Live Tax Free or Die: The Increase in Telecommuting and Need for a Federal Uniform State Tax Regulation After New Hampshire v. Massachusetts

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“[T]he pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court’s ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic.”

I. INTRODUCTION

In 2019, roughly 6% of employed Americans worked from home on a full-time basis. By May of 2020, the percentage of employed Americans working remotely—also known as telecommuting—increased to 48%. This sudden spike in telecommuting stemmed largely from the temporary pandemic restrictions set in place by local, state, and federal government entities. Such

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3. See Phillips, supra note 2, at 129 (recognizing 42% surge in remote working); see also Coate, supra note 2 (observing rapid increase in remote working in mid-2020).

restrictions forced American employers to change the way they conduct business.\textsuperscript{5} Since the start of the pandemic, several notable companies, including Microsoft and Facebook, elected to keep certain employees fully remote, while other companies have implemented policies that permit employees to telecommute in a hybrid format.\textsuperscript{6}

The increase in telecommuting led the Commonwealth of Massachusetts to implement a temporary regulation—Massachusetts Source Income of Non-Residents Telecommuting Due To the COVID-19 Pandemic (Telecommuter Regulation).\textsuperscript{7} Although Massachusetts did not direct its Telecommuter Regulation toward any state in particular, the guidelines disproportionately impacted the State of New Hampshire’s residents.\textsuperscript{5} New Hampshire officials became concerned


\textsuperscript{7} See 830 MASS. CODE RGS. 62.5A.3(3) (2020) (setting forth personal income tax Telecommuter Regulation for telecommuters); see also 830 MASS. CODE RGS. 62.5A.1(1)(a) (2008) (providing Massachusetts’s policy for imposing personal income tax on nonresidents).

with the Telecommuter Regulation because New Hampshire does not have traditional personal income tax, while Massachusetts imposes income tax on all qualifying personal income. Income-sourcing rules, the subject of the Telecommuter Regulation, often vary greatly among states, which sometimes leads to controversies between state governments. Due to its distaste for the Telecommuter Regulation and its polarizing tax rules, New Hampshire filed suit against Massachusetts in the Supreme Court of the United States. The Court rejected New Hampshire’s attempt to obtain economic relief for its residents without further explanation.

As of 2022, there is no federal uniform tax standard for imposing personal income tax on telecommuting nonresidents. Previous attempts at achieving uniformity have failed, but there are currently two bills in Congress that, if passed, would force all states to adopt the physical presence test as their income-sourcing rule. The physical presence test and the convenience-of-the-employer test (COTE) are two commonly used state income-sourcing policies. The physical presence test requires that a resident be physically present in the state of employment for that state to impose income tax on them. By contrast, COTE imposes a tax on nonresident telecommuters depending on whether the reason


12. See New Hampshire v. Massachusetts, 141 S. Ct. at 2848 (stating Court declined to exercise jurisdiction over suit).


16. See Borie, supra note 10, at 808 (analyzing physical presence test).
for remote working is employer necessity or employee convenience.17 In a COTE state, if an employee is working remotely for their own convenience, that state will impose income tax on the employee if the employer is located within that COTE state.18

This Note explores the impact of increased telecommuting and lack of federal guidance regarding states’ taxation of nonresident telecommuters.19 Given the wide discrepancy between New Hampshire and Massachusetts tax law and the recent conflict regarding the Telecommuter Regulation, Sections II and III focus on the respective states and certain issues that will likely result from a lack of federal regulation.20 Next, this Note discusses pending legislation, assess the constitutionality of states imposing taxes on nonresidents, and analyze COTE and other telecommuter state tax policies.21 This Note concludes by urging the federal legislature to enact a uniform standard for interstate taxing of telecommuters working out-of-state and calling for Massachusetts to permanently incorporate COTE as its tax income-sourcing rule.22

II. HISTORY

A. New Hampshire

New Hampshire is home to approximately 1.3 million residents and has a median household income of $76,768.23 Nearly one-fifth of New Hampshire residents commute to work in a different state; a majority of those out-of-state


19. See infra Part II (analyzing major changes in businesses and lack of federal guidance).

20. See infra Sections II.E.1, III.B.1 (outlining New York and Massachusetts tax law and potential impact on telecommuters).


22. See infra Part IV (urging congressional action and recommending Massachusetts’s enactment of COTE for telecommuters).

commuters work in Massachusetts. New Hampshire’s increase in migration has contributed to its population spike—the largest population percentage increase in New England. According to a survey conducted by the Carsey School of Public Policy at the University of New Hampshire, the top reasons for moving to New Hampshire are family, natural environment, quality of life, employment, and taxes. Statistics further indicate that the majority of recent and established migrants who listed “taxes” as a top reason for moving into the state earned at least $100,000 annually.

New Hampshire, unlike forty-one other states, does not impose ordinary income tax on its residents. The New Hampshire Department of Revenue Administration currently imposes a 5% tax rate on residents or inhabitants who receive interest-and-dividends income from all sources in excess of $2,400.

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26. See Johnson & Bundschuh, supra note 8, at 2 fig.3 (depicting top reasons for migration to New Hampshire).

27. See id. at 6 fig.6 (comparing reasons for migration by income bracket). Recent and established residents with income exceeding $100,000 also tended to favor “employment” as a top reason for migration. See id.


Nevertheless, in 2021, New Hampshire Governor Chris Sununu signed a bill that will phase out the individual interest-and-dividends tax by 2027.\textsuperscript{30} As a result, there will be an incremental decrease in the interest-and-dividends tax rate by 1% each taxable year ending after December 31, 2023.\textsuperscript{31}

\section*{B. Massachusetts}

New Hampshire’s neighbor, Massachusetts, has a population of over 6.8 million people.\textsuperscript{32} The median income Massachusetts households earn is $81,215, but the cost of living varies depending on one’s location within the Commonwealth.\textsuperscript{33} Massachusetts ranked sixteenth in a list of the most populous states, while New Hampshire ranked forty-first.\textsuperscript{34} In 2020, a higher percentage of Massachusetts residents migrated out of the Commonwealth than migrated in.\textsuperscript{35} Approximately 35\% of Massachusetts residents listed “employment” as a driving factor for their decision to move out of the Commonwealth.\textsuperscript{36} Based on U.S.
Census data, New Hampshire was the top migration destination for Massachusetts residents in 2019.\textsuperscript{37} Massachusetts acquired the nickname “Taxachusetts” because of its historically high income tax it imposed on its residents.\textsuperscript{38} The Commonwealth has, however, significantly reduced its income tax rates over the past thirty years, and Massachusetts currently ranks twenty-fifth in highest income tax rates among U.S. states.\textsuperscript{39} As of 2022, the Commonwealth imposes a 5% income tax on its residents.\textsuperscript{40} Massachusetts’s tax statute includes a provision taxing nonresidents who work within its borders.\textsuperscript{41} This provision proved to be an effective system for Massachusetts until 2020, when the rate of nonresidents telecommuting from out-of-state skyrocketed, and the Commonwealth implemented an alternative method for taxing nonresidents.\textsuperscript{42}

C. COVID-19: Worldwide Pandemic Changes the American Workforce

The COVID-19 outbreak abruptly disrupted the promise of 2020, which ultimately became one of the deadliest years in U.S. history.\textsuperscript{43} The COVID-19 pandemic forced local, state, and federal government officials to effectuate strict restrictions of nearly all social, religious, and business gatherings.\textsuperscript{44} To comply with these restrictions and prevent further spread of COVID-19, people expeditiously adapted to the “new normal,” which involved implementing remote-friendly technology in all aspects of life.\textsuperscript{45}

\textsuperscript{37} See Where People in Massachusetts Are Moving to Most, STACKER (Nov. 7, 2021), https://stacker.com/ma/ma/where-people-massachusetts-are-moving-most (highlighting Massachusetts residents’ migration to New Hampshire).


\textsuperscript{39} See id. (observing Massachusetts’s rank in recent study ranking U.S. states by tax rates). Massachusetts used to have the third-highest tax rate of any state. See id. (comparing Massachusetts’s old tax rate with current rate).


\textsuperscript{41} See 830 MASS. CODE REGS. 62.5A.1 (2008); MASS. GEN. LAWS ch. 62, § 5A (2011) (establishing tax of nonresident income).

\textsuperscript{42} See 830 MASS. CODE REGS. 62.5A.3(3) (expanding taxing to nonresidents telecommuters in light of COVID-19); supra note 3 and accompanying text (noting telecommuting increase).


\textsuperscript{44} See supra note 4 and accompanying text (listing restrictions various government officials executed).

\textsuperscript{45} See Rahul De et al., Impact of Digital Surge During COVID-19 Pandemic: A Viewpoint on Research and Practice, INT’L J. INFO. MGMT. (June 9, 2020), at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7280123 (https://perma.cc/E4XU-9BE2) (noting internet usage increased from 40% pre-pandemic to 100% during pandemic). Use of video-conferencing app, such as Zoom, skyrocketed in 2020. See id. (highlighting COVID-
While pandemic restrictions forced nonessential businesses to close physical offices, a multitude of companies moved work to virtual platforms.46 According to a recent study, 22% of all American employees can be equally productive working remotely as they would be in the office.47 The ability to work remotely and maintain a sufficient level of productivity varies among several areas of employment.48 For many employers and employees, the efficiency of telecommuting became very appealing, and several large companies offered their employees the option to continue telecommuting either full-time or part-time after the height of the pandemic.49

D. New Hampshire v. Massachusetts

1. Massachusetts’s Regulation

The sudden change of the American workplace forced the Massachusetts Department of Revenue (MDOR) to implement the Telecommuter Regulation in light of the Commonwealth’s various COVID-19 restrictions.50 Massachusetts enacted the Telecommuter Regulation to adhere to the pandemic-related safety protocols, while upholding the status quo of Massachusetts income-sourcing taxes.51 Under the Telecommuter Regulation, the Commonwealth would treat all nonresident employees who worked in Massachusetts immediately prior to the COVID-19 pandemic yet worked out-of-state due to a “pandemic-related


46. See supra note 2 and accompanying text (noting exponential increase in telecommuting due to pandemic).


48. See Lund, supra note 47 (observing remote-working productivity depends on task).

49. See supra note 6 and accompanying text (listing companies with option for employees to telecommute permanently).

50. See 830 MASS. CODE REGS. 62.5A.3 (2020) (regulating Massachusetts source income during COVID-19 pandemic); see also supra note 4 and accompanying text (listing state, local, and federal government restrictions related to COVID-19 pandemic).

51. See 830 MASS. CODE REGS. 62.5A.3(1)(b) (highlighting background information regarding COVID-19 and Massachusetts’s decision to implement Telecommuter Regulation).
circumstance” as subject to Massachusetts source income subject to tax.\textsuperscript{52} The Telecommuter Regulation was in effect for approximately eighteen months from March 10, 2020 to September 13, 2021.\textsuperscript{53}

2. \textit{New Hampshire Files Suit in the Supreme Court}

After the MDOR implemented the Telecommuter Regulation, Governor Chris Sununu stated that he viewed the Commonwealth’s Telecommuter Regulation as a “direct attack” on the “New Hampshire [a]dvantage,” given that 15% of New Hampshire residents were employed by Massachusetts employers.\textsuperscript{54} Governor Sununu spoke about his unease with the Telecommuter Regulation and his intent to take action against Massachusetts.\textsuperscript{55} Governor Sununu’s plan came to fruition on October 19, 2020, when New Hampshire officially filed suit against Massachusetts in the Supreme Court.\textsuperscript{56}

New Hampshire relied on both the Dormant Commerce Clause and the Due Process Clause in support of its suit.\textsuperscript{57} In its Dormant Commerce Clause argument, New Hampshire cited to the test articulated in \textit{Complete Auto Transit, Inc. v. Brady}\textsuperscript{58} and asserted that Massachusetts’s Telecommuter Regulation failed the

\begin{itemize}
\item \textsuperscript{52} See 830 MASS. CODE REGS. 62.5A.3(1)(b) (explaining MDOR’s purpose for implementing Telecommuter Regulation). “Pandemic-related circumstances” include a government order issued in response to COVID-19, an employer’s remote work policy related to COVID-19, a worker’s compliance with quarantine or other medical-related circumstances, and any other work arrangement that allows for an employee to perform services outside of Massachusetts due to COVID-19. See 830 MASS. CODE REGS. 62.5A.3(2) (defining “pandemic-related circumstances”). Further, the MDOR incorporated a section in the Telecommuter Regulation to clarify that remote work from January 1, through February 29, 2020, is still subject to pre COVID-19 Massachusetts tax income-sourcing policies. See 830 MASS. CODE REGS. 62.5A.3(3)(b) (clarifying income-sourcing rules for two months prior to COVID-19 lockdown).
\item \textsuperscript{56} See Bill of Complaint, supra note 1, at 1, 5 (bringing suit and claiming Supreme Court has jurisdiction over controversies between two or more states); see also Press Release, State of New Hampshire, State of New Hampshire v. Commonwealth of Massachusetts (Oct. 19, 2020), https://www.governor.nh.gov/news-and-media/state-new-hampshire-v-commonwealth-massachusetts [https/perma.cc/P4KA-QSSM] (confirming New Hampshire officially filed suit against Massachusetts).
\item \textsuperscript{57} See Bill of Complaint, supra note 1, at 25, 30 (presenting two constitutional violations to Supreme Court).
\item \textsuperscript{58} 430 U.S. 274 (1977).
\end{itemize}
necessary four-prong test. New Hampshire’s due process argument relied upon
Allied-Signal Inc. v. Dir., Div. of Taxation, arguing that the Commonwealth did
not have the requisite “definite link” with New Hampshire’s residents that would
permit the taxing.

3. Massachusetts’s Response and the Supreme Court’s Rejection

Massachusetts countered New Hampshire’s Dormant Commerce Clause and
Due Process Clause arguments and also rejected the notion that the Supreme
Court is the proper forum for the controversy. Massachusetts asserted the Tele-
commuter Regulation passes each of the Complete Auto elements, countering
each of New Hampshire’s arguments. Massachusetts relied upon Moorman
Mfg. Co. v. Blair to support its Complete Auto analysis, which provides that
states have “wide latitude” to select varying formulas for taxing nonresidents.
Finally, the Commonwealth rejected New Hampshire’s due process attack by
concluding that the Telecommuter Regulation was permissible because

59. See Bill of Complaint, supra note 1, at 25-30 (assessing merits of Massachusetts’s Telecommuter Reg-
ulation under Complete Auto test). The Complete Auto test provides that for a state’s taxation of nonresidents to
survive Dormant Commerce Clause scrutiny, the state must apply the tax to an activity with a substantial nexus
with the taxing State, fairly apportion the tax, ensure the tax is nondiscriminatory, and ensure the tax is fairly
related to state-provided services. See Complete Auto, 430 U.S. at 279. First, New Hampshire stated that Mas-
sachusetts lacks the requisite nexus with the nonresidents because the New Hampshire residents were working
tirely within their own state. See Bill of Complaint, supra note 1, at 26. Next, New Hampshire asserted that
Massachusetts’s “overreach” welcomes the possibility of double taxation, thus failing the “fairly-apportioned”
prong. See id. at 26-27. Massachusetts’s Telecommuter Regulation, New Hampshire stated, was impermissible
as it had the potential to result in discriminatory double taxation of income earned. See id. at 27. Finally, New
Hampshire stated that Massachusetts fails the fourth prong because the New Hampshire residents were not trav-
eling nor working within Massachusetts. See id. at 29-30.


61. See Bill of Complaint, supra note 1, at 30-32 (assessing fairness of Massachusetts’s Telecommuter Regu-
lation). New Hampshire argued its residents were benefitting from New Hampshire’s services—fire, police,
and rescue—and not Massachusetts’s services, and therefore, no sufficient connection exists between Massachu-
setts and the nonresidents’ remote work. See id. at 31.

62. See Brief in Opposition to Motion for Leave to File Complaint at 11-12, 31-37, New Hampshire v.
Massachusetts, 141 S. Ct. 2848 (2021) (No. 220154) (arguing case does not invoke Supreme Court’s original
jurisdiction). Massachusetts suggested that the issues presented by this case are better suited for Massachusetts
courts, and the Court should not assert original jurisdiction because there is an adequate alternative forum. See
id. at 22-23.

63. See id. at 31-36 (laying out Dormant Commerce Clause counterparts). Under the first prong of its
Complete Auto analysis, the Commonwealth asserted that the requisite nexus between Massachusetts and the
nonresident taxpayers was sufficient, given the nonresidents’ choice to work for a Massachusetts employer. See
id. at 32. Massachusetts’s second argument was that the tax was “fairly apportioned,” as it prevented double
taxation and did not reach beyond the portion of income attributable to Massachusetts. See id. at 33. The third
prong, Massachusetts suggested, was satisfied because the Telecommuter Regulation taxed nonresidents and
residents equally, thus avoiding discrimination. See id. at 35. Finally, Massachusetts argued that the fourth prong
was satisfied because the tax was “fairly related” to the services Massachusetts provided. See id. at 35-36.

64. 437 U.S. 267 (1978).

65. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 33 (discussing rule
discussed in Moorman Mfg. Co.; see also Moorman Mfg. Co., 437 U.S. at 274 (holding states have “wide lati-
dude” to adopt their own individual taxing formula).
Massachusetts has a significant connection with nonresident Massachusetts employees.  
Several amici curiae filed briefs supporting the position of either Massachusetts or New Hampshire; some states filed briefs hoping that a Supreme Court decision would resolve the murky area of law involving state tax income-sourcing.  
After reviewing these amici curiae briefs and assessing New Hampshire’s legal basis, the Supreme Court denied New Hampshire’s motion for leave of appeal.  
After this denial, Governor Sununu warned that the Supreme Court set a costly precedent by allowing “inappropriate taxation” of New Hampshire’s citizens.  
Since the rejection, New Hampshire legislators created House Bill 1097—a bill attempting to shield remote workers from paying out-of-state income tax while they physically work in New Hampshire.  
On June 17, 2022, Governor Sununu signed House Bill 1097 into law.

66.  See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 36-37 (rejecting New Hampshire’s Due Process Clause argument). In its own analysis, the Commonwealth asserted two positions: First, the taxpayer’s preexisting and continuing Massachusetts employment is a sufficient connection, and second, income attributed to Massachusetts under the Telecommuter Regulation was permissible because Massachusetts offered benefits and protection to each of its employees.  See id.

67.  See Brief for New Jersey et al. as Amicus Curiae Supporting Petitioners at 4, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (No. 220154) (arguing for Court to hear case due to relevance of issue presented); Brief for Ohio et al. as Amici Curiae Supporting Petitioners at 17-18, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (No. 220154) (supporting granting of New Hampshire’s motion). On January 25, 2021, the Court invited the Acting Solicitor General to file a brief on the issue articulating the views of the United States.  See Brief for United States as Amicus Curiae Supporting Respondents at 1, 4, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (No. 220154) (arguing Court should deny New Hampshire’s motion). Determining where to pay income tax can be complicated, and with the increase of telecommuting, this task has become increasingly difficult.  See Rani Molla, Did You Work Remotely Last Year? A Surprise Tax Might Be Waiting for You., Vox (Apr. 1, 2021), https://www.vox.com/recode/22356628/working-remotely-state-taxes-pandemic [https://perma.cc/8Y6V-PGBF] (warning taxpayers about confusing income-sourcing laws for remote working nonresidents).

68.  See New Hampshire v. Massachusetts, 141 S. Ct. 2848, 2848 (2021). As indicated in the Court’s response to New Hampshire’s motion, Justice Alito and Justice Thomas would have heard the case.  See id.


In order to promote the health of its economy and the welfare of its citizens, by preserving an environment in which labor is not unduly penalized, it is declared to be the sovereign interest of the state of New Hampshire that the income earned and received by residents of the state of New Hampshire for services entirely performed within the state of New Hampshire may not be subject to taxation as earned income in any other state.


E. Varying State Tax Income-Sourcing Statutes

Generally, states have discretion as to which mode of nonresident taxation aligns with the state’s values, so long as it does not disrupt constitutional principles.\textsuperscript{72} State legislatures are split between two of the most popular income-sourcing rules, COTE and the physical presence test.\textsuperscript{73}

1. COTE

A minority of states have adopted COTE as their income-sourcing rule.\textsuperscript{74} COTE allocates a nonresident’s income earned in a different state to the state of their employer, unless the nonresident works in such state for the employer’s necessity.\textsuperscript{75} New York’s COTE rule has been the subject of heavy criticism, given the Empire State’s high population, robust economy, and proportion of out-of-state commuters.\textsuperscript{76} New York’s COTE statute provides that it considers any income made by a nonresident from sources within the state to be New York income, so long as the employee is working out-of-state for convenience, rather than for the employer’s necessity.\textsuperscript{77} New York courts have consistently upheld the statute, and the state remains an economic powerhouse today.\textsuperscript{78}

\textsuperscript{72} See supra note 10 and accompanying text (identifying state discretion); infra Section II.F (addressing constitutional requirements).

\textsuperscript{73} See supra note 15 and accompanying text (articulating two popular income-sourcing rules).


\textsuperscript{77} See N.Y. COMP. CODES R. & REGS. Tit. 20, § 132.18(a) (2006) (using COTE test to tax nonresidents working for New York employers).

That said, critics ridicule COTE for several reasons, including its likelihood of discouraging telecommuting and being discriminatory and unfair to nonresidents working remotely.\textsuperscript{79} Critics of COTE also have cautioned taxpayers about the possibility of being taxed in both the employer’s state and the state where the employee is physically located while working.\textsuperscript{80} In two well-known New York cases, \textit{Zelinsky v. Tax Appeals Tribunal} and \textit{Huckaby v. N.Y. State Div. Of Tax Appeals}, the New York Court of Appeals addressed the common criticisms of COTE and upheld the statute as constitutional.\textsuperscript{81} The Supreme Court of the United States denied certiorari in both cases.\textsuperscript{82}

Much of the recent proposed federal legislation sought to cancel out COTE completely.\textsuperscript{83} Nevertheless, some states have implemented COTE for various reasons.\textsuperscript{84} Pennsylvania, Connecticut and Nebraska have adopted COTE along with New York.\textsuperscript{85} Courts have noted one of the COTE’s best attributes is it


80. \textit{See} Bentley, \textit{supra} note 76, at 1161-62 (tearing down COTE because of possibility for double taxation); Brian D. Tauber, \textit{Article, Telecommuters and the State Personal Income Tax, 14 U.C. DAVIS BUS. L.J.} 151, 157-58 (2013) (criticizing COTE); \textit{see also} Comptroller of Treasury of Md. V. Wynne, 575 U.S. 542, 549-50 (2015) (forbidding states subjecting interstate commerce “to the burden of multiple taxation”). Nevertheless, many states offer tax credits for income tax paid in other states. \textit{See, e.g.}, \textit{MASS. GEN. LAWS ch. 62 § 6(a)} (offering tax credit to certain taxpayers).

81. \textit{See} Zelinsky, 801 N.E.2d at 845, 847-48 (testing COTE’s constitutionality); Huckaby, 829 N.E.2d at 281-85 (applying COTE to Supreme Court precedent).


83. \textit{See infra} Section II.G (discussing proposed legislation written to create federal uniformity and eliminate COTE entirely).

84. \textit{See} Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 846-48 (N.Y. 2003) (stating purpose of implementing COTE statute); \textit{see also} Bentley, \textit{supra} note 76, at 1157 (discussing New York cases regarding taxpayers intentionally moving out-of-state to avoid tax liability); \textit{supra} note 75 (referring to various states using COTE).

85. \textit{See supra} note 75 and accompanying text (listing different states’ COTE statutes). Nebraska incorporated COTE into its income-sourcing statute. \textit{See generally} 316 NEB. ADMIN. CODE § 003.01C(1) (2006).

If the nonresident’s service is performed without Nebraska for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident’s convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income.

\textit{Id.}

\textit{Id.}
prevents taxpayer manipulation, unlike the physical presence test. Proponents of COTE have argued the test protects state interests by allowing nonresidents to profit off of the state’s economy while the state receives a return via tax revenue. In between anti-COTE and pro-COTE proponents are those who believe the test should only apply in clear cases of fraudulent conduct regarding taxes.

2. Physical Presence

Another popular income-sourcing test is the physical presence test. A number of states, including Georgia and Alabama, have adopted the physical presence test, which permits states to tax nonresidents only if they are present while earning income in that state. In plain terms, the test requires that nonresidents pay income tax to the state “where” they are working from. State legislators have incorporated the physical presence test into many federal tax bills since the early 2000s. Legislators and legal scholars praise the test for being fair, simple, and eliminating the possibility for double taxation.

Although many favor the physical presence test, as evidenced by its frequent appearance in federal legislation and articles, it is also the subject of condemnation. In practice, the physical presence test appears easier to apply than COTE, but a minority of states still prefer COTE because of its ability to prevent taxpayer fraud. In addition, critics have denounced the physical presence test and its simplicity, criticizing its inability to prevent fraud and manipulation, which COTE was designed to prevent.

87. See Borie, supra note 10, at 810-11 (setting forth COTE’s policy rationale).
88. See, e.g., Zelinsky, 801 N.E.2d at 846 (maintaining COTE’s purpose); Huckaby, 829 N.E.2d at 286-87 (Smith, J., dissenting) (agreeing with COTE application in cases of fraud).
89. See Borie, supra note 10, at 791 (discussing alternative test to COTE).
90. See GA. CODE ANN. § 48-7-20(a) (2018) (incorporating nonresident income tax for work performed within Georgia); ALA. ADMIN. CODE r. 810-3-14-.05(b)(2) (2008) (adopting physical presence test).
91. See Bentley, supra note 76, at 1164 (defining physical presence test and effects in simple terms).
92. See infra Section II.G (discussing previous and present income-sourcing federal legislation).
93. See Bentley, supra note 76, at 1164 (noting benefits of physical presence test through lens of Act); see also Tauber, supra note 80, at 165 (concluding adoption of uniform physical presence test will achieve simplification goal).
94. See Borie, supra note 10, at 796 n.60 (ridiculing physical presence test); see also infra Section II.G (discussing legislation using physical presence test).
95. See O’Brien, supra note 74 (noting small number of states use COTE); see also supra note 75 and accompanying text (highlighting COTE’s incorporation in various statutes).
96. See Borie, supra note 10, at 809-11 (circumventing COTE’s criticism). In their article, Borie argues that the simplistic nature of the physical present’s test is its “fatal flaw” and that it simply is incapable of protecting against the chance of fraud. See id. at 80-11.
F. Constitutional Barriers to Tax Income-Sourcing Policies

The Supreme Court has heard a myriad of constitutional challenges concerning state tax income-sourcing statutes involving nonresidents.\textsuperscript{97} Such challenges have historically attacked state tax statutes under the Due Process Clause and the Dormant Commerce Clause.\textsuperscript{98} In various cases, the Court remained transparent about the limit of states’ power to tax: Under the Dormant Commerce Clause and the Due Process Clause, states are prohibited from taxing value earned outside their borders.\textsuperscript{99} But the Court has made it equally clear that states can tax nonresidents’ earned income from employment in state.\textsuperscript{100} The test requires a direct application of the facts of the case to the relevant constitutional provisions.\textsuperscript{101}

1. The Due Process Clause

The Due Process Clause of the United States Constitution guarantees a person receives due process of law before any American government can deprive them of life, liberty, or property.\textsuperscript{102} The Due Process Clause’s protections require a state to have a definite, minimum connection to the person it seeks to tax.\textsuperscript{103} Further, the Court in \textit{Allied-Signal, Inc.}, held that such “minimum connection” requires a substantial nexus between the tax and the activity or person being taxed.\textsuperscript{104} States have “wide latitude” to implement their own income-sourcing laws, but the income attributed to the state must be rationally related to money earned within the taxing state.\textsuperscript{105}


\textsuperscript{98} See \textit{Wayfair, Inc.}, 138 S. Ct. at 2091 (requiring state tax to pass Dormant Commerce Clause and Due Process Clause scrutiny); see also \textit{Moorman Mfg. Co.}, 437 U.S. at 271-74 (setting forth proper due process test for state tax); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (establishing required four-part test for Commerce Clause).

\textsuperscript{99} See \textit{Allied-Signal, Inc. v. Dir.}, Div. of Taxation, 504 U.S. 768, 777 (1992) (prohibiting states from taxing value earned in other states).

\textsuperscript{100} See Shaffer v. Carter, 252 U.S. 37, 57 (1920) (holding states may only tax nonresidents for income earned within such state); \textit{Okla. Tax Comm’n}, 515 U.S. at 463 n.11 (affirming states’ power to tax nonresidents).

\textsuperscript{101} See Tauber, supra note 80, at 158-60 (analyzing various constitutional arguments against COTE).

\textsuperscript{102} See \textit{U.S. CONST. amend. XIV, § 1} (creating due process requirement under Fourteenth Amendment).

\textsuperscript{103} See id. (incorporating due process requirement); see also \textit{Allied-Signal, Inc.}, 504 U.S. at 777 (explaining due process “minimum connection” requirement for state tax laws).

\textsuperscript{104} See \textit{Allied-Signal, Inc.}, 504 U.S. at 778 (requiring nexus for taxing nonresidents). In \textit{Wisconsin v. J.C. Penney Co.}, the Court emphasized that a state’s power to tax an individual’s activities “bears fiscal relation to protection, opportunities[,] and benefits given by the state.” See 311 U.S. 435, 444 (1940).

2. The Dormant Commerce Clause

As enumerated in Article I of the Constitution, Congress has the authority to regulate commerce in the United States.\(^\text{106}\) Through the Dormant Commerce Clause doctrine, the Constitution prohibits states from passing legislation that discriminates against or unduly burdens interstate commerce.\(^\text{107}\) In Complete Auto, the Court designed a test to analyze a statute under the Dormant Commerce Clause.\(^\text{108}\) The Complete Auto test requires that the tax meets each prong: (1) the state applies the tax to an activity with a substantial nexus to the taxing state; (2) the state fairly apportions the tax; (3) the tax is nondiscriminatory against interstate commerce; and (4) the tax is fairly related to services provided by the state.\(^\text{109}\) If any of the four elements are not met, the tax is unconstitutional for violating the Dormant Commerce Clause.\(^\text{110}\)

G. Past and Present Federal Legislation

Congress has the express authority to regulate commerce among the states.\(^\text{111}\) In Moorman Mfg. Co., the Supreme Court affirmed Congress’s power to regulate state tax and added that Congress is in a better position to create state tax uniformity than the Court.\(^\text{112}\) There are currently two state tax pieces of legislation pending in Congress: the Multi-State Workers Tax Fairness Act (Multi-State Fairness Act) and the Mobile Workforce State Income Tax Simplification Act (Mobile Workforce Simplification Act).\(^\text{113}\) Representatives from New Hampshire and Connecticut joined forces to create the Multi-State Fairness Act in 2021.

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\(^\text{107}\) See U.S. Const. art. I, § 8; see also Redish & Nugent, supra note 106, at 570 (contrasting Commerce Clause with Dormant Commerce Clause). Many cases in the Supreme Court have deliberated the Dormant Commerce Clause doctrine as it pertains to the state taxation of domestic corporations. See, e.g., Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 550-52 (2015) (discussing Dormant Commerce Clause doctrine in realm of taxation).


\(^\text{109}\) See Complete Auto, 430 U.S. at 279 (listing elements for Dormant Commerce Clause analysis).


\(^\text{111}\) See U.S. Const. art. I, § 8 (creating Congress’s power); see also Moorman Mfg. Co. v. Blair, 437 U.S. 267, 280 (1978) (affirming Legislature’s ability to create state tax uniformity). In United States v. Lopez, the Court held that Congress has the power to regulate the use of channels in interstate commerce; instrumentalities of interstate commerce, or persons or in things in interstate commerce; and activities that substantially affect interstate commerce. See 514 U.S. 549, 558 (1995) (defining Congress’s limits under its commerce powers).

\(^\text{112}\) See Moorman Mfg. Co., 437 U.S. at 280 (deferring ability to create uniformity to federal legislature).

\(^\text{113}\) See Multi-State Workers Tax Fairness Act, S. 1887, 117th Cong. § 2(a) (2021) (attempting to create uniformity by incorporating physical presence test); Mobile Workforce State Income Tax Simplification Act, H.R. 429, 117th Cong. § 2(a) (2021) (proposing nexus-based approach to tax uniformity).
in response to the *New Hampshire v. Massachusetts* controversy.\(^{114}\) The Multi-State Fairness Act uses the physical presence test and, if passed, would prohibit states from taxing a nonresident’s income if they are not physically present in the state.\(^{115}\) Similarly, the Mobile Workforce Simplification Act of 2021, akin to the physical presence test, seeks to prevent states from taxing nonresidents if they are physically working from a different state.\(^{116}\) The Mobile Workforce Simplification Act focuses on strengthening and simplifying the “nexus” aspect: The legislation would tax an employee’s earnings in the state where the employee is physically located and working for over 30 days in a calendar year.\(^{117}\) As of today, neither bill has made any progress beyond introduction in the House of Representatives or the Senate.\(^{118}\)

The current pieces of legislation are not the first attempts at creating tax uniformity.\(^{119}\) Legislators had introduced the Telecommuter Tax Fairness Act (TTFA) to Congress four times between 2005 and 2012, yet it failed to gain traction each time.\(^{120}\) The four TTFA’s were nearly identical, proposing that states

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115. See S. 1887 § 2(b) (introducing physical presence test with hopes of creating simplistic state tax uniformity).

116. See H.R. 429 § 2(a). The Mobile Workforce Simplification Act proposes a uniform income-sourcing standard that mirrors the physical presence test. See id.

This bill prohibits the wages or other remuneration earned by an employee who performs employment duties in more than one state from being subject to income tax in any state other than (1) the state of the employee’s residence, and (2) the state within which the employee is present and performing employment duties for more than 30 days during the calendar year.


may not impose income tax on any resident working at home for convenience.\textsuperscript{121} Stated clearly, these bills attempted to prevent states from taxing a nonresident who does work from a different state.\textsuperscript{122} The previous bills’ attempts to create uniformity were unsuccessful, leaving states with no direction.\textsuperscript{123} Compounding Congress’s failure to create uniformity, the Supreme Court’s refusal to consider \textit{New Hampshire v. Massachusetts} has left states with little guidance.\textsuperscript{124}

### III. Analysis

#### A. Massachusetts Did Not Overstep the Relevant Constitutional Doctrines by Enacting the Telecommuter Regulation

The Telecommuter Regulation did not violate due process, and, if the Supreme Court heard the case, they would have held as such.\textsuperscript{125} The Due Process Clause requires that the state has a minimum connection to the person or entity it seeks to tax and that the tax is rationally related to the state.\textsuperscript{126} In its Bill of Complaint, New Hampshire asserted that Massachusetts lacked the minimum connection required for its tax under the Due Process Clause.\textsuperscript{127} New Hampshire argued the tax was too attenuated, relying heavily on the fact that New

\textsuperscript{121} See H.R. 5615 § 127(a); Telecommuter Tax Fairness Act of 2009, H.R. 2600, 111th Cong. § 127(a) (2009); Telecommuter Tax Fairness Act of 2007, H.R. 1360, S. 127, 110th Cong. § 127(a) (2007); Telecommuter Tax Fairness Act of 2005, S. 1097, 109th Cong. § 127(a) (2005). The 2005 version of the Bill states “[n]o State may deem a nonresident individual to be present in or working in such State on the grounds that such nonresident individual is present at or working at home for the nonresident individual’s convenience.” S. 1097 a(2). The 2007, 2009, and 2012 versions of the Bill added the “home office” language but kept the 2005 version of the Bill’s language, which explicitly rejects COTE. See H.R. 5615 § 127(a); H.R. 2600 § 127(a); H.R. 1360, § 127(a).

\textsuperscript{122} See supra note 121 and accompanying text (interpreting language used in each TFA).

\textsuperscript{123} See supra note 120 and accompanying text (discussing four bills’ failed attempts to create tax uniformity); see also Bentley, supra note 76, at 1164-65 (urging Congress to pass federal legislation); Goluboff, supra note 10, at 228 (promoting Bill’s adoption to add simplicity and clarity to nonresident state tax).


\textsuperscript{125} See infra Section III.A.1 (arguing Telecommuter Regulation met due process and Complete Auto standards).


\textsuperscript{127} See Bill of Complaint, supra note 1, at 31. New Hampshire argued that Massachusetts’s only connection to the nonresidents was the address of their employers. See id.
Hampshire residents—while working remotely from the State—were benefitting exclusively from the State’s fire, police, safety, and other related services.  

New Hampshire’s arguments were misplaced, as the Telecommuter Regulation satisfied both prongs of the due process analysis. Massachusetts accurately responded by pointing to the existence of the taxpayer’s “pre-existing and continuing Massachusetts employment” to support the minimum-connection requirement. In addition, Massachusetts asserted that the income attributed under the Telecommuter Regulation was rationally related to its “values” and that Massachusetts provided substantial protection and benefits to all Massachusetts employees, regardless of residency.

2. The Telecommuter Regulation Satisfied the Complete Auto Test

If the Supreme Court had heard New Hampshire v. Massachusetts, they would have concluded that the Telecommuter Regulation passed each of the four Complete Auto elements. First, New Hampshire argued that Massachusetts did not satisfy the requisite “nexus” of the first element, however, Massachusetts had a significant nexus as the New Hampshire residents sought out work from Massachusetts employers. Despite New Hampshire’s argument to the contrary, Massachusetts’s Telecommuter Regulation also satisfied the second Complete Auto element, as the taxing of nonresidents was fairly apportioned to their work for Massachusetts employers. Third, the Telecommuter Regulation was not discriminatory, as New Hampshire suggested, because Massachusetts taxed both residents and nonresidents equally.

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128. See id. at 31 (emphasizing protection given to Massachusetts’s nonresident employees working remotely from New Hampshire).
129. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 36-37 (concluding Massachusetts’s Telecommuter Regulation did not violate Due Process Clause scrutiny).
130. See id. at 36 (disagreeing with New Hampshire’s conclusion of Massachusetts’s “minimum connection” with nonresident employees). New York’s Court of Appeals held that if someone purposefully avails themselves of the benefits of employment in a particular state, they are subject to income tax there. See Zelinsky v. Tax Appeals Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003), cert. denied, 541 U.S. 1009 (2004) (acknowledging petitioner purposefully availed himself to benefits of New York’s economic market).
131. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 31, 36-37 (emphasizing what Massachusetts offers to resident and nonresident employees). Massachusetts pointed to various benefits that nonresident employees receive, including access to the Commonwealth’s legal system. Id. at 31.
132. See id. at 31-36 (analyzing Massachusetts’s Telecommuter Regulation under scrutiny of Complete Auto elements).
133. See id. at 31-32 (arguing substantial nexus exists in this case); Bill of Complaint, supra note 1, at 26 (stating Telecommuter Regulation fails first prong of Complete Auto test). In South Dakota v. Wayfair, Inc., the Court abrogated the notion that having a substantial nexus to tax requires physical presence in a state. See 138 S. Ct. 2080, 2097 (2018). The Court also highlighted the impact of the cyber age and how the physical presence test should adjust to it. See id. (noting difficulty in application of physical presence test to online retail sales).
134. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 32-35 (stating second prong met because Telecommuter Regulation internally and externally consistent).
135. Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 35 (identifying no discriminatory taxation); Bill of Complaint, supra note 1, at 27-29 (calling Telecommuter Regulation discriminatory).
taxation for New Hampshire residents is nonexistent because New Hampshire does not impose income tax on wages earned, and Massachusetts offers a tax credit for employees paying state tax elsewhere. The fourth prong is also met: Although New Hampshire residents were not physically commuting to work in the Commonwealth, the tax was fairly related to services provided by Massachusetts, as the Commonwealth taxed them based on their employment provided by Massachusetts.

3. States Have Discretion to Adopt Their Own State Tax Laws

Massachusetts, like the other forty-nine states, has wide discretion to create its own state tax laws, provided it does not violate the Commerce Clause or Due Process Clause. As indicated, the Massachusetts Telecommuter Regulation did not violate either constitutional provision, but merely attempted to maintain accustomed tax revenue during unprecedented times. The Supreme Court’s refusal to hear the case further evidences the permissibility of Massachusetts’s enactment.

B. Only the Federal Legislature Can Create State Uniformity

The federal government’s failure to provide uniformity is the primary reason for states’ concern about the mere possibility of double taxation. In addition, this lack of uniformity confuses taxpayers. Due to policies varying by state—and the perplexing tax statutes—taxpayers have difficulty resolving where to file their taxes. And the Supreme Court is unwilling to assuage taxpayers’ confusion, even though it has had multiple opportunities to do so. The Court has

136. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 33 (highlighting no risk of double taxation for New Hampshire residents working for Massachusetts employers); Mass. Gen. Laws ch. 62, § 6(a) (offering tax credits).
137. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 35-36 (asserting tax measured by percentage of work done remotely pre-pandemic sufficient for test).
139. See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 4, 29-36 (stating purpose for implementing Telecommuter Regulation and reasoning it passed constitutional requirements).
141. See Borie, supra note 10, at 821-22 (identifying double taxation possibility and concern); Bentley, supra note 76, at 1164 (suggesting Congress’s adoption of uniform rule would eliminate possibility of double taxation); Kess, supra note 5 (highlighting state’s confusion about tax law for employees and employers).
142. See Tauber, supra note 80, at 158 (discussing uncertain future in realm of state taxation); LeDoux, supra note 13 (observing potential for post-pandemic tax policy changes); Vlahos, supra note 124 (setting forth state tax law’s questionable future).
143. See Freda & Chiu, supra note 79 (recommending taxpayers seek professional advice to determine where to pay taxes); Molla, supra note 67 (cautioning taxpayers about confusing state tax laws amid age of telecommuting).
explicitly expressed that the federal legislature is in the best position to create the
uniformity that many states and scholars seek.\textsuperscript{145} Because the Supreme Court
will not act, Congress is the best avenue to provide taxpayers with clarity, as it
holds the power to lay tax and regulate interstate commerce.\textsuperscript{146}

Congress has two present opportunities to enact a uniform income-sourcing
standard.\textsuperscript{147} If Congress passes either of these bills, states will tax employees
based on where they are physically located, which is increasingly “at home” due
to the pandemic and telecommuting trends.\textsuperscript{148} But either of these bills would
leave open the possibility for abuse—the same abuse that COTE states have tried
to prevent—and thus are not ideal to protect vulnerable states such as New York
and Massachusetts.\textsuperscript{149} Nevertheless, even Congress’s enactment of the pending
bills would be better than the current disorganized state of the law, but until then
states must continue “funding for themselves” amid the age of telecommuting.\textsuperscript{150}

C. Massachusetts Should Adopt COTE Permanently

1. Until Congress Acts, Massachusetts Needs Protection

Like New York, Massachusetts is a part of the majority of states that impose
income tax on residents and nonresidents.\textsuperscript{151} Further, like New York, Massachu-
setts offers its employees competitive salaries, and its residents must pay a high

\textsuperscript{145} See \textit{Moorman Mfg. Co.}, 437 U.S. at 280 (stating federal legislature proper government branch to im-
plement uniformity); see also Brief for United States as Amicus Curiae Supporting Respondents, \textit{supra} note 67,
at 12 (acknowledging federalism traditionally prevents federal courts from hearing state tax disputes); Brief for
New Jersey et al. as Amici Curiae Supporting Petitioners, \textit{supra} note 11, at 1 (articulating need for constitutional
clarification for income-sourcing policies).

\textsuperscript{146} See \textit{supra} note 145 and accompanying text (highlighting need for congressional action); U.S. CONST.
art. I, § 8 (granting tax-related congressional powers).

\textsuperscript{147} See generally Multi-State Workers Tax Fairness Act, S. 1887, 117th Cong. (2021) (clarifying ambiguity
regarding income-sourcing); Mobile Workforce State Income Tax Simplification Act, H.R. 429, 117th Cong.
(2021) (proposing physical presence test to promote uniformity).

\textsuperscript{148} See \textit{Borie}, \textit{supra} note 10, at 791 (describing physical presence test); \textit{Bentley}, \textit{supra} note 76, at 1164
(laying out basics of physical presence test); \textit{supra} note 115 and accompanying text (highlighting pending bill’s
incorporation of physical presence test); \textit{Goluboff}, \textit{supra} note 10, at 226-27 (describing past congressional uni-
form tax bills); H.R. 429 § 2(a); CONG. RSRCH. SERV., \textit{supra} note 116 (describing bill’s incorporation of physical
presence test).

\textsuperscript{149} See \textit{Borie}, \textit{supra} note 10, at 823 (concluding COTE better suited to prevent fraud compared to physical
presence test); \textit{Bentley}, \textit{supra} note 76, at 1157 (stating COTE’s policy rationale); \textit{Zelinsky v. Tax Appeals Tri-
York’s adoption of COTE); \textit{Huckaby v. N.Y. State Div. of Tax Appeals}, 829 N.E.2d 276, 288 (N.Y. 2005)

\textsuperscript{150} See \textit{supra} Section II.C (discussing significance of COVID-19 pandemic’s impact on American work-
force); \textit{Vlahos}, \textit{supra} note 124 (hinting at nonuniform state tax’s inevitable conflict with post-pandemic life).

\textsuperscript{151} Compare \textit{MASS. GEN. LAWS} ch. 62, § 4 (imposing 5% income tax), with \textit{N.H. REV. STAT}, § 77:3 (2022)
(requireing income tax for interest and dividends but not wages or salary). Currently, there are only nine states
that do not have a “traditional” income tax. See \textit{Loudenback}, \textit{supra} note 29 (discussing minority of states which
do not impose income tax on wages). In 2020, New York received $92.72 billion in state tax revenue, while
Massachusetts received $31.63 billion in state tax revenue. See \textit{Duffin}, \textit{supra} note 78 (displaying graph showing
state tax revenues by state).
cost of living.152 Given New York and Massachusetts’s similar economic and commuting statistics, they share a similar potential for tax manipulation.153 New York adopted COTE to protect itself from a specific type of fraud: nonresidents living out-of-state while working for a New York employer to avoid New York income tax.154

There have been significant changes in the demographics of both New Hampshire and Massachusetts.155 In the past ten years, an alarming amount of residents have moved out of Massachusetts, while migration into New Hampshire has steadily increased.156 The top destination for Massachusetts migrants is New Hampshire.157 New Hampshire’s inbound migrants cited the scenery, tax policies, and lifestyle as some of their top reasons for moving into the state; high-income earners mainly listed the state’s tax policies as a top reason for moving into New Hampshire.158 Admittedly, there are stark differences between New Hampshire and Massachusetts’s economy: New Hampshire residents can live comfortably making under $70,000 a year, unlike Massachusetts residents, who live in one of the most expensive states in the country.159

With a growing number of companies initiating a permanent or a hybrid remote work system, many employees can efficiently work from wherever they choose, in-state or out-of-state.160 Following telecommuting trends,

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152. See Desjardins, supra note 78 (listing New York third and Massachusetts thirteenth for largest economies in United States); Cohn, supra note 33 (announcing list of most expensive states, including Massachusetts and New York in top five); Smith, supra note 33 (stating Massachusetts salaries have increased by 44.95% since 2010).

153. See Lisa, supra note 24 (ranking states by prevalence of commuters or “super commuters”); New Hampshire Commuting Patterns, supra note 8 (detailing commuter trends from New Hampshire to Massachusetts); Brooks, supra note 8 (indicating large number of New Hampshire commuters); Zelinsky, 801 N.E.2d at 848 (calling out taxpayer-taking advantages of New York’s economy).


155. Compare Albertson-Grove, supra note 25 (discussing New Hampshire’s spike in inbound migration), and Johnson, supra note 25 (determining New Hampshire’s migration trends highest in New England), with Where People in Massachusetts Are Moving to Most, supra note 37 (noting Massachusetts residents mostly moving to New Hampshire), and Murphy, supra note 35 (displaying concern due to Massachusetts’s new migration statistics).

156. Compare Albertson-Grove, supra note 25 (noting 89% of New Hampshire’s recent population spike due to migration), with Murphy, supra note 35 (highlighting Massachusetts’s significant rates of outbound migration). New Hampshire appears to be the main destination for those fleeing Massachusetts. See Where People in Massachusetts Are Moving to Most, supra note 37 (finding majority of Massachusetts migrants moving to New Hampshire).

157. See Where People in Massachusetts Are Moving to Most, supra note 37 (observing top destination for Massachusetts outbound migrants New Hampshire).

158. See Johnson & Bindschuh, supra note 8, at 6 fig.6 (dictating inbound migrants’ reasons for moving to New Hampshire).

159. See Shute, supra note 23 (noting earnings needed to live comfortably in New Hampshire); Actielli, supra note 33 (projecting residents must earn over $120,000 to live comfortably in Boston); Jackson & Davis, supra note 33 (finding Boston residents earning over $170,000 considered “rich”).

160. See Lund, supra note 47 (analyzing productivity of working remotely); De’ et al., supra note 45 (studying internet usage spike after COVID-19 outbreak). Many large companies witnessed the efficiency of remote
Massachusetts enacted its Telecommuter Regulation to maintain the status quo for employees working from their home states.\textsuperscript{161} As highlighted by the continued growth in telecommuting options, remote working is not a temporary phenomenon but has already become a staple for the American economy; thus, Massachusetts’s temporary fix did not solve a long-term problem.\textsuperscript{162} To further complicate things, Governor Sununu signed a bill\textsuperscript{163} that prohibits other states from imposing income tax on New Hampshire residents.\textsuperscript{164} Massachusetts needs to protect itself from potential abuse, and COTE has proven an effective tax mechanism to prevent tax manipulation in a similarly-situated state like New York.\textsuperscript{165}

2. COTE is Permissible and Preferable

As previously discussed, the Commerce Clause of Article I of the Constitution and the Due Process Clause of the Fourteenth Amendment each limit states’ ability to impose taxes on nonresidents.\textsuperscript{166} Notwithstanding these limits, states have a wide latitude to create tax income-sourcing laws affecting nonresidents.\textsuperscript{167} Given this discretion, states may elect to adopt some form of an income-sourcing policy that best fits their needs.\textsuperscript{168} New Hampshire is not the first party to endeavor a constitutional challenge to COTE before the Supreme Court.\textsuperscript{169}

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work and are incorporating long-term remote work into their policies. See supra note 6 and accompanying text (listing companies electing to make remote work permanent).

\textsuperscript{161} See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 1-5 (describing Telecommuter Regulation that helped maintain status quo); see also Molla, supra note 67 (highlighting tax-avoidance strategy available due to remote working phenomenon).

\textsuperscript{162} See MASS. DEP’T OF REVENUE, supra note 53 (solidifying September 2021 end date for Telecommuter Regulation); Kess, supra note 5 (observing major issue with state taxes requiring resolution); supra note 2 and accompanying text (noting exponential increase in telecommuting); supra note 45 and accompanying text (describing incorporation of telecommuting in different areas of life).

\textsuperscript{163} While this new law may create Full Faith and Credit Clause issues, the constitutionality of New Hampshire’s law and its effects is beyond the scope of this Note.

\textsuperscript{164} See supra note 71 and accompanying text (discussing Governor Sununu’s signing of House Bill 1097); Wade, supra note 70 (noting reason behind New Hampshire’s proposed legislation).

\textsuperscript{165} See Borie, supra note 10, at 822 (arguing COTE best protects New York’s interests even with flaws); Molla, supra note 67 (observing likely increase in people moving from higher-taxed states to lower-taxed states); Where People in Massachusetts are Moving to Most, supra note 37 (discussing Massachusetts’s outbound migration trends).

\textsuperscript{166} See U.S. CONST. art. I, § 8 (granting Congress power to regulate commerce amongst states); U.S. CONST. amend. XIV, § 1 (protecting peoples within United States borders with right to due process of law).


\textsuperscript{168} See Brief in Opposition to Motion for Leave to File Complaint, supra note 62, at 29-30 (advocating for state discretion in implementing tax laws).

Nevertheless, the Supreme Court has declined a multitude of opportunities to negate the constitutionality of COTE. 170

Under the current state of federal law, Massachusetts’s adoption of COTE is both permissible and preferable. 171 Although many praise the physical presence test for its simplicity, it is arguably this simplicity that subjects economically-powerful states to abuse and fraudulent manipulation. 172 COTE adds a level of protection to states that impose personal income tax on commuter nonresidents—or telecommuters—from out-of-state, although some critics find this to be an overreach. 173 Nevertheless, those who are pro-COTE or anti-COTE share a common goal of fairness. 174 In order to achieve this goal, Congress must pass measures to prevent double taxation. 175

IV. Conclusion

Neither of the bills pending in Congress would provide states with adequate protection against tax manipulation. Federal legislators should instead propose a bill, resembling COTE, that would shield states from nonresident employees enjoying the fruits of their state’s economy while avoiding the same tax that resident employees pay. Nonetheless, any uniform standard would be better than the current disorderly state of the law, especially in light of New Hampshire’s new law.

In the interim, Massachusetts should permanently adopt COTE as its nonresident income-sourcing policy. The New Hampshire v. Massachusetts controversy shed light on a major problem: Massachusetts relies on nonresident employees for tax revenue as part of its $31.63 billion state tax revenue and wants to continue relying on it. Massachusetts legislators created the Telecommuter Regulation to maintain the status quo while a significant number of people were

170. See New Hampshire v. Massachusetts, 141 S. Ct. 2848, 2848 (2021) (denying Motion for Leave to File Complaint); supra note 82 and accompanying text (refusing to determine constitutionality of two income-sourcing cases).
171. Cf. Borie, supra note 10, at 823 (noting COTE constitutional and favoring COTE over physical presence test).
172. See Borie, supra note 10, at 809 (suggesting simplicity likely downfall of physical presence test).
173. Compare Tauber, supra note 80, at 157-58 (criticizing COTE), and Bentley, supra note 76, at 1161-62 (proposing New York’s adoption of physical presence test), with Borie, supra note 10, at 819 (supporting New York’s COTE statute). In their 2006 article, Bentley falsely predicted that COTE would halt the rise of telecommuting and thus negatively impact the economy. See Bentley, supra note 76, at 1161-64 (fearing for COTE’s impact on telecommuting); e.g., Phillips, supra note 2 (identifying exponential increase in telecommuting); Stoller, supra note 6 (naming companies implementing permanent or semipermanent remote work).
174. See Tauber, supra note 80, at 165 (emphasizing benefit of physical presence test avoiding inequities); Bentley, supra note 76, at 1164 (noting policy concerns COTE test raises); Borie, supra note 10, at 822 (arguing COTE “most fair, accurate, and efficient” method to tax nonresident workers).
175. See Borie, supra note 10, at 821-22 (urging individual states to implement tax credits to avoid double taxation); Zelinsky v. Tax Appeal Tribunal, 801 N.E.2d 840, 849 (N.Y. 2003), cert. denied, 541 U.S. 1009 (2004) (indicating remedial tax credits often used to avoid double taxation); Moorman Mfg. Co. v. Blair, 437 U.S. 267, 280 (1978) (stating legislative branch best suited to create uniformity).
working remotely because of COVID-19. Telecommuting is not going anywhere, and Massachusetts must readjust its tax income-sourcing rule to calibrate to the new normal.