

THE CONVENIENCE OF THE EMPLOYER TEST: WHY WE  
SHOULD RECONSIDER THE CRITIQUE OF NEW YORK'S TAX  
APPORTIONMENT SCHEME

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I. INTRODUCTION

In recent years, telecommuting has become increasingly popular in the United States.<sup>1</sup> An employee telecommutes (or “teleworks”) when that employee is paid by his or her employer for work done at a location other than the employer’s office.<sup>2</sup> Most often, this location is an employee’s home.<sup>3</sup> Telecommuters often use laptop computers, additional phone lines, and handheld devices to complete their job responsibilities from outside the office.<sup>4</sup> As technology advances, opportunities to telecommute will continue to arise throughout the United States. Provided that an employer finds telecommuting to be an appropriate management technique for the company, employees elect to telecommute for myriad reasons, such as cutting commuting time, reducing living expenses, or simply wishing to be closer to the employee’s family.<sup>5</sup>

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\* Editor-in-Chief, *Albany Law Review*; Siena College, B.A., 2006; Albany Law School, J.D., 2009. I would like to thank my parents for their endless support throughout the years, regardless what path I chose to follow (or what country I disappeared to). I would also like to thank Nikki for being patient, for always encouraging me, and for laughing at my bad jokes. Finally, I would like to thank Dan Bresler for his hard work editing this article.

<sup>1</sup> See Eve Tahmincioglu, *The Quiet Revolution: Telecommuting*, msnbc.com, Oct. 5, 2007, available at <http://www.msnbc.msn.com/id/20281475>.

<sup>2</sup> U.S. General Services Administration, U.S. Office of Personnel Management, Frequently Asked Questions: What is the Definition of Telework?, <http://www.telework.gov/faq/Employee/What-is-the-definition-of-telework,27.aspx> (last visited Jan. 23, 2009).

<sup>3</sup> See *id.*

<sup>4</sup> U.S. General Services Administration, U.S. Office of Personnel Management, Frequently Asked Questions: What Equipment Will the Employee Need at the Home-Based Worksite and Who Will Provide It?, <http://www.telework.gov/faq/Telework-Coordinator/What-equipment-will-the-employee-need-at-the-homebased-worksite-and-who-will-provide-it,41.aspx> (last visited Jan. 23, 2009).

<sup>5</sup> U.S. Department of Transportation, Research and Innovative Technology Administration, Transportation Implications of Telecommuting, <http://ntl.bts.gov/DOCS/telecommute.html> (last visited Jan. 23, 2009).

As telecommuting increases throughout the United States and across state lines, accurate methods of taxing telecommuters will become more important to individual states. States have substantial discretion to develop their own tax schemes, and many states have approached the tax treatment of telecommuters differently.<sup>6</sup> New York, however, has encountered significant criticism for the application of its tax scheme: the “convenience of the employer” (“convenience”) test.<sup>7</sup>

New York’s convenience of the employer test derives its power from the interplay of several New York tax statutes and tax regulations. Section 601(e)(1) of the New York tax law taxes all income “which is derived from sources in this state.”<sup>8</sup> Section 631(c) of the tax law adds:

If a business, trade, profession or occupation is carried on partly within and partly without this state, *as determined under regulations of the tax commission*, the items of income, gain, loss and deduction derived from or connected with New York sources shall be determined by apportionment and allocation under such regulations.<sup>9</sup>

The relevant tax regulation to which the tax law refers is section 132.18(a) of Title 20 of the Codes, Rules, and Regulations of New York.<sup>10</sup> Section 132.18(a) states that:

If a nonresident employee . . . performs services for his employer both within and without New York State, his income derived from New York State sources includes that

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<sup>6</sup> See *infra* Part III.

<sup>7</sup> See Meredith A. Bentley, Huckaby v. New York State Division of Tax Appeals: *In Upholding the Current Tax Treatment of Telecommuters, the Court of Appeals Demonstrates the Need for Legislative Action*, 80 ST. JOHN’S L. REV. 1147, 1148–49 (2006). See generally Gene Gavin & Stacey Pavano, *The Long Arm of the Empire State: Convenience Rule Discourages Interstate Telecommuting*, J. MULTISTATE TAX’N & INCENTIVES, Mar.–Apr. 2002, at 6, available at 2002 WL 262758 (arguing that the convenience test hinders potential economic growth); Nicole Belson Goluboff, *The “Convenience of the Employer” Rule and The Telecommuter Fairness Act: New Meaning to “Reach Out and Touch Someone,”* 20 PRAC. TAX LAW. 55 (2005) (claiming that the convenience test harms people with disabilities, harms the environment, and threatens homeland security) [hereinafter Goluboff, *Reach Out*]; William V. Vetter, *A Critique of the Empire State’s “New” Convenience of the Employer Rule*, J. MULTISTATE TAX’N & INCENTIVES, Feb. 2007, at 14 (2007), available at 2007 WL 587154 (criticizing not only the convenience test set out in New York statutes, regulations, and cases but additionally a Technical Services Bureau memorandum issued by the Department of Taxation and Finance revising the convenience test); Raymond J. Keating, *A Decision That’s Bad for New York Business*, NEWSDAY, Apr. 10, 2005, at A32 (criticizing the New York Court of Appeals for upholding the validity of the convenience test).

<sup>8</sup> N.Y. TAX LAW § 601(e)(1) (McKinney 2006).

<sup>9</sup> N.Y. TAX LAW § 631(c) (McKinney 2006) (emphasis added).

<sup>10</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2007).

proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State.<sup>11</sup>

Since this language would create a simple physical presence apportionment formula,<sup>12</sup> the regulation further requires that “any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.”<sup>13</sup>

Individuals who support an alternative method of taxation, the “physical presence” test, have severely criticized the convenience test.<sup>14</sup> States that employ this simplistic formula consider the number of days the employee physically worked within a state and tax the employee only on those days.<sup>15</sup> When states use this test, they surrender to the “state of physical presence” potential tax revenue from the days the employee worked in that other state.<sup>16</sup> For example, an employee (“EE”) works for company X, which is based in state A, and lives in state B. If EE works 125 days at X’s office in state A and 125 days at home in state B, then both state A and state B will each tax EE (at their respective state income tax rates) for working 125 days.

Despite two rulings by the Court of Appeals upholding the constitutionality and validity of the convenience test, commentators and scholars have continued to criticize New York’s approach to the taxation of telecommuters.<sup>17</sup> In this article, I will address and dispel the most common criticisms of the convenience test.

## II. THE HISTORY OF NEW YORK’S CONVENIENCE TEST

### A. *The Development of the Convenience Test*

New York State’s taxation of nonresident employees of New York

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<sup>11</sup> *Id.*

<sup>12</sup> See *infra* notes 14–16 and accompanying text.

<sup>13</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2007).

<sup>14</sup> See *supra* note 7 and accompanying text.

<sup>15</sup> Bentley, *supra* note 7, at 1148–49 (defining a physical presence test).

<sup>16</sup> This is, simply, a common way to refer to the state where the employee engages in business activities.

<sup>17</sup> See *supra* note 7 and accompanying text.

based companies is not a new concept. The method of taxing these individuals, however, has changed throughout the last century. In 1919, the former New York Attorney General, Charles D. Newton, issued a report that articulated the state's original stance on the taxation of nonresident employees.<sup>18</sup> In this report, the former Attorney General framed the issue by defining the "source" of taxable income.<sup>19</sup> He stated that "[i]t seems to me that the work done, rather than the person paying for it, should be regarded as the 'source' of income."<sup>20</sup> He continued, stating that "[w]here services are rendered partially within and partially without the [s]tate, the income therefrom should be divided *pro rata* into income from sources within and without the [s]tate."<sup>21</sup> Many feel that this Attorney General report established the "place of performance" test in New York.<sup>22</sup> This "place of performance" test, or "physical presence" test, stood as New York's primary method of taxing nonresident employees until the late 1950s.<sup>23</sup>

In 1960, however, the definition of the "source" of taxable income was modified by the enactment and recodification of several tax statutes and regulations.<sup>24</sup> The enactment of these statutes and regulations caused the primary apportionment scheme in New York to change from the "place of performance" test to the "convenience of the employer" test.<sup>25</sup>

Even before the enactment of the tax laws and regulations in 1960, New York courts had already begun applying the convenience test. In *Burke v. Bragalini*,<sup>26</sup> a taxpayer tried to claim that the forty days that he worked at home, where there were fewer interruptions,

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<sup>18</sup> 1919 N.Y. ATT'Y GEN. ANN. REP. 301.

<sup>19</sup> *Id.* Defining a "source" of income is essential to apportionment scheme analysis because states have the power to tax activities sourced within their borders.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g., Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 279 (N.Y. 2005); *Speno v. Gallman*, 319 N.E.2d 180, 181 (N.Y. 1974); *see also Oxnard v. Murphy*, 203 N.E.2d 648, 648–49 (N.Y. 1964) (relying on the location of the taxpayer's work but not expressly mentioning the "place of performance" doctrine).

<sup>23</sup> *Huckaby*, 829 N.E.2d at 279–80; *Speno*, 319 N.E.2d at 181.

<sup>24</sup> *See* Act of Apr. 18, 1960, ch. 563, 1960 N.Y. Sess. Laws 939 (McKinney) (codified at N.Y. TAX LAW § 632 (b)(1)(B) (1960)) (current version at N.Y. TAX LAW § 631 (b)(1)(B) (McKinney 2006)); *see also Huckaby*, 829 N.E.2d at 279–80 (acknowledging the significance of this reformation of the tax law).

<sup>25</sup> *See* N.Y. TAX LAW § 601(e)(1) (McKinney 2006); N.Y. TAX LAW § 631(c) (McKinney 2006); N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2007).

<sup>26</sup> 196 N.Y.S.2d 391 (N.Y. App. Div. 1960). Here, the taxpayer was contesting his taxes for 1951. *Id.* at 392.

did not qualify as New York workdays.<sup>27</sup> The Third Department rejected this, stating that “[i]t is understandable that many people . . . may on occasions find it more advantageous to work at home, either during the regular working hours or extra ‘home work’ after hours” but “[s]uch a person living in the [s]tate is not entitled to special tax benefits and . . . [therefore] the commuter from outside the [s]tate is entitled to no such special benefits.”<sup>28</sup> The court additionally focused on the fact that there was no proof that the employee could not have done his work at a research library within the New York office.<sup>29</sup>

Probably the earliest and most influential application of the recodified tax apportionment scheme was in *Speno v. Gallman*.<sup>30</sup> In *Speno*, a New Jersey resident, who worked from home for a significant portion of the year, debated his tax returns from 1960 and 1961. The Court of Appeals focused mostly on the scope of the taxpayer’s business duties at home.<sup>31</sup> The court noted that the taxpayer did not perform several important business activities at home: he did not receive business calls nor did he meet with any local clients.<sup>32</sup> The court applied the convenience test and held that the taxpayer could have very easily performed his tasks in the New York office<sup>33</sup> and it was not necessary for the employer that the taxpayer worked from his home.<sup>34</sup> The court unanimously agreed

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<sup>27</sup> *Id.* at 392–93. The same rationale furthered by the court in *Burke*, that the source of an individual’s income is the employee’s office in New York, was also present in other earlier cases analyzing tax law prior to 1960. *See, e.g.*, *Carpenter v. Chapman*, 97 N.Y.S.2d 311, 312, 314 (N.Y. App. Div. 1950) (holding that an attorney’s source of income was New York when that attorney was licensed to practice in New York and primarily worked from a New York office); *Morehouse v. Murphy*, 197 N.Y.S.2d 763, 764–65 (N.Y. App. Div. 1960) (holding that the taxpayer’s source of income was in New York even when the taxpayer performed work at home on weekends and on commuter trains).

<sup>28</sup> *Burke*, 196 N.Y.S.2d at 393.

<sup>29</sup> *Id.* A taxpayer’s ability to complete tasks at an employer’s New York office will later serve to be one of the most important factors for determining whether or not a “necessity” existed. *See Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 848 (N.Y. 2003) (“As long as his work is completed, he receives his full salary, whether he completes his work during the three days he comes to the office, or at home, or on the weekend. . . . From the perspective of his employer, as long as he performs his teaching responsibilities as scheduled, it matters not when or where he performs his ancillary functions.”); *Speno v. Gallman*, 319 N.E.2d 180, 181 (N.Y. 1974) (“[H]is duties did not necessitate his residing in Summit, New Jersey. As Mr. Speno stated, ‘I could live in Hong Kong and do what I am doing.’”).

<sup>30</sup> 319 N.E.2d 180 (N.Y. 1974).

<sup>31</sup> *Id.* at 181.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 181–82. Additionally, one of the holdings of the Court of Appeals in *Speno* was very similar to the language used in *Burke*, stating that “a New York State resident would not be entitled to special tax benefits for work done at home, neither should a nonresident who

that the taxpayer was liable but, most importantly, the court made a point to clarify how the past understanding of “source” was replaced by the new definition under the revised tax law.<sup>35</sup> After clearly acknowledging the replacement of the place of performance test by the convenience test, the court also distinguished, but did not misinterpret,<sup>36</sup> other precedents that applied the former test.<sup>37</sup>

Throughout the next thirty years, numerous cases fine-tuned the parameters of the convenience test. In *Gross v. State Tax Commission*,<sup>38</sup> the taxpayer worked from his home because it was more convenient for him and because it increased his productivity.<sup>39</sup> The Third Department held that the tax law required a *necessity* to work from home, and not simply a *mere convenience*, to avoid tax liability.<sup>40</sup> According to the court, increased productivity was clearly related to convenience, not necessity.<sup>41</sup> The court held that the taxpayer could just as easily have performed his work at the New York office.<sup>42</sup> Therefore, applying the convenience test, the court did not allow the taxpayer to apportion his days worked at

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performs services or maintains an office in New York State.” *Id.* at 182.

<sup>35</sup> *Id.* at 181. The acknowledgment of the reformation of the tax law was not confined to one case; later cases further reassert the replacement of the place of performance test by the convenience of the employer test. See, e.g., *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 280 (N.Y. 2005) (“That is, we accepted the Department’s interpretation of the Tax Law in the convenience test, and held that ‘sources within the state’ does not simply mean ‘place of performance.’”).

<sup>36</sup> This would later constitute one of the arguments by the dissent in *Huckaby*. 829 N.E.2d at 287 (R.S. Smith, J., dissenting).

<sup>37</sup> *Speno*, 319 N.E.2d at 182. The Court of Appeals distinguished *Oxnard v. Murphy*, 203 N.E.2d 648 (N.Y. 1964), because the individual in that case performed no personal services in New York. *Id.* The court also distinguished *Linsley v. Gallman*, 329 N.Y.S.2d 486 (N.Y. App. Div. 1972), where the court applied the place of performance test and held that the taxpayer was not liable in New York for consultation activities performed at home, outside of the state. *Id.*

Interestingly, it seems in *Linsley* that because of the nontraditional employment relationship, where the taxpayer did not have a New York office nor did he need to come into New York, the court could have even applied the convenience test and reached the same result. In *Linsley*, it was almost as if the taxpayer was a self-employed independent consultant. When the convenience test is applied to self-employed nonresident workers, it is harder to hold them liable for New York taxes. See *Colleary v. Tully*, 415 N.Y.S.2d 266, 268–69 (N.Y. App. Div. 1979).

<sup>38</sup> 404 N.Y.S.2d 437 (N.Y. App. Div. 1978).

<sup>39</sup> *Id.* at 438–39.

<sup>40</sup> *Id.* Some courts have equated the necessity requirement with extreme inconvenience. See *Fischer v. State Tax Comm’n*, 484 N.Y.S.2d 345, 347–48 (N.Y. App. Div. 1985) (holding that the taxpayer could have returned from New Jersey job sites to his New York office instead of his New Jersey home to complete work but the commute time would have been so extreme that it would have been absolutely impracticable and an utter waste of a significant amount of time).

<sup>41</sup> *Gross*, 404 N.Y.S.2d at 439.

<sup>42</sup> *Id.*

home as non-New York workdays.<sup>43</sup>

In *Fass v. State Tax Commission*,<sup>44</sup> an editor of numerous magazines worked from his New Jersey home.<sup>45</sup> These magazines dealt with a wide range of topics including cars, firearms, and animals.<sup>46</sup> In contrast to *Gross*, the Third Department held that Mr. Fass did work from home out of necessity.<sup>47</sup> The court held that because the taxpayer needed “specialized facilities” to test and review the specialized products for his magazines it was necessary, as an essential part of his job, to work from his New Jersey home.<sup>48</sup> The court, therefore, held that Mr. Fass was not liable in New York for the days worked at his New Jersey home.<sup>49</sup> The court additionally noted that simply because the taxpayer could have operated special facilities somewhere else within New York State, it did not automatically mean he should be liable for New York taxes.<sup>50</sup>

In *Colleary v. Tully*,<sup>51</sup> a New Jersey resident worked under two different contracts for his New York employer.<sup>52</sup> The first contract involved his supervisory position at the New York company while the second contract involved his writing tasks, which were to be done entirely at his New Jersey home and a nearby New Jersey office.<sup>53</sup> The taxpayer claimed that the convenience of the employer test was improperly applied to both contracts, arguing that his writing contract involved no connection with New York and that his

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<sup>43</sup> *Id.* This rationale remained consistent for many years, and in *Fischer*, the Third Department held again that the petitioner’s claim that his wife was a better secretary was insufficient to qualify as a necessity under the convenience test. 484 N.Y.S.2d at 347.

<sup>44</sup> 414 N.Y.S.2d 780 (N.Y. App. Div. 1979).

<sup>45</sup> *Id.* at 781.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 782.

<sup>48</sup> *Id.* at 781–82.

<sup>49</sup> *Id.* at 782.

<sup>50</sup> *Id.* In *Kitman v. State Tax Commission*, the Third Department considered the special facility argument again and rejected a claim that a television critic for *Newsday* need to work from home. 461 N.Y.S.2d 448, 450 (N.Y. App. Div. 1983). The court held that it would not be difficult for *Newsday* to provide the facilities the critic needed in *Newsday*’s New York office (several televisions and a tape recorder). *Id.* The definition of “specialized facilit[y]” was also applied very narrowly in *Wheeler v. State Tax Commission*. 421 N.Y.S.2d 942 (N.Y. App. Div. 1979). In *Wheeler*, an expert in the field of trading and selling municipal bonds worked for a New York based company but needed to do market analysis every weekend from home in New Jersey. *Id.* at 943. The court found that simply because his office in New York was “generally unavailable” on the weekends, it did not convert the taxpayer’s home into a “highly specialized facilit[y].” *Id.* at 943–44. These cases show that courts are very reluctant to use the “specialized facilit[y]” exception unless it is truly a necessity.

<sup>51</sup> 415 N.Y.S.2d 266 (N.Y. App. Div. 1979).

<sup>52</sup> *Id.* at 267–68.

<sup>53</sup> *Id.*

employer did not provide him with an office in New York to write.<sup>54</sup> The court, however, rejected the taxpayer's position, stating that it is not the individual contracts but the single employment relationship that matters.<sup>55</sup> The court also held that his employer could have very easily provided the taxpayer with space to work at the employer's office in New York.<sup>56</sup>

### B. *Early Constitutional Challenges*

Shortly after the convenience test began to develop, it faced constitutional challenges. In addition to challenging the specific application of the convenience test in *Colleary*, the taxpayer also challenged the constitutionality of the law.<sup>57</sup> The taxpayer claimed that the law resulted in unfair apportionment and, thus, violated the Commerce Clause.<sup>58</sup> The Third Department rejected the argument that the law resulted in unfair apportionment and added that "[t]he 'convenience of the employer' test merely serves to protect the integrity of the apportionment scheme by including income as taxable where it results from services substantially connected with New York but performed outside New York to effect a subterfuge."<sup>59</sup> The court recognized the role of the convenience test as an effective method to assure accuracy of apportionment of taxes among the states by preventing fraudulent claims.<sup>60</sup>

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<sup>54</sup> *Id.* at 268.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 268–69.

<sup>58</sup> *Id.* at 268.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* Apportionment is an inherently complicated concept and when states apply an apportionment scheme, there is always the potential for inaccuracy. A physical presence test seems to err on the side of allowing inaccuracies that favor the state where work is physically done because the physical presence test does not have a method of testing individual apportionment claims for fraud. Its simplicity allows more fraudulent claims to slip through the grasp of the state of employment because work done in the state of physical presence is automatically assumed to be an accurate apportionment. The convenience test, however, takes an additional step and questions each of the claims made by a taxpayer and asks whether that taxpayer's income is truly attributable to the state of physical presence. The result is that when error occurs, it generally favors the state of employment. When an employment state uses a physical presence test, errors will favor the state of physical presence and harm the state of employment.

Therefore, when a state chooses an apportionment scheme, it has the option to decide if error, when this inevitable error occurs, will favor its own state or other states. This is what I call the "inevitable error" effect of apportionment schemes. Courts have only very vaguely touched on this issue. For example, the Court of Appeals stated in *Zelinsky* that in the absence of a convenience test, the chances for administrative difficulties and fraud increase. *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 846 n.4 (N.Y. 2003); *see also* *Kitman v.*



The taxpayer also claimed that the law violated the Due Process and Equal Protection Clauses because it treated nonresident employees of New York based companies differently than nonresident self-employed individuals who engaged in business in New York.<sup>61</sup> In New York, the self-employed nonresident individual is only taxable on the income made from his or her intrastate activities that create a connection with New York, while a nonresident employee of a New York company is taxable on his or her entire income unless it is necessary that he or she works outside of New York.<sup>62</sup> The court held that since the nonresident employee's entire employment relationship constituted the required connection with New York, there was a rational basis for the distinction between the two groups of nonresident individuals.<sup>63</sup>

### C. *Zelinsky v. Tax Appeals Tribunal*

*Colleary* was only the first of several cases that would analyze the constitutionality of the convenience test. In 2003, the Court of Appeals took a more in-depth look into the constitutionality of the convenience test in *Zelinsky v. Tax Appeals Tribunal*.<sup>64</sup> In *Zelinsky*, the taxpayer was a law school professor at Cardozo School of Law in New York City.<sup>65</sup> He worked three days each work week at the law school in New York, and he worked from home in Connecticut the remaining two days each week.<sup>66</sup> Additionally, while on sabbatical leave during one semester, the taxpayer worked entirely from home.<sup>67</sup> When filing his tax returns for 1994 and 1995, the taxpayer apportioned his income according to the days he worked in New York and the days he worked from home.<sup>68</sup> After the New York State Department of Taxation and Finance issued notices of deficiency for the years in question, the taxpayer challenged the statute, arguing that the convenience test violated both the Due

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State Tax Comm'n, 461 N.Y.S.2d 448, 449 (N.Y. App. Div. 1983) (holding that when the home is the workplace there is an "obvious potential for abuse"). Articulating this inevitable error effect and the reality of shifting this error between taxing states might be helpful to courts when analyzing the complexities of different apportionment schemes.

<sup>61</sup> *Colleary*, 415 N.Y.S.2d at 268–69.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 801 N.E.2d 840 (N.Y. 2003).

<sup>65</sup> *Id.* at 843.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 843–44.

Process and Commerce Clauses of the Constitution.<sup>69</sup>

The Court of Appeals first considered the test's validity under the Commerce Clause. The Court cited the *Complete Auto* standard for state tax apportionment schemes, stating that "a challenged tax will generally satisfy constitutional requirements if it 'is applied to an activity with a substantial nexus with the taxing [s]tate, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the [s]tate.'"<sup>70</sup> The taxpayer only challenged the fair apportionment of the test, conceding that the first, third, and fourth criteria in the *Complete Auto* test were met.<sup>71</sup>

The Court noted that fair apportionment is based on two factors: internal and external consistency.<sup>72</sup> "To be internally consistent, the tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result."<sup>73</sup> In this case, the taxpayer acknowledged that if Connecticut adopted the convenience test, then there would be no double taxation and, therefore, the taxpayer only challenged the external consistency of the statute.<sup>74</sup> External consistency involves "the economic justification for the [s]tate's claim upon the value taxed, to discover whether a [s]tate's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing [s]tate."<sup>75</sup> Further, the court highlighted that this analysis "is 'essentially a practical inquiry' for determining 'whether the [s]tate has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.'"<sup>76</sup> The court also noted that a particular apportionment formula was not necessary to meet the constitutional requirements.<sup>77</sup> Finally, the court held that the taxpayer has the burden to demonstrate that "the income attributed to the [s]tate is in fact out of all appropriate proportions to the business transacted . . . in that [s]tate, or has led to a grossly distorted result."<sup>78</sup>

The court relied on several factors when it concluded that the

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<sup>69</sup> *Id.* at 844.

<sup>70</sup> *Id.* at 845 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (quoting *Oklahoma Tax Comm'n. v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)).

<sup>76</sup> *Id.* (quoting *Goldberg v. Sweet*, 488 U.S. 252, 262, 264 (1989)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *Jefferson Lines*, 514 U.S. at 195).

convenience test did not result in a grossly distorted result. First, the court held that the taxpayer's work at home was "inextricably intertwined" with his teaching position in New York.<sup>79</sup> His primary job responsibility was to perform a service, teaching and meeting students at the law school, which he would ultimately complete in New York.<sup>80</sup> Second, it held that the convenience test was originally designed to prevent corruption and tax abuse in situations where taxpayers "spent an hour working at home every Saturday and Sunday and then claimed that two sevenths of their work days were non-New York days."<sup>81</sup> Here, the taxpayer's attempt to reduce his taxes highly resembled this type of situation.<sup>82</sup> Additionally, the court held that if the taxpayer were to allocate his income, it would be unfair to his New York resident colleagues who could not avoid paying taxes by working at home.<sup>83</sup> The court finally held that Connecticut's refusal to give the taxpayer a credit for the tax paid to New York would not automatically result in a violation of the Commerce Clause.<sup>84</sup>

The court next considered the test's validity under the Due Process Clause. The Due Process Clause first requires that there is "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."<sup>85</sup> Second, it requires that "the 'income attributed to the [s]tate for tax purposes must be rationally related to values connected with the taxing [s]tate."<sup>86</sup> The court summarized the analysis, stating:

[T]he tax imposed must "bear[ ] fiscal relation" to "opportunities which [the state] has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society . . . . The simple but controlling question is whether the state has given anything for which it can ask return."<sup>87</sup>

The court held that the taxpayer satisfied the minimum connection because he "purposefully avail[ed] [him]self of the

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<sup>79</sup> *Id.* at 846.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 847.

<sup>84</sup> *Id.* at 848–49.

<sup>85</sup> *Id.* at 849 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992)).

<sup>86</sup> *Id.* (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

<sup>87</sup> *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)) (alterations in original).

benefits of an economic market in the forum [s]tate.”<sup>88</sup> According to the court, there was a rational basis for taxing the taxpayer because he received substantial opportunities, protections, and benefits from his employment in New York.<sup>89</sup> Whether or not he elected to live in New York, the taxpayer received the benefits of a New York salary and the protections of public health and safety services that were made available to him.<sup>90</sup> Since the taxpayer met the required minimum connection, the Court of Appeals upheld the convenience test against Due Process challenges as well.<sup>91</sup>

#### D. *Huckaby v. New York State Division of Tax Appeals*

Despite the Court of Appeals’ decision in *Zelinsky*, the convenience test faced constitutional challenges in New York’s highest court again two years later. In *Huckaby v. New York State Division of Tax Appeals*,<sup>92</sup> a taxpayer challenged the convenience test against the Due Process and Equal Protection Clauses.<sup>93</sup> The Department of Taxation and Finance found, applying the convenience test, that the petitioner, a Tennessee resident working roughly seventy-five percent of the time at home, could not apportion his income and the Department allocated one-hundred percent of his income to New York State.<sup>94</sup>

The Court first addressed the Commerce Clause arguments by the petitioner. Once again citing *Complete Auto, Jefferson Lines*, and *Goldberg*, the court reasserted that the convenience test was fairly apportioned and rejected the petitioner’s argument that the law violated the dormant Commerce Clause.<sup>95</sup> The Court found further Commerce Clause support for the convenience test in *Shaffer v. Carter*,<sup>96</sup> stating that

“[J]ust as a state may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to nonresidents from their property or

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<sup>88</sup> *Id.* (quoting *Quill*, 504 U.S. at 307).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 848.

<sup>91</sup> *Id.* at 849.

<sup>92</sup> 829 N.E.2d 276 (N.Y. 2005).

<sup>93</sup> *Id.* at 277.

<sup>94</sup> *Id.* at 278.

<sup>95</sup> *Id.* at 281–82.

<sup>96</sup> 252 U.S. 37 (1920).

business within the state, or their occupations carried on therein.”<sup>97</sup>

The court next addressed the petitioner’s Due Process Clause arguments. The petitioner claimed that the law would unconstitutionally allow New York to “overreach[]” and tax one hundred percent of an individual’s income if he or she worked only one day a year in New York and thus demanded that the law require proportionality.<sup>98</sup> The court rejected the petitioner’s argument, stating that the time petitioner worked in New York was not “trivial” and it was clearly sufficient for taxation.<sup>99</sup> The court noted that “[a]ll that is required to satisfy due process is some ‘minimal connection’ between the taxpayer and the state, and that the income the state seeks to tax be ‘rationally related to values connected with’ the state.”<sup>100</sup> The court found that the petitioner received the benefits and opportunities of a New York based employer every day whether or not the petitioner took advantage of them.<sup>101</sup> The court further explained the statute’s rationality under the Due Process Clause, stating:

By taxing only income sourced to New York, the convenience test is rationally related to values connected with New York because New York has the right to tax 100% of a nonresident employee’s income derived from New York sources. Where a nonresident employee must perform work out of state for the employer’s necessity, a nexus is created between the employer and the foreign state. New York does not tax the nonresident employee’s income derived from these activities, which are properly sourced to the foreign state.<sup>102</sup>

Next, the court cited the equal protection standard for tax cases, stating:

“[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision-maker, and the relationship of the classification to its goal is not so attenuated as to render the

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<sup>97</sup> *Huckaby*, 829 N.E.2d at 282 (quoting *Shaffer*, 252 U.S. at 52).

<sup>98</sup> *Id.* at 282.

<sup>99</sup> *Id.* at 283.

<sup>100</sup> *Id.* at 283 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

<sup>101</sup> *Id.* at 283–84.

<sup>102</sup> *Id.* at 284.

distinction arbitrary or irrational.”<sup>103</sup>

The court further noted that “[a]bsolute equality is impracticable in taxation, and is not required by the [E]qual [P]rotection [C]lause.”<sup>104</sup> The Petitioner claimed that the convenience test discriminated between employees who work out of state for convenience and those who work out of state for necessity.<sup>105</sup> The court held that the convenience test clearly met the rational basis standard because when out of state residents work out of state for necessity, they create a nexus between themselves and this other state and New York no longer is the source of the individual’s income.<sup>106</sup> The court held that this classification was rational in every way and therefore complied with the Constitution.<sup>107</sup>

*E. The Revised Convenience Test: TSB-M-06(5)I*

In 2006, the Department of Taxation and Finance (“Department”) issued a Technical Services Bureau Memorandum (“TSB-M”) formally explaining and revising the convenience test.<sup>108</sup> The basic definition of the rule still derived from section 601(e) of the New York tax law and section 132.18(a) of the income tax regulations.<sup>109</sup> The Department still maintained the rule that days worked at home are considered New York work days unless the necessity of the employer requires that the employees work outside of the state.<sup>110</sup> The memorandum, however, adds a new concept to the convenience test equation: the “bona fide employer office.”<sup>111</sup> A bona fide employer office exists when “the employee’s assigned or primary work location is at an established office or other bona fide place of business of the employer.”<sup>112</sup> If this office is located within New York, the days worked at home, out of state, are considered New York work days.<sup>113</sup> If this “bona fide employer office” is located outside of New York, such as at an employee’s home, any days worked from home will not be considered New York work days and

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<sup>103</sup> *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

<sup>104</sup> *Id.* (quoting *Maxwell v. Bugbee*, 250 U.S. 525, 543 (1919)).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> N.Y. Dep’t Tax’n & Fin., TSB-M-06(5)I (May 15, 2006).

<sup>109</sup> *Id.* at 1.

<sup>110</sup> *Id.* at 1–2.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

will be apportioned to the state where the individual was physically present.<sup>114</sup>

In order to prevent possible confusion about what qualifies as a bona fide office, the memorandum provided a list of factors to aid employees and courts when determining if the out-of-state location is a “bona fide employer office.”<sup>115</sup> The memorandum lists three categories of important factors: “the primary factor,” “secondary factors,” and “other factors.”<sup>116</sup> In order for the office to qualify as a bona fide employer office, it must qualify for either (1) the primary factor or (2) at least four of the secondary factors and three of the other factors.<sup>117</sup>

### F. Post-Revision Tax Law

Since the Department of Taxation and Finance released its revised position of the convenience test in May 2006, the debate within the courts on the validity and constitutionality of the convenience test appears to have subsided. Additionally, no cases have appealed further than the Division of Tax Appeals. Since May 2006, there have been several Division of Tax Appeals (“Division”) determinations applying the convenience test, but the Division has refrained from directly or explicitly applying the revised TSB-M.<sup>118</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2–5. Some of these factors derive from case precedents while some do not. For example, the primary factor deals with specialized facilities. *Id.* at 3. This clearly derives from the *Fass* line of precedents. See generally *Fass v. State Tax Comm’n*, 414 N.Y.S.2d 780 (N.Y. App. Div. 1979) (finding that access to specialized facilities such as a firing range and dog kennel rendered working out of state a necessity); *Wheeler v. State Tax Comm’n*, 421 N.Y.S.2d 942 (N.Y. App. Div. 1979) (holding that a burglar alarm being activated at a home office on the weekend did not necessitate working at home); *Kitman v. State Tax Comm’n*, 461 N.Y.S.2d 448 (N.Y. App. Div. 1983) (holding that access to four televisions and family did not necessitate working at home).

<sup>116</sup> N.Y. Dep’t Tax’n & Fin., TSB-M-06(5)I, at 2 (May 15, 2006). The “primary factor” depends on if “[t]he home office contains or is near specialized facilities.” *Id.* at 3. The “secondary factors” exist if: (1) “[t]he home office is a requirement or condition of employment,” (2) “[t]he employer has a bona fide business purpose for the employee’s home office location,” (3) “[t]he employee performs some of the core duties of his or her employment at the home office,” (4) “[t]he employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office,” (5) “[t]he employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business,” or (6) there are “[e]mployer reimbursement[s] of expenses for the home office.” *Id.* at 3–4. The “other factors” include but are not limited to “maintain[ing] a separate telephone line and listing for the home office,” storing business records at the home office, and posting a sign at home office location indicating that the home is an office of the employer. *Id.* at 4–5.

<sup>117</sup> *Id.* at 2.

<sup>118</sup> See *In re Hill*, DTA No. 820629, 2006 WL 3220923, at\*5–6 (N.Y. Div. Tax App.) (Oct. 26, 2006); *In re Holt*, DTA No. 821018, 2007 WL 3342364, at \*13–15 (N.Y. Div. Tax App.) (Nov. 1,

The Division instead continued to apply the pre-revision interpretation of the law found within tax law section 601(e)(1), tax law section 631(c), regulation section 132.18(a), *Huckaby*, *Zelinsky*, and *Speno*.<sup>119</sup> In these determinations, the Division makes no mention of the May 2006 TSB-M and the revised standards and guidelines for the convenience test.<sup>120</sup> This does not, however, mean that the Division has completely ignored the Department's memorandum. It is very likely that the Division simply did not apply the TSB-M in these cases because not a single one of the taxpayers made a claim that they had contracted for or established a bona fide employer office.<sup>121</sup> Since the most important addition to the convenience discussion in the TSB-M is the bona fide employer office concept, if a taxpayer does not clearly argue that he or she established a bona fide office, then there is no need to refer to the TSB-M.

### III. OTHER APPROACHES TO THE APPORTIONMENT PROBLEM

#### *A. Other Convenience Tests*

##### 1. Pennsylvania's Approach

Pennsylvania's Department of Revenue employs a convenience test similar to New York's.<sup>122</sup> Not only are these two tests similar in substance, but they also contain comparable language.<sup>123</sup> The Pennsylvania Administrative Code, section 109.1, states, "The income of a nonresident individual subject to taxation shall be that part of his income from sources within this Commonwealth."<sup>124</sup> Section 101.8 of the Administrative Code defines a "source[]" within [the] Commonwealth" as

[a] trade, profession or occupation [that] shall be carried on in this Commonwealth by a nonresident when he or a

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2007).

<sup>119</sup> See *Hill*, 2006 WL 3220923, at \*5-6; *Holt*, 2007 WL 3342364, at \*13-15.

<sup>120</sup> See *Hill*, 2006 WL 3220923, at \*5-6; *Holt*, 2007 WL 3342364, at \*13-15.

<sup>121</sup> See *Hill*, 2006 WL 3220923, at \*5-6; *Holt*, 2007 WL 3342364, at \*13-15.

<sup>122</sup> Compare N.Y. TAX LAW § 631(b)(1)(B) (McKinney 2006), with 61 PA. CODE § 101.8 (2008).

<sup>123</sup> Compare N.Y. TAX LAW § 631(b)(1)(B) (McKinney 2006), with 61 PA. CODE § 101.8 (2008).

<sup>124</sup> 61 PA. CODE § 109.1 (2008).



partnership or association of which he is a member occupies, has, maintains or operates an office, shop, store, warehouse, factory, agency or other place where his or its affairs are systematically and regularly carried on.<sup>125</sup>

Section 109.8 then provides a basis for the Pennsylvania convenience test, stating:

If a nonresident employe[e] . . . performs services for an employer . . . both within and without this Commonwealth, his income derived from Commonwealth sources includes that proportion of his total compensation for services rendered as an employe[e] . . . which the total number of working days employed within this Commonwealth bears to the total number of working days employed both within and without this Commonwealth.<sup>126</sup>

As this language would simply create a physical presence test, the Administrative Code continues, “[h]owever, any allowance claimed for days worked outside of this Commonwealth shall be based upon the performance of services which, of necessity, obligate the employe[e] . . . to perform out-of-[s]tate duties in the service of his employer.”<sup>127</sup> At the conclusion of the chapter on nonresident employees, the Administrative Code leaves even more discretion to the department of revenue by stating that the department may tax the “income of a nonresident from sources within this Commonwealth” so long as it is in a “fair and equitable manner.”<sup>128</sup>

As seen above, much of the language in the Pennsylvania Administrative Code parallels the language in sections 601 and 631 of the New York tax law as well as section 132.18 of the Codes, Rules and Regulations of New York. Unlike New York, however, there has been no litigation in either Pennsylvania administrative determinations or state cases concerning these sections of the Pennsylvania Administrative Code.<sup>129</sup> The striking similarities between the two tests, however, suggest that a Pennsylvania court

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<sup>125</sup> 61 PA. CODE § 101.8 (2008).

<sup>126</sup> 61 PA. CODE § 109.8 (2008).

<sup>127</sup> *Id.*

<sup>128</sup> 61 PA. CODE § 109.9 (2008).

<sup>129</sup> The only discussion of these sections has been in the footnotes of cases, briefs, and law review articles related to the New York convenience test. *See, e.g., In re Zelinsky*, DTA No. 817065, 2001 WL 1512096, at \*10 n.4 (N.Y. Tax App. Trib. 2001); Brief for Respondent Comm’r of Taxation and Fin. at 11, *Zelinsky v. Tax Appeals Tribunal*, 790 N.E.2d 263 (N.Y. 2003) (No. 02-002521-A1), 2003 WL 23336429; Goluboff, *Reach Out*, *supra* note 7, at 56; Nicole Belson Goluboff, *Perspective: The Telecommuter Tax Fairness Act Needs to Pass*, N.Y. L.J., May 19, 2005, at 2.

would likely apply the regulations in a similar manner. For example, both statutes tax nonresidents on income derived from “sources” within the state.<sup>130</sup> Additionally, the definition of “source” in both New York and Pennsylvania involves a “trade, profession or occupation” that is “carried on” in the state.<sup>131</sup> In fact, the Pennsylvania Code takes an additional step, explaining what constitutes “carr[ying] on” within the state.<sup>132</sup> In this way, the Pennsylvania law on apportionment is potentially clearer than it is in New York. If New York adopted some of this language, it would likely face less criticism concerning the law’s supposed ambiguity.

## 2. Nebraska’s Approach

Nebraska’s convenience test is, in substance and form, similar to both the New York and Pennsylvania tests. Found in the Nebraska Administrative Code, Reg-22-003.01 states that “Nebraska adjusted gross income for a nonresident individual is the nonresident’s income from Nebraska sources.”<sup>133</sup> Further, in section 22-003.01C, the code provides that “[c]ompensation received by a nonresident for services performed which are directly related to a business, trade, or profession carried on within Nebraska shall constitute income derived from Nebraska” and “[c]ompensation received by a nonresident will be considered Nebraska source income if . . . such services performed without Nebraska are *incidental* to the services performed within Nebraska, or if the services that have to be performed in Nebraska *are an essential part* of the services performed.”<sup>134</sup> The code then provides that if a nonresident performs a service “without Nebraska for his or her convenience, but the service is *directly related* to a business, trade, or profession carried on within Nebraska and except for the nonresident’s convenience, the service *could have been performed within Nebraska*, the compensation for such services shall be Nebraska

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<sup>130</sup> Compare N.Y. TAX LAW § 601(e)(1) (McKinney 2006), with 61 PA. CODE § 109.1 (2008).

<sup>131</sup> Compare N.Y. TAX LAW § 631(b)(1)(B) (McKinney 2006), with 61 PA. CODE § 101.8 (2008).

<sup>132</sup> 61 PA. CODE § 101.8 (2008) (stating that work is “carried on” when the company of which the nonresident is an employee has, within Pennsylvania, “an office . . . or other place where . . . its affairs are systematically and regularly” performed). The Code goes even further, stating that a business will be “carried on” within Pennsylvania if the business activities are conducted in the state “with a fair measure of permanency and continuity.” *Id.*

<sup>133</sup> 316 NEB. ADMIN. CODE § 22-003.01 (2008).

<sup>134</sup> 316 NEB. ADMIN. CODE § 22-003.01C(1) (2008) (emphasis added).

source income.”<sup>135</sup> The code states the definition of “source[]” once more:

When a taxpayer has performed some service in this state and the base of operations, or, if there is no base of operations, the place from which the services are directed or controlled is in this state, the compensation paid by a business, trade, or profession for all services of the taxpayer shall be income from Nebraska sources.<sup>136</sup>

As these sections show, the Nebraska Administrative Code goes to great lengths to fully define “sources” of income within the state.

Similar to Pennsylvania, the Nebraska convenience test has not been the subject of litigation in either Nebraska administrative determinations or cases.<sup>137</sup> Also similar to Pennsylvania, courts would likely apply the Nebraska convenience test in the same manner as they would the New York test. Again, both New York and Nebraska tax nonresidents on income derived from “sources” within the respective states.<sup>138</sup> Additionally, they both provide that “sources” of income include a business, trade, profession or occupation carried on within the respective state.<sup>139</sup>

Like the Pennsylvania convenience test, the Nebraska regulations also provide language that would clear up potential ambiguities in the New York law. For example, the Nebraska regulations provide that source income can derive from a service that is “directly related to a business” in the state or from a service performed for a business that has its “base of operations . . . from which the services are directed” in Nebraska.<sup>140</sup> The “directly related” language would likely solve a *Zelinsky* situation where what Mr. Zelinsky did outside New York (grading papers and researching) “directly related” to his position as a Professor at a New York based law school.<sup>141</sup> The “base of operations” rationale would likely solve a *Huckaby* situation, where Mr. Huckaby was clearly directing his services at a company with its “base of operations” in New York.<sup>142</sup>

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<sup>135</sup> *Id.* (emphasis added).

<sup>136</sup> *Id.*

<sup>137</sup> The Nebraska convenience test has only been occasionally referenced in articles concerning the New York convenience test. See, e.g., Goluboff, *Reach Out*, *supra* note 7, at 56.

<sup>138</sup> Compare N.Y. TAX LAW § 601(e)(1) (McKinney 2006), with 316 NEB. ADMIN. CODE § 22-003.01 (2008).

<sup>139</sup> Compare N.Y. TAX LAW § 631(b)(1)(B) (McKinney 2006), with 316 NEB. ADMIN. CODE § 22-003.01C(1) (2008).

<sup>140</sup> 316 NEB. ADMIN. CODE § 22-003.01C(1) (2008).

<sup>141</sup> *In re Zelinsky*, DTA No. 817065, 2001 WL 1512096 (N.Y. Tax App. Trib. 2001).

<sup>142</sup> See Goluboff, *Reach Out*, *supra* note 7, at 57.

*B. States Focusing on Physical Presence*

Numerous states opt not to apply a convenience test and instead apply a simple physical presence test. Most of the language used by these states is often very straightforward. Below is a collection of several different ways that the states approach the physical presence test. Language found in these examples can be found in many other physical presence tests across the nation.

In Alabama, the physical presence test appears in the Alabama Administrative Code within the section related to the gross income of nonresidents. The first relevant part of the regulation states that “[w]here compensation is received for personal services rendered partly within and partly without this [s]tate, that part of the income attributable to this [s]tate is included in gross income. In such cases the test of physical presence is used to determine the situs of the rendition of the services . . . .”<sup>143</sup> The section then continues, stating that “[t]he gross income of all other nonresident employees . . . includes that portion of the total compensation for services which the total number of working days employed within this [s]tate bears to the total number of working days employed both within and without this [s]tate during the taxable period.”<sup>144</sup>

In Connecticut, the physical presence test is found in the Regulations of Connecticut State Agencies. Section 12-711(c)-5(a)(2) states that in order to determine the proper amount of income attributable to Connecticut, the individual’s income “shall be apportioned to Connecticut by multiplying the total compensation, wherever earned, from the employment, by a fraction the numerator of which is the number of days spent working in Connecticut and the denominator of which is the total working days both within and without Connecticut.”<sup>145</sup>

In Michigan, the physical presence test is found in the Michigan Administrative Code. Here, the code is particularly straightforward: section R 206.12(3) states that “[i]ncome from a trade or business as defined in R. 206.1 is allocated or apportioned to the state in which the activity takes place.”<sup>146</sup>

Although approaching the problem differently, all of the states employing a physical presence test share one thing in common:

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<sup>143</sup> ALA. ADMIN. CODE r. 810-3-14.05(1)(b)(2) (2008).

<sup>144</sup> *Id.*

<sup>145</sup> CONN. AGENCIES REGS. § 12-711(c)-5(a)(2) (2008).

<sup>146</sup> MICH. ADMIN. CODE r. 206.12(3) (2008).

simplicity. As I will discuss below, this shared simplicity is the fatal flaw of all physical presence tests.<sup>147</sup>

#### IV. A RESPONSE TO THE ARGUMENTS AGAINST NEW YORK'S CONVENIENCE TEST

Despite two Court of Appeals rulings on the validity and constitutionality of New York's convenience test and two denials of certiorari by the Supreme Court of the United States,<sup>148</sup> commentators have criticized the New York test and have even demanded that it be replaced by an apportionment scheme employing a physical presence test.<sup>149</sup> Most of these arguments, however, are without merit. Since the Court of Appeals ruled twice on the constitutionality of the test, the Supreme Court has denied certiorari twice, and the debate on the constitutionality of the convenience test could easily fill an entire book, I have narrowed my focus here to arguments aimed solely at the validity of and tax policy behind the convenience test.

##### A. *The Huckaby Dissent*

In *Huckaby v. Division of Tax Appeals*, the majority upheld the validity and constitutionality of the convenience test using some of the same rationales furthered in earlier cases.<sup>150</sup> The dissenting opinion in this case was the first instance in which the Court of Appeals articulated in-depth reasons why the convenience test should be invalidated.<sup>151</sup> The dissent in *Huckaby*, however,

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<sup>147</sup> See *infra* Parts IV.A.1, IV.B.3.

<sup>148</sup> *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276 (N.Y. 2005), *cert. denied*, 546 U.S. 976 (2005); *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003), *cert. denied*, 541 U.S. 1009 (2004).

<sup>149</sup> See *supra* note 7 and accompanying text; Nicole Belson Goluboff, *New York Makes it Official: Double Taxing of Telecommuters Will Continue*, ST. TAX NOTES, June 12, 2006, at 877; see also Nicole Belson Goluboff, *New York's Proposed Telework Tax Policy: State Won't Shift Gears*, ST. TAX NOTES, May 22, 2006, at 593; Nicole Belson Goluboff, *State Taxation of Interstate Telecommuters: The U.S. Supreme Court's Silence Puts Congress in the Driver's Seat*, ST. TAX NOTES, Nov. 21, 2005, at 719.

<sup>150</sup> For example, the Court of Appeals held that the taxation of the individual's income was rationally related to the benefits that individual received from New York. Compare *Huckaby*, 829 N.E.2d at 283–84, with *Zelinsky*, 801 N.E.2d at 849, and *Colleary v. Tully*, 415 N.Y.S.2d 266, 268–69 (N.Y. App. Div. 1979). Additionally, the Court held that the definition of “sources” within the state included more than simply the place of performance, a rationale furthered in early tax cases. Compare *Huckaby*, 829 N.E.2d at 279–80, with *Speno v. Gallman*, 319 N.E.2d 180, 181 (N.Y. 1974).

<sup>151</sup> In earlier cases upholding the validity of the convenience test there have been dissents, but none of them were as articulate and thorough as the one written by Judge Robert S.

incorrectly interpreted the tax law and the application of the convenience test.

### 1. The Purpose of the Convenience Test

The first argument the dissent made stemmed from the purpose of the convenience test as explained in *Speno*, *Zelinsky*, and *Colleary*: that the test “serves to protect the integrity of the apportionment scheme by including” services that are conducted out of New York “to effect a subterfuge.”<sup>152</sup> It seems that, according to these cases, the generally established purpose of the convenience test is to prevent fraud by taxpayers who attempt to illegally shift their tax liability in order to avoid paying New York State taxes.

The dissent in *Huckaby* stated that the convenience test, as applied to that *particular* taxpayer, did not serve the purpose to prevent fraud.<sup>153</sup> The dissent claimed that the convenience test was improperly applied to Mr. Huckaby because he chose to work in Tennessee merely because his home was in Tennessee, and not because he was intentionally trying to avoid New York taxes.<sup>154</sup> The dissent went further by stating that the “convenience” that was a concern in *Speno* and *Zelinsky* did not apply to the problems related to uprooting a family to move to New York.<sup>155</sup> The dissent said that this “convenience” is not subject to the sort of manipulation” that was present in earlier cases.<sup>156</sup> In other words, it seems that the dissent would hold that, merely because there is not traditional fraud, if a taxpayer had to potentially move his or her family for the purposes of a job, that “[in]convenience” should exempt the taxpayer from the application of the convenience test.

The problem with this rationale is that it cannot be formed into any practical or manageable rule; there is no way to distinguish between the individual who acts fraudulently and the one who has a

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Smith in *Huckaby*. Compare *Huckaby*, 829 N.E.2d at 285–91 (R.S. Smith, J., dissenting), with *Fass v. State Tax Comm’n*, 414 N.Y.S.2d 780, 782–83 (N.Y. App. Div. 1979) (Main, J., dissenting), and *Fischer v. State Tax Comm’n*, 484 N.Y.S.2d 345, 348 (N.Y. App. Div. 1985) (Mikoll, J., dissenting).

<sup>152</sup> *Colleary*, 415 N.Y.S.2d at 268. In *Zelinsky*, the court reasserts this by saying that “[t]he convenience test was originally adopted to prevent abuses arising from commuters who spent an hour working at home every Saturday and Sunday and then claimed that two sevenths of their work days were non-New York days and that two sevenths of their income was thus non-New York income.” 801 N.E.2d at 846.

<sup>153</sup> *Huckaby*, 829 N.E.2d at 285–86 (R.S. Smith, J., dissenting).

<sup>154</sup> *Id.* at 286–87.

<sup>155</sup> *Id.* at 287.

<sup>156</sup> *Id.*

supposedly legitimate excuse because his home is outside New York. Put simply, an exception like this would undermine the whole purpose of the convenience test and reopen New York to fraudulent claims.

Although *Huckaby* and *Zelinsky* are factually different, there should be no difference in the application of the convenience test in the two cases. There is the same threat of fraud in both situations. If there were a “family and home” exception to the convenience test, then taxpayers would always find some way to argue that their “convenience” was not a result of any fraud but instead that their “convenience” was based on the location of their home. For example, if Mr. Huckaby had lived in Connecticut, the dissent’s argument that he worked from home because it was his residence and not because he was trying to effectuate fraud would be very difficult to support in light of *Zelinsky*.

Although the dissent does not address this explicitly, it appears that the argument is that it would be unfair to force individuals like Mr. Huckaby to uproot his family and move to New York.<sup>157</sup> The argument is basically that the “inconvenience” he would suffer is not a type that the convenience test should tolerate.<sup>158</sup> This, however, would run contrary to some basic tax law concepts.<sup>159</sup> Federal tax law, for example, will not compensate individuals who opt, purely at their own discretion, to live further away from an employer than other employees.<sup>160</sup>

## 2. Defining “Carried On”

Next the dissent claimed that the majority confused the “natural and obvious” definition of “carried on” within section 631(b)(1)(B).<sup>161</sup> The dissent claimed that the majority (as well as prior courts) confused “carried on” by the employee/taxpayer and “carried on” by the employer.<sup>162</sup> The dissent noted that not only was this an incorrect interpretation of the statutory language but that the court disregarded precedent.<sup>163</sup> Challenging the majority’s logic, the

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<sup>157</sup> *See id.* at 286–87.

<sup>158</sup> *See id.*

<sup>159</sup> *See discussion infra* Part V.

<sup>160</sup> *Id.*

<sup>161</sup> *Huckaby*, 829 N.E.2d at 287 (R.S. Smith, J., dissenting) (“[A] business, trade, profession or occupation carried on in this state, is ‘a business, trade, profession or occupation’ that is ‘carried on’ by the taxpayer.”).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

dissent asked four questions:

First, what language in the statute even hints at a distinction between employee taxpayers and others of the kind the Commissioner advocates? Secondly, what indication is there in the background or legislative history of the statute that the Legislature had any such intention? Thirdly, if the relevant location is that of the employer and not the employee, why does the Commissioner's own regulation make the place of performance of the employee's duties the governing factor, as a general rule to which the 'convenience' test is an exception? And finally, if he really believes his reading of the statute is sound, why does the Commissioner not carry it to its logical conclusion, by trying to tax the salaries of all out-of-state employees of New York based firms?<sup>164</sup>

Although the dissent claimed the majority answered only one of these questions,<sup>165</sup> I will answer each of them, dispelling the dissent's claims about the invalidity of the convenience test.

In the first question, the dissent asked the majority for language in the statute that *clearly* states that "carried on" refers to the employer and not the employee. The dissent was right; there is not language in section 631 that explicitly refers to actions "carried on" by either "employer" or "employee."<sup>166</sup> The language of the statute simply states that "[i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to" the "business, trade, profession or occupation carried on in this state."<sup>167</sup> The statute does not specify that the "business, trade, profession or occupation" is that of the employee or employer. Therefore, the result is that "carried on" is open to interpretation by courts when no clear legislative intention is present<sup>168</sup> and that prior precedents are controlling.<sup>169</sup> And

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<sup>164</sup> *Id.* at 287–88

<sup>165</sup> *Id.* at 288. It is also important to keep in mind that section 631 of the tax law states that allocation and apportionment are subject to definitions set forth the regulations. N.Y. TAX LAW § 631(c) (McKinney 2006). Therefore, definitions left ambiguous in section 631 can be understood through reading of the regulations, specifically section 132.18.

<sup>166</sup> See N.Y. TAX LAW § 631 (b)(1)(B), (c) (McKinney 2006).

<sup>167</sup> § 631(b)(1), (b)(1)(B). It is also worth noting that since the statute's enactment in 1960, the language referring to out-of-state residents and "[i]tems of income, gain, loss and deduction" has not changed. Act of Apr. 18, 1960, ch. 563, 1960 N.Y. Laws 1759 (codified at N.Y. TAX LAW § 632 (b)(1) (McKinney 1960)).

<sup>168</sup> See N.Y. STAT. LAW § 71 (McKinney 1971) (stating that courts must "construct[]" the meaning of a statute "with respect to subjects which lie beyond the direct expression of the text"); N.Y. STAT. LAW § 92 (McKinney 1971) (stating that the intention of the legislature is



although the dissent mentioned two precedents that the majority supposedly ignored, almost all other courts have interpreted the language as the majority in *Huckaby* did.<sup>170</sup>

The second question can be answered with almost the same response as the first. The dissent claims that there is no support for the majority's position in legislative history. The language in the legislative history, however, does not support the dissent's argument and does not discuss the concept of "carried on" at all.<sup>171</sup> So again, the statute was open to interpretation by the courts, and thus far, the majority of these courts have interpreted the language consistent with the majority opinion in *Huckaby*.<sup>172</sup> Additionally, the dissent fails to provide any legislative history that suggests that the law should be interpreted according to its reasoning.<sup>173</sup>

The answer to the third question is slightly more complex. With the third question, the dissent interpreted section 132.18(a) of the regulations as creating a rule (place of performance test) and an exception (the convenience of the employer requirement).<sup>174</sup> The dissent then asked why the majority construed "carried on" in section 631 of the tax law to refer to the employer even though the general rule in the regulations, according to the dissent, was a place of performance test focusing on the actions "carried on" by the employee.<sup>175</sup>

The language of section 132.18 of the regulations says "any

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the primary consideration of courts); N.Y. STAT. LAW § 96 (McKinney 1971) ("A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment.").

There is little, if any, evidence in the legislative history that suggests the intention of the legislature with regard to this issue. *See generally* Act of Apr. 18, 1960, ch. 563, 1960 N.Y. Laws 1746 (stating only generally that the reformation of the tax laws will simplify preparation of taxes, improve enforcement, and aid interpretation of the tax law by the judiciary); Memorandum of the Bar of the City of N.Y., *reprinted in* 1960 N.Y. ST. LEG. ANN. 371-72 (discussing the definition of "adjusted gross income" in New York but not discussing any issues related to the "source of income" or the definition of "carried on").

<sup>169</sup> *See* N.Y. STAT. LAW § 72 (McKinney 1971) (stating that once a judicial interpretation has been made, subsequent courts are bound by the concept of *stare decisis*).

<sup>170</sup> *See* discussion *supra* Part II. Additionally, over thirty years ago in *Speno*, the Court of Appeals distinguished the two cases the dissent mentions from the line of precedent supporting the majority opinion in *Huckaby*. *Speno v. Gallman*, 319 N.E.2d 180, 181 (N.Y. 1974); *see also* discussion *infra* Part IV.B.1 (discussing why the correct interpretation of the tax law does not include the archaic analysis from the 1919 Attorney General Opinion).

<sup>171</sup> *See supra* note 168.

<sup>172</sup> *See* discussion *supra* Part II.

<sup>173</sup> *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 287 (N.Y. 2005) (R.S. Smith, J. dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

allowance” for apportionment of work “*must*” be based on the necessity of the employer.<sup>176</sup> This clearly states that there is no “exception” to the rule at all and that the second part of the statute merely clarifies and further explains the first part. An exception would say that in most situations where an individual works outside of the state, a place of performance test applies, *but* in certain situations, you look to the necessity of the employer. Instead, the regulation requires that every time an employee works outside of New York, a “convenience of the employer” analysis must apply.

Another way to approach this is to step back and look at the big picture. There is no question that work performed in New York for New York based companies is taxable by New York; this situation, however, is not the one covered by section 132.18(a). The purpose of section 132.18(a) is clearly to address the situations where work is performed outside of New York for New York based companies. In every one of these situations, the convenience test applies; therefore, the regulation operates as one rule. It is a very fine line, but a significant one.

In the fourth question, the dissent asks the Commissioner to take the rationale that “carried on” refers to the location of the employer to its logical conclusion; taxing all salaries of out-of-state employees of New York companies. This is unnecessary. Even if the majority’s use of “carried on” would at its logical conclusion result in taxation of all out-of-state employees, that is not the case here. The convenience test’s existence prevents this situation from occurring by taxing only the out-of-state taxpayers who work outside New York for their own convenience. Regardless of the logical conclusion, the current law does not tax all out-of-state employees of New York based companies. If New York were to tax all out-of-state employees, then it would certainly be easier to attack the validity and constitutionality of the convenience test. Since it is not the case that the convenience test taxes all out-of-state employees, a discussion of hypothetical situations is unnecessary under the current law.

Also, even if these answers would not adequately counter the dissent’s arguments, it is very logical to envision the “business, trade, profession or occupation” “carried on” by the employee as inseparable from those activities “carried on” by the employer. For

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<sup>176</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2007) (emphasis added).

example, in *Zelinsky*, the work the taxpayer performed was not researching and writing as an independent scholar in Connecticut, but instead he was researching and preparing for his teaching duties, as a professor, in New York State.<sup>177</sup> The court stated that “[t]he work he chooses to do at home is thus inextricably intertwined with the business of his New York law school . . . Cardozo did not employ him to carry out any of the school’s business activities in Connecticut.”<sup>178</sup> Although this argument was directed at the constitutionality of the statute, the point is the same. In situations like this, a New York based company does not employ individuals to do business for the company/school in another state; it employs them to do their jobs in New York, where the employer is based. Therefore, the location where the employee is “carrying on” her or his business is indistinguishable from where the employer carried on its business.

### 3. Lacks Even a Rational Basis?

After making the above stated points, the dissent concludes that the statute lacks even a rational basis.<sup>179</sup> The dissent concedes that the legislature had many “complexities” to consider while drafting the statute and that it allowed “the Commissioner to develop a workable rule.”<sup>180</sup> But the dissent stated that the convenience test was more or less out of harmony with the tax law and therefore failed to be rational.<sup>181</sup> The dissent cites *Jones v. Berman*,<sup>182</sup> because under New York law, “[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists” and agencies “have no authority to create a rule out of harmony with the statute.”<sup>183</sup>

As I noted above, the regulations issued (section 132.18) are not “out of harmony” with the tax law nor do they contradict it; these regulations *expand* the definitions in the tax law, as expressly authorized by the tax law.<sup>184</sup> Therefore, the regulation does not lack

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<sup>177</sup> *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 846 (N.Y. 2003).

<sup>178</sup> *Id.*

<sup>179</sup> *Huckaby*, 829 N.E.2d at 288 (R.S. Smith, J., dissenting).

<sup>180</sup> *Id.* (quoting majority at 281)

<sup>181</sup> *Id.*

<sup>182</sup> 332 N.E.2d 303 (N.Y. 1975).

<sup>183</sup> *Id.* at 308.

<sup>184</sup> The tax law clearly grants apportionment rules to the tax commission and regulations. N.Y. Tax Law § 631(c) (McKinney 2006) (“If a business, trade, profession or occupation is carried on partly within and partly without this state . . . New York sources shall be

a rational basis as the dissent claimed and was rightfully upheld by the majority.

#### 4. Constitutional Challenges in *Huckaby*

After discussing these issues, the dissent in *Huckaby* further discussed the constitutionality of the convenience test. As mentioned above, constitutional debate on the convenience test is abundant in tax commentary and discussion of this topic could quite easily fill its own book or article. It appears that the debate over the constitutionality of the convenience test is abundant mostly because the constitutional standards for state income taxation do not seem to appropriately fit many modern state taxation issues. But again, it is important to reiterate that the New York Court of Appeals twice held that the convenience test is constitutional despite Due Process, Equal Protection, and Commerce Clause challenges.<sup>185</sup> And again, the Supreme Court of the United States twice denied certiorari to cases involving this issue.<sup>186</sup> Therefore, for the purpose of this discussion, I have set most of the constitutional debate aside.

##### *B. Other Criticisms of the Convenience Test*

This section includes the most common arguments made in law journals and tax commentaries attacking the validity of and policies behind the convenience test. As I will show, these arguments lack merit.

#### 1. The Interpretation of the Tax Law is Inaccurate

One common argument in current convenience test discussion is that the 1919 New York Attorney General Opinion (suggesting a

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determined by apportionment and allocation *under such regulations.*") (emphasis added).

<sup>185</sup> *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276, 277, 284–85 (N.Y. 2005); *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843, 849 (N.Y. 2003).

<sup>186</sup> *Huckaby*, 829 N.E.2d 276, *cert. denied*, 546 U.S. 976 (2005); *Zelinsky*, 801 N.E.2d 840, *cert. denied*, 541 U.S. 1009 (2004). It is also important to note that although the Supreme Court can have numerous reasons for denying certiorari, in these cases, the Court very likely did not reject *Huckaby* and *Zelinsky* for lack of a federal constitutional issue. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds, we, of course, will not undertake to review the decision."). In both cases, the Court of Appeals relied almost entirely on federal constitutional case law and did not present any independent state constitutional grounds for its decision. See *Huckaby*, 829 N.E.2d at 281–84; *Zelinsky*, 802 N.E.2d at 845–49.

place of performance rationale) is a *better* (i.e., more correct) interpretation of the “source” language found in section 631 of the Tax Law.<sup>187</sup> This argument, however, is not very strong. The 1919 opinion was released well before the amendments to the tax law in 1960. The 1960 revisions acted as a reformation of the tax law, thus making the 1919 interpretation no longer valid. Additionally, the reformation was affirmed when the courts interpreted the statute clearly as a replacement of the old law.<sup>188</sup>

Most importantly, this misses a crucial part of section 631’s language. In subsection (c) it states that “[i]f a business, trade, profession or occupation is carried on partly within and partly without this state, as determined under regulations of the tax commission” income from “New York sources shall be determined by apportionment and allocation *under such regulations*.”<sup>189</sup> This clearly indicates that further explanation about what constitutes a “source” shall come from the regulations, namely, section 132.18, the convenience test. If the tax law intended to further the rationale of the 1919 opinion, it would not have been difficult to clearly say so. The tax law, however, instead puts the determination of an appropriate apportionment scheme on the shoulders of the tax commission. Since the determination of an apportionment scheme was left to the discretion of the tax commission, and the concept of “source within the state” depends on the selected apportionment scheme, then the tax commission was left the responsibility to define “source within the state” as they saw fit. The commission was, therefore, fully within its right to employ the convenience test as an appropriate method of sourcing.

Also, what these commentators have failed to mention is the later language in the Attorney General’s report. The often-quoted “work done, rather than the person paying for it” language is only half of the Attorney General’s opinion on what qualifies as a “source” within the state.” In the final paragraph, he stated “[w]here services are rendered partially within and partially without the [s]tate, the income therefrom should be divided *pro rata* into income from sources within and without the [s]tate. *I think the Comptroller*

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<sup>187</sup> See, e.g., Bentley, *supra* note 7, at 1153–54. The opinion states that “the work done, rather than the person paying for it, should be regarded as the ‘source’ of income.” 1919 N.Y. ATT’Y GEN. ANN. REP. 301.

<sup>188</sup> See *Huckaby*, 829 N.E.2d at 280; *Speno v. Gallman*, 319 N.E.2d 180, 181–82 (N.Y. 1974).

<sup>189</sup> N.Y. TAX LAW § 631(c) (McKinney 2006) (emphasis added).

*should make a rule fixing the methods of prorating.*<sup>190</sup> This is exactly the type of situation the convenience test seeks to address and this language supports two important conclusions. First, the Attorney General recognized in 1919 that there are situations that do not fall neatly into “work within the state” and “work without the state” categories; there are situations where work is partially “within” and partially “without.” Second, the Attorney General acknowledged that some sort of pro rata formula is needed for this type of situation (and that the commissioner must devise a method for addressing these complex situations). This later language, therefore, seems to undermine the conclusion made by many commentators about the 1919 report that it clearly suggested that a physical presence (place of performance) test is the appropriate interpretation of the tax law.

## 2. The “Revised Position” is Not a Revision at All

The May 2006 Technical Service Bureau Memorandum<sup>191</sup> has faced scrutiny because some commentators believe that the interpretation is not a revision at all, but simply a restatement of the current law and that the new “revised position” will not change the “harsh” impact of the rule.<sup>192</sup> Such an attack on the revision is without merit. First, the TSB-M is novel in the sense that it takes a significant portion of scattered case law rules surrounding the convenience test and consolidates them into one source that is easy for employers and employees to comprehend, access, and use. More importantly, however, it provides a template, through the listing of specific factors, that acts as a guide through the often complicated and factually dependant convenience test rules.<sup>193</sup> Finally, the TSB-M adds to the convenience test discussion the concept of the “bona fide employer office.”<sup>194</sup> If used properly, this concept can be very advantageous to taxpayers and employers alike. By following the guidelines set out in the TSB-M, taxpayers can contract with their employers (by requiring the factors required in the TSB-M) to assure that when they do work at home, they are working from a bona fide employer office and therefore will not be liable for New

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<sup>190</sup> 1919 N.Y. ATT'Y GEN. ANN. REP. 301 (emphasis added).

<sup>191</sup> See discussion *supra* Part II.E.

<sup>192</sup> William V. Vetter, *A Critique of the Empire State's 'New' Convenience of the Employer Rule*, 16 J. MULTISTATE TAX'N & INCENTIVES 14, 16–17 (2007).

<sup>193</sup> See discussion *supra* Part II.E.

<sup>194</sup> *Id.*

York taxes on the days worked from that bona fide office.<sup>195</sup> It seems likely, therefore, that proper use of this memorandum would help employees avoid the supposed “harsh” impact of the convenience test.

### 3. The Convenience Test is Not Tailored Well to Prevent Fraud

Another argument is that “the purpose of the convenience of the employer test is to avoid manipulation and abuses,” but individuals like Mr. Huckaby supposedly were not *trying* to act fraudulently.<sup>196</sup> This argument clearly misses the point. Yes, the purpose of the law is to attempt to prevent fraud as accurately and efficiently as possible, but every apportionment formula results in some error and can never operate flawlessly.<sup>197</sup> Not even a physical presence test would be able to escape erroneous application on occasion.<sup>198</sup>

Since *Huckaby*, however, the release of the TSB-M helps additionally counter this argument that the convenience test is not well-tailored. As some other commentators have noted, the specific and clear language provided by the Department’s revised interpretation of the law would probably allow more individuals like Mr. Huckaby to avoid liability for New York taxes.<sup>199</sup> This is because the TSB-M provides employers and employees with specific language and requirements and guidelines that they can satisfy with a well-planned telework arrangement. If the factors provided by the TSB-M are incorporated into the employee’s contract or other agreement, he or she could very easily work from Tennessee (or any location) without fear of violating the convenience test. With all of the tax commission’s cards now on the table concerning telecommuting arrangements, there is no excuse for individuals to fail to meet the requirements of the convenience test and therefore claim that the test is not well-tailored.

### 4. Eliminating the Convenience Test Will Boost the New York

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<sup>195</sup> *Id.*

<sup>196</sup> Bentley, *supra* note 7, at 1157.

<sup>197</sup> See *supra* note 60 (discussing the “inevitable error” in tax apportionment schemes).

<sup>198</sup> See *supra* Part IV.A.1 (discussing the purpose of preventing fraud more thoroughly in the context of *Huckaby*).

<sup>199</sup> Paul R. Comeau et al., *New York’s Revised Convenience Rule Provides Some Clarity and Continued Controversy*, 16 J. MULTISTATE TAX’N & INCENTIVES 18, 25 (2006). The authors of this article feel that Zelinsky would still be liable under the new test but Huckaby would likely not be and “[t]hus, taxpayers like Huckaby who find themselves clearly in a ‘telecommuting’ situation are much more likely to avoid the convenience rule under these new rules.” *Id.*

## Economy

Another common argument is that the convenience test harms New York economically.<sup>200</sup> The basic argument is that telecommuting promotes successful business and the large amount of tax revenues lost by eliminating the convenience test would be outweighed by an increase in income taxation revenues received from a boost in the economy through these successful businesses.<sup>201</sup> First, this argument relies on the premise that telecommuting is an absolute good thing, ignoring the many negative effects of telecommuting such as employee burnout due to longer hours, employee frustration, or an employee's inability to work well without adequate guidance and supervision.<sup>202</sup> Leaving aside the possibility that telecommuting is not necessarily an absolute good, this argument is based on pure conjecture. For example, in one article the author based her theory on an outdated 1996 public policy journal on welfare issues and from there the author merely speculates, without any other data, that increased revenues (if any) would outweigh the loss suffered by New York if they rid themselves of the convenience test.<sup>203</sup> Additionally, authors in a recent article found that a change from the convenience test to the physical presence test would result in a rather significant revenue loss.<sup>204</sup> Finally, many states, including New York, are facing tax revenue decreases as a result of the current status of the economy.<sup>205</sup> With the potential for a drop in revenue from income taxes, this is a large risk for a state like New York to take without other credible economic evidence.

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<sup>200</sup> Bentley, *supra* note 7, at 1157–58; Keating, *supra* note 7.

<sup>201</sup> Bentley, *supra* note 7, at 1165–66.

<sup>202</sup> See generally Cecily D. Cooper & Nancy B. Kurland, *Telecommuting, Professional Isolation, and Employee Development in Public and Private Organizations*, 23 J. ORGANIZATIONAL BEHAV. 511, 513 (2002) (finding that employee development is inextricably linked to factors that are more prevalent in a traditional workplace, including mentoring, personal networking, and informal learning); Robert Berman, *Telecommuting Has Its Downsides!*, LINKROLL, <http://www.linkroll.com/Business--6478-Telecommuting-Has-Its.html> (last visited Jan. 28, 2008) (arguing that telecommuting results in a loss of “team effort,” loss of beneficial “informal exchange” between employees, decrease in “individual growth” of employees, and decrease in “detail work”); U.S. Department of Transportation, *supra* note 5, at 38–40 (finding that telecommuting can lead to security issues, business credibility issues, employee loyalty issues, and initial increased costs).

<sup>203</sup> Bentley, *supra* note 7.

<sup>204</sup> Gavin & Pavano, *supra* note 7, at 9.

<sup>205</sup> See Conor Dougherty, *States to Tighten Belts as Weakness Of Economy Cuts Into Tax Receipts*, WALL ST. J., Jan. 15, 2008, at A1.



2009]

The Convenience of the Employer Test

823

## 5. The Convenience Test Threatens National Security

Individuals even stretch arguments that the convenience test impacts terrorism and homeland security.<sup>206</sup> They say that many government organizations support telecommuting in order to promote agency efficiency in the event of a disaster.<sup>207</sup> This argument was furthered, however, before the release of the revised TSB-M in 2006. As noted above, the language in the memorandum makes it clear what the agency must do to create a “bona fide office” in order to exempt the individual employees from liability. With some simple planning, these government agencies can assure that the individual offices are bona fide. By establishing a bona fide employer office, these government agencies can make sure they conform to the convenience test while still maintaining the necessary national security.

## 6. The Convenience Test Will Hinder Nationally Popular Telecommuting

Another argument is that there is significant federal support for telecommuting and that the convenience test stands in the way of national growth.<sup>208</sup> This again, like other arguments, does not mean that telecommuting and the convenience test cannot coexist. Employers and employees can contract, like they would over other contract terms, for the specifics provided by the TSB-M. If an employee or employer really wants to take advantage of telecommuting, it would not be very difficult to make the appropriate arrangements. The existence of the convenience test does not automatically mean that telecommuting will be hindered; that decision is up to the employees and employers.

## 7. Double Taxation

Another major argument is that individuals are being taxed twice.<sup>209</sup> This occurs when both states tax the individual for the income they believe to be sourced to that state.<sup>210</sup> However, as

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<sup>206</sup> See Goluboff, *supra* note 7, at 61.

<sup>207</sup> See *id.*

<sup>208</sup> See *id.*; see also Department of Transportation and Related Agencies—Appropriations, Pub. L. No. 106-346, § 359, 114 Stat 1356, 1356 A-36 (2000) (mandating that federal agencies make telecommuting available to all eligible employees).

<sup>209</sup> Gavin & Pavano, *supra* note 7, at 9.

<sup>210</sup> *Id.*

mentioned by the Court of Appeals, this is because the home states do not provide a credit.<sup>211</sup> If other states provided a credit, as New York does, for income that is sourced in another state, then there would be no problem.<sup>212</sup> New York does not and should not have the ability to control how other states tax their citizens. If anything, this argument leans towards an argument that other states should join New York by adopting the most fair, accurate, and efficient way to tax out-of-state workers for in-state companies: a convenience test.

#### V. SUPPORT FOR A CONVENIENCE TEST RATIONALE IN FEDERAL TAXATION

The underlying rationale behind the convenience test is not foreign to tax law and has been a recurring theme in federal taxation for some time. It is common in federal tax law not to allow individuals to receive benefits because they choose to live further away from their workplaces than their fellow employees. Revenue Ruling 99-7 analyzed whether or not a taxpayer's commuting expenses between the taxpayer's residence and place of employment were deductible as business expenses or nondeductible as personal expenses.<sup>213</sup> The ruling provided that individuals could not be compensated for electing to live a considerable distance from a place of employment.<sup>214</sup> The rationale behind this ruling is very similar to that behind the convenience test: the government is not going to provide further benefits to individuals who already benefit (whether financially or otherwise) from living further away from a place of employment. The federal tax law, like the convenience test, assumes that taxpayers live practically on the premises of employment and therefore refuses to compensate anyone who chooses, for his or her own convenience, to live elsewhere.

#### VI. CONCLUSION

Each state has the ability to tax its employees using the method it

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<sup>211</sup> *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 848–49 (N.Y. 2003).

<sup>212</sup> A rationale similar to this was adopted by the Court of Appeals in *Zelinsky* and part of an amicus curiae brief submitted by the city of New York. See *Zelinsky*, 801 N.E.2d at 849; Brief for City of New York as Amicus Curiae Supporting Respondents-Respondents, *Zelinsky*, 801 N.E.2d 840, 2003 WL 23336442, at \*3–4.

<sup>213</sup> Rev. Rul. 99-7, 1999-1 C.B. 361.

<sup>214</sup> *Id.* at 362.

chooses so long as that method is valid and meets the constitutional standards of the Due Process, Commerce, and Equal Protection Clauses. The New York Court of Appeals had two recent opportunities to find New York's "convenience of the employer" test unconstitutional, but did not. To further substantiate these decisions, the United States Supreme Court denied certiorari twice on appeals concerning the constitutionality of the convenience test.

Therefore, in order to have any strength, the only arguments against the convenience test must be those of tax policy. As I have shown, these policy arguments are generally without merit. Also, many of the policy arguments criticized the convenience test before the 2006 revision (TSB-M) and therefore did not consider the benefits derived from that memorandum. Well thought-out contracts and arrangements between employees and employers could easily prevent any inequities that might otherwise arise through poor planning. By following the guidelines and specific factors in the memorandum, individuals can create "bona fide employer office[s]" and therefore avoid any future problems.

The unspoken truth is that individuals would not work for a New York company if it did not provide them with some benefits over a company in their home state. New York has the right to be compensated for providing those benefits and opportunities. Having a New York employer provides obvious benefits to out-of-state residents. If these nonresident workers can reap these benefits *and* escape New York taxes, it will harm both New York and its resident employees.

As the courts and the legislature have recognized, the convenience test and its application are not without flaws, but a tax system is never absolutely perfect; small inequities are always a threat. As the court in *Zelinsky* noted, "in the absence of the convenience test, opportunities for fraud are great and administrative difficulties in verifying whether an employee has actually performed a full day's work while at home are readily apparent."<sup>215</sup> Put simply, the convenience test is significantly more efficient at preventing fraud than the alternative physical presence test. With telecommuting becoming more popular, there will undoubtedly be more opportunities for fraud in the future. New York must remain vigilant and guard itself from tax fraud through the use of the convenience test.

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<sup>215</sup> *Zelinsky*, 801 N.E.2d at 846 n.4.