones, *The Changing Pennsylvania Tax Landscape for Remote Work*, LAW360 TAX AUTH. (July 8, 2021), https://www.law360.com/articles/1400918/the-changing-pennsylvania-tax-landscape-for-remote-work [https://perma.cc/2ULL-6FBL] (discussing Philadelphia's version of the convenience

most significant because of the large number of persons impacted. New York is also the only state where its courts have examined these rules. A sixth state, Arkansas, previously applied the rule,[159] but the legislature repealed it during the pandemic.[160] This development illustrates how a state's political process ultimately determines its rules for taxing the wage income of telecommuters.[161]

Pursuant to a New York statute, that state's "source income includes income attributable to a business, trade, profession or occupation carried on in this state."[162] When a nonresident works in both New York and another state, a regulation applies to determine that employee's New York source income, dividing his or her wage income by the number of days worked in New York over the total days worked.[163] The convenience rule, however, impacts this ratio by limiting days worked outside the state to only those days for which the employer, by necessity, obligated the employee to perform out-of-state duties, "as distinguished from convenience."[164] Thus, nonresidents employed in New York who work from home by choice must treat those non-New York workdays as if they had been present at their employer's location in New York.[165] The New York regulation that effectuated this policy was promulgated in 1960, but the state has applied the rule more generally since at least 1951.[166]

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rule). Also, at least two cities, Wilmington, Delaware and St. Louis, Missouri, began applying a convenience rule during the pandemic. *See Wilmington, Delaware Issues Guidance Concerning Its Earnings and Head Tax Requirements for Teleworkers in Light of COVID-19*, EY TAX NEWS UPDATE (Dec. 15, 2020), https://taxnews.ey.com/news/2020-2871-wilmington-delaware-issues-guidance-concerning-its-earnings-and-head-tax-requirements-for-teleworkers-in-light-of-covid-19 [https://perma.cc/45CS-TKWP] (noting the Wilmington rule); *infra* notes 276–281 and accompanying text (discussing the St. Louis rule).

[159] *See* Letter from John Theis, Revenue Legal Couns., Ark. Dep't of Fin. & Admin., Legal Op. No. 20200203 (Feb. 20, 2020), https://www.ark.org/dfa-act896/index.php/api/document/download/20200203.pdf [https://perma.cc/6J2N-LDS5] (describing the Arkansas version of the rule).

[160] *See* ARK. CODE ANN. § 26-51-202(c) (2023); *see also* Lauren Loricchio, *Arkansas Enacts Bill Clarifying Nonresident Income Sourcing Issue*, TAX NOTES TODAY STATE (May 4, 2021), https://www.taxnotes.com/tax-notes-today-state/sourcing/arkansas-enacts-bill-clarifying-nonresident-income-sourcing-issue/2021/05/04/5jw5v?highlight=Arkansas%20Enacts%20Bill%20Clarifying%20Nonresident%20Income%20Sourcing%20Issue [https://perma.cc/PZM9-CYNK] (noting the Governor's comment that the law rescinding the convenience rule would "showcase Arkansas as a good place to do business and work").

[161] *See* Loricchio, *supra* note 160 (detailing the political process and context behind the law's repeal).

[162] Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 844 (N.Y. 2003) (citing N.Y. TAX LAW § 631(b)(1)(B) (McKinney 2023)).

[163] *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a)).

[164] *Id.* The convenience of the employer rule can more aptly be called the "necessity of the employer" rule. *See id.* at n.3.

[165] *Id.* at 844–45.

[166] *See* Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 280 & n.2 (N.Y. 2005) (stating that "[t]he policy, if not the regulation, appears to have been in place since at least 1951, the tax year considered in *Matter of Burke v Bragalini*, 196 N.Y.S.2d 391 (App. Div. 1960)").

Application of the convenience rule requires that certain state law requirements be met. For example, New York's law requires that telecommuters must perform some work for their employer in New York during the taxable year for their wages to be subject to tax.[167] Further, the New York rule does not apply if the employee has a home office that is a bona fide office of the employer, including where the employee's home is near some specialized facility necessary for his or her job.[168] These standards may immunize some persons from the application of the rule, but in most instances, the requirements for an exception may be difficult to meet.[169] Other states with a convenience rule have their own requirements.[170] Subsection 1 and Subsection 2 of this Section address two relatively recent cases from the New York Court of Appeals that test that state's convenience rule.[171]

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[167] *See* N.Y. STATE BAR ASS'N TAX SECTION, *supra* note 147, at 7 & n.19 (citing Matter of Arthur Hull Hayes, TSB-H-78(9)I (State Tax Comm'n, 1978)); Povich, *supra* note 68 (quoting a New York attorney discussing the requirement's "loopholes"). Many, if not most, remote jobs require in-office work at least part of the time. *See* Lindsay Ellis, *Is That Remote Job Opening Really Remote? Check the Fine Print*, WALL ST. J. (July 5, 2022), https://www.wsj.com/articles/is-that-remote-job-opening-really-remote-check-the-fine-print-11656961532 [https://perma.cc/XJU2-RK67] (noting that "[s]ome jobs listed as remote require the hire to come into an office at least part time or live nearby for occasional in-person meetups"); Jones, *supra* note 3 (noting that although remote work has become common, full-time remote work is limited). The New York rule also requires that the employee be assigned to, or work primarily at, an office of the employer in New York. *See* N.Y. STATE BAR ASS'N TAX SECTION, *supra* note 147, at 7–8.

[168] *See* N.Y. STATE BAR ASS'N TAX SECTION, *supra* note 147, at 2, 7–9 (explaining the New York home office rule); Charlie Kearns & Chelsea Marmor, *Covid-19 State Employment Tax Considerations—Part I: Employer Withholding*, BLOOMBERG TAX 5–7 (2020), https://us.eversheds-sutherland.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEqSJCo03!/fileUpload.name=/Kearns_TMM_Article%20PDF.pdf [https://perma.cc/7EVV-VPQ2] (same). The test for a "bona fide" office requires consideration of multiple factors; "specialized facilities" include a lab or test facility. Kearns & Marmor, *supra*.

[169] *See supra* note 167 and accompanying text; *see also* Povich, *supra* note 68 (noting that most remote workers cannot claim to have worked entirely outside the office during a calendar year or that they have a home office that is a "bona fide office of the employer or [is] near some very specialized facilities necessary for [their] job"). However, it may be possible to show that the employee does not work primarily at, and is not "assigned" to, an employer location in the convenience state, as is also required for application of the New York rule. *See* N.Y. STATE BAR ASS'N TAX SECTION, *supra* note 147, at 13–17 (explaining that the convenience rule applies only to those employees assigned to an established business location).

[170] *See* Kearns & Marmor, *supra* note 168, at 7 (evaluating the Connecticut and Pennsylvania rules); Kearns, *supra* note 4, at 27 (evaluating Delaware's rule).

[171] These cases are *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003), and *Huckaby*, 829 N.E.2d 276. The doctrine was also upheld in prior New York cases. *See, e.g.*, Speno v. Gallman, 319 N.E.2d 180, 182 (N.Y. 1974) (upholding the application of the convenience rule, and noting its application in prior cases).

1. *Zelinsky v. Tax Appeals Tribunal*

In 2003, in *Zelinsky v. Tax Appeals Tribunal*,[172] the New York Court of Appeals, New York's highest court, heard a case where a Connecticut resident, who was a professor at a New York City law school, commuted into the city three days a week to teach class and meet with students.[173] For the remainder of the time, the professor worked from home where he prepared exams, wrote student recommendations, and carried out research and writing.[174] One semester, the professor was on sabbatical and worked entirely from his Connecticut residence.[175]

The professor sought a partial refund for income taxes he paid to New York for the tax years in question.[176] In preparing his New York tax returns, he apportioned his salary from the law school according to the number of days he commuted to the school, and reported the remainder of his salary to Connecticut.[177] New York issued notices of deficiency claiming that the entire amount of the professor's wages was subject to New York tax under the convenience rule because the professor worked from home for his own convenience, and his employer did not obligate him to work outside New York.[178] The portion of the professor's salary reported to Connecticut was taxed by Connecticut, and the state did not provide a credit for the taxes he paid to New York.[179]

The professor contested the New York deficiencies and also sought a refund of taxes paid on the salary he earned during his sabbatical, claiming that the application of the convenience rule violated the Due Process Clause and the Commerce Clause.[180] The New York court ruled in favor of the State.[181] It noted that under *Shaffer v. Carter*,[182] a state "may constitutionally tax nonresidents on their income derived from sources within the state."[183] Further, the professor's "election to absent himself from the locus of his New York employment [did] not diminish what New York provide[d] in order to enable him to earn that income"; therefore, New York could tax the professor because he

[172] 801 N.E.2d 840, *cert. denied*, 541 U.S. 1009 (2004).
[173] *Id.* at 843.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 844.
[177] *Id.* at 843–44.
[178] *Id.* at 844.
[179] *Id.* at 844, 849.
[180] *Id.* at 844.
[181] *Id.* at 845–49.
[182] 252 U.S. 37, 51 (1920).
[183] *Zelinsky*, 801 N.E.2d at 844 (citing *Shaffer*, 252 U.S. at 57).

reaped the benefits and protections of New York government through his employment.[184]

The *Zelinsky* court concluded that the professor had the minimum connection to New York necessary for the State to impose its tax because he was physically present and purposefully directed his activities toward the state to receive his wages.[185] There was no fair apportionment issue because the professor's entire salary was derived from New York.[186] Further, the income the professor received was "rationally related" to benefits and protections he received as an employee of a New York employer.[187] Given these determinations, there was no improper taxation of "extraterritorial values."[188] Citing the Supreme Court's holding in *Wisconsin v. J.C. Penney Co.*,[189] the New York court answered the "simple but controlling question" of "whether the state has given anything for which it can ask return" affirmatively.[190]

The professor insisted there was a constitutional violation because two states taxed some of his income.[191] He paid tax on a portion of his wages on his Connecticut tax return,[192] while New York also taxed him on one hundred percent of his income applying that state's convenience rule.[193] But the court noted that the mere potential for, or actual existence of, double taxation does not automatically transgress the Commerce Clause where the challenged tax is fairly apportioned.[194] It further pointed out that it was the taxpayer's choice to allocate some of his income to Connecticut that lead to the double taxation, not New York's convenience rule.[195]

The court stated that it merely was determining the constitutionality of New York's convenience rule as applied to the facts.[196] The court noted that the State adopted the convenience rule to prevent commuters from working just an hour or two on Saturday and Sunday and then claiming those days as non-New York workdays.[197] These persons would subsequently maintain that two-

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[184] *Id.* at 848.

[185] *Id.* at 849 (quoting Quill Corp. v North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 307 (1992), *overruled on other grounds by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018)).

[186] *Id.* at 847 (noting that the Commerce Clause requirement was met).

[187] *See id.* at 849 (quoting Moorman Mfg. Co. v. Bair, 437 US 267, 273 (1978)) (noting that the Due Process Clause requirement was met).

[188] *Id.* (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 164 (1983)).

[189] 311 U.S. 435.

[190] *Zelinsky*, 801 N.E.2d at 849 (quoting *J.C. Penney*, 311 U.S. at 444).

[191] *Id.* at 848.

[192] *Id.* at 844.

[193] *Id.* at 848.

[194] *See id.* at 848–49 (tying this conclusion to the purpose of the Commerce Clause).

[195] *Id.* at 848.

[196] *Id.* at 845–46.

[197] *Id.* at 846.

sevenths of their income was non-New York income resulting in either tax-free income, if their resident state had no income tax, or income taxed at a lower rate than the tax rate of their employer state.[198] The court observed that the facts of this case raised similar concerns, given the professor's seeming attempt to allocate some of his income to Connecticut and not New York in order to reduce his tax burden in New York.[199] The court opined that without the convenience rule, there would be opportunities for fraud and administrative difficulties for employers in checking whether their employees actually performed full workdays while at their non-New York homes.[200]

2. *Huckaby v. New York State Division of Tax Appeals*

In 2005, in *Huckaby v. New York State Division of Tax Appeals*,[201] the Court of Appeals of New York further tested the doctrine with facts that more closely resemble a typical telecommuting situation. Unlike *Zelinsky*, *Huckaby* involved an employer policy that allowed for the employee to work remotely. In *Zelinsky*, the court analogized the facts to a situation where employees worked from home at night or on weekends simply to minimize their state tax.[202] In *Huckaby*, however, the taxpayer and his employer had agreed that he would perform his computer programming work in New York only "as needed" and otherwise could work from his home in Tennessee.[203]

The taxpayer in *Huckaby*, as in *Zelinsky*, allocated his workdays between the two states.[204] He determined that he spent approximately twenty-five percent of his workdays in New York and the remainder in Tennessee for the relevant tax years.[205] That allocation, if respected by New York, would have had significant tax ramifications for the taxpayer, as Tennessee does not tax wage income.[206] New York, however, as it did in *Zelinsky*, invoked its convenience rule and allocated one hundred percent of the taxpayer's income to New York.[207]

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[198] *Id*.

[199] *Id.*

[200] *Id.* at n.4.

[201] 829 N.E.2d 276 (N.Y.), *cert. denied*, 546 U.S. 976 (2005).

[202] 801 N.E.2d at 846.

[203] 829 N.E.2d at 278. The employer, however, would not have objected had the taxpayer worked full-time in its New York offices. *Id.*

[204] *Id.*

[205] *Id.*

[206] *See* Dan Dzombak, *These States Have No Income Tax*, USA TODAY (Apr. 26, 2014), https://www.usatoday.com/story/money/personalfinance/2014/04/26/these-states-have-no-income-tax/8116161/ [https://perma.cc/L2U6-VQLU] (noting that "Tennessee has no income tax but does have a 'hall tax'—that is, a 6% tax on interest and dividends").

[207] *Huckaby*, 829 N.E.2d at 278.

The taxpayer's constitutional argument in *Huckaby* focused on the Due Process Clause.[208] He claimed that the convenience rule violated due process because he was "taxed out of all proportion to the benefits that he receive[d] from New York."[209] The taxpayer argued that the convenience rule potentially allowed New York to tax one hundred percent of the income of a nonresident who physically worked in a New York office only one day a year. The taxpayer claimed that due process demands proportionality in order to prevent this overreaching.[210]

As was true in *Zelinsky*, the *Huckaby* court again relied on *Shaffer*.[211] The court noted that due process is "a proxy for notice and looks to the connection between the taxpayer and the taxing state" to determine whether "the state has authority to impose its tax."[212] The court concluded that the essential element "is some 'minimal connection' between the taxpayer and the state, and that the income the state seeks to tax be 'rationally related to values connected with' the state."[213]

The court passed on the taxpayer's question of whether a state violates due process by taxing one hundred percent of a nonresident's income if the nonresident only spends a trivial amount of time working in New York because those were not the facts.[214] The court concluded that the taxpayer had the requisite connection needed because he worked for a New York employer and spent approximately twenty-five percent of his time at the New York office.[215] The court also determined that this time spent working in New York was substantial enough to meet any "rough proportionality" due process requirement.[216]

For its conclusion that New York's tax imposed on one hundred percent of the taxpayer's income was "rationally related" to values connected with the state, the court cited, as did *Zelinsky*, the benefits and protections that New York provided to the taxpayer and his employer.[217] The court noted that the

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[208] *See id.* at 281–84 (relying on interstate business tax cases). The taxpayer made no Commerce Clause claim. *Id.* at 281 n.4. Unlike the taxpayer in *Zelinsky*, Huckaby asserted a claim under the Equal Protection Clause that the convenience rule "impermissibly discriminates between those employees who work out of state for personal convenience and those who work out of state as a necessity." *Id.* at 284. Nevertheless, the standard that evaluates a tax under the Equal Protection Clause only requires that the tax classification not be arbitrary or irrational. *Id.* The court concluded that New York's classification, designed to meet the requirements of the Commerce Clause and the Due Process Clause, was "rational in every respect." *Id.*

[209] *Id.* at 282.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 283 (citations omitted).

[213] *Id.* (citing Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978)).

[214] *Id.* at 283–84.

[215] *Id.* at 283.

[216] *Id.*

[217] *Id.*; Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003).

state provided these benefits every day, regardless of whether the taxpayer chose to telecommute from outside New York.[218] Accordingly, New York could require contributions from the taxpayer because the taxpayer realized pecuniary benefits under the protection of the government.[219]

B. The 2020–2021 Emergency Pandemic Rules

The COVID-19 pandemic occasioned a different set of rules governing the taxation of a nonresident telecommuter based upon the location of the employer, not the employee. Unlike New York's convenience rule, which focused on the appropriate taxing approach to apply to telecommuters, these emergency pandemic rules focused on the significant administrative burden suddenly faced by employers—who are generally responsible for withholding the correct state income tax that employees owe and can be penalized for failing to do so correctly.[220]

The pandemic resulted in emergency declarations and stay-at-home orders mandating that employees could not work from their offices and had to instead work from home or some other off-premises site.[221] As a consequence, the entire workforce of many employers began to work from a remote location—either their residence state, which may or may not have been the state of their employer, or some other place.[222] Employers did not necessarily know

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[218] *Huckaby*, 829 N.E.2d at 283.

[219] *Id.* The court also noted that "*the tax imposed need not bear an exact relation* to the services actually provided to the individual taxpayer." *Id.* at 283–84; *see supra* note 154 and accompanying text (discussing the "fairly related" constitutional test). There was a three-person dissent in *Huckaby*. 829 N.E.2d at 285 (Smith, J., dissenting). The dissent concluded that the wages in question were not source income within the meaning of the state statute, and that, pursuant to the Due Process Clause, the state tax was out of proportion to the time the taxpayer spent working in New York. *Id.* at 285–91. The dissent also noted that, unlike in *Zelinsky* and other prior New York cases testing New York's convenience rule, there was no suggestion that the taxpayer was engaged in tax avoidance or evasion. *Id.* at 286–87.

[220] *See supra* note 9 and accompanying test (noting that the failure to withhold tax properly will result in liability for the employer).

[221] *See COVID-19 Telework Triggers State Tax Withholding Guidance*, EVERSHEDS SUTHERLAND (Apr. 20, 2020), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/231540/COVID-19-telework-triggers-state-tax-withholding-guidance [https://perma.cc/PQ8J-UT8C] (noting that forty-three states and the District of Columbia had stay-at-home orders on April 16, 2020).

[222] Paul Jones, *Telework Taxation Uncertainties Remain as States Begin to Reopen*, TAX NOTES (May 27, 2020), https://www.taxnotes.com/tax-notes-today-state/audits/telework-taxation-uncertainties-remain-states-begin-reopen/2020/05/27/2cjz8?highlight=Telework%20Taxation%20Uncertainties%20Remain%20as%20States%20Begin%20to%20Reopen [https://perma.cc/GQN8-UAK3] (noting that teleworkers may have gone home or moved in with family living in a different state, perhaps somewhere across the country); Darla Mercado, *Leaving New York? Why You Might See Higher Tax Bills*, CNBC (Aug. 13. 2020), https://www.cnbc.com/2020/08/13/leaving-new-york-why-you-might-see-higher-tax-bills.html [https://perma.cc/7YVE-LKNF] (describing this phenomenon); *COVID-19 Telework Triggers State Tax Withholding Guidance*, *supra* note 221 ("State tax complications arise when

where their employees were working because of the pronounced challenges presented by the pandemic.[223] In many instances, these employees may have relocated to states where their employer had no previous tax accountability, increasing administrative challenges for their employers.[224]

In the spring of 2020, the early days of the pandemic, some states issued special income tax sourcing rules (Pandemic Rules) to minimize the administrative disruption for employers.[225] These Pandemic Rules bound employers to report wage withholding for their employees based upon the employees' work location prior to the pandemic.[226] The rules generally made it clear that affected employees similarly continued to be taxed by the state where they were working prior to the pandemic.[227]

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an employee's regular work location is in a different state than their current teleworking location, which presumptively (but not always) is the employer's state of tax residence.").

[223] *See supra* note 222 and accompanying text (describing the administrative difficulties faced by employers during the pandemic).

[224] *Cf.* Brian D. Tauber, *Telecommuters and the State Personal Income Tax*, 14 U.C. DAVIS BUS. L.J. 151, 155 (2013) (noting that, to avoid running afoul of state withholding requirements, employers must keep tabs on where their employees are working).

[225] *See generally State Guidance Related to COVID-19: Telecommuting Issues*, HODGSON RUSS LLP, https://www.hodgsonruss.com/assets/htmldocuments/Telecommuting_5.22.20.pdf [https://perma.cc/59FL-8EMF] (June 9, 2021) (presenting a table of all the COVID-19 state guidance issued for tax withholding for telecommuters); Charlie Kearns & Chelsea Marmor, *Permanent Telework and Covid-19—Should You Stay, or Should You Go?*, 30 J. MULTISTATE TAX'N & INCENTIVES 28 (Jan. 2021), https://admin.us.eversheds-sutherland.com/~sutherland/site-preview/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEr4ZCnC3!/fileUpload.name=/JMT-21-01-05-Salt.pdf [https://perma.cc/WR3Q-C7XZ] (summarizing states' taxation approaches to telework).

[226] Kearns & Marmor, *supra* note 225, at 28; *see* Brief in Opposition to Motion, *supra* note 68, at 3 (noting that during the pandemic, Massachusetts "maintained the pre-pandemic status quo for tax filing obligations and thereby sought to avoid uncertainty and spare employers additional compliance burdens amidst the unprecedented circumstances, when record-keeping employees themselves might be scattered from the office, and remote-work schedules might shift by the day or week").

[227] *See, e.g.*, 830 MASS. CODE REGS. 62.5A.3(3) (2023) (establishing that the wage tax rules from prior to the pandemic would continue to apply); H.B. 197, 133d Gen. Assemb. § 29 (Ohio 2020); Press Release, Jacob Manley, Miss. Dep't of Revenue, Mississippi Department of Revenue Response to Requests for Relief (Mar. 26, 2020), https://www.ms-cpa.org/writable/files/mdor_press_release_march_26_2020_002_.pdf [https://perma.cc/LE9X-NAAZ] (stating that Mississippi would not change withholding requirements for businesses with teleworkers during the pandemic); Paul Williams, *Pa. Requiring Out-of-State Teleworkers to Keep Sourcing Income*, LAW360 TAX AUTH. (Nov. 9, 2020), https://www.law360.com/employment-authority/articles/1327360/pa-requiring-out-of-state-teleworkers-to-keep-sourcing-income [https://perma.cc/YD69-YTED] (noting the same for Pennsylvania); *Withholding-tax Guidance for Working Remotely amid Pandemic*, R.I. DEP'T REVENUE DIV. TAX'N 2 (May 26, 2020), https://tax.ri.gov/sites/g/files/xkgbur541/files/Advisory/ADV_2020_22.pdf [https://perma.cc/GT7V-M5UG] (noting that nonresidents teleworking outside Rhode Island due to the pandemic will still earn "Rhode Island-source income" for withholding purposes); *SC Information Letter #20-11*, S.C. DEP'T REVENUE 2 (May 15, 2020), https://dor.sc.gov/resources-site/lawandpolicy/Advisory%20Opinions/IL20-11.pdf [https://perma.cc/A9GA-78KA] (stating that an employee's temporary change in work location will not affect withholding tax requirements). *But see* Kearns & Marmor, *supra* note

The state Pandemic Rules varied from the principles embodied in the convenience rules in certain respects. For example, the Pandemic Rules did not require consideration of the business reasons why an employee was working remotely.[228] Further, the income-sourcing principle was typically based upon the employees' pre-pandemic tax reporting.[229] In general, if an employee routinely telecommuted one out of five days a week prior to the pandemic, the employer would continue to assign eighty percent of the employee's income to the taxing state during the period of the Pandemic Rule.[230] The end result was similar to the application of the convenience rule—a state would be taxing a nonresident telecommuting employee on days spent working from another state.[231] The rationale and the implementing rules were different, however. The Pandemic Rules also applied only to the emergency period of the pandemic, as determined by the implementing states.[232]

Most of the states impose personal income tax, whereas only a minority of cities do.[233] Nonetheless, several cities implemented Pandemic Rules that resembled those of the states during 2020 and 2021—rules that continued to tax employees at the pre-pandemic city location of their employers. These rules served the same administrative purpose as the states' rules: allowing employers to continue to follow the pre-pandemic taxing status quo.[234] In addition to these administrative benefits, the city Pandemic Rules were also intended to

225, at 28 (stating that some of the states applied the rule only to the "inbound" employer requirement and not the "outbound" employee requirement).

[228] *See generally State Guidance Related to COVID-19: Telecommuting Issues*, *supra* note 225 (displaying the rules that applied to businesses in each state during the early period of the pandemic); Kearns & Marmor, *supra* note 225, at 28.

[229] *See generally supra* note 227 and accompanying text.

[230] *See, e.g.*, 830 MASS. CODE REGS. 62.5A.3(3)(b) (providing a similar example).

[231] Kearns, *supra* note 4, at 25 ("This Covid-19 guidance resembles the convenience test because it disregards the physical location of the nonresident teleworker by sourcing wages earned during the pandemic period to the ordinary work location of the nonresident employee.").

[232] The state Pandemic Rules generally ended no later than 2021. *See* Charlie Kearns, Chelsea Marmor & Fahad Mithavayani, *Teleworking Issues—Different Takes for Different States*, 31 J. MULTISTATE TAX'N & INCENTIVES 28, 28 (2021) (providing examples of states that ended their pandemic rules in 2021).

[233] *See U.S. Cities That Levy Income (Earnings) Taxes*, ST. LOUIS, MO. GOV'T, https://www.stlouis-mo.gov/government/departments/comptroller/initiatives/us-cities-that-levy-earnings-taxes.cfm [https://perma.cc/TEL5-36C6] (Oct. 1, 2021) (listing the U.S. cities that impose an income tax applied to earnings).

[234] *See, e.g.*, *Ohio Court Dismisses Challenge to City's Tax Provisions for Remote Workers*, EY TAX NEWS UPDATE (May 5, 2021), https://taxnews.ey.com/news/2021-0912-ohio-court-dismisses-challenge-to-citys-tax-provisions-for-remote-workers [https://perma.cc/7NW3-9VPU] (indicating that the Pandemic Rules implemented by Ohio cities were pursuant to section 29 of the Ohio statute, HB 197, which "was intended to alleviate the administrative burden on Ohio employers of withholding and remitting tax to the municipality where each employee resided and, instead, allow an employer to withhold taxes based on the employee's principal place of work").

enable employer cities to retain tax revenue that otherwise would have been lost.[235]

The Pandemic Rules issued by the State of Massachusetts and several cities in Ohio, as well as by the City of St. Louis, were later challenged by or on behalf of nonresident taxpayers who claimed that they were made to pay unlawful taxes by the states or cities where their employers were located.[236] New Hampshire filed a motion for leave to file a bill of complaint with the U.S. Supreme Court, outlining a grievance against Massachusetts.[237] New Hampshire filed on behalf of its residents who telecommuted for Massachusetts employers and had to continue paying Massachusetts taxes even though they were working in New Hampshire, a state that does not impose personal income tax.[238]

In addition to the New Hampshire action, individuals respectively brought suits against various cities in Ohio and in St. Louis.[239] The complaints in each

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[235] *See* Ben Martin, *Much "A-Due" About Nothing: Ohio Appellate Courts Reject Due Process Challenges to COVID Telework Tax Law*, U. CIN. L. REV. BLOG (Mar. 7, 2022), https://uclawreview.org/2022/03/07/much-a-due-about-nothing-ohio-appellate-courts-reject-due-process-challenges-to-covid-telework-tax-law/#_ftn1 [https://perma.cc/F8JC-LAJ8] (noting that the Ohio law "represented a policy decision . . . to protect the revenue of municipalities that saw the work force that had previously sustained them locked at home, working remotely" and that cities pushed for the law because they were "concerned about the income tax that had previously been derived from commuters traveling from suburbs to work in urban areas"); Raghav Agnihotri & Rachael Chamberlain, *Ohio Tax Talk: One Step Closer to Telework Income Tax Clarity*, LAW360 TAX AUTH. (Nov. 17, 2022), https://www.law360.com/articles/1546607/ohio-tax-talk-one-step-closer-to-telework-income-tax-clarity [https://perma.cc/GCJ5-9RTC] (noting that, "[t]he city of Cleveland, for example, collects more than $400 million a year from its 2.5% income tax and estimates that pre-COVID-19, 85% of that came from commuters who live outside the city"); Jennifer McLoughlin, *Class Action Challenges St. Louis's Denial of Earnings Tax Refunds*, TAX NOTES (Apr. 2, 2021), https://www.taxnotes.com/tax-notes-today-state/litigation-and-appeals/class-action-challenges-st-louiss-denial-earnings-tax-refunds/2021/04/02/4c5y5?highlight=Jennifer%20McLoughlin%2C%20Class%20Action%20Challenges%20St.%20Louis%E2%80%99s%20Denial%20of%20Earnings%20Tax%20Refunds [https://perma.cc/L9KE-KE28] (noting that the position taken by the City of St. Louis was driven by a "looming revenue problem").

[236] *See infra* notes 237–281 and accompanying text (discussing these cases challenging the Pandemic Rules).

[237] Motion for Leave to File Bill of Complaint at 2, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 22O154).

[238] *Id.*

[239] Schaad v. Alder, No. C-210349, 2022 WL 353625, at *1 (Ohio Ct. App.), *appeal allowed by* 188 N.E.3d 184 (Ohio Ct. App. 2022); Curcio v. Hufford, 204 N.E.3d 1107, 1110–11 (Ohio Ct. App. 2022); Buckeye Inst. v. Kilgore, 181 N.E.3d 1272, 1276 (Ohio Ct. App. 2021); Morsy v. Dumas, No. CV-21-946057, at 1–2 (Cuyahoga Cnty., Ohio Ct. Common Pleas Sept. 26, 2022), *sub nom.* Morsy v. Gentile, No. CA-22-112061 (2022); Petition for Damages and Injunctive Relief, for Refund of Taxes Paid but Not Owed, in the Alternative for Violations of Civil Rights, for Class Action Status for Two Classes, and for Declaratory Relief Under Hancock Amendment at 13, 22, Boles v. City of St. Louis, No. 2122-CC00713 (St. Louis Cir. Ct. Apr. 13, 2021) (bringing suit against St. Louis for using a convenience of the employer rule); *see also* Roxanne Bland, *The Pandemic's Tax Fallout Continues*, 104 TAX NOTES STATE 417, 419 (Apr. 25, 2022) (noting that seventeen such lawsuits were filed against Ohio cities).

of these cases resembled the New Hampshire lawsuit—a right of redress sought by teleworkers forced to pay tax to cities where their employers were located when the employees themselves were no longer physically working in these cities.[240] In all of the cases, the claimants alleged violations of the Due Process Clause.[241] In general, the parties claimed that the challenged tax was unconstitutional because the taxing state or city did not confer the requisite protections, benefits, and opportunities with respect to their income.[242] Subsection 1 and Subsection 2 of this Section address, respectively, New Hampshire's challenge to Massachusetts' Pandemic Rule and private lawsuits brought against several cities' Pandemic Rules.

1. *New Hampshire v. Massachusetts*

The New Hampshire action contesting Massachusetts' Pandemic Rule alleged harm on behalf of that state's resident employees who were telecommuting from New Hampshire for Massachusetts employers.[243] The action claimed that the Massachusetts tax violated both the Due Process Clause and Commerce Clause "for similar reasons."[244] Quoting *J.C. Penney Co.*,[245] New Hampshire argued that the Massachusetts Pandemic Rule applied in a context in which there was "no 'fiscal relation to [the] protection, opportunities and benefits given' by Massachusetts."[246] In addition, New Hampshire claimed that the Massachusetts rule directly harmed it because the rule impinged upon the "New Hampshire Advantage."[247] Specifically, New Hampshire claimed that it experienced economic harm because the Massachusetts rule negatively affect-

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[240] *See supra* note 239 and accompanying text (referencing these cases with similar fact patterns).

[241] *See infra* notes 243–246, 256–266 and accompanying text (referencing cases raising due process concerns). A Commerce Clause claim was made in *Morsy*, but no such claim was added in the other cases. *See also infra* notes 267–270 and accompanying text (discussing why this may have been so).

[242] *See infra* notes 243–246, 256–266 and accompanying text (discussing cases in which this argument was made).

[243] *See* Reply Brief in Support of Motion for Leave to File Bill of Complaint at 10, *New Hampshire*, 141 S. Ct. 2848 (No. 22O154) (arguing that "New Hampshire has a quasi-sovereign interest in protecting the 'health and well-being—both physical and economic—of its residents'" (citation omitted)).

[244] *Id.* at 13.

[245] 311 U.S. 435, 444 (1940).

[246] Reply Brief in Support of Motion, *supra* note 243, at 13.

[247] *Id.* at 2–3. The New Hampshire brief does not define the term "New Hampshire Advantage," but it is apparently the State's perceived ability to compete in the market for people, businesses, and economic prosperity resulting from its decision to reject a broad-based personal earned income tax or a general sales tax. *See id.* at 2–5 (providing examples of the New Hampshire Advantage).

ed the State's "ability to recruit new state employees, attract new businesses to the State, or protect the public health."[248]

Massachusetts opposed the New Hampshire action, as did the U.S. Solicitor General, who filed an amicus brief supporting Massachusetts.[249] Both opposition briefs claimed that Massachusetts afforded the requisite economic benefits to the New Hampshire teleworkers. Further, they argued that the Supreme Court's rules permit an employer state to claim source income in the nonresident telecommuter context.[250] The two briefs also took the position that the New Hampshire claim did not invoke the types of interests that would warrant the Supreme Court to exercise its original jurisdiction to adjudicate a lawsuit between two states, and that New Hampshire lacked standing.[251] Without identifying the basis for its decision, the U.S. Supreme Court subsequently denied the New Hampshire motion.[252]

Massachusetts issued the Pandemic Rule through a state regulation promulgated in the early days of the COVID-19 pandemic.[253] That regulation's period

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[248] *Id.* at 5.

[249] *See* Brief for the United States, *supra* note 68, at 1 (expressing the United States' view that the motion should be denied).

[250] *Id.* at 19; *see also* Brief in Opposition to Motion, *supra* note 68, at 14–16.

> The Court has long recognized that states have wide latitude to select different formulas and has consistently refused to mandate any one formula as a matter of constitutional law, under either the dormant Commerce Clause or the Due Process Clause. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278–80 (1978). Massachusetts's approach falls well within this latitude, because it neither causes discriminatory double taxation (or indeed any double taxation), *cf. Wynne*, 135 S. Ct. at 1803–04, nor is unfair or irrational in light of the substantial "protection, opportunities and benefits" provided by Massachusetts to all Massachusetts employees.

Brief in Opposition to Motion, *supra* note 68, at 29–30 (quoting Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 778 (1992)). The U.S. Solicitor General noted that, although "a New Hampshire resident who works from home will rely on New Hampshire services like police and fire protection . . . that resident's work also may continue to depend on and benefit from services provided by Massachusetts." Brief for the United States, *supra* note 68, at 20. The Solicitor General also noted, citing *Moorman*, 437 U.S. 267, the "State's wide latitude in apportioning income." *Id.* at 18.

[251] Brief in Opposition to Motion, *supra* note 68, at 11–12, 25–29; Brief for the United States, *supra* note 68, at 4–6. In addition, both briefs argued that the constitutional harm in question, if any, should be litigated by individual New Hampshire residents in the context of specific facts. Brief in Opposition to Motion, *supra* note 68, at 24–25; Brief for the United States, *supra* note 68, at 4.

[252] Andrea Muse, *SCOTUS Won't Hear New Hampshire Remote Worker Tax Fight*, TAX NOTES (June 29, 2021), https://www.taxnotes.com/tax-notes-today-federal/nonresident-taxation/scotus-wont-hear-new-hampshire-remote-worker-tax-fight/2021/06/29/76pwf [https://perma.cc/M3CB-758X].

[253] 830 MASS. CODE REGS. 62.5A.3 (2020); *see also* Technical Information Release (TIR) 20-15, Geoffrey E. Snyder, Comm'r of Revenue, Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic, MASS. DEP'T REVENUE (Dec. 8, 2020), https://www.mass.gov/technical-information-release/tir-20-15-revised-guidance-on-the-massachusetts-tax-implications-of-an-employee-working-remotely-due-to-the-covid-19-pandemic [https://perma.cc/8W5L-ZAAZ] (providing guidance on how to implement the state regulation).

of application was set to end ninety days after the Governor gave notice that the state of emergency, originally issued on March 10, 2020, was no longer in effect.[254] The Massachusetts Pandemic Rule terminated on September 13, 2021.[255]

2. Cases Challenging City Pandemic Rules

There also were various cases that challenged city Pandemic Rules on constitutional grounds. Four such cases filed in Ohio courts resulted in decisions.[256] In each of those cases, the taxpayers began telecommuting during the pandemic from a city that was different from the city where they worked pre-pandemic. These claimants contended that the continued taxation by the pre-pandemic city violated due process.[257] In three of the four cases, the individuals began telecommuting from another city that was in the same state.[258]

Judges sided in favor of the taxing cities in the three Ohio cases that pertained to nonresidents working within the same state.[259] In the first of these cases, the court concluded that the Due Process Clause "employs a 'flexible' standard focused on whether a taxpayer receives benefits and protections from the taxing government body."[260] That case held that the facts did not violate this standard because "the city . . . does afford to plaintiff not only a place to work but a place to work protected by the municipal government."[261] In the two later Ohio cases, the court ruled for the city in part by relying on the prior case.[262] One of the latter cases was subsequently appealed to the Ohio Supreme Court.[263]

In 2022, in *Morsy v. Dumas*, an Ohio court heard the only state case where the telecommuter physically worked outside Ohio, and applied a due

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[254] *See* 830 MASS. CODE REGS. 62.5A.3(1)(d) (stating the effective dates of the regulation).

[255] *See DOR NEWS—September 2021*, MASS. DEP'T REVENUE (Sept. 2021), https://www.mass.gov/info-details/dor-news-september-2021 [https://perma.cc/4LSW-VXGG] ("After September 13, compensation earned by non-resident employees will be sourced based on where they actually work, regardless of where they worked prior to the COVID emergency.").

[256] *See infra* notes 257–271 and accompanying text (providing the holdings of these four cases).

[257] *See infra* notes 257–271 and accompanying text (discussing the claims in these four cases).

[258] *See* Schaad v. Alder, No. C-210349, 2022 WL 353625, at *1 (Ohio Ct. App.), *appeal allowed by* 188 N.E.3d 184 (Ohio Ct. App. 2022) (capturing the situation where an employee worked in Cincinnati but lived in Blue Ash); Curcio v. Hufford, 204 N.E.3d 1107, 1110 (Ohio Ct. App. 2022) (capturing the situation where an employee lived in Springfield Township but worked in Toledo); Buckeye Inst. v. Kilgore, 181 N.E.3d 1272, 1276 (Ohio Ct. App. 2021) (capturing the situation where the employees' main office was in Columbus, but the employees performed most of their work remotely elsewhere in Ohio).

[259] *See supra* note 258 and accompanying text (noting such decisions).

[260] *Kilgore*, 181 N.E.3d at 1285 (citation omitted).

[261] *Id.* at 1286.

[262] *See Schaad*, 2022 WL 353625, at *4 (relying on *Kilgore*); *Curcio*, 204 N.E.3d at 1115 (same).

[263] *See* Andrea Muse, *Ohio Supreme Court Takes Up Local Tax Challenge*, 104 TAX NOTES STATE 1177, 1177 (June 13, 2022) (noting that the court accepted the case for review in a 4–3 decision).

process standard that focused on whether "the nonresident employee enjoys services and protections offered by the city."[264] The court, however, found for the employee, concluding that the only benefits conferred by the employer were virtual—"[t]he ability of an employee to communicate virtually with her office"—and that this capacity "does not create the fiscal relation required by the case law."[265] The court distinguished the previously-decided Ohio cases on the theory that the plaintiffs in those cases were state residents—a point that logically would not seem to justify a different constitutional analysis.[266]

The Commerce Clause was potentially implicated in *Morsy* because the Commerce Clause pertains to interstate commerce.[267] The taxpayer had argued that the need to pay tax to the Ohio city of her employer as well as the Pennsylvania city in which she resided violated the Commerce Clause.[268] This fact, if true—the Ohio city claimed that the employee was entitled to a tax credit from her resident city[269]—seemingly would differentiate the case from the other Ohio cases. The court's holding, however, did not reference the Commerce Clause.[270] *Morsy* is currently on appeal, but the result in the case may ultimately be determined by the other Ohio case currently pending at the state's supreme court.[271]

The Ohio cases evaluated city taxes imposed under a state statute enacted in March 2020.[272] That statute took effect on passage and applied during the

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[264] No. CV-21-946057, at 5 (Cuyahoga Cnty., Ohio Ct. Common Pleas Sept. 26, 2022) (citing Angell v. City of Toledo, 91 N.E.2d 250 (Ohio 1950)), *sub nom.* Morsy v. Gentile, No. CA-22-112061 (2022).

[265] *Id.* at 6–7. The court stated that "[a]n employee enjoys the protections, opportunities and benefits provided by the taxing authority when they are physically present in the municipality." *Id.* at 6.

[266] *Id.*; *see supra* notes 124–127, 150–154 and accompanying text (noting the constitutional standard that would apply).

[267] *See* U.S. CONST. art. I, § 8, cl. 3 (stating that "Congress shall have Power" to "regulate Commerce . . . among the several States").

[268] *Morsy*, No. CV-21-946057*,* at 4.

[269] *See* Paul Williams, *Wayfair Permits City Tax on Nonresidents, Cleveland Says*, LAW360 TAX AUTH. (Feb. 8, 2022), https://plus.lexis.com/api/permalink/8068c4a2-428f-4ccc-9607-a5374f76a11a/?context=1530671 [https://perma.cc/B7JN-2FJL] (noting that the City of Cleveland claimed that Bluebell, the city where the plaintiff resided, was required to provide residents with a credit against local taxes paid elsewhere).

[270] *See generally Morsy*, No. CV-21-946057, at 6–7 (making no reference to the Commerce Clause in its holding). Also, analysis under the Commerce Clause should not have mattered in any event. *See supra* note 266 and accompanying text; *see also supra* note 137 and accompanying text (noting the potential for double taxation is not determinative when evaluating the constitutionality of a state tax).

[271] *See* Agnihotri & Chamberlain, *supra* note 235 (noting that the City of Cleveland appealed the case and that on November 2, 2022, "Ohio's Eighth District Court of Appeals granted a stay and abeyance, effectively placing a hold on the appeal until the similar case, *Schaad v. Alder*, is decided at the Ohio Supreme Court").

[272] *See Ohio Court Dismisses Challenge to City's Tax Provisions for Remote Workers*, *supra* note 234 (discussing the enactment of the statute).

period of the Ohio Governor's emergency order requiring state employees to work from home and for thirty days thereafter.[273] The Governor subsequently rescinded the order on June 18, 2021.[274] Then, in July 2021, the Ohio legislature acted to limit the application of the statute to 2020, thereby allowing refund claims for 2021.[275]

There also was a lawsuit seeking damages and class action status for several telecommuters challenging the St. Louis Pandemic Rule.[276] Unlike the Pandemic Rules in Massachusetts and Ohio that resulted from state action, the City of St. Louis issued its Pandemic Rule.[277] Previously, only two cities in Missouri, St. Louis and Kansas City, imposed income tax, and both cities issued refunds for taxes withheld on earnings of persons to the extent that those persons were physically working outside the city.[278] Starting in 2020, however, with increased telecommuting because of the pandemic, St. Louis changed its position and refused to provide refunds for telecommuting days, though it continued to issue refunds for travel days.[279] The taxpayers argued that this "completely arbitrary and capricious distinction" violated due process.[280] The Mas-

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[273] *See* Mike DeWine, Governor of Ohio, Declaring a State of Emergency, Exec. Order No. 2020-01D (Mar. 9, 2020), https://governor.ohio.gov/media/executive-orders/executive-order-2020-01-d [https://perma.cc/L8SZ-XPTT] (providing the Ohio Governor's order); *Ohio Court Dismisses Challenge to City's Tax Provisions for Remote Workers*, *supra* note 234 (discussing the Ohio order and its effective date).

[274] Mike DeWine, Governor of Ohio, Rescinding Executive Order 2020-01D and Ending the Declared State of Emergency, Exec. Order No. 2021-08D (June 18, 2021), https://governor.ohio.gov/media/executive-orders/executive-order-2021-08d [https://perma.cc/T68Z-SW56].

[275] Edward I. Rivin, *Ohio Tax Talk: Adjusting to the Latest Telework Tax Rules*, FROST BROWN TODD (July 30, 2021), https://frostbrowntodd.com/ohio-tax-talk-adjusting-to-the-latest-telework-tax-rules/ [https://perma.cc/PGX2-4DNF].

[276] Petition for Damages and Injunctive Relief, *supra* note 239, at 25–28.

[277] Paul Jones, *Fight Over St. Louis Tax on Telecommuting Workers Ramps Up*, TAX NOTES (July 29, 2022), https://www.taxnotes.com/tax-notes-today-state/individual-income-taxation/fight-over-st-louis-tax-telecommuting-workers-ramps/2022/07/29/7dtj9?highlight=Fight%20Over%20St.%20Louis%20Tax%20on%20Telecommuting%20Workers%20Ramps%20Up [https://perma.cc/2CTS-KDK2]; *see also* GREGORY F.X. DALY, OFF. OF COLLECTOR OF REVENUE, STATEMENT REGARDING EMPLOYEE REMOTE WORK 1 (Oct. 7, 2021), https://www.stlouis-mo.gov/government/departments/collector/earnings-tax/documents/upload/Statement-Regarding-Employee-Remote-Work-Final.pdf [https://perma.cc/8KWH-6PF6] (providing the St. Louis Collector of Revenue's coronavirus remote work statement).

[278] *See* Jones, *supra* note 277 (discussing St. Louis's system for taxing telecommuters); *see also* Abraham Gross, *Mo. Court Won't Undo St. Louis Teleworker Tax Refund Rules*, LAW360 TAX AUTH. (Apr. 5, 2021), https://plus.lexis.com/api/permalink/c207d6cb-4530-4562-9aa4-326ecb59a68f/?context=1530671 [https://perma.cc/VC7Z-7NBK] (noting that although St. Louis employers, pre-pandemic, would withhold even with respect to persons telecommuting from outside the city, the city's tax collector would accept claims for a refund where the telecommuter would represent on a form his or her days spent working remotely from home).

[279] *See* Jones, *supra* note 277 (noting this shift).

[280] *Id.* The taxpayers' due process claim stated that "[t]he conduct of Defendants in refusing to pay earnings tax refunds: a. Is an abuse of executive power, b. Is an arbitrary action of government,

sachusetts and Ohio Pandemic Rules terminated in 2021, but the City of St. Louis did not terminate its Pandemic Rule at that time. The state legislature attempted to rescind the rule in 2022, but that effort failed.[281] Consequently, the City continues to impose a rule that resembles a convenience rule.

C. State Resident Income Tax Credits for Taxes Paid to Another Jurisdiction

Review of the recent controversies pertaining to the taxation of nonresident telecommuters makes clear that these disputes frequently depend upon whether the employee's state or city of residence confers a credit to the employee for income taxes paid to the employer jurisdiction. None of these cases referenced the taxpayer receiving a resident credit for the taxes paid to the employer jurisdiction. Further, in *Morsy v. Dumas*, the one case where the taxpayer prevailed, the absence of the credit may have been the basis for the decision because the taxpayer argued that the lack of a credit meant that he was subjected to double tax.[282] Moreover, an amicus brief filed by several states in *New Hampshire v. Massachusetts* suggests that states that pay these credits may, despite their laws requiring such action, also claim to be aggrieved. An understanding of the rules that apply to credits conferred for taxes paid to another jurisdiction helps to explain these issues. This Section explores these credit rules in greater detail, focusing on their application in the state income tax context.

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and c. Shocks the conscience." Petition for Damages and Injunctive Relief, *supra* note 239, at 22. The taxpayers also made a claim under the Equal Protection Clause. *Id.* at 13–14. A later decision ruled against the City on state statutory grounds, avoiding the need to resolve the constitutional claims. Boles v. City of St. Louis, No. 2122-CC00713, at 16–17 (St. Louis Cir. Ct. Jan. 19, 2023). St. Louis has announced its intent to appeal that ruling. Maria Koklanaris, *St. Louis to Appeal on Remote Earnings Tax*, LAW360 TAX AUTH. (Mar. 8, 2023), https://plus.lexis.com/api/permalink/a2e3efd2-70d6-4112-8c5e-288b67c92eda/?context=1530671 [https://perma.cc/X4B3-N4RK].

[281] *See* Paul Jones, *Missouri Bill to Protect Teleworkers from St. Louis Earnings Tax Dies*, TAX NOTES (May 19, 2022), https://www.taxnotes.com/tax-notes-today-state/income/missouri-bill-protect-teleworkers-st-louis-earnings-tax-dies/2022/05/19/7dhkj?highlight=Missouri%20Bill%20to%20Protect%20Teleworkers%20From%20St.%20Louis%20Earnings%20Tax%20Dies [https://perma.cc/M63J-Y5JD] (describing those efforts). The legislation would have applied to tax returns filed on or after January 1, 2022, but also allowed taxpayers to submit refund claims for tax year 2021. *Id.*; *see also* Koklanaris, *supra* note 280 (discussing the legislative background).

[282] *See* No. CV-21-946057, at 6–7 (Cuyahoga Cnty., Ohio Ct. Common Pleas Sept. 26, 2022) (holding that the City of Cleveland and the State of Ohio did not provide a basis for taxing the nonresident in this case), *sub nom.* Morsy v. Gentile, No. CA-22-112061 (2022); *see also supra* notes 256–270 and accompanying text (discussing several cases challenging city Pandemic Rules, and noting that *Morsy*—the one case where a taxpayer claimed to be double taxed—was the only case where the taxpayer prevailed).

Every state that imposes a personal income tax provides a credit to residents for taxes paid to another jurisdiction.[283] The application of those credits, however, is variable.[284] In 2015, in *Comptroller of Treasury of Maryland. v. Wynne*,[285] the U.S. Supreme Court held that if a state taxes residents on one hundred percent of their income and similarly taxes nonresidents on in-state source income, the state must confer a credit to residents for the tax imposed on source income derived from another state.[286] But, there are no other clear constitutional requirements or limitations that apply to states conferring personal income tax credits.[287] Further, *Wynne* only considers the outcome that follows when a state applies its own approach to what constitutes source income, because *Wynne* hypothetically asks what result would follow if every state adopted the taxing methodology of the taxing state.[288] Consequently, *Wynne* does not police actual double taxation, which would necessarily consider the tax structure of a second state, nor does it address the constitutional parameters of source income more generally. The limited constitutional restrictions that apply with respect to personal income tax credits means that, as a practical matter, wage income can be potentially subject to double taxation.[289]

The following Subsections explore the law that applies to states' tax credits. Subsection 1 discusses how state tax credit rules have impacted recent tax cases initiated by nonresident telecommuters.[290] Subsection 2 outlines grievances of states that confer resident credits to in-state telecommuters, as referenced in the Amici Brief filed in *New Hampshire*.[291] Subsection 3 evaluates the

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[283] *See* Jared Walczak, *Do Unto Others: The Case for State Income Tax Reciprocity*, TAX FOUND. (Nov. 16, 2022), https://taxfoundation.org/research/all/state/state-reciprocity-agreements/ [https://perma.cc/DP7Y-QLK9] (indicating that "every state with a wage income tax offers credits for taxes paid to other states, designed to avoid double taxation"); JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 20.10 (3d ed. 1998) (indicating that "every state with a broad-based personal income tax provides a credit for taxes that their residents pay to other states").

[284] *See generally infra* notes 294–296 and accompanying text (noting differences in the operation of state income tax credits).

[285] 575 U.S. 542 (2015).

[286] *Id.* at 564–68.

[287] *See* HELLERSTEIN ET AL., *supra* note 283, at ¶ 20.10 ("Because . . . states generally tax residents on their income from all sources while taxing nonresidents on income from sources within the state, and because the Due Process Clause does not forbid multiple taxation of personal income, taxpayers deriving income from states other than their own are exposed to [potential double taxation].").

[288] *See* 575 U.S. at 545–48, 564–66 (describing the internal consistency test).

[289] *See supra* notes 283–288 and accompanying text (noting the legal rules that lead to this possibility).

[290] *See infra* notes 294–315 (providing examples of how tax credit rules or the lack thereof practically impact nonresident employees more generally).

[291] *See infra* notes 316–333 (outlining the grievances of New Jersey and Connecticut vis-à-vis the New York convenience of the employer rule).

U.S. Supreme Court's analyses in two cases that considered state tax credits.[292] Subsections 4 and 5 address, respectively, recent legislative developments regarding credits conferred to telecommuters, and the treatment of such credits in the context of state reciprocity and reverse credit arrangements.[293]

1. Application in Recent State Cases

The recent state tax controversies concerning the taxation of telecommuter wage income have generally occurred in the mid-Atlantic and northeastern states; however, these rules tend to reflect the credit rules in the states more generally.[294] The states' laws typically confer a resident credit in one of two ways. First, some states confer a resident credit for taxes paid on income that is due to another state, that is, without consideration of the resident state's sourcing rules.[295] Second, other states confer a resident credit for taxes paid on income only if the income is derived from the other state—a requirement to pay alone is insufficient—but make that determination by applying the sourcing rules of the resident state.[296] The former broader credit rules generally dispense with the prospect of double taxation, whereas the latter narrower credit rules more readily allow for that possibility. This is because in the latter cases the resident state's sourcing rules may vary from the employer state's sourcing rules, and may not allow for a credit with respect to taxes that are required to be paid to the employer state.

Zelinsky[297] and *Huckaby*[298] exhibit the primary circumstances in which a nonresident telecommuting employee is likely to oppose a tax imposed by the employer state. These cases arose because the employee-telecommuter was

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[292] *See infra* notes 334–348 (discussing the cases, *Austin v. New Hampshire*, 420 U.S. 565 (1975) and *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976)).

[293] *See infra* notes 349–369 (probing alternative approaches involving either state legislation or state cooperation).

[294] *See* Jones, *supra* note 3 (noting that many of the pandemic rules were issued in mid-Atlantic and Northeast states where there was "a high number of interstate commuters before the pandemic" and "a significant number of such workers engaging in interstate telecommuting during the lockdowns").

[295] *See, e.g.*, 44 R.I. GEN. LAWS § 44-30-18(a) (2023); 280-20 R.I. CODE R. § 20-55-3.5(A)(1)(a) (LexisNexis 2023); N.J. STAT. ANN. § 54A:4-1(a) (West 2023); N.J. ADMIN. CODE § 18:35-4.1 (2023); MASS. GEN. LAWS ch. 62, § 6(a) (2023).

[296] *See, e.g.*, N.Y. TAX LAW § 620(a) (McKinney 2023); CONN. GEN. STAT. § 12-704(a) (2023); CONN. AGENCIES REGS. § 12-704(a)-3 (2023); VT. STAT. ANN. tit. 32, § 5825(a) (2023); ME. STAT. tit. 36, § 5217-A (2023).

[297] 801 N.E.2d 840 (N.Y. 2003).

[298] 829 N.E.2d 276 (N.Y. 2005).

either double taxed, as in *Zelinsky*,[299] or subject to tax when such taxpayer otherwise would not have been taxed, as in *Huckaby*.[300] In neither case was the employee-telecommuter able to invoke a credit in the resident state from which he telecommuted that effectively would have eliminated the tax imposed by the employer state.[301]

In *Zelinsky*, the telecommuting professor chose to work several days each week in his resident state, Connecticut.[302] His employer did not withhold Connecticut taxes, and Connecticut engaged in no enforcement activity.[303] The professor reported income tax to Connecticut for the periods that he was working in Connecticut and claimed that he did not owe tax for those same periods on his New York tax returns. New York disputed the professor's position, resulting in the litigation.[304] The New York Court of Appeals determined that the professor was not entitled to New York relief because New York's convenience rule applied.[305] Connecticut accepted the professor's payment of residence tax and refused to provide a credit.[306] Connecticut's position was that its credit rule applied only if the income at issue was deemed to have a source in the nonresident state. Further, Connecticut did not recognize the income from the services rendered in Connecticut as having a New York source.[307] The professor was subject to double tax because the two states disagreed on which state was the source state of the professor's work-from-home income.

In *Huckaby*, the analysis was more straightforward. The employee telecommuted from Tennessee.[308] Tennessee imposes personal income tax on in-

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[299] 801 N.E.2d at 844, 849; *see supra* notes 172–200 and accompanying text (describing the case where a Connecticut resident's income was taxed by New York due to his employer being located in New York).

[300] 829 N.E.2d at 279; *see supra* notes 201–219 and accompanying text (describing the case where a Tennessee resident's income was taxed by New York due to his employer being located in New York).

[301] *See supra* notes 172–179, 201–207 and accompanying text (noting the facts and legal claims in the two cases).

[302] 801 N.E.2d at 843.

[303] *Id.* at 843–44.

[304] *Id*.

[305] *Id.* at 845–49.

[306] *Id.* at 844, 849.

[307] Brief of the Appellants Edward A. and Doris Zelinsky at 9 n.18, 10 n.19, 12, *Zelinsky*, 801 N.E.2d 840 (No. 03-1177); *see also* CONN. GEN. STAT. § 12-704(a)(1) (2023) (indicating that Connecticut grants a tax credit for "income tax imposed . . . by another state of the United States . . . on income derived from sources therein and which is also subject to tax under this chapter"); CONN. AGENCIES REGS. § 12-704(a)-4(a)(3) (2023) (indicating that Connecticut grants residents a credit for income taxes levied by another state on their "personal services performed in" that state). Connecticut has since changed its rule, and would confer a credit on these facts. *See infra* notes 324–331 and accompanying text (discussing Connecticut's source income rule).

[308] Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 278 (N.Y. 2005).

terest and dividends but not on wage income.[309] Consequently, the employee was subject to personal income tax on his wages only in New York, not Tennessee, and there was no prospect of a state tax credit in Tennessee. In *Huckaby*, therefore, the issue was not the availability of a credit, but whether the Tennessee telecommuter should have been liable for the New York tax.[310]

The lack of a credit in the state from which the nonresident telecommuters worked also explains New Hampshire's claim in *New Hampshire*.[311] The state of Massachusetts, unlike Connecticut, credits taxes paid to another jurisdiction when such taxes are due under the other state's law.[312] Consequently, the Massachusetts Pandemic Rule likely would have had little economic effect for most nonresident employees telecommuting from contiguous states. Those nonresidents who ceased working for their employer in Massachusetts generally would have relocated to another state that imposed personal income tax. In that instance, if the Massachusetts rule did not continue to require tax, these persons likely would have instead paid comparable income tax to that resident state.[313]

The legal action in *New Hampshire* resulted because employees formerly working in Massachusetts who began telecommuting from their resident state,

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[309] *See supra* note 206 and accompanying text (describing Tennessee's approach to taxing personal income).

[310] *See supra* notes 201–210 and accompanying text (explaining the facts and legal claim in the case). It is also possible that a telecommuter-employee working for an employer located in another state would be aggrieved where that person's resident state does provide a tax credit, but the rate of tax of the employer state is higher than that of the employee's resident state because that person could be liable to the employer state for the tax differential. *See* Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, and Iowa in Support of Plaintiff at 7, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 22O154) (illustrating this hypothetical); Edward A. Zelinsky, *Coronavirus, Telecommuting, and the 'Employer Convenience' Rule*, 95 TAX NOTES STATE 1101, 1102 (Mar. 30, 2020) (providing the example of a New Jersey resident working from home for a New York employer who gets a credit from New Jersey for the taxes paid to New York, but pays an additional tax to New York that is not credited by New Jersey because the New York rate of tax is higher than that of New Jersey).

[311] *See* Motion for Leave, *supra* note 237, at 1–5 (explaining New Hampshire's claim as to why its residents were harmed by the Massachusetts Pandemic Rule).

[312] MASS. GEN. LAWS ch. 62, § 6(a) (2023).

[313] *See* Timothy Vermeer & Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2022*, TAX FOUND. (Feb. 15, 2022), https://taxfoundation.org/data/all/state/state-income-tax-rates-2022/ [https://perma.cc/DJ79-2PYX] (providing a chart showing as the personal income tax rate in Massachusetts and its contiguous states: Massachusetts, 5%; Connecticut, 3% to 6.99%; Rhode Island, 3.75% to 5.99%; Vermont, 3.35% to 8.75%; New York, 4% to 10.9%; and Maine, 5.8% to 7.15%); *see also* Kearns, *supra* note 4, at 26–27 (noting that the Massachusetts rule, when applied to an employee telecommuting from a contiguous state with a roughly equivalent personal income tax rate—where the affected employees could avail themselves of a resident credit for the Massachusetts taxes paid—would have had little adverse economic effect). Conversely, the Massachusetts emergency Pandemic Rule stated that Massachusetts residents formerly working in other states but telecommuting for out-of-state employers from Massachusetts during the pandemic would be entitled to a tax credit with respect to taxes that continued to be imposed by those other employer states. 830 MASS. CODE REGS. 62.5A.3(4) (2021).

New Hampshire, were not subject to tax in New Hampshire.[314] Consequently, as in *Huckaby*, these persons were required to pay state tax when they otherwise would not have been required to do so. New Hampshire effectively was bringing suit on behalf of these in-state residents.[315]

2. State Amicus Brief Arguments in *New Hampshire v. Massachusetts*

The claim in *New Hampshire* led four states to file an amicus brief (Amici Brief) that further explicate the tax credit issues.[316] New Jersey and Connecticut, joined by Hawaii and Iowa, filed a pleading that specifically questioned the constitutionality of the New York convenience rule.[317] That claim was largely based on the fact that New York's rule has the effect of causing New Jersey and Connecticut to confer credits to state residents telecommuting on behalf of New York employers.[318] The Amici Brief stated that to mitigate the possibility of double taxation, many states, like the Amici, give tax credits to residents for personal income tax paid to another state.[319] The Amici Brief argued that, therefore, whether a state, like Massachusetts, can tax nonresident telecommuters' income is an issue that potentially affects billions of dollars in tax revenue that would otherwise be received by states, like the Amici, that offer these credits.[320] The Amici Brief noted that prior to the pandemic, a significant number of New Jersey residents worked in New York for New York employers and sometimes telecommuted.[321] New Jersey provided a personal income tax credit for all of the income resulting from this employment taxed by New York, including the income derived from telecommuting that New York taxed under its convenience rule. Further, the dollar amount of even the

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[314] *See generally* Motion for Leave, *supra* note 237, at 1–5 (stating New Hampshire's argument against the Massachusetts Pandemic Rule).

[315] *See supra* notes 243–248 and accompanying text (explaining the New Hampshire suit brought on behalf of its residents).

[316] *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 1 (stating each State's interest in the proceeding).

[317] *Id*. at 3–5, 7–9. Ten other states also filed an amicus brief in support of New Hampshire. Brief of *Amici Curiae* States of Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, and Utah in Support of New Hampshire's Motion for Leave to File Bill of Complaint, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 22O154). That pleading, however, did not make any tax argument, but rather limited itself to the claim that the U.S. Supreme Court is required in all instances to hear and decide original interstate disputes. *Id.* at 5.

[318] *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 3–5, 7–13 (discussing the grievance of the States of New Jersey and Connecticut).

[319] *Id*. at 7–11, 23–24.

[320] *Id*. at 1–3, 8–9, 18.

[321] *See id*. at 10–12 (noting that prior to the pandemic, more than 400,000 residents of New Jersey commuted to jobs in New York City, but that some of the time those persons worked at home).

telecommuter component of this credit was substantial.[322] The Amici Brief stated that because the pandemic had dramatically increased the amount of telecommuting—and New York continued to apply its convenience rule to persons working from home during the pandemic—the amount of this state tax credit would increase significantly.[323]

The practical situation in Connecticut was similar to that in New Jersey.[324] The Amici Brief noted that the Connecticut statute that confers a credit for taxes paid to another jurisdiction applies such credit when the income in question has its source in the other state.[325] Connecticut sources income to the location where employees perform their services.[326] Consequently, the taxpayer in *Zelinsky* did not receive a credit from Connecticut for the taxes he paid to New York for work that he performed in Connecticut for a New York employer.[327] This analysis partially changed in the tax year 2019. In 2019, Connecticut adopted, by statute, a "reverse" convenience rule targeting New York. This statute imposed tax on nonresidents working for a Connecticut employer when those persons telecommute from another state that applies a convenience rule, unless such at-home work was required by the Connecticut employer.[328]

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[322] The Amicus Brief noted that in 2017, New Jersey credited over $2 billon for income taxes paid by residents with respect to wages received from non-resident employers—virtually all of which was credit conferred for taxes paid for work performed for New York employers. *Id.* at 11–12. The Brief also noted that "[b]ased on available estimates, approximately $100 million to $400 million of the credits were for work performed by New Jersey residents at home." *Id*. at 12.

[323] New Jersey estimated that it would credit its residents anywhere from $928.7 million to $1.2 billion for taxes paid to New York based on income these residents earned or were projected to earn while working in their New Jersey homes for the twelve-month period starting in March 2020. *Id.*

[324] *Id.* at 12–13.

[325] *See id.* at 8 (citing CONN. GEN. STAT. § 12-704 (2023)); *see also supra* note 307 and accompanying text (describing Connecticut's tax policy).

[326] *See supra* note 307 and accompanying text (noting the physical presence rule used in Connecticut).

[327] *See supra* notes 306–307 and accompanying text (showing that the plaintiff in *Zelinsky* did not meet the criteria to receive a state tax credit from Connecticut); *see also* RUTE PINHO, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH., 2021-R-0008, CONVENIENCE OF THE EMPLOYER RULE 3 (Jan. 15, 2021), https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0008.pdf [https://perma.cc/V8HK-YDTR] (noting that prior to 2019, "Connecticut residents who worked for a New York employer and owed taxes to New York for income sourced there under New York's convenience rule could not claim a resident credit against their Connecticut income taxes for those taxes paid to New York").

[328] *See* PINHO, *supra* note 327, at 1 ("Since 2019 . . . Connecticut resident taxpayers working for an employer in a state that applies a convenience rule have been able to claim a credit against their Connecticut income taxes for taxes paid to the other state under that rule."); Kearns, *supra* note 4, at 27 (explaining that before Connecticut followed the convenience rule, state teleworkers subject to New York's convenience test could not receive credits for New York taxes under Connecticut law, but "when Connecticut adopted its retaliatory convenience test effective for tax years beginning January 1, 2019, Connecticut residents became entitled to claim a credit for taxes paid to New York State under its convenience test"); *see also* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 5 & n.2 (referencing the Connecticut reverse convenience rule).

Connecticut's adoption of its convenience rule altered, in part, its approach to resident credits. Pursuant to the new law, Connecticut permitted its residents who telecommute from Connecticut for employers located in other states that have a convenience rule to receive a credit for taxes paid to the employer state.[329] This rule—pursuant to which most Connecticut residents telecommuting for New York employers would no longer be double taxed—was an exception to the Connecticut credit rules that apply more generally.[330] For this reason, Connecticut took the position in the Amici Brief that, like New Jersey, it could be required to confer significant tax credits to state residents working at home for New York employers during the pandemic.[331]

The Amici Brief stated that, because of the conferral of resident credits, "[t]he resolution of this case thus has far-reaching implications as to which States will collect billions in revenue during the pandemic—whether the States that unlawfully tax nonresidents working from home or the Home States."[332] The Amici Brief also stated that the tax issue, which was amplified by the pandemic, would continue to have heightened significance post-pandemic, given predictions as to how teleworking would remain a much more common aspect of employment.[333]

3. *Austin v. New Hampshire* and *Pennsylvania v. New Jersey*

The briefs that Massachusetts and the U.S. Solicitor General filed in *New Hampshire* did not address the Amici Brief's claim that state taxes imposed upon nonresident telecommuters by the employer state could violate the Constitution because they cause the telecommuter's resident state to offer a state tax credit.[334] Perhaps this is because the Amici Brief itself noted that states are

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[329] *See supra* note 328 and accompanying text (describing the Connecticut reverse convenience rule); *see also 2019 Form CT-1040: Connecticut Resident Income Tax: Return Instructions*, CONN. DEP'T REVENUE SERVS. 5 (2019), https://portal.ct.gov/-/media/DRS/Forms/2019/Income/CT-1040-Online-Booklet_1219.pdf [https://perma.cc/AD4P-WYVJ] ("Connecticut resident employees working from a remote location who are subject to tax on income earned in a jurisdiction that applies the convenience of the employer test, can claim a credit on their Connecticut income tax return for taxes paid to such jurisdiction.").

[330] CONN. GEN. STAT. § 12-711(b)(2)(C) (2023). *See generally* PINHO, *supra* note 327.

[331] *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 12–13 ("New Jersey is hardly alone in experiencing significant fiscal consequences from the six jurisdictions that directly tax income of nonresidents working from home. Based on 2020 work-from-home rates . . . Connecticut may credit residents anywhere between $339 million and $444.5 million for income taxes . . . paid to New York . . . .").

[332] *Id.* at 13.

[333] *Id.* at 2, 14–17.

[334] *See generally* Brief in Opposition to Motion, *supra* note 68 (revealing no attempt to address the Amici Brief's credit argument); Brief for the United States, *supra* note 68 (same).

not required to confer these credits and only offer these credits to mitigate the risk that their residents will be subject to double taxation.[335]

The U.S. Supreme Court previously addressed claims similar to that raised by New Jersey and Connecticut in the Amici Brief. In 1975, in *Austin v. New Hampshire*,[336] the Supreme Court evaluated a personal income tax instituted by the state of New Hampshire that effectively applied only to nonresidents working within that state.[337] The law only applied to nonresidents who would receive a credit for the income tax paid to New Hampshire from that employee's state of residence.[338] The statutory premise was that such nonresident employees would pay no more in taxes than what they would otherwise pay and therefore would not be economically harmed.[339]

New Hampshire claimed that its statute was constitutional because the affected resident states could have acted under their state laws to deny their credits with respect to the New Hampshire tax, in which case these states would have suffered no economic effects.[340] The Court concluded, however, that "we do not think the possibility that Maine could shield its residents from New Hampshire's tax cures the constitutional defect of the discrimination in that tax."[341] It also stated that "the constitutionality of one State's statutes affecting nonresidents [cannot] depend upon the present configuration of the statutes of another State."[342]

The relevance of *Austin* to the arguments made in the Amici Brief is further made clear by the 1976 U.S. Supreme Court case, *Pennsylvania v. New Jersey*.[343] There, three states that had conferred personal income tax credits for taxes paid under the New Hampshire statute evaluated in *Austin*—Maine, Massachusetts, and Vermont—sought back from New Hampshire the monies conferred in credits on the basis that the New Hampshire law had been held unconstitutional.[344] The Supreme Court refused this request and responded that

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[335] Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 2, 7–12, 18–23.

[336] 420 U.S. 656 (1975).

[337] *Id*. at 657–58. The tax technically applied to New Hampshire residents, as well as nonresidents, but the tax on the state's residents was eliminated through the means of a credit. *Id.* at 658–59. Given this fact, it is ironic that in its later 2020 Supreme Court filing, in *New Hampshire v. Massachusetts*, New Hampshire made the statement that "New Hampshire has never imposed an income tax on its residents." *See* Motion for Leave to File Bill of Complaint, *supra* note 237, at 15.

[338] *Austin*, 420 U.S. at 658–59.

[339] *See id.* at 665–66 (stating that "the argument advanced in favor of the tax is that the ultimate burden it imposes is 'not more onerous in effect' . . . on nonresidents because their total state tax liability is unchanged once the tax credit they receive from their State of residence is taken into account" (citation omitted)).

[340] *Id.*

[341] *Id.* at 666–67.

[342] *Id.* at 668.

[343] 426 U.S. 660 (1976).

[344] *Id.* at 663.

New Hampshire had not inflicted any harm upon these three states.[345] The Court stated that "[t]he injuries to the plaintiffs' fiscs were self-inflicted, resulting from decisions by their respective state legislatures."[346] The Court also noted that "[n]othing required Maine, Massachusetts, and Vermont to extend a tax credit to their residents for income taxes paid to New Hampshire."[347] Similar logic applies to the arguments made by New Jersey and Connecticut in the Amici Brief.[348]

4. Recent Legislative Developments with Respect to Resident Telecommuters

Recent legislative developments in Connecticut and New Jersey suggest that legislative action sometimes addresses issues that arise by reason of the application of tax credits provided to state residents for taxes paid on income to another state. In Connecticut, concerns arose as to whether that state's reverse convenience rule would adequately prevent state residents from being double taxed for telework performed for out-of-state employers while working from Connecticut during the 2020–2021 period of the COVID-19 pandemic.[349] One question was whether the reverse convenience rule allowed a conferral of credit to state residents who telecommuted for an out-of-state New York employer because of the pandemic—as opposed to for those persons' convenience.[350] The pandemic-related outcry from Connecticut residents led Connecticut to enact legislation that conferred an even broader credit to state residents

[345] *Id.* at 664.

[346] *Id.*

[347] *Id.*

[348] *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 11–13 (discussing the legislative determinations in New Jersey and Connecticut to offer credits to residents taxed under the New York convenience rule despite the financial cost).

[349] *See* PINHO, *supra* note 327, at 2 (suggesting that "[t]ax experts have raised the question of whether the days employees work remotely during the pandemic should qualify as convenience days or necessity days in states that apply a convenience rule"); *see also supra* notes 327–331 and accompanying text (discussing the credit conferred pursuant to Connecticut's reverse convenience rule).

[350] *See supra* note 349 and accompanying text (introducing this question).

teleworking for employers based in other states for tax year 2020.[351] Legislative efforts also sought to address tax year 2021, but those later efforts failed.[352]

In *New Hampshire v. Massachusetts*, Massachusetts and the United States argued that disputes concerning the constitutionality of the states' teleworker tax rules were fact-dependent and therefore should be pursued by taxpayers in individual cases.[353] Whether that argument was critical to the Court's determination to deny New Hampshire's motion for leave is, of course, impossible to say. Nevertheless, in the aftermath of the Supreme Court's rejection of certiorari, the New Jersey Governor sponsored a bill that would incentivize New Jersey residents to contest the application of a state convenience rule applied to New Jersey residents.[354] That proposed bill offered a tax credit to any New Jersey resident who succeeded in litigation in contesting such a rule.[355] The New Jersey Governor stated that this proposed bill would "protect [New Jersey] residents from unfair and inordinate taxation" collected by other states.[356]

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[351] *See* Lauren Loricchio, *Connecticut Enacts COVID-19 Remote Work Bill*, TAX NOTES TODAY STATE (Mar. 15, 2021), https://www.taxnotes.com/tax-notes-today-state/individual-income-taxation/connecticut-enacts-covid-19-remote-work-bill/2021/03/15/3k6dz?highlight=Connecticut%20Enacts%20COVID%E2%80%9319%20Remote%20Work%20Bill [https://perma.cc/FND3-N93U] (discussing Connecticut's legislative action); Lauren Loricchio, *Connecticut House Passes Remote Worker Protection Measures*, TAX NOTES TODAY STATE (Feb. 26, 2021), https://www.taxnotes.com/featured-news/connecticut-house-passes-remote-worker-protection-measures/2021/02/25/38w3c [https://perma.cc/UKC7-UR3Z] (discussing the Connecticut bill that was to become law).

[352] *See* Lauren Loricchio, *Connecticut Business Association Calls for Remote Worker Fix in Special Session*, TAX NOTES TODAY STATE (Sept. 23, 2021), https://www.taxnotes.com/tax-notes-today-state/income/connecticut-business-association-calls-remote-worker-fix-special-session/2021/09/23/78c9g [https://perma.cc/8GBV-6SD2] (noting that the legislative effort succeeded for tax year 2020, but that no similar determination was made for tax year 2021).

[353] *See supra* note 251 and accompanying text (presenting Massachusetts' and the United States' arguments that New Hampshire's motion should be denied on this basis).

[354] *See* Paul Williams, *Murphy Unveils Bill to Combat NY's Remote Worker Tax Rule*, LAW360 TAX AUTH. (Sept. 1, 2022), https://plus.lexis.com/api/permalink/6836576a-6a9b-40db-810a-06beb184fdf4/?context=1530671 [https://perma.cc/UC2P-87ZA] (noting the introduction of the bill and its underlying rationale); *see also* Paul Williams, *NJ Committee OKs Bill to Fight NY Remote Worker Tax Rule*, LAW360 TAX AUTH. (Dec. 5, 2022), https://plus.lexis.com/api/permalink/5e48d23c-dfee-4163-957e-d2c4db02b44f/?context=1530671 [https://perma.cc/DUU6-V2XU] (noting the bill's passage by a New Jersey Senate Committee). The general idea was seemingly suggested in the Amici Brief filed in part by New Jersey in the *New Hampshire v. Massachusetts* action. *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 19 (stating that "many taxpayers living in amici States have reduced incentive to file suit [against the convenience state subjecting them to tax] because their Home States accord them a credit in whole or in part").

[355] *NJ Committee OKs Bill to Fight NY Remote Worker Tax Rule*, *supra* note 354. New Jersey residents who obtain a court-ordered refund of taxes paid to another state while working inside New Jersey would receive an income tax credit equal to 50% of the recovered taxes that are allocated to New Jersey. *Id.*

[356] *Id.* The bill also proposed a reverse convenience rule, like that previously enacted by Connecticut, directed at New York residents telecommuting from New York for New Jersey-based employers. *Id.*

5. State Reciprocity Agreements and Reverse Credit Arrangements

In some cases, states have taken non-legislative action to address the legal and administrative tax issues that otherwise would arise when an employee resides in one state but commutes to work in another state or chooses to telecommute for work in that second state from his or her state of residence. Most notably, some states have entered into either reciprocity agreements with one or more other states or entered into arrangements where they would extend a reverse credit to nonresidents working for an employer in that state, or both.[357] These actions generally override the law that would otherwise apply to the extent dictated by the agreement or arrangement.[358] A broad discussion of these situations is outside the scope of this Article.[359] Nevertheless, the rules are worth noting in part because they suggest that the states can act amongst themselves to remedy whatever concerns that they might otherwise have. Further, as in the case of the convenience rule, these rules can result in the assignment of wage income to a different state than the state where the employee physically works.

Nearly a third of the states have entered into reciprocity agreements that apply to one or more other states.[360] Reciprocity agreements generally tax an employee that is a resident in one state but works for an employer in a second state based upon the law of the employee's resident state. The tax of the employee's resident state applies irrespective of the physical location from which the employee works.[361] Consequently, the resident state will tax employees even if they commute to another state to their employer location or if they telecommute for that employer from home in their resident state.[362] In both instances, the result is a potential variation on the result that would occur under either a straightforward physical performance rule or a convenience rule.

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[357] *See* Walczak, *supra* note 283 (discussing these two types of state arrangements); Lorraine E. Cohen et al., *The New Normal of Remote Work and the Impact on State Filing Obligations*, 103 TAX NOTES STATE 7, 9 (Jan. 3, 2022) (explaining the difference between reverse credit and reciprocity state arrangements).

[358] *See* sources referenced *supra* note 357 and accompanying text (explaining and providing examples of these arrangements).

[359] For a more detailed discussion of these rules, see sources referenced *supra* note 357 and accompanying text.

[360] *See* Walczak, *supra* note 283 (showing a chart of the states that have such agreements and the states with which they have them); *see also* Roxanne Bland, *Income Tax Reciprocity Agreements: You Scratch My Back, I'll Scratch Yours*, 93 TAX NOTES STATE 327, 328 (July 22, 2019) (discussing in general what states have such agreements).

[361] *See supra* note 360 and accompanying text (providing information on which states use these agreements).

[362] *See* Bland, *supra* note 360, at 328 (explaining the mechanics of reciprocity agreements).

For example, Pennsylvania, which has a convenience rule, has a reciprocity agreement with New Jersey—one of the amici in *New Hampshire*.[363] Pursuant to that agreement, a Pennsylvania resident working for a New Jersey employer would not be subject to income tax in New Jersey, nor would the employer be required to withhold New Jersey tax.[364] This would be the case whether the Pennsylvania resident traveled to New Jersey for work or worked from home in Pennsylvania. Similarly, a New Jersey resident working for a Pennsylvania employer would not be subject to income tax in Pennsylvania, nor would the employer be required to withhold Pennsylvania tax.[365] Again, this would be the case whether the New Jersey resident traveled to Pennsylvania for work or worked from home in New Jersey. Consequently, in situations governed by the agreement, the Pennsylvania convenience rule would not apply to New Jersey residents telecommuting from New Jersey for Pennsylvania employers, whereas the convenience rule could be implicated if the reciprocity agreement did not apply.[366]

Reverse credit arrangements also operate to potentially shift the otherwise applicable state taxing rules. Under these arrangements, an employer state typically offers nonresident employees a credit for taxes that they would otherwise owe to that state. This situation could arise either because the employees physically worked in the employer's state, or were taxable in that state because they telecommuted for the employer from their resident state and were subject

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[363] *See* Cohen et al., *supra* note 357, at 9 (discussing this agreement); *see also* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 1 (noting New Jersey's participation in the Amici Brief).

[364] *See PA/NJ Reciprocal Income Tax Agreement*, N.J. DIV. TAX'N, https://www.state.nj.us/treasury/taxation/njit25.shtml [https://perma.cc/S5BL-B6J6] (Feb. 27, 2023) (explaining the tax agreement).

[365] Paige Jones, *Pennsylvania House Urges Income Tax Reciprocity with New York*, TAX NOTES (Apr. 12, 2019), https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/pennsylvania-house-urges-income-tax-reciprocity-new-york/2019/04/12/29c9d?highlight=Pennsylvania%20House%20Urges%20Income%20Tax%20Reciprocity%20With%20New%20York [https://perma.cc/G6W6-TW24]. The Pennsylvania legislature has in recent years sought a reciprocity agreement with New York. *Id.* A recent Pennsylvania legislative resolution with respect to this effort noted that approximately 17,500 New York resident commuters pay state income tax to Pennsylvania, in comparison to the 42,400 Pennsylvania resident commuters who pay state income tax to New York. *Id.*; *see* H.R. 104, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019) (providing these statistics). Given the disparity in the two states' tax rates, the agreement would have lowered the percentage of income tax paid by Pennsylvania residents who work in New York, resulting in a net gain for Pennsylvania of $60 million. Jones, *supra*; *see* H.R. 104 (describing Pennsylvania's tax law). This potential loss of revenue is likely one reason why New York did not enter into the agreement. *Cf.* Bland, *supra* note 360, at 328 (noting revenue implications to be a significant consideration when states contemplate reciprocity agreements).

[366] *See* Kearns, *supra* note 4, at 24–25 (noting that Pennsylvania's convenience rule applies only to non-reciprocal states).

to the employer state's convenience-like rule.[367] The result in either instance would be that the employees would only be subject to tax on the credited income in their resident state.

As in the case of reciprocity agreements, reverse credit arrangements can result in a variation on the result that would occur under either a straightforward physical performance rule or a convenience rule. In contrast to the physical performance approach, the employee may be physically working in the employer state but taxed by the resident state. Alternatively, in contrast to the convenience rule, a telecommuting employee may be taxed by his or her resident state, notwithstanding the fact that he or she may be working in that state only for convenience. In either instance, an employee typically will pay tax to the employer state on the two states' rate differential, assuming the employer state has a higher rate of tax; that is, the employer state credit is only conferred to the extent of the tax in the resident state.[368] For example, if the employer state's rate of tax is 8% and the resident state's rate of tax is 6%, the employee would pay a 6% tax to the resident state and a 2% rate of tax to the employer state. Consequently, to the extent of this "differential tax," the application of the reverse credit arrangement could result in the partial application of a convenience rule by the employer state.[369]

III. The Prospect of Federal Legislation

There have been numerous congressional bills that have attempted to address the prospect of double taxation that potentially can result from the states' divergent treatment of nonresident employees.[370] These bills commenced in 2004 and effectively have sought to reverse the decisions of the New York Court of Appeals in *Zelinsky v. Tax Appeals Tribunal*, in 2003,[371] and *Huckaby v. New York State Division of Tax Appeals*, in 2005,[372] by preventing a state from imposing tax on wage income of a nonresident employee received for work physically performed in another state.[373] Congress has not held a hearing

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[367] *See, e.g.*, Walczak, *supra* note 283 (providing, as an example, a reverse credit arrangement in place between Arizona and California); Cohen et al., *supra* note 357, at 9 (providing, as an example, a reverse credit arrangement in place between Oregon and California).

[368] *See* sources referenced *supra* note 367 and accompanying text (noting this type of scenario).

[369] *See* Walczak, *supra* note 283 (providing an example where there would be such a differential tax under a reverse credit arrangement in place between Arizona and California).

[370] *See* Kearns, *supra* note 4, at 27 & nn.34–35 (noting thirteen previously proposed House and Senate bills).

[371] 801 N.E.2d 840, 848 (N.Y. 2003).

[372] 829 N.E.2d 276, 283 (N.Y. 2005).

[373] *See* Zelinsky, *supra* note 39, at 776 ("In the wake of these decisions, legislation has regularly been introduced in Congress to repeal the employer convenience doctrine and similar state laws . . . .").

for any of these bills.[374] Nevertheless, the COVID-19 pandemic resulted in added focus on the state taxation of teleworkers. The remote work that the pandemic fostered remains a more significant component of American life. In particular, telecommuting continues to be a prevalent practice in major urban centers.[375] These circumstances have made rules that would assign income to the location of a telecommuter's employer more consequential.[376] They also have raised questions about whether convenience rules will become more common.[377]

Given the recent developments, there has been a renewed attempt to provoke federal legislation that would prevent the imposition of income tax on employees when they are not working at the location of their employer. In both 2020 and 2021, Congress proposed the Multistate Worker Fairness Act (Fairness Act) to accomplish this result.[378] Consistent with its title, the Fairness Act would impose a "[l]imitation on State taxation of compensation earned by nonresident telecommuters and other multi-State workers."[379] In particular, the Act would limit a state's taxation of nonresident employee compensation to when a nonresident employee is "physically present" in said state for the tax period in question.[380]

There are numerous reasons why enactment of a bill like the Fairness Act would be problematic. Section A of this Part outlines the administrative challenges posed by such a bill, focusing on the draft language.[381] Section B explains how the bill represents poor tax policy, mostly because it would upend longstanding state budgetary considerations and would incentivize tax avoid-

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[374] *See id.* (highlighting that "[a]lthough almost two decades have elapsed since *Zelinsky* and *Huckaby*, this legislation has yet to receive a committee hearing").

[375] *See, e.g.*, Lauren Weber, Peter Grant & Liz Hoffman, *Big Cities Can't Get Workers Back to the Office*, WALL ST. J. (July 7, 2022), https://www.wsj.com/articles/office-remote-work-new-york-11657130765 [https://perma.cc/5YRG-U84U] (noting that various cities, particularly larger cities, are struggling with so many workers remaining at home); Jones, *supra* note 3 (noting that some cities, such as San Francisco and New York, are dealing with the loss of significant tax revenue, including from property and sales taxes, because many employees are choosing to work from home).

[376] *See* Amicus Curiae Brief for States of New Jersey et al., *supra* note 310, at 2, 13–17 (noting expectations that teleworking will persist after the pandemic, such that the telecommuter tax question will remain important).

[377] *See* Kearns, *supra* note 4, at 24, 29 (noting the influence of the pandemic on work practices, and stating that "the circumstances that have led to teleworking may also lead to adoption of the [convenience] test by more states"); Jones, *supra* note 3 (suggesting that "some states might be tempted to consider adopting [convenience] rules as more employees reduce time spent at their traditional work locations and telecommute out of state").

[378] S. 1887, 117th Cong. § 127(a) (2021); H.R. 4267, 117th Cong. § 127(a) (2021); H.R. 7968, 116th Cong. § 127(a) (2020).

[379] *See, e.g.*, S. 1887, § 127.

[380] *Id.* § 127(a).

[381] *See infra* notes 384–398 and accompanying text (addressing the administrative burden that would be created by the proposed bill).

ance.[382] Section C unpacks why this bill would likely violate the constitutional principle of state sovereignty.[383]

A. Administrative Issues

The Fairness Act does not define "physical presence," but the bill does say that:

> [N]o State may deem a nonresident individual to be present in or working in such State on the grounds that—(1) such nonresident individual is present at or *working at home* for convenience, or (2) such nonresident individual's *work at home* or *office at home* fails any convenience of the employer test or any similar test.[384]

This general rule set forth in the Act is plainly ambiguous, as recourse to the experience of the pandemic makes clear. The pandemic highlighted how persons telecommuting from remote locations were not always working from "home," however that term is defined—and the Act offers no definition of that term.[385] Therefore, the bill leaves unclear how less orthodox, but nonetheless common, telecommuter work arrangements are to be addressed.

Allocating wages to a particular location requires a method of allocation to account for an employee moving around, and the Fairness Act purports to

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[382] *See infra* notes 399–415 and accompanying text (noting the policy problems suggested by the proposed bill).

[383] *See infra* notes 416–441 and accompanying text (arguing that the proposed bill would be unconstitutional). The Fairness Act is not to be confused with another oft-proposed congressional bill frequently mentioned in the same breath, the Mobile Workforce State Income Tax Simplification Act. *See, e.g.*, H.R. 429, 117th Cong. § 2 (2021) (proposing a law that would impact employee withholding and tax in a different context); *see also* Benjamin Valdez, *Remote Work State Tax Issues Are Here to Stay, Panelists Warn*, TAX NOTES (Nov. 16, 2021), https://www.taxnotes.com/tax-notes-today-state/employment-taxes/remote-work-state-tax-issues-are-here-stay-panelists-warn/2021/11/16/7clvs [https://perma.cc/4NBN-S2TG] (noting the history of this bill). *But see* Edward A. Zelinsky, *Combining the Mobile Workforce and Telecommuter Tax Acts*, 65 STATE TAX NOTES 319, 319 (July 30, 2012) (arguing the two bills should be viewed as complementary and enacted together). The Mobile Workforce bill purports to address the distinct circumstance where employees who are not teleworkers travel to other states, short-term, for business meetings or training events. *See* Amy Hamilton, *New York Worse Off Without Income Safeguards for Mobile Workers*, TAX NOTES (Jan. 25, 2021), https://www.taxnotes.com/tax-notes-today-state/nonresident-taxation/new-york-worse-without-income-safeguards-mobile-workers/2021/01/25/2l6zx?highlight=amy%20hamilton [https://perma.cc/JR98-ZNXK] (discussing the provisions in the bill and their underlying rationale). The bill would exempt such persons from tax imposed by the state of visitation when the employee's presence in the state does not exceed thirty days. *Id.*; Zelinsky, *supra*, at 320. The Mobile Workforce proposal is seemingly inconsistent with the Fairness Act because the latter bill would limit a state's taxation of a nonresident employee's compensation to situations in which the employee is physically working in the state, and the former bill would preempt states from taxing such employees in these same circumstances.

[384] S. 1887, § 127(b) (emphasis added).

[385] *See generally id.* § 127(d) (offering no definition for the statutory term "home").

address that. There is a section in the Act that seeks to determine the total period for which wages are paid, which is to be used to determine the percentage of time to be allocated to the state where the employee physically works—that location is essentially what would be the denominator in making this calculation.[386] This provision does not define, however, what this specific period is for an individual employee. Rather, the bill attempts to determine what periods of time are *not* included in the allocation.[387] The Act states that "no State may deem a period of time during which a nonresident individual is physically present in another state and performing certain tasks" there to be (1) "not normal work time," (2) "nonworking time," or (3) "time with respect to which no compensation is paid" unless the individual's employer deems the time to meet any of these criteria.[388]

The Act oddly limits itself to a focus on excluded work, as noted, but then does not clearly explain how to determine the "certain tasks" that should be excluded. Employers are typically required to withhold tax on employee wages based on state income tax due, so presumably the task of making the apportionment determination—both as to included and excluded tasks—falls to those employers in the first instance. Nonetheless, the Act does not explain what happens if an employer fails to properly make these determinations or on what grounds such determinations could be questioned. In sum, these observations suggest that the wage allocation provision, a vital component of the rule, is critically flawed. Further, the Fairness Act seems oblivious to the fact that high-level or "key" employees can often effectively dictate the actions of their employer, and therefore could manipulate the bill's time-accounting in the most significant instances. This is because the people in a company who handle withholding and other payroll functions generally report to these higher-paid persons.

The Fairness Act also fails to address obvious questions of how the wage allocation computation would operate in the very instances the Act seeks to address. For one, it is unclear how the law would work if an employee does in fact work on a given day, but from two different locations. Further, it is uncertain how the allocation functions when an employee works a full week and then also on a weekend, but only for an hour or two during that weekend. The difficulty in addressing these fundamental issues was one reason *Zelinsky*[389]

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[386] *See id.* § 127(c) (addressing "Determination of Periods of Time with Respect to Which Compensation Is Paid").

[387] *See id.* (assigning the power to determine what counts as work time to the employer).

[388] *Id.* The language is convoluted, to be sure, but that is a function of the legislative drafting.

[389] 801 N.E.2d 840, 843 (N.Y. 2003).

upheld New York's convenience rule.[390] It is certainly odd that a bill that is intended in part to address the outcome of *Zelinsky* simply ignores one of that decision's primary concerns.

More fundamentally, the Fairness Act is inconsistent with the very logic that drove employer efforts to obtain the states' Pandemic Rules. Those rules continued to allocate wages based on the location of the employer—notwithstanding that the employees were physically working from other locations—on the theory that (1) the employer did not necessarily know where its employees were working, and (2) these employers might be unfamiliar with the tax laws in states where they had not formerly withheld state taxes.[391] The Fairness Act would apparently require these employers to know at which locations and when their employees are working. This knowledge will continue to remain difficult for employers to obtain, at least in certain cases, even after the pandemic.[392] This requirement would enhance the prospect that employers could be subject to liability and penalties for failure to properly withhold.[393] Nor can it be argued that the Fairness Act has the virtue of easing the administrative burden on employees. Importantly, it is the employer that withholds tax for employee wages, and the employee is only required to report income and the resulting tax when filing an annual return. The need to file an annual return and pay the tax that is due would remain the same even if Congress were to enact the Fairness Act.

Regulatory or sub-regulatory rules theoretically could help clarify some of the ambiguities that are latent in the Fairness Act. Such rules, however, have never been forthcoming in any prior instance where Congress has enacted a statute preempting a state tax, and there is no reason to think they would be forthcoming upon passage of the Fairness Act.[394] In those prior cases, unclear

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[390] *Id.* at 845–49; *see also supra* notes 197–200 and accompanying text (noting how difficult it can be to know when telecommuters are working).

[391] *See supra* notes 11–14, 220–227 and accompanying text (discussing the reasons states found it necessary to enact the Pandemic Rules).

[392] *See, e.g.*, Goldberg, *supra* note 17 (noting that, even post-pandemic, "it's been a period of surprises for business leaders—who are sometimes realizing they don't know where their employees are working, even if they know it isn't the office").

[393] *See* Jones, *supra* note 3 ("Employers will also have to deal with additional state and local withholding obligations resulting from employees telecommuting from different jurisdictions. Businesses need to comply with each jurisdiction's withholding rules; failure to do so potentially exposes employers to liability and penalties.").

[394] *Cf.* Brian Hamer, *In the Wake of the MTC's P.L. 86-272 Project*, 105 TAX NOTES STATE 659, 659 (Aug. 8, 2022) (noting the failure of Congress to designate an administrative body to issue guidance with respect to the terms set forth in the state tax preemption statute, Pub. L. No. 86-272 (codified at 15 U.S.C. §§ 381–384)); Andrea Muse, *Litigation on Digital Taxes Raises ITFA Questions, Panel Says*, 106 TAX NOTES STATE 326, 326 (Oct. 24, 2022) (noting that the state tax preemption statute, the Internet Tax Freedom Act, 47 U.S.C. § 151, "is a federal law with no official body in charge of administering it").

statutory language, including undefined terms, has resulted in significant confusion and subsequent litigation, further increasing the cost of the legislation to both taxpayers and the states.[395]

Last, the Fairness Act would define a "state" to include subdivisions of a state, seemingly so that the law would also apply to taxes that a city imposes.[396] It is unlikely, however, that a federal law could dictate how cities impose tax on persons who are located in other cities in that same state—a common fact pattern in the litigated pandemic cases.[397] This is because the Commerce Clause polices commercial practices "among the several States" and this language is the predicate for federal regulation of state taxation.[398]

B. Tax Policy

The prospect of the passage of the Fairness Act raises serious questions about what would necessarily be a significant change in state tax policy. The income of persons who telecommute from their resident state or some other state for an employer based in a second state can be fairly claimed to have its source in that second, employer state.[399] As such, a rigid rule that forecloses an employer state from taxing this wage income in all instances would operate, at least at times, to violate sound tax policy.

Five states impose tax applying a convenience rule.[400] Those states presumably would lose significant revenue upon the enactment of the Fairness Act and would be required to address their budgetary needs some other way.[401]

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[395] Michael T. Fatale, *Federalism and State Business Activity Tax Nexus: Revisiting Public Law 86-272*, 21 VA. TAX REV. 435, 439–40 (2002) (noting Congress's failure to define key terms in the state tax preemption statute, Public Law 86-272, codified at 15 U.S.C. §§ 381–384, an omission that has resulted in significant litigation); Maria Koklanaris, *Digital Taxes to Spark More ITFA Suits, Atty in Md. Case Says*, LAW360 TAX AUTH. (July 12, 2022), https://www.law360.com/tax-authority/articles/1510819/digital-taxes-to-spark-more-itfa-suits-atty-in-md-case-says [https://perma.cc/4VYP-D62S] (noting a projected "wave of lawsuits over whether digital taxing regimes violate the federal [preemption statute, the] Internet Tax Freedom Act").

[396] *See* S. 1887, 117th Cong. § 127(d)(7) (2021) (implying, by the definition of "State," that cities would be subject to these rules as well).

[397] *See supra* notes 239–242, 256–281 and accompanying text (noting cases where nonresident telecommuters pursued tax claims against cities).

[398] *See* U.S. CONST. art. I, § 8, cl. 3 (indicating that "Congress shall have Power" to "regulate Commerce . . . among the several States").

[399] *See supra* notes 64–91 and accompanying text (discussing the case law that supports this proposition).

[400] *See supra* note 158 and accompanying text (listing these states). Several cities follow a convenience rule as well. *See supra* note 158 and accompanying text (listing some such cities).

[401] *See* Robert D. Plattner, *New York's Highest Court Hears Debate in 'Convenience of Employer' Case*, 30 STATE TAX NOTES 285, 285 (Oct. 25, 2002) (noting that even back in the early 2000s, New York's Attorney General claimed that the state revenue collected under that state's convenience rule was substantial).

There is precedent for Congress to preempt a generally-imposed state income tax under certain circumstances—a 1959 law commonly referred to as Public Law 86-272 that preempts the state imposition of a net income tax under specific circumstances.[402] A critical distinction, however, is that Congress passed Public Law 86-272 to prevent states from imposing an income tax in a context where it was presumed that no state previously had been imposing such tax.[403] Therefore, the statute's revenue implications were thought to be minimal.[404] Conversely, the Fairness Act would have immediate negative revenue consequences, at least for the five states with convenience rules.

Passage of the Fairness Act would create state revenue "losers" and "winners." The latter would be those states without a convenience rule, where the primary impact of these laws has been the high volume of income tax credits conferred to in-state residents working for employers in states with a convenience rule.[405] This result would be questionable as a matter of tax policy because the U.S. Supreme Court has said that the revenue loss incurred by states through

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[402] 15 U.S.C. §§ 381–384. Several federal statutes dating back to 1995 or earlier prevent the imposition of a state income tax on a nonresident's wages where that employee works for an interstate carrier that travels through two or more states—a very narrow circumstance where it would be very difficult to determine the source of the income under the states' generic rules that source income to the location where the work is performed. *See* 49 U.S.C. § 11502 (covering railroad employees); *id.* § 14503 (covering motor carrier employees); 46 U.S.C. § 11108(b) (covering merchant mariner employees); *id.* § 11108(a) (covering water carrier employees). There is also a federal statute that was enacted in 1996 that prevents the states from taxing a nonresident on income derived from a qualified pension plan, such as an individual retirement account or an I.R.C. § 457 plan. *See* 4 U.S.C. § 114(a). In that latter case, prior to the enactment of the law, it was "very difficult for a state to determine what portion of a retiree's pension it was entitled to, especially in cases where the retiree worked in several different states." *See House Passes Bill Limiting State Taxation of Pensions*, TAX NOTES (Dec. 28, 1995), https://www.taxnotes.com/tax-notes-today-federal/legislative-and-policy-issues/house-passes-bill-limiting-state-taxation-pensions/1995/12/28/13f4l?highlight=House%20Passes%20Bill%20Limiting%20State%20Taxation%20Of%20Pensions [https://perma.cc/5T5R-GUAU] (capturing the comments of Representative Robert C. (Bobby) Scott, Democrat from Virginia); *see also* Kathleen K. Wright, *The Effects of P.L. 104-95: California and the New Federal Nonresident Pension Rules*, TAX NOTES (Mar. 14, 1996), https://www.taxnotes.com/tax-notes-today-state/state-and-local-taxation/effects-pl-104-95-california-and-new-federal-nonresident-pension-rules/1996/03/14/6zy8?highlight=Kathleen%20wright [https://perma.cc/734N-KM9R] (noting the difficulty in determining what portion of the pension amount would be taxable, and stating that nonresidents generally refused to pay the tax).

[403] *See* H.R. REP. NO. 88-1480, at 422 (1964) (stating that Congress concluded that to the extent the Act "was preserving a pre-existing jurisdictional rule rather than contracting the States' power to tax, it could not result in a material diminution of the States' income tax revenues"). *See generally* Fatale, *supra* note 395, at 484–85 (discussing Congress's rationale when passing the statute).

[404] *See supra* note 403 and accompanying text (discussing Congress's conclusion that the law would not materially affect state revenue).

[405] *See generally supra* notes 316–333 and accompanying text (discussing the arguments made by states conferring such credits as stated in the Amici Brief filed in support of the motion for leave in *New Hampshire v. Massachusetts*).

the conferral of such credits is an injury that has been "self-inflicted."[406] As such, it would seem to be poor tax policy for Congress to align itself with these states in the legal debate.

There also could be other less foreseeable implications of the Fairness Act. As an example, numerous states have addressed the dual-state tax issues raised by resident persons who work for an employer in another state by entering into reciprocity agreements or reverse credit arrangements.[407] Those understandings have the effect, at least in some instances, of assigning wage income to a state where the employee does not physically work.[408] As the Fairness Act does not address these arrangements, the passage of the Act would apparently preempt them, at least in part.[409] Consequently, the revenue implications of the Fairness Act to these states could be significant, as it would be to states applying convenience rules.

Another tax policy problem with the Fairness Act is that it would foster tax avoidance. As noted in *Zelinsky*,[410] one of the virtues of the convenience rule is that it prevents employees from working minimal hours outside the employer state or merely claiming to work outside the employer state to obtain preferential tax treatment from that state.[411] This prospect is a larger concern post-pandemic because there is increased worker mobility.[412] *Zelinsky* expressed concern with what can be described as taxpayer cheating, but tax avoidance can be less nefarious. In the aftermath of the pandemic, many more persons can more simply choose to perform their work from a no-tax or low-tax state—and often for extended periods.[413] Further, the greater breadth of remote work means that it will be more difficult for employers to track the location of their employees and to know if they are in fact working on a particular day.[414]

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[406] *See* Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) (suggesting that the states themselves are responsible for the cost of their credits); *see also supra* notes 343–345 and accompanying text (discussing *Pennsylvania v. New Jersey*).

[407] *See supra* notes 357–369 and accompanying text (noting states that mitigate double taxation concerns through these measures).

[408] *See generally supra* notes 357–369 and accompanying text (discussing the practical application of the reciprocity agreement and reverse credit rules).

[409] *See generally* S. 1887, 117th Cong. § 127 (2021) (providing no special accommodations for reciprocity agreements or reverse credit arrangements).

[410] 801 N.E.2d 840 (N.Y. 2003).

[411] *Id.* at 846 & nn.4–5; *see supra* notes 197–200 and accompanying text (noting this advantage).

[412] *See, e.g.*, Mitchell, *supra* note 3 (noting that post-pandemic, persons are leaving high-cost and high-tax states for those with lower costs and taxes); *see also* David R. Agrawal & Kirk J. Stark, *Will the Remote Work Revolution Undermine Progressive State Income Taxes?*, 42 VA. TAX REV. 47, 54–55 (2022) (suggesting that "remote work has the potential of enabling workers to derive labor income from a high-tax state (i.e., out-of-state employment opportunities) while living in a low-tax state (i.e., working from home)").

[413] *See supra* note 412 and accompanying text (providing examples of this issue).

[414] *See supra* notes 222–223, 392–393 and accompanying text (noting this challenge).

This confluence of factors means that the federal legislation effectively would incentivize state tax avoidance, thus constituting poor tax policy.[415]

C. Violation of State Sovereignty

The U.S. Constitution establishes dual sovereignty in which the state and federal governments constitute separate sovereigns.[416] Moreover, the ability of state governments to determine and administer their own taxes is a fundamental aspect of their separate sovereignty.[417] Under the Commerce Clause, Congress has the power to "regulate Commerce . . . among the several States."[418] Congress has preempted state taxes pursuant to this power.[419] The constitutionality of those enactments, however, is an unanswered question.[420] The nation's con-

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[415] *See, e.g.*, Jenny Gross, *Here's How Moving to Work Remotely Could Affect Your Taxes*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/business/coronavirus-nonresident-state-taxes.html?searchResultPosition=4 [https://perma.cc/7NF4-VB7Q] (noting the claim of one practitioner that after the onset of the pandemic, many of his clients left their residences in New York or California to move to Florida, Texas, Nevada, or Wyoming, i.e., states without any personal income tax, specifically to lower their state taxes); Chip Cutter & Emily Glazer, *Pay Cuts, Taxes, Child Care: What Another Year of Remote Work Will Look Like*, WALL ST. J. (Feb. 28, 2021), https://www.wsj.com/articles/pay-cuts-taxes-child-care-what-another-year-of-remote-work-will-look-like-11614508201 [https://perma.cc/9DLG-APEG] (noting the efforts of Facebook to determine whether persons working in high-tax states, such as New York and California, who claimed to have moved to low-tax states did in fact move); *see also* Holderness, *supra* note 2, at 58 (suggesting that sourcing income to the physical location of the worker, not the location of the employer, is more likely to lead to tax avoidance); Shanske, *supra* note 40, at 953 (stating that if the rule imposing tax on wages is a physical presence rule, "then a software engineer in the greater Boston area who lives in New Hampshire could carefully avoid some physical presence threshold as to Massachusetts, and thus avoid paying personal income tax to the primary jurisdiction enabling the worker to earn a high income").

[416] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1468 (2018) (referencing "the system of 'dual sovereignty' embodied in the Constitution"); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) ("Dual sovereignty is a defining feature of our Nation's constitutional blueprint."); Printz v. United States, 521 U.S. 898, 932 (1997) (referring to "the structural framework of [the country's] dual sovereignty"); *see also Murphy*, 138 S. Ct. at 1477 (indicating that "the Constitution divides authority between federal and state governments for the protection of individuals"); Gregory v. Ashcroft, 501 U.S. 452, 458–59 (1991) (listing some of the advantages "to the people" of the "federalist structure of joint sovereigns").

[417] *See, e.g.*, Arkansas v. Farm Credit Servs. of Cent. Ark., 520 U.S. 821, 826 (1997) (indicating that "[t]he power to tax is basic to the power of the State to exist" and that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation"); Dep't of Revenue of Or. v. ACF Indus., Inc., 510 U.S. 332, 345 (1994) (indicating that the power to tax is "central to state sovereignty"); Bode v. Barrett, 344 U.S. 583, 585 (1953) (suggesting that "[t]he power of a state to tax" is "basic to its sovereignty"); Curry v. McCanless, 307 U.S. 357, 366 (1939) (stating that the state power to tax is "incident of" and "co-extensive with" sovereignty); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199 (1824) (indicating that "[t]he power of taxation is indispensable to [the States'] existence").

[418] U.S. CONST. art. I, § 8, cl. 3.

[419] Fatale, *supra* note 129, at 42–43.

[420] *See id.* at 50–56 (noting the lack of clarity on the constitutionality question); *see also* Rick Handel, *Reflections on the Constitutionality of Public Law 86-272*, 97 TAX NOTES STATE 695, 695

stitutional design makes it clear that there must be limits upon Congress's ability to preempt state taxes.[421] Those limits, however, have yet to be determined.[422]

Importantly, the Supreme Court's understanding of congressional power under the Commerce Clause has shifted over time. The Court once considered Congress to have nearly limitless power under that Clause, but no longer adheres to that view.[423] Under the Court's current constitutional doctrine, Congress is limited to acting under its enumerated powers, and all other legislative power is reserved to the States.[424] Although Congress has specific power under the Commerce Clause to regulate commerce among the states, that power extends only to the regulation of private actors, not states themselves.[425] Conversely, Congress apparently does have broad power under the Commerce Clause to preempt state taxes that discriminate against interstate commerce.[426] This is because the original intent of the Commerce Clause was to prevent the

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(Aug. 17, 2020) (discussing the arguments for and against the constitutionality of Public Law 86-272); David Gamage & Darien Shanske, *The Federal Government's Power to Restrict State Taxation*, 81 STATE TAX NOTES 547, 547 (Aug. 15, 2016) (noting the lack of guidance on the question and theorizing what the constitutional limitations should be). The Supreme Court's recent decision in *Murphy* in 2018 has reinvigorated this question. *See, e.g.*, Daniel Hemel, *Justice Alito, State Tax Hero?*, MEDIUM (May 15, 2018), https://medium.com/whatever-source-derived/justice-alito-state-tax-hero-333830d097ab [https://perma.cc/UPF5-XWEH] (discussing the unexpected potential effect upon state tax law); Daniel Hemel, *More on* Murphy*—and a Response to Critics*, MEDIUM (May 17, 2018), https://medium.com/whatever-source-derived/more-on-murphy-and-a-response-to-critics-471b35c75ecb [https://perma.cc/TV2H-ZUPE] (same).

[421] *See supra* notes 416–417 and accompanying text (noting the Constitution's dual sovereignty principle and the fact that the right of taxation is a core component of this sovereignty).

[422] *See supra* note 420 and accompanying text (revealing a lack of guidance on where that limitation actually starts); *see also* Darien Shanske, *Proportionality as Hidden (but Emerging?) Touchstone of American Federalism: Reflections on the* Wayfair *Decision*, 22 CHAP. L. REV. 73, 83 (2019) ("Of course, the national government must be able to exert some control over state taxing power, but that control cannot go too far, or it would undermine the ability of the states to operate as sovereigns.").

[423] *See* United States v. Lopez, 514 U.S. 549, 552–59 (1995) (explaining this history); *see also* Fatale, *supra* note 395, at 451–65 (reviewing the history). *But see* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978) (stating in dicta that "[i]t is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income").

[424] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2019) ("The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms."); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[425] *Murphy*, 138 S. Ct. at 1481. This is because, given the nation's dual sovereignty, Congress cannot simply command the states to support that body's legislative preferences. *Id.* at 1475–78, 1481.

[426] *See* Fatale, *supra* note 129, at 45–49, 52–67 (discussing the intent to proscribe such discrimination as embodied in the Commerce Clause).

states from engaging in such discrimination.[427]Preemptions that exceed that generally recognized power, however, are at least questionable.[428] Further, as has been noted, the states' convenience rules do not discriminate against interstate commerce.[429]

Recourse to Supreme Court cases decided under the dormant Commerce Clause suggests some additional power that Congress may possess to limit state taxes pursuant to that Clause. Those dormant Commerce Clause cases infer that Congress may have the ability to alleviate state tax burdens imposed upon interstate commerce in at least certain instances.[430] In 2018, in *South Dakota v. Wayfair, Inc.*, the Supreme Court suggested that the states' sales and use tax collection duties, imposed on small out-of-state Internet vendors, could sometimes impose an undue burden on interstate commerce.[431] The Court made this suggestion by way of analogy to a prior decision pertaining to a non-tax state regulation.[432] The parameters of the undue burden notion referenced in *Wayfair*, however, even in the state sales and use tax collection context, are unclear.[433] Further, the prior case relied upon in *Wayfair* struck down a state administrative rule in a circumstance in which the Court determined that the state burdens imposed upon interstate commerce exceeded the legitimate but not

[427] *See id.* at 52–55 (noting the original interpretation of the Commerce Clause at drafting); *see also* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093–94 (2018) ("The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units."); *supra* notes 128–129 and accompanying text (discussing case law in which this concern has been considered).

[428] *See* Fatale, *supra* note 129, at 45–49, 52–67 (raising constitutional concerns about Congress limiting state tax power beyond situations that reveal discrimination); *supra* notes 394–395 and accompanying text (referencing statutes that raise this concern).

[429] *See supra* notes 128–149 and accompanying text (evaluating cases for the conclusion that the states' convenience rules do not implicate a discrimination concern).

[430] *See, e.g.*, MeadWestvaco Corp. *ex rel.* Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008) ("The 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.").

[431] *Wayfair*, 138 S. Ct. at 2090–91 ("This Court's doctrine has developed further with time. Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce."); *id.* at 2098 (suggesting that "the daunting complexity and business-development obstacles of nationwide sales tax collection" will result in burdens that "may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States"); *see* Michael T. Fatale, Wayfair*, What's Fair, and Undue Burden*, 22 CHAP. L. REV. 19, 51 & n.263 (2019) (suggesting that only smaller, remote sellers could actually bring such a claim).

[432] *See Wayfair*, 138 S. Ct. at 2099 *(*citing Pike v. Bruce Church, Inc.*,* 397 U.S. 137 (1970)).

[433] *See* Fatale, *supra* note 431, at 46–53 (discussing the Court's undue burden analysis in the *Wayfair* case).

"compelling" interest that the state had in enforcing its rule.[434] No similar argument can be made with respect to congressional action that would preempt state convenience rules or similar rules. Convenience rules are not necessarily burdensome on interstate commerce.[435] Further, any congressional act preempting such rules would impact compelling state interests, as the law potentially would have significant state tax revenue implications.[436]

It is also relevant that congressional acts that have preempted state taxes are generally not repealed or even revisited.[437] This practical fact further increases the costs of such laws to the states, as over time the commercial or legal landscape that such laws seek to address may change, causing them to cease to function as intended.[438] Similarly, because times change but laws remain static, these laws may later operate to prevent the states from acting as sovereign entities in unanticipated ways. As an obvious example, if the Fairness Act had been enacted prior to the pandemic, states would have been foreclosed from issuing the Pandemic Rules in 2020. It is worth emphasizing how employers and tax practitioners alike requested those rules.[439]

Whatever power Congress may have to restrict a non-discriminatory state tax based on the theory that the tax is otherwise burdensome to interstate commerce necessarily would have to be limited. This is because compliance with a state tax—with any tax—is intrinsically burdensome. Further, taxation is a core

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[434] *Pike*, 397 U.S. at 146 (stating that the "regulatory scheme [at issue] could perhaps be tolerated if a more compelling state interest were involved," but that, on the facts, "the State's interest [was] minimal at best—certainly less substantial than a State's interest in securing employment for its people").

[435] *See supra* notes 391–393 and accompanying text (analyzing the burden imposed by the convenience rules).

[436] *See supra* notes 400–404 and accompanying text (discussing the tax revenue concerns with preempting these rules).

[437] *See, e.g.*, Fatale, *supra* note 129, at 79–81 (noting that Public Law 86-272, codified at 15 U.S.C. §§ 381–385, though specifically described in the Senate Report that accompanied the Act as "temporary," has not been repealed, and has not even been reconsidered). As Professor Brian Galle has noted:

> In short, federalism theory predicts that congressional control of state taxation will tend to follow a relatively narrow pattern. Most of the time, what will enable Congress to overcome its institutional inertia is interest group pressure, particularly pressure to grant state tax cuts. Issues of widespread budget concern to many states and many actors will rarely motivate Congress. Similarly, if there are potent concentrated interests on both sides of potential legislation, a stalemate seems likely.

Brian Galle, Essay, *Kill* Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation*, 70 STAN. L. REV. ONLINE 158, 162 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/03/70-Stan.-L.-Rev.-Online-158-Galle.pdf [https://perma.cc/KL3K-EWLG].

[438] *Cf.* Fatale, *supra* note 129, at 82–83 (discussing the application of Pub. L. No. 86-272, codified at 15 U.S.C. §§ 381–385); Fatale, *supra* note 395, at 438–40 (similar).

[439] *See supra* notes 11–14, 220–227 and accompanying text (noting the history resulting in the Pandemic Rules).

aspect of governmental sovereignty, and if Congress has the power to restrict a state tax merely on the theory that the tax is burdensome, then Congress would have the power to effectively abolish all forms of state tax—a prospect that is inconsistent with the U.S. Constitution.[440] As the Supreme Court consistently has noted when evaluating the Commerce Clause, administrative inconvenience is not a basis for relieving multistate taxpayers from their fair share of the states' taxing burden, but rather, "interstate commerce may be made to pay its way."[441]

CONCLUSION

The COVID-19 pandemic increased the significance of remote work and raised questions about the rules that govern the states' taxation of nonresident employees telecommuting on behalf of an in-state employer from another state. The Due Process and Commerce Clauses generally permit the state in which an employer is located to tax employees who telecommute from another state on the theory that the income paid to such employees can appropriately be claimed to have its source in the employer state.[442] This taxation meets the constitutional standards primarily because the employer state provides opportunities, benefits, and protections to the employer—and the employee—relating to the income.[443]

Most states that impose an income tax on wages assign a telecommuter's income to the state where that employee physically works, even if that employee works in a different state than that of his or her employer.[444] A handful of states, however, apply an approach, generally known as the convenience of the employer rule, that imposes tax based upon the location of the employer unless the employer requires the employee to telecommute from the second state.[445] In some cases, the respective states of the employer and employee may apply different taxation methodology, resulting in the possibility that the employee could be subject to double tax.[446] State tax credits conferred for tax-

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[440] *See* Michael J. McIntyre, *Thoughts on the Future of the State Corporate Income Tax*, 25 STATE TAX NOTES 931, 942 (Sept. 23, 2002) (concluding that the states' personal income taxes and sales taxes could seemingly be abolished under a constitutional test that allows for the preemption of a state tax on the basis that the tax affects interstate commerce, and that the states' property taxes could possibly be abolished as well).

[441] *See, e.g.*, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 n.15 (1977) (suggesting that "administrative convenience, in this instance, is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way'").

[442] *See generally supra* Part I (discussing the applicable Due Process and Commerce Clause rules).

[443] *See generally supra* notes 64–70 and accompanying text (discussing this standard and applying it to nonresident teleworkers).

[444] *See supra* notes 116–118 and accompanying text (describing the physical location rule).

[445] *See supra* notes 158–170 and accompanying text (describing the convenience of the employer rule).

[446] *See supra* notes 122, 283–289 and accompanying text (providing examples of this situation).

es paid by a resident employee to another state, however, typically ameliorate this concern, as do state reciprocity agreements and reverse credit arrangements.[447] Further, the fact that the imposition of a convenience rule results in double tax will not generally raise constitutional concerns because the U.S. Constitution does not play favorites between two reasonable state tax apportionment methods.[448] This is true even where one methodology has a shorter historic pedigree or is significantly less prevalent.[449]

The U.S. Supreme Court has effectively adopted an approach that encourages taxpayers and states to act among themselves to resolve questions as to the proper taxing method to apply to nonresident employee wages. Although the rise of telecommuting stemming from the pandemic has changed the circumstances surrounding state taxation, the essence of the legal analysis remains the same. States can continue to avoid subjecting their resident employees who telecommute for out-of-state employers to double tax by offering these residents a credit for the taxes paid to the other state.[450] Alternatively, the two states could choose to enter into a reciprocity agreement or reverse credit arrangement that addresses which state will receive the tax and under what circumstances.[451]

More generally, states that pursue taxing policies that result in nonresident employees paying higher taxes than they would if they worked for an employer in their resident state run the risk that those employees may choose to seek employment in their resident state.[452] States with a large number of resi-

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[447] *See supra* notes 316–330, 357–369 and accompanying text (discussing these different approaches to mitigate this problem).

[448] *See supra* notes 103–114, 148–149 and accompanying text (noting that the Constitution does not have a preference toward tax systems); *see also* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 390 (2023) ("Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" (citation omitted)).

[449] *See generally supra* notes 135–136 and accompanying text.

[450] *See generally supra* notes 283–289, 316–333 and accompanying text (explaining the issues pertaining to such credits).

[451] *See supra* notes 357–369 and accompanying text (discussing these potential approaches).

[452] *The Future of Tax Policy for Remote Workers*, TAX NOTES TALK (May 6, 2022), https://www.taxnotes.com/tax-notes-talk/podcast/future-tax-policy-remote-workers/7dgfl [https://perma.cc/T5ZX-UYLU] ("If you're in a state that has a convenience rule, like New York, it may be hard to hire someone. . . . That employee's not going to want to take the job if it's going to mean eight percent of income tax on their compensation."); Roin, *supra* note 115, at 683 (noting that a state might refrain from the use of a convenience rule if it concluded that such a rule would provoke employees to abandon their in-state employers). Perhaps for similar reasons, Arkansas eliminated its convenience of the employer rule during the pandemic. *See supra* notes 159–161 and accompanying text (discussing Arkansas repealing its convenience rule); *cf.* Roin, *supra* note 115, at 673, 679–80 (noting that taxpayers who permit themselves to be subject to multiple taxation may do so because, notwithstanding the double tax, they perceive themselves to be better off in that circumstance, as they could always seemingly avoid the tax by changing jobs, moving to a new home, or choosing to work at the employ-

dent telecommuters working from home could pursue policies that enhance their job markets to accelerate this outcome.[453] Further, employers in states where many employees no longer physically work could demand a change in that state's tax policy to ensure better long-term retention of their employees.[454] Major U.S. cities that impose income taxes face these same questions, but the similar legal analysis means that the resolution should also depend upon local considerations.[455]

The post-pandemic policy questions raised by the income taxation of employees who telecommute between two states are varied and complicated. They even potentially intersect with other legal and policy questions that are not income-tax-specific.[456] Nevertheless, the employee tax questions are not ones that raise jurisdictional issues that will be, or should be, resolved by the Supreme Court. Additionally, they are not questions that can be "solved" by an act of Congress. Congress has recently proposed bills that would require states to impose tax on wage income in the state in which the employee physically performs this work.[457] If such a proposal were enacted, however, it would merely create a whole host of new legal and administrative problems and questions—and would violate fundamental principles of tax policy, in part by in-

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er's office); Karen Hube, *Remote Workers Still Face Confusing Tax Rules*, BARRON'S (Apr. 8, 2023), https://www.barrons.com/articles/remote-workers-state-tax-rules-e9840c6e [https://perma.cc/RGX3-Q2M2] (noting the instance of an individual who willfully subjected himself to tax imposed by two states, revealing that "[n]ot every decision is dollar driven" and that some such decisions are "based on lifestyle").

[453] *See* Elise Young & Donna Borak, *NJ Aims to Lure Back NYC Commuters with Hybrid Work Tax Breaks*, BLOOMBERG (Jan. 10, 2023), https://www.bloomberg.com/news/articles/2023-01-10/nj-aims-to-lure-nyc-commuters-back-with-hybrid-work-tax-breaks#xj4y7vzkg [https://perma.cc/NJF7-EZW5] (noting comments of the New Jersey Governor, acknowledging that "working remotely is here to stay" and, for this reason, announcing a grant program to incentivize New York businesses to open New Jersey offices).

[454] *See supra* note 452 and accompanying text (suggesting that citizens of different states could demand different political solutions that could impact the behavior of their employers).

[455] *See* Erin Adele Scharff & Darien Shanske, *The Surprisingly Strong Case for Local Income Taxes in the Era of Increased Remote Work*, 74 HASTINGS L.J. 823, 854–55 (2023) (arguing that remote work endangers local taxes); Billy Hamilton, *The Demise of Downtown Has Been Greatly Exaggerated*, 108 TAX NOTES STATE 153, 154 (Apr. 10, 2023) (noting the lack of downtown workers hurting local tax revenue); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938) (noting the Supreme Court's reluctance to strike down economic legislation on due process grounds because a government's "political processes . . . can ordinarily be expected to bring about repeal of" such legislation if it is "undesirable").

[456] *See supra* note 375 and accompanying text (noting some of these concerns faced by states and cities as a result of telecommuting); *see also* Scharff & Shanske, *supra* note 455, at 856–58, 856 n.173 (noting, as an example, that cities that lose workers may become more attractive to persons who dislike congestion, and posing the following question: "[i]f the sales tax base is in decline and a city needs the revenue to sustain itself as an attractive place to live and work, should it raise sales tax rates or impose a small local income tax?").

[457] *See supra* notes 378–380 and accompanying text (describing this proposal).

centivizing tax avoidance.[458] Further, such a congressional act likely would be unconstitutional, as it would represent a substantial and seemingly unjustifiable intrusion upon state sovereignty.[459]

The pandemic has undoubtedly raised a new set of legal and policy questions pertaining to the state taxation of nonresident telecommuter wage income, but the best way to address those questions is through the tax rules that existed pre-pandemic.

[458] *See supra* notes 384–415 and accompanying text (critiquing this proposal).

[459] *See supra* notes 416–441 and accompanying text (arguing that the proposed law would violate state sovereignty).