Note

Why Are There So Many Taxes?: Teleworking and the Multiple Taxation Dilemma—Time to Standardize and Apportion

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INTRODUCTION

Everyone knows that state income tax withholding issues are complicated and some may say that they are taxing. The tax implications of the recent upticks in remote work have proved to be especially troublesome. Due in large part to the COVID-19 pandemic, remote teleworking has become the new norm for many professions.[1] While employers and employees appreciate the convenience modern technology has brought them, remote working presents added tax compliance challenges and costs.[2]

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1. *See* Tim Bajarin, *Work from Home Is the New Normal for Workers Around the World*, FORBES (Apr. 29, 2021), https://www.forbes.com/sites/timbajarin/2021/04/29/work-from-home-is-the-new-normal-for-workers-around-the-world/?sh=6bde52597c20 [https://perma.cc/66LH-Z2FD].

2. *See* Caitlin Mullaney, *AICPA Asks Treasury and IRS for Remote Worker Guidance,* TAX NOTES (Aug. 26, 2022), https://www.taxnotes.com/tax-notes-today-federal/benefits-and-pensions/aicpa-asks-treasury-and-irs-remote-worker-guidance/2022/08/26/7dzbf [https://perma.cc/92SG-93LG] ("The lack of updated guidance has left employers and employees in the untenable position of making decisions regarding employer workplace policies while the rules . . . remain uncertain.").

"Every time an employer allows remote work from a new location for an employee, a new tax compliance review is required."[3]

The fallout from COVID-19 continues to have a significant impact on the way employers conduct business.[4] During the pandemic, the percentage of employees working remotely grew immensely, from roughly two percent of the U.S. workforce pre-pandemic, to about seventy percent by May 2020.[5] According to recent work statistics, about 36.2 million Americans will work remotely by 2025,[6] and ninety-nine percent of employees would choose to work remotely for the rest of their lives.[7] As the consequences of long-term remote working garner national attention, many states and localities continue to issue guidance regarding the income tax treatment of teleworking employees.[8] Some con-

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3. Suzanne Odom & Raymond Turner, *Remote Employees: The Geographic Tax and Benefits Challenges*, JD SUPRA (May 10, 2021), https://www.jdsupra.com/legalnews/remote-employees-the-geographic-tax-and-1208744 [https://perma.cc/2L43-GFNP].

4. "This change in working arrangements is impossible to overhype. As big as it is, it's even bigger than people think." Kaia Hubbard, *Out of Office: Indefinitely*, U.S. NEWS (Dec. 10, 2021), https://www.usnews.com/news/the-report/articles/2021-12-10/remote-work-extends-toward-two-years-as-omicron-pushes-more-companies-to-delay-return-to-office [https://perma.cc/3M3N-J42J].

5. Paul Bergeron, *Working from Anywhere to Persist After Pandemic*, SHRM (Aug. 25, 2021), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/working-from-anywhere-to-persist-after-pandemic.aspx [https://perma.cc/5XMK-DPXV].

6. *Statistics on Remote Workers That Will Surprise You (2022)*, APOLLO TECH. (May 11, 2022), https://www.apollotechnical.com/statistics-on-remote-workers [https://perma.cc/69FN-4GNZ].

7. Jack Steward, *The Ultimate List of Remote Work Statistics for 2022*, FINDSTACK (July 20, 2020), https://findstack.com/remote-work-statistics [https://perma.cc/9Z8B-2QT3].

8. *See, e.g.*, *TIR 20-10: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic*, MASS. DEP'T OF REVENUE (July 21, 2020), https://www.mass.gov/technical-information-release/tir-20-10-revised-guidance-on-the-massachusetts-tax-implications-of-an-employee-working-remotely-due-to-the-covid-19-pandemic [https://perma.cc/HH69-94LB] (adopting the convenience rule to continue taxing employees who used to perform services in Massachusetts but began working outside the state due to COVID); *see also* 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=state%20teleworking%20employees [https://perma.cc/6YQW-99N9] (introducing a lawsuit filed by remote-working employees to challenge state tel-

troversial policies, such as the convenience rule,[9] "have invited lawsuits, however, as the states continue to grapple with the long-term effects of a remote workforce."[10] The expansion of remote work is likely to exacerbate such legal challenges.

It has long been recognized that a state has the power to tax individuals both based on residency and source of income.[11] Resident-based double taxation can arise when one state claims to be an individual's state of domicile while a second state simultaneously claims to be their state of residence for tax purposes by virtue of other criteria. Such nondomiciliary residence is often denoted as "statutory residence."[12] Because domiciliary residency is always a fact-intensive inquiry, resident-based double taxation can result from inconsistent and competing residency conclusions among different states.[13]

Nonresident-based double taxation issues are always raised in the states which adopt the "convenience of the employer rule."[14] New York has been especially aggressive in applying the

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eworking income tax statutes as well as city ordinances). *See generally* discussion *infra* Part II.B.

9. *See* discussion *infra* note 14 and accompanying text.

10. Mark Klein, Joseph Endres & Katherine Piazza, *Tax Implications of COVID-19 Telecommuting and Beyond*, CPA J. (July 2021), https://www.cpajournal.com/2021/07/16/tax-implications-of-covid-19-telecommuting-and-beyond [https://perma.cc/4ATZ-WELH].

11. *See* Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 279 (1932) (suggesting that states have unrestricted power to tax those domiciled within them). *See generally* Curry v. McCanless, 307 U.S. 357, 368 (1939) ("[I]ncome may be taxed both by the state where it is earned and by the state of the recipient's domicile.").

12. *See* discussion *infra* Part I.A.2.

13. *See* Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 543 (2014) (explaining that tax collectors in both states would possibly look at the same facts and each conclude that the taxpayer is domiciled in their state, causing both to tax the taxpayer's worldwide income).

14. "The convenience of the employer rule is really looking at for whose convenience is the employer working remotely. If it's for the employer's convenience, then that employee is not subject to the jurisdiction in which the employer is located. . . . But if that employee is instead working for his or her convenience from home . . . they're still going to be subject to that jurisdiction's income tax, despite the fact that they are not physically working within the office of that specific employer." *Importance of* New Hampshire v. Massachusetts *Crosses State Lines*, PICPA (Sept. 7, 2021), https://www.picpa.org/articles/cpa-now-blog/cpa-conversations/2021/09/07/importance-of-new-hampshire-v.-massachusetts-crosses-state-lines [https://perma.cc/7KZW-GABL].

convenience rule; therefore, many scholars have primarily discussed New York's rule.[15] In contrast, most other states continue to apply the physical-presence rule and impose taxes based on the location where the employee performs services. Lack of interstate uniformity sets the stage for disadvantageous double-tax results for those wandering workers[16] who straddle multiple states with conflicting rules, all of which claim the right to tax those workers.[17]

The following example illustrates the tax headache of working remotely:[18] Kyson was born and domiciled in Minnesota and considers Minnesota his home state. He works in his company's Minnesota office, but he relocates to the employer's Massachusetts office for a one-year period while keeping his domicile in Minnesota. In this example, Minnesota would tax Kyson's worldwide income,[19] even income not earned within Minnesota. Massachusetts would at the same time tax his entire income because he maintained "a permanent place of abode" for more than 183 days in Massachusetts, thereby making him a Massachusetts statutory resident.[20] Imagine if Kyson has also been appointed to a role in the company's New York office, and he commuted to

15. *See infra* notes 55–56 and accompanying text; *see also* Edward A. Zelinsky, *Coronavirus, Telecommuting, and the 'Employer Convenience' Rule*, 95 TAX NOTES ST. 1101, 1102 (2020) ("In good times, New York's policy of taxing the income earned by out-of-state telecommuters makes no sense. In times like today, that policy is even more unsound.").

16. This Note uses the term "wandering workers" as an alternative to "remote workers" or "teleworkers" to express the idea of remote workers' relocation due to COVID-19.

17. *See* Tom McAdams, *Super Commuting: Beware Double Taxation of Income*, 87 WIS. LAWS. 28, 31 (2014) ("[A] state could retain the ability to tax even in a situation in which the taxpayer has not been in the state for many years.").

18. See Aaishah Hashmi, *Is Home Really Where the Heart Is?: State Taxation of Domiciliaries, Statutory Residents, and Nonresidents in the District of Columbia*, 65 TAX LAW. 797, 799 (2012) for a similar example.

19. Worldwide income is income earned anywhere in the world, and is used to determine taxable income. In the United States, citizens and resident aliens are subject to tax on worldwide income. *Foreign Earned Income Exclusion*, IRS, https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion [https://perma.cc/X9DK-LV5Q] (Nov. 4, 2020).

20. *See TIR 95-7: Change in the Definition of "Resident" for Massachusetts Income Tax Purposes*, MASS. DEP'T OF REVENUE (Jan. 10, 1996), https://www.mass.gov/technical-information-release/tir-95-7-change-in-the-definition-of-resident-for-massachusetts-income-tax-purposes [https://perma.cc/EYX3-H9YK].

New York City for two days per week and returned to his Massachusetts abode to work from home for the rest of the week. Arguably, Kyson would be subject to triple taxation: Kyson would be subject to the domiciliary resident tax from the state of Minnesota, the statutory resident tax from the Commonwealth of Massachusetts, and the nonresident tax from the state of New York because of the convenience rule.[21]

In general, multiple taxation issues arise in two different scenarios: (1) employees live in one state and merely work in another; and (2) employees maintain two residences—one in the state of their employer, and the other in another state. Teleworking, particularly amid the pandemic, can feature both scenarios.

Therefore, this Note will revisit the old troubles within a new environment, where there is a significantly larger group of people facing the same double taxation problem, and will again urge Congress, the Supreme Court, and states themselves to act. This Note examines the current inconsistent state income tax withholding rules around the country in order to propose a new solution that solves both the resident-based and the nonresident-based double taxation problems.[22] Its ultimate goal is to urge Congress and the Supreme Court to design an effective tax system that will propel states to coordinate and negotiate with each other in eliminating double taxation, thus creating a more friendly remote working environment for employers and employees.

This Note makes two main contributions to the conversation. First, while other scholars focus their discussion of state income tax issues on the constitutionality of states' power to tax, this Note serves a different purpose—it aims to serve as a comprehensive guidebook offering clarity to both employers and em-

21. *See* Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 843–44 (N.Y. 2003) (concluding that New York has the authority to tax Professor Zelinsky on his whole income, even if he only physically works in New York City for three days per week and spends the rest of the week at home in Connecticut, because of the convenience rule). For more information about the convenience rule, see discussion *infra* Part I.B.

22. This Note innovatively suggests a uniform test for residency determination among states and proposes a standardized apportionment formula to address state individual income double taxation issues. The proposed formula incorporates the logic of the well-established federal "substantial presence test," and adopts a progressively decreasing apportionment ratio between the former domiciliary resident state and the new resident state to allocate the taxpayer's tax base in a certain tax year.

ployees who struggle to comply with their state income tax withholding obligations. Second, this Note proposes a new solution to the troublesome problem of double taxation, arguing that standardizing residency tests and designing an equitable, feasible, and uniform apportionment formula would eliminate, or at least mitigate, the multi-taxation burdens on taxpayers. Very few scholars have called for adopting an apportionment formula, which is a common concept in the business income double taxation context, to solve individual income double taxation problems. This Note is also one of the few papers to incorporate the long-established federal "substantial presence test"[23] into its proposed apportionment formula in solving individual state income double taxation problems.

Part I sets up the legal foundation of the states' authority to tax residents' and nonresidents' income. This Part introduces current residents' and nonresidents' state income tax rules around the country. This Part also aims to explain whether and why a state has the authority to impose income tax on taxpayers. Part II illustrates how the double taxation problem becomes more pressing as remote work becomes a new trend with a much larger class of telecommuters nationwide. This Part reviews the current solutions to double taxation issues and examines their effectiveness. Part III lays out constitutional theories to explain why Congress and the Supreme Court could and should intervene and fix the underlying state income tax scheme. Part IV concludes by offering suggestions on structuring model federal legislation to standardize states' residency determination tests and by offering a new apportionment formula for states to follow.[24]

I. LEGAL FOUNDATIONS OF RESIDENT-BASED AND NONRESIDENT-BASED STATE INCOME TAX

It was not until the early part of the twentieth century that states started to impose income taxes with any regularity.[25] Like the Federal Internal Revenue Code (IRC), state tax laws also im-

23. *See* discussion *infra* notes 87–89 and accompanying text.

24. *See* Hashmi, *supra* note 18, at 842 (suggesting that in furtherance of uniformity and tax fairness goals, model tax legislation at the individual income tax level could avoid multistate taxation by providing consistent definitions of domicile and place of abode).

25. Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX REV. 885, 888 (2008).

pose individual income taxes, which require employers to withhold income tax from the wages of their employees, and to remit the withheld taxes to the taxing authorities.[26] Most individuals file income tax returns in their home state, which is their state of residence. However, an increasing number of taxpayers now must also file an additional income tax return to the state or states in which their source of income is located, if that state is not their state of residence.[27]

This Part describes the relevant legal foundations of state income tax schemes. Section A explains the current residency determination test. Section B introduces the history of the employer convenience rule and the existing legal debate surrounding it. Based on the legal framework set up in the first two Sections, Section C discusses the structural flaws of the current tax system and the resulting state income double taxation dilemma across the nation.

A. RESIDENCY DETERMINATION TESTS

The fact that states normally enjoy broad taxing power over their own residents is premised on a special relationship between those residents and their home state.[28] Since the resident state may tax the entire income of its residents, including the income earned in that particular state, as well as income earned outside of that state, how the state defines residency has a significant impact on individuals' ultimate tax burdens.[29]

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26. *See* Sean Ross, *Federal Withholding Tax vs. State Withholding Tax: What's the Difference?*, INVESTOPEDIA (Oct. 23, 2021), https://www.investopedia.com/ask/answers/051515/what-difference-between-federal-and-state-withholding-tax.asp [https://perma.cc/742B-9KUF] (stating that the major difference between state and federal withholding is the scope of taxable income).

27. *See* WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 379 (11th ed. 2020) ("[States] are constitutionally restrained, however, from taking the income of nonresidents except insofar as it is derived from sources within the state.").

28. *See* Holcomb, *supra* note 25, at 889 ("Residence-based taxation is premised on the idea that residents of a state have a special relationship to their home state."); *see also* Zelinsky, *supra* note 13, at 540 ("[S]tate of residence . . . is best positioned to aggregate all of its residents' sources of income and thus tax such residents on the basis of their overall ability to pay.").

29. *See* Daniel C. Soriano, *Multi-State Taxation of Personal Income*, 111 U. PA. L. REV. 974, 976 (1963) ("[V]arying definitions of 'residence' may aggravate the burden of multiple taxation.").

Generally, for income tax purposes, an individual is the resident of a given state if they meet either of the following conditions: (1) the state is their "domicile," the place they envision as their true home and where they intend to return after any absences; or (2) though domiciled elsewhere, they are nevertheless considered a "statutory resident" under state laws, meaning they spent more than half the year and kept a permanent place of abode in the state.[30] However, even the Supreme Court has acknowledged the difficulty of determining one's domicile because of the subjective nature of the established domiciliary test.[31]

1. Domiciliary Test

The term domicile has a generally accepted legal meaning as the place where a person has their true, fixed, permanent home.[32] The place where an individual lives will be assumed to be their domicile until the facts demonstrate otherwise.[33] The very broad definition of domicile invites tax disputes because multiple states may each reasonably assume an individual to be its own domiciliary resident, and the burden to prove the opposite is on the taxpayers themselves.[34]

Although domiciliary status is often a fact-intensive inquiry,[35] there are some objective factors for states to consider in order to find requisite indicia of domicile for tax purposes. The Supreme Court in *District of Columbia v. Murphy* proposed a

30. Daniel Kurt, *Tax Residency Rules by State*, INVESTOPEDIA (July 10, 2022), https://www.investopedia.com/tax-residency-rules-by-state-5114689 [https://perma.cc/B4BC-ZD2N]; *see also* discussion *infra* Part IV.A.

31. *See* District of Columbia v. Murphy, 314 U.S. 441, 454–55 (1941) (suggesting that persons are domiciled in another state when they have no fixed and definite intent to return to their homes where they were formerly domiciled, and that intention is subjective in nature).

32. *Murphy*, 314 U.S. at 451; *see also Domicile*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere.").

33. *See Murphy*, 314 U.S. at 455 ("The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary."); *see also* Ennis v. Smith, 55 U.S. 400, 423 (1853) (applying the rule that a domicile was the actual residence along with the intention to remain permanently).

34. *See* discussion *infra* note 90 and accompanying text.

35. *See* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1293–95 (2011).

two-part test for domicile determination, concluding that establishing a domicile requires both (1) a physical presence and (2) an intent to abandon any former domicile and remain in the new state for an indefinite period of time.[36] However, finding the intent of taxpayers to permanently change their domicile is another heavily fact-dependent process, and some of the factors states currently rely on are highly subjective in nature.[37] States' taxing agencies have not yet reached an agreement on how to weigh each factor when adjudicating residency disputes.

Case law and state statutes also provide certain objective factors to the taxing authorities. In determining whether a dwelling-place constitutes a person's domicile, consideration may be given to (1) its physical characteristics; (2) the time one spends therein; (3) the things one does therein; (4) the persons and things therein; (5) one's mental attitude towards the place; (6) one's intention when absent to return to the place; and (7) elements of other dwelling-places of the individual concerned.[38] Even with this inexhaustive list of factors, residency disputes nonetheless frequently arise because there are no consistent and easy-to-apply standards regarding the factors' optimal weighting.[39]

The Supreme Court in *Murphy* suggested several factors are more indicative than others with regard to establishing domicile.[40] Among those, one's place of voting or registration to vote, term of employment, and the time spent in a certain state are generally given more weight in determining domicile by the taxing authorities.[41] However, courts still have failed to provide a

36. *See Murphy*, 314 U.S. at 454–55 ("[W]e hold that persons are domiciled here who live here and have no fixed and definite intent to return and make their homes where they were formerly domiciled . . . The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary.").

37. *See, e.g.*, CAL. CODE REGS. tit. 18, § 17014(b) (2021) (evaluating whether the presence in the state is for anything other than a temporary or transitory purpose to determine domiciliary residency).

38. *See* Texas v. Florida, 306 U.S. 398, 413–14 (1939) (listing the factors courts and state agencies look at when determining residency); *see also* discussion *infra* Part IV.A.

39. *See* Hashmi, *supra* note 18, at 811 ("[T]axing authorities are therefore left to make the determination themselves").

40. *See Murphy*, 314 U.S. at 456–57 (stating that voting, nature of employment, and manner of living in a location are all highly relevant in determining domicile).

41. *See* Alexander v. District of Columbia, 370 A.2d 1327, 1329 (D.C. 1977)

solid formula which taxpayers and government agree upon when evaluating those residency factors.[42]

The Supreme Court in *Murphy* made clear that the presumption of continued domicile in the prior home state could be overcome by demonstrating that an individual intended to remain in a new state for an indefinite period.[43] Therefore, whether an individual has relinquished their former domicile is critical in determining an individual's residency. Although case law provides some elements and various objective tests to standardize the judgment, the focus of the question still lies in a finding of "intent," which is highly subjective, leading to continuous conflicts and inconsistency among states. For instance, the court in *Severy v. Office of Tax & Revenue* listed several types of objective evidence judges look for when adjudicating the issue of "intent."[44] In contrast, the Franchise Tax Board in California defers to principles from California's state' statutes to evaluate with which state the taxpayers have their "closest connection" during the tax year when adjudicating on an individual's intent to change domiciliary residency permanently.[45]

To make things even more convoluted, states have not always taken a consistent and standardized approach to tax their former residents. While some states take a narrow approach to tax only the income that their former residents earned within that state,[46] others have taxed former residents (and other nonresidents) on their income earned within the state together with

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(suggesting that voting be afforded greater weight in determining domicile because it highlights one's exercise of political rights).

42. *See* Hashmi, *supra* note 18, at 838 ("Residency and domicile are the touchstones of tax status; yet, as indicated through the case law, residence and domicile are not tax concepts.").

43. *See Murphy*, 314 U.S. at 457–58 (remanding the case with a list of factors to consider before determining domicile).

44. *See* Severy v. Off. of Tax & Revenue, 2010 DCOAH 800124, 2010 WL 2030374 at *8–11 (D.C. Off. of Admin. Hearings Apr. 1, 2016) (illustrating that under all facts and circumstances, the Court put more emphasis on the taxpayer's term of employment, time spent within the state, voter registration, and whether the individual had other dwelling-places outside the state).

45. *See infra* note 198 and accompanying text.

46. For example, the Massachusetts Supreme Judicial Court held that a former resident cannot be taxed on payments received from their former Massachusetts employer during those years in which the taxpayer did not carry on any trade or business in Massachusetts. *See generally* Comm'r of Revenue v. Oliver, 765 N.E.2d 742, 748 (Mass. 2002). The court construed the Massachusetts statute, which taxes former residents on "gross income derived from or

their income derived from other states.[47] In summary, both statutes and case law illustrate the inconsistency and ambiguity of the domiciliary test.

2. Statutory Resident Test

States utilize different tests to determine whether someone is a statutory resident for income tax purposes, even though that individual is not domiciled in that state.[48] Twenty states and the District of Columbia assert that an individual is a statutory resident for tax purposes if they live in the state for more than 183 days (or six months) in any year and maintain a permanent place of abode within the state.[49]

Some states classify individuals as statutory residents for tax purposes based on in-state physical presence (no require-

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effectively connected with any trade or business, including any employment carried on by the taxpayer in the commonwealth," MASS. GEN. LAWS ANN. ch. 62, § 5A(a)(1) (West 2022), as not extending to "taxation of nonresident income 'derived from or effectively connected with' past Massachusetts employment where the taxpayer has not 'carried on' any business in the Commonwealth during the taxable year of receipt." *See Oliver*, 765 N.E.2d at 748.

47. The reason why those states continue to tax former residents on their worldwide income might be that they still treat those moved-out residents as continuing current residents. Discretion is always in the hands of taxing authorities. *See infra* note 77 and its accompanying text.

48. A majority of the states currently follow some version of the statutory 183-day rule to define residency. The 183-day rule means that if a person spends more than half of the year (183 days) in a single state while maintaining a place of abode, then this person will become a tax resident of that state. However, each state may have variations to this rule. *Compare* CONN. AGENCIES REGS. § 12-701(a)(1)-1(a) (2022) (containing a 183-day requirement), *and* MASS. GEN. LAWS ANN. ch. 62, § 1(f) (West 2022) (same), *with* MINN. R. 8001.0300 (2022) (defining resident as an individual who "maintains a place of abode in Minnesota and spends in the aggregate more than one-half of the taxable year in Minnesota").

49. Currently, Colorado, Connecticut, Delaware, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, North Carolina, Pennsylvania, Rhode Island, Utah, Vermont, Virginia and West Virginia follow the statutory residency rule. Those states declare that an individual, though not domiciled in the state, is nevertheless a resident for tax purposes if the taxpayer maintains a permanent place of abode in the state and resides in the state for more than six months of the year. *See, e.g.*, LA. STAT. ANN. § 47:31 (2022); COLO. REV. STAT. ANN. § 39-22-103(8)(a) (West 2022)*; see also* Hashmi, *supra* note 18, at 818 ("The statutory residence analysis usually focuses on two key aspects: (1) physical presence for 183 days and (2) maintaining a place of abode."). *See generally* Kurt, *supra* note 30 (providing an overview of tax residency).

ment of a permanent adobe) while other states treat an individual as a resident on the basis of an in-state domicile (even if their in-state physical presence is minimal).[50] Distinctly, Arizona, California, and Hawaii declare an individual to be a resident for personal income tax purposes if one is in the state "for other than a temporary or transitory purpose."[51]

Different domiciliary and statutory residency rules can be onerous and confusing for employees and employers, and the inconsistency creates huge tax compliance burdens for wandering workers across states' borders. This imposition on remote workers' tax practices demonstrates the urgent need for a consistent state income tax scheme.

B. THE TROUBLESOME EMPLOYER CONVENIENCE RULE

Most states are non-convenience states, which adopt the standard rule. In non-convenience states, nonresidents are generally subject to state income tax only on the portion of their compensation that was generated from the services performed as an employee while physically present in that state. The convenience rule, on the other hand, expands that standard rule to tax nonresidents not only on the income earned in that state, but also on the portion of compensation received when working out of state, unless those workdays were for the necessity of the employer and not for the convenience of the employees.[52] For instance, to determine one's workday location, New York's convenience rule declares that "any allowance claimed for days worked outside New York must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of their employer."[53]

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50. *See* Zelinsky, *supra* note 13, at 544. For example, Alabama treats individuals as residents for those "individuals who are domiciled in Alabama regardless of whether or not they had a physical presence there during the tax year." *See generally* Kurt, *supra* note 30.

51. *See, e.g.*, ARIZ. REV. STAT. ANN. § 43-104(19)(a) (2022); CAL. REV. & TAX CODE § 17014(a)(1) (West 2022); HAW. REV. STAT. ANN. § 235-1 (West 2022). *See generally* Kurt, *supra* note 30.

52. *See* Ariele R. Doolittle, *Remote Workers Beware: Potential Double Taxation Under the Convenience Rule*, NYS SOC'Y OF CPAS (Nov. 1, 2020), http://www.nysscpa.org/news/publications/the-tax-stringer/stringer-article-for-authors/remote-workers-beware-potential-double-taxation-under-the-convenience-rule [https://perma.cc/LP6X-M8M9].

53. *See* N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2022).

Today, six states formally apply some version of the convenience rule, and they are collectively referred to as "convenience states."[54] The convenience states gain a huge advantage by applying the employer convenience rule and thereby taxing employees regardless of where they work. This rule subjects millions of telecommuters to double taxation.[55] Among the various adopters, New York's convenience test is the most well-known because of its broad application to workers in neighboring states (namely, Connecticut and New Jersey), its aggressive enforcement, and the breadth of the state's relevant case law and administrative guidance on the test.[56] With the extensively applied convenience of the employer test, employees must treat any day

54. The convenience states include Connecticut, Delaware, Massachusetts, Nebraska, New York, and Pennsylvania. *See infra* Appendix B. New Jersey ceased sourcing income in accordance with the employer's jurisdiction. *See New Jersey Income Tax Withholding Instructions*, N.J. DIV. OF TAX'N (Jan. 2021), https://www.state.nj.us/treasury/taxation/pdf/current/njwt.pdf [https://perma.cc/Z2CD-9RPS] (beginning on and after October 1, 2021, employers should resume sourcing income based on where the service or employment is performed and withhold New Jersey Gross Income Tax from such wages); *see also* Rute Pinho, *Convenience of the Employer Rule*, CONN. OFF. OF LEGIS. RSCH. 1 (Jan. 15, 2021), https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0008.pdf [https://perma.cc/H2PT-55HK] (noting the difficulty of applying Connecticut's convenience rule during COVID-19).

55. Under this doctrine, the 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 their employer. *See* Timothy P. Noonan, *Remote Workforce Doctrine and Policy: Looking to the New York Approach*, COLUM. J. TAX L. (Oct. 21, 2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/3GQE-5BYW]. However, "reason" is a magic word similar to "intent," which is commonly regarded as vague and amorphous, thereby invoking disputes. In addition, the factors New York State provides in determining if telework is for the necessity of the employer or for the convenience for the employees are highly fact dependent. *See New York Issues Guidance on the Nonresident Income Tax Liability to Employees Working Temporarily Outside of the State Due to COVID-19*, EY (Oct. 23, 2020), https://taxnews.ey.com/news/2020-2543-new-york-issues-guidance-on-the-nonresident-income-tax-liability-to-employees-working-temporarily-outside-of-the-state-due-to-covid-19 [https://perma.cc/KY44-WEJQ].

56. *See* Charlie Kearns, *Give Me Convenience or Give Me Federal Preemption*, J. MULTISTATE TAX'N & INCENTIVES 24, 27 (2020). The Court of Appeals reasoned that New York State provided affected teleworkers a "host of tangible and intangible protections, benefits and values . . . and that these benefits were provided every day, regardless of whether the taxpayer chose to absent himself from New York . . . ." Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276, 283 (N.Y. 2005) (internal quotations omitted).

they performed services outside of New York State as an in-state workday if they stay in another state for their own convenience.[57]

C. STRUCTURAL FLAWS AND CURRENT INEFFECTIVE SOLUTIONS TO DOUBLE TAXATION

Conflicting rules and regulations among states give rise to detrimental resident-based double taxation when two different states both treat one single taxpayer as its resident and tax their global income simultaneously.[58] By contrast, the convenience rule results in nonresident-based double taxation mainly because states employ inconsistent standards to recognize taxpayers' source income.[59] The focus of the convenience test hinges on the nature and basis of an employee's choice of working location.[60] However, as a practical matter, working for "employers' necessity" and for "employees' convenience" are not necessarily mutually exclusive particularly during the COVID-19 crisis,[61] rendering the convenience rule arbitrary and unsound. For instance, does an employee with a contagious illness work from home in a different state to accommodate their own sickness or their employer's need to avoid spreading sickness in the workplace?[62]

One of the present solutions to double taxation issues currently accepted (to varying extents) by most states and generally

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57. *See* PICPA, *supra* note 14 and accompanying text. *See generally* Darien Shanske, *Remote Workforce Doctrine and Policy: Short-Term and Long-Term Considerations*, COLUM. J. TAX L. (Oct. 21, 2020), https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/350 [https://perma.cc/3GQE-5BYW] (distinguishing between short-term solutions for the pandemic and long-term solutions once the pandemic subsides).

58. *See* discussion *infra* Part II.A.

59. *See* discussion *supra* notes 11, 14 and accompanying text.

60. *See* PICPA, *supra* note 14.

61. *See* Doolittle, *supra* note 52; *see also* Timothy P. Noonan & Doran J. Gittelman, *Taxing Times to Be a Telecommuter: Convenience Rules During COVID-19,* TAX NOTES (Sept. 21, 2020), https://www.taxnotes.com/featured-analysis/taxing-times-be-telecommuter-convenience-rules-during-covid-19/2020/09/17/2cyh2 [https://perma.cc/KUT8-N5ZR] (raising questions about whether days employees work remotely because of a COVID-19 stay-at-home order should qualify as convenience days or necessity days); *see also* Shanske, *supra* note 57 ("[I]f a taxpayer's home office has enough of the bells and whistles to essentially create what looks like an actual office or nexus in the employee's home state, rather than an employee simply working in their pajamas on their couch, then New York would respect their remote work arrangement.").

62. *See* discussion *infra* note 110 and accompanying text.

adopted and applied in the international setting is a "tax credit." Most states afford some type of credit to their resident taxpayers against their resident tax if they are simultaneously taxed by another state on source income derived from that source state.[63] However, this solution is not ideal because states have differing definitions of what constitutes source income.[64]

Less commonly, some states have also negotiated reciprocity agreements with other states as a tax relief to their residents. Residents of Wisconsin, for instance, are not required to pay tax on income earned in Illinois, Kentucky, Michigan, or Indiana—they only need to file a return in their home state.[65] If any of these states deducted income tax throughout the year and the employee lived in Wisconsin, that employee would be eligible to claim a refund on that withholding.[66] However, few states have successfully negotiated a reciprocity agreement with other states, and the reciprocity agreements are normally only possible among neighboring states.

To illustrate the structural flaws of the current state tax system and the ineffectiveness of existing solutions, imagine a scenario where State M has adopted the standard physical presence test to find source income, and State N uses the convenience rule for sourcing income taxation purposes. Suppose an individual is State M's resident but commutes to work in State N for one of State N's local employers. The taxpayer physically stays in State N for eighty days during a certain tax year, and the individual works at home in State M for the rest of the tax year at their own convenience. State N will tax the taxpayer on all the income generated this year based on the convenience rule, regardless of the 285 days when the taxpayer is not physically present in State N. However, State M, the resident state, will only

63. *See, e.g.*, CAL. CODE REGS. tit. 18, § 18001-1 (2022); DEL. CODE ANN. tit. 30, § 1111 (2022).

64. *See* discussion *supra* Part I.B; *see also* Pinho, *supra* note 54, at 1 ("Although the resident credit is generally intended to avoid double taxation, differences in the income sourcing rules between states can result in the same income being taxed by two states.").

65. "Wisconsin has reciprocity agreements with Illinois, Indiana, Kentucky, and Michigan. Persons who employ residents of those states are not required to withhold Wisconsin income taxes from wages paid to such employees." *See Withholding Tax Guide*, WIS. DEP'T OF REVENUE 10 (Oct. 2021), https://www.revenue.wi.gov/DOR%20Publications/pb166.pdf [https://perma.cc/BL2U-P5AL].

66. *See id.*

grant tax credits[67] against the portion of tax calculated based on the actual days the taxpayer physically works in the nonresident State N (i.e., eighty days). Therefore, the majority portion of the taxpayer's income is subject to double taxation in such a tax year. In short, the lack of uniformity in the residency and source income concepts significantly erodes the utility of tax credits relief as a solution to double taxation.[68]

In the wake of the COVID-19 pandemic, the tax compliance challenges, including the double taxation issue, will cause trouble for a much larger group of remote-working employees. As both employers and employees are grappling with how to smooth and streamline the remote working transition process, the tax compliance challenges make things even more complicated. As the following Part will show, several recent high-profile lawsuits highlight the undesirability of the current tax system, and more scholars have started to join the fight for a systematic fix.

II. THE CURRENT STATUS OF DOUBLE TAXATION AND EXISTING PROPOSED SOLUTIONS

Incompatible and inconsistent state tax laws regarding the residency determination and sourcing of employee income are not ideal from either legal or policy perspectives. Individuals face the risk of double taxation every time they work across state borders. The current solutions to this issue are tax credits and reciprocity agreements among states.[69] As illustrated in Part I.C., they are not the best solutions to double taxation issues because those tax benefits are not always available to the taxpayers they are intended to benefit. Not surprisingly, litigation results frequently from tax credit disputes among states because resident states are generally reluctant to grant tax credits to their residents.

The reason for such a dilemma is obvious: if a resident state follows the norm to offer tax credits for taxes paid by its residents to another source state, the resident state often ends up getting

67. When more than one state taxes the same income, normally the individual's resident state will grant tax credit for taxes paid to the other state, which is usually the nonresident state.

68. *See* Hashmi, *supra* note 18, at 843.

69. *See, e.g.*, Daniel C. Soriano, Jr., *Multi-State Taxation of Personal Income*, 111 U. PA. L. REV. 974, 981 (1963) ("The most important concession made by the states to alleviate multiple taxation is the allowance of credits for income taxes paid to other jurisdictions.").

very little or even zero tax revenue.[70] Even if all relevant states granted tax credits to taxpayers, the credits would still provide them with fewer tax benefits than they would have if the taxpayer could apportion their taxable income among the states.[71] The following example as well as the illustration in Table 1 provides further clarity.

Suppose a taxpayer is the resident of State C and works for a national company's branches in both State C and State D in a certain tax year. The resident made $80 out of $100 in State C and the remaining $20 was earned in State D. Let us calculate this taxpayer's effective tax rate[72] in both the apportionment context and tax credits context.[73] The table below shows that the effective tax rate under the tax credits system is higher than that with the apportionment scheme, meaning the apportionment approach provides more tax benefits than the tax credits approach does.

Table 1: Tax Credit versus Apportionment

Tax Base	**Tax Before Credit**	**Credits for State D**	**Tax After Credit**	**Effective Tax Rate**[74]
$80 (Apportionment context)	$6.4 = (80*8%)	$0	$6.4	8% = (6.4/80)
$100 (Tax credit context)	$8 = (100*8%)	$0.8 = (100-80) * 4%[75]	$7.2	9% = (7.2/80)

70. *See* Darien Shanske, *Agglomeration and State Personal Income Taxes: Time to Apportion*, 48 FORDHAM URB. L. J. 949, 963 (2021). "The system of tax credits and offsets does not necessarily produce consistent results and it is not always a failsafe method against double taxation." *See* Hashmi, *supra* note 18, at 835.

71. *See, e.g.*, N.J. Nat. Gas Co. v. Dir., Div. of Tax'n, 24 N.J. Tax 59 (2008).

72. A method to evaluate the taxpayer's tax burden. If the effective tax rate is higher, then the tax burden is heavier.

73. For this example, let us assume the tax rate of State C is 8%, the tax rate in State D is 4%, and the resident made $100, with $80 in State C and $20 in State D.

74. Effective Tax Rate is calculated by "tax after credit"/ "income earned in one particular state (apportioned income)." The apportioned income for State C in this case is $80, both in apportionment and tax credit contexts.

75. For the rationale of this calculation, see *Connecticut Employer's Tax Guide*, CIRCULAR CT (Dec. 21, 2021), https://portal.ct.gov/-/media/DRS/Publications/pubsip/2022/IP-2022-1.pdf [https://perma.cc/5JAQ-BT8A] ("For an

Other efforts have also been made to alleviate double taxation on taxpayers. A few states have adopted provisions expressly targeting double taxation caused by inconsistent residency determination definitions.[76] However, the application of such provisions ultimately returns to the question of whether a certain taxpayer has effectively relinquished their former residence and whether the taxpayer can prove their change of residency. Unfortunately, the determination standards regarding whether to relieve taxpayers from residency are far from clear.[77]

This Part builds on the previous discussion of the structural flaws in the state income tax system and elaborates on how double taxation occurs from both dual residents' and nonresidents' perspectives.

A. RESIDENT-BASED DOUBLE TAXATION AND PROPOSED SOLUTIONS

Double taxation disputes arise consistently because the residency test and the key definitions within this doctrine are overly broad and not guided by universal principles.[78] Double taxation resulting from dual residency also often arises from the overlap between states' domiciliary and statutory residency tests.[79] Even if a taxpayer plans to change their domiciliary residency,[80] carefully follows the new residence state's statutes and

employee who is a resident individual and works for you in one or more qualifying jurisdictions and in Connecticut, you must first determine the Connecticut income tax that would otherwise be required to be deducted and withheld from the employee's total wages and prorate that amount between the qualifying jurisdictions in which the employee works for you. If the prorated tax amount for a qualifying jurisdiction exceeds the income tax required to be deducted and withheld from the wages for the qualifying jurisdiction, you must withhold the difference and remit it to DRS. You also deduct and withhold from the employee's wages the prorated tax amount for Connecticut and remit that amount to DRS.").

76. For example, Georgia allows a person who changes their residence during any part of the taxable year to report and pay a tax only for that portion of the year in which they were a resident, and to comply with the nonresident tax provisions for the rest of the year. GA CODE ANN. § 48-7-1(10)(C) (2022).

77. *See, e.g.*, GA. CODE ANN. § 48-7-85 (2022) ("Whenever the commissioner in his discretion determines that a person is not liable for the tax for an entire year because of moving into the state or moving out of the state . . . . The commissioner in his reasonable discretion shall be the sole judge as to when this Code section shall apply."). *See generally* discussion *infra* Part IV.A.

78. *See* Hashmi, *supra* note 18, at 799.

79. *See* discussion *infra* note 207 and accompanying text.

80. *See* discussion *supra* Part I.A.1.

regulations, fulfills the residency requirements, and genuinely believes that a new domicile has been successfully established with the old one being sufficiently abandoned, the taxpayer could still be surprised to find that the old home state continues to deem them as its resident, taxing them on their worldwide income.[81]

Imagine a taxpayer's permanent home is in New York and they fly down to Florida (a non-income-tax state) during the colder months.[82] To avoid double taxation, they established a domicile in the new state, changed the location of their voter registration, got a driver's license, and opened multiple bank investment accounts. They also spent at least 183 days of the year in a place of abode in Florida to meet the physical presence element of the statutory residency test.[83]

New York, known for its vigorous audits and aggressive tax policies, is highly likely to treat the taxpayer as its continuous domiciliary resident, drawing from a series of facts and circumstance analyses, even in situations where the taxpayer can show the record of shopping receipts and other documents to substantiate their physical stay in another newly-moved-in state.[84]

Unfortunately, there are still no effective solutions to such dilemmas. Although it has been well acknowledged that current tax reliefs from tax credits and reciprocity agreements are neither effective nor sufficient, very few scholars have proposed following the business income tax apportionment scheme and constructing a similar apportionment formula to be implemented under the individual income double-taxation context.[85] One scholar has advanced a federal substantial presence test to establish an objective standard for determining the statutory residency across states;[86] however, no scholars have proposed an individual state income tax apportionment formula incorporating the logic of the substantial presence test.

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81. *See* Kurt, *supra* note 30.

82. *See id.*

83. *See* discussion *supra* Part I.A.2.

84. *See* Kurt, *supra* note 30.

85. *See* Zelinsky, *supra* note 13, at 535 (quoting the "Snowbirds" proposal by Minnesota Governor Mark Dayton) ("A state should tax the income with respect to which it has source jurisdiction. As to income which two or more states tax only on the basis of residence, such states should apportion based on the dual resident's relative presence in each state of residence."); *see also* discussion *infra* Part IV.B.

86. *See* Hashmi, *supra* note 18, at 839–40.

The federal substantial presence test is established by a carryover of days.[87] The rule reads that if an individual is not physically present in the United States for 183 days or more in the calendar year, then the number of days the individual was physically present in the United States during the two preceding years is combined with the number of days the individual was physically present in the current calendar year for purposes of meeting the 183-day test.[88] The first preceding year would be counted as one-third of a day and the second preceding year would be counted as one-sixth of a day.[89]

As a result of the current lack of uniformity among states regarding the determinations of residency and source income, self-apportionment of taxable income is a highly fact-intensive practice for taxpayers crossing the states' borders.[90] It is therefore extremely hard for individuals to escape the state double taxation quagmire. Taxpayers often resort to solving their double taxation disputes by appealing to the states' courts and seeking remedies, taking extra time and facing additional legal expenses. To make things worse, the Tax Injunction Act[91] "requires nonresidents to seek relief from the administrative tribunals and courts of the taxing states. These state tribunals and courts often do not protect nonresidents, but instead burden them with the prohibitive costs of state court litigation."[92]

Dual-residency double taxation issues have historically received little attention from scholars and legislators, but given the unprecedented changes brought on by the pandemic and the implications for common future working modes, this type of tax

87. I.R.C. § 7701(b)(3)(A)(ii).

88. *Id.*

89. For example, if a foreign national were present in the United States during the current year for approximately 120 days, 90 days in the first preceding year, and 60 days in the second preceding year, then the total would only be 160 days (120+1/3*90+1/6*60) over the course of three years and, therefore, the individual would not be subject to U.S. taxation. *Id.*

90. *See e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 195 (1994) (citations omitted) (suggesting that because taxpayers have the burden to demonstrate that "the income attributed to a certain state is in fact out of all appropriate proportions to the business transacted . . . in that State," disputes would not be completely avoided) (internal quotations omitted) (citations omitted).

91. 28 U.S.C. § 1341.

92. Brief of Professor Edward A. Zelinsky as Amicus Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 3, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 154).

headache has become more widely discussed in recent years.[93] Unfortunately, the nonresident-based double taxation, especially that caused by the well-known convenience rule, has already created numerous controversies around the nation, including several high-profile cases that will be discussed in the following Section.[94]

B. NONRESIDENT-BASED DOUBLE TAXATION AND DISPUTES

Nonresident-based double taxation problems have become extremely troublesome, as an increasing number of employees opt to work remotely. Two bills aimed at addressing this issue were introduced to Congress in 2021. One is the Multi-State Worker Tax Fairness Act of 2021, which proposes that remote workers should only be taxed by their state of residence on the income they earn while working at home.[95] The second is the Remote and Mobile Worker Relief Act of 2021, which is a temporary measure made in response to the pandemic and in essence adopts the problematic "convenience rule."[96] Similar federal legislation has previously been introduced by seven other congresses, though none of the bills moved forward.[97]

One of the primary obstacles that hinders such legislation from being passed is that states have substantial discretion to develop their own tax schemes, and states have approached the tax treatment of telecommuters differently.[98] States have implemented different guidance to respond to pandemic-related remote working tax withholding issues. In summary, states have

93. This Note therefore aims to construct a novel apportionment formula to be applied to state individual income taxation doctrine. In normal circumstances, the formula proposed is to apportion the tax base simply by dividing taxpayers' actual working days in each state. Under certain special scenarios, the formula reshapes to incorporate the substantial presence test into the physical presence calculation. This Note will discuss comprehensively how such an apportionment formula approach could help with developing a fair and effective tax system in Part IV. *See* discussion *infra* Part IV.

94. *See* discussion *infra* Part II.B.

95. S. 1887, 117th Cong. (2021); H.R. 4267, 117th Cong. (2021).

96. S. 1274, 117th Cong. § 3 (2021) ("The term 'primary work location' means, with respect to an employee, the address of the employer where the employee is regularly assigned to work when such employee is not working remotely during the covered period.").

97. *See* Kearns, *supra* note 56.

98. *See* discussion *supra* Part I.B.

generally acted in three ways: (i) abstaining from issuing published guidance on employer withholding;[99] (ii) adopting temporary laws, regulations, or other guidance that change the normal pre-pandemic withholding rules;[100] and (iii) issuing guidance that specifically confirms that the pre-pandemic rules remain in full force and effect.[101]

Double taxation issues and heavy tax burdens on taxpayers caused by the debatable convenience rule have only been exasperated as working modes change. There have been several high-profile lawsuits on the convenience rule, such as *New Hampshire v. Massachusetts*[102] and *Zelinsky v. Tax Appeals Tribunal*.[103] As telecommuting continues to grow throughout the United States, an accurate and consistent nonresident state income tax system is crucial.

1. *New Hampshire v. Massachusetts*

As background, Massachusetts Department of Revenue (MADOR) issued a proposed regulation that affected neighbor-states' teleworkers, thus beginning one of the most high-profile

99. These states include Arizona, Colorado, Hawaii, Indiana, Louisiana, New Mexico, North Carolina, Oklahoma, Utah, Virginia, and West Virginia, plus D.C. *See State Guidance Related to Covid-19*, HODGSON RUSS LLP, https://www.hodgsonruss.com/assets/htmldocuments/Telecommuting_5.22.20.pdf [https://perma.cc/7RR8-JJ2U] (June 9, 2021).

100. *See, e.g.*, *Alabama Department of Revenue Coronavirus (COVID-19) Updates*, ALA. DEP'T OF REVENUE, https://revenue.alabama.gov/coronavirus-covid-19-updates [https://perma.cc/6DJU-CREU] (indicating Alabama will adopt the temporary rule in face of the pandemic to tax teleworkers according to their pre-COVID-19 work location); *see also* 280-20 R.I. CODE R. § 55-14.6(A) (LexisNexis 2021) ("The State of Rhode Island will continue to treat as Rhode Island-source income the income of employees who are non-resident individuals temporarily working outside of Rhode Island solely due to the COVID-19 State of Emergency.") (extended four times to July 17, 2021).

101. *See* Charles Kearns & Chelsea Marmor, *Permanent Telework and Covid-19 – Should You Stay, or Should You Go?,* 30 J. MULTISTATE TAX'N & INCENTIVES 28, 29 (2021); *Wisconsin Tax Bulletin 211*, WIS. DEP'T OF REVENUE (Nov. 2020), https://www.revenue.wi.gov/WisconsinTaxBulletin/211-11-20-WTB.pdf [https://perma.cc/97KF-74LW] ("Telecommuting employees continue to report their income based on the guidance in the article titled *Telecommuting and Mobile Employees* on page 13 of *Wisconsin Tax Bulletin 171* (April 2011).").

102. Motion for Leave to File Bill of Complaint, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 154).

103. Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004).

double taxation disputes of the COVID-19 era.[104] The MADOR published a regulation stating that all compensation received for services performed by a non-resident was to be treated as Massachusetts source income subject to personal income tax withholding if the following two conditions were met: (1) immediately prior to the Massachusetts COVID-19 state of emergency, the nonresident was an employee engaged in performing such services in Massachusetts and (2) the nonresident is currently performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance.[105]

The case was about state tax jurisdiction disputes between New Hampshire and Massachusetts. Massachusetts issued a new regulation which requires employees to treat at-home days as in-office days when working from home due to pandemic-related circumstances.[106] Before the pandemic, Massachusetts respected constitutional restraints and taxed nonresidents only on the income earned within the state's border.[107] The regulation in face of the pandemic causes detrimental double-taxation problems for remote workers, and one might surmise that the primary rationale for this strict law is pecuniary self-interest.

After Massachusetts imposed this broad individual income tax including on nonresidents' income sourcing from the state, the New Hampshire Attorney General filed a Motion challenging Massachusetts's tax rule by arguing that New Hampshire's sovereign right to control its own tax was infringed and that the tax rule violated the Commerce Clause and Due Process Clause, and was therefore unconstitutional.[108] However, the Supreme Court declined to hear the case on June 28, 2021.[109]

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104. *See* Motion for Leave to File Bill of Complaint, *supra* note 102. *See generally* Kearns, *supra* note 56.

105. *See* 830 MASS. CODE REGS. 62.5A.3 (2021); *see also TIR 20-10: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic*, MASS. DEP'T OF REVENUE (July 21, 2020), https://www.mass.gov/technical-information-release/tir-20-10-revised-guidance-on-the-massachusetts-tax-implications-of [https://perma.cc/QD3B-HXNH].

106. *See* 830 MASS. CODE REGS. 62.5A.3 (2021); *see also* Billy Hamilton, *Walling in and Walling Out Taxes in New England*, 98 TAX NOTES ST. 501 (2020).

107. *See* MASS. GEN. LAWS. ANN. ch. 62, § 5A(a) (West 2022) ("Massachusetts gross income shall be determined solely with respect to items of gross income from sources within the commonwealth of such person.").

108. *See* Motion for Leave to File Bill of Complaint, *supra* note 102, at 3.

109. *See* New Hampshire v. Massachusetts, SCOTUSBLOG, https://www

Massachusetts's new regulation hurts millions of telecommuters and remote workers, and states overtaxing caused by self-interest will only worsen as COVID-19 telecommuting and remote work shifts continue. Similar to New York, Massachusetts penalizes work-from-home workers by overtaxing them while at the same time encouraging remote work as part of its larger COVID-19 response.[110]

2. *Zelinsky v. Tax Appeals Tribunal*

Similar to Massachusetts, New York's extensive discretion to enforce broad taxation on nonresidents also brings about quite a few double taxation lawsuits. When interpreting the Consolidated Laws of New York by its plain meaning,[111] taxpayers should only be subject to the portion of their total taxable income which is derived from sources in New York, and the tax base should equal the total taxable income "multiplied by the New York source fraction."[112] However, the adopted convenience rule complicates New York's seemingly innocent tax scheme by making it the case that if the nonresident employee performs services for their New York employer both within and without New York State for the *entire* tax year, the taxpayer shall be taxed on the income earned both within and without New York, unless the days the employee worked in the other states are based upon the employer's necessity.[113]

Another provision under the same statute adopts ostensibly the opposite principle: that nonresidents should apportion the tax base according to their actual number of days worked within New York State if the nonresident employee performs services both within and without New York for only *part* of a taxable

.scotusblog.com/case-files/cases/new-hampshire-v-massachusetts [https://perma.cc/YG6R-RDNC]; *see also* New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (denying leave to file a bill of complaint).

110. *See COVID-19: Essential Services*, MASS.GOV, https://www.mass.gov/info-details/covid-19-essential-services [https://perma.cc/36CH-T9JL] ("Governor Charlie Baker's order requiring all businesses and organizations that do not provide COVID-19 Essential Services was originally issued on March 23, 2020. The order was extended on March 31, April 28, and May 15."); *see also Declaration of a State of Emergency to Respond to COVID-19,* MASS.GOV (Mar. 10, 2020), https://www.mass.gov/news/declaration-of-a-state-of-emergency-to-respond-to-covid-19 [https://perma.cc/EB3P-2G2D].

111. N.Y. TAX LAW § 601(e)(1) (McKinney 2022).

112. *Id.*

113. N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2021) (adopting the commonly known convenience rule).

year.[114] Because of the convoluted and conflicting language of these regulations, New York takes an aggressive position on taxing nonresidents on both the days spent within and without the State based on the convenience rule.

In *Zelinsky v. Tax Appeals Tribunal*, taxpayer Zelinsky was a law school professor at Cardozo School of Law in New York City.[115] He commuted to New York and worked there for three days each week at the law school, and he worked from home in Connecticut on the remaining two days.[116] When filing his tax returns for 1994 and 1995, Zelinsky apportioned his income according to the days he worked in New York and the days he worked from home.[117] With the self-apportionment rejected and additional tax assessed by the State, Zelinsky challenged the statute, arguing that the convenience test violated both the Due Process and Commerce Clauses of the Constitution.[118] However, New York's highest court sustained New York's extraterritorial tax on Professor Zelinsky, taxing him on the salary he earned even when he was not physically in New York based on the reasoning that Zelinsky's salary was derived from a New York source and that he benefitted directly from an employment opportunity there.[119]

After New York's highest court rejected the challenge in 2003, New York continued its hostile tax sovereignty and taxed nonresidents as far away as Tennessee,[120] Florida,[121] and

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114. N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(b) (2021) ("[H]is income derived from New York State . . . multiplied by a fraction the numerator of which is the number of days he worked within New York State and the denominator of which is the number of days he worked both within and without New York State during the period he was required to perform services both within and without New York State."). Therefore, it is unclear what would trigger the convenience rule to apply by merely interpreting the regulation with its plain meaning—i.e., whether a telecommuter should truly never step into New York to avoid New York tax, or whether there is any amount of time a nonresident could work inside the state that would be deemed insignificant enough to excuse the nonresident from New York tax on the income earned out-of-state.

115. Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 843 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004).

116. *Id.*

117. *Id.* at 843–44.

118. *Id.* at 844.

119. *Id.* at 848; *see also* discussion *supra* note 113 and accompanying text.

120. Huckaby v. N.Y. State Div. of Tax Appeals, 829 N.E.2d 276 (N.Y. 2005), *cert. denied*, 546 U.S. 976 (2005).

121. *In re* Holt, No. 821018, 2008 WL 2880343 (N.Y. Tax App. Trib. July 17, 2008).

Arizona.[122] Transitioning into the new remote-working era, the double taxation problem caused by the convenience rule is expected to become increasingly prevalent.

As different COVID-19 variants still surge in the United States, a larger number of employers and employees are fully prepared to maintain remote working policies, possibly indefinitely. After two years of teleworking, employees prefer to continue with a remote workforce to save on personal costs and increase their productivity. If the convenience rule remains in place, double taxation issues will eventually break long-term external consistency,[123] devastating interstate commerce.[124] In short, notwithstanding the Supreme Court's denial of certiorari in the above high-profile cases, this Note presents a critical view of the convenience of the employer rule and calls for the Supreme Court to intervene and Congress to legislate to put an end to the unfair tax treatment of telecommuters.[125]

III. CONGRESS'S CONSTITUTIONAL CONCERNS AND THE SUPREME COURT'S INTERVENTION

Although many scholars have joined the battle to criticize the unconstitutionality of states imposing excessive taxes, which could subject individuals to double taxation,[126] the Supreme Court still refused to break its own longstanding stance that the states' power to raise revenue is an authority essential to their independent sovereignty.[127]

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122. *In re* Kakar, No. 820440, 2006 WL 721643 (N.Y. Div. Tax App. Feb. 16, 2006).

123. *See* discussion *infra* notes 135–37 and accompanying text.

124. *See* discussion *infra* Part III.

125. See Meredith A. Bentley, Note, 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, 1166 (2006) for similar arguments. *See also* discussion *infra* Part III.

126. As Professor Hellerstein has written, "For more than 75 years, the Supreme Court has steadfastly adhered to the doctrine that the dormant Commerce Clause forbids state taxes that expose interstate commerce to a risk of multiple taxation to which intrastate commerce is not exposed." *See* Walter Hellerstein, *Deciphering the Supreme Court's Opinion in Wynne*, 123 J. TAX'N 4, 6 (2015); *see also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, 1 STATE TAXATION ¶ 4.09[1][a] (3d ed. 2022) ("[A] tax that exposes a multistate taxpayer to the risk of multiple taxation is invalid under the Commerce Clause.").

127. Bradley W. Joondeph, *The States' Multiple Taxation of Personal Income*, 71 CASE W. RSRV. L. REV. 121, 122 (2020).

However, as double taxation issues brought by remote working are becoming extremely pressing and hundreds of millions of employers and employees struggle with the current state income tax scheme, Congress and the Supreme Court should start to intervene to invalidate both resident-based and nonresident-based double taxation. The Supreme Court has long recognized that states should have limited power to tax nonresidents,[128] and the Commerce Clause and the Due Process Clause prohibit the states from "taxing value earned outside their borders."[129]

A. CONSTITUTIONAL THEORIES AND THEIR APPLICATIONS

The states' tax must be (1) applied to an activity with a substantial nexus with the taxing State; (2) fairly apportioned; (3) nondiscriminatory—i.e., it must not discriminate against interstate commerce; and (4) fairly related to the services provided by the taking state.[130]

First, the substantial nexus requires that "there must be a connection to the activity itself, rather than a connection only to the actor the state seeks to tax."[131]

Second, regarding the fair apportionment prong, the *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* Court adopted the test to evaluate whether one state's overreaching tax conflicts with the possibility that another state will claim its fair share of the value already taxed.[132] In other words, the Court looked at whether "the portion of value by which one state exceeded its fair share would be taxed again by a state properly laying claim to

128. *See e.g.*, Motion for Leave to File Bill of Complaint, *supra* note 102, at 3.

129. *See e.g.*, Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992); *see also* Miller Bros. Co. v. Maryland, 347 U.S. 340, 342 (1954) (concluding that a state's reach beyond its borders to take money from nonresidents is simply a confiscation). The real core of the debate should be the discussion of whether multiple taxation violates one of the two deeply embedded, foundational limits on states' taxing authority: (1) that states may only tax income over which they have lawful jurisdiction; and (2) that states may not impose taxes that discriminate against interstate commerce. *See* Joondeph, *supra* note 127, at 125.

130. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (introducing the four-part test which has been largely recognized and adopted by different courts). This test will be referred to as the "*Complete Auto* four-part test" for the rest of this Note.

131. *Allied-Signal, Inc.*, 504 U.S. at 778.

132. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184–85 (1994) (suggesting that there would be double taxation without a fair apportionment).

it."[133] Case law lends additional legal support to the fair apportionment prong of the *Complete Auto* four-part test[134] by noting that a fair apportionment is based on two factors: internal and external consistency.[135] "To be internally consistent, the tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result."[136] External consistency, on the other hand, involves "the economic justification for the state's claim upon the value taxed by discovering whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[137]

Third, the *Comptroller v. Wynne* Court, by introducing three notable cases,[138] supported its conclusion that taxing individuals across state borders constitutes discrimination over interstate commerce. Therefore, the Court ruled that Maryland's tax scheme which might have resulted in double taxation of income earned out of a certain state and discriminated in favor of intrastate over interstate economic activity was unconstitutional.[139]

Last, but not least, the Supreme Court upheld the "fairly related to the services provided by the taking State" prong in *Curry v. McCanless*[140] case. The Court concluded that each state was seen as providing the "benefit and protection of [its] laws enabling the owner[s] to enjoy the fruits of [their] ownership and simultaneously to have the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax."[141] States impose taxes on their residents "to provide for the preservation of peace, good order, and health, and the execu-

133. *Id.*

134. *See supra* note 130 and accompanying text.

135. *See, e.g.*, Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 845 (N.Y. 2003); *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

136. *Zelinsky*, 801 N.E.2d at 845.

137. *Jefferson Lines, Inc.*, 514 U.S. at 185.

138. *See, e.g.*, J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 311 (1938) (holding that a tax scheme without apportionment violated the dormant Commerce Clause); Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434, 439 (1939) ("This tax . . . discriminates against interstate commerce . . . ."); Central Greyhound Lines, Inc. v. Mealey, 334 U. S. 653, 662 (1948) (holding that the New York scheme violated the dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce).

139. Comptroller of the Treasury v. Wynne, 575 U.S. 542, 550–51 (2015).

140. Curry v. McCanless, 307 U.S. 357, 367 (1939).

141. *Id.* at 364.

tion of such measures as conduce to the general good of their citizens."[142] The Supreme Court has held that a state's power to tax an individual's activities is justified based on "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities, and benefits given by the state."[143]

1. The *Complete Auto* Four-Part Test's Application in Resident-Based Double Taxation

Resident-based double taxation violates the Commerce Clause because the double taxation on dual residents burdens the flow of interstate commerce and violates the "substantial nexus" and "fair apportionment" prongs of the *Complete Auto* four-part test.[144] Consider a Resident, C, of State A who moved to State B during the pandemic and worked remotely for an entire tax year in State B. Suppose State A adopts the domiciliary test to define residency, and State B adopts the statutory residency test. In this case, Resident C will be regarded as a tax resident by both States A and B, subject to double taxation on Resident C's entire income because of their dual-residency.[145] The resident-based double taxation here violates the "substantial nexus" prong because State A's tax authority on Resident C's income during the tax year at issue lacks substantial connection to Resident C's economic activity itself. Rather, State A merely has a reasonable connection with the actor the state seeks to tax—Resident C themself. As a result, Resident C's entire income has been taxed twice, resulting in successive taxation and unfair apportionment between the two taxing states.[146]

142. United States v. City of New Orleans, 98 U.S. 381, 393 (1878); *see also* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (suggesting that the only question that matters to the Due Process Clause is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state).

143. *See J.C. Penney Co.*, 311 U.S. at 444; *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (suggesting that in order to be constitutional, the tax must be fairly related to the services provided by the taking state).

144. *See Complete Auto*, 430 U.S. at 279.

145. *See* discussion *supra* Part II.A.

146. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 191 (1994) (applying these two factors in the analysis); *see also* Zelinsky, *supra* note 13 at 565 (discussing apportionment requirement when personal income taxes are collected in multiple states).

Resident-based double taxation also inevitably breaks both the internal[147] and external consistency prongs,[148] resulting in an unfair apportionment of tax. The resident-based double-taxation is invoked by conflicting and inconsistent residency tests among the states. Due to the lack of a uniform definition of what constitutes a "domicile," an individual may be found to be a resident of multiple states even if all states follow the same residency test—the domiciliary test[149]—and thereby be subject to multiple internally inconsistent state income taxes.[150]

The resident-based double taxation is externally inconsistent as well. Let us continue with the Resident C example, where both State A and State B will tax the resident's global income during that tax year.[151] In this example, the domiciliary State (State A) arguably should not tax Resident C's earned income at all because there was simply no in-state economic activity performed in State A by the taxpayer Resident C. In other words, State A has overtaxed the portion of the revenue from Resident C's interstate activity, and the portion does not reflect the in-state component of the activity being taxed, breaking the external consistency.[152]

2. The *Complete Auto* Test's Application in Nonresident-Based Double Taxation

The nonresident-based double taxation, which is commonly invoked by the home state and the source state taxing on the same income,[153] again violates the Dormant Commerce Clause under the *Complete Auto* four-part test[154] and the Due Process Clause. When teleworkers worked remotely from home for an

147. *See supra* note 136 and accompanying text.

148. *See supra* note 137 and accompanying text.

149. Here it is supposed all states define their residents using domiciliary test and no state determines tax residency by the statutory test.

150. *See* discussion *infra* Part IV.A.

151. State A would claim the residency based on the domiciliary test and State B based on the statutory test, and nearly all the states currently legislate to tax on the entire global income of its own tax residents in a certain tax year. *See* discussion *supra* Part II.A.

152. *See* discussion *supra* note 137 and accompanying text.

153. Normally, home states may grant certain tax credits to its residents who are also subject to tax on the source income from another state if both states tax on the same portion of income. However, this tax benefit is not always available when one of the "convenience states" gets involved. *See* discussion *supra* Part I.B.

154. *See supra* note 130 and accompanying text.

entire tax year for an employer located in another state, and when the nondomiciliary state[155] is one of the "convenience states,"[156] they will almost certainly be subject to double taxation[157] on their entire income. The nonresident-based double taxation fails all four prongs of the *Complete Auto* test because the remote workers' activity lacks a substantial nexus with the source state; the tax is not fairly apportioned between the home state and the source state; the tax rule discriminates against interstate commerce; and the nonresident tax is not fairly related to the services provided by the source state.[158] The following hypotheticals illustrate the illegality of nonresident-based double taxation.

Consider Resident D, who is a resident of State E and used to physically work in State F, which adopted the convenience rule, for a local employer. During the COVID-19 pandemic, Resident D returned to State E and started a one-year-long remote work period at home. In this case, all the business activities and services were performed in State E. State F, therefore, lacks a substantial nexus with Resident D's income because all the economic activities were conducted in State E, whereas the only connection between State F and Resident D is an indirect and tenuous link formed through Resident D's employer located in State F.[159] State F's nonresident tax on Resident D's entire income also violates the fair apportionment prong of the four-part test because one hundred percent (100%) of Resident D's business activity was performed in State E instead of State F. Following the logic adopted by the *Oklahoma Tax Comm'n* Court, State F's overreaching taxes conflict with the possibility that State E will claim its fair share of the value already taxed, and the portion of value State F taxed on exceeded its fair share,

155. Nondomiciliary states are the same as source states. The Author uses the two terms interchangeably in this Note.

156. *See infra* Appendix B.

157. Both from their home state which always has the jurisdiction to tax on its residents' global income, and from the nondomiciliary state because of the convenience rule. *See* discussion *supra* Part I.B.

158. *See* Young Ran (Christine) Kim, *Taxing Teleworkers,* 55 U.C. DAVIS L. REV. 1149, 1158 (2021) (using *New Hampshire v. Massachusetts* as an example to argue that the nonresident-based double taxation is unconstitutional under the *Complete Auto* four-part test).

159. *See* Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 778 (1992) ("[T]here must be a connection to the activity itself, rather than a connection only to the actor the state seeks to tax.").

which in this case should be zero.[160] In conclusion, State F's tax on Resident D's entire income under the convenience rule is unsound and unconstitutional.

With the legal theories proving that both resident-based and nonresident-based double taxation are unconstitutional, the following Sections demonstrate the reasons why Congress and the Supreme Court could/should intervene and maintain a broad power to solve state double taxation problems.

B. LEGAL BASIS IN THE COMMERCE CLAUSE, PRIVILEGES AND IMMUNITIES CLAUSE, AND DUE PROCESS CLAUSE FOR CONGRESS TO INTERVENE

The United States Constitution operates to prohibit a state from imposing a tax that unfairly burdens interstate commerce.[161]

Pursuant to the Constitution, Congress has the power to regulate commerce among the states and with foreign nations.[162] Granting the Commerce Power to Congress is a means of providing the national government with the express authority to override restrictive and conflicting state commercial regulations, preventing states from harming national unity and the national economy.[163] Considering the gradual expansion of the Commerce Clause, there are an increasing number of cases starting to press the constitutional questions concerning the current extremely burdensome state tax scheme by arguing that the power to regulate interstate commerce should be vested in Congress.[164]

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160. *See supra* note 132 and accompanying text; *see also* Kim, *supra* note 158, at 1175 (arguing that the nonresident-based tax is unconstitutional and violates the fair apportionment because there is a difference between the service performed by employees and business conducted by employers).

161. *See* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 549–50 (2015) (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)) ("Nor may a State impose a tax which discriminates against interstate commerce . . . by subjecting interstate commerce to the burden of 'multiple taxation.'").

162. *See* U.S. CONST. art. I, § 8, cl. 3.

163. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571 (1997) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring)).

164. *See* Michael Kraich, *The Chilling Realities of the Telecommuting Tax: Adapting Twentieth Century Policies for Twenty-First Century Technologies*, 15 U. PITT. J. TECH. L. & POL'Y 224, 232 (2015); *see also* Mich.-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157, 170 (1954) ("That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.").

The Article IV Privileges and Immunities Clause is commonly referred to as the "interstate" Privileges and Immunities Clause. It provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[165] As Professor Morgan Holcomb argues in her scholarship, the Privileges and Immunities Clause of Article IV of the Constitution shares a common goal and overlapping functions with the dormant Commerce Clause in prohibiting states from discriminating against nonresidents.[166] Compared with those resident workers who do not have to straddle between states to perform their daily work, nonresident teleworkers who commute across state borders (especially when convenience states are involved) are subject to excessive nonresident taxation by those convenience states.[167] This is exactly the type of discriminating behavior the Privileges and Immunities Clause governs and endeavors to prevent.[168] If states do not cooperate to fix the overall state income tax system, numerous wandering workers straddling state borders will continuously fall into the double (or even multiple) taxation traps, hurting the nation's interstate commerce.

To survive a challenge under the Due Process Clause, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[169] In other words, if the connection between the tax and activity is attenuated, there will be a violation of the Due Process Clause. Although the home state has long been held to have the original jurisdiction to tax its residents on their worldwide income, sufficient contact with the state to impose tax on individuals is still required under the Due Process Clause. The Due Process Clause lends support to the illegality of nonresident-based double taxation and explains why a state's income tax can only be imposed

165. U.S. CONST. art. IV, § 2.

166. Holcomb, *supra* note 25, at 926–28.

167. *See* discussion *supra* note 52 and accompanying text.

168. Holcomb, *supra* note 25, at 927 ("The Privileges and Immunities Clause expressly protects the rights of nonresidents.").

169. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992); *see also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 274 (1978) (quoting Norfolk & W. Ry. Co. v. State Tax Comm'n, 390 U.S. 317, 325 (1968)) ("[I]ncome attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'"). *See generally* N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr., 139 S. Ct. 2213, 2219 (2019) (concluding that the Due Process Clause centrally concerns the fundamental fairness of governmental activity).

on a nonresident's income from their in-state sources.[170] In summary, double taxation violates the Commerce Clause, the Privileges and Immunities Clause, and the Due Process Clause.

C. THE SUPREME COURT'S LEGAL BASIS TO INTERVENE

Article III of the U.S. Constitution provides that "[i]n all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."[171] In addition, "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states."[172] Although a state's power to tax nonresidents provided that their income is sourced to that state is broad, the Supreme Court has placed an explicit restriction on a state's power to tax nonresidents: "[a]s to non-residents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."[173] In addition, if the Supreme Court does not exercise jurisdiction over a controversy between two states, "then the complaining State [will have] no judicial forum in which to seek relief."[174]

Resolving the merits of the Commerce Clause and Due Process Clause challenges on double taxation issues inevitably requires "a sensitive, case-by-case analysis of purposes and effects,"[175] which would depend on individual variations among taxpayers and other factual determinations. As a result, state income double taxation disputes would be better resolved through tax abatements or similar actions initiated by states, ultimately subject to the Supreme Court's certiorari jurisdiction. Therefore, the Supreme Court is the only practical forum available for combating the unconstitutional state income taxation of interstate remote workers.

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170. *See, e.g.*, Central R.R. Co. of Pa. v. Pennsylvania, 370 U.S. 607, 619 (1962) (Black, J., concurring) ("The modern use of due process to invalidate State taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited.").

171. U.S. CONST. art. III, § 2, cl. 2.

172. 28 U.S.C. § 1251(a).

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

174. Arizona v. California, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting) ("Denying leave to file in a case between two or more States is thus not only textually suspect, but also inequitable.").

175. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2094 (2018).

The Supreme Court has already set rules for the exercise of state authority over nonresidents in our modern economy.[176] Wandering workers' double taxation issues are equally important to, or even more pressing than those precedent cases. Remote working is no longer just a temporary adjustment in light of the pandemic, and corporate America has repeatedly underestimated how long teleworking will last.[177] As remote working becomes a new norm, the double taxation issue is affecting a dramatically larger group of employers and employees.[178] Double taxation detrimentally harms states' economies because the excessive tax burden on remote workers and employers in a certain state will cause local businesses to lose the incentive to maintain an office and continue business activities there. Instead, businesses will have an incentive to go elsewhere in order to avoid future double taxation.

The complicated and burdensome tax withholding requirements lead to the loss of capital and talent in the long run. The Supreme Court necessarily has original jurisdiction over this issue because it not only impacts individuals, but also threatens the states' interests.[179] Therefore, the Supreme Court should intervene to enforce a constitutionally equitable and fair state income tax system.

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176. *See, e.g.*, *id.* ("[S]tates may require online retailers to collect sales taxes . . . ."); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017) (holding that there must be a connection between the forum state and the specific claims at issue).

177. A number of companies have announced that they will maintain remote work indefinitely. *See* Henry O'Loughlin, *Every Company Going Remote Permanently*, BUILDREMOTE, https://buildremote.co/companies/companies-going-remote-permanently [https://perma.cc/BL6G-49KU].

178. "This unconstitutional tax is extracting hundreds of millions of dollars from over one hundred thousand New Hampshire residents—more than 15 percent of the state's workforce." Reply Brief in Support of Motion for Leave to File Bill of Complaint at 4, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (mem.) (No. 154); *see also* Motion for Leave to File Bill of Complaint, *supra* note 102, at 11 (discussing that as of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, and most of them were the victim of the Massachusetts "temporary" convenience rule).

179. *Contra* Kansas v. Colorado, 533 U.S. 1, 8 (2001) ("[T]he State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.").

IV. THE DESIRABILITY OF UNIFORM RESIDENCY TESTS AND AN APPORTIONMENT FORMULA

This Part urges Congress to design and enforce model federal legislation to standardize the tests states use to determine residency, and to structure a model apportionment formula for states to follow and implement.[180] This Note introduced the concepts of internal and external consistency and the "fair apportionment" standard comprehensively in Part III,[181] which lays out the legal foundation to support the proposed apportionment formula. This Part concludes by proposing federal legislation including uniform residency determination rules as well as an apportionment formula to help build an effective state tax framework.

Although the convenience rule[182] has been widely recognized as problematic and heavily criticized by scholars for a long time, only a few discussions have been had regarding resident-based double taxation due to relatively infrequent controversies on this subject matter. However, COVID-19 has changed the dynamic. Prior to the shift to remote work and other pandemic-related changes in living habits, there was an implicit assumption that an individual always possesses a single primary domicile, and the domiciliary state was presumed to be the same as the source state for an entire tax year. In the pandemic era, a multitude of employees started working remotely. Many either moved back to their former home state—where they had lived before they moved out for work and where their family still maintains a domicile—or migrated to a new state with which they had no prior nexus.[183] Frequently, taxpayers are ignorant of the fact that two different states are treating them as a tax resident, and therefore imposing excessive taxes on their income.[184]

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180. "Legislation can proactively anticipate problems and provide comprehensive frameworks, rather than respond to particular cases." Zelinsky, *supra* note 13, at 573.

181. *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 564–66 (2015) (applying the "internal consistency" test); Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984) (discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the state). *See generally* discussion *supra* Part III.

182. *See* discussion *supra* note 14 and accompanying text.

183. Such as those people who migrate from the colder northern parts of North America to warmer southern locales, who are often called "snowbirds."

184. *See* discussion *supra* Part I.A; *see also* Hashmi, *supra* note 18, at 842 ("[I]n furtherance of uniformity and tax fairness goals, model tax legislation at

The dramatic shift in people's working and living schedules makes the double taxation problem a serious and pressing one. The existing residency standards across the nation are undesirably inconsistent and subjective in nature, providing little, if any, guidance to taxpayers and making tax compliance practice for both employers and employees troublesome.[185] Lack of an instructive guideline from Congress and scarce Supreme Court precedent concerning double taxation disputes further add to the difficulties of taxpayers in litigation because of the conflicting results derived from case-by-case judicial determinations.[186] Therefore, uniform residency standards across states and a fair apportionment formula are crucial.

A. UNIFORM RESIDENCY TESTS

This Section proposes that an objective and uniform residency test to define domiciliary and statutory residents could/should be regarded as the first step when tackling double taxation problems.[187] Although case law and statutes provide certain clarity to taxing authorities, disputes often arise because states consider numerous subjective factors when finding one's domicile for tax purposes[188] and there are no standardized tests for determining a factor's relative importance.[189]

States either adopt the domiciliary residency test, the statutory residency standard, or both.[190] Different states consider various factors when finding domiciles to determine residency, such as the taxpayer's place of employment as well as the nature of their job, including whether it's permanent or temporary.[191]

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the individual income tax level could avoid multistate taxation by providing definitions of domicile and place of abode, including the presumption of continued domicile and the presumption against acquiring a foreign domicile, and any other relevant definitions.").

185. *See infra* Appendix A.

186. *See infra* notes 197–98 and accompanying text.

187. *See* Robert J. Misey, Jr., *Simplifying International Jurisdiction for United States Transfer Taxes: Retain Citizenship and Replace Domicile with the Green Card Test*, 76 MARQ. L. REV. 73, 78 (1992) ("Objective tests typically result in a trade-off between certainty and fairness.").

188. *See* Kim, *supra* note 158, at 1161 ("[M]any states employ multiple tests for determining residency. Some tests are more circumstantial, using fact-based determinations, while others use more objective factors.").

189. *See* discussion *supra* Part I.A.

190. *See supra* note 30 and accompanying text.

191. *See* Donna Scaffidi & Frank Czekay, *Dual State Residency Can Result in Dual Taxation*, BAKER TILLY (Aug. 4, 2021), https://www.bakertilly.com/

Other factors include whether the taxpayer is registered to vote in a certain state, the issuance of a driver's license or other permits by a certain state, the location of the school a family's child attends, and so on.[192]

As it stands today, some states have provided an instructive guideline for taxpayers and the taxing authority to consider when determining domiciliary residency,[193] and some states incorporate a relatively subjective residency test framework.[194] At the other end of the spectrum are those states which provide merely general and ambiguous instructions on how to determine residency, inviting a large number of tax disputes.[195] To an extent, there are fifty different state income residency rules, with each state employing disparate determination tests. As illustrated by just the six states listed in the States' Residency Tests Table located in Appendix A of this Note,[196] taxpayers can easily get lost when trying to figure out their appropriate tax obligations not only due to the incompatible residency regulations different states currently adopt, but also the inconsistency in how those states define the key terms within the residency rules—i.e., the definitions of "domicile" and "permanent place of abode."

Although this Note roughly categorizes all fifty states' income tax residency rules into three major types based on the clarity and objectivity of their state income tax laws, such categorization is far from capturing the diversity of state approaches. For instance, the domicile test in New York State looks at common law principles and the test itself is an intensively factual and subjective inquiry into whether a taxpayer's "heart" is located in the state.[197] In California by contrast, what constitutes a domicile is often evaluated by the Franchise Tax Board (FTB),

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insights/dual-state-residency-can-result-in-dual-taxation [https://perma.cc/XXY7-7LQS] (laying out a list of typical factors states use to determine residency and what state auditors will review in residency audits).

192. *See id.*

193. Such as Minnesota, Oregon, and Colorado. *See infra* Appendix A.

194. Such as New York, California, and Massachusetts. *See infra* Appendix A.

195. *See, e.g.*, MICH. ADMIN. CODE r. 206.5 (2022).

196. *See infra* Appendix A.

197. Timothy P. Noonan & Ariele R. Doolittle, Gaied v. New York*: The State's High Court Weighs in on Statutory Residence Rules*, J. MULTISTATE TAX'N & INCENTIVES 6, 8 (2014), at 6, 8 ("This domicile test looks to common law principals going back more than 100 years, and it involves a subjective inquiry into whether or not a taxpayer's 'heart' is located in New York.").

and the FTB lays out a list of domiciliary residency audit standards regarding what constitutes a "temporary and transitory purpose."[198]

Double taxation headaches are also commonly invoked by inconsistent state definitions of "permanent place of abode." *Gaied v. New York State Tax Appeals Tribunal*[199] illustrates how the New York State's high court weighed in on the statutory residence rules adopted in the state. The above-referenced case discussed what factors the court and taxpayers should consult when defining the term "permanent place of abode."[200] Reversing the lower court's finding that the taxpayer kept a permanent place of abode in the state despite the arbitrary nature of the test used, New York's highest court held that the "place of abode" in question must relate to the taxpayer and that the taxpayer must have a residential interest in the property.[201] Nonetheless, the court still failed to provide a uniform interpretation of the term "permanent place of abode," thus leaving plenty of leeway for discretion in future similar tax residency disputes.

This Note proposes that Congress and the Supreme Court should intervene and structure model uniform residency rules for states to borrow from in order to streamline the residency determination process. As the Multistate Tax Compact suggests: alleviating multistate tax burdens requires the involvement of all the states with a goal towards uniformity.[202] The proposed

198. *See What is Temporary and Transitory Purpose?*, BROTMAN LAW [hereinafter *Temporary and Transitory Purpose*], https://www.sambrotman.com/personal-income-tax-residency-california/what-is-temporary-transitory-purpose [https://perma.cc/3VWR-5HX4] (laying out the factors practitioners often come across in determining what constitutes temporary or transitory purposes, including length of time, retirement purposes, job transitions, family reasons, etc.); *see also In re* Appeals of Stephen D. Bragg, 2003-SBE-002, 2003 WL 21403264 (Cal. State Bd. of Equalization May 28, 2003) (introducing a list of factors which informs taxpayers of the type and nature of connections the California Franchise Tax Board finds informative when determining residency).

199. Gaied v. N.Y. State Tax Appeals Tribunal, 957 N.Y.S.2d 480 (App. Div. 2012).

200. *Id.* at 481–82 (laying out an inexhaustive list of considerations the court looked at when determining a taxpayer's permanent place of abode in the state, including whether the individual supplied furniture in the dwelling, had access to a key, received visitors there, the location of their personal belongings, etc.).

201. Gaied v. N.Y. State Tax Appeals Tribunal, 6 N.E.3d 1113, 1116–17 (N.Y. 2014).

202. *See Multistate Tax Compact*, MULTISTATE TAX COMM'N, https://www.mtc.gov/The-Commission/Multistate-Tax-Compact [https://perma.cc/75RK

modified uniform residency rule adopting both the domicile standard and the statutory standard is as follows:

> Article I. A resident is a person (1) who is domiciled in the state and intends to live in the state permanently; or (2) who is not domiciled in the state but who maintains a permanent place of abode in the state and spends in the aggregate more than one-half of the taxable year in the state. To be eligible for the second qualification, i.e., statutory residency, both of the following terms should be fulfilled: a) the taxpayer must spend at least 183 days in the state during the tax year, and a day should be comprised of more than 12 hours spent in that certain state;[203] and b) the taxpayer or taxpayer's spouse must rent, own, maintain, or occupy a permanent place of abode. An abode is a residence in the state suitable for year-round use and equipped with its own cooking and bathing facilities. The determination criteria of what constitutes a permanent place of abode involves relevant factual investigation, but two factors—proximity of the relationship between the adobe and the taxpayer and the location of the taxpayer's personal belongings—should be given greater weight.[204]
>
> Article II. Domicile is the place in which individuals have voluntarily fixed the habitation of themselves and their families, not for a mere special or limited purpose. (1) Day counts; (2) residential property; (3) location of taxpayer's business and family (including where their children attend school); (4) state of voter registration; (5) when absent, intent to return to the place; (6) employment status (whether permanent or temporary); and (7) other economic ties such as bank accounts and investment accounts constitute an *exhaustive* list of factors for courts and taxpayers to consider in determining the domiciliary residency.[205]

-6C6V] (introducing that the purpose of the Multistate Tax Compact is to facilitate proper determination of state tax liability of multistate taxpayers, including the equitable apportionment of tax bases and to "promote uniformity or compatibility in significant components of tax systems").

203. The Author argues to follow the rationale of the substantial presence test for federal income tax purposes, which is regarded as the federal equivalent of the state statutory residency test. *See* I.R.C. § 7701(b)(1)(A), (b)(3). Because 183 days stands for a period of time which is more than half of a year, the standard of what constitutes a "day" should adopt the same logic that a "day" should be comprised of cumulatively more than twelve hours. If a day is defined as "any part of a calendar day," then a taxpayer could possibly be treated as a statutory resident of multiple states when the taxpayer commutes across state borders multiple times in a single day, subject to double taxation.

204. The Author acknowledges that the "place of abode" rule is still a factual-dependent process, but the Author suggests the model law provide at least some instructions on how to weigh those factors.

205. The Author proposes to adopt a "check-the-box" approach that if more than half (at least four) of the factors are satisfied for a certain state without disputes, then that particular state should be deemed to be able to claim the domiciliary residency of that taxpayer. Those factors are based on the Supreme Court and some state courts' precedents as well as state administrative rules.

> Article III. A person can only have one domicile at any given time. To change domicile, a taxpayer must actually physically move to a new residence in another state and intend to remain there permanently or indefinitely. In determining the intent to move out permanently or indefinitely, courts and taxpayers should consult those factors listed in Article II and make the final judgment by a balancing test.[206]

Adopting a uniform model law with all states determining taxpayers' residency in a compatible way would effectively alleviate the double taxation problems, and the consistency provides considerable clarity and convenience to taxpayers in a practical way. A uniform standard for determining residency also helps alleviate the burden on employers in their tax withholding practice because employees will have the incentives to actively track their locations and working hours and to report them diligently. However, a uniform test alone is still not a perfect solution. Any two states may still have different interpretations of certain terms, which is a common difficulty with almost every statute and regulation. In addition, this standardized residency test could not solve the dual-residency double taxation problems resulting from conflicts between domiciliary residency states and statutory residency states.[207]

Therefore, this Note also urges Congress to design an apportionment formula for states to implement or at least to borrow from when states negotiate with each other in tackling double taxation problems.[208]

See, e.g., *In re* Appeals of Stephen D. Bragg, 2003-SBE-002, 2003 WL 21403264 (Cal. State Bd. of Equalization May 28, 2003); MINN. R. 8001.0300 (2022); *see also* Texas v. Florida, 306 U.S. 398, 413–14 (1939) (listing relevant factors to find domicile).

206. The Author proposes that the courts and taxpayers should test and decide in which state the taxpayer could meet with more factors listed in Article II. In the event that the taxpayer can prove one single state satisfies at least four out of the seven factors in Article II without disputes, courts shall rule in favor of that particular state. However, in a close case where two states possess equal possibilities to claim domiciliary residency of the taxpayer, courts should then consult the apportionment formula articulated in Part IV.C.2.

207. Consider the Kyson case again here. Even if the states adopt the proposed uniform residency rules and determine that Kyson was a domiciliary resident of Minnesota, Kyson could still be found as a statutory resident of Massachusetts. Therefore, the dual-residency issue still could not be solved completely. *See supra* notes 18–21 and accompanying text.

208. *See* discussion *infra* Part IV.C.

B. LEGAL FOUNDATION FOR THE APPORTIONMENT FORMULA

Apportionment of the tax base has long been recognized as a common method to avoid double taxation in the corporate income tax context. All the states that have adopted the Uniform Division of Income for Tax Purposes Act (1957) (UDITPA) allow for apportionment and allocation of their net income taxes to "[a]ny taxpayer having income from business activity which is taxable both within and without this state."[209] There are different apportionment formulas, with the three-factor formula as the most common one.[210] The following Sections will illustrate the benefits of adopting a similar apportionment approach in the individual state income tax context. This Section starts by introducing the shortcomings in the state income tax system without an apportionment formula and demonstrating the legal theses to support the standardized apportionment scheme.

1. Undesirability of the Current State Income Tax System Without Apportionment

Let us revisit and change the fact pattern of the Resident D example[211] a bit here. Assume that Resident D planned to abandon their former domiciliary State E, move to State G and establish a new domicile in State G for the first year, fulfilling four out of seven factors in the model residency rules.[212] Even if all states uniformly adopt the proposed model residency rules, disputes can still arise when State E, by employing a slightly dif-

209. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT § 2 (1957).

210. The Multistate Tax Commission adopted a broad "apportionable income" definition, recommending the use of a three-factor apportionment formula with a double-weighted sales factor. *See* Melissa A. Oaks, *The Significance of the Multistate Tax Compact and UDITPA Amid Recent Developments*, ACCOUNTINGWEB (May 18, 2016), https://www.accountingweb.com/tax/business-tax/the-significance-of-the-multistate-tax-compact-and-uditpa-amid-recent-developments [https://perma.cc/E5JL-CYKH]*; see also* JUDITH LOHMAN, OLR RSCH. REP., CORPORATION TAX INCOME APPORTIONMENT FORMULAS (2012) ("The three-factor formula uses three fractions representing the ratios of a company's property, payroll, and sales within a taxing state to its total property, payroll, and sales. The three ratios are multiplied together to produce the percentage of the company's total taxable income to be allocated to the taxing state. In the classic version of this formula, each of the factors has equal weight in the calculation. Twelve states use an equal-weighted, three-factor apportionment formula.").

211. *See supra* notes 159–60 and accompanying text.

212. *See supra* note 205 and accompanying text.

ferent reading of the regulation from State G, argues that Resident D nevertheless had a strong continuing relationship with their former state of residence (State E), and that State E has the authority to tax Resident D's global income as its tax resident. As a result, Resident D unfortunately would be subject to both State E's and State G's taxes on the entire income earned during that tax year at issue. Suppose during the same year of changing domicile, Resident D traveled frequently to State F for job purposes, enabling State F to claim them as a statutory resident.[213]

To their detriment, Resident D in this case would then face multiple taxation.

In the modern era, remote working propels considerable mobility of telecommuters, resulting in regular and relatively frequent changes of domicile, and, in turn, generating a multitude of new double taxation troubles. Therefore, the best solution is for Congress to legislate under its Commerce Clause authority an apportionment formula to allocate taxpayers' taxable income.[214] If Congress does not act, the U.S. Supreme Court should set a precedent to require such apportioned state income taxation under the Commerce and Due Process Clauses.[215]

2. Legal Support for Apportioning the Tax Base

As this Note has discussed comprehensively regarding the Commerce Clause doctrine,[216] which generally protects taxpayers from the risk of multiple taxation, taxpayers have a right to a division of the tax base if the individuals can demonstrate that they are subject to double taxation.[217] The Supreme Court sustained the constitutionality of an apportionment of the tax base in *Ott v. Mississippi Valley Barge Line Co.*[218] The Court confined its discussion to a determination on "what portion of an interstate organism may appropriately be attributed to each of the

213. This type of double taxation could not simply be eliminated by a uniform residency test. *See supra* note 207 and accompanying text.

214. *See supra* note 85 and accompanying text.

215. *See generally* Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 TAX L. REV. 47, 93–98 (1995).

216. *See* discussion *supra* Part III.

217. *See, e.g.*, Central R.R. Co. v. Pennsylvania, 370 U.S. 607, 612 (1962) ("[M]ultiple taxation' of interstate operations . . . offends the Commerce Clause.") (quoting Standard Oil Co. v. Peck, 342 U.S. 382, 385 (1952)).

218. *See* Ott v. Miss. Valley Barge Line Co., 336 U.S. 169 (1949).

various states in which it functions,"[219] and finally concluded that an apportionment formula, by ensuring that the taxes on taxpayers are confined solely to business activities carried out in the taxing state, was constitutional without the risk of multiple taxation.[220]

A similar apportionment rule which permits taxation by two or more states on a proportionate basis could effectively preclude excessive taxes which have no relation to the opportunities, benefits, or protection provided by that taxing state to taxpayers.[221] Fair apportionment of the tax base also helps to advance the internal and external consistency across the country because no multiple taxation would exist if a taxpayer pays tax on a proportionate share of the tax base to different states, with no more competing states seeking to tax the same bases simultaneously.[222] In short, the Commerce Clause appears to preclude one state from denying a taxpayer the right to a division of the tax base when a portion of that tax base is taxable in other states.

As the following sections will demonstrate, this Note proposes to design a fair apportionment formula considering "physical presence" as a critical and decisive factor.[223] Legal theories supporting such apportionment scheme include: (1) economic

219. Nashville, Chattanoga & St. Louis Ry. v. Browning, 310 U.S. 362, 365 (1940).

220. *See Ott*, 336 U.S. at 174.

221. *See Standard Oil Co.*, 342 U.S. at 384–85 (concluding that under the Due Process Clause and Commerce Clause, multiple taxation of interstate operations which has no relation to the benefits conferred by the taxing states is unconstitutional).

222. *See* discussion *supra* notes 135–37 and accompanying text; *see also* Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 548 (2015) ("[A] state may avoid discrimination against interstate commerce by providing a tax credit, or some other method of apportionment, to avoid discriminating against interstate commerce . . . .").

223. *See* discussion *infra* Part IV.C (introducing the proposal to apportion the tax base according to the days actually spent in each state).

nexus,[224] (2) benefits theory,[225] (3) interstate commerce,[226] and (4) the Due Process Clause.[227]

C. A NEW APPORTIONMENT FORMULA

Following the similar apportionment scheme which was upheld and sustained in the corporate income context, now is the time for states to shift to a similar practice within the individual income tax context.[228] In general, this Note urges Congress to structure a model apportionment formula to achieve two main goals: (1) to allocate taxable income between two states which simultaneously treat one single taxpayer as their tax resident; most importantly, to solve the dual-residency double taxation issues resulting from conflicting domiciliary tests and the overlap between domiciliary and statutory residency rules; and (2) to limit the source state's authority to merely tax the taxpayers on the income actually generated in that particular state. Congress should design a uniform apportionment formula by publishing a model federal legislation for states to follow when deciding what proportion of the total tax base a state should be entitled to claim tax on.

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224. Physical presence is critical to individuals because the location of a taxpayer reflects their choice of the lifestyle and the reality of the living situation. *See, e.g.*, Cait Lamberton, Jan-Emmanuel De Neve & Michael I. Norton, *Eliciting Taxpayer Preferences Increases Tax Compliance* 6–10 (Harv. Bus. Sch., Working Paper No. 14-106, 2014), https://www.hbs.edu/ris/Publication%20Files/14-106_479019b0-1a7c-4a7a-a338-798a91a9e83d.pdf [https://perma.cc/C5EA-WQV7] (talking about how taxpayers tax compliance would improve because of the preference of local government spending).

225. Taxpayers are willing to pay expensive rent and excessive income tax for a better job opportunity, higher compensation, pleasant networking environment, and superior education for children. *See, e.g.*, Cook v. Tait, 265 U.S. 47, 56 (1924) ("[P]ower . . . is based on the presumption that government by its very nature benefits the citizen and his property wherever found . . . .").

226. *See* discussion *supra* Part III.A.

227. Individuals who enjoy the benefits provided by a certain state should "bear the corresponding burdens—in particular, the payment of taxes." *See, e.g.*, Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 470 (2007); *see also* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (suggesting that the only question that matters to the Due Process Clause is whether the tax in practical operation the relation to opportunities, benefits, or protection has conferred or afforded by the taxing state). *See generally* discussion *supra* notes 169–70 and accompanying text.

228. *See* Shanske, *supra* note 70, at 964–65 ("States already tax individuals on the basis of days worked in one state or another. It will require another shift to understand when and how states can fairly and reasonably tax workers who are virtually present in one state or another.").

1. The General Apportionment Formula and Its Drawbacks

Let us revisit and change the fact pattern of the Kyson case introduced at the beginning of this Note:[229] Kyson was born and domiciled in Minnesota and considered Minnesota his home state. He transferred to the employer's Massachusetts office for a one-year period. Kyson also planned to permanently move to and establish a new domicile in Massachusetts by changing the location of his voter registration, getting a driver's license, and opening multiple bank investment accounts in Massachusetts. In this example, Minnesota would still tax Kyson's worldwide income based on his domiciliary residency, even the income not earned within Minnesota. Massachusetts would probably at the same time treat Kyson as its domiciliary resident,[230] taxing him on his entire income. Minnesota is no doubt Kyson's old domiciliary home state,[231] which is technically entitled to tax on Kyson's entire income. In this case, the double taxation problem arises due to Kyson's dual residency caused by the inconsistent domiciliary rules among states.

This Note advances a general proposition to apportion the tax base according to the days Kyson actually spent in each state. However, an apportionment formula purely based on physical working days is not always flawless. As the above-referenced Kyson example illustrates, if the state income tax is calculated merely by days Kyson stayed in one particular state, then Minnesota could expect zero tax, jeopardizing its state tax revenue. This could be one of the most important reasons why states still have not reached agreements with each other to apportion taxpayers' taxable income. Therefore, this Note also offers a supplementary approach to apportion the tax base primarily aiming to solve this type of dual-residency double taxation dilemma.[232]

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229. *See supra* note 18 and accompanying text.

230. Massachusetts, by consulting the domiciliary residency test and conducting residency audits on Kyson, would probably determine that Kyson is its tax resident, subject to Massachusetts's state income taxation. *See supra* note 205 and accompanying text.

231. Minnesota Department of Revenue would also consult the domiciliary residency test and probably determine that Kyson fulfills five out of the seven factors, therefore still maintains Kyson as its tax resident. *See supra* note 205 and accompanying text.

232. With respect to this special type of dual-residency problem, where the dual resident totally "abandoned" their domiciliary state during a certain tax year, spending zero days in that home state while still keeping the domicile and

2. A Supplementary Apportionment Formula Is Proposed

The supplementary apportionment method follows the logic of the "substantial presence test"[233] and adopts a progressively decreasing apportionment ratio to allocate taxable income between two potential residential states. Under this supplementary apportionment formula, a taxpayer's tax base is not merely apportioned by days spent in each state, but by splitting the taxable income into 70% at the former domiciliary resident State A and 30% at a newly-moved-in domiciliary resident State B in the first transitional year. If the individual still lives in the new domiciliary resident State B all year long for the second year following the first year of moving, the tax base would then be apportioned by 30% at A and 70% at State B. For the third year and forward, the taxpayer should have already shown their bona fide intent of permanently moving to State B, when State B could finally be entitled to tax 100% of their taxable income.[234] In other words, it is essentially a tax apportionment scheme with a phaseout period of three years.

There are two exceptions in applying this supplementary apportionment formula. The first one being that a residency determination test and the check-the-box practice using the exhaustive factors[235] laid out in the proposed model regulation will always be needed every time before an apportionment of taxation is made. The second being that taxpayers can choose to apply for a "closer connection exception"[236] each year before any type of apportionment scheme has been applied, and they can choose to cut the connection with their former domiciliary resident State A if they can show a clean move from State A to State B.

To illustrate this formula using our above-referenced example, Massachusetts, as Kyson's new domiciliary residence state,

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other ties (such as intent to comeback and family ties etc.) therein, this Note offers an alternative apportionment approach.

233. *See supra* notes 87–89 and accompanying text; *see also supra* note 203.

234. *See* discussion *supra* note 43 and accompanying text.

235. *See supra* note 205 and accompanying text.

236. Taxpayers can prove their closer connection with a certain state by showing fulfillment of the corresponding residency requirements, and at the same time abandon their ties with their former resident state. See the similar concept in *Closer Connection Exception to the Substantial Presence Test,* IRS (Oct. 12, 2022), https://www.irs.gov/individuals/international-taxpayers/closer-connection-exception-to-the-substantial-presence-test [https://perma.cc/U5NU-MM7M] (Oct. 12, 2022).

is entitled to tax on 30%*365/365 of Kyson's income; whereas Minnesota (as his old domiciliary state where Kyson has domiciled since he was born until this year's change of employment) is entitled to claim the remaining 70%*365/365 of Kyson's income for this transitional tax year.[237] The primary goal for this progressively decreasing apportionment formula is to incentivize states to cooperate and try to reach an agreement in solving multiple taxation. This special apportionment formula is not perfect, but it at least motivates states to start negotiating and coordinating with each other to ultimately form a uniform rule nationwide, preventing future double taxation.

3. Apportionment Formula's Application in Double Taxation Scenarios

Imagine Kyson now has also been appointed a role in the company's New York office. He commutes to New York City for two days per week and returns to his Massachusetts home for the rest of the week working from home in Massachusetts. Arguably Kyson would now be subject to triple taxation: Kyson would be subject to the domiciliary resident tax from the state of Minnesota, the resident tax from Massachusetts and the nonresident tax from the state of New York because of the convenience rule. Nonresident-based double taxation invoked by the convenience rule is generally about taxation on individuals who don't live in a state and don't even physically work there but whose employer is located in that state. Under New York's convenience rule, Kyson—a Massachusetts-based remote worker of a New York company—owes New York income taxes and, to the taxpayer's detriment, Massachusetts may decide not to offer him tax credits for taxes he already paid to New York,[238] yielding multiple taxation.

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237. The rationale of a progressively decreasing apportionment ratio is similar to that of the federal substantial presence test, which counts days spent in the first preceding year by multiplying the actual days spent by one third and days in the second preceding year by one sixth. The special apportionment formula is beneficial in many ways, the most important one being that it motivates states to coordinate. It has been extremely hard for the old domiciliary state and the new residence state to reach an agreement on how to apportion taxpayers' tax base, especially during taxpayers' transitioning/migrating period, when the old domiciliary state would jeopardize their tax revenues for the first couple years of taxpayers' change of residency.

238. Tax credits are not effective most times, which makes them not always an available remedy to taxpayers subject to double taxation. *See* discussion *supra* notes 70–75.

This Note maintains that the remote work in an employee's home state should be respected, and the home state should be entitled to serve as the sole taxing authority if the relevant home office qualifies as a "bona fide employer office."[239] Under the Commerce Clause and the Due Process Clause, the state where teleworkers physically stay and enjoy services therein provided should be entitled the full jurisdiction to tax the income earned within that certain state. Therefore, now is the time to modify the convenience rule and replace it with physical-presence tax apportionment rules.[240]

To combine and illustrate all aspects of the proposed apportionment formula comprehensively, now let us change the Kyson case again so that instead of commuting to New York for two days per week and returning to his Massachusetts home for the rest of the week, Kyson now commutes to New York every day and stays there for about 15 hours per day and comes back to his Massachusetts home for an average 9-hour stay for a total of 185 days. Kyson also returned to Minnesota and stayed at his domicile for 180 days. Suppose now all the states adopt the proposed statutory residency test discussed in Part IV.A, which requires that a day should be comprised of more than 12 hours when finding statutory residents.[241] In this scenario, neither New York nor Massachusetts could treat Kyson as its statutory resident because Kyson does not have a place of abode in New York, and he does not stay in Massachusetts for at least 183 days for statutory residency purpose.[242] As a result, Kyson is a domiciliary resident of Minnesota and a nonresident of both Massachusetts and New

239. *See, e.g.*, *New York Tax Treatment of Nonresidents and Part-Year Residents Application of the Convenience of the Employer Test to Telecommuters and Others*, N.Y. STATE DEP'T OF TAX'N & FIN. 2–5 (2006), http://www.tax.ny.gov/pdf/memos/income/m06_5i.pdf [https://perma.cc/2WQP-EGZL].

240. *See* discussion *supra* Part IV.C.1. Apportionment is currently a standard in special cases, such as athletes. *See* Timothy P. Noonan & Doran J. Gittelman, *Taxing Times to Be a Telecommuter: Convenience Rules During COVID-19*, TAX NOTES (Sept. 17, 2020), https://www.taxnotes.com/featured-analysis/taxing-times-be-telecommuter-convenience-rules-during-covid-19/2020/09/17/2cyh2 [https://perma.cc/KUT8-N5ZR]. *See generally Model General Allocation & Apportionment Regulations with Amendments Submitted for Adoption by the Commission*, MULTISTATE TAX COMM'N 80–81 (2017), https://www.mtc.gov/getattachment/Events-Training/2017/Special-Meeting/FINAL-APPROVED-2017-Proposed-Amendments-to-General-Allocation-and-Apportionment-Regulat.pdf.aspx [https://perma.cc/DM35-GBAY].

241. *See supra* note 203 and accompanying text.

242. Because Kyson stays in Massachusetts for only 9 hours per day, failing the statutory resident test laid out in discussion *supra* Part IV.A.

York. The question then becomes how his taxable income should be apportioned using the proposed formula.

Firstly, the general proposition is still the same that the tax base should be apportioned based on actual days Kyson spent in a certain state. Minnesota therefore could only tax the 180-day-equivalent portion of Kyson's income generated in that tax year even though Minnesota is still well recognized to be Kyson's domiciliary state.[243] Secondly, there is the issue of how to appropriately allocate Kyson's income between New York and Massachusetts. This Note proposes to count a partial day for tax apportionment purposes as only one-half of a day.[244] Therefore, Kyson should be treated as spending 92.5 days[245] in New York, 92.5 days in Massachusetts, and 180 days in Minnesota. Finally, Minnesota would tax 180/365 of Kyson's income generated, and New York and Massachusetts would each tax 92.5/365 of Kyson's income in the tax year at issue.

With the apportionment formula, none of Kyson's income generated in the tax year at issue would be subject to multiple taxation anymore, and each state is entitled to tax a fair portion of the value generated, consistent with the dormant Commerce Clause and the Due Process Clause. In short, a model federal regulation proposing a uniform and standardized residency determination test and a fair apportionment formula could effectively solve the exacerbated double taxation issues, creating a more advantageous cross-border remote working environment for business activities. As Professor Zelinsky commented, a national economy requires uniform national regulation.[246]

CONCLUSION

The whole world is facing an unprecedented challenge with everyone's life and work dramatically affected by the COVID-19

243. Note that the Author does not deny Minnesota's right to continue taxing on Kyson's global income other than the portion earned in New York and Massachusetts in this tax year. For example, Minnesota could still tax Kyson's entire foreign income (if applicable) in a certain tax year, and how and whether the international tax treaty would apply in the circumstance are beyond the scope of this Note. Minnesota's taxing authorities on Kyson with regards to the property tax, excise tax, etc. are also beyond the scope of this Note.

244. See Zelinsky, *supra* note 13, at 575 for a similar calculation.

245. Calculated as 185/2=92.5 days.

246. Edward A. Zelinsky, *Lobbying Congress: 'Amazon' Laws in the Lands of Lincoln and Mt. Rushmore*, 60 TAX NOTES ST. 557 (2011) (supporting national legislation to permit state sales taxation of internet and mail order purchases).

pandemic, including the tax world. As remote working is becoming the new norm, now is the time for Congress and the Supreme Court to intervene and exercise their broad power to help states solve the troublesome multiple taxation problems. The general proposition is that the source state should only tax the income generated from that state, and potential resident states, either domiciliary resident states or statutory resident states, should apportion the tax based on dual residents' physical presence in each state of residence.

This Note proposes three main solutions to avoid future double taxation. First, Congress should consider publishing model federal legislation and the Supreme Court should set a precedent for standardizing the residency determination test. A uniformly instructive guideline for courts, taxing authorities, and taxpayers to determine residency is critical in eliminating or at least significantly reducing future disputes regarding taxpayers' residence status. Second, Congress and the Supreme Court should intervene to modify or even repeal the unconstitutional convenience rule adopted by several states. Finally, Congress should legislate to introduce a standardized apportionment formula for states to follow, preventing future risks of resident-based double taxation when a taxpayer is treated as a resident by multiple states with each state taxing their global income simultaneously. If neither Congress nor the Court moves towards such a system of apportioned personal state income taxation, states could and should move in that direction on their own, either through formal agreements, interstate compacts,[247] or informal actions which would eventually change the generally accepted principles of taxation.[248]

247. Interstate compacts are formal, legislatively enacted agreements between two or more states that bind them to the compacts' provisions. Compacts provide states the opportunity to cooperatively address policy issues, ensure state agreement on complex policy issues, establish state authority over areas reserved for states, and allow states to speak strongly with one unified voice. *What Are Interstate Compacts?*, NAT'L CTR. FOR INTERSTATE COMPACTS, https://compacts.csg.org/compacts [https://perma.cc/4YEN-4DBZ].

248. States should not restrict a taxpayer's right to attribute a portion of its tax base to other states when the taxpayer has income in different states and subject to multiple taxes. *See* WALTER HELLERSTEIN, STATE TAXATION ¶ 8.02 (3d ed. 2020).

APPENDIX A: STATES' RESIDENCY TESTS[249]

State	**Guidance on the Residency Test**	**Definition on Domicile**
California[250]	Resident includes (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is outside the state for a temporary or transitory purpose.[251]	An individual **domiciled** in California remains a resident **until** he or she leaves for other than a temporary or transitory purpose. **A person can only have one domicile at any given time.** Domicile is the place in which individuals have voluntarily fixed the habitation of themselves and their families, not for a mere special or limited purpose. To change domicile, a taxpayer must actually move a new residence and intend to remain there permanently or indefinitely.
Colorado[252]	A natural person is a resident individual of Colorado if either: (a) The person is domiciled in Colorado, or (b) The person satisfies the six-month rule (statutory residency rule).	An intention to initially establish domicile without being physically present in the intended domicile is insufficient to establish a domicile in such place. Once a person's domicile is established in a state, it will continue to be the person's domicile until the person establishes domicile in another state.

249. The states' residency test table was created by the Author, loosely based on Daniel Kurt, *Tax Residency Rules by State*, INVESTOPEDIA (Mar. 19, 2021), https://www.investopedia.com/tax-residency-rules-by-state-5114689 [https://perma.cc/B4BC-ZD2N].

250. CAL. CODE REG. tit. 18, § 17014(b) (2022).

251. CAL. REV. & TAX CODE § 17014(d) (West 2022) ("[A]ny individual domiciled in this state who is absent from the state for an uninterrupted period of at least 546 consecutive days under an employment-related contract shall be considered outside this state for other than a temporary or transitory purpose.").

252. COLO. CODE REGS. § 39-22-103(8)(a) (2022).

		The indicia of domicile includes length of time stayed, Colorado voter registration, Colorado driver's license, school registration, property ownership, employment status, and residence of spouse and children, etc.
Minnesota[253]	A permanent Minnesota resident is a person who has demonstrated that the person is domiciled in the state and intends to live in the state permanently; and who is not domiciled in Minnesota but who maintains a place of abode in Minnesota and spends in the aggregate more than one-half of the taxable year in Minnesota. You are considered a Minnesota resident for tax purposes if both apply: 1) You spend at least 183 days in Minnesota during the year. Any part of a day counts as a full day; and 2) you or your spouse rent, own, maintain, or occupy an abode. An abode is a residence in Minnesota suitable for year-round use and equipped with its own cooking and bathing facilities.	Domicile means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home. A change of domicile requires intent and physical removal. **An individual can have only one domicile at any particular time.** Considerations include location of domicile for prior years; mailing address; place of voting; employment status; location of bank accounts, prior tax returns, etc.

253. MINN. STAT. ANN. § 256L.09 (West 2022); MINN. R. 8001.0300 (2022).

Massachusetts[254]	An individual domiciled in Massachusetts or who maintained a permanent "place of abode" in the state and spent more than 183 days in Massachusetts during the year, including days spent partially in and partially out of the commonwealth.	Domicile is the place which is an individual's true, fixed and permanent home, determined by established common law principles and the facts and circumstances in each case.[255] **A person can have only one domicile** and the intent is critical. When determining the domicile, common law factors and underlying facts should be considered.
New York[256]	An individual may be a resident of New York State for personal income tax purposes, if: (1) Domiciled in New York State, subject to the exceptions set forth in subdivision (b) of this section; and (2) Any individual . . . who is not domiciled in New York State, but who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends in the aggregate more than 183 days of the taxable year in New York State.	Domicile is the place which an individual intends to be such individual's permanent home–i.e., the place to which such individual intends to return whenever such individual may be absent. **A person can have only one domicile.** Change of domicile depends on individuals' bona fide intention of permanently moving to another State. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

254. *TIR 95-7: Change in the Definition of "Resident" for Massachusetts Income Tax Purposes*, MASS. DEP'T OF REVENUE (Jan. 5, 2022), https://www.mass.gov/technical-information-release/tir-95-7-change-in-the-definition-of-resident-for-massachusetts-income-tax-purposes [https://perma.cc/EYX3-H9YK].

255. 830 MASS. CODE REGS. 62.5A.1(2) (2022).

256. N.Y. TAX LAW § 605(b)(1)(B) (McKinney 2022); N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20(a)(2) (2022).

Oregon[257]	(A) An individual who is domiciled in this state **unless** the individual: (i) Maintains no permanent place of abode in this state; (ii) Does maintain a permanent place of abode elsewhere; and (iii) Spends in the aggregate not more than 30 days in the taxable year in this state; or (B) An individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than 200 days of the taxable year in this state unless the individual proves that the individual is in the state only for a temporary or transitory purpose.	Domicile is the place a person intends to return to after an absence. **A person can only have one domicile at a given time.** It continues as the domicile until the person demonstrates an intent to abandon it, to acquire a new domicile, and actually resides in the new domicile. Factors that contribute to determining domicile include family, business activities and social connections.[258]

257. OR. REV. STAT. § 316.027(1)(a)(A) (2022).
258. OR. ADMIN. R. 150-316.0025(1)(a) (2021).

APPENDIX B: CONVENIENCE STATES.

State[259]	**Statute/Administrative Code**	**Relevant Texts**
Nebraska	316 NEB. ADMIN. CODE § 22-003.01C(1)[260]	If the nonresident's service is performed without Nebraska for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident's convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income.
Delaware	Schedule W Apportionment Worksheet (PIT-SCW)[261]	Any allowance claimed must be based on necessity of work outside the State of Delaware in performance of duties for the employer, as opposed to solely for the convenience of the employee. Working from an office out of your home does not satisfy the requirements of "necessity" of duties for your employer and is considered for the convenience of the employee unless working from home is a requirement of employment with your employer.

259. Previously, Arkansas was one of the states which had long adopted the convenience rule. However, Arkansas's newly regulated rule abandoned it. *See* S. 484, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) ("A nonresident individual who . . . performed both inside and outside of Arkansas shall pay Arkansas income tax only on the portion of the individual's income that reasonably can be allocated to work performed in Arkansas.").

260. 316 NEB. ADMIN. CODE § 22-003.01C(1) (2022).

261. *Delaware Schedule W Apportionment Worksheet 2021,* DEL. DIV. OF REVENUE, https://revenuefiles.delaware.gov/2021/TY21_PIT-SCW_2021-01_PaperInteractive.pdf [https://perma.cc/UW59-Z6XG].

New York	N.Y. Comp. Codes R. & Regs. Tit. 20 § 132.18[262]	Any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.
Pennsylvania	61 PA. CODE § 109.8[263]	Non-Pennsylvania workdays include days worked out-of-state performing services which, of necessity, obligate the [employee] to perform out-of-state duties in the service of his employer.
Connecticut[264]	CONN. GEN. STAT. § 12-711(b)(2)(C)	For purposes of determining the compensation derived from or connected with sources within this state, a nonresident . . . shall include income from days worked outside this state for such person's convenience if such person's state of domicile uses a similar test.
Massachusetts	830 CMR § 62.5A.3[265]	All compensation received for services performed by a nonresident who, immediately prior to the Massachusetts COVID-19 state of emergency

262. N.Y. COMP CODES R. & REGS. tit. 20, § 132.18(a) (2022).

263. 61 PA. CODE § 109.8 (2022).

264. CONN. GEN. STAT. § 12-711 (2022).

265. *Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*, MASS. DEP'T OF REVENUE (Oct. 16, 2020), https://www.mass.gov/regulations/830-CMR-625a3-massachusetts-source-income-of-non-residents-telecommuting-due-to-the-covid-19-pandemic [https://perma.cc/L7MQ-K8U8]; *see also TIR 20-10: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic*, MASS. DEP'T OF REVENUE (July 21, 2020), https://www.mass.gov/technical-information-release/tir-20-10-revised-guidance-on-the-massachusetts-tax-implications-of [https://perma.cc/HH69-94LB].

		was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2.