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STATE TAXATION OF INTERSTATE COMMUTERS: CONSTITUTIONAL DOCTRINE IN SEARCH OF EMPIRICAL ANALYSIS

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Introduction

The constitutional powers of state taxation are at a doctrinal Rubicon. Prepared to push these powers into a constitutional quagmire are changes both in technology and in societal patterns of work and employment.

In terms of technological changes, the rise of the Internet and e-commerce raises important questions about the power of states to tax commercial transactions when it implicates businesses that are not physically located in a state but nonetheless have sales in it that are transacted over the Internet.[1] Despite the growth of this type of commerce and its potential for significant tax revenue,[2] current constitutional doctrine denies states the capacity to tax this activity.[3]

Similarly, changes in work and life style habits also challenge state taxation power. By that, the nature of work and employment in America has changed dramatically in the last twenty to thirty years. These changes include where the jobs are located in this country and where people are migrating to locate employment.[4] With this increase in job mobility comes a shift in the type of work done, where the jobs are located, and where people live. People often choose or are required to work in certain places that are

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1 *See* WALTER HELLERSTEIN, ELECTRONIC COMMERCE AND THE FUTURE OF STATE TAXATION, IN THE FUTURE OF STATE TAXATION, 207 (David Brunori ed. 1998) (discussing the impact of e-commerce on state taxation).

2 *Id.*

3 *See* Quill v. North Dakota, 504 U.S. 298 (1992) (holding that the Commerce clause precludes states taxing businesses that have sales in a state but otherwise have no physical presence in that jurisdiction).

4 James Dao, *New York City Grows, Even as Many Leave*, N.Y. TIMES March 19, 1998, at A20 (noting the shifting patterns of migration in the United States from the Northeast and Midwest and towards the South and West.).

located in a different jurisdiction, county, or state from where they live.

Yet this changing pattern of work also brings with it tax implications, especially if individual taxpayers cross state boundaries for employment reasons. As the recently decided *The City of New York v. The State of New*[5] York and the 1998 Lunding *v. Tax Appeals Tribunal of the State of New York* Supreme Court opinion demonstrated,[6] when individuals work in one state, but live in another, the tax treatment that states afford nonresident individual taxpayers can implicate important constitutional questions with respect to how states apportion their tax burden without violating the Commerce, Due Process, Privileges and Immunities, and Equal Protection Clauses.[7] In the interest of preventing states from discriminating against one another, interstate commerce, and individual taxpayers, the Court has imposed significant limits on state taxing of instate versus out-of-state taxpayers.[8]

In turn, while the Court and Congress have placed limits upon state taxation,[9] the Court has also aided in the resurgence of federalism and a return of power back to states by imposing limits on national power;[10] yet increased state responsibility thus brings

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[5] 2000 WL 343886 (April 4, 2000) (holding that a state law rescinding a New York City tax on in-state but not out-of-state commuters who work in the city violated the United States Constitution's Privileges and Immunities and Commerce Clauses).

[6] 522 U.S. 287 (1998).

[7] *See* Ferdinand P. Schoettle, TAXING NONRESIDENTS- THE 'PUZZLING FAILURE OF ECONOMICS': *Christopher H. Lunding v. State of New York*, ST. TAX NOTES, 1119 (November 3, 1997) (reviewing the constitutional issues surrounding state taxation of nonresidents).

[8] *See infra* Part III.

[9] Winkfield F. Twyman, Jr., *Losing Face But Gaining Power: State Taxation of Interstate Commerce,* 16 VA. TAX REV. 347 (1997) (reviewing the various constitutional limits the Supreme Court has placed upon state's ability to tax interstate commerce.).

[10] *See, e.g.,* Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board, 527 U.S. 666 (1999); Alden v. Maine, 527 U.S. 706 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ; U.S. v. Lopez, 514 U.S. 549 (1995) (holding Congress lacked the power under the Commerce

with it increased state revenue requirements and that leads to a greater need to tax and pay for services.[11] Increasing or returning power to states via "New Federalism," but not giving them increased capacity to raise revenue to address local needs, is producing a political and, more importantly, for our purposes, a constitutional doctrine problem. Specifically the constitutional imperatives of the Commerce Clause to limit state taxing discretion and prevent states from discriminating against interstate commerce are at odds with the Court's recent Tenth Amendment jurisprudence stipulating that states should have increased autonomy to address their needs. Giving states increased political and constitutional power yet denying them increased taxing authority to preserve national uniformity considerations is a federalism disaster in the making.

Recent examination of state taxation issues and how changing technology and life style choices are challenging the constitutional power has focused almost exclusively on e-commerce and state taxation of commercial transactions over the Internet;[12] yet little, if any, research has been devoted to how these two factors are impacting state power to tax personal income. More importantly, throughout the debates on state taxation and regulation of interstate commerce and how both are affected by the changing workplace and political considerations, surprisingly little empirical data has been employed to guide constitutional discussion. By that, in looking to how states treat residents and nonresidents, little analysis has been given to ascertaining how many individual taxpayers actually cross state lines to seek employment. In failing to examine actual employment migration patterns, there is no real

clause to ban guns in local schools); New York v. U.S., 112 S.Ct. 2408 (1992) (holding Federal government may not compel states to enact or administer a federal regulatory program).

[11] *See, e.g.*, Robert Tannenwald, *Come the Devolution, Will States Be Able to Respond?*, ST. TAX NOTES, 357 (February 2, 1998) (examining the fiscal capacity of states to pay for services).

[12] *See, e.g.*, WALTER HELLERSTEIN, ELECTRONIC COMMERCE AND THE FUTURE at 214 (1998) David Brunori, STARTING TO SLIDE DOWN THE SLIPPERY SLOPE: WHAT'S NEXT FOR THE INTERNET TAX FREEDOM ACT?, ST. TAX NOTES 577 (February 22, 1999); Eileen Shanahan, *www.taxfree.com*, 12 GOVERNING 34 (December, 1998).

analysis in judicial opinions regarding how state taxation actually influences or affects the behavior of taxpayers.[13] By that, in *Lunding*, while the Court ruled that New York's bifurcated tax deduction treatment between a resident's and a nonresident's alimony payment amounted to a violation of the Privileges and Immunities Clause,[14] it made its ruling without any use of economic or demographic data to show that in fact the differential treatment did influence the behavior of taxpayers. In effect, categorical constitutional claims of discrimination against interstate commerce are being asserted by the Court without any empirical foundation to support these assertions.

This Article seeks to fill in some of the missing empirical data in constitutional doctrine. It examines the scope and status of tax commuters--individual taxpayers who cross state lines to work—and assess how these types of workers are important to the debate surrounding state taxation of nonresidents and the various tests employed to test the constitutionality of taxing these individuals.

Part one of this Article outlines the constitutional power states have to tax individuals. It seeks to examine some of the major doctrines granting states the power to tax individuals who reside, domicile, or earn income in a state. This section provides the groundwork for the major part of the paper which seeks simply to ascertain who and how many individuals are tax commuters. This part of the Article will distinguish between commuters, telecommuters, and professional athletes as three classes of tax commuters or nonresidents that states may seek to tax. The goal of this section is simply empirical—providing some estimates to who crosses state lines for employment purposes. Finally, the last section of the Article looks both at the constitutional limits placed on states as well as the implications of these doctrines for state taxation of commuters. These limits are examined in light of recent demands to increase the authority states have in political system.

Overall, what this Article aims to do is multifold. First, it is to make a plea for empirical analysis of current constitutional

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[13] *See infra* Part III.

[14] Christopher H. Lunding v. State of New York, ST. TAX NOTES 1119 (November 3, 1997)

doctrine. Efforts to clarify how far states may go in taxing without burdening interstate commerce can be better resolved not by appealing to abstract constitutional doctrines but instead by using analysis of current empirical and economic data to clarify what individuals are really doing when they engage in interstate commerce and what impact state taxation seems to have on this behavior. Second, this Article documents the rise of interstate commuting for employment purposes, indicating how this potentially gives state greater ability to tax more individuals. Third, this Article demonstrates how new technologies and behaviors are challenging current constitutional doctrine. Finally, the Article notes the inconsistent path the Court's recent federalism jurisprudence has taken. While the Court has overall increased state sovereignty and authority it has failed to provide for changes in state taxation power that reflect the new fiscal needs of the states that come with this increased sovereignty. Hence, the Court has failed to shape a constitutional doctrine of state taxation that reflects the reality of new forms commerce and life style choices. In sum, this Article will show how an empirical examination of tax commuting is important to clarification of the debate on the various constitutional and political issues surrounding states' capacity and authority to tax nonresidents.

I. State Authority to Tax

States are able to tax the income of individuals who reside or domicile within their borders, and states may also tax the income of individuals sourced or earned within their borders.[15] However, in some circumstances, states may also be able to tax nonresidents working outside their borders if an individual elects to work out of state instead of working at a business that is located within the taxing state.[16] A brief review of four cases establishes these principles.

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[15] JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 872 (1997).
[16] *Id.* at 876.

A. Taxation based on Residence

A state may tax any individual who takes up residence in a state. In *Evans v. New York*,[17] an individual working in New York City but living 70 miles away in Pawling, New York, made arrangements to live with a friend at a church rectory in New York City. He slept there several nights per week, thereby returning to his Pawling home on weekends. The taxpayer shared some of the living expenses with his host friend at the rectory. Eventually, based upon the taxpayer's 1985 and 1986 tax returns, the City of New York concluded that Evans was a New York City resident and therefore was obligated to pay city taxes.[18] Evans appealed, contending that the rectory was not his permanent place of abode because he did not pay rent or operating expenses and because he did not hold the rectory out as his residence.[19] Instead, his residence was his home in Pawling, New York. Therefore, Evans concluded, the City of New York lacked the authority to tax is income.

The New York Appellate rejected Evans claim. Because Evans shared living expenses with his friend, because he supplied furniture, and because he kept some clothing there, the court ruled that the New York City rectory was a residence for Evans and therefore it was a permanent place of abode that gave the City the authority to tax Evans on the basis of his residency.[20]

B. Taxation based on Domicile

A State may also tax an individual who makes that state her domicile. To be domiciled in a state means, among other things, to be the state where a taxpayer subjectively declares or intends to be her home; where the taxpayer's family is located; where the taxpayer votes, registers a car, votes, has regular bank accounts, or

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[17] 1999 A.D. 2d 840, 606 N.Y.S.2d 404. (N.Y. App. Div.)(1993).
[18] *Evans* at 405.
[19] *Id.*
[20] *Id.* at 405.

otherwise has established professional and social relationships.[21] Overall, once a person has established domicile, a state may tax the income of that person even if the taxpayer is not physically located or residing in the state.

In *Kornblum v. New York*,[22] the taxpayer was a long-term New York City resident who had domicile in the state. In 1983, Kornblum purchased a condominium in Florida and took up residence in that state. New York contended that despite this residence in Florida, the taxpayer still had his domicile in New York for the years 1983-1985 and therefore was required to pay New York State and City taxes.[23]

The Court of Appeals indicated that looking merely to the subjective intent of the taxpayer to change domicile was not sufficient evidence to determine a change in domicile. Instead, the court insisted on a review of more objective factors to ascertain whether Kornblum had actually changed domicile.[24] Even though Kornblum obtained a Florida driver's license and had voted in that state, the fact that he kept a safe deposit box in New York, kept his New York bank accounts and residence, and continued to use a New York physician was enough to convince the court that Kornblum had not abandoned his New York domicile.[25] Hence, New York maintained its authority to tax Kornblum based on his state domicile.

C. Taxation based on Source of Income

A state may also tax an individual, even a nonresident, if that individual sourced and derived income from within the state. In *Shaffer v. Carter*,[26] an Illinois resident and citizen owned and

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[21] *See* WALTER HELLERSTEIN, ELECTRONIC COMMERCE AND THE FUTURE OF STATE TAXATION, IN THE FUTURE OF STATE TAXATION, 207 (David Brunori ed. 1998).

[22] 194 A.D. 2d 882, 599 N.Y.S.2d 158 (N.Y. App. Div. 1993).

[23] *Id.* at 159.

[24] *Id.*

[25] *Id.* at 159-160.

[26] 252 U.S. 37 (1920).

operated several oil and mining leases within the state of Oklahoma.[27] In 1916, Shaffer earned $1.5 million on these Oklahoma leases and the state of Oklahoma contended that he owed $76,000 in taxes based on this income in the state. Shaffer contended that the tax violated the Due Process, Commerce, and Privilege and Immunities clauses of the Constitution in that Oklahoma lacked jurisdiction over him since he was neither a resident nor domiciled in the state.[28]

The U.S. Supreme Court ruled in favor of the state. The Court, quoting Chief Justice Marshall, argued that it was a well- settled proposition that "all subjects over which the sovereign power of a state extends, are objects of taxation."[29] In this case, the Court noted that the State of Oklahoma did not seek to tax nonresidents for income derived beyond the borders of its state.[30] Instead, Oklahoma simply was using its sovereign power to tax income sourced within its borders and that there was no constitutional prohibition that would preclude the state from doing this.

D. Taxation based on Activities Outside a State

Shaffer involved a scenario where the Court affirmed the power of a state to tax a nonresident nondomiciled individual on income earned within its borders, yet the Court also suggested that a state could not tax such an individual on income not earned within its borders. However, in some circumstances, a state may in fact tax a nonresident who is not domiciled in the state and who appears to earn income located outside of its borders.

In *Speno v. Gallman*,[31] a New Jersey resident domiciled in that state was employed in New York for 60 days in one year and 43 days in another.[32] According to the taxpayer's 1960 New York tax return, he also worked 252 days outside of New York, of which 174 were in Speno's residence in New Jersey making telephone

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[27] *Id.* at 222.
[28] *Id.*
[29] *Id.* at 225.
[30] *Id.* at 225.
[31] 35 N.Y.2d. 256 (1974).
[32] *Id.* at 257.

business calls.[33] New York claimed that the work performed at Speno's home in New Jersey was taxable income in New York and that the state could compute these days in determining Speno's New York tax obligation.[34] Speno objected, claiming that the state lacked jurisdiction to tax this New Jersey activity.

The New York Court of Appeals upheld the authority of the state to count the New Jersey days in the computation of the New York income.[35] To arrive at this result, the court indicated that in general a state may not tax a nonresident on income derived from beyond its borders.[36] However, there are some circumstances under New York law when it may do that. Specifically, codified in New York tax law[37] is the "convenience of employer" test. Under this test:

> [A] nonresident who performs services in New York or has an office in New York is allowed to avoid New York tax liability for services performed outside the State only if they are performed of necessity in the service of the employer. Where the out-of-State services are performed for the employee's convenience, they generate the New York State Tax liability.[38]

According to the convenience of employer test, if a nonresident is required to work outside of New York, then he does not incur a New York tax liability. If the work is performed simply at the convenience of the employee, then a New York tax liability ensues. In Speno's case, he made his business calls from his home in New Jersey not because he was required to by work, but out of his own personal convenience. As a result, in applying the convenience of employer test, the New York court found that

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 259.

[36] *Id.*

[37] NY Income Tax. Reg. § 131.16.

[38] *Speno*, 35 N.Y.2d at 259.

Speno's work in New Jersey could be counted as New York work and therefore included in his tax liability to the state.

E. Summary

In general, states have broad sovereign authority to tax objects under their control.[39] This means that states may tax individuals who live in their state, are domiciled, or who otherwise earn income within its borders, even if that income earned is by persons who are nonresidents. Finally, in some circumstances, a state may also tax a nonresident who works outside of the state if that work is done at his convenience when it otherwise would have been performed within the state.

II. Tax Commuters: Empirical and Conceptual Analysis

Because states have significant authority to tax income sourced within its borders earned by persons who live, reside, or work within its jurisdiction, there are many types of nonresidents who may come under the taxing power of a particular state or states. This section outlines three classes of nonresidents whom a state may be able to tax.

State taxation of nonresidents involves a scenario where an individual taxpayer lives in one state but works in another. For our purposes, there are three classes of individuals who meet this definition. First, there is the individual taxpayer who lives in one state and regularly and physically commutes to another state to work. This type of individual is our primary image of the tax commuter since she physically commutes to work regularly and her regular place of residence and place of work are located in different states. A second class of workers is the telecommuter. This is an individual who works at home, for part or all of her work, but her employer is located in a different state. Unlike the real tax commuter who physically crosses state lines, a telecommuter does not physically cross state lines; instead, she electronically crosses from one state to another. Finally,

[39] Christopher H. Lunding, ST. TAX NOTES, 1119(November 3, 1997).

professional athletes are an example of a third type of tax commuter. Like the real commuter, athletes represent a class of individuals who physically cross state lines to work. However, athletes, as well as many other professionals, do so only for a portion of their employment.

The commuter, telecommuter, and professional athlete are three classes of nonresident workers who might come within a state's tax jurisdiction. For reasons to be described below, the numbers of individuals of each type is different and the potential tax treatment of each is also unique.

A. Commuters

When the Court discusses the state taxation of nonresidents, one top-of-mind case is that of Christopher Lunding. This is an individual who lives in Connecticut but works in New York. This individual physically commutes and crosses state lines to work. Hence, Mr. Lunding is a tax commuter, and the jurisprudence on state taxation of individual taxpayers is defined by this type of taxpayer. However, while *Lunding* and other cases involving state taxation of nonresidents focus on tax commuters and how state laws may influence or affect these individuals, surprisingly little data has been provided to examine how many individuals fit this profile.

How many individuals actually cross state lines to work? Unfortunately, this is not an easy question to answer. When seeking to gather data for this Article, calls were made to the Bureau of Labor Statistics, the Internal Revenue Service, and the revenue departments in the states of New York, Illinois, and Wisconsin regarding how many individuals cross state lines to work. None of these offices had data or estimates. Instead, all suggested calling the Census Bureau. Calls to the Census Bureau indicated that employment data known as "journey-to-work" would describe where people lived and worked. However, the data here generally asked people if they resided and worked in the same county, not if they lived in one state and worked in another.

However, 1990 Census data revealed some information on this issue, with 1980 data also providing some limited information. The up shot is, while there is a lot of information on individuals crossing county lines to work, prior to 1980 there is no journey-to-work Census data on people cross state lines to work.

1. Census Data

Drawing upon Census data, the Federal Highway Administration's *Journey-to-Work: Trends in the United States and its Major Metropolitan Areas, 1960-1990 Final Report* examined changes in employment over a thirty year period.[40] According to the report, from 1960-1990, there was little variation in the percentage of people who worked in the county of their residence. In 1960, 81.7% worked in the county of their residence and in 1990 76.1% did so.[41] Yet the actual number of individuals working outside of their county of residence increased by 36.7% during this time period.[42] From 1980-90, the percentage of workers employed outside of their county of residence was up by 200%.[43] Broken down more specifically, the report examined the number of individuals working outside their state, and the results are provided in Table I.

Table I
Residence and Location of Work in the United States and 39 Top Metro Areas in 1990

Category	U.S. Total	U.S. %	Metro Total	Metro %
Total Population	248,709,873	100%	123,814,261	100%

[40] Federal Highway Administration, Office of Highway Information Management, *Journey-to-Work: Trends in the United States and its Major Metropolitan Areas, 1960-1990 Final Report* (1994).

[41] *Id.* at 4-15.

[42] *Id.* at 2-8.

[43] *Id.* at ES-1.

Total Workforce	115,070,274	46.3%	59,704,401	46.3%
Worked in County of Residence	87,587,677	76.1%	43,233,668	72.4%
Worked outside County of Residence	23,488,393	20.4%	14,016,809	23.5%
Worked outside State of Residence	3,994,204	3.5%	2,377,625	4.0%

According to Table I, 3.5% of the United States workforce crossed state lines to work, whereas among the thirty-nine largest metropolitan regions, that percentage was 4.0%. These almost four million workers are the Christopher Lundings of America—they are the tax commuters or potential nonresidents that states may tax. One question that emerges from this table is whether the numbers and percentages of tax commuters have changed over time. Unfortunately this report does not provide an answer to this question.

Turning directly to data provided by the Census Bureau, some comparisons between 1980 and 1990 are possible. In 1980, there were 96,672,203 workers age sixteen or over in the United States.[44] In 1990, there were 115,070,274 workers, an increase of 19% from 1980.[45] In 1980, 2,757,177 or 3.1% of the workforce was employed outside the state of their residence, while in 1990, 3,994,204 individuals or 3.5% of the workers fit this category.[46] This means that an additional 1,237,027 workers were employed

[44] U.S. Census Bureau, *Place of Work–State and County Level-For the United States*(Visited June 5, 1998) <http://www.census.gov/population /socdemo/ journey/powstco.txt>.

[45] *Id.*

[46] *Id.*

outside their state of residence.[47] Looked at in another way, between 1980 and 1990, the total workforce increased by 19% but the number of individuals working outside their state of residence increased by 44.9%.[48] Clearly, this demonstrates that a small but increasing total number and percentage of the workforce is crossing state lines to work.

Another way to examine the data is to look at the aggregate summary of all 244 Standard Metropolitan Statistical Areas (SMSAs) in the country. Here, only 1990 data is available and one finds that 3,233,853 of the 91,515,002, or 3.5%, of the workers age sixteen or over work outside their state of residence.[49] Further, the percentage of workers crossing state lines varies by city and region. Table II demonstrates the variance by examining the SMSA encompassing the ten largest cities in the United States in 1990.

Table II
Residence and Location of Work in the MSA's of Ten Largest Cities in 1990

City	Total Workforce	Total Working Outside State of Residence	Percentage Working Outside State of Residence
New York MSA	8,550,473	543,233	6.4%
Los Angeles MSA	6,809,043	23,640	3.5%
Chicago MSA	3,841,337	. 95,798	2.5%
Houston	1,759,796	10,761	0.6
Philadelphia	2,794,917	269,752	9.7%
San Diego	1,230,446	10,175	0.8%
Detroit	2,079,880	24,390	1.2%

[47] *Id.*
[48] *Id.*
[49] GEOLYTICS, INC.: CENSUS C.D.: THE COMPLETE CENSUS C.D. (1996).

Dallas	1,976,606	12,835	0.7%
Phoenix	996,495	9,879	1.0%
San Antonio	569,149	3,262	0.6%

Table II reveals that the percentage of workers crossing state lines varies from a high of 9.7% in Philadelphia to a low of 0.6% in Houston and San Antonio. In addition to these ten cities, 4.3% of the workers in the Boston area and 29.5% of those in the Washington, D.C. live in one state and work in another. These statistics reveal many variations in cross-state commutes.

However, while many individuals are crossing state lines to work, these tables do not indicate why there is wide variation in commuting patterns. One explanation may be geography. Cities or SMSAs close or near state borders might be more likely to have a higher percentage of the workforce crossing state lines. In fact, geography facially does seem to be a factor. New York and Philadelphia are located on top of or very close to state borders and they have the highest percentage of workforce crossing state lines. In addition, Boston and Washington, D.C. located on top of one or more state lines, also have high percentages of the workforce crossing state lines. Conversely, cities like San Antonio which are far from borders, have low percentages of individuals crossing state lines to work.

In addition, if one were to examine all 33 SMSAs that cross at least two states, the percentage of workforce crossing state lines to work is 8.7%. In comparison, in the 211 SMSAs that include only one state, only 1.2% of the workers cross state lines. In other words, while only 31.3% of the total workforce in the 244 SMSAs are located in the 33 SMSAs that cross state lines, 74.5% of the workers who cross state lines to work are located in these areas. Hence, geography seems to be a major factor influencing cross-state employment travel.

But, are individuals who cross state lines to work tax commuters? In other words, are they crossing state lines for tax reasons? The Census data do not discuss this. However, all other things being equal, one measure of the reasons for crossing state lines might be the existence or nonexistence of certain taxes, such as a state income tax. One could hypothesize that, all things being equal, individuals would be more likely to live in nontax states and work in tax states, assuming the residence state taxes the income. Thus, patterns of cross state migration involving an income and non income tax state would perhaps be higher than migration patterns that involve states that both have income taxes. Hence, one crude and perhaps inexact way to see if the existence of an income tax is a factor in migration is to compare states that have an income tax to those that do not and see if the percentages of the workforce commuting varies.

Seven states: Alaska, Florida, New Hampshire, Nevada, South Dakota, Texas, and Wyoming, have no income tax for individual taxpayers.[50] In the 59 SMSAs that include these states, 1.8% of the population crosses state lines for employment. In contrast, among the 185 SMSAs that do not include these states, 3.9% of the population crosses state lines. On first impression, it appears that employment migration might certainly occur for income tax reasons. However, one needs to hold constant many factors that these statistics do not address. For one, geography needs to be addressed. While some of the SMSAs in the nontax states are located near tax states--e.g., New Hampshire is near Massachusetts--many of the SMSAs, such as San Antonio, Texas and Anchorage, Alaska, are quite far from other states, thus perhaps discouraging interstate travel. Moreover, if the 1.8% figure for states without an income tax is compared to the 8.7% for SMSAs crossing states, it appears again that geography may be more of a factor than the existence of a state tax in terms of motivating where one works.

Overall, while the statistics here are not conclusive and fail to account for geography, migration between high and low income tax states, and other types of state taxes, among other variables, there is some evidence that migration to/from states with individual income taxes is different than migration from/to SMSAs that do not identify a non income tax state. However, this migration pattern is less than in SMSAs that cross state lines. This

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[50] Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 SPORTS LAW. J. 127, 128 n.6 (1995).

suggests other variables are operative and influencing migration. Overall, the data does not support the claim that commuting patterns and decisions are influenced by taxation.

2. New York City Commuter Tax Data

A second source of data on tax commuting comes from the New York State Department of Taxation and Finance (NYSTF) which tracks the number of commuters who pay this tax. New York City imposes a commuter tax on individuals who work in the city but reside outside it borders.[51] This data is provided in Table III.

Table III

New York City
Nonresident Tax Liability
1983-1996

Year	# of NonNYC Tax Returns	Tax Liability ($000)	# of Non NYS Tax Returns	Tax Liability ($000)
1983	670,564	108,543	266,174	43,530
1984	683,009	116,532	272,039	44,270

[51] New York City Administrative Code § 11-1900 *et seq.* (1999). In 1999, the New York State Legislature amended state law to preclude the enforcement of this commuter tax against state residents but kept in place for out-of-state residents. *See N.Y. Tax Law* § 1305(b) (McKinney 1999) and *N.Y. General City Law* § 25-m(1)(h) (McKinney 1999). In *The City of New York v. The State of New York*, 2000 WL 343886 (April 4, 2000), the New York Court of Appeals invalidated this law as a violation of the federal Privileges and Immunities and Commerce clauses, thereby invoking a "poison pill" in the state legislation that would repeal the entire tax commuter law if a court invalidated it. *Id.* at *2. Thus, as of this date, the entire New York City Tax commuter law is now repealed. Despite repeal of the law, the New York City data are still instructive on the number of people who are tax commuters and how much money is at stake.

1985	692,072	125,367	276,355	47,870
1986	698,592	139,425	283,995	53,415
1987	717,883	155,605	300,544	63,450
1988	723,871	172,072	303,609	71,296
1989	731,781	181,679	293,484	70,367
1990	732,766	193,115	314,259	83,696
1991	707,358	184,791	303,183	80,502
1992	720,591	217,060	310,226	98,870
1993	733,532	219,603	315,766	99,636
1994	762,760	223,127	321,950	99,354
1995	757,802	241,032	325,299	108,883
1996	769,293	259,469	314,615	109,356

According to the NYSTF, from 1983-1996, the number of returns filed by non New York State tax commuters increased by 48,441, representing an 18.2% increase. In comparison, the total number of returns filed during that period increased by 98,729, or 14.7%, thus indicating a more rapid increase in the number of tax commuters. In addition, NYSTF data indicated that the actual tax liability for tax commuters increased by 151.2% during this time period, while overall the increase was 139%. Finally, as shown in Table IV, the percentage of returns filed by tax commuters has increased from 39.7% to 40.9%, with a high of 43.1% in 1993. Similarly, the actual tax liability percentage for tax commuters increased from 40.1% of the total liability to 42.2%, with a high of 45.6% in 1992.

Table IV
Percentage Tax Commuter
and Liability: 1983-1996

Year	Percentage of Commuters Living Outside of NYS	Percentage Tax Liability of Commuters Living Outside NYS
1983	39.7	40.1
1984	39.8	38.0
1985	39.9	38.2
1986	40.7	38.3
1987	41.9	40.9
1988	41.9	41.4
1989	40.1	38.7
1990	42.9	43.3
1991	42.9	43.6
1992	43.1	45.6
1993	43.0	45.4
1994	42.2	44.5
1995	42.9	45.2
1996	40.9	42.2

Overall, the New York State figures reaffirm trends found in the Census data. Specifically, that the number of tax commuters, at least in the New York City area, is increasing, and these individuals represent a large source of revenue for a state.

3. Illinois-Wisconsin, Illinois-Indiana, and Wisconsin-Minnesota Data

Another source of estimates regarding the number of individuals crossing state borders to work grew out of studies done by the state of Illinois. Illinois has negotiated tax agreements with the states of Wisconsin and Indiana that would permit residents who cross state borders to work to pay their income tax in their state of residence. Hence, Illinois residents who work in Indiana would not have to pay Indiana income tax but would pay Illinois income tax.[52] Similarly, Indiana residents who work in Illinois would not have to pay Illinois income tax but instead would pay Indiana income tax. A similar agreement was negotiated between Illinois and Wisconsin.[53] In addition, Minnesota and Wisconsin also have in place a similar tax agreement for commuters.[54]

The fiscal implications of tax commuters is clearly demonstrated in the Illinois/Indiana and Illinois/Wisconsin agreements. According to the Illinois Department of Revenue, 21,900 Illinois residents commute to Indiana to work on a daily basis, while 52,400 Indiana residents commute to Illinois on a daily basis.[55] Given the differences in numbers and the state tax rates, Illinois determined that it was losing $10 million per year and it demanded that Indiana pay this amount to Illinois. When the former declined, Illinois canceled the tax reciprocity agreement.

Similar studies found that 9,100 individuals live in Illinois and work in Wisconsin while 33,300 Wisconsin residents work in Illinois.[56] Hence, Illinois was losing $11 million per year, and like with Indiana, was demanding that Wisconsin pay its share or the agreement would be canceled.[57] However, at the heart of the dispute was uncertainty regarding the numbers of people actually crossing state borders to work,[58] leading the two states to differ over the tax obligations between the two.

Finally, under a tax agreement between Minnesota and Wisconsin, the latter paid the former $31.9 million in 1995 to

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[52] Christi Parsons, *State Set to Cancel Indiana Tax Deal" Non-Resident Worker Pact Called Unfair*, CHICAGO TRIBUNE October 17, 1997 at S1.

[53] Dave Newbart, *Wisconsin May Renew Bistate Income Tax Pact*, CHICAGO TRIBUNE February 20, 1998 at N5.

54 *See* WIS. STAT. ANN. § 71.03 (West 1997).

[55] Christi Parsons, *State Set to Cancel Indiana Tax Deal" Non-Resident Worker Pact Called Unfair*, CHICAGO TRIBUNE October 17, 1997 at S1.

[56] Steven Walters, *Share Income Tax, Illinois demands: Neighbor wants new deal on workers who live here*, MILWAUKEE J. SENTINEL, October 17, 1997 at A1.

[57] *Id.*

[58] *Id.*

make up the revenue Minnesota was losing as a result of the commuting patterns between the two states.[59]

Overall, what the agreements among these four states reveal is that calculation of the exact numbers of tax commuters has serious revenue implications for states. Knowledge of how many are tax commuters will lead to a major and growing source of revenue for states.

B. Telecommuters

A second category of commuters is telecommuters. The exact definition of a telecommuter is unclear, but one definition or categorization suggests that these are individuals who work with a computer in their own home-based business, or who work at home for some or part of their employment, and use a computer to access their out-of-state workplace.[60] For our purposes, however, a telecommuter is a person who works in one state and engages in business located in another state. This type of telecommuting may include home-based businesses that are located in one state and the workers use the computer to conduct business in another state. Another definition may include an individual who lives in one state and uses the computer to access her worksite that is located in another state. Under either of these definitions, the critical point is that the residence and place of business or work is located in another state and the worker uses a computer to access that place of business or worksite for all or part of her work. Hence, as opposed to physically crossing state lines to work, a telecommuter electronically crosses state lines.

Determining how many individuals telecommute is hard to ascertain. Joanne Pratt reviewed over 20 government surveys in an attempt to ascertain how many people work at home or otherwise telecommute. She determined that the number of people who are self-employed and work at home increased from 2.2 to 3.4 million

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[59] Calls by this author to the Wisconsin Department of Revenue in March, 1998, to ascertain the exact number of people crossing the Minnesota and Wisconsin borders to work indicated that the State's records could not provide exact numbers or estimates.

[60] JOANNE H. PRATT, COUNTING THE NEW MOBILE WORKFORCE, 3 (1997).

from 1980 to 1990. This represents a 56% increase.[61] In addition, at least 53.5 million people bring some work home, although it is not clear if they are using the computer to access a remote worksite.[62]

One study that Pratt examined indicated that in October, 1989, 13,683,000 or 15% of the U.S. households had a computer in the home.[63] Of that population, 12.5% use a computer at home to work, and of the 9.3 million who said they had a computer at work and at home, 20% or 1.86 million said they used their computer at home to do work.[64] Hence, over 13 million households potentially have some type of tax commuter, and 1.86 million individuals potentially could be using a computer to access a worksite located outside of their state of residence. Unfortunately, none of the surveys undertaken by the federal government that Pratt studied asked questions about the location of the residence versus worksite, including whether that site is located out of state.

In addition to Pratt, a 1995 American Information User Survey (AIUS) sought to ascertain the number of telecommuters in the United States.[65] According to this survey, 8.1 million workers "work at home one or more days per month during normal business hours."[66] The survey also revealed that another 3.1 million individuals were contract telecommuters—those who are not employees of a company but work for it on a contract basis.[67] Hence, there are over 11 million workers who telecommute to work according to the AIUS study.

Finally, a 1999 United States Department of Commerce study found that in 1998 slightly over 25% of all the households in America had Internet access.[68] Hence, by one measure, several

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[61] PRATT at 3.

[62] *Id.*

[63] PRATT at 17.

[64] *Id.*

[65] Thomas E. Miller, *Telecommuting Fact Sheet* (Visited on June 14, 1998) <http://etrg.findsup.com/telework/teleindx.html>.

[66] *Id.*

[67] *Id.*

[68] U.S. Department of Commerce, Falling Through the Net: Defining the Digital Divide (Visited April 17, 000) http://www.ntia.doc.gov/ntiahome/fttn99/contents.html>.

million households potentially could be using a computer to access a worksite located outside of their state of residence.

Unfortunately, the surveys examined by Pratt and either the AIUS or the Department of Commerce studies do not indicate what percentage of these individuals actually cross state lines and constitute telecommuters for the purposes of this article. In fact, one goal of Pratt's study was to examine other federal studies and to recommend changes in their methodology and questions, with the intent being to ascertain better information about telecommuting.[69] Oddly, none of her recommendations sought to include asking questions about the location of one's residence and whether the worksite was located out of state.

In addition to the lack of specificity regarding how many people telecommute across state lines to work, the above studies do not examine the reasons why individuals telecommute. Generally, evidence suggests that employees do so often for personal reasons or convenience, including to take care of children or attend to family or other personal matters.[70] Why individuals telecommute is significant because depending on the reason why people work at home that may influence a state's ability to tax.

For example, assume an individual lives in Connecticut but works in New York. However, that person also telecommutes to work two days per week. Under current taxing doctrine, if the employee is required to work at home those two days per week then the state of Connecticut may be precluded from taxing the individual under the convenience of the employer test. If the employee chooses to work at home for personal reasons, then the convenience of employee test would suggest that the state of Connecticut would be able to tax this telecommuter for the two days of work per week performed at home. Hence, the reason for telecommuting may be critical to a state's taxing authority over a telecommuter.

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[69] PRATT at 1.

[70] Municipal Research and Services Center, *Telecommuting* (Visited on June 14,1998)<http://www.mrsc.org/personnel/telcomut.htm;USAToday, *Telecommuting Gains Momentum* (Visited on June 14, 1998) <http://www.USAToday.com/life/cyber/ctb511.htm>.

Overall, the exact number of individuals who are engaged in telecommuting across state lines is unclear, but no doubt it is certainly a substantial sum. Also unclear are the reasons why people telecommute, leaving open some questions regarding the tax liability and state tax authority over these commuters.

C. Athletes

The last category of commuters constitutes athletes and other professionals who cross state lines to work. Athletes are singled out as the most visible example of a class of individuals who occasionally cross state lines to work. The class of individuals who fit into this category is potentially very large. It includes entertainers who perform in several states, business executives and sales staff who might go to different states on occasion to work, and lawyers who may go to a different state to work, consult, or otherwise assist a client. All of these individuals, like the athlete, live in one state but travel to one or other states on occasion to work. Hence, these individuals are potentially subject to numerous taxing jurisdictions.

There is no estimate of the number of individuals who fit into this third class. The number could be in the millions, yet there are no studies to clarify this. However, in the case of professional athletes, the number of individuals who fit this category is relatively easy to define—it consists of all the professional athletes who play for major league sports such as basketball, football, baseball, and hockey. This number, according to one estimate, is about 3,300 individuals, including coaches, managers, and other sports personnel who work with the professional athletes.[71] However, this estimate may be low since it may exclude minor league professional sports and other sports beyond those listed above. Whatever the exact number it is certainly a smaller number compared to telecommuters or real commuters.

Why would states be interested in professional athletes who play games in their state? Quite simply, their salaries are high.[72] For

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[71] Krasney at 128.

[72] *See* Stefan Fatsis, *NBA Owners Vote to Reopen Labor Pact, Risking Possibility of Strike-Hit Season*, WALL. ST. J. March 25, 1998 at A6 (noting how the NBA's current *minimum* salary is $272,250 per year).

example, when Michael Jordan played for the Chicago Bulls basketball team he reportedly earned about $300,000 per game.[73] With a National Basketball Association schedule consisting of 82 games, that meant that Jordan made about $24 million per year playing basketball. Generally, Jordan played half or 41 of his regular season games in Illinois, with the other 41 outside the state. This means that over $12 million might potentially be taxed by states other than Illinois.

Moreover, in seeking to create formulae to tax athletes, states have devised two tests—games played and duty days—as apportionment tools.[74] Under duty days, a state looks to how many days an athlete is in its state playing a sport versus the total number of days the athlete plays the sport in a year. That ratio would then be the state's tax apportionment. Under games played, a state looks to what percentage of games are played in that state versus all games played to determine a state's tax share. Thus, for example, assume that Michael Jordan played the Knicks three times per year at Madison Square Garden in New York City. Under duty days, one would look at how many total days Jordan was in New York to play basketball versus how many days overall to play basketball. Under a games played formula, one would multiply his $300,000 salary per game times 3 to get a potential New York State tax income of $900,000. Multiply this New York experience with many other states that Jordan played in and suddenly many states have interests in six or seven figure incomes by Jordan and other professional sports figures. Combine Jordan's income with the 3,300 or more athletes also crossing state lines to play sports and the result is that many states potentially can tax millions of dollars of income for work or sports performed in their state.

The personal income of athletes crossing state borders has important tax implications.[75] These considerations are very similar

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[73] *Michael Jordan's Salary* (Visited on June 7, 1998). <http:www.cyberhighway.net/~transnet/humor/sjordan.htm>.

[74] Krasney at 135-8.

[75] In addition to crossing state borders, many professional athletes also cross national boundaries, having multinational tax implications. *See, e.g.*, Lindsay Ann Histrop, *Taxation of Canadian Resident Athletes and Artists Performing in*

to that of the tax commuters who physically cross state lines to work. Specifically, they are nonresidents who enter a state to work. However, unlike tax commuters who live in one state and perhaps only commute to one other state to work, professional athletes potentially enter every state that has a professional sports team in the sport or league one is playing, thereby giving several states a chance to tax. Hence, the issue here for the athlete is which states have jurisdiction to tax and for how much; how will taxes in one state be credited towards another; and how will different income tax rates in different states factor into decisions of where to locate income for the purposes of taxation. Finally, the athlete problem could be even further compounded by the athlete domiciling in one state; residing in another state where his home team is located; and playing a sport in several states. Here, different states simultaneously have jurisdiction to tax premised upon domicile, residence, and source of income.[76]

The issues confronting the taxing of a professional athlete are representative of the larger problem surrounding the taxing of other professionals who occasionally cross state lines to work. Besides simply estimating who and how many people are crossing state lines to work, there is the problem of apportionment or ascertaining how many days and what percentage of income a state may tax. Overall, the potential income that may possibly be at stake in taxing individuals such as athletes and other traveling professionals is perhaps quite large, giving cash-starved states strong incentives to go after such income.

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the United States, 32 CAN. TAX. J. 1060 (Nov-Dec. 1984); Lindsay Ann Histrop, *Taxation of U.S. Resident Athletes and Artists Performing Services in Canada*, 16 TAX. MGMT. INT'L.J. 275 (July 10, 1987).

[76] *See e.g.,* Scott Miller, *Twins get thrown a curve in tax season,* SAINT PAUL PIONEER PRESS, April 15, 1998 at A1 (Noting how the Minnesota Twins baseball team withholds player payroll taxes for five states besides Minnesota, as well as two cities, and at present must report but not withhold earnings for New York State). As this article points out, eight jurisdictions presently tax the earnings of Minnesota baseball players. Multiply the Twins by other professional sports teams as well as by other employers who have employees working in multiple jurisdictions and the result is a significant amount of complexity if not a burden for employees and employers engaged in interstate commerce.

D. Summary

Commuters, telecommuters, and athletes represent three classes of individuals who cross state borders for employment purposes. All three types of these individuals may be taxed by states under a variety of rules related to the residence, domicile, or location of the source of income; and depending on the reasons for a person being in a state, a state's jurisdiction to tax a nonresident individual taxpayer may or may not be implicated.

Even though commuters, telecommuters, and athletes all may be subject to multiple state taxation, there is generally little data available regarding how many individuals fit into any of these categories. In the case of tax commuters, evidence suggests that their numbers are increasing. For telecommuters, the presumption is their number is also increasing, although no firm data exists. For athletes and professionals who occasionally cross state lines, the numbers may be large and growing, but there is no solid data providing a definitive answer. Finally, even though the assumption is that the numbers of people crossing state lines is increasing, the reasons for this acceleration in commuting are unclear. Perhaps tax considerations are important to this decision, but so far there is little evidence to substantiate this.

III. Constitutional Restrictions on State Taxation of Individual Taxpayers

States have broad authority to tax individuals who earn income in their state. Oftentimes, these individuals are not residents of the state.[77] Despite this broad authority to tax, the United States Constitution imposes limits upon the ability of states to tax. These limits are found in the Commerce, Due Process, Equal Protection, and Privileges or Immunities clauses. Within the jurisprudence of all these clauses is the argument that states may not discriminate against interstate commerce or nonresidents, or otherwise prefer their residents or commerce at the expense of nonresidents or out-of-state commerce. While many of the constitutional tests the

[77] Shaffer v. Carter, 252 U.S. 37 (1920).

Court has fashioned on this issue go beyond their application to individual taxpayers, a central thrust of all of these tests is to prevent states from engaging in pure protectionism.

These different legal claims rest upon a specific economic theory to maintain national markets, to encourage the free flow of goods, or otherwise encourage open borders. Hence, the assumption is that certain types of state taxation or activity may impede this free flow of goods or commerce. What this suggests, for example, is that certain types of taxes are factors considered in making economic decisions in interstate commerce. However, under the prevailing tests, there is little hard economic evidence to show that this is true.

A quick review of the case law demonstrates that the Court has not generally used empirical economic data to show the impact of specific taxes on taxpayers when seeking to ascertain whether a tax is discriminatory.

A. Commerce Clause

Under the Commerce Clause of the U.S. Constitution, states may not directly discriminate against interstate commerce. The Court has indicated that facial and direct discrimination by a state against interstate commerce is always unconstitutional. As far back as *Gibbons v. Ogden*,[78] the Court has used the Commerce clause to limit state taxation of interstate commerce. Moreover, even in cases where Congress has not directly spoken or acted on an issue, the Court has applied the "dormant" Commerce clause to invalidate certain state regulations that clearly discriminate against interstate commerce. However, there are situations where the discrimination is not facial and direct. Instead, in cases where the regulation is indirect, it may be upheld if it meets several conditions of a balancing test.

Although the criteria for determining the validity of statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only

[78] 9 Wheaton 1 (1824).

incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[79]

Under the *Pike* test,[80] even if a state discriminates against interstate commerce, the regulation will be upheld if, on balance, local interests outweigh the burdens on interstate commerce and the regulation serves an important local purpose.

In addition to the above limits, when state tax income is derived from interstate commerce there are two additional requirements. First, under *Complete Auto Transit v. Brady*,[81] states must meet four requirements before they can tax. First, there must be a nexus between an activity and the state. Second, the tax must be fairly apportioned to the share of property or income generated within the state. Third, the tax must not discriminate against interstate commerce and fourth ,the tax must be related to the benefits provided by the state. Hence, for example, a company or individual that does not have an office in the state or whose only contact would be through the mail, would not possess sufficient contacts to justify taxation.[82] Thus, Michael Jordan could not be taxed on his basketball income by states where he does not play basketball. Moreover, the tax on Jordan could only be based on income generated within the state and not based on the income generated from playing basketball in all the different states. Third, the tax must not discriminate by favoring resident players over non resident players. Finally, there must be some connection between the tax and benefits or services Jordan receives.

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[79] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1971).

[80] *See also*: C & A Carbone, Inc. v. Town of Clarkstown, New York, 114 S.Ct. 1677 (1994); Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, (1994), illustrating other recent applications and statements of this test.)

[81] 430 U.S. 274 (1977).

[82] *See e.g.*, Quill v. North Dakota, 504 U.S.298 (1992).

The Court has also imposed an "internal consistency" test[83] on some taxation, arguing that a state tax would be unconstitutional unless the tax, if applied by every jurisdiction, would not result in an impermissible interference with free trade.[84] Third, the Court also applies a dormant Commerce clause test, striking down state taxes that discriminate even in the absence of Congressional action.

These various Commerce Clause rules may implicate the ability of a state to tax commuters, telecommuters, and athletes. If a taxpayer could demonstrate that the tax directly discriminates against interstate commerce, or that the tax indirectly burdens interstate commerce so that national burdens outweigh local needs, or that the tax is unfairly apportioned, then a state might be prohibited from taxing these commuters.

B. Due Process and Equal Protection

Closely related to the Commerce clause, the Due Process and Equal Protection clauses also impose limits upon the ability of a state to tax an individual. While the Due Process and Equal Protection clauses are distinct parts of the Fourteenth Amendment, generally Equal Protection tax claims between residents and nonresidents will be treated the same as Due Process claims. This is true unless some type of fundamental right or suspect classification is implicated.[85] For our purposes, the analysis here will be directed towards Due Process.

The Court stated in *National Belle Hess v. Illinois Department of Revenue*,[86] that although the Due Process and Commerce clauses are "closely related,"[87] they impose "distinct limits on the taxing power of states." See, Quill v. North Dakota.[88] While Congress

[83] *See e.g.*, Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 239 (1987), Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984) (discussing the application internal consistency test).

[84] *Armco*, 467 U.S. at 644.

[85] WALTER HELLERSTEIN, ELECTRONIC COMMERCE AND THE FUTURE OF STATE TAXATION, IN THE FUTURE OF STATE TAXATION, at 51-64, 82-83.

[86] 386 U.S. 753 (1967).

[87] *Id.* at 756.

[88] 504 U.S. 298, 305 (1992).

can lift the bar on regulation by states under the Commerce clause, it cannot do so under the Due Process clause.[89] Hence, the Due Process clause imposes an absolute bar on certain types of state activity.

One historical requirement of the Due Process clause was that a state could not act against an individual or entity unless there was some nexus or connection between the person and the state.[90] In addition, for tax purposes, "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'"[91] In general, the second requirement has not been as important as the first, making the establishment of nexus the critical issue under the Due Process clause for taxing purposes.

Exactly what the nexus requirement is has been problematic, but generally some physical presence in the state, no matter how remote, was enough to create a nexus. For example, in *Scripto, Inc. v. Carson*,[92] the Court upheld a tax on a seller even though the entire physical presence in the state was based on in-state solicitation by independent contractors. However, despite this minimal presence, it was more than that found in *Belles Hess* where the Court refused to allow a tax on a company whose only nexus with the state was through the mail. Thus, physical presence in the state seems to be a minimal requirement to uphold a state tax under the Due Process clause.

However, in *Quill*, the Court reversed its ruling in *Belles Hess*, arguing that having a physical presence in the state was not essential to establishing the nexus to tax. Instead, contacts though the mail may be sufficient.[93] The Court reached this conclusion by drawing upon its Due Process state jurisdiction cases which had rejected physical presence in lieu of a more flexible test that looked to whether a defendant had "minimum contacts" with a

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[89] *Id.*

[90] *See, e.g.*, Miller Brothers v. Maryland, 347 U.S. 340, 344-45 (1954) (Stating that the Due Process clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.").

[91] Moorman Mfg. Co. v. Blair, 437 U.S. 267, 273 (1978).

[92] 362 U.S. 207 (1960).

[93] *Quill*, 504 U.S. at 307.

state[94] or had "purposively availed itself of the benefits of an economic market" of a state.[95] In *Quill*, the Court concluded that "a mail-order house. . . is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign."[96] Thus, the Court found that a mail-order company like *Quill* that had "purposively directed its activity" towards a state would be found to have a nexus under the Due Process clause even if the company had no physical presence in the state.[97]

Quill was a mixed blessing for states. Under the Due Process clause, the case strengthened the ability of states to tax entities that do business in the state. This would suggest that a state could probably tax a telecommuter under the Due Process clause since one could argue that the commuter had purposively directed its activity towards the state. Even if one rejects the argument that the telecommuter's income is sourced in the taxing state, *Quill* provides a possible additional Due Process nexus to tax. Yet *Quill* also maintained the Commerce clause bar on state activity, suggesting that regardless of physical presence, state taxes that discriminate against interstate commerce or which otherwise conflict with the dormant Commerce clause, would be invalidated unless Congress approved the tax.

C. Privileges and Immunities Clause

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[94] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[95] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). (Where the Court stated: "Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable forseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."). *Id.*

[96] *Id.* at 308 (Quoting Shaffer v. Heitner, 433 U.S., at 218 (1977) (Stevens, J., concurring in judgment)).

[97] *Quill*, 504 U.S. at 308.

Under the Privileges and Immunities clause, states are forbidden from treating nonresident citizens differently from their own residents. As the Court stated in *Paul v. Virginia*,[98] the object of the Privileges and Immunities Clause is to "strongly . . . constitute the citizens of the United States one people," by "plac[ing] the citizens of each State upon the same footing with the citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[99] In the context of taxes, this meant that a citizen of any State should be able to "remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to."[100]

In general, to determine whether a different tax treatment for nonresidents and residents was valid under the Privileges and Immunities clause, the Court invoked the twofold *Piper* test and asked if "(i) there is a substantial reason for the difference in treatment; and (ii) [if] the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[101] If a state court meet both prongs of the test, the differential treatment would be upheld. In general, this test means that a state cannot deny nonresidents a general tax exemption provided to residents.[102] It has also precluded different rules for residents and nonresidents in terms of deductions for business and nonbusiness expenses and in-state income.[103]

Lunding v. Tax Appeals Tribunal of the State of New York[104] represents one of the most recent Supreme Court applications of the Privileges and Immunities clause to limit state taxation. Here, a Connecticut resident who worked in New York objected to the latter's law which denied a nonresident the income tax deduction

[98] 75 U.S. 168 (1868).

[99] *Id.* at 180.

[100] Shaffer v. Carter, 252 U.S. 37, 56 (1920).

[101] Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274, 284 (1985).

[102] *See, e.g.*, Austin v. New Hampshire, 420 U.S. 656, 665 (1975).

[103] Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[104] 118 S.Ct. 766 (1998).

for alimony paid.[105] Lunding objected to the differential treatment and after losing in tax court but prevailing in a state supreme court and then eventually losing at the New York Court of Appeals on the Privileges and Immunities claim, the taxpayer was granted cert. before the Supreme Court.[106]

In applying the two part *Piper* test to the New York tax law, the Court first tried to determine the reason New York gave for the different treatment of residents and non-residents. According to the state, New York did not have jurisdiction over Lunding's personal activities, such as divorce and alimony, that were outside of the state. The state asserted that expenses such as these should not have to be considered when applying its tax code to nonresidents. On the other hand, if the plaintiff's divorce and other personal activities were within the state, as is the case with residents, then a consideration of such a deduction would have been proper.[107]

A majority of the Court rejected this reason. The Court indicated that there was no evidence in the legislative history of § 631(b)(6) to suggest that its purpose was to limit deductions of expenses related to residence in another state.[108] Moreover, the Court also stated that this differential treatment of residents and nonresidents could lead to a situation where a nonresident may pay substantially more tax than a resident[109] and therefore, the state would be treating the two parties substantially different.[110] In short, New York had failed to provide a substantial justification for its treatment of nonresidents and therefore, § 631(b)(6) violated the Privileges and Immunities clause.

The implications of *Lunding* are unclear, but potentially significant. The holding suggests that almost any personal expenses of nonresidents sourced outside of a state but which

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[105] N.Y. TAX LAW § 631(b)(6) (McKinney 1987).

[106] *Lunding* at 772. In addition to the Privileges and Immunities claim, Lunding also raised Equal Protection and Commerce Clause issues which shall be ignored here.

[107] *Lunding* at 780-81.

[108] *Lunding* at 781.

[109] *Id.*

[110] *Id.*

impact the tax treatment of the nonresident taxpayer in comparison to the resident taxpayer will need to be counted. This ruling narrows if not eliminates state exclusion on nonresident, nonstate personal deductions unless some substantial justification can be shown. Exactly what would be is left in doubt in *Lunding*. However, in terms of the implications of this ruling for commuters, it opens up numerous Privileges and Immunities issues. For example, will states be required to allow tax personal deductions sourced outside the state to telecommuters or professional athletes? Perhaps not, but by not allowing this deduction, even to people who only occasionally or never set foot in the state, there may be a Privileges and Immunities violation. In brief, not only does it place limits on the kinds of taxes that can be imposed but it may also be a crow bar forcing states to provide additional tax breaks to those who are taxed. It is, potentially, then, no simply a limitation on states but also perhaps an affirmative requirement that seems to say "If a state taxes residents and nonresidents it has to treat them the same."

III. Conclusion: Taxation and Political Federalism

The Constitution places significant limits on the ability of states to tax interstate commerce. One of the implications of these limits is that while states have broad and diverse fiscal needs, often times state authority to generate revenue must take a backseat to the needs of the national government to maintain a unified national market. States are thus faced with a conflict between having the need to tax yet such taxation might very well be damaging to other important political and economic goals in the United States.

At the same time that states are subjected to numerous constitutional limitations on their power to tax interstate commerce, states also have their own important police power and constitutional functions to perform. In particular, states are sovereign units, required to perform numerous functions related to education, social welfare, and public safety, among other duties. Moreover, given the rise of the numbers of individuals who commute across state lines to work, states will no doubt face increased pressures and needs to address the costs associated with these new workers. Hence, there is a strong incentive to tax commuters.

In addition, recent changes in the political climate in the United States has supposedly returned more political control back to the states. For example, the 1994 Republican Party *Contract for America* sought to return more control to the states over welfare and it also sought to place limits on the government mandating that the states perform federal duties without also receiving federal funds.[111] This "Unfunded Mandates" law,[112] as well as other recent Supreme Court limits on federal power over states all suggest that at least in theory, states are enjoying increased political power in the federal system.[113]

While states are reaping the benefit of increased political autonomy, they do not appear to be reaping any increased state taxation power under the Constitution. As *Lunding* suggests, states are still subjected to significant limits on how they tax residents and nonresidents because this taxation autonomy threatens the maintenance of a national uniform economy. Thus, we have a paradox. How, for example, can we give states more political control over their destiny when that control may impinge upon interstate commerce. Or, how do we give states more control while at the same time limit their ability to tax? In the context of tax commuters, the challenge is that as more people cross state boundaries to work, more and more individuals are facing multiple taxation in several states. What we do not know is exactly how this possibility of multiple taxation actually influences commuting decisions or how it may impede or otherwise influence interstate

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[111] ED GILLESPIE AND BOB SCHELLHAS EDS., CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH AND REPRESENTATIVE DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (1994).

[112] 2 U.S.C. 1501 *et seq.* (1999)

[113] *See, e.g.,* Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2219 (1999); College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board, 119 S.Ct. 1354 (1999); Alden v. Maine, 119 S.Ct. 2240 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ; U.S. v. Lopez, 514 U.S. 549 (1995) (Congress lacked the power under the Commerce clause to ban guns in local schools); New York v. U.S., 112 S.Ct. 2408 (1992) (Federal government may not compel states to enact or administer a federal regulatory program).

commerce. Perhaps when only a few people crossed lines to work the threat of multiple taxation was not a major issue, but with the increase in the numbers and types of those who occasionally or routinely cross state lines physically, or who cross state lines electronically, the cumulative burdens of this taxation may have a pronounced effect on interstate commerce, yet we do not know.

As this Article has shown, tax commuters are of at least three different types with little if any attention has been given to understanding how state taxation may influence these commuters. Different theories on what constitutes tax discrimination rest upon an assumption that specific taxes or regulations will in fact discriminate. By that, to discriminate may mean to inhibit or deter interstate commerce. However, there is no hard evidence on the impact of taxes on the three different types of tax commuters examined in this Article. Instead, commuting in general seems to be increasing in spite of the fact that states have the opportunity to tax much of this activity.

What we are left with then is a state taxation power that is both overinclusive and underinclusive. It is overinclusive in that states may be able to tax the income of people who never physically set foot in their state, potentially stretching the long hand of state taxation (and perhaps ultimately personal jurisdiction for lawsuits) in an almost limitless fashion. It is underinclusive in that at present the Constitution may be limiting states' capacity to fashion taxation policies that reflect the new realities of work and commuting that are arising.

What this Article concludes with then is a statement about constitutional doctrine. First, there is an absence of data regarding the numbers, reasons, and how tax rates or differential tax treatments really influence behavior. What if individuals are not deterred by tax differences or that tax differences are not considered when decisions to commute are being made. If there is no real empirical deterrence of commuting, is there discrimination? Ferdinand Schoettle is correct that we need an economic theory of tax to guide our understanding of state taxation.[114] Second, even more that a theory is needed. Instead, economic data to test theory

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[114] *Schoettle* at 1119.

is required. It is required, in part, because the rise of commuting of all types may challenge the current way the constitutional line is drawn between state power to tax and the national needs to maintain a uniform national economy. In demanding this empirical information the Court would not be venturing into foreign territory. After all, court doctrine in the past has been influenced by life experiences and social facts[115] and recently its Commerce clause jurisprudence has demanded of Congress empirical grounding to support legislation.[116]

Finally, what is lacking in the Court's jurisprudence on tax discrimination is an analysis of how taxation actually influences behavior. What is needed is a better understanding of how the

[115] The reference here is to Louis Brandeis' brief presented to the United States Supreme court in Muller v. Oregon, 208 U.S. 412 (1908), documenting the harsh working conditions facing women. As a result of providing empirical evidence of the working conditions facing women in factories, the Court upheld a state law regulating work place safety at a time when the Court did not seem supportive of such type of regulations. *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience") as recognition that the law rests not just upon categorical declarations but must reflect social changes.

[116] United States v. Lopez, 414 U.S. 549, 561 (1995) (Holding that Congress lacked the constitutional authority under the Commerce clause to make it a crime to carry a gun within 1,000 feet of a school because Congress had failed to demonstrate on the record how gun possession here affected interstate commerce), where the Court stated:

> Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, *e.g., Preseault v. ICC,* 494 U.S. 1, 17, 110 S.Ct. 914, 924-925, 108 L.Ed.2d 1 (1990), the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. . . . But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

increases in tax commuting may be challenging current theories of state authority and discrimination on taxation. Once we have that, then perhaps the Court can shape a constitutional doctrine that is both consistent with its other federalism decisions and with the changing patterns of work and technology.