

XI. Taxation of Nonresident Telecommuting Employees

A. Introduction

When the pandemic caused by the novel coronavirus (COVID-19) struck the United States in March of 2020, many workers, particularly white-collar office workers, began to work from home.¹ This movement to a work-from-home environment produced complex state tax consequences for those whose homes were in different states than their workplace offices.² These issues are of particular importance for states where there is significant daily commuting from nearby states into a key metropolis (think of Wisconsin and Indiana residents commuting to Chicago, Maryland and Virginia residents commuting to Washington D.C. or Connecticut and New Jersey residents commuting to New York City).³ Should the trend towards long-term work-from-home flexibility

¹ According to the U.S. Census Bureau, between August and December of 2020 more than one-third (36.9%) of households had an adult substitute some or all of their typical in-person work for telework because of the coronavirus pandemic. See Joey Marshall, Charlynn Burd, and Michael Burrows, *Those Who Switched to Telework Have Higher Income, Education and Better Health*, U.S. CENSUS BUREAU, (Mar. 31, 2021) <https://www.census.gov/library/stories/2021/03/working-from-home-during-the-pandemic.html> [<https://perma.cc/J99K-PXNR>] (“Since August 2020, the U.S. Census Bureau has asked participants in the Household Pulse Survey: ‘Working from home is sometimes referred to as telework. Did any adults in this household substitute some or all of their typical in-person work for telework because of the coronavirus pandemic, including yourself?’ Among those surveyed between Aug. 19 and Dec. 21, 36.9% answered ‘yes.’”).

² See generally Kristie Lowery, Kenneth Hausser and Debera Salam, *Massachusetts to end COVID-19 income tax relief for teleworkers*, EY TAX NEWS UPDATES 2021-1273 (Jun. 28, 2021) <https://taxnews.ey.com/news/2021-1273-massachusetts-to-end-covid-19-income-tax-relief-for-teleworkers> [<https://perma.cc/5MVZ-SMUJ>] (“The Massachusetts Department of Revenue (DOR) announced that the temporary income tax rules for teleworkers that were put in place to minimize disruption for employers and employees during the COVID-19 state of emergency will end as of September 13, 2021.”).

³ See e.g., Jordan Pascale, *How Will Transportation, Commutes Change In A Post-Coronavirus World? We Asked Experts*, NAT’L PUB. RADIO, (May 1, 2020) <https://www.npr.org/local/305/2020/05/01/849120816/how-will-transportation-commutes-change-in-a-post-coronavirus-world-we-asked-experts> [<https://perma.cc/G672-FQ9Z>].

continue following the eventual end of the COVID-19 pandemic, states' decisions on whether to tax out-of-state workers teleworking into their state could have critical impacts on state and local finances.⁴

This issue is most acute for closely adjacent states which have notably differing levels of state and local taxation. In one example, New Hampshire sued Massachusetts alleging that Massachusetts wrongfully taxed New Hampshire residents telecommuting to Massachusetts.⁵ The number of people affected by this is not insubstantial, as, even prior to COVID-19, the State of New Hampshire estimated that over 12% of its working residents commuted to Massachusetts.⁶ The State of New Hampshire assesses neither a state income tax,⁷ nor a state sales tax.⁸ On the other hand, Massachusetts charges a flat 5% income tax and a 6.25% sales and use tax.⁹ Thus, for a New Hampshire telecommuter worker earning the mean New Hampshire wage of \$28.24 per hour,¹⁰ working

⁴ See generally Lowery, Hauser and Salam, *supra* note 2.

⁵ *New Hampshire v. Massachusetts*, SCOTUSBLOG: INDEP. NEWS & ANALYSIS ON THE U.S. SUP. CT., (June 28, 2021), <https://www.scotusblog.com/case-files/cases/new-hampshire-v-massachusetts/> [<https://perma.cc/WX63-TN66>].

⁶ *Where do New Hampshire's Residents travel for work and where do New Hampshire's workers live? A closer look at the County-to-County Commuting Flows*, N.H. ECON. CONDITIONS, N.H. EMP. SEC., ECON. & LAB. MKT INFO. BUREAU, (May 2013) <https://www.nhes.nh.gov/elmi/products/documents/ec-commuting.pdf> [<https://perma.cc/9EGY-5R76>] (“Overall, 106,338 New Hampshire residents commute out of state for work, accounting for 15.7 percent of the state’s working residents. The majority of these commuters (78.6 percent) work in Massachusetts.”).

⁷ “Taxpayer Assistance – Overview of New Hampshire Taxes”, N.H. DEP’T OF REVENUE ADMIN., (Jan. 26, 2022) <https://www.revenue.nh.gov/assistance/tax-overview.htm> [<https://perma.cc/BTL5-PCGQ>].

⁸ “Taxpayer Assistance - Requests for Resale & Exempt Certificates”, N.H. DEP’T OF REVENUE ADMIN., (Jan. 26, 2022) <https://www.revenue.nh.gov/assistance/resale-exempt-certs.htm#:~:text=Taxpayer%20Assistance%20%2D%20Requests%20for%20Resale,Department%20issue%20tax%20exempt%20numbers> [<https://perma.cc/D33T-4T2A>].

⁹ “Massachusetts tax rates” (Apr. 12, 2021) <https://www.mass.gov/service-details/massachusetts-tax-rates> [<https://perma.cc/KPW8-3JBZ>].

¹⁰ Christopher T. Sununu, George N. Copadis, and Brian J. Gottlob, *New Hampshire Occupational Employment & Wages 2021*, N.H. EMP. SEC., ECON. & LAB. MKT INFO. BUREAU, (Sept. 2021) at iii

40 hours per week, avoiding Massachusetts income tax could save the telecommuter nearly \$3,000 per year.

Though the Supreme Court ultimately declined to hear the case in June 2021,¹¹ and the issue seems to have subsided as Massachusetts temporarily changed its nexus rules to accommodate COVID-related telecommuters, this issue will likely persist. As one example, the Omicron variant further delayed many large firms from having their employees return to the office.¹² Additionally, while the Supreme Court declined to hear the case in its original jurisdiction capacity, the case might well make its way through the state courts to the Supreme Court on its merits.¹³ Above all, the issue likely will not go away due to powerful incentives to practice tax arbitrage. For example, a resident of Vancouver, Washington working in Portland, Oregon (ten miles apart from one another) has tremendous incentive to be classified as working from home in Washington (which has a state sales tax but no state income tax)¹⁴ rather than in Oregon (which has a state income tax, but no state sales tax).¹⁵ This article seeks to examine both the extraterritoriality claims and analyze arguments for and against taxing nonresident telecommuters.

<https://www.nhes.nh.gov/elmi/products/documents/wages-intro.pdf>
[<https://perma.cc/424N-8FTA>].

¹¹ See SCOTUSBLOG *supra* note 5.

¹² See Martha C. White, *Omicron delays quarter of companies' reopening plans*, NBC NEWS, (Dec. 22, 2021) <https://news.yahoo.com/omicron-delays-quarter-companies-reopening-002100199.html>
[<https://perma.cc/JTL9-WFJS>] (observing Omicron delayed a quarter of companies' reopening plans) (“According to a recent Gartner survey, 44 percent of companies have pushed back or altered their reopening plans because of the omicron variant.”).

¹³ See Edward A. Zelinsky, *Taxing Interstate Remote Workers After New Hampshire v. Massachusetts: The Current Status of the Debate*, 656 CARDOZO LEGAL STUD. RSCH. PAPER 1, 11 (Oct. 4, 2021)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934566
[<https://perma.cc/BNL4-NX4A>] (“This issue will now wind its way through the state courts and will hopefully reach the U.S. Supreme Court on the merits”).

¹⁴ Katherine Loughhead, *State Individual Income Tax Rates and Brackets for 2021*, 3, TAX FOUND., (Feb. 2021)
<https://files.taxfoundation.org/20210217114725/State-Individual-Income-Tax-Rates-and-Brackets-for-2021.pdf> [<https://perma.cc/TXM4-9797>];
SALES TAX INST., *State Sales Tax Rates*, (Mar. 1, 2022)
<https://www.salestaxinstitute.com/resources/rates> [<https://perma.cc/KZ7V-3UMP>].

¹⁵ *Id.*

1. *How States Choose to Fund Themselves*

The source of the problem to be discussed in this article is the different methods state use to collect revenues to finance their activities. The very first income tax in the United States dates back to the Civil War, when President Lincoln imposed an income tax of 3% on incomes above \$800.¹⁶ The first permanent state income tax predates its federal counterpart, with Wisconsin implementing the first state income tax in 1911,¹⁷ while the current federal income tax was implemented following the passage of the Sixteenth Amendment in 1913.¹⁸ Forty-two U.S. States levy individual income taxes, while eight other states levy no income taxes at all.¹⁹ Within the forty-two states levying income taxes, nine have single-rate tax structures, where one rate applies to all income levels, while thirty two states and the District of Columbia implement progressive state income taxes, where marginal income tax rates increase as a taxpayer's income rises.²⁰

Massachusetts is an example of a state with a single-rate income tax structure, where all income earned by a taxpayer in the state is taxed at a rate of 5.1%.²¹ New Hampshire has a unique income tax structure among these United States. Crucially for this discussion, unlike all forty-one other states levying a state income tax, New Hampshire limits it to interests and dividend income only.²²

¹⁶ W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A HISTORY*, 63 (Cambridge University Press eds., 3rd ed. 2016). (“The income tax that became law in August 1861 was almost flat, imposing a basic rate of 3% on incomes while offering taxpayers . . . a personal exemption of \$800”).

¹⁷ Erika Janik, *Wisconsin And The Creation Of The Modern Income Tax*, WISC. PUB. RADIO, (Apr. 11, 2016, 10:00AM) <https://www.wpr.org/wisconsin-and-creation-modern-income-tax> [<https://perma.cc/VQG8-TYX6>].

¹⁸ U.S. CONST. amend XVI.

¹⁹ See Loughhead, *supra* note 14 at 2 tbl.1.

²⁰ *Id.*

²¹ See *id.* at 3 tbl.1; see also “Massachusetts tax rates” *supra* note 9. (“[Personal income and fiduciary income . . . 5.00%](#)”)

²² Loughhead, *supra* note 14 at 2-3. Interestingly, New Hampshire's income tax on interest and dividends is slated to be phased out beginning in 2023, before being ultimately repealed in 2027, leaving this anomaly in jeopardy. N. H. DEP'T OF REVENUE ADMIN. FREQUENTLY ASKED QUESTIONS - INTEREST & DIVIDEND TAX, (Feb. 18 2022) <https://www.revenue.nh.gov/faq/interest-dividend.htm>

Collectively, 38% of state tax revenue is raised via individual income taxation nationwide.²³

Thus, 62% of state tax revenue comes from sources other than state income taxes.²⁴ While not directly related to the subject of the memorandum, these mostly take the form of sales taxes, property taxes, corporate income taxes, and excise taxes.²⁵ Thus, examining the overall composition of the state tax receipt structure, analysts can gain an understanding of how a state's priorities can be shaped by its methods of taxation. To take our two states, New Hampshire is the state most reliant in the nation on property taxes (generating 64% of all state taxes)²⁶ while Massachusetts has the sixth-highest share of its revenue derived from its individual income tax (34% of all state taxes).²⁷

2. *Distributional Effects of Various Tax Systems*

Of course, taxation is a two-way street, where the question of how a state chooses to finance its expenditures, entails asking how a state chooses to distribute the burden of taxation across its citizens. This question appears in at least three conceptual dimensions (1) how

[<https://perma.cc/9PUJ-M9UD>] (“What is the Interest and Dividends Tax (I&D Tax)? It is a 5% tax on interest and dividends income. Please note, recently enacted legislation phases out the I&D Tax starting at 4% for taxable periods ending on or after December 31, 2023, 3% for taxable periods ending on or after December 31, 2024, 2% for taxable periods ending on or after December 31, 2025 and 1% for taxable periods ending on or after December 31, 2026. The I&D Tax is then repealed for taxable periods beginning after December 31, 2026.”).

²³ See Loughhead, *supra* note 14 at 2 (“Individual income taxes are a major source of state government revenue, accounting for 38 percent of state tax collections in fiscal year 2018”).

²⁴ *Id.* (“Individual income taxes are a major source of state government revenue, accounting for 38 percent of state tax collections in fiscal year 2018”).

²⁵ Janelle Cammenga, *Facts and Figures 2021: How Does Your State Compare?*, TAX FOUND., (Mar. 10, 2021)

<https://taxfoundation.org/publications/facts-and-figures/>

[<https://perma.cc/3HM2-SK6T>].

²⁶ This is somewhat intuitive in that New Hampshire declines to impose either a general income or general sales tax, leaving it especially reliant upon other sources of taxation to provide revenue. See Cammenga, *supra* note 25, tbl.8.

²⁷ See *id.*

does the inherent nature of a taxation method (i.e. income vs. sales vs. property) impact how the burden of taxation is distributed across the population (2) how the method of taxation impacts the broadness of the taxation base (who is required to pay tax at all) and (3) how the method of taxation chosen impacts the ability to design a progressive tax (where those with higher abilities to pay are assessed higher marginal rates). For example, consumption taxes (i.e. sales taxes) are generally considered to be regressive, in the sense that they draw a larger share from low-income budgets than from high-income budgets.²⁸ Property taxes are similarly considered to be regressive.²⁹ This occurs because low income taxpayers tend to spend a higher share of their income on items subject to consumption and property taxes than do wealthier individuals.³⁰ Additionally, sales taxes, for example tend to be applied near-universally, regardless of the ability to pay, whereas income taxes are not assessed on those who earn no income.³¹

3. *Teleworking Can Increase State Tax Progressiveness*

²⁸ See Howard Chernick and Andrew Reschovsky, *Yes! Consumption Taxes Are Regressive*, 43 CHALLENGE, Sept.–Oct. 2000, at 60,60-61 (“More systematic evidence shows that regressivity of consumption taxes is still important, whatever the time horizon”). Note that this is quite different from a question of marginal rates – generally sales taxes – for administrability purposes – are assessed as flat taxes – equal across all similar purchases in the state economy.

²⁹ Kevin Erdmann, *Are Property Taxes Regressive?*, MERCATUS CTR., (Aug. 13, 2019) <https://www.mercatus.org/bridge/commentary/are-property-taxes-regressive> [<https://perma.cc/274G-LRZB>] (“Households with lower incomes spend a much larger portion of their incomes on rent.”).

³⁰ *Id.* (“Households with lower incomes spend a much larger portion of their incomes on rent.”).

³¹ States of course, can and do exempt certain *categories* of transactions from sales and gross receipts tax. In the case of New Hampshire, the opposite is done, where for example, despite lacking a generalized sales tax, New Hampshire imposes a Meals and Rooms tax of 8.5%. N.H. DEP’T OF REVENUE ADMIN, MEALS AND ROOMS (RENTALS) TAX (Feb. 18, 2022) <https://www.revenue.nh.gov/meals-rooms/index.htm> [<https://perma.cc/U6HH-RY3H>]. The distributional rationale for this is quite strong, as relative to say, grocery store spending.

Like many aspects of the modern American economy, the rise of telework is not distributed evenly.³² For example, while more than six-in-ten (62%) of households with a bachelor's degree switched from in-person work to telework between August and December of 2020, only one-in-five (19%) of households with a high school diploma or GED did so during the same period.³³ Perhaps unsurprisingly, this disparity is mirrored by the gap between high-income and low-income households, where nearly three-in-four (73%) of households earning \$200,000 or more annually had an adult switch to telework because of the coronavirus pandemic, compared to one-in-eight (13%) of households earning less than \$25,000 annually.³⁴ Thus, should states with income taxes decline to collect income taxes previously owed by currently teleworking commuters, the beneficiaries of this decision would likely be predominantly wealthy households.³⁵ We could expect that this effect would be one sided, as, for example, a resident of Massachusetts who formerly commuted to New Hampshire but now teleworks within Massachusetts would be unlikely to declare their income in Massachusetts, and suddenly be subject to a 5.1% income tax rate. This regressivity aspect would be exacerbated if the limitation on the deductibility of state and local taxes (SALT) were lifted above the cap imposed by the 2017 Tax Cuts and Jobs Act (TCJA) as has been proposed as part of the Biden Administration's Build Back Better Plan.³⁶

³² See generally Marshall, Burd, and Burrows, *supra* note 1 (“Households with members who teleworked more frequently reported higher levels of income and education and better health than those in which no one changed their typical in-person work in response to the COVID-19 pandemic.”).

³³ *Id.* (“Those with a bachelor's degree or higher were more than three times as likely as those with a high school education or GED only to have an adult in their household substitute in-person work for telework (Figure 2): 61.7% compared to 19.1%.”).

³⁴ *Id.* (“In the highest-earning households — those with annual incomes of \$200,000 or more — 73.1% switched to telework (Figure 1). This is more than double the percentage (32.1%) of households with incomes between \$50,000 and \$74,999, a range that includes the 2019 median U.S. household income (\$65,712). Lowest-earning households were less likely to switch to telework. Only 12.7% of households earning under \$25,000 reported teleworking in lieu of in-person work.”).

³⁵ *Id.*

³⁶ COMM. FOR A RESPONSIBLE FED. BUDGET, *SALT Cap Repeal Below \$500k Still Costly and Regressive*, (Nov. 19, 2021) <https://www.crfb.org/blogs/salt-cap-repeal-below-500k-still-costly-and->

Hampshire³⁹ responded with stay-at-home orders instructing their citizens not to leave for non-essential purposes. While the stay-at-home orders have long since lifted,⁴⁰ many workers continued to work from home through 2020 and 2021. As alluded to previously, a substantial percentage of the New Hampshire adult population began earning income from their Massachusetts jobs while working at their homes in New Hampshire.⁴¹ Despite this, on April 21, 2020, Massachusetts began retroactively taxing nonresident income for

[<https://perma.cc/VQ86-5MMM>] (“Today, Governor Charlie Baker issued an emergency order requiring all businesses and organizations that do not provide ‘COVID-19 Essential Services’ to close their physical workplaces and facilities to workers, customers and the public as of Tuesday, March 24th at noon until Tuesday, April 7th at noon.”).

³⁹ STATE OF NEW HAMPSHIRE BY HIS EXCELLENCY CHRISTOPHER T. SUNUNU, GOVERNOR, *Closure of non-essential businesses and requiring Granite Staters to stay at home*, Emergency Order # 17 Pursuant to Executive Order 2020-04, (Mar. 26, 2020) <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/emergency-order-17.pdf> [<https://perma.cc/MA37-VN5H>] (“Beginning at 11:59 p.m. on March 27, 2020, New Hampshire citizens shall stay at home or in their place of residence with the following exceptions”).

⁴⁰ See e.g. KC Downey, *Stay-at-home order in effect for New Hampshire since late March has expired*, WMUR, (Jun 16, 2020 9:15AM) <https://www.wmur.com/article/new-hampshire-stay-at-home-order-expired/32879222> [<https://perma.cc/2TTL-34T5>] (“New Hampshire is now under a safer-at-home advisory after the stay-at-home order expired at 11:59 p.m. Monday.”).

⁴¹ See *supra* note 6 (“Overall, 106,338 New Hampshire residents commute out of state for work, accounting for 15.7 percent of the state’s working residents. The majority of these commuters (78.6 percent) work in Massachusetts.”).

services performed outside of Massachusetts.⁴² New Hampshire responded by filing suit on October 19, 2020.⁴³

Citing Massachusetts's decision to continue taxing New Hampshire's workers as an attack on state sovereignty,⁴⁴ New Hampshire asserted that to pass constitutional muster, a state tax on nonresidents must be fairly related to services provided by the State.⁴⁵ Prior to the COVID-19 pandemic, New Hampshire noted that Massachusetts regulations required allocation of income between

⁴² State of New Hampshire, Motion for Leave to File Bill of Complaint, *New Hampshire v. Massachusetts* (Oct. 19, 2020), <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/nh-v-ma-action.pdf> [<https://perma.cc/85S6-PBW6>] (“On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed outside Massachusetts would be subject to the State’s income tax”); TIR 20-5: MASSACHUSETTS DEPARTMENT OF REVENUE, MASSACHUSETTS TAX IMPLICATIONS OF AN EMPLOYEE WORKING REMOTELY DUE TO THE COVID-19 PANDEMIC (Apr. 21, 2020), <https://www.mass.gov/technical-information-release/tir-20-5-massachusetts-tax-implications-of-an-employee-working-remotely-due-to-the-covid-19-pandemic> [<https://perma.cc/VG9E-A4ZM>] (“Pursuant to the regulation, for the duration of the Massachusetts COVID-19 state of emergency, all compensation received for personal services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency, was an employee engaged in performing such services in Massachusetts, and who, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding.”).

⁴³ KC Downey, *Governor, NH AG announce filing of lawsuit against Mass. over taxation of NH remote workers*, WMUR (Oct. 19 2020, 6:43PM), <https://www.wmur.com/article/governor-new-hampshire-doj-to-file-lawsuit-against-mass-over-taxation-of-nh-remote-workers/34412589> [<https://perma.cc/MM3C-4NAN>] (“A battle is underway between New Hampshire and Massachusetts over what Gov. Chris Sununu calls an attack on Granite Staters who work in the Bay State.”).

⁴⁴ See State of New Hampshire, *supra* note 42 at 1 (“The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire’s sovereignty.”).

⁴⁵ *Id.* at 7 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (“Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, ‘fairly apportioned’ and ‘fairly related to the services provided by the State’”); see also *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

taxable Massachusetts sources and non-taxable out-of-state sources by using 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.’⁴⁶

Massachusetts responded to the complaint with its own counterarguments. Firstly, it argued that the questions presented by New Hampshire could be answered using “this Court’s usual review of all federal questions” rather than through original jurisdiction.⁴⁷ Secondly, it claimed that New Hampshire failed to show “a direct interest of its own” and was rather “seek[ing] recovery for the benefit of individuals who are the real parties in interest”.⁴⁸ Finally, Massachusetts claims New Hampshire failed to establish the threats to sovereignty were “of serious magnitude” with “clear and convincing evidence.”⁴⁹

Perhaps the Supreme Court agreed with Massachusetts, at least on the question of jurisdiction, as on June 28, 2021, the Supreme Court elected not to hear the case.⁵⁰

C. Arguments for Taxing Out-of-State Teleworkers

1. Race-to-the-Bottom Concerns

One main argument for taxing out-of-state teleworkers is to reduce incentives for tax arbitrage, or a race-to-the-bottom in state income tax rates. This is more familiar in the context of corporate taxation where high profile examples include Tesla moving its headquarters from California to Texas⁵¹ and Boeing moving much of

⁴⁶ *Id.* at 9 (citing 830 CMR 62.5A.1(5)(a) (2008)).

⁴⁷ COMMONWEALTH OF MASSACHUSETTS, Brief in Opposition to Motion for Leave to File Complaint, *New Hampshire v. Massachusetts*, 1,12, https://www.supremecourt.gov/DocketPDF/22/22O154/163519/20201211121204330_New%20Hampshire%20v.%20Massachusetts%20brief%20in%20opposition.pdf [<https://perma.cc/3LGM-KC26>].

⁴⁸ *Id.* at 14 (citing *Kansas v. Colorado*, 533 U.S. 1, 8 (2001) (internal quotations omitted)).

⁴⁹ *Id.* at 17 (citing 451 U.S. at 736 n.11) (internal citations omitted).

⁵⁰ See SCOTUSBLOG, *supra* note 5. (“Jun 28 2021- Motion for leave to file a bill of complaint DENIED. Justice Thomas and Justice Alito would grant the motion.”). Justices Alito and Thomas would have granted New Hampshire’s motion to hear the case.

⁵¹ Lora Kolodny, Tesla moves headquarters from California to Texas, CNBC (OCT 7, 2021 6:19 PM),

its production from Washington to South Carolina.⁵² While high-tax states like California, Washington and Massachusetts have traditionally been able to counterbalance their disadvantages sourcing from their high income tax rates with high-paying jobs deriving from their dynamic labor markets,⁵³ this counterbalance might dry up with the rise of telework. This can be seen as concerning for at least three reasons. For one, it might make it too challenging for states to continue to have high income tax rates, which can be a concern both from a Brandeis-ian “laboratories of democracy” perspective (the idea that having sub-federal jurisdictions differentiate on policy matters can help other governments evaluate the efficacy of different policy options),⁵⁴ and from a social policy perspective.⁵⁵ Additionally, it

[https://www.cnn.com/2021/10/07/tesla-moves-its-headquarters-from-california-to-texas.html#:~:text=Tesla%20officially%20moved%20its%20headquarters%20from%20Palo%20Alto%2C,Covid-related%20health%20orders%20%E2%80%9Cfascist%E2%80%9D%20in%20an%20expletive-laced%20rant,\[https://perma.cc/CDV3-Z344\]](https://www.cnn.com/2021/10/07/tesla-moves-its-headquarters-from-california-to-texas.html#:~:text=Tesla%20officially%20moved%20its%20headquarters%20from%20Palo%20Alto%2C,Covid-related%20health%20orders%20%E2%80%9Cfascist%E2%80%9D%20in%20an%20expletive-laced%20rant,[https://perma.cc/CDV3-Z344]) (“Tesla officially moved its headquarters from Palo Alto, California to Austin, Texas CEO Elon Musk announced at the company’s 2021 annual shareholder meeting.”).

⁵² Nicholas Reimann, *Boeing Moving All 787 Production Away From Seattle Area, Possibly Costing 1,000 Jobs*, FORBES (Oct. 1, 2020, 12:46pm EDT), <https://www.forbes.com/sites/nicholasreimann/2020/10/01/boeing-moving-all-787-production-away-from-seattle-area-possibly-costing-1000-jobs/?sh=47201f331e52> [<https://perma.cc/LPP5-KYM9>]. (“All production of 787 aircraft will now move to North Charleston, South Carolina, by mid-2021, according to a company estimate.”).

⁵³ Carl Davis & Nick Buffie, *Trickle-Down Dries Up: States without personal income taxes lag behind states with the highest top tax rates*, INST. ON TAXATION & ECON. POL’Y (Oct. 2017), https://itep.sfo2.digitaloceanspaces.com/trickledowndriesup_1017.pdf [<https://perma.cc/8P6A-CPVX>] (“Residents of states with the highest top income tax rates are more likely to have a job than people living in states lacking income taxes.”).

⁵⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (“a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

⁵⁵ Tracy Gordon, Richard Auxier, John Iselin, *Assessing Fiscal Capacities of States: A Representative Revenue System—Representative Expenditure System Approach, Fiscal Year 2012*, URB. INST. 1 (Mar. 2016),

would be perhaps more than a bit ironic for race-to-the-bottom-style competition in state income tax assessment to intensify at the same time that the Biden Administration, and other global leaders seek to reduce the incentives for race-to-the-bottom style competition in international taxation through a global minimum tax on multinational corporations.⁵⁶ Finally, perhaps the most compelling logic behind taxing out-of-state teleworkers would be that it would bring the treatment of income taxation in line with how the Supreme Court’s 2018 decision in *Wayfair v. South Dakota* treated sales taxes for companies operating without a physical presence in a given state.⁵⁷

2. *Wayfair v. South Dakota*

Much as the question of taxing telecommuting employees arose from increasing use of information technology following the beginning of the coronavirus pandemic, the rise of the internet in the 1990’s prompted the sleepy question of how to treat sales tax for transactions occurring over the internet. From the early days of the internet until 2018, internet retailers with no employees or real estate in a state were not subject to relevant state sales taxes.⁵⁸ *Wayfair v.*

https://www.urban.org/sites/default/files/publication/78431/2000646-assessing-fiscal-capacities-of-states-a-representative-revenue-system-representative-expenditure-system-approach-fiscal-year-2012_1.pdf [<https://perma.cc/B289-FA4Y>] (“Reflecting the country’s broad diversity and strong federalist traditions, there is enormous variation in the amount of revenue that state and local governments collect from taxes, fees, and charges, and how much they spend on public goods and services such as schools, hospitals, and roads.”). In the sense that generally speaking, if a state takes in less revenue, then because states have to balance their budgets (unlike the federal government) then states would either have to receive more in grants from the federal government, cut services, or use less progressive forms of taxation to make up the difference.

⁵⁶ Naomi Jagoda, *Yellen proposing global minimum tax on multinationals*, THE HILL (Mar. 15, 2021 10:08 AM EDT)

<https://thehill.com/policy/finance/543208-yellen-proposing-global-minimum-tax-on-multinationals> [<https://perma.cc/R8QC-LVHK>] (“Treasury Secretary Janet Yellen is working with other countries on an agreement to update corporate tax rules to establish a global minimum tax as the Biden administration considers raising taxes on businesses in order to finance spending priorities.”).

⁵⁷ See *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

⁵⁸ See *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 (1992), overruled by *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018)

South Dakota reversed this long-standing precedent by determining that the rise of the internet increased revenue shortfalls from states seeking to collect sales and use taxes and that the online sales had rendered the physical presence rule of *Quill* unworkable.⁵⁹ Thus, if the rise of internet in retail transactions means a physical presence is not required to assess sales taxes, it seems inconsistent to require a physical presence to assess income taxes.

D. Arguments against Taxing Out-of-State Teleworkers

1. Constitutional Concerns

Two main constitutional concepts are at threat of violation: the Due Process Clause of the Fifth and Fourteenth Amendments, and the Commerce Clause.⁶⁰ Dating back to *Oklahoma Tax Commission v. Chickasaw Nation*, the Supreme Court has held that the Due Process Clause prevents states from taxing income earned outside the state's boundaries.⁶¹ Additionally, when income is earned by activity crossing state borders, the Commerce Clause independently required that a state could only tax the portion of such interstate income apportionable to the state.⁶² The underlying motivation for these decisions is to prevent

(holding that an out-of-state mail-order business lacked the substantial nexus between the business and state provided services necessary to be subject to state sales taxes).

⁵⁹ See *Wayfair*, *supra* note 57 at 2086. ("Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced.")

⁶⁰ U.S. CONST. AMEND V ("No person shall be... deprived of life, liberty, or property, without due process of law."); U.S. CONST. AMEND XIV ("No state shall... deny to any person within its jurisdiction the equal protection of the laws."); U.S. CONST. art. I, sec. 8 ("The Congress shall have power... to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.")

⁶¹ See *Zelinsky* *supra* note 13 at 7 ("Writing for the Court in *Oklahoma Tax Commission v. Chickasaw Nation*, 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")

⁶² See *id.* (citing *Complete Auto*, 430 U.S. at 279) ("Per *Complete Auto*, when income is earned by activity that straddles state borders, the Commerce Clause independently requires that a state must stop at its border

a state creating an arbitrary apportionment which grossly distorts the income earned within the taxing state, and appropriating excess tax revenue to itself.⁶³ Thus, in the case of New Hampshire and Massachusetts, the fear would be that Massachusetts could subsidize state expenditures by taxing out of state residents who are not able to vote in state level elections.⁶⁴ As this is described in New Hampshire's brief, it could erode state sovereignty by effectively subjecting people who spend 100% of their daily lives within state borders to the tax laws of another state.⁶⁵

2. *The Double Taxation Problem*

Double taxation problems traditionally emerge when a taxpayer is a resident of multiple states during a given tax year.⁶⁶ Under this scenario, “double taxation occurs when two (or more) states

and tax only the portion of such interstate income ‘fairly apportioned’ to that state”).

⁶³ See *id.* at 8. (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) (“The U.S. Supreme Court grants the states leeway to fashion apportionment formulas”).

⁶⁴ For a general understanding of the types of behavior covered by the dormant commerce clause See *City of Philadelphia v. New Jersey* 437 U.S. 617 (1978) (“New Jersey statute (ch. 363) that prohibits the importation of most ‘solid or liquid waste which originated or was collected outside the territorial limits of the State . . .’ held to violate the Commerce Clause of the United States Constitution.”); *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951) (“Upon these facts we find it necessary to determine only the issue raised under the Commerce Clause, for we agree with appellant that the ordinance imposes an undue burden on interstate commerce.”); *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977) (“The North Carolina statute violates the Commerce Clause by burdening and discriminating against the interstate sale of Washington apples.”).

⁶⁵ See State of New Hampshire *supra* note 42 (“Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.”).

⁶⁶ 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, 536 (2014) (“This apportioned approach would eliminate the double taxation of dual residents’ income”).

treat the same individual as a resident for tax purposes and both tax his worldwide income without providing a tax credit for the income taxes paid to the other state of residence.”⁶⁷ Though this scenario traditionally arises when taxpayers reside in multiple states in a given tax year, should income taxation of non-resident telecommuters become the norm, it will create similar issues.⁶⁸

For example, imagine workers living in the Fargo, North Dakota Metro Area, on the state’s eastern border with Minnesota. North Dakota assesses a top marginal income tax rate of 2.9%, while neighboring Minnesota assesses a top marginal income tax rate of 9.85%.⁶⁹ Minnesota and North Dakota have a tax reciprocity agreement, where, under conventional circumstances, North Dakota residents can file a Minnesota tax return to get a refund for the income withheld by the state of Minnesota for tax purposes.⁷⁰ This has intuitive logic to it: workers should not be taxed twice at the state level.⁷¹ In fact, while double taxation of the same income at the state level is not explicitly unconstitutional, most resident states credit their residents for taxes paid to other states.⁷² Thus, in the scenario where a North Dakota resident teleworked “to” Minnesota, and Minnesota taxed a high earner at their 9.85% marginal rate, North Dakota could spend more money crediting that resident for her state income tax paid

⁶⁷ *Id.*

⁶⁸ See Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 UC Davis L. Rev. 1149, 1163 (2021) (“The shift towards teleworking is raising tax concerns for workers who work for employers located in another state than where they live.”).

⁶⁹ See Loughhead, *supra* note 19 at 5 tbl.1.

⁷⁰ MINNESOTA DEP’T OF REVENUE, RECIPROCITY, <https://www.revenue.state.mn.us/reciprocity> [<https://perma.cc/7CKJ-UTUT>] (“Minnesota has income tax reciprocity agreements with Michigan and North Dakota. These agreements may simplify tax filing for people who live or work in Minnesota and one of these states.”).

⁷¹ See Kim, *supra* note 68 at 1163 (“Because Sam is subject to two states’ taxing powers, she may be subject to the risk of double taxation of the same income—once under residence and again under source. Indeed, anytime an individual is subject to the competing rights of source and residence states, double taxation may occur.”).

⁷² *Id.* (“Under the United States Supreme Court’s jurisprudence, double taxation is not inherently unconstitutional. However, to avoid double taxation, most resident states provide a credit for taxes paid by their residents to other source states.”).

to Minnesota, than it may generate from taxing her income earned in North Dakota.

E. A Challenge to a Potential Solution

One argument in favor of taxing out-of-state telecommuters is that a solution already exists for assessing state income taxes in a manner that avoids the double taxation problem: crediting taxpayers for income taxes paid to other states.⁷³ However, unlike in the Minnesota “snowbird tax” proposal suggested by Zelinsky,⁷⁴ the administrability problem would create significant judicial uncertainty. For example, a person residing in a state and telecommuting to another predominantly uses services provided by the residing state. Yet, if a telecommuter is taxed by the state “in which” they telework, any credit for state income taxes paid would have to come from the state which likely has the stronger claim to have provided services meriting the taxpayer’s tax receipts.⁷⁵ This would lead to difficult issues where states would compete to claim as much as possible of the teleworker’s income tax, and would likely require judicial intervention to settle the issue (which would create significant opportunities for circuit splits).

F. Conclusion

While it is ultimately unclear what the result will be, the rise of telework following the coronavirus pandemic certainly brought the issue of taxing interstate teleworkers to the forefront. With strong legal and policy arguments on both sides of the issue, I hesitate to come

⁷³ See Zelensky *supra* note 66 at 536 (“Under the prevailing regime of personal state income taxation, double taxation occurs when two (or more) states treat the same individual as a resident for tax purposes and both tax his worldwide income without providing a tax credit for the income taxes paid to the other state of residence”).

⁷⁴ See *id.* (“All individuals who, for income tax purpose, are residents of two or more states should be taxed along the lines proposed by Minnesota Governor Mark Dayton for ‘snowbirds’: A state should tax the income with respect to which it has source jurisdiction”).

⁷⁵ See Kim, *supra* note 68 at 1153 (“Further, another issue arises if the residence state offers credits for taxes paid by its residents to other states because this means the residence state foregoes collecting taxes from its residents despite all the public services it has offered. The result of this double taxation is a reduction in revenue for the residence state.”).

down firmly on one side or the other. From an internal consistency perspective, it seems strange to impose a completely different location nexus requirement for income tax than the Supreme Court declared for sales taxes in *Wayfair*.⁷⁶ On the other hand, the idea that states may see to discriminatorily tax telecommuters in violation of the dormant commerce clause seems eminently sensible.⁷⁷ Regardless of the exact outcome, the issue will be one to watch going forward.

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⁷⁶ See *Wayfair*, *supra* note 57 (“Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State.”).

⁷⁷ After all, the imposition of the SALT cap in the 2017 Tax Cuts and Jobs Act was widely criticized for shouldering the burden of federal taxation more heavily onto high tax “blue” states, perhaps violating the spirit of apportionment. See generally David Altig, et. al, *Did the 2017 Tax Reform Discriminate Against Blue-State voters?* NAT’L TAX J., 73 (Dec. 2020).

⁷⁸ Student, Boston University School of Law (J.D. 2023).