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Edward Zelinsky
Yeshiva University

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TAXING INTERSTATE REMOTE WORKERS AFTER *NEW HAMPSHIRE V. MASSACHUSETTS*: THE CURRENT STATUS OF THE DEBATE

by

*Edward Zelinsky**

ABSTRACT

Under the dormant Commerce Clause, Massachusetts, New York and other states emulating them violate their constitutional duty to apportion when they tax the income nonresident telecommuters earn remotely working at their out-of-state homes. Also for dormant Commerce Clause purposes, nonresident telecommuters lack substantial presence in their employer's state when such nonresidents work at their out-of-state homes. New Hampshire argued correctly in New Hampshire v. Massachusetts that, for Due Process purposes, Massachusetts taxed extraterritorially and unconstitutionally when it taxed income earned by nonresident telecommuters from their homes outside Massachusetts's borders.

This issue will now wind its way through the state courts and will hopefully reach the U.S. Supreme Court on the merits. When the Court does confront the constitutional substance of this debate, the dormant Court's Commerce Clause and Due Process precedents compel protection for nonresident telecommuters who earn income at home. On the days

* Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. For comments on prior drafts of this article, he thanks Professor Richard Pomp and the members of the Cardozo faculty seminar. For research assistance, he thanks Shalom Rubin, Michelle Datikashvili and Justin Weinblatt of the Cardozo class of 2021.

interstate remote workers work at their out-of-state homes, they should not be income-taxed by the states in which their employers are located.

Introduction

In *New Hampshire v. Massachusetts*,[1] the Granite State challenged Massachusetts's income taxation of New Hampshire residents who had commuted to the Bay State for Massachusetts employers, but who subsequently worked remotely at their New Hampshire homes because of the coronavirus. New Hampshire's lawsuit stimulated both academic[2] and popular[3] debate about the state income taxation of nonresident

1. New Hampshire v. Massachusetts, U.S. Supreme Court Docket No. 220154 (docketed Oct. 23, 2020), https://www.supremecourt.gov/docket/docketfiles/html/public/22o154.html [https://perma.cc/2Q8S-WW4K].

2. *See* Darien Shanske, *Agglomeration and State Personal Income Taxes: Time to Apportion (With Critical Commentary on New Hampshire's Complaint Against Massachusetts)*, 48 Fordham Urb. L.J. 949 (2021); Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. Davis L. Rev. 1149 (2021); Richard D. Pomp, New Hampshire v. Massachusetts: *Taxation Without Representation?*, 36 J. State Tax'n 19 (2021).

3. *See, e.g.*, Laura Saunders, *The Long Arm of State Tax Threatens Telecommuters*, Wall St. J. (June 12, 2020), https://www.wsj.com/articles/the-long-arm-of-state-tax-law-threatens-telecommuters-11591954207 [https://perma.cc/8PB5-PVW8]; Jenny Gross, *Here's How Moving to Work Remotely*

telecommuters who live and work at home in a different state than the state in which their respective employers are located.

New Hampshire v. Massachusetts was no mere cross-border skirmish. New Hampshire raised fundamental constitutional concerns which apply to all states (including New York) which project their taxing authority beyond their borders to tax incomes earned remotely by nonresident telecommuters.

The Supreme Court declined to hear New Hampshire's case[4] and Massachusetts has announced that it has ceased its extraterritorial income taxation of nonresident telecommuters as of September 13, 2021.[5] As a result of the High Court's refusal to hear New Hampshire's case, discussion of states' constitutional ability to tax nonresident remote workers' incomes will now proceed in the state courts.[6]

In this essay, I assess the current status of the ongoing debate about the proper state income taxation of nonresident telecommuters in a post-pandemic world. In particular, I address three academic articles which came to different conclusions about *New Hampshire v. Massachusetts*. My review of these articles confirms the position I took

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Could Affect Your Taxes, N.Y. Times (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/business/coronavirus-nonresident-state-taxes.html [https://perma.cc/4E8H-AJGN].

4. *See* New Hampshire v. Massachusetts, U.S. Supreme Court Docket No. 220154 (docketed Oct. 23, 2020) (denial of New Hampshire's motion for leave to file a bill of complaint (filed June 28, 2021)), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o154.html [https://perma.cc/M647-KRXU].

5. Mass. Dept. of Revenue, *2021 Personal Income and Corporate Excise Tax Law Changes* (Feb. 10, 2022), available at https://www.mass.gov/info-details/2021-personal-income-and-corporate-excise-tax-law-changes [https://perma.cc/P9WF-ZTCY].

6. In the interest of full disclosure, I note that I am one who has initiated this process by claiming on constitutional grounds a refund of New York State income taxes I paid in 2019 on income I earned working at home in Connecticut. *Edward Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003) (No. DTA 830517). *See* Lynn A. Gandhi, *Zelinsky— Round 2 of the Convenience of the Employer Test*, 101 Tax Notes State 1301 (Sept. 20, 2021); James Nani, *NY Remote Worker Tax Rule Unconstitutional, Prof Says*, Law360 Tax Authority (July 26, 2021); Donna Borak, *New York's Remote Work Tax Rule Faces 'Unconstitutional' Test*, Bloomberg Tax, Daily Tax Report: State (Aug. 3, 2021).

in the amicus brief I filed supporting New Hampshire in the U.S. Supreme Court:[7] Under the dormant Commerce Clause, Massachusetts, New York and other states emulating them violate their constitutional duty to apportion when they tax the income nonresident telecommuters earn remotely working at their out-of-state homes. Also for Commerce Clause purposes, nonresident telecommuters lack substantial presence in their employer's state when such nonresidents work at their out-of-state homes. New Hampshire argued correctly that, for Due Process purposes, Massachusetts taxed extraterritorially and unconstitutionally when Massachusetts taxed income earned by nonresident telecommuters from their homes outside Massachusetts's borders.

In contrast, Professor Darien Shanske contends that Massachusetts can constitutionally tax the income New Hampshire residents earn at their homes in the Granite State without setting foot in Massachusetts. Professor Shanske similarly defends as constitutional New York's "convenience of the employer" doctrine which taxes the incomes of nonresident telecommuters who work remotely at their out-of-state homes for New York-based employers. Professors Richard D. Pomp and Christine Kim come to the contrary (and, I think, correct) conclusion that the Constitution forbids the kind of unapportioned, extraterritorial income taxation of nonresidents in which Massachusetts engaged during the pandemic and which New York and other states continue to pursue today.

These three articles focus attention on five important issues in the current debate. First, who are the state taxpayers about whom we should be concerned in a post-pandemic world? As the term "convenience of the employer"[8] indicates, the individuals upon whom we should currently focus attention are nonresident employees working remotely at home for employers located in another state. The taxation of interstate independent contractors, sole proprietors and other kinds of businesses raise important and often overlapping issues. But, in the wake of the pandemic and the consequent expansion of interstate telecommuting, the pressing constitutional and tax policy issue today is the proper state income taxation of nonresident employees working remotely at home for an employer located in another state. While Massachusetts has announced that it will return to constitutionally

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7. Brief of Professor Edward A. Zelinsky as Amicus Curiae in Support of Plaintiff's Motion for Leave to File Bill of Complaint, New Hampshire v. Massachusetts, 141 S. Ct. 1262 (2021) (No. 220154) (filed Dec. 10, 2020).

8. *See* discussion *infra*, notes 20–24 and accompanying text.

appropriate practices,[9] New York and other states emulating New York continue to exceed their constitutional authority when they tax nonresidents on income such nonresidents earn remotely at their out-of-state homes.

A second important issue in this ongoing debate is the implication of *South Dakota v. Wayfair*.[10] *Wayfair* holds that an out-of-state business with substantial economic presence but no physical presence in a taxing state has sufficient nexus to that taxing state to be required to collect that state's sales tax. Professor Shanske invokes *Wayfair* for his support of Massachusetts's and New York's extraterritorial taxation of out-of-state telecommuters. This pushes *Wayfair* farther than it should go.

Wayfair does not hold that physical presence (or its absence) is never relevant under the Due Process and Commerce Clauses. In the context of nonresident telecommuting employees, it is.

On the days when out-of-state remote workers live, work and receive their primary public services from their home states, such workers have minimal ties to the states in which their employers are located. In light of those insubstantial ties, the nonresident who works at home should not be income-taxed by her employer's state on the income she earns remotely at her out-of-state home. *Wayfair* does not compel a contrary conclusion.

Professor Pomp correctly observes that *Wayfair* is relevant to this debate but in a different way. He cites *Wayfair* as a model of productive constitutional decisionmaking which the Supreme Court should replicate by buttressing the constitutional norms which protect nonresident telecommuters from extraterritorial income taxation on the days they work at their out-of-state homes. By rejecting New Hampshire's lawsuit against Massachusetts, the Court declined to decide in this fashion now. But the hope remains that, as state court litigation ultimately reaches the U.S. Supreme Court, the Court will rule broadly to protect nonresident telecommuters, as Professor Pomp suggests the Court should.

Third, for a straightforward reason, the way in which Massachusetts income taxed interstate remote work during the pandemic and in which New York continues to tax such work today fails the constitutional test of apportionment: these states did not and do not apportion. Rather than identifying and taxing part of the income earned by

9. *See supra* note 5
10. 138 S. Ct. 2080 (2018).

nonresident remote workers at their respective out-of-state homes, Massachusetts taxed (and New York continues to tax) all of a remote worker's income including 100% of the income remote workers earn telecommuting from their homes outside New York's and Massachusetts's borders. Taxing all income is not the apportionment of interstate income required by the dormant Commerce Clause as construed by *Complete Auto Transit, Inc. v. Brady*.[11]

Fourth, in the context of taxing remote work, the metaphor of "virtual presence" invoked by Professor Shanske hinders more than it assists. Professor Shanske argues that, on a day a New Hampshire resident working at home logs onto his employer's server in Boston, that New Hampshire resident benefits from the agglomeration economies of the Greater Boston area. This agglomeration-utilizing New Hampshirite, he reasons, has significant virtual presence in Massachusetts. This agglomeration-based virtual presence, he concludes, gives Massachusetts constitutional authority to tax this New Hampshirite's income earned at her home in New Hampshire.

Professor Shanske's theory of virtual presence based on agglomerations has no persuasive limiting principle. This same New Hampshire resident may also use zoom or other similar technology to communicate from her home with customers in San Francisco, Chicago and Philadelphia. If the agglomeration economies of Greater Boston justify Massachusetts taxing the income earned by the New Hampshire resident working at her home in the Granite State, the agglomeration economies of San Francisco, Chicago and Philadelphia justify California's, Illinois's and Pennsylvania's simultaneous taxation of that income as well. The New Hampshire resident has an agglomeration-utilizing virtual presence in those three states when he communicates electronically with persons in those states. Applied consistently, Professor Shanske's agglomeration-virtual presence theory nullifies the properly-apportioned state income taxation required by *Complete Auto* and the dormant Commerce Clause. That theory of agglomeration-virtual presence invites—indeed, compels—multiple states to tax the income earned by a New Hampshire resident who doesn't leave her home, but who has virtual presence in many agglomeration-generating states on the same day working from her New Hampshire home.

Finally, Professors Shanske, Kim and I agree that Congress should adopt legislation in this area. However, such legislation is unlikely

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

for the same reason Congress did not address the issue of state sales taxation before *Wayfair*: the legislative process has many bottlenecks enabling organized interests to protect the status quo by blocking legislation. New York and other states emulating New York through the employer convenience rule constitute such a status quo interest. As Professor Pomp observes, these states will not voluntarily surrender the revenues they derive by taxing nonvoting nonresidents who telecommute from their out-of-state homes. Congress is unlikely to overcome the effective veto in the legislative process exercised by New York, Pennsylvania and the other states which continue to tax the incomes earned by nonresidents working remotely beyond their borders.

If Congress were to legislate, I would favor statutory confirmation of the constitutionally-compelled rule of apportionment: on the days an interstate telecommuter works at home, she should pay income tax only to the state in which she lives, works and receives her principal public services. On such a work-at-home day, the remote worker's state of residence is the state which provides the most substantial services to that worker. Professor Kim favors federal legislation which would require a nonresident to be physically present in a state for at least 30 days annually before that state can tax the nonresident's income. I would go farther and would explicitly prevent a state from taxing income earned on a nonresident employee's out-of-state days even if that nonresident commutes to the employer's state on other days. In contrast, Professor Shanske envisions federal legislation confirming that an employer's state can tax "some"[12] of the income earned by a nonresident remote worker on her out-of-state work days at home.

To advance my analysis, I first summarize the Due Process and dormant Commerce Clause principles governing states' income taxation of nonresidents. I then recap the current and extended controversy over the state income taxation of nonresident remote employees when they work at their out-of-state homes. The most recent event in this controversy is the Supreme Court's refusal to hear *New Hampshire v. Massachusetts*. I next discuss the arguments advanced by Professors Shanske, Kim and Pomp and then highlight my conclusions: New Hampshire was correct that, under the dormant Commerce Clause, Massachusetts violated its constitutional duty to apportion by taxing income New Hampshire residents earned remotely working at their homes in the Granite State during the pandemic. Nonresident telecommuters do not have

12. Shanske, *supra* note 2, at 961.

substantial presence in their employer's state when such nonresidents work at their out-of-state homes. New Hampshire was also correct that, for Due Process purposes, Massachusetts taxed extraterritorially and thus unconstitutionally when Massachusetts taxed income earned by telecommuters from their homes outside Massachusetts's borders.

This issue will now wind its way through the state courts and will hopefully reach the U.S. Supreme Court on the merits. When the Court does confront the constitutional substance of this debate, the Court's Commerce Clause and Due Process precedents compel protection for nonresident telecommuters who earn income at home. On the days interstate remote workers work at their out-of-state homes, they should not be income-taxed by the states in which their employers are located.

I. The Constitutional Background: The Due Process and Dormant Commerce Clauses

Writing for the Court in *Oklahoma Tax Commission. v. Chickasaw Nation*,[13] Justice Ginsburg observed that, under the Due Process Clause, a state taxing nonresidents "generally may tax only income earned within the" state, not income nonresidents earn outside the taxing state's boundaries. This observation confirmed the foundational teaching of *Shaffer v. Carter*[14]:

> As to non-residents, the jurisdiction [to tax] 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.

Per *Complete Auto*, when income is earned by activity that straddles state borders, the Commerce Clause independently requires

13. 515 U.S. 450, 463 n.11 (1995).

14. 252 U.S. 37, 57 (1920). *See also Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (state "has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders. . . ."); Cook v. Tait, 265 U.S. 47, 55 (1924) ("The taxing power of a State, it was decided, encountered at its borders the taxing power of other States and was limited by them.").

that a state must stop at its border and tax only the portion of such interstate income "fairly apportioned" to that state.[15] In addition, *Complete Auto* mandates that a state may only tax interstate activity if such activity has "a substantial nexus with the taxing state."[16]

Central Greyhound Lines, Inc. v. Mealey[17] underpins *Complete Auto*'s dormant Commerce Clause requirement of apportionment between states. In *Central Greyhound*, buses operated by a New York corporation traveled from one point in New York State to a final location in New York State, but used the highways of Pennsylvania and New Jersey to move between these New York locations. *Central Greyhound* held that the dormant Commerce Clause requires that, for state taxation purposes, the gross receipts of these trips must be apportioned between New York and these other states to reflect the mileage traveled in each state.

The U.S. Supreme Court grants the states leeway to fashion apportionment formulas.[18] But, in light of their constitutional obligations to apportion and to avoid extraterritorial taxation beyond their borders, a state cannot apply an income apportionment formula which creates "arbitrary result[s]" by "grossly distort[ing]" the income earned within the taxing state "[19]

II. The History of the State Income Taxation of Remote Work: "Convenience of the Employer" to Covid-19

The current controversy over the state income taxation of nonresident remote workers traces its origins to New York's "convenience of the employer" doctrine.[20] Under that doctrine, New York taxes the income

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15. *Complete Auto*, 430 U.S. at 279. See also MeadWestvaco Corp. v. Ill. Dep't. of Revenue, 553 U.S. 16, 24 (2008) ("The Commerce Clause forbids the States to levy . . . unfairly apportioned taxation.").

16. *Complete Auto*, 430 U.S. at 279. In addition to the requirements of apportionment and substantial nexus, a state tax on interstate income cannot "discriminate against interstate commerce" and must be "fairly related to the services provided by the [taxing] State." *Id*.

17. 334 U.S. 653 (1948).

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

19. *Id.* at 274-75.

20. Much has been written about New York's "convenience of the employer doctrine." *See, e.g.* Jerome R. Hellerstein et al., State Taxation, ¶ 20.05[4][e] (3d. ed. 2020 rev.); Morgan L. Holcomb, *Tax My Ride: Taxing*

nonresident remote workers earn at their out-of-state homes working for New York employers. In 2003 and 2005, New York's Court of Appeals (the Empire State's highest court) sustained the convenience of the employer rule against constitutional challenge.

In *Zelinsky v. Tax Appeals Tribunal*,[21] the telecommuting taxpayer was a law professor[22] employed by Yeshiva University's Cardozo Law School, located in Manhattan. New York taxed under the employer convenience rubric the income earned by this law professor on the days he worked at his home in Connecticut, writing, researching and grading exams for Cardozo. Despite *Central Greyhound*, *Chickasaw Nation* and *Complete Auto*, New York State asserted and New York's highest court upheld the taxation of this income earned in Connecticut since the professor worked at home in the Nutmeg State for his convenience, not for his New York employer's necessity. In *Huckaby v. N.Y. State Div. of Tax Appeals*,[23] New York similarly taxed the income earned by a computer programmer at his home in Tennessee on the grounds that he worked at his home in the Volunteer State for his convenience, not for his New York employer's benefit.

In the wake of these decisions, legislation has regularly been introduced in Congress to repeal the employer convenience doctrine and similar state laws taxing income earned beyond the taxing state's boundaries.[24] Although almost two decades have elapsed since *Zelinsky* and *Huckaby*, this legislation has yet to receive a committee hearing.

Commuters in Our National Economy, 8 Fla. Tax. Rev. 885 (2008); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash from Nonresidents, Part 2*, 42 State Tax Notes 229 (2006); Edward A. Zelinsky, *Coronavirus, Telecommuting, and the 'Employer Convenience' Rule*, 95 State Tax Notes State 1101 (2020); Edward A. Zelinsky, *New York's 'Convenience of the Employer' Rule Is Unconstitutional,* 48 State Tax Notes 553 (2008).

21. Zelinsky v. Tax Appeals Tribunal, 1 N.Y.3d 85 (2003), cert. denied 541 U.S. 1009 (2004).

22. I am the law professor in the case.

23. Huckaby v. N.Y. State Div. of Tax Appeals, 4 N.Y.3d 427 (2005), cert. denied 546 U.S. 976 (2005).

24. *See, e.g.,* Telecommuter Tax Fairness Act, S. 2785, 108th Cong. (2nd Sess. 2004); Telecommuter Tax Fairness Act, H.R. 5067, 108th Cong. (2nd Sess. 2004); Multi-State Workers Tax Fairness Act, S. 2347, 113th Cong. (2nd Sess. 2014); Multi-State Workers Tax Fairness Act, H.R. 4085, 113th Cong. (2nd Sess. 2014); Multi-State Worker Tax Fairness Act, H.R.

Then came the coronavirus. Remote work had been increasing before Covid-19. But the response of governments, employers and employees to the virus rapidly brought remote work to new prominence.[25] Like all such developments, the growth of covid-related remote work brought important legal issues in its wake. Central among these is whether states can tax interstate remote workers who fled the virus to work by telecommuting from their out-of-state homes.[26]

In response to the pandemic, states which taxed out-of-state remote workers before Covid-19 under the banner of employer convenience doubled down on such extraterritorial taxation. New York in particular asserts that nonresident employees who work at their out-of-state homes for their New York employers owe New York state income taxes even though these nonresidents did not set foot in the Empire State in a Covid-19 world.[27] In addition, Massachusetts claimed that, during the pandemic, nonresident remote workers who did not commute into the Bay State because of Covid-19 must pay Massachusetts income taxes

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7968, 116th Cong. (2nd Sess. 2020). Most recently, this legislation has been introduced as Multi-State Worker Tax Fairness Act of 2021, S. 1887, 117th Cong. (1st Sess. 2021), and Multi-State Worker Tax Fairness Act of 2021, H.R. 4267, 117th Cong. (1st Sess. 2021). In the interest of full disclosure, I note my role in drafting the original versions of this legislation.

25. Joseph De Avila, *Remote Work Makes Jersey Shore a Hot Spot*, Wall St. J. A3 (June 1, 2021); Prithwiraj (Raj) Choudhury, *Our Work-from-Anywhere Future*, Harvard Bus. Rev. 58 (Nov.-Dec. 2020); Christopher Mims, *Remote Work Isn't Just for White-Collar Jobs Anymore*, Wall St. J. R4 (Oct. 23, 2020).

26. Another important issue highlighted by covid-related remote work is the income taxation of individuals who are residents of two or more states. Such double taxation typically occurs because an individual is domiciled in one state but is a "statutory resident" of a second state. *See* Edward A. Zelinsky, *Double Taxing Dual Residents: A Response to Knoll and Mason*, 86 State Tax Notes 677, 679–80 (2017); Kim, *supra*, note 2, at 1152.

27. New York State Department of Taxation and Finance, *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax* (Oct. 24, 2020), available at https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#file [https://perma.cc/W4F3-DA3Y].

on the salaries these individuals earned remotely at their out-of-state homes working for Massachusetts employers.[28]

Many New Hampshire residents who previously commuted to Boston worked remotely from their homes in the Granite State in the wake of the pandemic. Invoking the original jurisdiction of the U.S. Supreme Court,[29] New Hampshire challenged Massachusetts's taxation of the incomes earned at home by these New Hampshire residents.[30] The High Court declined to hear New Hampshire's case,[31] thereby channeling the legal debate about the taxation of remote work through the state courts.

III. Professor Shanske's Analysis

Professor Shanske rejects New Hampshire's constitutional claim. In doing so, he advances three arguments to support the constitutionality of New York's and Massachusetts's taxation of income earned by nonresident telecommuters at their out-of-state homes.

First, Professor Shanske reads *Wayfair* and its test of economic nexus as precluding constitutional consideration of physical presence or absence. Because *Wayfair* permits a state to force an out-of-state "business with a substantial economic presence . . . to collect the use tax,"[32] Prof. Shanske argues that the state in which a nonresident remote worker's employer is located can tax income earned outside its borders at the remote worker's out-of-state home. *Wayfair*, he tells us, held "that physical presence is not . . . required for nexus under the dormant

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28. 830 Mass. Code Regs. 62.5A.3 (2021). While Massachusetts has terminated its extraterritorial taxation of nonresident telecommuters as of September 13, 2021, these telecommuters must sue in the Massachusetts courts to recover the extraterritorial income taxes Massachusetts imposed before that date. See *supra* note 5 (announcing Massachusetts's termination of its state income taxation of nonresident remote workers).

29. U.S. Const. art. III, § 2; 28 U.S.C. § 1251(a).

30. *New Hampshire v. Massachusetts*, supra, note 1. On December 10, 2020, I filed an amicus brief in support of New Hampshire. This brief and the other briefs in the case are available on the Supreme Court's website at https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/22O154.html [https://perma.cc/B9R5-CW9R].

31. Denial of New Hampshire's motion for leave to file bill of complaint, U.S. Supreme Court Docket No. 220154 (filed June 28, 2021).

32. Shanske, *supra* note 2 at 954.

Commerce Clause."[33] The position that physical presence matters is "an outdated understanding of where and how work happens."[34]

Second, Professor Shanske defends New York's "convenience of the employer" doctrine as satisfying New York's dormant Commerce Clause obligation to apportion interstate income. "New York's convenience of the employer test is . . . an apportionment rule."[35]

Third, Professor Shanske claims that an employer's state has nexus to a nonresident's income earned at home "because of the employee's substantial virtual presence in the state."[36] This virtual presence, he argues, is bolstered by the economic benefits of agglomerations created in the state in which the employer is located. New Hampshire residents who commuted into Massachusetts in a pre-Covid world did so because "there is an agglomeration of talent in the Boston area that these [New Hampshire resident] workers benefit from."[37] This agglomeration-based virtual presence constitutionally justifies Massachusetts's and New York's taxation of the income nonresident remote workers earn at their out-of-state homes for these Massachusetts and New York employers.

In this context, Prof. Shanske further contends, it would be wrong for the Supreme Court to "impos[e] a new physical presence rule"[38] which would permit a New Hampshire resident to "avoid paying personal income tax to the primary jurisdiction enabling that worker to earn a high income,"[39] i.e., Massachusetts. The possible distinction between businesses and individuals, Professor Shanske also contends, is unpersuasive because such a distinction "den[ies] that a state may assert nexus based on the lessons of aggregation economics."[40]

Like Massachusetts, "New York has some claim to income that remote employees earn through taking advantage of New York's agglomerations."[41]

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33. *Id.* at 958.
34. *Id.* at 959.
35. *Id.* at 960.
36. *Id.* at 961.
37. *Id.* at 953.
38. *Id.*
39. *Id.*
40. *Id.* at 959.
41. *Id.* at 962.

Turning from constitutional concerns to tax policy, Professor Shanke becomes more sympathetic to true apportionment:

> For example, if Google were to have 10% of its workforce in New York and then have a certain number of permanently remote employees reporting to multiple offices, then apportioning 10% of the remote employee's income to New York seems reasonable and appropriate.[42]

The courts would "hamper the emergence of this solution by imposing a novel physical presence requirement on the taxation of individual income."[43] "The Court needs to allow states to negotiate and, ideally, prompt congressional action."[44] "If the Court imposes a physical presence rule, particularly one based on due process, then such development would be impossible."[45]

Thus, while Professor Shanske is not certain about the result he wants, he is clear about the result he does not want: he does not want the U.S. Supreme Court to hold on constitutional grounds that interstate remote workers should only pay income tax to their respective states of residence because they are physically present at their homes in those states. These out-of-state telecommuting employees, he tells us, have substantial agglomeration-based virtual presence in the employer's state. Therefore, the employer's state is entitled to "some"[46] portion of the income earned by these nonresidents despite their physical absence from the employer's state when these nonresidents work at their out-of-state homes.

IV. Professor Kim's Analysis

In contrast to Professor Shanske's analysis, Professor Kim concludes "that a source state's extraterritorial assertion to tax nonresident teleworkers' income likely violates the dormant Commerce and Due Process Clauses."[47] According to Professor Kim, Massachusetts's income

42. *Id.*
43. *Id.* at 965.
44. *Id.* at 964.
45. *Id.*
46. *Id.* at 961.
47. Kim, *supra* note 2 at 1149.

taxation of New Hampshire telecommuters violated all four prongs on the *Complete Auto* test.[48] Among other deficiencies, such taxation is unconstitutional because the "nonresident teleworkers' activity lacks substantial nexus with" the employer's state and such taxation does "not fairly apportion[]" the nonresident's income between that state and the employee's state of residence.[49]

In terms of nexus and the New Hampshirite who works remotely from her home for her Massachusetts employer, Professor Kim argues that

> Massachusetts may still have some nexus as a state that offers employment opportunity, but it is far less substantial compared to the services provided by New Hampshire amid COVID-19. Non-resident workers being taxed do not receive the services of the Massachusetts police, fire services, road or highway construction, water systems, or utilities.[50]

Just as Massachusetts's taxation of nonresident remote work income fails *Complete Auto*'s dormant Commerce Clause requirement of substantial nexus, that taxation fails to apportion according to Professor Kim: "Massachusetts's law is too broad as it seeks to tax 100% of the income earned by non-residents who neither work nor live in Massachusetts."[51] Thus, "the Supreme Court should [have] decided in *New Hampshire* that extraterritorial source taxation over nonresident teleworkers . . . violates both the Commerce Clause and [the] Due Process Clause."[52]

For the same reasons, Professor Kim is critical of New York's taxation of nonresident remote workers under the "convenience of the employer" doctrine. She criticizes the *Zelinsky* court for "evad[ing] the real issue: . . . the fair apportionment of multistate income."[53]

Professor Kim also criticizes Massachusetts's taxation of nonresident remote workers as "bad tax policy" that "does not accurately

48. *Id.* at 1186.
49. *Id.* at 1158.
50. *Id.* at 1188.
51. *Id.* at 1189.
52. *Id.* at 1225.
53. *Id.* at 1200.

reflect the modern marketplace."[54] Indeed, in tax policy terms, Professor Kim comes to precisely the opposite conclusion as does Professor Shanske. Professor Kim calls for "residence-based taxation for teleworking income" in light of "the evolution and inevitable development" of remote work.[55]

> Teleworking is the new normal for American business. The nation's tax law should reflect that fact by allowing the states where teleworkers live and work to be their primary tax state.[56]

Like Professor Shanske, Professor Kim supports federal legislation. However, Professor Kim envisions that that legislation would "enforce the primacy of residence-based taxation on teleworkers' income."[57] "Congress would be the best candidate" to regulate "the taxing of teleworkers' income."[58]

In particular, Professor Kim favors legislation like the Mobile Workforce State Income Tax Simplification Act[59] which "would establish a uniform 30-day threshold before employees are required to comply with the income taxes of a state other than their state of residence."[60] "[T]he physical presence of individuals indicates the locale in which they benefit from government services."[61]

V. Professor Pomp's Analysis

Professor Richard D. Pomp also urged the Supreme Court to rule for New Hampshire. His comments[62] emphasize the political reality that nonresident remote workers do not vote in the states levying taxes on their incomes:

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54. *Id.* at 1173.
55. *Id.* at 1203.
56. *Id.* at 1205.
57. *Id.* at 1150.
58. *Id.* at 1194.
59. Mobile Workforce State Income Tax Simplification Act of 2021, H.R. 429, 117th Cong. (2021).
60. *Id.*
61. *Id.*
62. Pomp, *supra* note 2.

> [T]he more taxes that can be raised from nonresidents who do not vote, the less the legislature will have to raise from residents who do vote. Legislators share this same perspective. Expansive and aggressive views of nexus serve the interests of residents— not those of nonresidents.[63]

Professor Pomp also offers a different perspective on *Wayfair* and its implications for *New Hampshire v. Massachusetts*.

In his view, *Wayfair* is a model decision which properly "modernized the rules on the interstate collection of sales and use taxes."[64] The Court could have done "the same for personal income taxes" by ruling for New Hampshire's challenge to Massachusetts's taxation of nonresident telecommuters. Presumably, such a "moderniz[ing]" ruling remains possible when the Supreme Court again confronts this issue after its journey through the state courts.

VI. What is Remote Work?

Consider initially the disagreement about what was at stake in *New Hampshire v. Massachusetts*. Professor Shanske criticizes any distinction in this context between individuals and businesses. But the aptly-named "convenience of the employer" doctrine captures what was at stake before Covid-19 and what remains at stake today: the proper taxation of interstate telecommuting employees when they work at their out-of-state homes for employers located in other states.

There are important challenges in the modern "gig" economy, identifying who is an employee and who is an independent contractor.[65] The taxation of out-of-state businesses (including sole proprietorships) raises important and overlapping concerns. But in a post-pandemic world reflecting greater remote work by interstate employees, the urgent constitutional and tax policy question is the proper state income taxation of nonresident employees working at their out-of-state homes.

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63. *Id.* at 20 (parentheses in original).

64. *Id.*

65. Edward A. Zelinsky, *Defining Who Is An Employee After A.B.5: Trading Uniformity and Simplicity for Expanded Coverage*, 70 Catholic Univ. L. Rev. 1 (2021).

VII. The Implications of Wayfair

Consider next Prof. Shanske's reading of *Wayfair*. In *Wayfair*, the U.S. Supreme Court upheld South Dakota's imposition of sales tax on out-of-state businesses that annually transact in South Dakota more than $100,000 in total sales or that have 200 or more separate South Dakota sales in a year. The Court held that such yearly sales create for the out-of-state business "economic nexus" to South Dakota despite the business' physical absence from the state. Professor Shanske invokes *Wayfair* to argue that nonresident remote workers, despite working at their out-of-state homes, similarly have "economic nexus" to the state in which their employer is located.[66]

This stretches *Wayfair* farther than it should go. Because physical presence (or absence) can be irrelevant in particular cases does not mean that physical presence (or absence) is always irrelevant in all cases. In the context of taxing remote work, the physical absence of a telecommuter from the employer's state precludes that state from taxing the income such nonresident telecommuter earns at his out-of-state home. The state of the telecommuter's residence is the jurisdiction in which she lives, works and receives her primary public services. While she works at her out-of-state home, the interstate remote working employee does not have substantial nexus to the state in which her employer is located.

By way of analogy, consider a business with total annual sales in South Dakota of $90,000 earned through 190 transactions. If this business is located in Minnesota and conducts all of its South Dakota activity through the internet, this business is not subject to South Dakota sales tax. Its economic presence is too small as South Dakota defined such presence with the Supreme Court's subsequent approval. The South Dakota statute upheld in *Wayfair* requires a yearly minimum of $100,000 of South Dakota sales or 200 annual transactions in South Dakota to establish economic presence in South Dakota and consequent sales tax collection responsibility for the Mt. Rushmore State. Below those thresholds, the Minnesota business' ties to South Dakota are today deemed insubstantial.

But if an otherwise identical small business is located in South Dakota, this business must collect South Dakota sales tax since this business is "engaging in business as a retailer . . . in the State of South

66. Shanske, *supra note* 2 at 958-59.

Dakota . . ."[67] by virtue of its physical presence in the state. The controlling difference in these two cases is physical presence in South Dakota. While neither of these two businesses is large enough to trigger the economic presence standards of South Dakota law approved in *Wayfair*, the business physically located in South Dakota doesn't have to. This business, by virtue of its physical presence in South Dakota, has "substantial nexus" to South Dakota and is thus subject to South Dakota tax collection responsibility because it is "a retailer" in the state.[68]

Perhaps South Dakota could seek to lower the statutory thresholds at which economic presence is considered substantial, decreasing the dollar volume of a business' in-state sales or the number of in-state sales triggering sales tax collection responsibilities. Perhaps the U.S. Supreme Court would condone such a decrease. Perhaps it would not. But, at some point, economic presence is too small for an out-of-state retailer to be subject to sales tax collection responsibilities. And, at that point, a business of the same size which is physically present in South Dakota is subject to the state's taxing authority because it is physically present within the Mt. Rushmore State.

This analogy is instructive in the context of interstate remote work. On a day that a New Hampshire commuter drives into Massachusetts to work, the income earned on that day is subject to Massachusetts income taxation because of the commuter's physical presence in the Bay State. On that day, the commuter looks like the South Dakota business conducting business inside the Mt. Rushmore state's borders. However, a day spent completely working at home in New Hampshire is different. On that day, the New Hampshire resident resembles the Minnesota business beyond South Dakota's sales tax jurisdiction because of the business' physical absence from South Dakota. Even in an internet age, physical presence or absence can make a difference in particular cases. Remote employment work is one of these.

The dormant Commerce Clause teaching of *Central Greyhound* remains intact after *Wayfair*. *Central Greyhound* confirms that interstate remote workers should pay income tax in their states of residence, where they work, live and receive their principal public services. In this context, there is nothing "novel"[69] about a physical presence test. Even

67. S.D. Codified Laws § 10-45-2 (2016).
68. *Id.*
69. Shanske, *supra* note 2, at 965.

in the world of the internet, state boundaries retain constitutional significance.

Professor Pomp's take on *Wayfair* is more persuasive. *Wayfair* is, as he suggests, a model which properly "modernized the rules on the interstate collection of sales and use taxes."[70] The Court could have done "the same for personal income taxes" by ruling for New Hampshire's challenge to Massachusetts's taxation of nonresident telecommuters.[71] The Court can still "modernize[]" the taxation of interstate remote work when an appropriate case reaches the Court on the constitutional merits.[72] In that case, the Court should affirm that a state cannot constitutionally tax a nonresident employee's income earned on the days the employee works at his out-of-state home.

VIII. New York and Massachusetts Fail to Apportion

Contrary to Professor Shanske's characterization, New York does not apportion under its "convenience of the employer" rule and Massachusetts did not apportion during the pandemic. The Massachusetts and New York levies Professor Shanske defends are unapportioned state income taxes on interstate telecommuters, taxing all of the income nonresident telecommuters earn at their out-of-state homes. Such unapportioned taxation of interstate employees' income violates the dormant Commerce Clause per *Complete Auto*.

Consider again *Zelinsky*, in which a law professor domiciled in Connecticut spent 60% of his work days at his home in the Nutmeg State, writing, researching and grading for Cardozo. New York did not deploy its "convenience of the employer" rule to tax some of this professor's salary attributable to these Connecticut work days. New York taxed all of that salary earned in the Nutmeg State, making no effort to apportion any part of that salary earned out-of-state between itself and Connecticut.

Similarly, in *Huckaby*, New York, under the employer convenience rubric, taxed all of Mr. Huckaby's income earned at his home in Tennessee. New York made no effort to apportion Mr. Huckaby's Tennessee-generated income between itself and the Volunteer State. And

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70. Pomp, *supra* note 2, at 20.
71. *Id.*
72. *Id.*

Massachusetts (like New York) did not tax "some"[73] of the income earned by remote workers at home in New Hampshire during the pandemic. Massachusetts taxed all of such out-of-state income.

New York's and Massachusetts's own regulations highlight these states' failure to implement their constitutional responsibility to apportion on the basis of in-state physical presence. New York's income tax regulations admonish that a nonresident employee's income should be apportioned in and out of New York based on the employee's days worked in and out of New York. These regulations require that, to determine the part of a nonresident employee's salary taxable to New York, such employee's total salary must be multiplied by a fraction. This is the fraction that the "total number of working days employed within New York State bears to the total number of working days employed both within and without New York State."[74]

When, for example, a Connecticut resident who regularly commutes to New York spends days at sales conventions in Florida and Arkansas, New York's regulations eschew New York taxation of the income earned on those days outside the Empire State. Those regulations apportion part of the employee's income to Florida and Arkansas based on the number of days the employee physically works in those two states.[75] Similarly, per New York's own regulations, when a New Jersey resident who typically commutes to New York opens an office for his employer in Chicago, the income the commuter earns on those Illinois work days is apportioned to Illinois by virtue of his physical presence there, not to New York.[76]

The so-called "convenience of the employer"[77] doctrine abrogates these rules of apportionment based on physical presence in and out-of-state:

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73. *See* Shanske, *supra* note 2, at 961.

74. 20 NYCRR § 132.18(a).

75. *Id*. (Example 1).

76. *Id*. (Example 2).

77. Although this regulation is referred to as the "convenience of the employer" rule, that term does not actually appear in the regulation. *See* Zelinsky v. Tax Appeals Tribunal, 1 N.Y.3d 85, 89 (2003), cert. denied, 541 U.S. 1009 (2004) (characterizing New York regulation as "convenience of the employer" test).

> [A]ny 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.[78]

In practice, under this rule of employer convenience, New York taxes all income earned by a nonresident employee on the days she works remotely from her out-of-state home for a New York employer. This rule suspends the obligation to apportion as New York itself defines that obligation in its own regulation based on the days the nonresident employee works within and without the Empire State. Whatever else it may be, the "convenience of the employer" rule is not a rule of apportionment, dividing interstate income among different states. Employer convenience is instead a banner for New York to tax all of a nonresident remote worker's income on an unapportioned basis.

Massachusetts law also acknowledges the need to apportion nonresidents' incomes based on their physical presence in and out of the Bay State. By regulation, Massachusetts provides that

> the income of employees who are compensated on an hourly, daily, weekly or monthly basis must be apportioned to Massachusetts by multiplying the gross income, wherever earned, by a fraction, the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days. The result is the amount of the nonresident's Massachusetts source income.[79]

The Bay State's regulations illustrate such apportionment based on physical presence with an example of an auditor who lives in Rhode Island. This auditor is employed by a Boston-based accounting firm and spends 2/3 of his days working on engagements in Rhode Island and Connecticut.[80] Two-thirds of this nonresident's income is apportioned to these two states by virtue of his physical presence in those states. Only one-third of his salary is Massachusetts source income

78. 20 NYCRR § 132.18(a).
79. 830 Mass. Code Regs. § 62.5A.1(5).
80. *Id.* Example (5)(a)(1.1).

since only one-third of this nonresident's work days are physically spent in the Bay State.

The result is the same under these Massachusetts regulations when an individual works at her home in Ohio for 3/4 of her working days.[81] Only the 1/4 of her salary attributable to her days physically spent in the Bay State is taxed by Massachusetts.

Notwithstanding these regulations and their recognition of the need to apportion nonresidents' incomes based on their in-state physical presence, for the duration of the pandemic, Massachusetts suspended these apportioning rules to tax all of the income earned by individuals who previously commuted to Massachusetts but who worked at their out-of-state homes because of the coronavirus.[82] This pandemic-induced rule abrogated apportionment as Massachusetts's own regulations implement such apportionment based on days in and out of the Bay State. Whatever Massachusetts was doing during the Covid-19 crisis, it was no more apportioning income among the states than was New York. One hundred percent is not apportionment.

Consider again New York's application of its "convenience of the employer" doctrine to tax 100% of the income earned at home by the nonresident taxpayers in *Zelinsky* and *Huckaby*. New York thereby effectively denied that Connecticut and Tennessee have any legitimate authority to tax the income telecommuters earn when they spend a majority of their working days in those states of residence. If New York's claim to tax all of this out-of-state remote work income is not an "arbitrary," "grossly distort[ing]"[83] result, it is hard to know what would be.

IX. Physical Presence (or Absence) Still Matters

Professor Shanske tells us that physical presence is "an outdated understanding of where and how work happens."[84] Instead, he argues, the constitutionally relevant test is substantial virtual presence, reinforced by the agglomeration benefits of the state into which the nonresident employee projects his virtual presence.

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81. *Id.* Example (5)(a)(1.2).

82. 1417 Mass. Reg. 71 (Apr. 21, 2020); 830 Mass. Code Regs. § 62.5A.3.

83. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 274–75 (1978).

84. Shanske, *supra* note 2, at 959.

The metaphor of "virtual presence" is often helpful. But in the context of taxing remote working employees, the trope of "virtual presence" hinders more than it assists. There is no limiting principle for this theory of agglomeration-based virtual presence. The result of this theory is multiple states taxing the same income, the result that *Complete Auto* and the dormant Commerce Clause preclude by requiring apportionment among the states in which income is earned.

On any given day, an employee in the modern economy may have virtual presence in many states, assisted by the agglomerations in each of them. Under the virtual presence-agglomeration theory, each of these several states can tax the income earned by a nonresident virtually present in each state. The upshot would be multiple state taxation of the same income, the outcome that *Complete Auto* and the dormant Commerce Clause curb by the rule of apportionment.

Consider the law professor[85] who, in the Covid-19 world, taught his classes from his Connecticut home by zoom while his Manhattan-based law school was closed by the virus. Students joined his electronic classes from around the country. Some of these students returned to their families' homes for the duration of the coronavirus crisis. Other students relocated to communities distant from Covid-19 hotspots. All of these students attended classes virtually and received instruction where they were physically located.

Under a virtual presence theory, the law professor was present for income tax purposes in each state into which he taught electronically. The upshot would be multiple state income taxation of the professor's salary as each state taxes on the basis of his virtual presence in that state.

Or take the example of a New Hampshire telecommuter who works at her home. On any given day, this telecommuter communicates electronically with her co-workers and with her employer's suppliers and customers throughout the nation. When this telecommuter communicates into each of these states, she benefits from the agglomerations each state contains. The result again is multiple state income taxation by virtue of the New Hampshire remote worker's virtual presence in multiple states.

Consider now a possible limiting principle to avoid this overlapping taxation by many states: since the professor's law school is in

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85. Again, in the interest of full disclosure, I am the law professor in question

New York (albeit closed), only New York can tax on the basis of virtual presence. From this vantage, the other states in which his students were located cannot tax the professor's salary. Similarly, since the New Hampshirite's employer is physically based in Boston, only Massachusetts can tax her income on the basis of her virtual presence, not any of the other states with which she has electronic contact. Only the telecommuter's virtual presence in the employer's state is considered "substantial."

But this approach reintroduces physical presence as a controlling consideration, preferring New York and Massachusetts because the remote worker's employer is physically located there. And the premise of the virtual presence-agglomeration theory is that physical presence is "an outdated understanding of where and how work happens."[86]

If we permit in this fashion the reintroduction of physical presence as a legitimate constitutional consideration, we confront the core fact: the law professor has no physical presence in New York on the days he works at home. His employer does. No one doubts that New York can tax this professor's employer located in Manhattan.[87] But, if physical presence is reintroduced into the discussion to limit the virtual presence theory, the law professor lives, works and receives his principal public services in Connecticut, just as the New Hampshire telecommuter lives, works and receives his primary public services at home in the Granite State. As Professor Kim argues,[88] it is the interstate telecommuter's state of residence with which she has "substantial nexus," not the employer's state from which the nonresident telecommuter is physically absent.

Professor Shanske dubs Massachusetts as the "primary" jurisdiction permitting the New Hampshire telecommuter to earn his income.[89] This is not convincing. In terms of public services, New Hampshire is the principal provider of services to the New Hampshirite

86. Shanske, *supra* note 2, at 959.

87. Even though the law professor's nonprofit employer does not pay basic property and income taxes, it can pay other taxes including sales taxes, taxes on unrelated business income, real estate conveyance taxes, and unemployment compensation taxes. *See generally* Edward A. Zelinsky, Taxing the Church: Religion, Exemptions, Entanglement, and the Constitution 65–111 (2017).

88. Kim, *supra* note 2.

89. Shanske, *supra* note 2, at 953.

who, on a work-at-home day, is protected by New Hampshire police and fire personnel and receives other services from New Hampshire.

Instructive in this context is Professor Shanske's acknowledgment that New York and Massachusetts have a "lesser" claim to tax the income of a remote worker living and working in Montana.[90] This recognizes sub silentio that, notwithstanding identical virtual presence, physical presence does matter: Missoula is farther from Boston than is Nashua.

X. Federal Legislation

Professor Shanske and I agree that federal legislation should address the states' taxation of interstate remote work income. In this context, Professor Shanske points to my plan for taxing individuals who reside for tax purposes in two or more states. As to such dual state residents, I urge that each state of residence should apportion and tax part of this dual resident's income to avoid multiple taxation.[91]

I welcome Professor Shanske's reference to my proposal addressing the problem of dual state residents. But the devil, as they say, is in the details. And the details of my proposal support the conclusion that New York and Massachusetts cannot tax nonresident employees on remote work income earned outside New York's and Massachusetts's respective borders.

As Prof. Shanske observes,[92] my plan is designed to preclude the double state income taxation which can occur when two (or more) states exercise residence-based tax jurisdiction over the same individual. I recommend that a dual state resident report to each state of residence the income physically arising in that state. If, for example, a dual resident of New York and South Carolina owns a rental property in New York, the rent derived in New York would be taxed exclusively by the Empire State.

However, as to income without a geographic situs, the two states should apportion, each taxing part. This apportionable income chiefly

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90. *Id.* at n.45.

91. *Id.* at n.53 (citing 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 (2014)).

92. *Id.*

arises from dual residents' investment intangibles such as stocks and bonds[93] and from dual residents' retirement distributions from IRAs, 401(k) plans and other deferred compensation arrangements.[94] Since these forms of income do not have geographic situs, the two states of residence should apportion this income between them.

Remote work income falls into the first category, i.e., income (like real estate rents) which physically arises in the state in which the remote worker lives, works and receives his principal public services. Professor Shanske would, for purposes of federal legislation, place such remote work income in the second category of income without geographic situs. But New Hampshire is the geographic situs of the income earned by a New Hampshirite who telecommutes from her home just as Connecticut is the situs of the income earned by the law professor who works at his personal residence in the Nutmeg State.

While Professor Shanske and I both favor federal legislation to regulate the states' income taxation of interstate remote work, in substance we support quite different legislative proposals. I helped to draft the original bills which would proscribe the employer convenience doctrine. This legislation would only permit states to tax income earned by nonresident employees on the days such nonresidents work within the borders of the employer's state.[95]

In contrast, Professor Shanske favors federal authorization for states like New York and Massachusetts to tax some quantum of the remote work income earned by telecommuters working outside New York's and Massachusetts's respective borders. He justifies this approach based on the agglomerations created within the borders of the Empire and Bay States.

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93. The traditional rule of *mobilia sequuntur personam* attributes investment income to the taxpayer's state of residence since there is no convincing method for attributing such income to a state of source. A problem confronting individuals who are residents of two (or more) states is that both states tax such investment income on the basis of residence. *See* Zelinsky, *supra* note 89, at 540–41.

94. Federal law permits only the retiree's state(s) of residence to tax such retirement income. 4 U.S.C. § 114. A problem confronting individuals who are residents of two (or more) states is that both states tax such retirement income on the basis of residence.

95. *See* legislation discussed *supra* note 24.

Benefits are a traditional doctrine for allocating income among different taxing jurisdictions.[96] But, in the context of the states, the concept of benefits has conventionally been linked to state-provided services which are physically furnished within the boundaries of the taxing state.[97] Is it meaningful to say that the government of Massachusetts provides the agglomerations of the Greater Boston area in the same way that the city of Boston provides police and fire services to commuters physically present in downtown Boston? I am skeptical.

In any event, federal legislation is not in the political cards. Since *Zelinsky* and *Huckaby*, legislation to address the state income taxation of remote work has regularly been introduced in Congress. That legislation has yet to receive a committee hearing. New York and other states following the "convenience of the employer" rule have no incentive to negotiate a legislative approach to the taxation of remote work. As Professor Pomp observes,[98] under the status quo, New York and other states emulating New York can tax with impunity all of the income earned outside their respective borders by nonvoting, nonresident remote workers. And the well-known bottlenecks of the legislative process favor the defenders of the status quo.[99]

Instructive in this regard is the law adopted by Arkansas, reversing an administrative ruling which apparently put Arkansas on the path to the "convenience of the employer" approach to remote work income.[100]

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

97. *Id.* at 51 (taxes are "contributions from those who realize *current pecuniary* benefits under the protection of the government. . . .") (emphasis added). *See also Cook v. Tait*, 265 U.S. 47, 55–56 (contrasting the geographically limited benefits provided by the states with the federal government which by "its very nature benefits the citizen and his property wherever found."). *See also* Kim, *supra* note 2, at 1215–16 (discussing the benefits theory of taxation).

98. Pomp, *supra* note 2.

99. *See* Abner J. Mikva & Eric Lane, Legislative Process 126, 556, 558 (3rd ed. 2009); Robert A. Katzmann, Judging Statutes 15 (2014); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 Nw. U. L. Rev. 1437, 1452 (2001); Walter J. Oleszek, Congressional Procedures and the Policy Process 18, 184 (9th ed. 2014); Edward A. Zelinsky, *The Political Process Argument for Overruling* Quill, 82 Brook. L. Rev. 1177 (2017).

100. S. 484, 2021 Leg., Reg. Sess., (Ark. 2021). *See* Lauren Loricchio, *State Enacts Bill Clarifying Nonresident Income Sourcing Issue*, 100 Tax Notes State 649 (2021).

The Arkansas legislature evidently concluded that the extra revenue raised by taxing nonresident remote workers under the employer convenience rule was not worth the costs and consequences of the hostile tax environment which the rule creates.

States like Arkansas may thus also oppose a congressional resolution of the problem of state taxation of remote work: Why not let New York continue to penalize New York-based firms by taxing the income of their nonresident remote workers? One more reason to relocate from the Empire State to Arkansas.

XI. Massachusetts's Pandemic Only Rule

Consider finally the possible argument that Massachusetts's taxation of nonresident telecommuters is more defensible than is New York's (and other states') taxation under the "convenience of the employer" rule: Massachusetts's extraterritorial taxation was for a limited, pandemic-based period and is now over.[101] In contrast, New York and the states emulating New York's employer convenience rule taxed nonresident remote workers' out-of-state incomes before and during the pandemic and will continue that extraterritorial taxation after the coronavirus is (hopefully) just a distant memory.

The simple reply to this argument is the U.S. Supreme Court's observation in *Roman Catholic Diocese v. Cuomo*[102]: "even in a pandemic, the Constitution cannot be put away and forgotten." The Commerce Clause and Due Process limits on states' ability to tax income earned outside their borders are not suspended by the coronavirus.

We will have an interesting debate about the states' public health police powers in the face of the pandemic.[103] But, as engaging and important as that debate may be, the state income taxation of interstate remote work raises different constitutional issues in terms of apportionment and substantial presence. Whether Massachusetts can mandate vaccinations is a different inquiry from whether the Covid-19 crisis somehow temporarily released Massachusetts from its constitutional obligation to avoid extraterritorial taxation of income earned outside Massachusetts's borders. It did not.

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101. *See* Mass. Dep't. Revenue, *supra* note 5.

102. 141 S.Ct. 63, 68 (2020).

103. *Compare id*. at 69 (concurring opinion of Justice Gorsuch), *with id*. at 75 (dissenting opinion of Chief Justice Roberts).

Conclusion

New Hampshire was correct that, under the dormant Commerce Clause, Massachusetts violated its constitutional duty during the pandemic to apportion by taxing income New Hampshire residents earned remotely working at their homes in the Granite State. New Hampshire was also correct that, for Due Process purposes, Massachusetts taxed extraterritorially and thus unconstitutionally when it taxed income earned by telecommuters from their homes outside Massachusetts's borders. Nonresident telecommuters do not have substantial presence in their employer's state when such nonresidents work at their out-of-state homes. The U.S. Supreme Court should eventually address this controversy on the merits and enforce upon states like New York and Massachusetts the Due Process and dormant Commerce Clause norms for the income taxation of interstate income. Under the constitutional rules of apportionment and substantial presence, income earned by telecommuters at their out-of-state homes should only be taxed by their states of residence—that is, the states in which they live, work and receive their principal public services.