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# Hillenmeyer, "Convenience of the Employer," and the Taxation of Nonresidents' Incomes

Edward A. Zelinsky

*Benjamin N. Cardozo School of Law of Yeshiva University*

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# **HILLENMEYER, “CONVENIENCE OF THE EMPLOYER,” AND THE TAXATION OF NONRESIDENTS’ INCOMES**

EDWARD A. ZELINSKY\*

## ABSTRACT

In *Hillennmeyer v. Cleveland Board of Review*, Ohio’s Supreme Court unanimously declared that Cleveland’s municipal income tax violated the Due Process Clause of the United States Constitution by taxing a nonresident athlete under the “games-played” method rather than the “duty-days” method. According to the Ohio court, the games-played approach overtaxed Mr. Hillennmeyer by allocating to Cleveland Mr. Hillennmeyer’s compensation from the Chicago Bears using the percentage of the Bears’ games played in Cleveland. By this approach, Cleveland taxed Mr. Hillennmeyer extraterritorially, reaching income he earned from services he performed for the Bears outside of Cleveland’s borders. Due process, the Ohio court concluded, requires Cleveland to avoid such extraterritorial taxation by allocating income based on all of Mr. Hillennmeyer’s days worked for the Bears including days devoted to practice sessions and promotional activity.

The Supreme Court of the Buckeye State correctly construed the Due Process Clause of the U.S. Constitution and thereby created a conflict with the interpretation of that clause advanced by New York’s highest tribunal, the Court of Appeals, in its *Zelinsky* and *Huckaby* decisions. As a matter of constitutional law and tax policy, a nonresident’s income should be taxed in the state and city where it is earned. The *Hillennmeyer* court got this principle right. New York’s courts did not.

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## INTRODUCTION

In *Hillennmeyer v. Cleveland Board of Review*, the Supreme Court of Ohio unanimously declared that Cleveland’s municipal income tax violated the Due Process Clause of the U.S. Constitution by taxing a nonresident athlete under the “games-played” method rather than the “duty-days” method.<sup>1</sup> According to the Ohio Supreme Court, the games-played approach overtaxed Mr. Hillennmeyer by allocating

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\* Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law of Yeshiva University.

<sup>1</sup> 41 N.E.3d 1164, 1177 (Ohio), *cert. denied*, 136 S. Ct. 491 (2015).

to Cleveland Mr. Hillenmeyer's compensation from the Chicago Bears using the percentage of the Bears' games played in Cleveland. By this approach, Cleveland taxed Mr. Hillenmeyer extraterritorially, reaching income he earned from services he performed for the Bears outside of Cleveland's borders. Due process, the Ohio Supreme Court concluded, required Cleveland to avoid such extraterritorial taxation by allocating income based on all of Mr. Hillenmeyer's days worked for the Bears including days devoted to practice sessions and promotional activity.

At one level, *Hillenmeyer* is the most recent episode in the evolution of "jock taxation," i.e., the efforts of cities and states to enforce their income taxes against nonresident athletes (and entertainers) performing within their respective borders.<sup>2</sup> However, the implications of *Hillenmeyer* extend beyond such "jock taxation." The Supreme Court of the Buckeye State correctly construed the Due Process Clause of the U.S. Constitution and thereby created a conflict with the interpretation of that clause advanced by New York's highest tribunal, the Court of Appeals, in its *Zelinsky*<sup>3</sup> and *Huckaby*<sup>4</sup> decisions.

Holding for Mr. Hillenmeyer, the Ohio Supreme Court understood due process as requiring that, for income tax purposes, a nonresident employee's "compensation must be allocated to the place where the employee performed the work."<sup>5</sup> In contrast, under New York's so-called "convenience of the employer" rule, New York's highest court allows New York to tax extraterritorially, reaching income earned on days when nonresidents work at their out-of-state homes and never set foot in the Empire State.

*Hillenmeyer* properly implements the due process case law of the United States Supreme Court barring extraterritorial taxation. *Hillenmeyer* also reaches better results as a matter of tax policy. In contrast, New York's employer convenience rule often creates double state income taxation by projecting the Empire State's taxing authority beyond New York's boundaries to tax nonresidents on income they earn at their out-of-state homes.

In an appropriate case, the United States Supreme Court could resolve the tension between these conflicting approaches to the state taxation of nonresident incomes. Alternatively, Congress should enact legislation to confirm the *Hillenmeyer* approach and thereby eliminate the double taxation caused by New York's extraterritorial taxation of nonresidents' incomes when such nonresidents work outside New York's boundaries.

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<sup>2</sup> See, e.g., Robert Willens, *Cleveland's "Games Played" Method of Allocation Rejected*, 87 DAILY TAX REP. J. 1 (2015); Kirk Berger, Note, *Foul Play: Tennessee's Unequal Application of its Jock Tax Against Professional Athletes*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 333, 336 (2014); Jennifer Carr, *Former NFL Players Have Strong Claims in Cleveland Income Allocation Dispute*, 73 ST. TAX TODAY, Jul. 29, 2014, at 4-5; Steven Pahunsk, *Heads Up! Recent Federal and State Attempts to Address Nonresident Income Taxation Perpetuate Selective Enforcement and Unfairness of the "Jock Tax,"* 64 TAX LAW 961, 970-71 (2011).

<sup>3</sup> *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003).

<sup>4</sup> *Huckaby v. N.Y. State Div. of Tax Appeals*, 829 N.E.2d 276 (N.Y. 2005).

<sup>5</sup> *Hillenmeyer*, 41 N.E.3d at 1176.

As a matter of constitutional law and tax policy, a nonresident's income should be taxed in the state and city where it is earned.<sup>6</sup> The *Hillmeyer* court got this principle right. New York's courts did not.

#### I. THE *HILLENMEYER* DECISION

Hunter T. Hillmeyer was a linebacker for the Chicago Bears.<sup>7</sup> In 2004, 2005, and 2006, Mr. Hillmeyer worked in Cleveland for two days in each year.<sup>8</sup> Each year, the Bears played approximately twenty games, one of which was played in Cleveland.<sup>9</sup> Each year, the Bears practiced in Cleveland on a Saturday, played a game on the immediately following Sunday, and departed for home after the game.<sup>10</sup> Hence, Mr. Hillmeyer worked each year in Cleveland for two days, one day of practice, one day for the actual game.

Using the "games-played" method, Cleveland imposed its nonresident municipal income tax against 1/20 of Mr. Hillmeyer's salary from the Bears.<sup>11</sup> Under this method, Cleveland each year divided the total number of games the Bears played in Cleveland (1) by the total number of "pre-season and regular-season games" played by the Bears (20).<sup>12</sup> Cleveland then multiplied the resulting fraction (1/20) against Mr. Hillmeyer's salary from the Bears. Cleveland thereby allocated to itself and taxed five percent of Mr. Hillmeyer's salary on the theory that five percent of the Bears' games occurred in Cleveland.<sup>13</sup>

In contrast is the "duty-days" method of allocating nonresident athletes' incomes to the various states and communities in which they work. Under the duty-days method, the numerator of the fraction is the number of days the nonresident athlete works each year in the taxing jurisdiction.<sup>14</sup> For Mr. Hillmeyer, this number was two, representing the two days each year he spent with the Bears in Cleveland.<sup>15</sup> The denominator of the fraction is the total number of the athlete's work days including all game, practice, promotional, and training days.<sup>16</sup> In Mr. Hillmeyer's case, this

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<sup>6</sup> "[A] fundamental, underlying principle of income taxation [is] that income should be taxed where it is earned . . ." Maria Koklanaris, *U.S. House Members Introduce 2015 Version of Mobile Workforce Bill*, 76 ST. TAX NOTES 500 (2015) (quoting Patrick Carter, director of the Delaware Division of Revenue and spokesperson for the Federation of Tax Administrators). Ironically, notwithstanding Mr. Carter's comments, Delaware employs the "convenience of the employer" doctrine to tax nonresident employees on days they work outside Delaware. See *Flynn v. Dir. of Revenue*, RIA SLT DE 1504 (Del. Tax Appeals Bd. Sept. 14, 2011).

<sup>7</sup> *Hillmeyer*, 41 N.E.3d at 1167.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1169.

<sup>11</sup> *Id.* at 1167-68.

<sup>12</sup> *Id.* at 1170-71.

<sup>13</sup> *Id.* at 1171.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

number was on the order of 157, representing not just game days but all duty days Mr. Hillenmeyer worked for the Bears.<sup>17</sup> These duty days for the Bears included days devoted to “training, practices, strategy sessions, and promotional activities.”<sup>18</sup> The resulting fraction (2/157) allocates a much smaller percentage (1.27%)<sup>19</sup> of Mr. Hillenmeyer’s salary to Cleveland on the theory that the proper way to measure Mr. Hillenmeyer’s salary earned in, and allocable to, Cleveland is by looking at all of the “duty days” on which Mr. Hillenmeyer worked for the Bears. In any year, only two of these duty days occurred in Cleveland.<sup>20</sup>

When Cleveland insisted on the games-played, rather than the duty-days, method for allocating to Cleveland a portion of Mr. Hillenmeyer’s salary from the Bears, Mr. Hillenmeyer objected, asserting both state law and constitutional claims. Among his constitutional claims, Mr. Hillenmeyer contended that, under the dormant Commerce Clause of the U.S. Constitution, Cleveland overtaxed Mr. Hillenmeyer under the games-played method by failing to apportion his income properly between Cleveland and the other locations in which Mr. Hillenmeyer performed services for the Bears.<sup>21</sup> Mr. Hillenmeyer also maintained that the games-played method, violated the Due Process Clause of the U.S. Constitution by taxing him extraterritorially, allocating to Cleveland compensation he earned from the Bears outside of Cleveland.

The Ohio Supreme Court held that Cleveland’s use of the games-played method, while justified under Ohio law, violated the requirements of the Due Process Clause:

Cleveland’s power to tax reaches only that portion of a nonresident’s compensation that was earned by work performed in Cleveland. The games-played method reaches income for work that was performed outside of Cleveland, and thus Cleveland’s income tax violates due process as applied to NFL players such as Hillenmeyer.<sup>22</sup>

Central to the Ohio Supreme Court’s analysis was the U.S. Supreme Court’s seminal statement of state taxing authority in *Shaffer v. Carter*.<sup>23</sup> Per *Shaffer*, a state may only tax a nonresident’s income that “actually arises” in the state.<sup>24</sup> Under this principle, the Ohio court declared, “local taxation of a nonresident’s compensation for services must be based on the location of the taxpayer when the services were performed.”<sup>25</sup> Accordingly, for state and local income tax purposes, a nonresident’s

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<sup>17</sup> *Id.* This was the total number of “duty days” Mr. Hillenmeyer worked for the Bears in 2004. The equivalent number of duty days was 165 in 2005 and 168 in 2006. *Id.*

<sup>18</sup> *Id.* at 1168.

<sup>19</sup> *Id.* at 1171 (this was the percentage for 2004). For 2005, the equivalent percentage under the “duty days” method was 1.21%, while for 2006 the equivalent percentage was 1.19%. *Id.*

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

<sup>21</sup> *Id.* at 1167-68.

<sup>22</sup> *Id.* at 1176.

<sup>23</sup> 252 U.S. 37 (1920).

<sup>24</sup> *Id.* at 55.

<sup>25</sup> *Hillenmeyer*, 41 N.E.3d at 1175.

“compensation must be allocated to the place where the employee performed the work.”<sup>26</sup>

The games-played method allocated five percent of Mr. Hillenmeyer's compensation to Cleveland when he actually only worked in Cleveland for “approximately 1.25 percent” of his duty days for the Bears.<sup>27</sup> As the court in *Hillenmeyer* stated, “[b]y using the games-played method, Cleveland has reached extraterritorially, beyond its power to tax.”<sup>28</sup> “Due Process requires” that Cleveland use for income tax purposes “an allocation that reasonably associates the amount of compensation taxed with work the taxpayer performed within the city.”<sup>29</sup>

Buttressing the *Hillenmeyer* court's due process analysis is *Moorman Manufacturing Co. v. Bair*,<sup>30</sup> in particular, *Moorman*'s observation that due process requires that to avoid extraterritorial taxation, “the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’”<sup>31</sup> The Ohio court summarized its due process analysis:

Cleveland's games-played method imposes an extraterritorial tax in violation of due process, because it foreseeably imposes Cleveland income tax on compensation earned while Hillenmeyer was working outside Cleveland. Consistent with the rule that the taxing authority may not collect tax on a nonresident's compensation earned outside its jurisdiction, the duty-days method properly includes as taxable income only that compensation earned in Cleveland by accounting for all the work for which an NFL player such as Hillenmeyer is paid, rather than merely the football games he plays each year. This method therefore comports with due process and ensures that the tax collected is not disproportionate to the income received for work in Cleveland.<sup>32</sup>

Because the Ohio court ruled for Mr. Hillenmeyer on due process grounds, it did not address Mr. Hillenmeyer's dormant Commerce Clause claim.<sup>33</sup>

## II. NEW YORK'S “CONVENIENCE OF THE EMPLOYER” RULE

New York nominally allocates nonresidents' income on the equivalent of the “duty days” method. Specifically, in any year New York taxes a nonresident's salary on the basis of a fraction consisting of the days the nonresident works in New York state for his employer divided by the nonresident's total days worked for his employer in all locations.<sup>34</sup> However, a controversial<sup>35</sup> exception effectively

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<sup>26</sup> *Id.* at 1176.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 437 U.S. 267 (1978).

<sup>31</sup> *Id.* at 273 (quoting *Norfolk & W. Ry. Co. v. State Tax Comm'n*, 390 U.S. 317, 325 (1968)).

<sup>32</sup> *Hillenmeyer*, 41 N.E.3d at 1176-77.

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

<sup>34</sup> N.Y. COMP. CODES R. REGS. 20, § 132.18(a) (2015).

swallows this rule: New York maintains that a day worked outside the Empire State will nevertheless be treated as an in-state day for income tax purposes unless the nonresident works out-of-state that day out “of necessity, as distinguished from convenience.”<sup>36</sup> In practice, this so-called “convenience of the employer”<sup>37</sup> test produces the same result as Cleveland’s “games-played” method by allocating nonresidents’ incomes to New York even if such income is earned on a day wholly worked outside New York’s boundaries.

*Zelinsky v. Tax Appeals Tribunal* involved a law professor<sup>38</sup> who lives in New Haven, Connecticut, and teaches in Manhattan at Yeshiva University’s Benjamin N. Cardozo School of Law.<sup>39</sup> In stipulations agreed to by this nonresident professor and the New York Department of Taxation and Finance,<sup>40</sup> New York acknowledged that, in the years in question, the professor taught in and commuted to Manhattan eighty-four days each year “mainly to teach classes and meet with students.”<sup>41</sup> The Department also stipulated that the professor otherwise worked at his Connecticut home “grading examinations, writing recommendations for students, and conducting scholarly research and writing.”<sup>42</sup> Since a majority of the professor’s work days for

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<sup>35</sup> See, e.g., Walter Hellerstein & John A. Swain, *Income Taxation of Nonresidents*, STATE TAXATION ¶ 20.05[4][e][i] (3d ed. 2015), 1999 WL 1399044 [hereinafter Hellerstein & Swain]; WALTER HELLERSTEIN ET AL., STATE & LOCAL TAXATION: CASES & MATERIALS 391-402 (10th ed. 2014) [hereinafter HELLERSTEIN ET AL.]; Nicole Belson Goluboff, *Back in Business With The Multi-State Worker Tax Fairness Act*, 72 ST. TAX NOTES 101, 102 (2014) [hereinafter Belson Goluboff, *Tax Fairness Act*]; Nicole Belson Goluboff, *State Tax Reform: The Modern Solution To Keep Workers Mobile and Businesses Resilient*, TAX MGMT. WKLY ST. TAX RPT. 1, 1-3 (2014); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX. REV. 885, 922 (2008); William V. Vetter, *New York’s Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents* (pt. 2), 42 ST. TAX NOTES 229, 238 (2006). For my most recent comments on New York’s employer convenience rule, see Edward A. Zelinsky, *Combining the Mobile Workforce and the Telecommuter Tax Acts*, 65 ST. TAX NOTES 319 (2012).

<sup>36</sup> N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2015).

<sup>37</sup> The term “convenience of the employer” does not actually appear in the regulation though this is how the courts and commentators have come to refer to New York’s taxation of nonresidents on days they work outside the Empire State. See, e.g., *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 844 (N.Y. 2003) (referring to the “convenience of the employer” rule).

<sup>38</sup> I.e., me.

<sup>39</sup> *Id.* at 843-44.

<sup>40</sup> These stipulations were accepted *in toto* by the administrative law judge as his findings of fact. In turn, the Tax Appeals Tribunal accepted these stipulation-based findings of fact as found by the administrative law judge. *In re Zelinsky*, DTA No. 817065, 2001 WL 1512096, at \*1-\*2.

<sup>41</sup> *Zelinsky*, 801 N.E.2d at 843-44.

<sup>42</sup> *Id.* at 844. Professor Vetter and Professor Hellerstein both criticize the Court of Appeals for ignoring the factual stipulations agreed to by Professor Zelinsky and the Department. See William V. Vetter, *New York’s Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents* (pt. 1), 42 ST. TAX NOTES 173 (2006) (“clearly inconsistent with the stipulations and ALJ findings”); Hellerstein & Swain, *supra*

his law school employer occurred at his out-of-state home, the resulting fraction allocated to New York was less than half of his salary from Cardozo.

However, under the rubric of New York's convenience of the employer rule, the Department taxed all of Professor Zelinsky's salary even though he spent a majority of his working days at home in Connecticut, engaging in legal writing and other professorial activities.<sup>43</sup>

In the face of constitutional claims similar to those advanced by Mr. Hillenmeyer, New York's Court of Appeals sustained New York's taxation of all of Professor Zelinsky's salary, even though he spent a majority of his working days outside the Empire State, engaged in legal scholarship and other professorial duties at his Connecticut home. The Court of Appeals summarily dismissed the claim that the due process prohibition on extraterritorial taxation limited New York to taxing the portion of Professor Zelinsky's law school salary actually earned on the professor's days teaching in New York: "[A]n ample foundation to justify the tax is provided by the host of tangible and intangible benefits flowing directly and indirectly to petitioner from New York, the location of the law school that supplies his total relevant income."<sup>44</sup>

The New York court never explained how the benefits New York provides to the professor's New York employer, the Cardozo School of Law, overcome the due process requirement that New York only tax the income earned by Professor Zelinsky within New York's borders.

The Court of Appeals decided *Zelinsky* against the taxpayer by a 6-0 vote. On its second confrontation with the constitutionality of the employer convenience doctrine, two members of the New York court developed reservations about the constitutionality of the "convenience of the employer" rule. However, in *Huckaby v. N.Y. State Division of Tax Appeals*, a bare majority of the court's seven judges still sustained the rule against constitutional challenge.<sup>45</sup>

Thomas L. Huckaby was a Tennessee resident and a computer programmer who worked for a New York company.<sup>46</sup> Mr. Huckaby "spent roughly 25% of his workdays in New York and 75% of his workdays in Tennessee" at his home office in the Volunteer State.<sup>47</sup> When New York taxed all of Mr. Huckaby's salary, he raised both dormant Commerce Clause and Due Process challenges. Citing its due process discussion in *Zelinsky*, the *Huckaby* court reiterated the "host of tangible and intangible protections, benefits and values' New York provided to the taxpayer and his employer"<sup>48</sup> and cited these as overcoming Mr. Huckaby's due process claim to be free of New York state income tax on the days he worked for his employer at his home in Nashville.<sup>49</sup>

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note 35 ("The court chose to ignore the fact that teaching constituted only a portion of Zelinsky's duties . . .").

<sup>43</sup> *Zelinsky*, 801 N.E.2d at 840-41.

<sup>44</sup> *Id.* at 48-49.

<sup>45</sup> 829 N.E.2d 276, 277 (N.Y. 2005).

<sup>46</sup> *Id.* at 277-78.

<sup>47</sup> *Id.* at 278.

<sup>48</sup> *Id.* at 283 (quoting *Zelinsky*, 801 N.E.2d at 848).

<sup>49</sup> *Id.* at 279.

Judge Robert Smith (who joined the New York Court of Appeals after *Zelinsky*) dissented in *Huckaby*,<sup>50</sup> supported by Judges George B. Smith and Carmen Ciparick (who had been part of the six-judge majority that ruled against Professor Zelinsky).<sup>51</sup> In due process terms, Judge Smith stated, “the tax in this case—applied to 100% of Huckaby’s income—is out of all proportion to the time he spent working in New York—25%.”<sup>52</sup> It is a “novel due process theory”<sup>53</sup> that “permits a state to tax income earned out of state by nonresident employees of local employers . . . .”<sup>54</sup>

Like “jock taxation,” New York’s convenience of the employer rule has been subject of extensive and overwhelmingly negative commentary.<sup>55</sup> However, as of today, New York persists in taxing nonresidents’ incomes earned on days such nonresidents work for their employers at their out-of-state homes and do not set foot in the Empire State.

### III. DISCUSSION

*Hillmeyer* faithfully implements the U.S. Supreme Court’s due process case law. *Zelinsky* and *Huckaby* do not. A central theme of the U.S. Supreme Court’s due process case law is that states must avoid extraterritorial taxation and thus may only tax values that arise within their respective borders: “The Due Process and Commerce Clauses forbid the States to tax ‘extraterritorial values.’”<sup>56</sup>

It is hard to imagine taxation more extraterritorial in nature than New York’s taxation of the income earned by Mr. Huckaby in Tennessee or by Professor Zelinsky in Connecticut. This was the point grasped by the Ohio Supreme Court in *Hillmeyer*, namely, as a matter of due process, Cleveland cannot tax Mr. Hillmeyer on the income he earned from the Bears on services performed outside Ohio. “[L]ocal taxation of a nonresident’s compensation for services must be based on the location of the taxpayer when the services were performed.”<sup>57</sup>

Besides being correct as a matter of constitutional law, the result in *Hillmeyer* is also better as a matter of tax policy. New York’s “convenience of the employer” rule typically causes double state income taxation of compensation earned by nonresidents on days they work at their homes outside the borders of the Empire State.

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<sup>50</sup> *Id.* at 285.

<sup>51</sup> *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840 (N.Y. 2003).

<sup>52</sup> *Huckaby*, 829 N.E.2d at 290 (Smith, J., dissenting).

<sup>53</sup> *Id.* at 291.

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

<sup>55</sup> See Berger, *supra* note 2.

<sup>56</sup> *MeadWestvaco Corp. v. Ill. Dept. of Revenue*, 553 U.S. 16, 19 (2008) (quoting *Container Corp. of America v. Franchise Tax Bd.* 463 U.S. 159, 164 (1983)); see also Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit and the Dormant Commerce Clause*, 28 VA. TAX REV. 1 (2008).

<sup>57</sup> *Hillmeyer v. Cleveland Bd. of Rev.*, 41 N.E.3d 1164, 1175 (Ohio), *cert. denied*, 136 S. Ct. 491 (2015).

A majority of states which impose income taxes on their residents provide no offsetting credit for the income taxes New York (or any other state)<sup>58</sup> levies under the employer convenience rule since this income arises in the state where the resident works at home, not in New York. These states of residence are correct to withhold a credit against their respective income taxes when New York, via the employer convenience rule, taxes income earned outside its boundaries. On the days one of their residents works from home, these states of residence (not New York) provide public services to the resident working at home. Under these circumstances, a credit by the resident state for the income taxes improperly imposed by New York cedes to New York the primary authority to tax – even though, on this work-at-home day, it is the state of residence (not New York) which provides public services to the resident laboring at home.

Consider, for example, a day when Professor Zelinsky researches, writes, and grades exams at home in Connecticut. When he turns on the faucet, the water is provided by the Greater New Haven Water Pollution Control Authority. The policeman who patrols in front of Professor Zelinsky's Connecticut house on this work-at-home day is an employee of a Connecticut municipality. If Professor Zelinsky requires EMT services on a day he writes, researches, or grades at his house, the EMT will be also be an employee of a Connecticut municipality.

Thus, on a day when Professor Zelinsky works at home, any services New York provides to him are at best tangential compared to the services provided by Connecticut and its municipalities. In light of the benefits it provides to its residents on the days they labor at home, Connecticut, like most of its sister states, correctly views its authority to tax income on this day as primary. Connecticut (like most other states imposing an income tax) thus does not furnish a credit, which would cede the authority to tax on such day to New York.<sup>59</sup>

The result is double state income taxation as, on such a day, Connecticut (the state where Professor Zelinsky lives, works and receives public services) properly imposes its income tax on him. Simultaneously, New York imposes a second tax even though, on this work-at-home day, Professor Zelinsky does not leave Connecticut or enter New York. Since neither state gives a credit for the income tax levied by the other, the upshot is double state taxation of the income Professor Zelinsky earns in Connecticut.

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<sup>58</sup> While New York has been the most aggressive state in applying the “convenience of the employer” rule, the other states embracing some version of the rule are Delaware, Pennsylvania and Nebraska. *See Flynn v. Dir. of Revenue*, RIA SLT DE 1504 (Del. Tax Appeals Bd. Sept. 14, 2011); *see also* 316 NEB. ADMIN. CODE. § 22-003.01(C)(1) (2015); 61 PA. CODE § 109.8 (2015).

<sup>59</sup> Connecticut, like most states which impose a personal income tax, only grants an income tax credit for taxes paid to another state “derived from sources” within that other state. CONN. GEN. STAT. ANN. § 12-704(a)(1) (West 2015). Since New York's employer convenience doctrine taxes income earned outside New York's borders, there is no credit under this or any similar standard which grants a credit only if another state taxes income which is earned within that other state. For a discussion of state income tax credits for taxes paid to another state, see Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 546-48 (2014).

A minority of states do give a credit against their income taxes when New York (or another state) taxes under the employer convenience rule.<sup>60</sup> This credit avoids double taxation for the individual working at home, but causes the resident state's treasury to subsidize New York on a day when the resident state provides public services to its resident working at home.

Consider, for example, Professor Zelinsky's Cardozo colleague who works a day from her home in New Jersey, writing, researching, and grading. On such a day worked at home, the Garden State and its municipalities provide the public services protecting this professor. New Jersey is one of the minority states that credits against its income tax the New York taxes attributable to this day.<sup>61</sup>

This New Jersey credit avoids double taxation for its resident, though she still pays the higher New York rate on the salary she earns at home in New Jersey.<sup>62</sup> Moreover, this New Jersey credit depletes New Jersey's treasury even though, on this work-at-home day, New Jersey and its localities provide the public services to the law professor working at her home in the Garden State. As a matter of tax policy, this result (like double state income taxation of the same income) is unsound as the state of residence, New Jersey in this example, obtains no taxes from its resident working at home—even though New Jersey and its localities, not New York, provide services on that day to the resident working at home.

In contrast to the outcomes in *Zelinsky* and *Huckaby*, *Hillenmeyer* reaches the right result as a matter of tax policy: Mr. Hillenmeyer only pays municipal income taxes to Cleveland for the two days each year he actually spent in Cleveland for the Bears—the two days on which he received Cleveland's public services.

*Moorman* suggests that, in taxing the salaries of nonresident athletes, Cleveland could weigh game days more heavily than practice and promotional days on the theory that game days are more important to the production of Mr. Hillenmeyer's salary from the Bears.<sup>63</sup> In *Moorman*, the Supreme Court upheld an Iowa income apportionment formula, which assigned to the Hawkeye State the same percentage of a corporate taxpayer's total income as the percentage of the taxpayer's total sales, which occurred in Iowa.<sup>64</sup> The Iowa apportionment formula disregarded the minimal percentage of the taxpayer's property and payroll located in the Hawkeye State. In sustaining Iowa's sales-only apportionment formula, the *Moorman* Court observed that:

[T]he basic principles [concerning apportionment formulas are] that the States have wide latitude in the election of apportionment formulas and that a formula-produced assessment will only be disturbed when the

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<sup>60</sup> *Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843 (N.Y. 2003).

<sup>61</sup> Unlike Connecticut or the majority of other states imposing a tax on personal incomes, New Jersey grants a credit for "any income tax" imposed by another state, even if that tax is imposed on income not attributable to that other state. N.J. STAT. ANN. § 54A:4-1(a) (West 2015).

<sup>62</sup> New Jersey, like most states, limits its credit to the taxes New Jersey assesses. *Id.* Consequently, there is no New Jersey credit to the extent the New York income tax imposes a higher tax than does the Garden State.

<sup>63</sup> *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978).

<sup>64</sup> *Id.*

taxpayer has proved by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportion to the business transacted . . . in that State or has led to a grossly distorted result.<sup>65</sup>

In the wake of *Moorman*, many states reconfigured their respective formulas for apportioning corporate income. One common post-*Moorman* approach is to apportion income on the basis of an average of the percentages of a corporation's sales, property, and payroll in the taxing state, but to double count the fraction reflecting the percentage of the taxpayer's sales in the taxing state.<sup>66</sup> In a similar fashion, Cleveland could plausibly conclude that game days are the most important days on an athlete's schedule and thus double count these days.

But Cleveland cannot do what it did to Mr. Hillenmeyer, namely, ignore completely the nongame days on which a nonresident athlete provides practice and promotional services for the team employing him. That, as the *Hillenmeyer* court recognized, produces a "grossly distorted result"<sup>67</sup> in violation of the Due Process Clause's prohibition on extraterritorial income taxation.

#### IV. REMEDIES

Ideally, the U.S. Supreme Court could have heard *Hillenmeyer* and confirmed that decision's application of the Due Process Clause. Alternatively, Congress, using its authority under the Commerce Clause of the U.S. Constitution, could confirm the *Hillenmeyer* result legislatively.

Legislation to overturn *Zelinsky* and *Huckaby* has regularly been introduced in Congress since those decisions were handed down by the New York Court of Appeals. In its most recent incarnation, this legislation was introduced in Congress as the Multi-State Worker Tax Fairness Act of 2014.<sup>68</sup> If enacted into law, this Act would confirm *Hillenmeyer* on a nationwide basis by providing that a state may impose income tax on a nonresident's compensation "for any period of time only if such nonresident individual is physically present in such State for such period."<sup>69</sup> The Act would further clarify that a "State may not impose nonresident income taxes on such compensation with respect to any period of time when such nonresident individual is physically present in another State."<sup>70</sup> Moreover, the Act would

<sup>65</sup> *Id.* (internal quotation marks and citations deleted) (ellipsis in original).

<sup>66</sup> See HELLERSTEIN ET AL., *supra* note 35, at 501; see also, e.g., KY. REV. STAT. ANN. § 141.120(8) (West 2015); N.H. REV. STAT. ANN. § 77-A:3II(a) (LexisNexis 2015); VA. CODE ANN. § 58.1-408 (West 2015).

<sup>67</sup> *Moorman*, 437 U.S. at 274.

<sup>68</sup> S. 2347, 113th Cong. § 2 (2014) (introduced by Senators Blumenthal and Murphy); H.R. 4085, 113th Cong. § 2 (2014) (introduced by Representatives Himes, DeLauro, and Esty); see also Belson Goluboff, *Tax Fairness Act*, *supra* note 35. This Act would have amended Chapter 4 of title 4 of the United States Code to add 4 U.S.C. §127, Limitation on State taxation of compensation earned by nonresident telecommuters and other multi-State workers.

<sup>69</sup> S. 2347, 113th Cong. § 2(a).

<sup>70</sup> *Id.*

explicitly bar any state from utilizing “any convenience of the employer test or any similar test.”<sup>71</sup>

Thus, if enacted into law, the Multi-State Worker Tax Fairness Act would implement nationwide the due process principle, exemplified by *Hillenmeyer*, that states may not tax nonresidents extraterritorially on compensation such nonresidents earn on days worked outside the taxing state.

#### CONCLUSION

Both as a matter of constitutional law and tax policy, a nonresident’s income should be taxed in the state and city where it is earned. The *Hillenmeyer* court got this principle right. The *Zelinsky* and *Huckaby* courts did not.

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