Taxed from Home: How Post-Pandemic Remote Work Magnifies the Constitutional Issues with Taxing Telecommuters

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INTRODUCTION

Source state telecommuter tax laws—such as the one passed by Massachusetts during the pandemic and the "convenience of the employer" rule in New York—are unconstitutional. They violate the dormant Commerce Clause, Due Process Clause, and the Privileges and Immunities Clause. Congress should pass legislation protecting telecommuters from such unconstitutional taxation.

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Some definitions are in order. This paper focuses on telecommuters, not mobile workers. Telecommuters (or teleworkers or remote workers) are those "who work[] for an employer in a state they do not live in and lack[] physical presence but earn[] income from their employer in that state."[1] The residence state refers to the state where the telecommuter claims residence and has a physical presence. The source state is the state where the telecommuter's employer is located—the telecommuter would have a physical presence in this state were they to commute and work in person. When discussing telecommuter tax laws, this paper refers to a tax law enacted by a source state taxing the income of a telecommuter who works from another state (their residence state).

This paper begins by examining an example so the reader can understand the issue at hand. Next, it discusses the tax from the example: the Massachusetts telecommuter tax. It analyzes the constitutional challenges of this tax before proceeding to a similar tax commonly referred to as the "convenience of the employer" rule, such as the one instated in New York. Again, the paper examines the constitutional challenges to this tax. Finally, the paper concludes with a proposed solution for the constitutional issues raised throughout.

I. EXAMPLE OF PANDEMIC TELECOMMUTER TAX

Consider taxpayer Jill. In 2019, she took a job as a social media manager for a Massachusetts-based company. For the first year of her job, Jill lived in Massachusetts and worked in the office. When she filed her 2019 tax return, she filed as a Massachusetts resident and paid income tax to Massachusetts.

However, in March 2020, Jill received an email from her employer. Due to the pandemic, Jill was told to work from home for the next two weeks. Jill's lease was up, and she wanted to live somewhere new. On March 10, 2020—while abiding by relevant COVID-19 safety precautions—Jill moved out of her Massachusetts apartment and began living and working from a home she purchased in New Hampshire. It quickly became clear that the pandemic would not resolve within two weeks, and Jill's employer suspended the return-to-office date indefinitely. While the adjustment to working remotely was initially difficult, Jill eventually found she could manage her employer's social media presence successfully while working remotely. When her employer reopened the office in October 2020 with the option to continue working remotely, Jill opted to stay remote and work from her new home in New Hampshire.

During the pandemic, Massachusetts passed a law taxing the income of employees of Massachusetts-based businesses who worked remotely out of state.[2] Thus, when Jill filed her 2020 tax return, she paid Massachusetts income tax on 100% of the income she earned in 2020. This was frustrating for Jill as she had looked forward to moving to New Hampshire because it is a state without an

1. Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. DAVIS L. REV. 1149, 1164 (2021).
2. 830 MASS. CODE REGS. § 62.5A.3 (2020).

income tax.[3] As a New Hampshire homeowner, Jill paid property taxes at a higher rate than the national average—something she anticipated would be offset by not incurring an income tax.[4] Instead, Jill found herself facing Massachusetts income tax rates and New Hampshire property tax rates.

While her office remained in Massachusetts, Jill had no contact with the office for 75% of the year. She personally was not relying on the office's presence in Massachusetts. In contrast, Jill did rely on New Hampshire. One day, while working, Jill had her laptop plugged into a faulty surge protector. The outlet sparked and caused a small fire, which Jill quickly extinguished. However, as an extra layer of caution, she called the fire department and had them come take a look. The fire caused an issue with her fuse box, and Jill called her county electric company to come and resolve the issue. Feeling shaken by the experience, Jill worked from her local library for a few days following the fire. Because she was working in New Hampshire, Jill relied on services her state and local government provided, which she gladly supported by paying her property taxes. However, Jill received no benefit from paying income tax to Massachusetts.

II. MASSACHUSETTS NON-RESIDENT TELECOMMUTER TAX

On April 21, 2020, Massachusetts passed 830 CMR 62.5A.3 (hereafter "the Massachusetts telecommuter tax" or "the Massachusetts tax"), a regulation taxing the income of nonresidents who began telecommuting due to the pandemic.[5] The tax applied retroactively to "employee services performed commencing March 10, 2020" and was set to remain in effect until "90 days after the date on which the Governor of the Commonwealth gives notice that the COVID-19 state of emergency is no longer in effect."[6] The language of the regulation states the tax applies to telecommuting resulting from "pandemic-related circumstances," which includes "any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which 830 CMR 62.5A.3 is in effect."[7] This broad definition covered any instance where an employee would work remotely following the start of the pandemic, such as Jill from the example above.[8]

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3. *Taxes in New Hampshire*, TAX FOUND., https://taxfoundation.org/location/new-hampshire/#library [https://perma.cc/Q732-6D9Y].

4. Single-family homeowners in New Hampshire on average pay the fourth-highest amount of property tax in the country. Jeff Feingold, *Report: New Hampshire Had 7th-Highest Effective Tax Rate in '21*, N.H. BUS. REV., May 6, 2022, at 4.

5. 830 MASS. CODE REGS. § 62.5A.3 (2019).

6. *Id.*

7. *Id.*

8. This could apply to Jill's situation, which is arguably a pandemic-related circumstance. It could also apply to a situation where a Massachusetts employer has a long-standing option for employees to work remotely. Employee A never took advantage of the remote-work option, but in October of 2019, A planned to start working remotely on March 15, 2020, to be near family in another state. Though A's

The motivation behind the Massachusetts law is clear: in order to maintain the pre-pandemic budget for public services, Massachusetts needed to maintain the pre-pandemic revenue streams. This law is justified by the rationale that Massachusetts was still the source state of the income—the employer company resides in Massachusetts and relies on relevant Massachusetts public services. Further, Massachusetts had a legitimate public policy rationale for the telecommuter tax. Following the COVID-19 recession, states with income taxes fared better than those without, emphasizing the important role income taxation played in balancing state budgets.[9] To minimize the pandemic's negative impact on the state budget, Massachusetts was incentivized to maintain income tax revenue as much as possible.

There is precedent for source states levying income taxes. *Shaffer v. Carter* states, "[J]ust as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may . . . levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or business within the State, or their occupations carried on therein."[10] Generally, however, a source state only imposes an income tax on the nonresident's income resulting from work performed while the nonresident was physically in the source state.[11] The privilege of taxing an individual on the entirety of their income, regardless of source, is reserved for residence states.[12] The source state's taxation powers over nonresidents are limited by the Constitution, but "[a] state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."[13] Massachusetts can argue it grounded the telecommuter tax in the opportunities it offered to the Massachusetts-based employers. Viewed from this perspective, Massachusetts's telecommuter tax seems reasonable.

However, such a cursory analysis ignores the burden the Massachusetts tax places on either the telecommuter, the residence state, or both. As discussed above, residence states have the right to tax a resident's whole income regardless of where the income was earned. Tax credits for income earned out-of-state will be discussed later, but in the case of a telecommuter, the income is not earned out-of-state. The telecommuter was physically present in the residence state while earning their income. If a residence state has the right to tax income earned

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decision to work remotely was not triggered by the pandemic, this still falls under the regulation's definition of a pandemic-related circumstance because of the timing.

9. 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, 825 (2023).

10. Shaffer v. Carter, 252 U.S. 37, 52 (1920).

11. Kim, *supra* note 1, at 1152.

12. New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937) (holding that residency allows the jurisdiction to tax the taxpayer's income regardless of source).

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

out-of-state, it certainly has the right to tax income a resident earns in-state. There is no precedent requiring a residence state to cede the right of income taxation to a source state. Therefore, a residence state may rightly tax the same income as the Massachusetts telecommuter tax, resulting in double taxation for the telecommuter. As remote work is here to stay,[14] the possibility of double taxation for telecommuters should be alarming. Double taxation effectively penalizes a work situation often necessary during the pandemic and common post-pandemic.

The Massachusetts tax made no provisions or exceptions for telecommuter taxpayers who may have faced double taxation. As a result, if a residence state wished to spare its resident taxpayers double taxation, the residence state had to offer a tax credit for income taxes paid to Massachusetts.[15] However, this solution had its own problems. By offering a credit, the residence state "foregoes collecting taxes from its residents despite all the public services it has offered."[16] As Justice Ginsburg articulated in her dissenting opinion in *Maryland v. Wynne*, "[t]he justification for the residence tax is that individuals should contribute to the state they live in since it is that state which provides them with public services."[17] Think of the example of Jill from above. Were Jill to live in a state that levied an income tax and offered a tax credit for the amounts paid to Massachusetts, she would not contribute to the public services she used while working in New Hampshire.

Where there are tax credits available to a telecommuting taxpayer, those credits do not necessarily erase the possibility of double taxation. It is common practice for states to offer an income tax credit only to the amount of income taxes their resident would have paid to the residence state if they had worked in-state rather than for an employer in another state. This means a telecommuting taxpayer whose residence state offers a tax credit may still be paying more in income tax than their neighbor who works solely in-state. Or, a taxpayer may face a situation like Alabama's tax credit regime: a resident of Alabama with income from another state will always pay income tax on the out-of-state income at the higher

14. Working remotely increased dramatically during the pandemic, but numbers of employees working from home were rising pre-pandemic. The presence of pre-pandemic teleworking indicates that not all of the 88% of employees working from home at least once a week during the pandemic will return to the office. *See, e.g.,* Kim, *supra* note 1, at 1156.

15. There are broad inconsistencies among the format of tax credits, so even the presence of a tax credit is not guaranteed to alleviate the double-tax burden on the taxpayer. Some states "like New York, offer[] up a limited credit mechanism that will only allow a credit for taxes paid to the other state if the income was sourced to that state using the home state's sourcing rules. . . . Others—like Oregon, Michigan, and Montana—have broader provisions like New Jersey's, allowing in most instances a credit for taxes paid to the other states so long as the income was also taxed in the home state." Timothy P. Noonan, *Remote Workforce Doctrine and Policy: Looking to the New York Approach*, 12 COLUM. J. TAX L. (October 21, 2020) (footnotes omitted), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/5NB5-4BDW].

16. Kim, *supra* note 1, at 1153.

17. Veazie Bank v. Fenno, 75 U.S. 542, 582–83 (2015) (Ginsburg, J., dissenting).

tax rate between Alabama and the source state.[18] And while some neighboring states have income tax reciprocity with each other, the nature of remote work allows a taxpayer to work for an employer in a state on the other side of the country. Reciprocity between the residence state and the state where the employer is located is unlikely. The particularities of each state's tax credit structure or reciprocity agreements are too vast an issue to discuss here. Suffice to say, it is complex and far from uniform from state to state. When considering issues of a telecommuter tax, relying on income tax credits or reciprocity is not a solution.

It is unsurprising, then, that New Hampshire challenged the Massachusetts tax law by filing a motion for leave to file a bill of complaint with the Supreme Court. Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, Utah, New Jersey, Connecticut, Hawaii, and Iowa signed amicus curiae briefs supporting New Hampshire's motion. The motion was filed on October 19, 2020. On June 28, 2021, the motion was denied. It should be noted that Justice Thomas and Justice Alito would have granted the motion. Because the motion was denied, whether a telecommuter income tax like the one instituted by Massachusetts is constitutional remains an open question. However, the proceeding analysis demonstrates that New Hampshire was correct to challenge the Massachusetts tax—such income taxes on telecommuters are unconstitutional.

A. Dormant Commerce Clause Analysis

The first cause of action New Hampshire alleged was a dormant Commerce Clause violation. The Commerce Clause is found in Art. I, § 8 of the United States Constitution. The dormant Commerce Clause has been read into the explicit text: the Commerce Clause "contains a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."[19] The goal of the dormant Commerce Clause is to advance the purpose behind the Commerce Clause—"preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."[20] In other words, the dormant Commerce Clause "generally prohibits tax statutes that create a risk of multiple taxation of interstate commerce.'"[21] This is a broad definition, and it has not always been clear how the dormant Commerce Clause operates. It has been "characterized by the United States Supreme Court as a 'tangled underbrush,' or a 'quagmire.'"[22]

The "quagmire" is evident in the ambiguity of determining which state has priority over taxing income: the residence state or the source state. On one hand,

18. Kim, *supra* note 1, at 1165.

19. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

20. *Id*. at 179–80.

21. John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax 'Nowhere' Activity*, 33 VA. TAX REV. 209, 223 (2013).

22. Kim, *supra* note 1, at 1174.

"While the Commerce Clause precludes the multiple taxation of income derived from interstate commerce, there is nothing in the Court's Commerce Clause jurisprudence to suggest that residence states 'lose' jurisdiction in a territorial sense to tax income that is taxable elsewhere."[23] On the other hand, "Under the Commerce Clause, a state's power to tax income from interstate commerce on a residence basis is limited by other states' power to tax the same income on a source basis insofar as is necessary to avoid the risk of multiple taxation that the Commerce Clause generally prohibits . . . the state of the taxpayer's residence must yield to the state of the income's source to avoid the risk of multiple taxation."[24] While it seems the source state may ultimately prevail, such a conclusion relies on the premise that the source state has a valid claim on the income in question.

Such a determination requires the four-prong test provided in *Complete Auto Transit, Inc. v. Brady* to determine whether a state tax on interstate commerce will be sustained: (1) if the activity being taxed has a substantial nexus with the taxing state; (2) if the tax is fairly apportioned; (3) if the tax does not discriminate against interstate commerce; and (4) if the tax is fairly related to the services provided by the taxing state.[25] New Hampshire alleged that the "Massachusetts[] tax rule violates the dormant Commerce Clause under the *Complete Auto* test as well as the Due Process Clause because (1) nonresident teleworkers' activity lacks substantial nexus with Massachusetts, (2) the income is not fairly apportioned between source and residence states, (3) Massachusetts'[s] tax rule discriminates against multistate teleworkers and burdens interstate commerce, and (4) it taxes activities not fairly related to the services provided by Massachusetts."[26] In other words, it fails all four prongs of the test.

Substantial nexus, the first prong of the *Complete Auto* test, requires that "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."[27] New Hampshire argued that the Massachusetts tax was "based solely on the location of the employer regardless of the work being done and where."[28] Massachusetts responded that the tax was based on the activity—that the employee was earning Massachusetts-sourced income. However, this appears inconsistent with the rest of Massachusetts's tax policy. Out-of-state residents who worked from home for Massachusetts-based employers before the pandemic were not subject to Massachusetts income tax.[29] This is because there is no substantial nexus between Massachusetts and a nonresident telecommuter's income. There is a substantial nexus between Massachusetts and the Massachusetts-based employers, and Massachusetts is free to tax the earnings of those businesses. But the employees

23. Swain & Hellerstein, *supra* note 21, at 224.
24. *Id.*
25. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).
26. Kim, *supra* note 1, at 1158.
27. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 778 (1992).
28. Motion for Leave to File Bill of Complaint at 26, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 220154).
29. *Id.* at 21.

who never have physical presence in Massachusetts are separate taxpayers from their employers. There is no evidence to suggest that the state of emergency induced by the COVID-19 pandemic would trigger nexus with nonresident telecommuters that did not preexist the pandemic. The Massachusetts tax law fails the first prong.

The second prong requires the tax law be "fairly apportioned." *Central Greyhound Lines, Inc. v. Mealey* provides helpful precedent for New Hampshire. At issue in that case was a New York State tax applied to "100% of the gross receipts earned by a bus company even though 43% of the buses' mileage physically occurred in Pennsylvania and New Jersey. The Court held that the dormant Commerce Clause required New York to 'fairly apportion[]' its gross receipts tax based on the buses' relative 'mileage within' New York and the two other states."[30] Though the bus company relied on the state of New York for the bus route, New York did not have taxing jurisdiction over the entirety of the bus's profits from that route. The issue is that multiple states have competing claims on the gross receipts. Problems arise "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it."[31] The concern is that a failure to fairly apportion a tax will trigger double taxation, even when such double taxation is only a possibility.[32] While New Hampshire does not have an income tax, as discussed above, it has the right to tax its residents' income. All the income earned by New Hampshire residents teleworking for Massachusetts-based employers is earned in New Hampshire, relying on New Hampshire services and infrastructure. New Hampshire, therefore, would be justified in taxing that income. The Massachusetts tax needs to be fairly apportioned.

Fair apportionment has two tests: "The first . . . is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed. The second and more difficult requirement is . . . external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."[33] The Massachusetts tax makes no apportionment provisions. Applying the internal consistency test, it seems likely that, were every jurisdiction to apply the Massachusetts tax without apportionment, it would increase overall taxation. Massachusetts argued against this point, relying on the fact that they offer tax credit for all residents who found themselves in a similar situation—working from home for an out-of-state employer due to the pandemic. However, Massachusetts's counterargument is weak on two points. First, Massachusetts's argument requires every state to adopt a taxation regimen

30. Edward A. Zelinsky, *The Proper State Income Taxation of Remote and Mobile Workers*, 12 COLUM. J. TAX L. nn.9–11 (October 21, 2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/5NB5-4BDW].

31. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 184 (1995).

32. *See, e.g.*, Evco v. Jones, 409 U.S. 91, 94 (1972).

33. Swain & Hellerstein, *supra* note 21, at 220 (citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983)).

identical to Massachusetts—including having an income tax in the first place. This is simply impractical. Second, Massachusetts resident telecommuters working from home before the pandemic were taxed by Massachusetts on their income, meaning Massachusetts acknowledged a residence state's right to tax income on resident telecommuters working for out-of-state employers. Applying the internal consistency test would require every jurisdiction to adopt an inconsistent tax regimen due to a pandemic. And while the COVID-19 pandemic is certainly disruptive, there is nothing to indicate a telecommuter working from home due to the pandemic has more nexus with Massachusetts than a telecommuter who was previously working from home before the pandemic. Massachusetts fails the internal consistency test. The Massachusetts tax law obviously fails the external consistency test—it does not apportion the tax whatsoever, which does not reflect that income is solely earned in another state. The Massachusetts law fails the second prong.

The third *Complete Auto* prong looks at potential discrimination against interstate workers. The Massachusetts tax law is not facially discriminatory: it simply continues to tax previously in-person employees of Massachusetts-based employers, whether they are Massachusetts residents or not. However, because of the threat of double taxation, there is "a powerful incentive to engage in intrastate rather than interstate economic activity."[34] Again, consider Jill from the opening example. Jill moved to New Hampshire and found she faced heavy property taxation from New Hampshire, in addition to continued income taxation from Massachusetts. Jill would be reasonably incentivized to consider moving back to Massachusetts for a better tax situation. The Massachusetts tax discriminates against interstate activity and, thus, fails the third prong of the test.

The fourth and final prong of the *Complete Auto* test looks at whether the taxed activity can reasonably be attributed to the services the state provides. This is not a high bar: "the Commerce Clause has been read to embrace a forgiving standard . . . requiring only that the income be reasonably attributable to in-state activities."[35] Nevertheless, New Hampshire and tax scholars argued that Massachusetts cannot meet this low requirement. New Hampshire's argument was that the source state "can tax the in-state employer for the services provided to it. But the remote worker is a separate person from the employer and, as a separate taxpayer, should only be taxed on her income by the second state when the worker actually spends time there, not when she telecommutes from her out-of-state home."[36] Massachusetts, however, argued that the non-resident taxpayers do personally continue to enjoy Massachusetts's services while telecommuting, such as "the employee protections that Massachusetts provides, [and] to the very jobs [nonresidents] hold that

34. Comptroller of the Treasury v. Wynne, 575 U.S. 542, 561 (2015).

35. Swain & Hellerstein, *supra* note 21, at 223 (citing Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992) (observing that "[t]he principle that a State may not tax value earned outside its borders rests on . . . *both* the Due Process and Commerce Clauses . . . ." (emphasis added))).

36. Zelinsky, *supra* note 30.

Massachusetts has created."[37] Nonresidents may rely on Massachusetts's employment laws, but Massachusetts does not adequately address the distinction between the employer and the employee. The Massachusetts business is still liable to Massachusetts for relevant taxation. The employee relies on Massachusetts's employment laws by nature of their relationship to the business, but that is distinct from the employee relying on Massachusetts itself for such services Jill used while working in New Hampshire. Massachusetts has not demonstrated that the tax is reasonably attributable to services provided by the state, and therefore fails the fourth prong. The Massachusetts tax law violates the dormant Commerce Clause and is, therefore, unconstitutional.

B. Due Process Clause Analysis

The Due Process Clause is a distinct analysis from the dormant Commerce Clause. "Indeed, in . . . *Quill Corp. v. North Dakota*, the Court . . . observ[ed] that '[d]ue process centrally concerns the *fundamental fairness of governmental activity*' whereas the central concern of the Commerce Clause is to 'limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.'"[38] Fairness is analyzed by "tying the states' taxing power to 'benefits' and 'protections' that they confer upon taxpayers."[39] As the Court elsewhere articulated, "[t]he simple but controlling question is whether the [S]tate has given anything for which it can ask in return."[40] It should be noted that, unlike the dormant Commerce Clause, "[t]he Due Process Clause does not forbid double taxation of income on the basis of residence and source: '[i]ncome may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state.'"[41]

In the case of the Massachusetts tax law, the analysis hinges on whether Massachusetts has offered enough services as the source state to justify a claim on nonresident telework income. *Chickasaw Nation* held a state may tax a nonresident on income from sources within the state,[42] but *Shaffer v. Carter* held that income sourced outside the state is out of the state's jurisdiction.[43] The focus, then, is to what extent Massachusetts was a source state for the income being

37. Brief in Opposition to Motion for Leave to File Complaint at 37, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 220154).

38. Swain & Hellerstein, *supra* note 21, at 220 (emphasis added) (citing Quill Corp. v. North Dakota, 504 U.S. 298, 317–18 (1992) (reaffirming the rule that vendors without a physical presence in a state could not be required to collect use taxes on goods shipped to in-state customers)).

39. *Id.* at 219.

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

41. Swain & Hellerstein, *supra* note 21, at 221 (citing Curry v. McCanless, 307 U.S. 357, 368 (1939); Guar. Tr. Co. v. Virginia, 305 U.S. 19, 22–23 (1938) (holding that the Due Process Clause does not bar multiple taxation of income from trust)).

42. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 n.11 (1995).

43. Shaffer v. Carter, 252 U.S. 37, 57 (1920).

taxed, and "[t]he standard for determining whether income has its source in the state is '[r]ough approximation rather than precision.'"[44]

New Hampshire argued the Massachusetts tax law "require[d] no connection between Massachusetts and the nonresidents on whom it impose[d] Massachusetts income tax other than the address of the nonresident's employer."[45] In rebuttal, Massachusetts relied heavily on the fact that "non-residents must have worked for their Massachusetts employer in person in Massachusetts in the immediate pre-pandemic period and, indeed, are taxed only in direct proportion to the days worked in person versus remotely in that period."[46] This, however, suggests that past connection justifies current taxation. And while Massachusetts referenced the ongoing benefits taxpayers receive from their employment by Massachusetts's businesses, the analysis above for the dormant Commerce Clause reveals the services Massachusetts offered to taxpayers were more related to the employer than the taxpayer's activities in Massachusetts. The Massachusetts tax law, therefore, violated the Due Process Clause and is, therefore, unconstitutional.

C. Privileges and Immunities Clause Analysis

While New Hampshire's complaint against Massachusetts did not present a Privileges and Immunities argument, it is worth considering. In *Ward v. Maryland*, the Court defined the Privileges and Immunities Clause as

> the clause [which] plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.[47]

The purpose of the clause is to turn the several independent sovereign states into a unified nation, where an individual citizen of, say, New Hampshire can enter Massachusetts and enjoy the same privileges as Massachusetts's citizens.[48] This supports the essential concept of federalism: "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment

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44. Swain & Hellerstein, *supra* note 21, at 221 (citing Ill. Cent. R. R. v. Minnesota, 309 U.S. 157, 161 (1940)).

45. Motion for Leave to File Bill of Complaint at 29, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2020) (No. 220154).

46. Brief in Opposition to Motion for Leave to File Complaint at 36, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 220154).

47. Ward v. Maryland, 79 U.S. 418, 430 (1870).

48. Toomer v. Witsell, 334 U.S. 385, 395 (1948); *but see* Austin v. New Hampshire, 420 U.S. 656, 662 (1975) (stating "Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures." Each state's sovereign power to enact taxation will be balanced, but not erased by the Privileges and Immunities Clause.).

but also, perhaps more so, the structural balance essential to the concept of federalism."[49]

The test for analyzing a Privileges and Immunities issue is to determine whether a greater tax burden is placed on nonresidents than residents.[50] Where there is a negative disparity between the tax treatment of nonresidents and residents, a state may defend itself by demonstrating "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[51]

On its face, the Massachusetts tax law seems to place the same income tax burden on nonresidents and residents alike. However, because the tax law was passed during the COVID-19 pandemic, nonresidents were paying for benefits which they could no longer receive, but residents could. The Massachusetts tax law only applied to employees who were not working remotely before the pandemic but, due to the emergency circumstances, began working remotely after March 10, 2020. Nonresidents were taxed at the same rate as before but, because of work from home orders and safety concerns, they no longer used the same Massachusetts's services as before. Again, from the example, Jill no longer used Massachusetts's emergency or public services. In fact, had she entered Massachusetts to do so, she would have violated New Hampshire's shelter-in-place orders.[52] Residents, however, continued to have access to the same services. So, while nonresidents and residents continued to contribute the same income taxes, the benefits offered in exchange for the taxes were disproportionately inaccessible for nonresidents. This essentially places a greater tax burden on nonresidents. And while Massachusetts assumed telecommuting taxpayers could rely on residence state tax credits to alleviate double taxation, coercing another state to remedy Massachusetts's undue tax burden is contrary to the principles of federalism.[53]

In order to justify the greater tax burden, Massachusetts would need to show (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination bears a substantial relationship to Massachusetts's objective. Massachusetts claimed the purpose of the tax was to "maintain[] the pre-pandemic status quo for tax filing obligations and thereby … avoid uncertainty and spare employers

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49. *Austin*, 420 U.S. at 662.

50. *See, e.g.*, Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522 (1919); Toomer v. Witsell, 334 U.S. 385 (1948); Mullaney v. Anderson, 342 U.S. 415 (1952).

51. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 284 (1985).

52. *See, e.g.*, Office of Governor Charlie Baker and Lt. Governor Karyn Polito, COVID-19 ORDER NO. 33, (May 18, 2020), https://www.mass.gov/doc/may-18-2020-re-opening-massachusetts-order/download [https://perma.cc/AKX9-ELG3] (outlining the history of orders issued during March 2020 to restrict all non-essential movement outside the home, which presumably would include traveling to Massachusetts to work in the office for a job that could be worked from home in New Hampshire).

53. *See, e.g.*, *Austin*, 420 U.S. at 666–67 (stating, "[W]e 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," concerning an income tax New Hampshire only applied to nonresident workers which only applied if the nonresidents received a tax credit from their residence state to offset the New Hampshire tax).

additional compliance burdens amidst the unprecedented circumstances."[54] However, the pre-pandemic status quo in Massachusetts was that remote workers do not pay income tax to Massachusetts on income earned while out-of-state. This reasoning is far from compelling. If Massachusetts truly wished to maintain pre-pandemic norms, it would retain the policy that remote workers do not owe Massachusetts state income tax. The implementation of the discriminatory tax policy does not bear a substantial relationship to Massachusetts's objective. Failing both prongs of analysis, the Massachusetts tax, therefore, violates the Privileges and Immunities Clause.

D. Procedural Posture of the Complaint

As stated above, New Hampshire filed a motion for leave to file a bill of complaint on October 19, 2020. Several states filed an amicus brief in support of New Hampshire with respect to the constitutional challenges of the Massachusetts tax law. However, on June 28, 2021, New Hampshire's motion was denied, and the challenge ended.

After extending the tax law beyond the original deadline,[55] Massachusetts eventually exited a state of emergency due to the COVID-19 pandemic and ceased levying the tax on September 13, 2021. However, because neither Congress nor the Supreme Court have provided guidance on the question of taxing telecommuters, Massachusetts could reinstate the tax law, or one of like nature, at any time.

There is no method of preventing a state from extending a "temporary" telecommuter tax indefinitely; "at this time there is no uniform guideline by state or federal governments."[56] What guidance does exist is either written in light of pre-pandemic work structures or treats post-pandemic conditions as temporary, expecting a quick return to pre-pandemic norms.[57] Massachusetts's decision to repeal the telecommuter tax does not resolve the issue when the introduction of more such laws remains possible.

III. CONVENIENCE OF THE EMPLOYER RULES

While the Massachusetts tax law was a "temporary" measure to navigate the pandemic, more permanent telecommuter tax laws are present in five states: Arkansas, New York, Delaware, Nebraska, and Pennsylvania. All five of these states have "convenience of the employer" rules. Connecticut has adopted a "convenience of the employer" rule reciprocally against these five states. New York is

54. Brief in Opposition to Motion for Leave to File Complaint at 3, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (No. 220154) (2020).

55. Originally, the tax was to apply to income earned from March 10, 2020, through December 31, 2020, or 90 days after the date on which the Governor of the Commonwealth gave notice that the Massachusetts COVID-19 state of emergency is no longer in effect. *Massachusetts Issues Final Regulations Concerning Income Tax Withholding for Employees Working Temporarily in the State Due to COVID-19,* TAX NEWS UPDATE: U.S. EDITION (October 26, 2020), https://taxnews.ey.com/news/2020-2554-massachusetts-issues-final-regulations-concerning-income-tax-withholding-for-employees-working-temporarily-in-the-state-due-to-covid-19 [https://perma.cc/6AUX-2A5T].

56. Kim, *supra* note 1, at 1149.

57. *Id.* at 1155.

largely considered the model for "convenience of the employer" tax rules, and the analysis below will follow New York with the assumption that it is generally representative of the other states.

New York's "convenience of the employer" rule has been around for decades. While the date of its first use is difficult to identify, it was definitely "embodied in regulation by 1960."[58] The rule operates as follows:

> [T]he source of the employment compensation generated while working remotely depends on the reason for working remotely—specifically whether the employee was working remotely for convenience or by necessity in the service of her employer. If the latter, the income will be determined by the employee's physical location; in other words, the days worked at home will "count" as out-of-state days. If the former, the income source defaults to the employer's location.[59]

In other words, if work completed out-of-state was not required by an employee's New York-based employer, the income will be apportioned to New York for income tax purposes. The key word is "convenience." It is generally understood that "New York requires that services performed outside the state be done out of *necessity* as opposed to convenience."[60] (emphasis added). This rule is strictly enforced and whether "an employee is working in another state for the convenience of the employer is strictly scrutinized."[61]

The law has withstood decades of challenge.[62] In 2003, Professor Edward Zelinsky pursued a claim against the law to the New York Court of Appeals.[63] Bills on the issue have been before Congress for at least a decade, and the

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58. Ellen S. Brody & Cory M. Paul, *In Defense of the "Convenience of the Employer" Test*, 12 COLUM. J. TAX L. (Oct. 21, 2020) (citing Huckaby v. Tax Appeals Tribunal, 829 N.E.2d 276, 280 (N.Y. 2005) (finding that a Tennessee domiciliary working as a computer programmer for a New York employer was required to source income to New York despite working in the state only a few days per year)), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/5NB5-4BDW].

59. Timothy P. Noonan, *Remote Workforce Doctrine and Policy: Looking to the New York Approach*, 12 COLUM. J. TAX L. (Oct. 21, 2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/5NB5-4BDW].

60. Chris Atkins, *Telecommuter Tax Fairness Act of 2005: Restoring Balance to State Taxation of Telecommuters*, TAX FOUND. (Jan. 31, 2006), https://taxfoundation.org/research/all/federal/telecommuter-tax-fairness-act-2005-restoring-balance-state-taxation-telecommuters [https://perma.cc/3RG7-TWJR].

61. Brody & Paul, *supra* note 58.

62. *See, e.g.*, Paul R. Comeau et al., *New York's Revised Convenience Rule Provides Some Clarity and Continued Controversy*, 16 J. MULTISTATE TAX'N & INCENTIVES 18, 21 (2006); Brody & Paul, *supra* note 58 ("While this challenge did not arise out of the Covid-19 pandemic, it was certainly exacerbated by it as it no longer simply impacts those employees who used to commute daily between neighboring states, but also now impacts employees who fled their apartments in big cities to homes in more isolated communities around the country.").

63. Darien Shanske, *Remote Workforce Doctrine and Policy: Short-Term and Long-Term Considerations*, 12 COLUM. J. TAX L. (Oct. 21, 2020) (citing Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840 (N.Y. 2003), cert. denied, 541 U.S. 1009 (2004), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/5NB5-4BDW].

Multistate Tax Commission approved model legislation for a mobile workforce statute in 2011.[64] The pandemic raised more issues with the law—Is working from home due to COVID-19 for the necessity of the employer?[65] And while some scholars assume the days worked outside New York due to the pandemic will not be allocated to New York, others are not so sure.[66] Such questions heighten the concern with the law. The consistent outcry is that the "convenience of the employer" rule violates the Constitution.

A. Dormant Commerce Clause Analysis

As discussed above, a dormant Commerce Clause analysis uses a four-prong test: (1) if the activity being taxed has substantial nexus with the taxing state, (2) if the tax is fairly apportioned, (3) if the tax does not discriminate against interstate commerce, and (4) if the tax is fairly related to the services provided by the taxing state.[67]

The analysis of the first prong follows the analysis completed above for the Massachusetts tax law. Again, "there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."[68] And, again, this analysis is focused on activity performed wholly out-of-state. New York's "convenience of the employer" analysis does not depend on the activity itself, rather looking to the reason for the employee's presence in another state. New York concedes that work performed out-of-state for the employer's convenience may be apportioned to the other state, which underscores the fact that New York is not basing nexus on the activity itself. Whether or not an employer requires the work completed out-of-state does not change the character of the activity, only the employer's relationship to that activity. There is nothing to suggest that the attitude of an employer changes the status of New York's nexus to out-of-state activity. New York fails this prong.

The second prong looks to fair apportionment. This analysis is different than that of the Massachusetts tax law because the New York "convenience of the employer" rule does provide an apportionment formula. There are two tests to apply: (i) internal consistency and (ii) external consistency. Defenders of this rule claim "the convenience rule is . . . easy to administer and is internally consistent, such that if every state followed the same rule, there would be no multiple taxation."[69] Assuming arguendo that every state agreed on the definition of "convenience," this would be true. However, the external consistency test is not so easily

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64. *Id.*

65. *See* Walter Hellerstein, *Nonresident NY Employees Are Not Currently Working at Home for Their 'Convenience'*, TAX NOTES (Apr. 6, 2020), https://www.taxnotes.com/featured-analysis/nonresident-ny-employees-are-not-currently-working-home-their-convenience/2020/04/02/2cbx8 [https://perma.cc/U4TW-GGD5].

66. *See* Brody & Paul, *supra* note 58.

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

68. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 778 (1992).

69. Brody & Paul, *supra* note 58 (citing Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 845 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004)).

met. As in Massachusetts's tax analysis, there is an issue with the "convenience of the employer" rule actually reflecting a reasonable sense of how income is generated. Any time income earned out-of-state is apportioned as in-state income for tax purposes, there is dissonance between how the income is actually generated and how it is apportioned. While internally consistent, the New York "convenience of the employer" rule is externally inconsistent and fails the second prong of the dormant Commerce Clause analysis.

The third prong requires an absence of interstate discrimination. Because of the strict scrutiny with which the "convenience of the employer" rule is enforced, it could easily have a chilling effect on nonresident workers working outside New York unless strictly necessary. The danger being, of course, that a telecommuter could risk double taxation if, for example, they worked from home. Further, "while it is often true that States will credit their residents for taxes paid to other States, they are not required to do so."[70] And "even where a State does provide a tax credit, the tax rate of the taxing jurisdiction could be higher than that of the resident's Home State."[71] Remote work is now a significant portion of interstate commerce. Where an employer offers the option for an employee to be remote full-time, it cannot reasonably be said the employee is out-of-state for the employer's necessity. By apportioning 100% of that employee's income to New York, New York opens that employee to double taxation—something a nonresident working full-time in New York would be less likely to face (and a resident working in New York would not face). The New York law fails the third prong.

The fourth prong is whether the tax is fairly related to the services provided by the taxing state. Again, as in the Massachusetts analysis, New York is providing services to the employer—not the employee—when the employee is working out-of-state. The employer and employee are separate entities, and the tax laid on the employee must be related to the services provided to the employee. When an employee is working outside of New York, they are not relying on the services provided by New York. New York's "convenience of the employer" rule violates this prong, and, therefore, it violates the dormant Commerce Clause.

B. Due Process Clause Analysis

The Due Process analysis for the New York "convenience of the employer" rule is nearly identical to that of the Massachusetts tax law. As discussed in that analysis above, the question focuses on what services New York is offering in exchange for the tax it levies on the nonresident's income when working out-of-state and not for the convenience of their New York-based employer. The services a source state provides to a nonresident telecommuter are inherently limited. While work has shifted to remote, the source state services remain largely based

70. Brief for States of New Jersey & Connecticut et al. as Amicus Curiae in Support of Plaintiff at 6–7, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 220154).

71. *Id.* at 7.

on physical presence in the state. As long as that is true for New York, the "convenience of the employer" rule violates the Due Process clause.

C. Privileges and Immunities Clause Analysis

A Privileges and Immunities analysis looks to whether a greater tax burden is placed on nonresidents than residents.[72] The New York "convenience of the employer" rule does not necessarily place a greater tax burden on nonresidents than residents. While the tax does open nonresident telecommuters to double taxation, the New York tax itself is not a greater burden. New York residents owe New York income tax on all their income—regardless of source. In contrast to the Massachusetts tax law, which taxed nonresident telecommuters as if they were in-state while COVID-19 precautions forbid them from commuting to Massachusetts, New York's law is not coupled with other regulations preventing nonresidents from accessing the services New York offers in-state employees. It seems unlikely, then, that the Court would find that New York's "convenience of the employer" rule violates the Privileges and Immunities Clause. However, such a finding is unnecessary to prove the unconstitutionality of the law: New York's "convenience of the employer" rule violates both the dormant Commerce Clause and the Due Process Clause. It is unconstitutional.

IV. PROPOSED SOLUTION

"Double taxation arises when one state uses a convenience of the employer test and the other looks at the physical location of where the employee is performing the work. If a nation-wide standard was adopted, this double taxation would be eliminated and tax credits would work as intended."[73] While many have lamented that the Supreme Court declined to hear *New Hampshire v. Massachusetts*, the true solution to telecommuter tax issues lies in federal preemption by Congress. When writing on the Massachusetts tax law, Professor Zelinsky stated,

> The correct approach to [the Massachusetts tax situation] and similar contexts involving interstate remote work is embodied in the Multi-State Worker Tax Fairness Act of 2020, introduced in the House by Representatives Himes, Pappas and Hayes: No taxation of this New Hampshire resident by Massachusetts as long as this resident exclusively lives, works, and receives public services in New Hampshire.[74]

The Himes-Hayes-Pappas bill "would prohibit on a national level any state from adopting convenience of the employer rules and instead require states to tax nonresidents only on income earned while physically present in a state."[75]

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72. *See, e.g.*, Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522, 526–27 (1919); Toomer v. Witsell, 334 U.S. 385, 395–99 (1948); Mullaney v. Anderson, 342 U.S. 415, 416 (1952).

73. Brody & Paul, *supra* note 58.

74. Zelinsky, *supra* note 30.

75. Brody & Paul, *supra* note 58.

Another bill introduced to Congress was proposed by Iowa Senator Chuck Grassley. This bill would prevent a state from taxing "wages or other remuneration earned by an employee" other than the residence state or "any taxing jurisdiction within which the employee is present and performing employment duties for more than 30 days during the calendar year."[76]

The best legislative solution is found in Senate Bill S.1274 - Remote and Mobile Worker Relief Act (2021).[77] The Senate should pass this bill and preempt unconstitutional taxation of nonresident telecommuters. S.1274 prohibits the "wages or other remuneration earned by an employee who is a resident of a taxing jurisdiction (i.e., states, localities, the District of Columbia, territories or possessions) and performs employment duties in more than one taxing jurisdiction" from being subject to income tax in any other taxing jurisdiction other than (1) the taxing jurisdiction of the employee's residence, and (2) the taxing jurisdiction within which the employee is present and performing employment duties for more than [thirty] days during the calendar year in which the wages or remuneration are earned."[78] This bill eliminates the possibility of unconstitutional taxation by source states, preserving a residence state's right to tax income earned in its borders and protecting telecommuters from double taxation.

There are those who oppose this model and argue that the "convenience of the employer" rules should be protected. There are genuine concerns about whether physical presence should matter in a world so dependent on the internet: "[T]he real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule … must give way to the 'far reaching systemic and structural changes in the economy' and 'many other societal dimensions' caused by the Cyber Age."[79] This, however, ignores that the services offered in exchange for income taxation services like police and fire departments, electricity, public transit, etc.—are tied to physical location. We have not completely shifted to a cyber world, and we risk incurring unconstitutional tax burdens if we tax based on cyber-presence while the rest of our lives remain geographically dependent. Another argument is that remote work is damaging the economies of large cities as workers can now work anywhere: "a national approach would promote mobility of employees without depleting the tax base of the large cities that must rely on the personal income tax to fund the numerous services they provide."[80] This concern, however, does not address the constitutional concerns with implementing source state income taxes on telecommuters. Large cities will have to find other ways to attract in-person employees and residents. They cannot be maintained by unconstitutional taxes on nonresidents. The best solution lies in federal preemption protecting telecommuters and residence states.

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76. American Workers, Families, and Employers Assistance Act, S. 4318, 116th Cong. § 403(a)(1)(b) (2020).

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

78. *Id*.

79. South Dakota v. Wayfair, Inc., 585 U.S. 162, 184 (2018).

80. Brody & Paul, *supra* note 58.