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Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax

Edward A. Zelinsky
Yeshiva University

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APPORTIONING STATE PERSONAL INCOME TAXES TO ELIMINATE THE DOUBLE TAXATION OF DUAL RESIDENTS: THOUGHTS PROVOKED BY THE PROPOSED MINNESOTA SNOWBIRD TAX

Edward A. Zelinsky

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APPORTIONING STATE PERSONAL INCOME TAXES TO ELIMINATE THE DOUBLE TAXATION OF DUAL RESIDENTS: THOUGHTS PROVOKED BY THE PROPOSED MINNESOTA SNOWBIRD TAX

by

Edward A. Zelinsky*

ABSTRACT

As a matter of both tax policy and constitutional law, it is time to apportion state personal income taxes to eliminate the double taxation of dual residents. All individuals who, for income tax purposes, are residents of two or more states should be taxed along the lines proposed by Minnesota Governor Mark Dayton for “snowbirds:” A state should tax the income with respect to which it has source jurisdiction. As to income which two or more states tax only on the basis of residence, such states should apportion based on the dual resident’s relative presence in each state of residence. This apportioned approach would eliminate the double taxation of dual residents’ income and would comport better with modern patterns of residence and mobility.

While Minnesota’s legislature did not adopt the Dayton proposal, that proposal should provoke reconsideration of the conventional understanding of personal residence for state income tax purposes. The traditional understanding can cause double taxation when an individual is deemed to be a resident of two or more states, each entitled to tax this dual resident’s entire income. As a matter of tax policy and constitutional law, the formula advanced by Governor Dayton for Minnesota snowbirds is the proper way to tax all dual residents. A state should tax

* Morris and Annie Trachman Professor of Law of the Benjamin N. Cardozo School of Law of Yeshiva University. For comments on drafts of this Article, I thank Professors Mitchell Engler, Andrew J. Haile, Walter Hellerstein, and Carlton Smith. For research assistance, I thank Louise Loeb of the Cardozo Class of 2013 and Jacqueline Srour of the Cardozo Class of 2015.

the income with respect to which it has source jurisdiction because the income arises within the state's geographic boundaries, whether or not the taxpayer is a resident of such state. As to income with respect to which two or more states have only residence-based jurisdiction to tax, the states of residence should tax on a proportionate basis, based on the part of the year the dual resident spends in each state. The income apportioned between states of residence under this approach will typically be dual residents' intangible investment income such as dividends and interest. To eliminate double residence-based taxation of such income, the Dayton formula should, both as a matter of tax policy and of constitutional law, apply to all individuals who are, for tax purposes, residents of two or more states.

The Dayton proposal highlights the obsolescence of current tax policy and constitutional norms for states' personal income taxation of residents, norms fashioned for an earlier era. It is time to shift from the traditional personal income tax regime, with its increasing possibilities of double residence-based taxation, to a system which recognizes multiple states of residence and apportions personal income tax authority among them as to items which are not geographically sourced to the taxing state.

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I. INTRODUCTION

As a matter of both tax policy and constitutional law, it is time to apportion state personal income taxes to eliminate the double taxation of dual residents. All individuals who, for income tax purposes, are residents of two or more states should be taxed along the lines proposed by Minnesota

Governor Mark Dayton for “snowbirds”: A state should tax the income with respect to which it has source jurisdiction. As to income which two or more states tax only on the basis of residence, such states should apportion based on the dual resident’s relative presence in each state of residence. This apportioned approach would eliminate the double taxation of dual residents’ income and would comport better with modern patterns of residence and mobility.

In his 2013 budget message, Governor Dayton proposed this new, hybrid form of personal income tax treatment for an individual who has a permanent home in Minnesota and who lives in the North Star State for at least two months in any year, but who is not a Minnesota resident because he is neither domiciled in Minnesota nor spends more than half of the year in the state. For these persons, Governor Dayton suggested a new classification of “part-year” Minnesota resident for income tax purposes.¹ As to income geographically arising in Minnesota, such a part-year² resident would have the same tax obligation as a nonresident and would thus pay Minnesota personal income tax on all such Minnesota source income.³ For example, a part-year resident, like a nonresident, would report for tax purposes as Minnesota income all of the rent he receives from real property located in the North Star State.⁴

However, the part-year resident’s tax obligation would be apportioned as to those forms of income with respect to which Minnesota has jurisdiction to tax only on the basis of the taxpayer’s residence rather than such income’s geographic source. Among these items subject to residence-based tax jurisdiction, the most prominent are dividends and interest earned on stocks and bonds held for investment. As to these items of intangible investment income, the part-year resident would report a percentage of such income for Minnesota tax purposes equal to the percentage of the year the part-year resident spends in the North Star State.⁵ Governor Dayton agreed with the characterization of his proposal as a “snowbird tax,”⁶ designed to

1. See H.B. 677, 88th Leg., Reg. Sess. § 2 (Minn. 2013) (adding definition of “part-year resident” in new Minnesota Statutes § 290.01, subdivision 7(d)) [hereinafter, Minn. H.B. 677]; *id.* at § 13 (describing income taxation of part-year residents in new Minnesota Statutes § 290.17, subdivision 1(d)).

2. As I discuss below, this new category of part-year residence would be different from the traditional personal income tax status of part-year residence. See *infra* notes 98–102 and accompanying text.

3. Minn. H.B. 677, *supra* note 1, at § 13.

4. MINN. STAT. ANN. § 290.17 subdiv. 2(b) (West 2007).

5. Minn. H.B. 677, *supra* note 1, at § 13.

6. *Editorial: ‘Snowbird’ Tax Won’t Fly*, ORANGE COUNTY REG., Feb. 11, 2013, <http://www.ocregister.com/articles/state-495497-minnesota-tax.html> (“Mr. Dayton, a Democrat, is unapologetic. Yes, he told reporters last month, it’s ‘a snowbird tax, absolutely.’”). In tax terms, the quintessential snowbird is someone

raise state revenues from individuals who reside in Minnesota during the summer and who spend the rest of the year in warmer climes.

While Minnesota's legislature did not adopt the Dayton proposal,⁷ that proposal should provoke reconsideration of the conventional understanding of personal residence for state income tax purposes. The traditional understanding can cause double taxation when an individual is deemed to be a resident of two or more states, each entitled to tax this dual resident's entire income. As a matter of tax policy and constitutional law, the formula advanced by Governor Dayton for Minnesota snowbirds is the proper way to tax all dual residents. A state should tax the income with respect to which it has source jurisdiction because the income arises within the state's geographic boundaries, whether or not the taxpayer is a resident of such state. As to income with respect to which two or more states have only residence-based jurisdiction to tax, the states of residence should tax on a proportionate basis, based on the part of the year the dual resident spends in each state. The income apportioned between states of residence under this approach will typically be dual residents' intangible investment income such as dividends and interest. To eliminate double residence-based taxation of such income, the Dayton formula should, both as a matter of tax policy and of constitutional law, apply to all individuals who are, for tax purposes, residents of two or more states.

The first Part of this Article describes the current rules for residence-based personal income taxes. The prevailing rules are a combination of constitutional norms, statutory provisions, and generally accepted principles of taxation. These rules distinguish between a state's jurisdiction to tax on the basis of geographic source and a state's jurisdiction to tax on the basis of residence. Historically, the norm of residence-based taxation has been that the state of residence exercises plenary tax authority over a resident's overall worldwide income. Under the prevailing regime of personal state income taxation, double taxation occurs when two (or more) states treat the same individual as a resident for tax purposes and both tax his worldwide income without providing a tax credit for the income taxes paid to the other state of residence.

The second Part of this Article looks more closely at Governor Dayton's proposal for taxing the new category of "part-year" residents. These part-year residents would, like nonresidents, report and pay tax on all of their Minnesota source income. However, these part-year residents would also apportion and report for Minnesota income tax purposes a percentage of their other income with respect to which Minnesota exercises tax jurisdiction

who resides in Florida, which has no state income tax, while spending part of the year in a northern state, like Minnesota, which has a state income tax.

7. The Dayton proposal was not included in H.F. 677, as finally approved by Minnesota's House and Senate.

only on the basis of residence. As to this income beyond Minnesota's source jurisdiction (typically investment interest and dividends), Minnesota's tax would be based on the percentage of the year the part-time resident spends in the North Star State.

The third Part of this Article advances the tax policy critique of current law and the corresponding argument for apportioned residence-based personal income taxation along the lines of the Dayton proposal, that is, a state should tax all income sourced to that state but, as to a dual resident's other income, should only tax a proportionate share of such income. As a result of modern mobility and technology, residence is not what it used to be. It is no longer persuasive to characterize residence in traditional terms, that is, as a special, foundational relationship between an individual and a state of residence; a psychological relationship which is central to an individual's cultural and political identity and which persists even when an individual is living elsewhere. Residence in modern America is a purely utilitarian connection between an individual and a state. The problem of double residence-based personal income taxation, once a quandary of the very rich, is moving down the income scale as more individuals maintain second residences in different states, for example, the Baby Boomer retiree who establishes a winter home in a warm climate or the dual career couple which balances the demands of work and family by maintaining two homes in different states.

On days when a dual resident lives in his second state of residence, the first state provides no services which justify taxing the part of the individual's income properly apportioned to the time in his second state of residence, the state which provides services on those days. Part-year benefits do not justify full-year taxation. The status quo is economically inefficient as the specter of double residence-based taxation causes unproductive tax-motivated behavior to avoid such taxation. Such economically unproductive behavior inhibits individuals from moving across state lines as they would without interference by tax considerations.

The fourth Part of this Article advances the constitutional argument for a system of apportioned residence-based income taxation along the lines of the Dayton proposal. In important respects, the constitutional rationale for such an apportioned approach to residence-based income taxation parallels the tax policy arguments for such taxation. Dual residence-based taxation, while currently permitted, impedes interstate commerce in the form of the movement of individuals across state lines. For both Due Process and Commerce Clause purposes, a state of residence provides no public services for which it is entitled to return on the days an individual resides in another state of residence. Consequently, a state should tax only its respective pro rata share of the global income of a dual resident unless the state has source jurisdiction over that income because such income arises within the state's geographic boundaries.

The fifth and final Part argues that the best alternative is for Congress to legislate under its Commerce Clause authority a system of apportioned residence-based personal income taxation along the lines of the Dayton formula. If Congress does not act, the U.S. Supreme Court should require such apportioned residence-based income taxation under the Commerce and Due Process Clauses. If neither Congress nor the Court moves towards such a system of apportioned residence-based personal income taxation, the states can and should move in that direction on their own, either through formal agreements or through informal actions which would eventually change generally accepted principles of taxation. This Part also discusses the implementation of apportioned residence-based income taxation for individuals, including the desirability of uniform national definitions of state residency for personal income tax purposes and uniform rules for sourcing income to particular states.

The Dayton proposal highlights the obsolescence of current tax policy and constitutional norms for states' personal income taxation of residents, norms fashioned for an earlier era when dual tax residence was merely a problem of the very rich. It is time to shift from the traditional personal income tax regime with its increasing possibilities of double residence-based taxation to a system which recognizes multiple states of residence and apportions personal income tax authority among them as to items which are not geographically sourced to the taxing state.

II. THE CURRENT LEGAL STATUS OF RESIDENCE TAXATION

Both domestically and internationally, there are two accepted bases for a government to assert jurisdiction to tax: source and political allegiance.⁸ Source jurisdiction is *in rem* in nature. When a government asserts source-based jurisdiction, it asserts such jurisdiction by virtue of a taxable occurrence taking place within its borders. For example, when income is earned in a particular state, that state has the right under the Due Process Clause of the U.S. Constitution to tax that income since the taxing state is the geographic source of that income.⁹ In contrast, tax jurisdiction bottomed on political allegiance is *in personam* in nature and arises, not from the location of a taxable event, but from the relationship of the taxpayer to the government asserting the jurisdiction to tax. For example, the United States

8. Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1293-95 (2011) [hereinafter Zelinsky, *Citizenship and Worldwide Taxation*].

9. See *Okl. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n.11 (1995) ("For nonresidents, in contrast, jurisdictions generally may tax only income earned within the jurisdiction.").

asserts the right to tax its citizens' incomes wherever earned on the globe.¹⁰ This authority to tax citizens is not premised on the location in which income is earned but rather on the status of the taxpayer as a U.S. citizen. Virtually every state of the Union asserts the same right to tax the worldwide incomes of its respective residents.¹¹

Traditionally, both administrative and benefits justifications have been advanced for source-based income taxation and for residence-based income taxation. As a practical matter, the jurisdiction in which income is earned typically has the first and most enforceable claim to tax. Suppose, for example, that an Iowa resident crosses the Missouri River every day to work in Omaha. As a matter of enforcement, Nebraska has the ability to impose income tax withholding obligations on the Nebraska employer before those wages are paid to the Iowa resident.¹² Nebraska also provides public services—for example, roads and police protection—which underpin the job of the Iowa resident.

In addition to Nebraska's source-based claim to tax the wages earned within the Cornhusker State by this Iowa resident, Iowa also has a residence-based claim to tax this individual's income.¹³ Iowa provides services to this resident.¹⁴ Iowa and its localities provide the public schools which educate this resident's children. When he returns home from work, this Iowa resident is protected by police departments administered by Iowa and its municipalities. Beyond these kinds of tangible benefits, there has historically been perceived to be a special, foundational quality to the relationship

10. Reg. § 1.1-1(b); see also Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 8, at 1295-96.

11. See, e.g., *Chickasaw Nation*, 515 U.S. at 462-63 (noting the "well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction"). As a constitutional matter, a resident of a state is a citizen of that state. U.S. CONST. amend. XIV, section 1 ("All persons . . . are citizens . . . of the State wherein they reside."). Thus, we could denominate the states' taxation of their residents as citizenship-based taxation. The convention, however, is to characterize such taxation as residence-based.

12. NEB. REV. STAT. ANN. § 77-2753(1)(a) (LexisNexis 2010). Iowa has a reciprocal tax agreement with Illinois governing wage withholding when Iowa residents work in Illinois and Illinois residents work in Iowa. However, Iowa has no such agreement with Nebraska. See IOWA ADMIN. CODE r. 701-38.13(1) (2013) (Iowa reciprocal tax agreement with Illinois) & r. 701-38.13(2) (no Iowa tax agreement with any other state).

13. See, e.g., *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) ("Domicil[e] itself affords a basis for such taxation.").

14. See *id.* ("Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.").

between an individual and the jurisdiction in which he resides.¹⁵ This relationship has historically been understood as central to an individual's cultural and political identity and as persisting even when an individual lives elsewhere. The special quality of this psychological relationship has implicitly underpinned the claim of the state of residence to tax its residents' worldwide income, regardless of where such income arises and regardless of where such residents spend the day on which such income is earned.

Moreover, the state of residence, it is conventionally thought, is best positioned to aggregate all of its residents' sources of income and thus tax such residents on the basis of their overall ability to pay.¹⁶ Suppose, for example, that the Iowa resident who works in Nebraska has a summer cabin in Missouri he often rents out as well as dividend and interest investment income. Nebraska and Missouri can most easily tax the incomes earned within their respective borders by imposing withholding obligations on this individual's employer or by imposing a lien on the cabin if the Iowa resident fails to pay Missouri income taxes on the rent he earns in the Show Me State.¹⁷ In contrast, Iowa, by virtue of its *in personam* jurisdiction over its resident, is conventionally thought to be best positioned to require this Iowa resident to aggregate all of his sources of income and thereby measure his overall ability to pay.

It has also conventionally been thought that certain forms of income do not have easily determined geographic sources and thus should be taxed by the taxpayer's state of residence. To take the prototypical case, sourcing the dividends or interest paid by a multinational corporation can be a challenging task since such corporations themselves overlap a variety of jurisdictions. A multinational corporation may be incorporated in one jurisdiction, maintain its headquarters in another jurisdiction, and operate in yet other jurisdictions.¹⁸ By default, the state of the individual taxpayer's

15. As I discuss below, this traditional understanding is today unconvincing. State residence today is a utilitarian relationship between an individual and a political jurisdiction with no significant psychological component. In contrast, there remain important psychological benefits to U.S. citizenship though these benefits do not justify the taxation of citizens' worldwide incomes. See *infra* Part IV; Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 8, at 1310–11, 1316–17.

16. Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 8, at 1295.

17. See MO. ANN. STAT. § 143.902(1) (West 2006) (authorizing “a certificate of lien” on property located in Missouri to enforce income taxes, penalties, and interest).

18. This reality was recently highlighted by the hearings of the Senate Permanent Subcommittee on Investigations into Apple's complex network of tax-avoiding subsidiaries throughout the world. Nelson D. Schwartz & Charles Duhigg, *Billions in Taxes Avoided By Apple*, *U.S. Inquiry Finds*, N.Y. TIMES, May 21, 2013, at A1.

residence can be viewed as best positioned to tax dividends and similar forms of investment income derived from this individual's ownership of difficult-to-source investment intangibles like stocks and bonds.

This understanding has been embedded in the "long-recognized doctrine of *mobilia sequuntur personam* (['(m)ovables follow the . . . person'],"¹⁹ under which income derived from intangible assets like stocks and bonds is sited to, and thus taxed by, the state (or states) of residence of the owner of such assets.²⁰ As a matter of generally accepted tax policy, it has conventionally been thought that the income arising from an individual's employment, business, or professional activities are properly sited to the geographic jurisdiction in which such activities take place.²¹ Similarly, the rent an individual receives from leasing tangible property such as real estate or equipment has traditionally been sourced to the state in which the property is located.²² On the other hand, investment (as opposed to business) income derived from stocks, bonds, and other forms of intangible property has been attributed to and taxed by the state of residence of the owner of such stocks and bonds.²³ As we shall see,²⁴ the threat of dual residence-based personal income taxation in large measure arises when two or more states both implement the doctrine of *mobilia sequuntur personam* and thus both claim residence-based jurisdiction to tax the same investment income while granting no credit for the other's taxes.

For purposes of the present discussion,²⁵ the possibility of double personal income taxation arises in two settings. First, if a resident of one state earns income in another state, the latter state can tax based on the

19. *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1129 (N.Y. 1998) (alteration in original) (quoting BLACK'S LAW DICTIONARY 905 (5th ed. 1979)).

20. *See Luther v. Commissioner*, 588 N.W.2d 502, 511 (Minn. 1999) ("The well-established doctrine of *mobilia sequuntur personam* . . .").

21. *See, e.g.*, MO. ANN. STAT. § 143.181(2)(2) (For Missouri income tax purposes, "[i]tems of income, gain, loss, and deduction derived from or connected with sources within this state are those items attributable to: . . . [a] business, trade, profession, or occupation carried on in this state.").

22. *See, e.g.*, MO. ANN. STAT. § 143.181(2)(1) (For Missouri income tax purposes, "[i]tems of income, gain, loss, and deduction derived from or connected with sources within this state are those items attributable to: . . . [t]he ownership or disposition of any interest in real or tangible personal property in this state.").

23. *See, e.g.*, Mo. Ann. Stat. § 143.181(3)(1) (For Missouri income tax purposes, "[i]ncome from intangible personal property, including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from sources within this state only to the extent that such income is from: . . . [p]roperty employed in a business, trade, profession, or occupation carried on in this state.").

24. *See infra* notes 71–79, 122–27 and accompanying text.

25. Two states may also claim to be the source of the same income.

geographic source of such income while the former state can tax the same income based on the residence of the income earner.²⁶ In these contexts, double taxation might be justified by the two sets of services an individual receives when his income arises in one state while he resides in another. However, as a matter of practice, double personal taxation caused by simultaneous source- and residence-based taxation of the same income has generally been disfavored. The domestic (and international) norm is for the jurisdiction of residence to extend to its resident an income tax credit for income taxes the resident pays to the jurisdiction of source.²⁷

Second, residence-based double taxation can arise whenever two (or more) states both claim that an individual is, for tax purposes, a resident and is therefore subject to global taxation by each.²⁸ One way such dual residence arises is for two (or more) states to both assert that each is an individual's state of domicile, that is, his permanent home.²⁹ Every state with an income tax declares an individual domiciled in the state to be a resident for tax purposes.³⁰ Domiciliary status is often a fact-intensive inquiry.³¹ It is,

26. WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 397–400 (9th ed. 2009) [hereinafter HELLERSTEIN ET AL., *STATE AND LOCAL TAXATION*].

27. *See* CHARLES H. GUSTAFSON, ROBERT J. PERONI & RICHARD CRAWFORD PUGH, *TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS* 307 (4th ed. 2011) (discussing foreign tax credit).

28. HELLERSTEIN ET AL., *STATE AND LOCAL TAXATION*, *supra* note 26, at 351–53.

29. A classic instance of multiple states each claiming to be an individual's state of domicile is *Texas v. Florida*, 306 U.S. 398 (1939). For a recent review of the case law on domicile for tax purposes, see Morgan L. Holcomb & John Mulé, *Persistence of Residence*, 66 ST. TAX NOTES 247 (Oct. 22, 2012) [hereinafter Holcomb & Mulé, *Persistence of Residence*].

30. *See, e.g.*, S.C. CODE ANN. § 12-6-30(2) (2000) (“§ 12-6- individual” means an individual domiciled in this State.”). However, some states provide limited exemptions from state taxation for certain domiciliary residents. These exemptions typically extend to individuals who are out-of-state for prolonged periods. *See, e.g.*, CAL. REV. & TAX CODE § 17014(d) (West 2010); DEL. CODE ANN. tit. 30, § 1103(1) (2009).

31. *See Zelinsky, Citizenship and Worldwide Taxation*, *supra* note 8, at 1325–42. Recent cases highlight the often fact-intensive nature of domicile status. *See Mauer v. Commissioner*, 829 N.W.2d 59 (Minn. 2013); *Severns v. N.M. Taxation & Revenue Dep’t*, 2013 WL 4516183 (N.M. Ct. App. Apr. 1, 2013), cert. denied, 2013-NMCERT-006, 304 P.3d 425; *Gaied v. N.Y. State Tax Appeals Tribunal*, 101 A.D.3d 1492, 1494, 957 N.Y.S.2d 480, 482 (App Div. 2012) *rev’d*, 26, 2014 WL 590486 (Feb. 18, 2014); *Redacted Decision*, No. 201200229-I, 2013 STT 91-4 (Ariz. Dep’t Revenue Jan. 23, 2013); *James*, No. 596166, 2013 STT 104-4 (Cal. Bd. Equalization May 30, 2013); *Redacted Decision*, No. 24940, 2013 STT 111-10 (Idaho Tax Comm’n Jan. 22, 2013); *Clah & Murphy*, No. 12-19, 2012 STT 191-18 (N.M. Taxation Revenue Dep’t Sept. 21, 2012); *Cooke*, No. 823591 (N.Y.

accordingly, possible for the tax collectors in two states to look at the same facts and each conclude that an individual is domiciled in his state. If so, both states will tax the worldwide income of this individual as a resident as each state claims to be his permanent home for income tax purposes.

Residence-based double taxation can also arise when one state claims to be an individual's state of domicile while a second state simultaneously claims to be her state of residence for tax purposes by virtue of other criteria. Such nondomiciliary residence is often denoted as "statutory residence."³² States utilize different tests to determine when an individual, though not domiciled in the state, is a statutory resident for income tax purposes. Sixteen states³³ and the District of Columbia assert that an individual is a statutory resident for tax purposes if he lives in the state for more than 183 days in any year and maintains a permanent place of abode within the state.³⁴ Four states propound a substantively similar statutory rule, declaring that an individual, though not domiciled in the state, is nevertheless

Div. Tax App. Nov. 15, 2012); Redacted Decision, No. 11-051P, 2012 STT 86-34 (W. Va. Off. Tax App. Mar. 20, 2012).

32. Aaishah Hashmi, *Is Home Really Where the Heart Is?: State Taxation of Domiciliaries, Statutory Residents, and Nonresidents in the District of Columbia*, 65 TAX LAW. 797, 798 (2012) [hereinafter Hashmi, *Is Home Really Where the Heart Is?*].

33. CONN. GEN. STAT. ANN. § 12-701(a)(1)(B) (West 2008); DEL. CODE ANN. tit. 30, § 1103(2) (2009); D.C. CODE § 47-1801.04(42) (LexisNexis 2012); GA. CODE ANN. § 48-7-1(10)(A)(iii) (2013); IND. CODE ANN. § 6-3-1-12(b) (LexisNexis 2007); KY. REV. STAT. ANN. § 141.010(17) (West 2010); ME. REV. STAT. ANN. tit. 36, § 5102(5)(B) (2010); MASS. GEN. LAWS ANN. ch. 62, § 1(f)(2) (West 2009); MO. ANN. STAT. § 143.101(1) (West 2006); N.J. STAT. ANN. § 54A:1-2(m)(2) (West 2002); N.Y. TAX LAW § 605(b)(1)(B) (McKinney 2006); 72 PA. CONS. STAT. ANN. § 7301(p) (West 2000); R.I. GEN. LAWS § 44-30-5(a)(2) (2010); UTAH CODE ANN. § 59-10-103(1)(q)(i)(B) (LexisNexis 2011); VT. STAT. ANN. tit. 32, § 5811(11)(A)(ii) (2008 & Supp. 2013); VA. CODE ANN. § 58.1-302 (2013); W. VA. CODE ANN. § 11-21-7(a)(2) (LexisNexis 2010). Many of these statutes exempt from their coverage any individual who is serving in the armed forces. See, e.g., R.I. GEN. LAWS § 44-30-5(a)(2).

34. See Hashmi, *Is Home Really Where the Heart Is?*, *supra* note 32, at 818 ("The statutory residence analysis usually focuses on two key aspects: (1) physical presence for 183 days and (2) maintaining a place of abode."). The application of statutory residence rules has often been controversial. See, e.g., *Gaied*, 957 N.Y.S.2d 480; Barker, No. 822324 (N.Y. Div. Tax App. Jan. 13, 2011). For commentary on *Barker*, see Edward Zelinsky, *NY's Irrational Income Taxation of Nonresidents: The Barker Decision*, OUPBLOG, June 6, 2011, <http://blog.oup.com/2011/06/barker/>. For commentary on *Barker* and *Gaied*, see Peter L. Faber, *New York's Statutory Residence Wars: A Ray of Hope?*, 67 ST. TAX NOTES 477 (Feb. 18, 2013).

a resident for tax purposes if he maintains a permanent place of abode in the state and resides in the state for more than six months of the year.³⁵

Three states' statutes trigger resident status for tax purposes when an individual with a permanent in-state home lives there for a period longer than 183 days or six months. For tax income purposes, Idaho law classifies as a resident an individual who is not domiciled in Idaho but who maintains an Idaho home and spends more than 270 days in the state in any year.³⁶ North Dakota treats an individual as a resident for tax purposes if he has a permanent in-state place of abode and spends more than seven months of the year in-state.³⁷ Oregon declares an individual to be a resident for tax purposes if he maintains a permanent place of abode in-state and also spends more than 200 days of the year in-state.³⁸

Other states classify individuals as statutory residents for tax purposes on the basis of in-state physical presence (with no requirement of a permanent abode) while yet other states treat an individual as a resident on the basis of an in-state abode (even if his in-state physical presence is minimal). In the former category, Michigan deems an individual to be residing in the state for tax purposes if he lives in-state "at least 183 days during the tax year."³⁹ New Mexico defines statutory residency as in-state physical presence "for one hundred and eight-five days or more during the taxable year."⁴⁰ Oklahoma imposes a presumption of residence status for tax purposes if an individual in any year "spends in the aggregate more than seven (7) months" in the Sooner State.⁴¹ None of these states requires an in-state abode to establish residence for income tax purposes.

In contrast, other states declare an individual to be a resident for income tax purposes by virtue of an in-state home even if his in-state physical presence during the year is minimal. Iowa's statute and regulation exemplify this approach.⁴² If an Iowa resident retires to Florida but keeps a "permanent place of abode within the" Hawkeye State⁴³ at which he stays for less than half of the year, Iowa may continue to classify him as a resident for

35. See ARK. CODE ANN. § 26-51-102(14) (2012); COLO. REV. STAT. ANN. § 39-22-103(8)(a) (West 2007); MINN. STAT. ANN. § 290.01 subdiv. 7(b) (West 2007); NEB. REV. STAT. ANN. § 77-2714.01(7) (LexisNexis 2010).

36. IDAHO CODE ANN. § 63-3013(1)(b) (2007).

37. N.D. CENT. CODE § 57-38-01(10) (2011).

38. OR. REV. STAT. § 316.027(1)(a)(B) (2011). However, Oregon eschews resident status if an individual can prove that he was in the state "only for a temporary or transitory purpose." *Id.*

39. MICH. COMP. LAWS SERV. § 206.18(1)(a) (LexisNexis 2012).

40. N.M. STAT. ANN. § 7-2-2(S) (LexisNexis 2008).

41. OKLA. STAT. ANN. tit. 68, § 2353(4) (West 2008 & Supp. 2014).

42. IOWA CODE ANN. § 422.4(15) (West 2011); IOWA ADMIN. CODE r. 701-38.17 (2013).

43. IOWA CODE ANN. § 422.4(15).

income tax purposes.⁴⁴ In a case like this, a residence test like Iowa's may effectively impose an unapportioned snowbird tax on the (now retired) resident, taxing his entire income even though he spends most of the year in the Sunshine State. Mississippi declares a non-domiciled individual to be a resident for income tax purposes if she "maintains a legal or actual residence within the state."⁴⁵ Montana bestows resident tax status on an individual if he has a permanent abode in the state and has "not established a residence elsewhere."⁴⁶

Some states impose resident status for tax purposes under either standard, that is, in-state presence or a permanent place of abode within the state. Louisiana declares a non-domiciled individual to be a statutory resident if he has a permanent abode in the Pelican State or spends more than six months of the year there.⁴⁷ Similarly, Alabama creates a presumption of statutory residence for income tax purposes if an individual either "maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state."⁴⁸

Finally, Arizona, Hawaii, California, Illinois, and North Carolina declare an individual to be a resident for personal income tax purposes if she is in the state "for other than a temporary or transitory purpose."⁴⁹ Arizona and California augment this standard with a presumption that an individual in the state for more than nine months in any year is a statutory resident for that year.⁵⁰ Hawaii presumes residence for tax purposes when an individual is in the Aloha State for more than 200 days in any year.⁵¹ North Carolina presumes residence for income tax purposes when an individual is in the Tar Heel State in any year for more than 183 days.⁵²

I suggest below that Congress could productively simplify this welter of statutory residence rules by promulgating a single, nationwide standard for statutory residence.⁵³ However, at this stage in the discussion, the point is that whatever definition a state utilizes to determine statutory residence, if an individual triggers that statutory test, he will be subject to

44. See IOWA ADMIN. CODE r. 701-38.17(4), ex. a.

45. MISS. CODE ANN. § 27-7-3(e) (2013).

46. MONT. CODE ANN. § 15-30-2101(28) (2013).

47. LA. REV. STAT. ANN. § 47:31(1) (2001).

48. ALA. CODE § 40-18-2(b) (LexisNexis 2011).

49. See ARIZ. REV. STAT. ANN. § 43-104(19)(a) (2013); CAL. REV. & TAX CODE § 17014(a)(1) (West 2010); HAW. REV. STAT. § 235-1 (2001); 35 ILL. COMP. STAT. ANN. 5/1501(20)(A)(i) (West 2012); N.C. GEN. STAT. § 105-134.1(12) (2013).

50. ARIZ. REV. STAT. ANN. § 43-104(19)(c); CAL. REV. & TAX CODE § 17016.

51. HAW. REV. STAT. § 235-1.

52. N.C. GEN. STAT. § 105-134.1(12).

53. See *infra* text accompanying notes 185–86.

personal income tax on his global income in that state of statutory residence as well as in the state in which he is domiciled, that is, in which he maintains his permanent home.

In similar fashion, two (or more) states can both claim that an individual is a statutory resident under their respective criteria for statutory residence. In such cases also, both states of statutory residence can subject this dual resident to state taxation of his worldwide personal income. For example, a taxpayer who maintains permanent places of abode in both Des Moines and New Orleans would be treated by both Iowa and Louisiana as a statutory resident subject to state income taxes in both states on his global income.

To date, there has been greater acceptance of the double taxation caused when two states both claim the right to tax an individual on the basis of residence than there is of dual taxation caused when one state taxes on the basis of source while the other taxes on the basis of residence. Residence-based double taxation has been accepted as constitutional.⁵⁴ Eight states abate all double personal income taxation, whether the second taxing state asserts source-based or residence-based jurisdiction. These eight states— Illinois,⁵⁵ Maryland,⁵⁶ Massachusetts,⁵⁷ Minnesota,⁵⁸ New Jersey,⁵⁹ Ohio,⁶⁰ Pennsylvania,⁶¹ and Wisconsin⁶²—simply require that a resident pay or owe income taxes to a second state to secure a credit against these states' respective income taxes. Thus, these eight states grant a credit against their income taxes if a second state imposes its income tax on the basis of either residence or source.

However, most states limit their income tax credits to situations where dual taxation results from a second state taxing on the basis of source. Such limited credits do not abate the double taxation caused when a second state asserts that it too is the jurisdiction of the taxpayer's residence, entitled to tax his worldwide income.

States use several formulas to limit their respective credits to income taxes asserted by a second state on the basis of source rather than residence.

54. *See, e.g.*, *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 181 (1942) (“[T]here is no constitutional rule of immunity from taxation of intangibles by more than one State.”); *Texas v. Florida*, 306 U.S. 398, 410 (1939).

55. 35 ILL. COMP. STAT. ANN. 5/601(b)(3) (West 2012).

56. MD. CODE ANN., TAX-GEN. § 10-703(a) (LexisNexis 2010).

57. MASS. GEN. LAWS ANN. ch. 62, § 6(a) (West 2009).

58. MINN. STAT. ANN. § 290.06 subdiv. 22(a) (West 2007); *see also* *Luther v. Commissioner*, 588 N.W.2d 502, 510 (Minn. 1999).

59. N.J. STAT. ANN. § 54A:4-1(a) (West 2002); *see also* *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1137 (N.Y. 1998) (Titone, J., dissenting).

60. OHIO REV. CODE ANN. § 5747.05(B) (LexisNexis 2013).

61. 72 PA. CONS. STAT. ANN. § 7314(a) (West 2000).

62. WIS. STAT. ANN. § 71.07(7)(b) (West 2010).

A common formulation, used in eleven states' statutes, is that a state will grant a credit for a second state's income tax only if the income taxed by the second state is "derived from" sources within that second state.⁶³ Another statutory formulation used by six states requires that, to be creditable, another state's tax must be imposed on income "derived from" sources within such other state and additionally (and redundantly) requires that the other state's income tax not be imposed on the basis of the taxpayer's residence or domicile.⁶⁴ Louisiana and Rhode Island dispense with the first of these statutory tests ("derived from" sources in the second state) and instead permit their respective income tax credits for taxes paid to a second state only if the second state taxes such income "irrespective of the residence or domicile" of the recipient of such income, that is, taxes on the basis of source in the second state, not residence.⁶⁵

Other phrases which recur in states' statutes limiting their income tax credits are "sources in another state,"⁶⁶ "sources outside" the taxing state,⁶⁷ and "sources without" the taxing state.⁶⁸ Thus, for example, Colorado only grants its credit for income taxes paid "to another state" on income from "sources in another state."⁶⁹ Michigan's credit similarly extends only to another state's taxes levied on income "from sources outside this state."⁷⁰

63. See CONN. GEN. STAT. ANN. § 12-704(a)(1) (West 2008); DEL. CODE ANN. tit. 30, § 1111(a) (2009); IDAHO CODE ANN. § 63-3029(1) (2007); ME. REV. STAT. ANN. tit. 36, § 5217-A (2010); MO. ANN. STAT. § 143.081(1) (West 2006); NEB. REV. STAT. ANN. § 77-2730(1) (LexisNexis 2010); N.Y. TAX LAW § 620(a) (McKinney 2006); N.D. CENT. CODE § 57-38-30.3(4)(a) (2011); OR. REV. STAT. § 316.082(1) (2011); UTAH CODE ANN. § 59-10-1003(1)(c)(i) (LexisNexis 2011); W. VA. CODE ANN. § 11-21-20(a) (LexisNexis 2010).

64. See ARIZ. REV. STAT. ANN. § 43-1071(A)(1) (2013); CAL. REV. & TAX. CODE § 18001(a)(1) (West 2004); HAW. REV. STAT. § 235-55(a) (2001); MONT. CODE ANN. § 15-30-2302(2) (2013); N.C. GEN. STAT. § 105-151(a)(1) (2013); S.C. CODE ANN. § 12-6-3400(A)(1) (2000).

65. LA. REV. STAT. ANN. § 47:33(A)(1) (2001); R.I. GEN. LAWS § 44-30-18(a) (2010).

66. COLO. REV. STAT. ANN. § 39-22-108(1) (West 2007).

67. See, e.g., MICH. COMP. LAWS SERV. § 206.255(1) (LexisNexis 2012); N.M. STAT. ANN. § 7-2-13 (LexisNexis 2008).

68. See, e.g., IND. CODE ANN. § 6-3-3-3(a) (LexisNexis 2007); KY. REV. STAT. ANN. § 141.070(1) (West 2010).

69. COLO. REV. STAT. ANN. § 39-22-108(1); see also KAN. STAT. ANN. § 79-32,111(a) (1997).

70. MICH. COMP. LAWS SERV. § 206.255(1); see also IOWA CODE ANN. § 422.8(1) (West 2011).

Despite the different wordings, the import of all of these and other⁷¹ statutory formulas is the same—namely, to limit tax credits to taxes assessed by a second state on the basis of source, not residence.

When state tax credits are thus limited to the source-based taxation imposed by another state, double residence-based taxation occurs, particularly (though not exclusively) with respect to the investment income of dual residents since no credit is extended to eliminate such double taxation. Such double residence-based taxation results from the interaction of the two legal rules just examined: First, state income tax credits are usually restricted to the taxes levied by another state on income geographically sourced to that other state. Second, under the traditional maxim of *mobilia sequuntur personam* and the statutory and regulatory manifestations of that traditional maxim, the taxing state attributes investment income to itself as a state of residence. The net result of these two rules is that a state will decline to grant a credit against its personal income tax for the taxes assessed by a second state of residence on investment income since such income is not properly sourced to that second state.

New York's law is instructive in this context. New York's tax credit statute uses the common formulation that a credit is only extended by the Empire State for the income tax paid to a second state if the income taxed by that second state is "derived" from sources in that state.⁷² New York's regulation implements this statutory rule as well as the rule of *mobilia sequuntur personam* by denying a New York resident an income tax credit for the taxes assessed by a second state of residence on the New York resident's investment income:

[T]he resident credit is not allowed for tax imposed by another jurisdiction upon income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction. Thus, for example, no resident credit is allowable for an income tax of another jurisdiction on dividend income not derived from property employed in a business, trade or profession carried on in such jurisdiction.⁷³

71. See, e.g., ALA. CODE § 40-18-21(a)(1) (LexisNexis 2011); ARK. CODE ANN. § 26-51-504(a)(1) (2012); D.C. CODE § 47-1806.04(a) (LexisNexis 2012); GA. CODE ANN. § 48-7-28 (2013); MISS. CODE ANN. § 27-7-77(1) (2013); OKLA. STAT. ANN. tit. 68, § 2357(B)(1) (West 2008 & Supp. 2014); VT. STAT. ANN. tit. 32, § 5825(a) (2008); VA. CODE ANN. § 58.1-332(A) (2013).

72. N.Y. TAX LAW § 620(a) (McKinney 2006).

73. N.Y. COMP. CODES R. & REGS. tit. 20, § 120.4(d) (2006); see also CONN. AGENCIES REGS. § 12-704(a)-4(a)(3) (2013); W. VA. CODE R. § 110-21-20.4.4 (1990) (no credit for West Virginia resident for second state's taxation of

Since New York attributes a resident's intangible income to itself and since New York grants credits for another state's taxes only when that other state has source jurisdiction over the double taxed income, New York will not grant a credit against its income tax for taxes assessed by a second state on dividends, interest, and similar income from intangible investment property. In the words of the Court of Appeals, New York's highest court: "The credit is not generally available for intangible income because that income has no identifiable situs. Intangible income generally is not derived, at least directly, from the taxpayer's efforts in any jurisdiction outside of New York, and cannot be traced to any jurisdiction outside New York."⁷⁴

California law is to the same effect, that is, no California income tax credit to avoid double taxation of intangible investment income. In *Christman v. Franchise Tax Board*,⁷⁵ Mr. Christman was a California resident and a shareholder of a closely held Georgia corporation. The corporation operated in Georgia and Mr. Christman's stock certificates were held in Georgia by an attorney there. The Golden State's appeals court denied Mr. Christman a credit on his California personal income return to offset the Georgia state income tax Mr. Christman paid on the Georgia corporation's earnings. For tax purposes, the court noted, "California law utilizes the *mobilia sequuntur personam* doctrine to locate the stock in California."⁷⁶ Accordingly, the dividends from the Georgia corporation were deemed, by virtue of Mr. Christman's California residence, to be "derived in" the Golden State.⁷⁷ As these were nonbusiness dividends,⁷⁸ no California personal income credit abated the double taxation of Mr. Christman's stock-based income caused by California and Georgia both taxing the same income.

Hence, if someone domiciled in California spends enough time at an apartment in Manhattan to be a statutory resident of the Empire State, both states will tax this dual resident's investment income from stocks and bonds. Both New York and California will treat the dual resident's dividends and interest as sourced to it on the basis of residence. Neither state will grant a credit for the income taxes levied by the other state on the dual resident's

"income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction").

74. *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1129 (N.Y. 1998); see also *Luther v. Commissioner*, 588 N.W.2d 502, 511-12 (Minn. 1999) ("[T]he ownership of intangible assets and income derived from that ownership follow the beneficial owner wherever she goes and may, in proper situations, be taxed in multiple jurisdictions.").

75. 134 Cal. Rptr. 725 (Ct. App. 1976).

76. *Id.* at 732.

77. *Id.*

78. *Id.* at 730-31.

dividends and interest income since both New York and California will attribute the dual resident's intangible investment income to itself.

Had Mr. Christman been a dual resident of California and Georgia, double residence-based state personal income tax would have occurred since the Peach State's tax rules on this subject are the same as New York's and California's and thus deny a credit to relieve a dual resident of double income taxes on her intangible investment income. Georgia grants a Georgia resident a credit against another state's income taxes only if that Georgia resident "has an established business in another state, has investment in property having a taxable situs in another state, or engages in employment in another state."⁷⁹ Georgia then grants a credit against its residence-based income taxes only for taxes which the second state levies against "the net income of the business, investment, or employment" the resident maintains in such second state.⁸⁰ The Georgia credit thereby abates double taxation when a second state has source jurisdiction and taxes income arising from within the second state's boundaries. However, if Georgia and a second state also claiming to be a state of residence both tax an individual's income from intangible investment assets such as stocks and bonds, Georgia does not grant a credit against its tax in this setting since that double taxed intangible income does not arise from a "business, investment, or employment" in the second taxing state.

While dual residents' income from intangible investments is the form of income most commonly subjected to residence-based double taxation, it is not the only such double-taxed income. Income which arises in a third state can be subject to residence-based taxation by both states asserting residence-based jurisdiction to tax a resident's global income.

Assume, for example, that a dual resident of California and New York owns a condominium in Las Vegas from which he receives rent. Nevada does not tax this rent since the Silver State lacks a state income tax. However, both California and New York tax this Nevada-sourced rent on the basis of this individual's residence, while neither state will grant a credit for the other's income tax attributable to this rent because such rent arises outside the boundaries of that other state.

To date, the U.S. Supreme Court has declined to declare unconstitutional the double taxation of an individual when two or more states both classify him as a resident. In *Cory v. White*,⁸¹ Justice Powell, joined by Justices Marshall and Stevens, called for the Court, under the Due Process Clause "to hold that multiple taxation on the basis of domicile—at least insofar as 'domicile' is treated as indivisible, so that a person can be the

79. GA. CODE ANN. § 48-7-28 (2013).

80. *Id.*

81. 457 U.S. 85 (1982).

domiciliary of but one State—is incompatible with the structure of our federal system.”⁸²

The Court so far has declined Justice Powell’s invitation to declare unconstitutional the double taxation which results from two or more states simultaneously asserting residence-based tax authority. Unsurprisingly, the state courts have not traveled ahead of the U.S. Supreme Court. Thus, in *Tamagni v. Tax Appeals Tribunal*,⁸³ the New York Court of Appeals declared that there was no constitutional problem when both New York and New Jersey globally taxed the same individual as a resident.

In *Tamagni*, Mr. and Mrs. Tamagni owned a home in New Jersey and were domiciled in the Garden State. They also owned an apartment in Manhattan. Mr. Tamagni was an investment banker in Manhattan. For each of the years at issue in *Tamagni*, Mr. Tamagni spent more than 183 days during the year in New York State. Consequently, both New Jersey and New York claimed the right to tax Mr. Tamagni’s worldwide income on the basis of residence—New Jersey as the state of domicile, New York as the state of statutory residence.

In *Tamagni*, the double tax was abated by New Jersey’s generous credit against its state income tax for the residence-based income taxes asserted by the Empire State.⁸⁴ Because the New Jersey credit was limited to the Garden State’s lower tax rate,⁸⁵ the practical stakes in *Tamagni* were New York’s assertion of its higher tax rate against the Tamagnis’ intangible investment income. If, however, the Tamagnis had maintained their permanent home in Connecticut rather than New Jersey, a double tax would have resulted from New York’s assertion of residence-based tax jurisdiction since neither New York⁸⁶ nor Connecticut⁸⁷ extends a tax credit for the residence-based taxes levied by a second state against a dual resident’s intangible investment income.

Mr. and Mrs. Tamagni argued that the Due Process and Commerce Clauses of the U.S. Constitution prohibited New York from taxing the global

82. *Id.* at 97.

83. 695 N.E.2d 1125 (N.Y. 1998).

84. *See id.* at 1137 (Titone, J., dissenting) (citing N.J. STAT. ANN. § 54A:4-1(a)).

85. *See* N.J. STAT. ANN. § 54A:4-1(b) (West 2002).

86. *See* N.Y. TAX LAW § 620(a) (McKinney 2006); N.Y. COMP. CODES R. & REGS. tit. 20, § 120.4(d) (West, Westlaw through Aug. 31, 2013).

87. *See* CONN. GEN. STAT. ANN. § 12-704(a)(1) (West 2008); CONN. AGENCIES REGS. § 12-704(a)-4(a)(3) (2013). Indeed, this was the situation in *Barker*, No. 822324 (N.Y. Div. Tax App. Jan. 13, 2011), described *supra*, note 34, that is, the Barkers were domiciled in Connecticut, but New York characterized them as statutory residents, and neither state granted a tax credit for the income taxes assessed by the other on the Barkers’ intangible-based income.

income, including their intangible investment income. The Court of Appeals rejected the Tamagnis' constitutional claim

inasmuch as the ability of a State to tax its own residents is undoubtedly a "traditional aspect[] of state sovereignty[,]” historical precedent and fundamental principles of federalism provide further support for our conclusion that the New York resident income tax is not unconstitutional, either on its face, or as applied to these taxpayers.⁸⁸

Similarly, in *Luther v. Commissioner*,⁸⁹ Minnesota's Supreme Court, citing *Tamagni*, held that there was no constitutional problem when Minnesota taxed a statutory resident's global income even though she was domiciled in Florida. Adelyn Luther was a classic Minnesota snowbird with homes in four states, Minnesota, Florida, Hawaii, and Montana. She lived in her Minnesota "summer home" from May until November when she went to Florida. She served as the chairperson of the board of a closely held Minnesota corporation which had been founded by her deceased husband. Mrs. Luther was also the majority shareholder of a Minnesota corporation which held real estate in the North Star State, and she owned rental property there as well. Mrs. Luther maintained accounts in Minnesota banks and in a Minnesota office of Merrill Lynch. For the years in question, Mrs. Luther was, for Minnesota income tax purposes, a Minnesota statutory resident as she spent more than half of her time in Minnesota and had a home there, though for tax purposes Florida was Mrs. Luther's domicile, that is, her permanent home.

Mrs. Luther argued that the Due Process and Commerce Clauses of the U.S. Constitution precluded Minnesota from taxing her as a statutory resident while she was domiciled in Florida. In rejecting her constitutional argument, the Minnesota Supreme Court declared that, in Due Process terms, Mrs. Luther had the constitutionally required "minimum connection"⁹⁰ to Minnesota by virtue of her time spent in the state. While in Minnesota and while in Florida, Mrs. Luther "enjoy[ed] the many services, benefits, and protections" of Minnesota law including roads, police, and fire protection; Minnesota's protection of her tangible and intangible investment assets located in the North Star State; and "Minnesota's high health and environmental standards, educational opportunities, arts and cultural

88. *Tamagni*, 695 N.E.2d at 1134 (first alteration in original) (quoting Nat'l League of Cities v. Usery, 426 U.S. 833, 849 (1976)).

89. 588 N.W.2d 502 (Minn. 1999).

90. *Id.* at 509.

opportunities, and state recreational resources, all of which are supported by state government.”⁹¹

Moreover, in Due Process terms, the Minnesota court pointed to the generous income tax credit Minnesota grants against its income tax for any “tax paid to another state.”⁹² This credit, the Court held, eliminates “the risk of multiple taxation of individual taxpayers”—“even if [that] risk . . . was a due process concern.”⁹³

The Minnesota Supreme Court similarly rejected Mrs. Luther’s Commerce Clause arguments on the ground that her dual residences in Minnesota and Florida did not implicate interstate commerce. Rather, Mrs. Luther’s “substantial contacts with Minnesota—maintenance of an abode in Minnesota and presence in Minnesota for more than one-half of the tax year—represent activity that takes place wholly within Minnesota and does not substantially affect interstate commerce.”⁹⁴

III. GOVERNOR DAYTON’S PROPOSAL FOR APPORTIONED RESIDENCE-BASED INCOME TAXES

If enacted into law,⁹⁵ the Dayton proposal would create for the North Star State’s income tax a new category of “part-year resident.”⁹⁶ Subject to this new tax classification would be individuals who are neither domiciled in Minnesota nor who meet the test for Minnesota statutory residence—namely, maintaining “a place of abode in the state and spend[ing] in the aggregate more than one-half of the tax year in Minnesota.”⁹⁷ To meet the proposed new test of part-year residence, an individual would have to maintain “a place of abode in [Minnesota] for more than one-half of the tax year, and spend[] in the aggregate more than 60 days” in Minnesota while domiciled elsewhere.⁹⁸ The classic person subject to the new Minnesota proposal would be the snowbird who spends the summer months at his Minnesota home and the rest of the year in a warmer state of domicile such as Florida.

While this new category of Minnesota resident would be denominated as “part-year,” it is fundamentally different from the tax category today labeled as “part-year” resident. Under current law, the status of “part-year” resident is usually a temporary, transitional status to full time

91. *Id.*

92. MINN. STAT. ANN. § 290.06 subdiv. 22(a) (West 2007).

93. *Luther*, 588 N.W.2d at 510.

94. *Id.* at 512.

95. The Dayton proposal was not adopted by the Minnesota legislature in 2013. *See* H.F. 677, 88th Leg., Reg. Sess. (Minn. 2013).

96. *See* H.B. 677, 88th Leg., Reg. Sess. § 2 (Minn. 2013) (adding to Minnesota Statutes § 290.01, subdivision 7, a new subsection (d)).

97. MINN. STAT. ANN. § 290.01 subdiv. 7(b) (West 2007).

98. Minn. H.B. 677 § 2.

residence. In contrast, “part-year” residence under the Dayton proposal could be a permanent and recurring status.

Consider, for example, an individual who purchases a home in Idaho as of September first and who moves into that home intending to be domiciled in Idaho as of that date. Before September first, this individual was domiciled elsewhere. For future years, he will be domiciled in Idaho for the entire year. For the year in which he bought his home, this individual is not a statutory resident of Idaho because he lives in the state for only four months.⁹⁹ However, the traditional category of “part-year” resident applies to these four months of domicile and requires this individual, on a one-time transitional basis, to pay residence-based taxes to Idaho on all his income for those four months in which he “[h]as changed his domicile . . . to Idaho.”¹⁰⁰ In subsequent years, he will be a full-year resident for tax purposes, domiciled at his new Idaho home “for the entire taxable year.”¹⁰¹ Part-year resident status provides a transition to such full-time residence.¹⁰²

In contrast, the classification of “part-year” resident proposed by Governor Dayton could apply on a permanent, recurring basis, that is, in every year in which an individual maintains a Minnesota home and spends more than 60 days in the North Star State without being domiciled in Minnesota or spending more than 183 days there. “Part-year” residence under the Dayton proposal would not be a transition to full-time tax residence. Rather, “part-year” residence would be a new status which repeatedly and continually requires the “part-year” resident to report annually a pro rata share of part of his global income as Minnesota income. This new type of part-year resident¹⁰³ would, like a nonresident, pay Minnesota income tax on all his Minnesota source income such as “income from wages” for “work . . . performed within” Minnesota,¹⁰⁴ “[i]ncome or gains from tangible property located in” Minnesota,¹⁰⁵ and “[i]ncome derived from carrying on a trade or business” in Minnesota.¹⁰⁶ However, this part-year resident, unlike a nonresident, would also report and pay tax to

99. Statutory residence in Idaho requires more than 270 days in the state. IDAHO CODE ANN. § 63-3013(1)(b) (2007).

100. Idaho Code Ann. § 63-3013A(a).

101. Idaho Code Ann. § 63-3013(1)(a).

102. For a similar statute, see OR. REV. STAT. § 316.022(5) (2011) (“§ 31-year resident’ means an individual taxpayer who changes status during a tax year from resident to nonresident or from nonresident to resident.”).

103. See Minn. H.B. 677 § 2 (adding definition of “part-year resident” in new Minnesota Statutes § 290.01, subdivision 7(d)); *id.* § 13 (describing income taxation of part-year residents in new Minnesota Statutes § 290.17, subdivision 1(d)).

104. MINN. STAT. ANN. § 290.17 subdiv. 2(a)(1) (West 2007).

105. MINN. STAT. ANN. § 290.17 subdiv. 2(b).

106. MINN. STAT. ANN. § 290.17 subdiv. 3.

Minnesota on a pro rata share of his other income unrelated to Minnesota sources,¹⁰⁷ for example, investment income from intangibles like stocks and bonds, or income earned from a business in a state other than Minnesota.

Consider in this context a variant of Mrs. Luther's situation. Since, under present law, residence is an all-or-nothing status, Mrs. Luther, domiciled in Florida, could terminate her tax status as a statutory resident of the North Star State by staying in Minnesota fewer than 183 days in any year. If so, as a nonresident, she would remain liable to Minnesota for taxes on her Minnesota source income, such as her rental income from her property located in Minnesota. However, as a nonresident, she would report none of her dividends or interest from investments as Minnesota income nor would she report any income she earns by renting her Florida, Montana, or Hawaii homes when she is not living there.

However, if Governor Dayton's proposal became law and if Mrs. Luther spent more than 60 days (but less than half the year) in Minnesota, she would, in addition to her Minnesota source income, also report and pay Minnesota income tax on a pro rata share of her intangible investment income and of her non-Minnesota rents.¹⁰⁸ Minnesota would grant a credit against its income tax for the Montana and Hawaii income taxes paid on the rents derived in those states.¹⁰⁹ Minnesota would grant no such credit as to the Florida rent since Florida imposes no state income tax on that rent. Thus, in this example, the Dayton proposal would cause Minnesota to receive the entire fiscal benefit from taxing its proportionate share of Mrs. Luther's Florida rental income since Minnesota would grant no offsetting credit as to that income. However, the North Star State would only receive a net fiscal benefit from taxing its share of the Montana and Hawaii rents to the extent that Minnesota's tax rate was higher than the rates of either (or both) of those two states since Minnesota would grant a credit against its taxes for the taxes levied by those two states.

While Governor Dayton advanced this proposal as a limited response to the perceived "snowbird" problem, I suggest that, as a matter of tax policy and constitutional law, the Dayton proposal has broader applicability. Indeed, the Dayton approach should more generally serve as the model for taxing dual residents by assigning, for tax purposes, income with a geographic source to the state of source while apportioning other income such as intangible investment income on the basis of the relative time spent in the two (or more) states of residence.

107. Minn. H.B. 677 § 13.

108. *Id.*

109. MINN. STAT. ANN. § 290.06, subd. 22(a) (West 2014).

IV. THE TAX POLICY ARGUMENT FOR APPORTIONED RESIDENCE-BASED PERSONAL INCOME TAXATION

This section advances the tax policy argument for extending to all individuals who reside in two or more states the Dayton formula for apportioned residence-based personal income taxation, namely, apportioned taxation of income over which the state taxes only on the basis of residence since it lacks source jurisdiction: As a result of modern mobility and technology, residence is not what it used to be. The problem of double residence-based taxation, once a quandary of the very rich, is moving down the income scale as more individuals maintain second residences in different states, e.g., the Baby Boomer retiree who establishes a winter home in a warm climate or the dual career couple which balances the demands of work and family by maintaining two homes in different states.

In the modern world, it is no longer persuasive to characterize residence in traditional terms, i.e., as a special, foundational relationship between an individual and a state of residence that persists even while the individual lives elsewhere. Residence today is not a foundational psychological status, central to an individual's cultural and political identity. Residence in modern America is a purely utilitarian connection between an individual and the states in which he resides.

On days when a dual resident lives in his second state of residence, the first state provides no *in personam* services that justify taxing that individual's income properly apportioned to the days spent in his second state of residence. On such days, it is that second state which provides services to the person of the dual resident. Modern technology and information sharing have eroded the premise that a single state of residence is best positioned to require an individual to report his overall income to that state. Double taxation caused by dual residence taxation is economically inefficient as it causes individuals to engage in unproductive behavior to avoid such taxation. Specifically, the threat of double taxation inhibits interstate travel in which individuals would otherwise engage absent the possibilities of such double taxation.

For two reasons, Governor Dayton's proposal—with its two month threshold for "part-year" resident status—should trigger a fundamental (and overdue) reassessment of residence-based personal income taxation as a matter of tax policy. First, the proposed two month standard to make an individual a "part-year" resident highlights and potentially increases the possibilities that individuals will be considered statutory residents by multiple states. Second, the two month threshold challenges the premise that an individual has a special, foundational relationship with a single (or any) state of residence.

As to the heightened possibilities of multiple residence-based taxation when residence is defined as 60 in-state days, consider again Mrs.

Luther who owned homes in Minnesota, Florida, Hawaii and Montana. She could spend two months each year in as many as six states. In the absence of proration, this could lead to multiple state taxation of the same income. Even without a two month test for residence, dual residence for income tax purposes is an increasing phenomenon as more individuals maintain second residences in different states.¹¹⁰

Take, for example, a retiree who lives at his traditional home during the summer, spends the winter months in a warmer state, and routinely visits his children and grandchildren in a third state, staying in a bedroom permanently set aside for him. Under a two month rule for statutory residence, this individual could trigger resident status in all three states where he has a permanent place of abode. Indeed, under current statutes like those of California,¹¹¹ Illinois,¹¹² Louisiana¹¹³ and Iowa,¹¹⁴ this individual may already be a statutory resident for income tax purposes in all three states because he has a permanent place of abode in all three states and arguably is not in any state for a temporary or transient purpose.

Or consider the married couple with careers in different states, e.g., she is a lawyer for the federal government in Washington, D.C.; he works on Wall Street. This is similar to the taxpayers' lifestyle in *Cooke*.¹¹⁵ Mr. Cooke spent the workweek as an executive living in Boston; Mrs. Cooke spent weekdays in Manhattan; the Cookes spent weekends and holidays together at their home on Long Island.

These possibilities highlight that, in light of modern mobility and technology, residence is not what it used to be. In the past, except for the very rich, most individuals had a single jurisdiction with respect to which they had a foundational relationship of residence. This state was deemed to provide on a continuing basis distinctive services justifying the taxation of the resident even when she lived elsewhere. Residence was considered a foundational psychological status, central to an individual's cultural and political identity. None of this resonates today as it did in the past.

110. The Census Bureau in 2000 found that there were in the United States 3,604,216 housing units used for "seasonal, recreational or occasional use." This represented 3.1 percent of all U.S. housing units. United States Census of Housing, *Historical Census of Housing Tables, Vacation Homes*, last accessed February 20, 2014, <http://www.census.gov/hhes/www/housing/census/historic/vacation.html>. This number includes second homes located within the same state as the owner's principal residence.

111. CAL. REV. & TAX CODE § 17014(a)(1) (West 2010).

112. 35 ILL. COMP. STAT. ANN. 5/1501(20) (West 2012).

113. LA. REV. STAT. ANN. § 47:31(1) (2001).

114. IOWA CODE ANN. § 422.4(15) (West 2011).

115. *Cooke*, No. 823591 (N.Y. Div. Tax App., Nov. 15, 2012). The issue in *Cooke* was whether, for New York City income tax purposes, the Cookes' tax residence was their apartment in Manhattan or their home on Long Island.

Consider in this context the Minnesota court's argument that the benefits provided by the North Star State to Mrs. Luther justify taxing her entire income. As a matter of tax policy, this argument is today unconvincing. When she lived in Florida, Mrs. Luther received no personal benefits as a Minnesota resident. Many of the services that the Minnesota Supreme Court says Mrs. Luther enjoyed as a Minnesota resident¹¹⁶ have nothing to do with residence and are received by all Minnesota property owners, resident and nonresident alike. The *Luther* Court, for example, noted that, while Mrs. Luther was in Florida, Minnesota provided benefits to her family corporation and to her real estate including her investment real estate and her Minnesota summer home. However, Minnesota provides the same services to the Minnesota property of nonresidents. There is no special police or fire protection for homes owned by Minnesota residents. A Minnesota corporation owned by nonresident shareholders receives the same services (and pays the same tax)¹¹⁷ as does Mrs. Luther's corporation.

Similar observations are to be made about Mrs. Luther's intangible assets. Whatever services Mrs. Luther received from the North Star State for her bank accounts at Minnesota banks were also provided to a nonresident depositor and his account at that same bank. Similarly, a North Dakota resident with a brokerage account registered at the Minneapolis office of Merrill Lynch receives the same services for this account as did Mrs. Luther for her brokerage account based at a Merrill Lynch office in Minnesota. In short, as to the services rendered to property located within Minnesota, no unique service was provided to Mrs. Luther as a resident of the state. These same services were also furnished to the equivalent property owned in Minnesota by nonresidents.

The *Luther* Court also listed benefits which were provided to Mrs. Luther's person while she lived in Minnesota, i.e., police and fire protection, cultural amenities, and environmental standards. However, these *in personam* services were provided to Mrs. Luther only when she was physically present in Minnesota. When Mrs. Luther resided in Florida, it was the Sunshine State which provided her with these protective and quality-of-life services.

Modern technology permits Mrs. Luther to manage her Minnesota properties and investments without setting foot in the North Star State and thus without using these personal benefits. The board of her family corporation can meet by Skype with Mrs. Luther sitting in her Florida home.

116. *Luther v. Commissioner*, 588 N.W.2d 509, 512 (Minn. 1999).

117. Minnesota imposes a corporate income tax on any corporation with "contacts with [Minnesota] that produce gross income attributable to sources within" Minnesota. It is thus, for tax purposes, irrelevant whether a corporation is owned by residents or nonresidents as long as the corporation has sufficient activity in Minnesota to trigger tax liability. MINN. STAT. ANN. § 290.02 (West 2007).

Email, cell phones, text messages and other modern forms of communication allow Mrs. Luther to maintain instantaneous contact with her Minnesota property manager from Florida.

No one doubts that Mrs. Luther should pay Minnesota income taxes on her Minnesota-source income and should pay property taxes for her Minnesota property. There is, as well, a plausible claim that, for the time she physically resides in Minnesota, the benefits of residence during that period justify taxation of all income Mrs. Luther earns during that period from all non-Minnesota sources. The Minnesota Supreme Court sustained an unapportioned resident income tax on Mrs. Luther's entire worldwide income because of the benefits she putatively received as a Minnesota resident while she was in Florida. However, the benefits Minnesota gave Mrs. Luther personally were restricted to the days when she was physically present in the state. Part-year benefits do not justify full-year taxation.

An earlier age perceived a continuing foundational tie between Mrs. Luther and Minnesota, a connection central to an individual's cultural and political identity. This psychological status as a resident of the North Star State was perceived to persist while Mrs. Luther lived in Florida and was thought to justify Minnesota's taxation of Mrs. Luther on her days in the Sunshine State.

Today, for two reasons, none of this resonates as it did in the past. First, we no longer understand the relationship between an individual and a state as a foundational connection of great cultural and political importance. Rather, we today understand the relationship between states and their residents in the purely utilitarian terms described by the *Luther* Court, i.e., government services purchased for tax payments. Minnesota provides no services to Mrs. Luther's person while she lives in Florida.

Second, even if an individual perceives an important psychological tie to one state of residence (Mrs. Luther really feels like an Minnesotan when she lives in Florida), that psychological connection does not justify Minnesota's taxation of Mrs. Luther's non-Minnesota income on the days she lives in Florida and receives her public services from the Sunshine State.¹¹⁸

In this context, the Dayton proposal requires us to focus upon the personal benefits received by an individual who resides in Minnesota for 61 days a year and to ask how those benefits justify residence-based taxation for the other 304 days in the year this individual spends outside the North Star State. The conclusion I draw—Minnesota should tax only its pro rata share of this resident's global income from non-Minnesota sources—is equally applicable to the person who resides in Minnesota (or in any other state) in any year for 100 days or for 182 days or for 200 days. As a matter of tax

118. Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 8, at 1314–18.

policy, the services extended to this individual's person while within the state do not justify residence-based taxation of non-Minnesota income for the days lived outside the state.

In addition to the benefits allegedly received by residents, the second traditional defense of residence-based taxation is that the state of residence, by virtue of its *in personam* jurisdiction over the resident, is best positioned to require the resident to aggregate all of his sources of income to assess his overall ability to pay.¹¹⁹ The Dayton proposal also undermines this traditional defense of residence-based taxation. The administrative justification for taxing a resident's worldwide income is less than compelling when residence is based on only 61 days of in-state presence. Another state where the resident spends more time is presumptively better positioned to enforce global taxation against all of this individual's income.

Moreover, modern technology and information sharing have eroded the premise that a single state of residence can best require an individual to report his overall income to that state. Information sharing between states¹²⁰ and information sharing between the IRS and the states¹²¹ enable all states from which an individual derives income to assess his overall ability to pay. Consider again the Iowa resident with a Missouri summer cabin he rents. The traditional understanding is that Missouri, as a source state, can best tax the rent earned by that cabin but is not as well-placed as Iowa to assess this individual's overall ability to pay. But Iowa and Missouri can share information. Missouri and the IRS can share information. It remains true, in the context of international tax issues, that the nation of residence can most effectively enforce global taxation of a resident's worldwide income. However, within the United States, the states' legal and technological ability to share information among themselves and the IRS erodes that traditional claim.

In sum, information sharing and modern technology facilitate individuals reporting their global incomes to each of the states in which they reside for part of the year. Thus, from an administrative perspective, a system of apportioned residence income tax is today quite feasible.

The Dayton proposal highlights what is typically at stake when individuals are subject to two or more states each claiming to be the state of residence: the double taxation of intangible investment income. To see this,

119. *Id.* at 1295.

120. For statutes authorizing the exchange of state tax information, *see* ARK. CODE ANN. § 26-17-403 (1997); GA. CODE ANN. § 48-2-16 (2010); S.C. CODE ANN. § 12-54-225 (2000); S.D. CODIFIED LAWS § 10-1-13.1 (2013); TEX. TAX CODE ANN. § 162.003 (West 2008); VA. CODE ANN. § 58.1-2203 (2013); W. VA. CODE § 11-14C-4 (LexisNexis 2010).

121. *See* I.R.C. § 6103(d), 26 U.S.C. § 6103(d). *See generally*, I.R.M. § 11.3.32, Disclosure to States for Tax Administration Purposes.

let us revisit the retiree with homes in both Iowa and Maine and enough presence in the Pine Tree State to qualify as a resident there.¹²² Let us further assume that, when he is away from either home, he rents it out and that his other income consists of dividends and interest from publicly traded stocks and bonds held for investment. In this case, each state will tax his worldwide income.¹²³ Iowa will grant a credit against its tax for the Maine income tax he pays on the rent earned in Maine¹²⁴ while Maine will similarly grant a credit against its income tax for the Iowa tax generated by the rent earned in Iowa.¹²⁵ However, neither state will grant a credit against its tax for the tax the other levies on this individual's intangible-based investment income. Each state, observing the prevailing rule of *mobilia sequuntur personam*,¹²⁶ will site that investment income to itself on the basis of residence.¹²⁷

To flesh out the picture further, let us assume that this individual also has a large individual retirement account reflecting his cumulative retirement savings over the course of his career. As a matter of federal law,¹²⁸ both states can tax his withdrawals from his IRA since both states claim him as a resident. This specific kind of double income taxation will become more common in the years ahead as the Baby Boomers retire and draw down their retirement savings. As a matter of tax policy, the appropriate response to this prospect is for each state of residence to apportion, taxing the same percentage of his retirement income as the percentage of his time spent in each state of residence.

The final tax policy consideration is the economic inefficiency which results from the unproductive behavior which individuals undertake to avoid dual residence-based taxation. The threat of double income taxation inhibits

122. Maine's test for statutory residence in any year is "a permanent place of abode" within the State combined with "more than 183 days" spent in the State. ME. REV. STAT. tit. 36, § 5102-5B (West 2013). Iowa's test for statutory residency is that the individual "maintains a permanent place of abode within the" Hawkeye State. IOWA CODE ANN. § 422.4(15) (West 2011).

123. ME. REV. STAT. tit. 36, § 5102-1-C(A) (West 2013) (Maine resident's "Maine adjusted gross income" is his "federal adjusted gross income" with certain modifications); IOWA CODE ANN. § 422.7 (West 2013) (Iowa "net income" is federal "adjusted gross income" with certain exceptions).

124. IOWA CODE ANN. § 422.8(1) (West 2013).

125. ME. REV. STAT. tit. 36, § 5217-A (West 2010).

126. *See Crane Co. v. Des Moines*, 208 Iowa 164, 166 (1929) ("the situs of personal property is the domicile of the owner"); *Eastman v. Johnson*, 161 Me. 387 (1965) (following doctrine of *mobilia sequuntur personam*).

127. As noted *supra*, Maine will reduce the tax burden on dual residence if the other state of residency does also. ME. REV. STAT. tit. 36, § 5128 (West 2010). Since Iowa does not have a similar relief provision, Maine does not reduce its residence-based tax.

128. 4 U.S.C. § 114 (2006).

individuals from moving across state lines as they would without interference from tax considerations. Articles in the general press¹²⁹ reveal to the public what has long been known to tax professionals: Individuals engage in much pointless activity because of state (and local) residency laws, curtailing for tax reasons their presence in states to avoid resident status.

The prototypical case is the individual who is deterred from spending more than 183 days in a state because the 184th in-state day would make him a statutory resident, liable for state income taxes on his worldwide income. An apportioned residence-based income tax might discourage this individual from coming into the state since each in-state day would increase the proportion of the year spent in-state and thus expand his pro rated income taxable to the state. On the other hand, the all-or-nothing quality of current law—e.g., an individual is or is not a resident for tax purposes depending on the 184th in-state day—creates the kind of tax cliff which is particularly intrusive in individual decision-making.¹³⁰

In short, in terms of tax policy, double state income taxation of dual residents is no longer sensible in light of a variety of factors. These include modern mobility and technology, the purely utilitarian connection today between states and their respective residents, the failure of the first state of residence to provide *in personam* benefits to a dual resident on the days she resides in the second state, and the economic inefficiencies which result when individuals engage in unproductive behavior to avoid dual residence-based taxation.

The proper solution follows the Dayton “snowbird” proposal: With respect to income over which two or more states exercise only residence-based jurisdiction, require the states of residence to apportion such income in proportion to the days spent in each such state. A single state will typically¹³¹ exercise geographic-based source jurisdiction over a particular item of income. States of residence universally grant credits to abate source-based double taxation. There is thus little danger of the states double taxing income which can be taxed by a single state on the basis of source.

In contrast, income over which two or more states exercise only residence-based jurisdiction, typically intangible investment income, is often double taxed. To avoid such double taxation, income over which states exercise only residence-based jurisdiction should, as a matter of tax policy, be apportioned among the states in which a dual resident resides on the basis of the time spent in each state of residence.

129. See, e.g., James B. Stewart, *Tax Me if You Can*, THE NEW YORKER, at 46, March 19, 2012.

130. *Id.*

131. But not always. As I discuss *infra*, there is a strong argument for federal legislation addressing those situations where two states both claim to be the state of source. See notes 198 and 199, and accompanying text.

V. THE CONSTITUTIONAL ARGUMENT FOR APPORTIONING RESIDENCE-BASED PERSONAL INCOME TAXATION

Turning from tax policy to constitutional law, the U.S. Supreme Court should reconsider its traditional position that multiple-residence-based taxation is constitutional. Whatever the merits of that position in the past, it is today obsolete, as recognized both by Justice Powell¹³² and by Judge Titone, dissenting in *Tamagni*.¹³³ The constitutional case against current law and for apportioning residence-based personal income taxation runs parallel to and in important respects overlaps the tax policy argument against the status quo.

The Supreme Court should invalidate multiple residence-based personal income taxation under both the dormant Commerce Clause and the Due Process Clause. Under those provisions of the Constitution, the Court should require states to apportion the residence-based taxation of income over which such states lack source jurisdiction.

Double state personal income taxation of dual residents violates the Commerce Clause in three respects. First, states' double taxation of dual residents impedes interstate commerce in the form of individuals crossing state lines when such boundary crossing subjects their income to double taxation. Second, dual residence-based personal income taxation also violates the requirement that taxes on interstate commerce be "fairly apportioned"¹³⁴ to avoid double taxation. Third, if a state imposes residence-based personal income taxes on a day when an individual lives in another state, such taxes violate the Commerce Clause tenet that taxes be "fairly related to the services provided by the [taxing] State."¹³⁵ On such an out-of-state day, an individual taxed as a resident by the state from which he is absent receives his *in personam* government benefits from the other state in which he resides rather than the state from which he is absent.

When a dual resident lives outside the taxing state, residence-based personal income taxation by the state from which he is absent also contravenes the venerable Due Process test that, in order to tax, a state must give something "for which it can ask return."¹³⁶ On a day spent out-of-state,

132. *Cory v. White*, 457 U.S. 85, 97 (2004).

133. *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530, 545 (N.Y. 1998) (Titone, J., dissenting).

134. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). For background on the four-part Commerce Clause test of *Complete Auto*, see Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 10, 24 (2008) [hereinafter Zelinsky, *Rethinking Tax Nexus*].

135. *Complete Auto*, 430 U.S. at 279.

136. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). See also Zelinsky, *Rethinking Tax Nexus*, *supra* note 134, at 6–7.

the state from which an individual is absent furnishes no *in personam* services justifying return in the form of residence-based income taxes.

Thus, under both the Commerce Clause and the Due Process Clause, the Supreme Court should eliminate the double income taxation of dual residents. The Court should hold that, when a taxing state lacks source jurisdiction, the state may only tax a pro rata share of the dual resident's income based on the dual resident's time in that state.

Consider in this context *Oklahoma Tax Commission v. Jefferson Lines*,¹³⁷ cited by both the *Tamagni*¹³⁸ and *Luther*¹³⁹ courts for the proposition that residence-based double taxation does not affect interstate commerce for purposes of the Commerce Clause. A careful reading of *Jefferson Lines* leads to a different conclusion, namely, that, in violation of the dormant Commerce Clause, double residence-based personal income taxation impedes interstate commerce in the form of individuals moving across state lines.

In *Jefferson Lines*, Oklahoma imposed a sales tax on the entire price of bus tickets purchased in Oklahoma for trips starting in Oklahoma, but continuing and ending outside the Sooner State. The U.S. Supreme Court sustained under the Commerce Clause this Oklahoma sales tax on the entire price for bus tickets for interstate travel.

For two reasons, the Court held that there was no danger of double taxation in this situation and thus no Commerce Clause need to apportion the sales tax among the states in which the buses traveled. First, a sales tax is levied only once in the state of sale, in this case, Oklahoma. As to Oklahoma's sale tax, "[t]he taxable event comprises agreement, payment, and delivery of some of the services in [Oklahoma]; no other State can claim to be the site of the same combination"¹⁴⁰ since the bus tickets in question were sold only once in the Sooner State. Second, there was no danger of "successive taxation"¹⁴¹ when the buses left Oklahoma for other states since those other states, if they imposed use taxes on the tickets purchased in Oklahoma, were constitutionally obligated to provide a credit against their use taxes for the Oklahoma sales tax already paid by the ticket holder.

The opposite is true of the double personal income taxation of dual residence. In these instances, residence (unlike the one-time sale of a bus ticket) is not confined to a single state; each state claiming to be a state of residence imposes duplicative residence-based taxation on the same individual's total income. There is "successive taxation"¹⁴² when the second

137. 514 U.S. 175 (1995).

138. *Tamagni*, 91 N.Y.2d at 537, 543 (citing *Jefferson Lines*).

139. *Luther v. Commissioner*, 588 N.W.2d 502, 510 (Minn. 1999).

140. *Jefferson Lines*, 514 U.S. at 190.

141. *Id.* at 191.

142. *Id.*

state of residence taxes the dual resident's worldwide income without granting a credit against the first state's residence-based taxation of that same income. This is typically the case today.¹⁴³

Thus, the Oklahoma sales tax sustained in *Jefferson Lines*—a one-time tax imposed by only one state—is distinguishable from the dual imposition by different states of “successive”¹⁴⁴ residence-based personal income taxes. A sales tax need not be apportioned for dormant Commerce Clause purposes since there is no danger of double taxation when a state imposes a sales tax on a sale occurring once within that state. Similarly, income over which a single state exercises geographic source-based jurisdiction need not be apportioned because typically¹⁴⁵ only that single state will have such source-derived jurisdiction to tax and because states of residence grant credits to eliminate the double taxation of such income. In contrast, residence-based income taxes imposed on dual residents should be apportioned because double taxation occurs when two (or more) states claim the right to tax the same income on the basis of residence and neither provides a credit for the other's taxes.

Moreover, neither *Tamagni* nor *Luther* satisfactorily confronts *Camps Newfound/Owatonna, Inc. v. Town of Harrison*.¹⁴⁶ That decision buttresses the conclusion that double residence-based personal income taxation violates the Commerce Clause because the movement of individuals across state lines is a form of interstate commerce. Double residence-based taxation impedes this movement.

The taxpayer in *Camps Newfound/Owatonna* was a nonprofit corporation which ran a summer camp in Maine for children who were Christian Scientists. Most of these campers were nonresidents of Maine. Because the camp predominantly served nonresidents, Maine law imposed real and personal property taxes which would not have been imposed had the campers been Maine residents. The U.S. Supreme Court struck the Maine property tax as improperly discriminating under the dormant Commerce Clause.

Defending Maine's statute, the Town of Harrison claimed that the camp and its property taxation were purely local matters, beyond the ambit of interstate commerce and the Commerce Clause. Justice Stevens, writing for the Court, rejected this claim, countering that “the transportation of persons across state lines . . . has long been recognized as a form of ‘commerce.’”¹⁴⁷ Although the camp's services “are consumed locally” in

143. See *supra* notes 55 through 80 and accompanying text.

144. *Id.*

145. But not always. See *infra* notes 196 and 197 and accompanying text.

146. 520 U.S. 564 (1997). *Luther* ignores *Camps Newfound/Owatonna* altogether.

147. *Id.* at 573.

Maine,¹⁴⁸ Maine's heavier property taxation of camps serving nonresidents "impeded interstate commerce in the form of travel"¹⁴⁹ by "limit[ing] the access of nonresidents to [Maine's] summer camps."¹⁵⁰

Rephrasing its position, the Town further argued that the dormant Commerce Clause did not apply to a real estate tax. The Court disagreed: "A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce."¹⁵¹

These observations indicate that the double tax caused by dual residence-based personal income taxation affects interstate commerce and thus must comply with the dormant Commerce Clause tests designed to prevent such double taxation. When a state assesses a second residence-based income tax, it imposes an "other tax"¹⁵² which penalizes the dual resident for crossing into that second state to reside there.

Indeed, the tax impediment to interstate commerce is more direct in the case of dual residence-based income taxation than it was in *Camps Newfound/Owatonna*. In that case, Maine imposed higher property taxes on the camp because the camp mainly served nonresidents. The property tax impediment to nonresidents coming into Maine was mediated through the camp which presumably charged higher fees to nonresidents than if the camp had enjoyed the preferred tax status granted to nonprofit camps serving Maine residents.

In contrast, the dual resident of Iowa and Maine is directly burdened for coming to Maine and establishing residence there, i.e., he is personally subject to Maine's second, "successive"¹⁵³ state income tax on his intangible investment income.

In its Commerce Clause discussion of need to apportion to avoid double taxation, the Court has sometimes deployed the tests of "internal consistency" and "external consistency."¹⁵⁴ The Commerce Clause test of internal consistency is formal in nature. A state tax scrutinized under the Commerce Clause is said to be internally consistent if, on its face, the tax, were it to be replicated by other states, would avoid double taxation of the same income.¹⁵⁵ In contrast, the Commerce Clause test of external consistency is practical in nature. A state tax reviewed under the Commerce Clause is said to be externally consistent if such tax "actually reflect[s] a

148. *Id.*

149. *Id.*

150. *Id.*

151. *Camps Newfound*, 520 U.S. 564, 574 (1997) (emphasis added).

152. *Id.*

153. *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 191 (1995).

154. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). See also Zelinsky, *Rethinking Tax Nexus*, *supra* note 134, at 28–29.

155. *Container Corp.*, 463 U.S. at 169.

reasonable sense of how income is generated” and thus in practice avoids double taxation.¹⁵⁶

Consider again in this context Iowa’s rules discussed earlier: First, an individual who owns a permanent home in the Hawkeye State can be a statutory resident for tax purposes even if he spends less than half of the year in-state.¹⁵⁷ Second, Iowa will not grant an income tax credit against its personal income tax if another state also taxes this individual’s intangible investment income since Iowa sources such income to itself as the state of residence.¹⁵⁸ In Commerce Clause terms, these two rules are internally inconsistent since, if replicated by other states, these rules would make double taxation inevitable whenever a individual with intangible investment income has permanent places of abode in two (or more) states. All states following Iowa’s approach would declare as statutory residents for tax purposes all individuals with permanent in-state abodes even if such residents spend less than half of the year in-state. Hence, the states replicating the Iowa regime would impose duplicative personal income taxes on these individuals’ respective global incomes and would not abate their respective income taxes to prevent the double taxation of these individuals’ investment incomes.

In Commerce Clause terms, Iowa’s rules are also externally inconsistent since, in practice, a dual resident of Iowa and of a second state such as Maine or Connecticut pays double state personal income tax on his intangible investment income. In these settings, both states tax dual residents’ global incomes without providing a credit to avoid the double taxation of investment income. Since Iowa’s personal income tax regime is both internally inconsistent in form and externally inconsistent in practice, that regime fails the Commerce Clause apportionment requirement and thus should be invalidated under the Commerce Clause as causing double taxation in theory and in practice.

Consider as well states which impose a requirement of more than 183 in-state days for statutory residence. These laws are also internally inconsistent for Commerce Clause purposes, at least as long as a day spent partially within the taxing state is classified as a full day for purposes of the 183-day threshold. These statutory residence laws are also externally

156. *Id.*

157. IOWA CODE ANN. § 422.4(15) (West 2011); IOWA ADMIN. CODE r. 701-38.17(4), example a (2013).

158. IOWA CODE ANN. §§ 422.8(1), 422.8(2)(b) (“A resident’s income allocable to Iowa is the income determined under section 422.7...”), 422.7 (net income is “adjusted gross income...as properly computed for federal income tax purposes under the Internal Revenue Code...”); *Crane Co. v. Des Moines*, 208 Iowa 164, 166 (1929) (“the situs of personal property is the domicile of the owner”).

inconsistent as other states simultaneously impose global taxation on the same individuals as domiciliary residents.

Let us revisit in this context New York's taxation of Mr. Tamagni as a statutory resident because he owned an apartment in Manhattan and spent more than half of the year in the Empire State.¹⁵⁹ When Mr. Tamagni spent part of a working day in New York, New York counted that day in full for the purposes of New York's 183-day test for statutory residence even though Mr. Tamagni started and ended the day at his house in New Jersey.¹⁶⁰ As a logical matter, double state income taxation is inherent if every state¹⁶¹ declares, as does New York, that an individual is a statutory resident if he annually spends parts of 184 days in-state. An individual can spend parts of 184 days in two or more states and can thus be classified as a statutory resident in all such states.

Consider, for example, an individual who is domiciled in California, and spends 184 days living at his Connecticut home and commuting to an office in Manhattan. Under the regime which counts part days as full days, this individual is a statutory resident of both New York and Connecticut since both states count part days as full days for purposes of their respective statutory residence rules. This result is internally inconsistent since, on its face, regimes like New York's and Connecticut's cause multiple personal income taxation as an individual can divide each of 184 days between two (or more) states and thus be classified, for tax purposes, as a resident in both such states.

Suppose, instead, that a state were to count for its 183-day test for statutory residency only those days when an individual spends all 24 hours within the state. This approach would render statutory residence rules based

159. *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530 (1998).

160. N.Y. COMP. CODES R. & REGS, tit. 20, § 105.20(c) (1998) ("presence within New York State for any part of a calendar day constitutes a day spent within New York State"). See also *Leach v. Chu*, 150 A.D.2d 842, 844 (1989) ("a day may include a portion of a 24-hour period"); *Zanetti*, No. 824337 (N.Y. Div. of Tax App., May 31, 2013) (following *Leach* as "controlling law").

161. For other states that declare that a part of day is to be treated for income tax purposes as a full day, see CONN. AGENCIES REGS. § 12-701(a)(1)-1(c) (2013) ("a day spent within Connecticut includes any part of a day"); GA. CODE ANN. § 48-7-1(10)(iii) (2013) ("for 183 days or part-days..."); MD. CODE REGS. 03.04.02.01(B)(1) (2013) (day "includes any part of a day."); MASS. GEN LAWS ch. 62, § 1(f) (2013) ("including days spent partially in and partially out of the commonwealth."); MINN. STAT. ANN. § 290.01, subd. 7(b) (West 2014) ("presence within the state for any part of a calendar day constitutes a day spent in the state"); OR. REV. STAT. § 316.027(2) ("a fraction of a calendar day shall be counted as a whole day."). For further discussion, see Hashmi, *Is Home Really Where the Heart Is?*, *supra* note 32, at pp. 824–25.

on 183 days of in-state presence¹⁶² internally consistent. An individual can, in one year, only spend 184 full days of 24 hours in one state. Hence, an individual can be a statutory resident under such a rule in only one state and can only be subject to that single state's personal income tax as a statutory resident.

However, this theoretically restrained rule of statutory residence is externally inconsistent since in practice taxation on the basis of such residence conflicts with personal income taxation based on domicile. To see this, let us consider a *Cooke*-like¹⁶³ situation involving a dual career couple with a home in Los Angeles where the wife lives throughout the week with the couple's children while she practices law. Suppose further that the husband has a job on Wall Street and a studio apartment in Manhattan. For 46 weeks of the year, the husband on Sunday nights travels to New York and returns to his family in their California home on Friday. In this example, the husband spends 184 full days¹⁶⁴ in the Empire State where he maintains a fixed place of abode. He is thus a statutory resident of New York even under a theoretical rule which only counts as in-state days entire days spent in the Empire State. The husband is also domiciled in California where he and his family maintain their principal home. Both states tax this individual's global income as a resident. While California grants an income tax credit for the income this individual earns in New York, neither state will grant a credit for the state income taxes imposed by the other on this individual's intangible investment income.¹⁶⁵ The result is in practice double taxation which the Court has, for purposes of the Commerce Clause's apportionment requirement, labeled external inconsistency.

In general, source-based taxation will be internally and externally consistent since typically¹⁶⁶ a single state is the geographic source of any particular item of income. Thus, in theory and in practice, when a state taxes personal income on the basis of source, there is no double taxation because only one state can tax on this geographic basis, and, consequently, there is no need to apportion to avoid double taxation. However, when two or more states tax a particular item of investment income, e.g., a dividend, on the basis of residence and both lack a geographic source claim to tax this item, the result is double taxation by the two states of residence when neither grants a credit for the taxes levied by the other. Hence, the need to apportion

162. See note 33, *supra*.

163. *Cooke*, No. 823591 (N.Y. Div. Tax App., Nov. 15, 2012).

164. This theoretical husband spends four (4) twenty-four hour days in New York each week, i.e., Monday through Thursday. He spends 46 such weeks in the Empire State. $46 \times 4 = 184$.

165. *Christman v. Franchise Tax Board*, 64 Cal. App. 3d 751 (1976); N.Y. COMP. CODES R. & REGS. tit. 20, § 120.4(d).

166. However, see notes 196 and 197 *infra* and accompanying text.

between the two states of residence to avoid double taxation. In contrast, source-based tax jurisdiction is inherently limited to a single state since such geographic-based taxation can only be asserted by the single state in whose boundaries the income arises.

At this point in the discussion, the eight states¹⁶⁷ that provide to their respective residents a credit for all income taxes paid to another state can agree that dual resident income taxation as practiced by the other states violates the dormant Commerce Clause requirement to apportion to avoid double taxation. However, these eight states can also assert that their respective taxes are distinguishable from the personal income taxes levied by the other states as those other states limit their respective credits to the source-based taxes assessed by another state. In contrast, the personal income taxes of these eight states comply with the Commerce Clause mandate to apportion because these states eschew all double taxation, in practice and in theory, by providing a credit for all personal income taxes assessed by a second state including residence-based taxes levied in the absence of source jurisdiction.

The U.S. Supreme Court has recognized that tax credits, since they abate double taxation, can satisfy the dormant Commerce Clause apportionment requirement.¹⁶⁸ In terms of internal and external consistency, tax laws like those of Minnesota and New Jersey, in theory and in practice, avoid all double taxation of dual residents since such states grant to their residents credits against their respective personal income taxes for all income taxes levied by another state, including taxes assessed against the intangible investment income of dual residents.

However, these liberal tax credits cannot overcome a second constitutional barrier, namely, the fact that these states, notwithstanding such liberal credits, provide no personal services to dual residents on the days such residents live out-of-state. In Commerce Clause terms, states can impose taxes that affect interstate commerce only if such taxes are “fairly related to the services provided by the [taxing] State.”¹⁶⁹ Unapportioned residence-based personal income taxes fail this constitutional test. Unapportioned residence-based double personal income taxes also contravene the venerable and quite similar Due Process test that, in order to tax, a State must give something “for which it can ask return.”¹⁷⁰ Even the most generous tax credit addresses neither of these constitutional tests, which look not to the danger of double taxation, but to the services provided *vel non*

167. Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Wisconsin. See notes 55 through 62, *supra*.

168. See, e.g., *Goldberg v. Sweet*, 488 U.S. 252, 264–65 (1989).

169. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

170. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

by the taxing state. A state provides no personal services to a dual resident on a day he lives in the other state of residence.

As we have seen, when Mrs. Luther lives in Florida, Minnesota provides no services to her person, only to her property.¹⁷¹ The public services furnished to her Minnesota property are the same as the services provided to nonresidents' Minnesota property. On the days Mrs. Luther lives in Florida, it is the Sunshine State that provides services "for which it can ask return"¹⁷² in the form of residence-based income taxes. A Minnesota tax on Mrs. Luther's non-Minnesota income for the days she lives in Florida is not "fairly related to the services provided by"¹⁷³ Minnesota to Mrs. Luther's person. There are no such Minnesota-provided services on the days she lives in Florida. On a day when Mrs. Luther is in Florida, Minnesota gives her person no services for which Minnesota can ask return.

As commentators have observed,¹⁷⁴ the Court has been reluctant to strike taxes on the dormant Commerce Clause ground that such taxes are not "fairly related to the services provided by"¹⁷⁵ the taxing state. While that reluctance may (or may not)¹⁷⁶ be justified in other settings, in the context of dual residence-based personal income taxation, the Court should recognize that, in the modern age, a state of residence provides no personal benefits justifying taxation on the days a dual resident lives in a second state of residence.

In this context, let us assume a Louisiana resident who owns a permanent place of abode in New Orleans but who spends an entire year in Colorado where he also owns a permanent home. It is appropriate for this Louisiana resident to pay property taxes on his New Orleans home and to pay Louisiana income tax on any rent he receives if he rents that home while he is away. Such rent would be classic Louisiana source income. However, in this year, Louisiana provides no services to this individual's person; the Centennial State provides all such services. While the Pelican State provides services to this individual's property during the year, Louisiana provides no personal services for which it is entitled to residence-based personal income taxes on this individual's intangible investment income such as dividends and interest.

171. See discussion *supra* at notes 115 and 116 and accompanying text.

172. *J.C. Penney*, 311 U.S. at 444.

173. *Complete Auto*, 430 U.S. at 279.

174. See, e.g., Robert D. Plattner, *New York's "Convenience of the Employer" Doctrine—A Role for Complete Auto Transit's Fourth Prong*, 2003 State Tax Today 129-29 (Jul. 7, 2003) (discussing "diminished" "stature of the fourth [Complete Auto] prong") [hereinafter Plattner, *Convenience of the Employer*].

175. *Complete Auto*, 430 U.S. at 279.

176. See Plattner, *Convenience of the Employer*, *supra* note 174 (New York's employer convenience doctrine "is best recognized as a violation of the fourth [Complete Auto] prong.").

Or consider a modified version of Mrs. Luther's situation, an individual who moves his domicile from North Dakota to Florida, but retains his house in North Dakota and spends from late April through November at that house. This individual, while no longer domiciled in North Dakota, is, for tax purposes, a statutory resident of North Dakota since he retains a permanent abode there at which he lives "more than seven months" every year.¹⁷⁷ It is unconvincing in this hypothetical to claim that an unapportioned North Dakota tax on this individual's entire income is "fairly related"¹⁷⁸ to the services provided to him during the roughly seven months he actually lives there. Florida provides the *in personam* services to this individual for the other five months of the year he lives in the Sunshine State.

An earlier age perceived that, even on the days a dual resident was absent from one state of residence, she nevertheless had a continuing relationship with that state of residence, which justified its taxation during her absence. However, such a foundational concept of residence does not resonate in the modern world, a world of mobility in which the residence relationship between an individual and a state is purely utilitarian in character. And even if we still posit that, in this case, there persists some important psychological tie between this individual and North Dakota while he is living in Florida, there is nothing about that continuing cultural and political identity that justifies North Dakota's residence-based taxation on the days he lives in Florida and receives his personal benefits from the Sunshine State.

In sum, if Congress does not adopt legislation to establish to a system of apportioned residence-based personal income taxation, the U.S. Supreme Court should apply its dormant Commerce Clause and Due Process precedent to get there: Double residence-based personal income taxation impedes the movement of individuals across state lines and exacts taxes on days when a individual receives no personal services because he lives in another state. The Court should accordingly mandate as a Commerce Clause and Due Process matter that a state lacking source jurisdiction over particular items of a dual resident's income (such as investment income from intangible assets like stocks and bonds) may only tax a pro rata share of such income based on the percentage of the year the resident spends in the taxing state.

VI. IMPLEMENTING APPORTIONED RESIDENCE-BASED TAXATION

The best way to achieve apportioned residence-based income taxation is by federal legislation under Congress's Commerce Clause power. If Congress won't adopt such legislation, the U.S. Supreme Court should require such taxation via its Commerce Clause and Due Process doctrines. If

177. N.D. CENT. CODE § 57-38-01.11 (2013).

178. *Complete Auto*, 430 U.S. at 279.

neither Congress nor the Court will act to eliminate the double taxation of dual residents' personal incomes, the states on their own can agree that a state without source jurisdiction over part or all of a dual resident's income should only tax its pro rata share of the income which the state taxes on the basis of residence.

Congress ideally should address the need for apportioned residence-based personal income taxation. Legislation can proactively anticipate problems and provide comprehensive frameworks, rather than respond to particular cases. Specialized staffs support legislative tax-writers. Taxation inevitably involves trade-offs and political calculations properly undertaken by the political branches of government. The legislative process is best suited for the give-and-take of the contending parties and interests that shape tax law. Federal legislation can also address important details on a nationwide basis.

For these reasons, Congress should implement apportioned residence-based personal income taxation through federal legislation. As previously observed, Congress has decreed that only states of residence may tax retirees' pension payments and other retirement savings.¹⁷⁹ In similar fashion, Congress has declared that only states of residence may tax the income earned by persons working in certain channels of interstate transportation.¹⁸⁰ Most recently, Congress addressed the state income taxation of individuals who work "on the navigable waters of more than one State."¹⁸¹ Congress prohibited states and their municipalities from imposing income taxes on nonresidents' compensation earned during their "regularly-assigned duties while engaged as a master, officer, or crewman on a vessel operating on the navigable waters of more than one State."¹⁸² Thus, today, only their respective states of residence may tax the wages of individuals who work in interstate waters. The same is also true of interstate bus¹⁸³ and railroad¹⁸⁴ employees, i.e., Congress has declared that only their respective states of residence may tax their earned incomes.

In this vein, Congress should today confront the problem of double income taxation caused by two or more states both claiming the same individual to be a resident for tax purposes. In such cases, Congress should limit each state to taxing the state's pro rata share of the dual resident's income over which the state only exercises residence-based jurisdiction. Such pro rata share should be determined by the amount of time the individual spends in each state of residence.

179. 4 U.S.C. § 114.

180. Zelinsky, *Rethinking Tax Nexus*, *supra* note 134, at 36–37.

181. 46 U.S.C. § 11108(b)(2)(B).

182. *Id.*

183. 49 U.S.C. § 14503(a).

184. 49 U.S.C. § 11502(a).

Federal legislation could provide a comprehensive, uniform and nationwide framework for the states' apportioned personal income taxation of dual residents. Among its other features, federal legislation could establish a uniform, nationwide definition of statutory residence for state personal income tax purposes. For this national definition, I would prefer the tax test for statutory residence proposed by Governor Dayton, i.e., a permanent place of abode in-state plus at least 61 days spent in-state during the year. While such a test is not without its interpretative issues (e.g., when is an in-state home permanent?), no rule can avoid all such issues. The Dayton proposal is more administrable than the residency test used by California and Illinois, i.e., an individual is a resident for tax purposes when in-state "for other than a temporary or transitory purpose."¹⁸⁵

Congress might instead find attractive the most common definition of a statutory resident, namely, an individual with a permanent in-state abode who spends more than 183 days in the state during the year. The fundamental point is that, whatever definition of statutory residency Congress might adopt, such a definition would help provide a comprehensive, nationwide framework for the taxation of dual residents, thereby reducing the incidence of double taxation.

Another question best addressed by federal legislation is the treatment of a day spent in two or more states. Consider in this context a situation like *Barker*,¹⁸⁶ where an individual domiciled in Connecticut commuted to work daily in Manhattan and owned a beach house in New York he used sporadically. Let us suppose that an individual commutes to his Manhattan office from his home in the Nutmeg State on 200 days, returning to Connecticut each evening. Suppose further than this individual additionally spends 20 full days in the Empire State at his beach house there and spends the remaining 145 days of the year as full days in Connecticut. Under current law, both New York and Connecticut treat the 200 commuting days as full in-state days since this individual spends part of these days in both states, waking up and going home in Connecticut while working in New York during the hours in between.¹⁸⁷ The upshot is that these 200 days are double counted for personal income tax purposes, resulting in 345 Connecticut days¹⁸⁸ and 220 New York days.¹⁸⁹ This could cause

185. CAL. REV. & TAX CODE § 17014(a)(1) (West 2010); 35 ILL. COMP. STAT. ANN. 5/1501(20) (West 2012).

186. *Barker*, No. 822324 (N.Y. Div. Tax App., Jan. 13, 2011).

187. N.Y. COMP. CODES R. & REGS. tit. 20, § 105.20(c) (1998); CONN. AGENCIES REGS. § 12-701(a)(1)-1(c) (2013).

188. The 200 commuting days spent partially in Connecticut and the 145 full days in Connecticut.

189. The 200 commuting days spent partially in New York and the 20 full days in New York.

unacceptable duplicative taxation even under a system of apportioned residence-based personal income taxation if Connecticut taxed 345/365 of this dual resident's apportionable income while New York taxed 220/365 of his apportionable income.

One solution would be federal legislation mandating each state to count a partial day for tax purposes as only one-half (1/2) of a day. Under this approach, Connecticut would tax on the basis of 245 days,¹⁹⁰ New York would tax on the basis of 120 days¹⁹¹ and together the two states would tax all, but no more than all, of this individual's income.

An alternative approach would allow each state to count a partial day as a full day but to use as the denominator for tax purposes, not 365, but the total days claimed by both states. Under this approach, Connecticut would tax 345/565¹⁹² of this individual's income from non-Connecticut sources; correspondingly, New York would tax the remaining 220/565 of this individual's investment income as well as all of his New York source income earned in Manhattan.

Again, as to this issue, there is more than one plausible choice. Federal legislation would have the benefit of imposing from among these choices a uniform nationwide rule to prevent the double taxation of dual residents' incomes.

Another issue that federal legislation can best address is the income tax treatment of days when a dual resident is present in neither state of residence. Suppose, for example, that a dual resident of California and Colorado spends some time in Nevada. Suppose, in particular, that this individual is domiciled in Los Angeles where she spends 160 days in a particular year, that she is a statutory resident of Colorado by virtue of the 185 days she is present at her "permanent place of abode within" the Centennial State¹⁹³ and that she spends the remaining 20 days of the year working for her employer at trade shows in Las Vegas. How should the fractions be calculated for apportioning this individual's personal income between her two states of residence? One possibility is a denominator of 365. Under this approach, the apportionment fraction for California would be 160/365 while the equivalent fraction for Colorado would be 185/365. This approach would effectively allocate to Nevada, a state without an income tax, part (20/365) of this individual's apportionable income. Some would consider this an acceptable result since, on her twenty days in Nevada, this individual receives government services from the Silver State.

190. $200/2 + 145 = 245$.

191. $200/2 + 20 = 125$.

192. The 345 days claimed by Connecticut plus the 220 days claimed by New York equal 565 days.

193. COLO. REV. STAT. ANN. § 39-22-103(8)(a) (West 2007).

Alternatively, in this case, Congress could decree that the denominator of the apportionment fraction should be the sum of the days spent in the two states of residence. Under this approach, the apportionment fraction used for income tax purposes by California would be 160/345, the fraction for Colorado would be 185/345 and consequently all of this individual's income would be allocated to these two states of residence.¹⁹⁴ Again, my argument is not for either of these alternatives (though I think the second approach is better) but for federal legislation, which can make a single, uniform choice for the nation as a whole.

Yet another area where federal legislation can provide a comprehensive, nationwide framework is the source of particular forms of income. I have noted that there is little danger of double taxation when a single state of source can exercise exclusive jurisdiction to tax a particular item of income arising geographically within that state's boundaries. Under the system I advocate, each state will tax income with respect to which the state has source jurisdiction (whether or not the taxpayer is a resident), but will apportion income over which the states of residence have only residence-based jurisdiction. This will typically be intangible investment income and income earned in a third state of non-residence.

A disadvantage of this proposal is that, if enacted into law, a state would have strong financial incentive to characterize income as sourced to it and thus fully taxed by it. For example, in the case of the dual resident of California and Colorado who works at trade shows in Nevada on 20 days, both California and Colorado will be incented to claim source jurisdiction for the salary allocated to those 20 days since source jurisdiction would permit the state of source to tax all of such salary on the basis of such source.

However, the generally accepted rule of taxation is that this salary should be sourced to Nevada since that is the state in which this individual physically performs services on the 20 days she attends trade shows for her employer.¹⁹⁵ Federal legislation could codify this understanding and thereby require California and Colorado to apportion their respective income taxation of this salary earned in Nevada since both California and Colorado only exercise residence-based jurisdiction over this Nevada income.

Even under current law, some states push the boundaries of source jurisdiction unacceptably. The best-known example today is New York's "convenience of the employer" doctrine under which the Empire State exercises source jurisdiction over nonresident telecommuters on the days such telecommuters work at their out-of-state homes and do not set foot in

194. $160/345 + 185/345 = 1$.

195. HELLERSTEIN ET AL., STATE AND LOCAL TAXATION, *supra* note 26, at 373-75.

New York.¹⁹⁶ As part of federal legislation mandating apportioned income taxes for dual residents, Congress should promulgate rules to prevent such overreaching by codifying and amplifying standards of geographic source for states' personal income taxes.¹⁹⁷

Consider now two arguments against national legislation implementing apportioned state taxation of dual residents' incomes. First, federalism concerns, it might be argued, counsel for states' autonomy and against congressional regulation of state income taxation. Second, if there is to be national legislation addressing the problem of residence-based dual income taxation, it might also be contended, a tie-breaking statute would be the better approach to the problem of the double taxation of dual residents.

Issues of federalism are ultimately questions of balance and judgment. In many cases, policymaking by the states is preferable to federally imposed standards because of the value of experimentation and diversity.¹⁹⁸ In other contexts, a national economy requires uniform national regulation.¹⁹⁹ There is no particular merit in permitting states to double tax the incomes of dual residents. There is merit in eliminating such duplicative taxation. Similarly, there is no benefit to the welter of different rules by

196. I am something of a poster boy for this problem. *See Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003). *See also Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y. 3d 427 (2005); Edward A. Zelinsky, *Combining the Mobile Workforce and the Telecommuter Tax Acts*, 65 STATE TAX NOTES 319 (2012); Edward A. Zelinsky, *New York's "Convenience of the Employer" Rule is Unconstitutional*, 48 STATE TAX NOTES 553 (2008); Edward A. Zelinsky, *Metro North Disruption and "Employer Convenience" Double Taxation—Again*, OUPBLOG, Oct. 7, 2013, blog.oup.com/2013/10/metro-north-disruption-employer-convenience-double-taxation.

197. *See* Edward A. Zelinsky, *The Federalist Argument for the Multi-State Worker Act*, OUPBLOG, Aug. 5, 2013, blog.oup.com/2013/08/federalist-argument-multi-state-worker-act-tax [hereinafter, Zelinsky, *Federalist Argument*].

198. *See, e.g.*, Edward A. Zelinsky, *California Dreaming: The California Secure Choice Retirement Savings Trust Act*, 19 CONN. INS. LAW J. (forthcoming) (2013) ("favor[ing] state-by-state experimentation rather than any single approach to the task of encouraging greater retirement savings."); Edward A. Zelinsky, *The New Massachusetts Health Law: Preemption and Experimentation*, 49 WM. & MARY L. REV. 229 (2007); Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U.L. REV. 741 (1997); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation and the Tenth Amendment: On Public Choice, Public Interest and Public Services*, 46 VANDERBILT L. REV. 1355 (1993).

199. Edward A. Zelinsky, *Lobbying Congress: Amazon Laws in the Lands of Lincoln and Mt. Rushmore*, 60 STATE TAX NOTES 557 (2011) (supporting national legislation to permit state sales taxation of internet and mail order purchases); Zelinsky, *Federalist Argument*, *supra* note 197 (supporting national legislation to preclude New York's "convenience of the employer" rule).

which the states determine statutory residence for income tax purposes.²⁰⁰ Congress is best positioned under the Commerce Clause to address these issues.

As previously observed, Congress has eliminated the income tax impediments caused when states exercised source jurisdiction over the wages earned within their respective boundaries by nonresident employees working in interstate waterways²⁰¹ and on interstate buses²⁰² and railroads.²⁰³ Removing the impediments to people crossing state lines is a classic congressional function under the Commerce Clause.²⁰⁴ Just as Congress eliminated the tax barriers to workers earning their salaries in interstate transportation, Congress should eliminate the double income taxation of dual residents, which is a similar tax barrier to interstate movement.

An alternative would be federal legislation that acts as a tiebreaker when two or more states both claim that an individual is, for tax purposes, a resident. Such legislation would give priority to one state over the other, granting that state exclusive jurisdiction to tax income on the basis of residence. Tie-breaking legislation along these lines would be analogous to the similar tie-breaking clauses of international tax treaties. For example, the United States Model Income Tax Convention provides that, if an individual is a resident of two or more countries, he shall for tax purposes be deemed to be a resident of only the country in which “he has a permanent home available to him.”²⁰⁵ If he has a permanent home in both countries, then he is deemed to be a resident of the country “with which his personal and economic relations are closer.”²⁰⁶ If that inquiry proves inconclusive, then the individual is, for tax purposes, deemed to be a resident exclusively of the country in which “he has an habitual abode.”²⁰⁷ As a final tie-breaker, the individual, if not assigned to one country of residence by any of the foregoing criteria, will be deemed for tax purposes to be a resident only of the country “of which he is a national.”²⁰⁸

For two reasons, federal legislation establishing apportioned residence-based taxation is preferable to similar tie-breaking legislation assigning an individual to a single state of residence. The first concern is the problem of administering any tie-breaking test: Whatever tie-breaking

200. *See supra*, notes 33–52, and accompanying text.

201. 46 U.S.C. § 11108(b)(2)(B).

202. 49 U.S.C. § 14503(a).

203. 49 U.S.C. § 11502(a).

204. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

205. United States Model Income Tax Convention of November 15, 2006, Article 4(3)(a).

206. *Id.*

207. *Id.* at 3(b).

208. *Id.* at 3(c).

criteria are selected, states will assert that they satisfy such criteria and thus exercise tax jurisdiction over the dual resident. Suppose (as is likely) that the predominant tie-breaking criterion to be embodied in federal legislation would favor the state of domicile over the state of statutory residence, giving the domicile state exclusive authority to tax on the basis of residence. Domicile is a fact-intensive inquiry.²⁰⁹ We would thus expect states currently satisfied to assert tax jurisdiction over particular individuals based on statutory residence to upgrade their claims to domiciliary status.

Second, even if such tie-breaking criteria proved administrable, an all-or-nothing approach ignores the services provided by the second (losing) state of residence. Suppose, for example, that a federal statute were to assign exclusive jurisdiction to tax Mrs. Luther's income to Florida as her state of domicile. Mrs. Luther receives significant public services during the time she spends in Minnesota at her permanent home there. Minnesota has a legitimate claim to a proportionate share of Mrs. Luther's apportionable income by virtue of those *in personam* services. That claim would be satisfied if, as I suggest, Minnesota could tax an apportioned share of her intangible investment income in addition to taxing her Minnesota source income.

In sum, Congress should eschew the tie-breaking approach and instead implement apportioned residence-based personal income taxes through legislation similar to the statutes Congress has already enacted to regulate state personal income taxes.²¹⁰

As earlier observed,²¹¹ another possibility is for the U.S. Supreme Court to recognize that the current regime of residence-based personal income taxation contravenes the principles the Court has advanced under the Commerce and Due Process Clauses of the Constitution. These clauses should be construed to prevent the double taxation of dual residents, which is permitted under current law. When a state lacks source jurisdiction, these constitutional provisions should be interpreted as preventing that state from taxing a dual resident's income on days spent in the other state of residence. On such days, the dual resident receives her public services from her second state of residence and thus should not pay for government services provided by the first state from which she is absent.

Suppose, however, that neither Congress nor the U.S. Supreme Court is willing to lead towards a system of apportioned resident-based income taxation. It is possible for the states to move in that direction on their own, either formally or informally.

209. See note 31, *supra*, and accompanying text.

210. 4 U.S.C. § 114; 46 U.S.C. § 11108(b)(2)(B); 49 U.S.C. §§ 11502(a); 49 U.S.C. 14503(a).

211. See *supra*, notes 131 and 176 and accompanying text.

Formal movement by the states toward a system of apportioned residence-based income taxation could come several ways including bilateral or multi-lateral tax agreements among the states.²¹² Such agreements today occur between adjacent states and address the tension between source-based taxation and residence-based taxation by typically forbidding the source state from taxing the earnings of a resident of the other state that is a party to the agreement. However, noncontiguous states can also enter into tax agreements. One could envision two (or more) states agreeing to apportion residence-based personal income taxes when an individual is a resident of both states signing the agreement.

The Multistate Tax Commission is another formal mechanism available to the states to coordinate their tax laws.²¹³ The Commission could prod the states toward a system of apportioned residence-based personal income taxation. The Commission could, for example, propose a Uniform Apportionment of Residence-Based Personal Income Taxation Act²¹⁴ similar to the Uniform Division of Income for Tax Purposes Act (UDITPA).²¹⁵ Such an Act could address many questions raised by the taxation of dual residents including uniform standards for determining who is a resident for tax purposes, the treatment of days spent in two or more states, and uniform rules about sourcing.

Less formally, individual states can on their own move incrementally toward a system of apportioned residence-based taxation. Maine authorizes a reduction of “the tax on that portion of [a] taxpayer’s income which is subjected to tax in [two] jurisdictions solely by virtue of dual residence, provided that the other taxing jurisdiction allows a similar reduction.”²¹⁶ Similarly, while North Carolina conventionally limits its credit against its income taxes to “taxes paid to another state . . . on income that is derived

212. See, e.g., 20 ILL. COMP. STAT. 2505/2505-575 (West 2008) (Income Tax Reciprocal Agreements); 35 ILL. COMP. STAT. 5/701(d) (West 2010) (Reciprocal Exemption); ILL. ADMIN. CODE § 100.7090 (2013) (Reciprocal Agreement); IOWA ADMIN. CODE 701-38.13(422) (2013) (Iowa reciprocal tax agreement with Illinois); MICH. COMP. LAWS § 206.256 (2012) (authorizing income tax reciprocal agreements); MONT. CODE ANN. § 15-30-2621 (2013) (authorizing income tax reciprocal agreements with contiguous states).

213. HELLERSTEIN ET. AL., STATE AND LOCAL TAXATION, *supra* note 26, at 14, 535–36; RICHARD A. POMP & OLIVER OLDMAN, 2 STATE AND LOCAL TAXATION 10–49 (5th ed. 2005) [hereinafter POMP & OLDMAN, STATE AND LOCAL TAXATION].

214. In a similar vein, Professor Holcomb and Attorney Mulé propose a uniform act to develop a standard tax definition of state resident. Holcomb & Mulé, *Persistence of Residence*, *supra* note 29.

215. HELLERSTEIN ET. AL., STATE AND LOCAL TAXATION, *supra* note 26, at 527–39; POMP & OLDMAN, STATE AND LOCAL TAXATION, *supra* note 213, at 10–46.

216. ME. REV. STAT. tit. 36, § 5128 (West 2010).

from sources within that state,”²¹⁷ in the case of dual residents, the Secretary of Revenue “may allow a credit” to avoid double residence-based taxation. As more individuals are subjected to dual residence-based income taxation because they maintain residences in two or more states, other states might emulate these unilateral efforts to abate dual residence taxation. Eventually, a consensus could develop as a general principle of taxation that, to avoid double taxation, the residence-based personal income taxes assessed against dual residents should be apportioned with respect to income over which the taxing states lack source jurisdiction.

VII. CONCLUSION

As a matter of both tax policy and constitutional law, it is time to apportion the states’ personal income taxation of dual residents to eliminate double taxation. A state should tax the income with respect to which it has source jurisdiction, whether the taxpayer is a resident or nonresident. As to income with respect to which the states of residence lack source jurisdiction, such states should apportion, based on the dual resident’s relative presence in each state of residence.

Current law can cause double taxation when an individual is treated for tax purposes as a resident of two or more states, each entitled to tax this dual resident’s entire income. Under a system of apportioned state personal income taxation for dual residents, multiple residences would be accepted as normal. Each state would tax the income geographically sourced to it but, as to income over which the states only exercise residence-based jurisdiction, each state of residence would only tax its pro rata share. Apportionment along these lines would eliminate the existing possibilities for double residence-based income taxation when an individual is treated as a resident by two or more states each of which now taxes his entire income.

A system of apportioned residence-based personal income taxation would be more consistent with the realities of residence in the modern world. The Minnesota “snowbird” proposal is a harbinger of such a system and highlights the inadequacy of current tax policy and constitutional norms for the state personal income taxation of dual residents. As a matter of tax policy and constitutional law, these norms reflect an earlier era.

As a result of modern mobility and technology, residence is not what it used to be. The tax law should recognize this by moving to a system of apportioned residence-based state personal income taxation for dual residents.

217. N. C. GEN. STAT. § 105-153.9 (2013).

