An Extended Presence, Interstate Style: First Notes on a Theme from Saenz

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AN EXTENDED PRESENCE, INTERSTATE STYLE:
FIRST NOTES ON A THEME FROM SAENZ

Bernard E. Jacob*

"[P]roperty will [not] be subjected to double or treble taxation. Each state will tax only the capital really employed in it . . . ."1

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Readers should not hold the Editors of the Hofstra Law Review responsible for deviations from THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass’n et al., eds., 17th ed. 2000) on which I have insisted.

1. Daniel Webster, making a losing argument for the State of Maryland in McCulloch v. Maryland, 17 U.S. 316, 348 (1819). The Court, famously, did not rely on his assurance.
I. Founder-State Trusts

New York has imposed a tax on the net income of resident and nonresident individuals, trusts and estates for more than eighty years. During all of that time, the scheme for the taxation of trusts has centered on a distinction between resident trusts and nonresident trusts. The same distinction is important for all taxpayers, not just trusts. A resident individual, for example, is taxed on his or her global income, that is, income from any and all sources whatever, just as in the case of a resident trust, while a nonresident pays taxes only on income that has its source in New York.

Most states impose taxes on income of both residents and nonresidents, so that where an out-of-state taxpayer receives income from a source within a state there is a potential for double taxation. To take the example of someone who is a resident of New York, but owns a goldmine in California, that taxpayer would report and pay a tax on all her income to New York, including the net income from the California goldmine. She would, as a nonresident under California law, report and pay a tax to California, but California would tax only her goldmine income.

The taxation of the goldmine income by both California and New York is surely double taxation of that income, but this double taxation

4. See Hellerstein & Hellerstein, supra note 2, § 20.04[2].
5. For a discussion of double (or multiple) taxation, see infra notes 379-83 and accompanying text.
has always been seen as comporting with the United States Constitution. As a result, the imposition of these two state income taxes on the same income by New York and California depends solely on the tax laws of the two states. The good news is that New York, as almost any American State that has a general state income tax, will permit a resident taxpayer to credit the tax paid elsewhere as a nonresident taxpayer against the tax due the state of residence.

In New York, however, I also find another aspect of the income tax law applicable to trusts that is even stranger than the potential for double taxation that New York's tax credit has, generally, transformed into the stately dance of cooperation described above. I mean, here, New York's definition of a New York resident trust. A New York resident trust is one whose settlor or settlors were New York residents at the time the trust became effective and irrevocable. Every testamentary trust whose settlor died a resident of New York is a resident trust; and every inter vivos trust is a resident trust if the settlor was a resident of New York at the time the trust became irrevocable. All such trusts are New York resident trusts without any regard to the current residence of living settlors or the current or past residence of trustees or beneficiaries of the trust, the place of "administration" of the trust in the sense of the carrying on of its regular operations, whether or not any of the income

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6. The principle has always been clear. See Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 280-81 (1932) (stating resident taxable on out-of-state income); Shaffer v. Carter, 252 U.S. 37, 52 (1920) (explaining nonresident taxable on income from in-state property). Actually, the passive receipt of income from reality, as from a goldmine, presented some special problem. In Senior v. Braden, 295 U.S. 422, 433 (1935), the Court struck down a state property tax imposed on a beneficiary's income interest in an out-of-state trust whose assets were out-of-state reality, and many felt that the Court was insisting on looking through the trust to the underlying reality; but New York ex rel. Cohn v. Graves, 300 U.S. 308, 311 (1937), put to rest the issue of barring a tax on a resident's income from out-of-state reality. At issue was a New York tax on a New Yorker's income from rents from a New Jersey property. Upholding the New York tax, then-Justice Stone said: "It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land . . . ." Id at 314.

7. See Hellerstein & Hellerstein, supra note 2, ¶¶ 20.04, 20.10; Warren Freedman, Practical Aspects of Multiple State Taxation of Intangibles of Nonresident Decedents Since the Aldrich Case, 24 Notre Dame Law. 41, 1 (1948-1949).


9. See id.

10. In most states, the court which had jurisdiction over the administration of the estate will "retain" jurisdiction over any trust created by the will. In some states, trustees will have to account periodically before that court. In others, the court will continue to represent a possible forum for litigation affecting the trust or the trustees. This has been identified as an appropriate nexus for imposing a tax. See Chase Manhattan Bank v. Gavin, 733 A.2d 782, 790 (Conn.), cert. denied, 528 U.S. 965 (1999); District of Columbia v. Chase Manhattan Bank, 689 A.2d 539, 543 (D.C. 1997);
of the trust has its source in New York or how long a time has elapsed without any contact with New York by any of the beneficiaries, trustees, or settlors.\textsuperscript{11} I call a trust that fits this definition of residence, a \textit{Founder-State Trust}.

The language of the New York tax law imposes state income taxation on the entire or global net income of any trust if it is a Founder-State Trust. That law makes residence of a Founder-State Trust turn solely on the residence of the settlor of the trust as of a particular moment in time.\textsuperscript{12} A number of other states have similar Founder-State Trust provisions,\textsuperscript{13} but others fix upon the current residence of the beneficiaries or of the trustees of the trust.\textsuperscript{14} This interplay, taken together with the interplay between source based and global taxation, means that the possibilities for double taxation are increased with respect to trust income.\textsuperscript{15}

Under the statute, the settlor’s residence may have been momentary and may have occurred long in the past, have long since been terminated and need not be currently accompanied by any other contact with the state.\textsuperscript{16} Thus, we can take the following plausible case of an inter vivos New York trust. Let us suppose the trust was created in 1931 by a divorcing husband, who had moved to New York after he left his former wife and children in Chicago where the marital home was. The trust itself was designed to provide for his former wife and the children he had with her, and the trust was irrevocable when created. The husband, let us say, would be found to be a New York resident at the moment he created the trust although he was never a resident before and soon after ceased to be a resident; he died many years later as an Illinois resident. The trust has, from its inception, been administered by a corporate trustee who is both incorporated in and has its principal place of business in California. The settlor’s former wife, children, and grandchildren, the only beneficiaries of the will, might have never had a domicile in New York. Under the statute, New York still claims—in

\begin{verbatim}
First Nat’l Bank of Boston v. Harvey, 16 A.2d 184, 189 (Vt. 1940). No such jurisdictional nexus is created in the case of an inter vivos trust.
11. See N.Y. TAX LAW § 605 (McKinney 2002).
12. See id.
13. See infra Appendix.
14. See id.
15. State taxation of trusts is almost universally a “conduit” approach, where the trust gets a deduction for income distributed and taxable to the beneficiaries, but pays a tax on income that is accumulated. Subsequent distribution to beneficiaries is without further tax. See HELLERSTEIN & HELLERSTEIN, supra note 2, ¶ 20.09.
\end{verbatim}
tax all intangibles in the state of the taxpayer’s residence and prohibited any other state from imposing any tax, either on such intangibles or their transmission at death. The basis for this approach in the Cases Allocating Intangibles, as I later will call them, was that the Due Process Clause protected taxpayers against “double taxation” by states, which, absent the constraint imposed on the states by that clause, could and would seize upon various aspects of an intangible’s connection to different states.

The attempt to create such a rigid scheme of protection was always a controversial one. Each decision in the line evoked dissents and called forth an outpouring of partisan commentary, pro and con. Numerous earlier cases on the taxation of intangibles had to be overruled to effectuate the desired allocation of the tax situs of intangibles. Ultimately, this initiative with respect to the taxation of intangibles was overturned in a series of cases decided by a court with a different make-up.

To return to New York Founder-State Trusts, however, the New York court in Murphy found that the Safe Deposit and Trust Co. was recognized as still standing in the 1938 case of Guaranty Trust v. Virginia, even after this turn-around. As the New York Court saw it, neither that case nor Graves v. Elliott undercut the earlier Maryland trust case. The intermediate court in Murphy had found “no merit” in the argument that the continuing jurisdiction of New York Surrogate

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24. For example, in addition to the state of the creditor’s residence, to which the Court wished to award the allocation, states had sought to tax intangible property on the grounds that they were the state of the debtor’s residence, the state of the corporation’s charter (for purposes of taxing corporate shares), the state where the evidences of the intangibles were kept (especially where these were treated as embodying the debt) and, in certain cases, the state where intangibles, even if not evidenced by any document, could be treated as part of an ongoing business located in such state, even when conducted on behalf of the nonresident. Where a trust was involved, the possible “properties” and the possible “connections” were multiplied. See Roger John Traynor, State Taxation of Trust Income, 22 IOWA L. REV. 268, 284 (1937).
25. See, e.g., the articles cited in notes 270-71 infra.
27. See infra notes 272-78, 311-34 and accompanying text.
30. 307 U.S. 383 (1939). In this case, Utah was permitted to exact an inheritance tax on bonds issued by a corporation incorporated in Utah.
31. See infra notes 38-59 and accompanying text; Hellerstein & Hellerstein, supra note 2 ¶ 20.09(2) (questioning the continuing validity of Safe Deposit & Trust Co. v. Virginia as based on aversion to double taxation “long . . . repudiated by the [Supreme] Court” and thus having “weakened authority”).
principle—a tax on all the net income of the trust (reduced by recognized distributions), which for all we know might have been principally invested in businesses scattered throughout the western United States, each of them also without any contact whatsoever with the State of New York.

I say that New York demands such a tax payment "in principle," because in fact it has been seen as uncollectible at least since 1964 and perhaps in fact from the time the statute was first passed or shortly thereafter. The formal occasion for suspension of the tax provision was the decision of the New York Court of Appeals in Mercantile-Safe Deposit & Trust Co. v. Murphy. There a New York resident had settled a trust in Maryland in 1953 as a revocable inter vivos trust; on his death in 1956, an additional $1 MM was poured over into the trust. Because the trust was originally settled on and has remained with non-New York institutions as trustee, the Court held that the trust was not subject to New York income tax for lack of a nexus. In fact, the beneficiary was a New York resident but the trustee has power to accumulate, and the tax is on accumulated income.

The New York Court put the case on an old U.S. Supreme Court decision, Safe Deposit & Trust Co. of Baltimore v. Virginia, which set aside Virginia's attempt to impose an ad valorem property tax on intangibles that stood in the name of a Maryland corporate trustee, but which had been transferred to that trustee by a settlor resident in Virginia, for accumulation for the benefit of Virginia beneficiaries. The Court, back then, had viewed the Virginia tax as an attempt to tax a valuable intangible property right that was not "in" Virginia, but was treated by the Court as having a constitutionally compelled situs in Maryland, the principal place of business of the trustee. This invalidation of this intangibles property tax can be seen as one of a string of decisions leading up to First National Bank of Boston v. Maine, in an effort to impose a national taxing regime that localized the power to

17. 15 N.Y.2d 579 (1964).
18. In a number of states, the local residence of a noncontingent trust beneficiary would trigger resident taxation of the trust. See, e.g., Chase Manhattan Bank v. Gavin, 733 A.2d 782, 802 (Conn. 1999) (imposing a tax on undistributed income of an inter vivos trust settled by a Connecticut resident with a New York trustee based on the Connecticut residence of the sole beneficiary). Other states make a similar move, for example, see CAL. REV. & TAX. CODE, §§ 17442, 17744 (2002).
19. 280 U.S. 83 (1929).
20. See id. at 89-90.
21. See id. at 93.
22. 284 U.S. 312 (1932).
Court over the pour-over trust was a sufficient nexus, so as to permit taxing of income accumulated in the Maryland trust. 32

The Murphy case still stands as governing New York law. 33 The legislature, however, has never reacted to the loss of revenue stemming from the holding in the Murphy case. Despite many other changes in the state income tax law, the old statutory definition remains unchanged. 34 Finally, in 1992, the New York State Department of Finance adopted a regulation setting out at least a minimal reading of the Murphy case, and a paraphrase of the regulation is now found in the Instructions relating to the resident tax return. 35 That regulation provides that Founder-State Trusts are not liable as residents for New York State income tax in any year where all trustees and beneficiaries are nonresidents of New York and the trust does not have any New York source income or assets. 36 The section makes no reference to the Murphy case, and it does not state whether the regulation is intended to create a safe harbor or whether it means that the trust does become liable if any one of the three contacts is established. 37


34. See N.Y. TAX LAW § 605 (McKinney 2002).


36. See id.

37. The relevant part of the regulation, reads as follows:

(c) The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;
(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and
(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

(d) Examples. The following examples illustrate the provisions of this section.

Example 1: Taxpayer A who is domiciled in New York State and taxpayer B who is domiciled in New Jersey together create an irrevocable trust. The portion of such trust attributable to property transferred by A is a New York State resident trust and the portion of such trust attributable to property transferred by B is a New York State nonresident trust.

Example 2: Taxpayer C creates an irrevocable trust while such taxpayer is a domiciliary of New York State. Subsequent to the creation of such trust, C moves and becomes a domiciliary of California and transfers additional property to such irrevocable trust. The portion of such trust attributable to property transferred while C was a domiciliary of New York State is a New
I have already indicated above that the Murphy court may be exaggerating in their claim that Safe Deposit and Trust Co. of Baltimore v. Virginia remains sound law. The decisions of the Supreme Court of the United States have repudiated the attempt that was made in Cases Allocating Intangibles during the late 1920s and early 1930s—of which Safe Deposit and Trust Co. of Baltimore v. Virginia is an exemplar—to fix a single constitutionally compelled situs for state ad valorem and inheritance taxation of intangibles.

This turn from a Due Process Clause based rule against double taxation is part of the discernible trend on the part of the Supreme Court, over the past five decades, to protect the tax sources available to the state in almost every field, even at the risk of double taxation. The Court has moved slowly, but surely in the direction of removing all formal bars to state taxation that were laid “on” interstate commerce, in the case of reasonably apportioned income taxes, that do not discriminate in favor of in-state businesses. These were bars that it previously had erected under the Interstate Commerce Clause as well as the Due Process Clause of the Fourteenth Amendment. The last formal bar was removed as long ago as 1977 in Complete Auto Transit, Inc. v. Brady. The Court has also, in effect, coordinated under the Interstate Commerce Clause and the Due Process Clause of the Fourteenth Amendment, a whole complex of sales and use taxes on the sale of goods and services. The Court has generally relaxed the standards for the elements of nexus that will sustain a Due Process or Interstate Commerce Clause attack on the effort to get out-of-state merchants to collect such a tax.

At the same time, the Court has continued to reserve the powers it first asserted early in the nineteenth century to review state tax laws in the light of these and other provisions of the constitution.

York State resident trust and the portion of such trust attributable to property transferred while C was a domiciliary of California is a New York State nonresident trust.

Example 3: D, who is domiciled in Canada, creates an irrevocable trust with the X Trust Company in New York City as trustee. The entire corpus of the trust consists of securities of American corporations, which are actively traded by the trustee on the New York Stock Exchange. The beneficiaries of the trust are all New York State residents. Regardless of whether the trust is held to be a resident of the United States for Federal income tax purposes, it is, for New York State income tax purposes, a nonresident trust.

Id. 38. 280 U.S. 83 (1929).
40. See U.S. CONST. art. I, § 8, cl. 3.
41. Brady, 430 U.S. at 289.
Either this relaxation of Due Process nexus requirements has encouraged efforts by tax collectors in other states with Founder-State Trust provisions to apply the provisions of the statute literally, or the grudging admission of limits on Founder-State Trust taxation evidenced, for example, in the New York State 1992 regulation has prodced trustees to contest tax claims. Chase Manhattan Bank as trustee has been involved in such litigation in Connecticut and Washington, D.C. in the last few years, and it has lost in each case. In District of Columbia v. Chase Manhattan Bank, the testamentary trust was established in the D.C. decedent’s probate proceedings in 1935, but the trust never had any connection with the District of Columbia other than the jurisdiction of the probate court. In Chase Manhattan Bank v. Gavin, there are four testamentary trusts that became effective, respectively, in 1975, 1974, 1968, and 1936 and so are, respectively, 24, 25, 31 and 63 years removed from the proceedings in the probate court. None of these trusts have current contacts with Connecticut, save that each was established under the will of a Connecticut resident probated in Connecticut and under Connecticut law. Under Connecticut law, the probate court has continuing jurisdiction over testamentary trusts in certain matters.

The two courts emphasized the relaxation of the standards under the United States Constitution for the nexus required for state taxation and enlarged upon the consequences of the continuing jurisdiction of the probate court over a testamentary trust. In both cases, the court relies

42. Much earlier a Vermont court had upheld Founder-State Trust taxation of testamentary trusts without any other state nexus. See First Nat’l Bank of Boston v. Harvey, 16 A.2d 184, 190 (Vt. 1940) (relying on Hutchins v. Comm’r, 172 N.E. 605, 607, 610 (Mass. 1930), which refused to tax Massachusetts trustees of a trust established under the will of a New York resident and taxed in New York under the Founder-State Trust approach).
43. 689 A.2d 539 (D.C. 1997).
44. See id. at 540-41.
45. 733 A.2d 782, 787 (Conn. 1999).
46. See id. at 787.
47. See id.
48. Two of the testamentary trusts require accountings to be made in Connecticut, but Connecticut law permits waiver of annual accountings, and such accountings have been waived under the other two trusts; all will be wound up and discharged under Connecticut law by a Connecticut court. See id. at 799.
49. As used in this Article, a probate court is a court of limited jurisdiction with power over matters relating to the probate, administration, and distribution of the assets of local decedents. In some states, the probate court may have another name, such as the Surrogate’s Court in New York, or Orphans’ Court in Pennsylvania and elsewhere; but the functions and histories of the probate court in each state conforms, to a substantial degree, to a single, national template.
50. Jurisdiction of the probate court over inter vivos trusts has itself varied over time. The Gavin court recognizes that inter vivos trusts stand on a different footing than do testamentary trusts. See Gavin, 733 A.2d at 790.
on the relaxation of nexus demanded under the Due Process Clause, citing *Quill Corp. v. North Dakota*,51 and then proceeds to find the continuing jurisdiction of the probate court to constitute a sufficient nexus for the tax.52

Both these cases are, decided on a winner-take-all basis; if the minimal nexus is established, the full reach of the state statute is justified. In each case the court notes that the parties did not litigate the possibility that imposition of a tax in the circumstances would not satisfy, without some form of apportionment, the Constitutional test under the Due Process Clause.53 That clause, in addition to the requirement of a minimum nexus, requires that “there be a rational relationship between the income attributed to the state and the intrastate values of the enterprise.”54

One of the trusts involved in the *Gavin* case was an inter vivos irrevocable trust.55 Like the other trusts, the trust was administered by Chase Bank as trustee; the founder, however, had been a Connecticut resident.56 He had since died, but the sole beneficiary of the trust is currently a Connecticut resident.57 The court, in determining the taxability of trust income, finds that the probate court does not provide the same nexus as in the case of the testamentary trust, but that the Connecticut residence of the beneficiary is a sufficient jurisdictional nexus, to permit Connecticut to tax the trust income under a Founder-State Trust provision.58

51. 504 U.S. 298 (1992). This case involved challenges to North Dakota’s ability to compel the plaintiff to collect and pay over use tax for out-of-state sales to Dakota residents where the plaintiff had no physical facilities in North Dakota. See id. at 301. First, the Court held that the want of physical facilities did not necessarily offend the nexus requirements under the Due Process Clause, but that, distinguishing the requirement of nexus under the Interstate Commerce Clause, it would not reverse its earlier decisions limiting the liability of out-of-state sellers for use tax on goods sold to North Dakota residents. See id. at 305, 317. Laurence Tribe lends voice to a fierce attack on the inadequacies of the Court in respect of the broader reaches of the “nexus” doctrines under the Due Process Clause. See *LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6-39, at 1282, 1286 (3d ed. 2000)* [hereinafter TRIBE Third].

52. See *Gavin*, 733 A.2d at 792; District of Columbia v. Chase Manhattan Bank, 689 A.2d 539, 542 (D.C. 1997). The New York court rejected the Surrogate Court’s, that is New York’s probate court’s, continuing jurisdiction as a relevant contact in the *Murphy* case. See *supra* note 17.

53. See *Gavin*, 733 A.2d at 791; *Chase Manhattan Bank*, 689 A.2d at 542 n.6.

54. The paraphrased language comes from *Moorman Manufacturing Co. v. Bair*, 437 US. 267, 273 (1978), and it is set forth in the *Gavin* opinion. See *Gavin*, 733 A.2d at 791.

55. See id. at 787.

56. See id.

57. See *supra* at 788.

58. See id. at 790. Note that this analysis no longer justifies Founder-State Trust taxation as such. Taxability of this trust pieces together (1) the Founder-State language of the Connecticut tax law with (2) the fortuitous fact that the beneficiary is a Connecticut resident.
Finally, in the *Gavin* case, the court does not find *Safe Deposit & Trust Co. of Baltimore v. Virginia* a barrier; it considers that case has been overruled. 59

The purposes of this Article will be to consider the history of Founder-State Trusts as part of the state income tax law, to elucidate their purpose and effect, and to consider the present day status of claims of a constitutional protection that can be erected against state taxing power in this context. This Article will also consider specifically those claims of constitutional protection that ought to be erected against the literal application of the Founder-State Trust concept and other variant concepts of state residence, or at least against some applications of those concepts, to consider what constitutional provisions might be applicable to such taxation in light of historical constitutional jurisprudence, and finally, 60 to argue that the privileges or immunities of national citizenship may be the guerdon that will right these wrongs, now that the clause seems to have been revived in Justice Stevens’ opinion in *Saenz v. Roe*. 61

II. AT THE INCEPTION

The New York personal income tax was initiated in 1919. 62 The Founder-State Trust approach to distinguishing between resident and

59. See id. at 802; *McCulloch v. Franchise Tax Bd.*, 390 P.2d 412, 418 (Cal. 1964) (concluding that *Safe Deposit and Trust Co. of Baltimore v. Virginia* is no longer good law; most specifically that conclusion rests on a per curiam affirmance, *Stewart v. Pennsylvania*, 312 U.S. 649 (1941), of a state court decision, *Commonwealth v. Stewart*, 12 A.2d 44 (Pa. 1940) which held Pennsylvania properly levied a personal property tax on the equitable interest, a life estate, of a Pennsylvania beneficiary of a New York Founder-State Trust administered by New York trustees) and on *Commonwealth v. Sutcliffe*, 140 S.W.2d 1028 (Ky. 1940). Both the latter cases distinguish, rather than treat as overruled *Safe Deposit and Trust v. Virginia*. It is also worth noting that the California statute is one that specifically purported to tax the income of trusts, wherever located, to the extent of the interest of beneficiaries resident in California. See *McCulloch*, 61 P.2d at 416-17.

60. See Part IV, infra for a statement about the failure, in this Article, to consider notable cases of tax-competition and tax-harmonization among the states in light of that constitutional protection, as part of identifying some factors of state action in view of tax fairness.


62. See generally 1919 N.Y. Laws ch. 627. It was preceded by a corporate franchise tax in 1917, a tax “measured” by net income. See 1917 N.Y. Laws ch. 726. New York State has continuously imposed a personal income tax from 1919. In 1960 the New York legislature enacted an income tax which was calculated by using the taxable income reported on the taxpayer’s Federal return, with New York adjustments as Article 22 of the N.Y. TAX LAW, §§ 601-99. See 1960 N.Y. Laws ch. 563. The new law had been authorized by an amendment to the NYS Constitution of 1938 adding an additional paragraph in Article 3, § 22, adopted at the General Election of November 3, 1959 and effective as of the first of January, 1960. The old tax law, NYS TAX LAW Article 16, §§ 350-73, was retained for years prior to 1960. See § 350a. Article 16 was finally repealed by 1987 N.Y. Law ch. 19, effective July 20, 1987. Notwithstanding the new approach to calculating New York state income tax under the 1960 Act, the tax, differently imposed on “resident
nonresident trusts essentially arrived at the same time, in the form of a limitation on the taxation of nonresident trusts to income from sources within the state, a limitation that can be found in a provision in § 365-3 of the Act, which states that

an estate or trust created by a person not a resident . . . shall be subject to tax only to the extent to which individuals other than residents are liable under section 359, subdivision 3 . . .

Before approaching the problem of Founder-State Trust taxation, we need to provide some context for the provisions of 1919’s section 365-3.

A. Income Taxation in the United States

Introduction of personal income taxes, the main-stay of Federal taxation for nearly a century and, at the beginning of the twenty-first century, an important element in the revenues of most states, did not come without political and constitutional struggle at both the state and the federal level. From any perspective, imposition of such taxes would
be a novelty. It was argued that income taxes were difficult to administer, insofar as the entire tax structure depended on the taxpayer’s declaration of income or, in the alternative, required the creation of an expensive group of administrators and investigators who would oversee an unpopular inquisition into the affairs of individuals.

Although there were instances of taxation of incomes at the state level—where incomes were treated as property and often assessed by arbitrary rules-of-thumb—in the eighteenth and early nineteenth centuries, these gradually sank into desuetude. The most famous and important examples of the imposition of income taxes in the nineteenth century came during the Civil War of 1861 to 1865 when taxes were imposed on incomes, in both the North and the South,66 to meet the emergency demands of financing the Civil War. Although the Confederate taxes fell with the Confederacy and the federal income tax expired without renewal some years after the end of the Civil War, at the same time the federal experience with an income tax (and its subsequent lapse) became the focus of a call for relief from high tariffs and for taxes to be collected on incomes rather than property and to be coupled with the greater “vertical equity” of a progressive tax rate. At both the national and state levels, there was also widespread agitation over the escape of non-real estate assets from taxation.67

A new national personal income tax, so structured that it exempted all but a relatively small class of the wealthy, was enacted in the 1890s, as part of a revision of federal taxation and revenues. Support by representatives from largely agricultural states was key to passage of the tax.68


66. Income taxes were imposed by the federal government of the Confederate states only in 1863. When introduced, the success of any Confederate financing efforts were already compromised due to earlier unwise Confederate fiscal policies that had resulted in a runaway depreciation of the Confederate paper currency. Increasingly desperate, the Confederate government had raised the rate of income tax to high levels by the end of war. See Sidney Ratner, Taxation and Democracy in America 100 (1980 reprinted).

67. The Federal income tax in the Civil War was first proposed as an alternative to a national real estate tax. In 1862, Congress enacted both taxes, but the income tax proved more productive. 68. "With industrialization . . . real-property taxes failed to capture revenue from the growing wealth in intangible property . . . Because property taxes failed to tap existing sources of wealth, they did not keep pace with spending in local governments." Webber & Wildavsky, supra note 65, at 417.

As a novel form of taxation, the income tax called for the articulation of a justification. As noted, the imposition of an effective tax on income could be justified as a solution to what was widely perceived as almost total dependence on an existing local property tax program that—largely as a result of lax enforcement and dependence on an uneven local administration—undertaxed non-real estate assets, and especially financial assets such as stocks and bonds and did not tax income at all.

But the national income tax was, also a progressive tax. Perhaps the strongest justification for progressive taxation, for larger and smaller incomes, depends on the argument that a progressive rate imposes a different tax, but an “equal burden” on rich and poor, an argument already stated by J.S. Mill. The progressive income tax also comports with the requirement that taxation should always seek the maximum relative ability to pay. The latter point had been emphasized in the “four . . . maxims in regard to taxes in general” premised by Adam Smith. But the political furor that surrounded passage of the tax raised a debate that often wandered from the argument that a progressive tax rate reflected the realities of an “equal pain” as well as satisfying the requirement of ability to pay. Instead, the class bias of the tax was almost the only theme considered.

It was against this background that the Supreme Court of the United States intervened. In Pollock v. Farmers’ Loan & Trust Co., Federal imposition of a tax on income “from capital” was declared unconstitutional as a “direct tax.” Since the federal enactment was not, as the Constitution required any “direct tax” to be, apportioned among the states, the entire 1894 income tax was struck down although the

70. See generally J.S. MILL, PRINCIPLES OF POLITICAL ECONOMY (Ashley ed. 1921); see also HYMAN, supra note 65, at 355-59.

71. See ADAM SMITH, THE WEALTH OF NATIONS 777 (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776). The first maxim was that “The subjects of every state ought to contribute . . . as nearly as possible, in proportion to their respective abilities;” the third, that levies should be timed “in the manner, in which it is most likely to be convenient for the contributor to pay it.” These two maxims, along with avoiding arbitrariness or over-high deadweight costs of enforcement were the standards by which Smith reviewed taxes known to him. See id. at 777-78.

72. “The present assault upon capital is but the beginning. [Ultimately,] our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.” Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 607 (1895) (Field, J., concurring). See the discussion in RATNER, supra note 66, at 194-215.

73. 157 U.S. 429 (1895), and on rehearing, 158 U.S. 601 (1895).

74. See Pollock, 158 U.S. at 637.

75. “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 9. A direct tax, the majority held, was, in effect, any tax on wealth as such, such as land or personality, and so any tax on income
case left open the question of taxation of \textit{earned} income was a direct tax.\textsuperscript{77} The political result of the \textit{Pollock} case was that progressive-rate income taxation, federal and state, became a fixed and important part of the progressive agenda, Democratic and Republican. After nearly two decades of agitation, Congress in 1909 passed a corporate franchise tax and sent to the states a proposal for amending the Constitution to overcome the \textit{Pollock} case. The corporate franchise tax was upheld by the Court as an excise that was merely \textit{measured} by net income.\textsuperscript{78} In due course, the proposed amendment was adopted in 1913 as the Sixteenth Amendment from that wealth was equally a direct tax. The dissenters argued that the exercise required more than seeking the meaning of the eighteenth century distinction between direct and indirect taxes. See \textit{Pollock}, 158 U.S. at 641-42. They insisted that the constitutional provisions referring to direct taxes evolved from the anxieties of the southern states about a discriminatory tax on land and slaves (as realty) and so was tied, as seems to be the case, to the compromise by which slaves, as wealth, were also partially counted for purposes of representation. See \textit{id.} at 644-45. As a result, the clause should not be applied broadly, that it meant no more than a tax on real estate or slaves (as realty). The prohibition should not be extended to a tax on the \textit{income} of lands, noting that such a restrictive construal was almost contemporaneous, upholding the imposition of a tax on the "use" of wealth was in any case as not a direct tax in the constitutional sense. See \textit{id.} at 645; Hylton v. United States, 3 U.S. (3 Dall.) 171, 172-73 (1796) (discussing sumptuary tax on carriages). Although Federal taxes on land—levied in times of emergency (1798, 1813, 1815, 1861)—were uniformly apportioned as direct taxes, Civil War taxes were imposed on income without apportionment (1861, 1862, 1863, 1864, 1865, 1866, 1867, 1870). In fact, in 1861, the Act of August 6, 1861, imposed an apportioned tax on lands, but also levied, without apportionment, a tax on incomes. The issue had been squarely presented, and answered unanimously in the negative, with respect to the Civil War income tax. See \textit{Springer} v. United States, 102 U.S. (12 Otto) 586, 602 (1880). Similarly, a Federal succession tax had been squarely treated as an excise, and not a direct tax, in \textit{Schley} v. \textit{Rev.}, 90 U.S. (23 Wall.) 331, 347-48 (1874). The distinction became unimportant with passage of the Sixteenth Amendment, but between the \textit{Pollock} decision and then, there were many detailed arguments addressed to the topic. See, e.g., \textit{Seligman}, supra note 65, at 531-89.

\textsuperscript{76} See \textit{Pollock}, 158 U.S. at 436. Howell Jackson, appointed to the Court in 1893, fell very ill with active tuberculosis and was not sitting when the case was first argued and decided, although he had not retired. He returned to the Court, so that the case could be reargued and the questions on which the Court had been evenly split, could be decided. Jackson died less than three months after the opinions on rehearing were handed down. Ironically, he ended up among the dissenters, but an unidentified other had decided to vote with Chief Justice Fuller in holding that the entire income tax act fell. The identity of the switch vote remains uncertain. Sidney Ratner argues, on the authority of Edward S. Corwin, that the switch vote came from Justice Horace Gray. See \textit{Ratner}, supra note 76, at 210. On the other hand, \textit{John Spencer Basset}, \textit{Expansion and Reform} 1889-1926, at 43 (1971), states as a fact, that it was Mr. Justice Shiras who shifted his vote.

\textsuperscript{77} See \textit{Pollock}, 158 U.S. at 635. Chief Justice Fuller's majority opinion left open the possibility that a tax on earned incomes alone could be a valid "excise" tax, but it went on to suggest grave difficulties with the pattern of exemptions provided in the 1894 Act and, by extension, with progressive rates as such. These suggestions never eventuated in a serious attack on the progressive nature of the tax. See \textit{id.} at 635-36.

\textsuperscript{78} See \textit{Flint} v. \textit{Stone Tracy Co.}, 220 U.S. 107, 109 (1911).
Amendment,\textsuperscript{79} and the general national income tax on individuals and corporations it authorized was enacted.\textsuperscript{80}

Later during the Great Depression, national income taxation permanently captured the imagination of most liberals as an irreplaceable instrument of government finance and policy.\textsuperscript{81} Wage-withholding was introduced during the Second World War; it greatly simplified tax collection and made it highly efficient, as employer and employee were, made cosureties for the payment of the employee’s tax.\textsuperscript{82}

At the state level, the debate about imposing a personal income tax focused on a pair of other problems. Both state and local governments were in need of additional revenues to meet increased demands on them, and an increase in the traditional property tax rates or assessments was seen as excessive as applied to real property, while the property tax so far as it attempted to reach personal property was seen as almost wholly ineffective.\textsuperscript{83} As the Mills Committee Report, prepared by a New York State joint legislative investigative committee created in 1915 stated,

\begin{itemize}
\item \textsuperscript{79} See U.S. CONST. amend. XVI. The Amendment was certified as ratified on February 3, 1913. It read: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Id.
\item \textsuperscript{80} See Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913). In the Revenue Act of 1913, II-D, fiduciaries were only liable as agents to report and to withhold at the lowest (normal) rate tax on money distributed by them. See generally INTERNAL REVENUE ACTS OF THE UNITED STATES 1909-1950 v.144 (Bernard D. Reams, Jr. ed., 1979); KIXMILLER & BAH, CONSOLIDATED UNITED STATES INCOME TAX LAWS SINCE 1909 WITH REGULATIONS AND DIGEST OF COURT DECISIONS AND UNOFFICIAL RULINGS 506 (1923). Trusts and estates were not taxable entities until the enactment of the Revenue Act of 1916, ch.463, § 2(b), 39 Stat. 756,757-58 and the residence of the fiduciary became and has remained the key to resident or nonresident status of Federal income taxation of trusts.
\item \textsuperscript{81} “It took the depression of the late twenties and the thirties to create an American ‘left’ that viewed bigger government as both a counter to big business and a force for good, . . . spreading a more uniform national policy throughout the land. The nation . . . was turned Democratic by the depression. That is how the party of Jefferson became identified with uniform national domestic welfare policies, and the party of Hamilton with state diversity and a smaller federal government.” WEBBER & WILDAVSKY, supra note 65, at 427.
\item \textsuperscript{82} In 1998 the individual income tax was the source of forty-six percent of national collections, while the corporate income tax made up twelve percent. I.R.S. Statistics, available at http://flat.tax.house.gov/taxfacts/irsfacts.asp (last visited Sept. 20, 2002). Since the fastest growing part of Federal tax collections consist of the Social Security and Medicare taxes (34.7 percent in 1998 up from 31 percent in 1997), income tax collections are dominant so far as general revenues are concerned.
\item \textsuperscript{83} The main tax structure in New York continued to be what it had been throughout the nineteenth century and still was in much of the rest of the nation. Local assessors, at the county level, sought to identify and value all “property,” real and personal, including securities, credits and other intangibles. On the tax base of such property, so assessed, both state and local governments levied an annual tax, which was collected by local officials and turned over to the various taxing authorities. Personal property, as the Mills Committee Report notes “under modern conditions
\end{itemize}
All semblance of justice or equity has long since left the personal property tax, which has been suffered to remain on our statute books because of the widespread apathy and ignorance of the public... and because... it has not, generally speaking, been enforced... One of the main purposes for which this... Committee was appointed was to seek out that property which is now escaping and to recommend changes that would equalize the tax burden by broadening the base.... [T]his committee, in answer to the specific question submitted to it, desires to state that... the end sought for will be accomplished best by: (1) the abolition of the present tax on personal property...; and (3) the imposition of an income tax on individuals and general business corporations, including manufacturing corporations. 84

The income tax was thus seen as responding to what was widely perceived as under-taxation of intangible property, thus shifting almost the entire state tax burden to the traditional tax on real estate.

Wisconsin had adopted the first "modern" personal income tax law in 1911. 85 It did so, as commentators agree, propelled by the popularity of a tax that would shift taxation away from over-taxed real and tangible personal property, and especially agricultural land and farming implements, and in the direction of under-taxed intangible wealth. Politically, the tax belongs to a farmer coalition, and as such the new tax has been viewed as shifting taxation too much in the other direction.

Almost unnoticed at the time, the Wisconsin tax made important administrative reforms to accompany the new tax. 86 Mostly, these began the replacement of the local assessment and collection machinery in favor a state-wide body charged with collection and enforcement of the tax. 87

consists of securities, credits and other intangibles," which unlike real property, cannot be discovered without effective self-assessment. See Report of the Joint Legislative Committee on Taxation of the state of New York [hereinafter Mills Committee Report] (1916), at 43.

84. Mills Committee Report, supra note 83, at 43, 47, 207.
85. See BROWNLEE, JR., supra note 69, at 58-64.
86. "Without exception... the nineteenth century income taxes were administrative failures, and their revenue yields trifling." HELLERSTEIN & HELLERSTEIN, supra note 2, ¶ 20.01 SELIGMAN, supra note 65, at 367-429; BROWNLEE, JR., supra note 69, at 60; J.C. Bullock, Note, Wisconsin Income Tax Act, 21 Wis. L. Rev. 191 (1917).
87. "It was realized that the failure of all State income taxes in the past was directly attributable to lax methods on the part of local officials, and this danger was sought to be avoided by securing a higher degree of centralization." Mills Committee Report, supra note 83, at 192, as part of its analysis of the Wisconsin income tax since 1911. EDWIN R.A. SELIGMAN, ESSAYS IN TAXATION 651 (9th ed. 1921) [hereinafter ESSAYS IN TAXATION], said that the administrative cost effectiveness of the state income taxes was also greatly aided by the existence of a Federal tax and the cooperation of federal and state officials.
Thus the political energy behind state income taxes—granted the growing need for public revenues—in this decade was that it served fairness, in the sense of replacing an under-enforced tax on personal and especially intangible property, with a more effectively-enforced tax on incomes. But the income tax was also openly progressive, that is, it was enacted with increasing marginal rates, so that as income increased the tax applied more heavily on the last dollars earned. That, too, had great political appeal. Cynics could and did articulate that appeal as stemming from a desire to soak the rich, but the appeal also served fairness. An economic justification for increasing marginal rates rests on the probability that each successive dollar earned has a declining marginal utility, so that the taxes imposed at different rates impact, nevertheless, with "equality of pain." This argument is independently supported by Adam Smith’s maxim that demands that taxes be aware of “ability to pay” the tax. And it is also supported by the political insight, going all the way back to Aristotle, that republican forms of government should avoid great disparities in wealth. It is fair to say that enactment of a progressive-rate income tax was over-determined in the sense that the political appeal of the progressive rate income tax lay both in the argument of taxation from each according to ability to pay, and at the same time it represented a reduction of tax on agriculture; it not only imposed a greater tax burden on the rich, but it was designed to overcome illegal tax evasion by those same rich.

In the decade that followed Wisconsin’s enactment, a few states reinstated income taxes on the nineteenth century model; and a few more adopted features of the Wisconsin statute and, after 1913, copied the federal tax law. Despite New York’s adoption of a state income tax in 1919, there was no wide-based spread of income tax laws among the states after 1919. A number of states even repealed their tax acts during the 1920s.

The next wave of state enactments occurred in the decade following 1929 when another thirteen states adopted the income tax. Income tax laws were enacted in yet other states in the 1960s and after, driven by the need of the states for more revenue and the political pressure to give property tax relief. At the same time, the benefits of employing a tax using the federal tax base made income taxation easier, both for taxpayers and for administrators.

88. See generally ARISTOTLE, POLITICS, bk. 4, ch. 9 (H. Rackham trans. 1922).
During the 1970s and early 1980s, personal income taxes were the most dynamic source of State revenue, rising from 19.2 percent in 1970 to 29.8 percent in 1985. In 1991, 41 States and the District of Columbia levied broad-based personal income taxes. The total yield of personal income taxes for the year ended March 1991 was $106.9 billion, which represented 35 percent of total State tax collections.  

B. Legislative History

This is the general background against which we are to read the meaning of the Founder-State Trust concepts we already find in the first New York personal income tax. Where the concept came from presents a serious mystery. The Mills Committee Report provided a draft of an income tax in support of their recommendation that such a tax be adopted. But it provides, section 363-2, that any trustee or personal representative residing in or appointed by New York should report income of the estate or trust, which “shall be taxed or not according as the beneficiary resides within or without the state.”

Moreover, although the New York statute, as adopted in 1919, was clearly copied almost entirely from the federal income tax, the Federal tax was imposed on resident trustees and made no mention of the Founder-State concept.

We have not managed to find legislative or source materials bearing directly on the introduction of the Founder-State model for identifying resident trusts for income taxation purposes. We have looked at the enactments of states that had an income tax before 1919, that is Wisconsin (1911), Oklahoma (1915), Massachusetts (1916), Missouri (1917), Delaware (1917), and Virginia (1918).
The New York statute does take a position, the Founder-State Trust position, on the taxability of trusts as residents. The statutes of some states with earlier enacted income acts apparently do not mention trustees and those states whose income tax acts do mention trustees, with the possible exception of Missouri, do not reflect the New York approach before 1919 even though some of these same states can currently be listed as using the Founder-State Trust approach in defining resident trusts for income tax purposes. The intention of these early acts, in some cases is too vague to be determined; in other cases it seems clear that the tax is due from a local fiduciary, based either on the fiduciary’s residence or that of the beneficiaries. In no states’ laws is there any

commonwealth.” Id. § 5. Implicit in the statute is a different treatment of estates and testamentary trusts, §§ 8 and 9, on the one hand, and other trusts, on the other hand. Fiduciaries of estates of Massachusets residents are to pay tax on income of the decedent and so much of the income of the estate as is accumulated for resident beneficiaries, § 8, while taxable income from Massachusetts testamentary trusts payable to Massachusetts residents are taxable to the trustee if a Massachusetts resident or to the beneficiaries when received if the trust has no Massachusetts trustees, § 9. The final sentence of section 9 provides that income accumulated for contingent beneficiaries “shall be taxed as if accumulated for the benefit of inhabitants of this commonwealth.” Id. § 9.

95. Section 2(b) of Missouri Act of April 12, 1917, an Act providing for the assessment, levying, collecting and paying of income tax, states that “income of . . . any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or ascertained persons, or persons with contingent interests and income held for future distribution under the terms of the . . . trust shall be likewise taxed, the tax in each instance . . . to be assessed to . . . the trustee . . . .” It goes on to require the trustee to make returns and pay the tax. The tax is imposed (section 1(a)), generally, on the global income of residents and Missouri-source income of nonresidents. The statutory language does not make it clear whether either the beneficiary or the fiduciary needs to be a Missouri resident; if this is a Founder-State Trust, it is such in an inchoate form. Currently, Missouri is listed as a Founder-State Trust State. Mo. Rev. Stat. § 143.331 (2001). The 1919 North Dakota income tax, N.D. Stats. 1919, ch. 224, uses language similar to that of Section 2(b) of the Missouri Act, above. Today the North Dakota income tax treats those trusts as resident trusts, for filing purposes, which have “a relationship to the state sufficient to create nexus” broadly defined. N.D. Stats. § 81-03-02.1-04 (2001).

96. See 29 Del. Laws ch. 26 (1917). This law enacted an income tax which was imposed on every “natural person who is a citizen or resident of the State of Delaware.” Id. at 281A § 245. The act goes on to say that returns and payment of tax in respect of “income of infants, idiots and insane persons” shall be made by “guardians, trustees, or other persons having charge of their estates.” Id. 281E § 249. This does not answer the question of what is to happen to a trust that has “income” which is not “income of infants, idiots or insane persons.”

97. The Virginia tax (Virginia Acts of Assembly, 1918, ch. 219) imposed an income tax “on each person and corporation residing or doing business in this State.” The statutory definition of person did not include a trust, but a later provision required trustees and other fiduciaries to return income “of every person for whom they act, subject to this tax.”

98. Hawaii, then a territory, adopted an income tax as early as 1905, but neither it nor subsequent amendments prior to 1919 addressed the question of taxing trusts. See Hawaii Laws of 1905, Act 87.

99. That seems the intention of the relevant provision of the Wisconsin Act. See supra note 92; State ex rel. Wis. Trust Co. v. Widule, 159 N.W. 630, 632 (Wis. 1916). There, the will of a Wisconsin testator (Nathan Hamburger, apparently a principal in Gimbel’s, itself a Pennsylvania
language on which the language in the New York statute could be said to be modeled. We are left to winkle out for ourselves the motives and intentions that led to the introduction of the Founder-State Trust concept.

We have also gone through current state income tax laws and attempted to see how those laws define resident and nonresident trusts. As can be seen in Appendix, where the results of that research is summarized, the Founder-State Trust concept has spread far and wide. In other states, the residence of the trustee, the residence of actual beneficiaries or the “place of administration of the trust” is made decisive. A substantial number of states follow New York in modifying Founder-State Trust income taxation by taxing as residents only those Founder-State Trusts where a trustee or beneficiary is resident.

C. What Founder-State Trusts Mean

What justifies a state’s approach to determining the state of residence of a trust for income tax purposes? The arguments that one seeks as justification must determine taxability in a way that is fair, assists in the efficient administration of the tax, and comports with sound policy. In the case of the Founder-State approach, there are at least three plausible, but not conclusive, arguments, and behind each of these arguments stand strong, but not unopposed constituencies. It is a decided plus for the Founder-State Trust justification that it seems to fit well within, or even to be strongly derived from, the operation of an established legal category. Another justification is that it also assists administrative ease and efficiency in the collection of the tax in several important ways. Finally, since states have to be aware of consequences that follow from the determination of taxability, including the extent to which the rule adopted increases in-migration or out-migration of citizens and wealth, the strongest prop of the Founder-State Trust concept is that it locks the trust assets, and their income, into the state of domicile of the settlor at death.

100. See infra Appendix.
101. See supra note 32.
We will limit our consideration to the case of testamentary trusts, for treatment of inter vivos trusts present additional issues as to which there is little guidance because justifying the taxation on inter vivos trusts on a Founder-State Trust basis has, generally, been unattended and shunted to one side.\textsuperscript{102} Justifying taxability of an inter vivos trust on Founder-State Trust principles is so much more difficult if attempted on the grounds that are advanced in the case of testamentary trusts, that the whole question is put off or, as with the majority opinion in the \textit{Gavin} case, placed on an entirely different (and adventitious) ground.\textsuperscript{103} For that reason, we analyze the testamentary trust, the core case of the Founder-State Trust theory, and leave aside theory’s applicability to inter vivos trusts.\textsuperscript{104} Even so limiting our analysis, however, we soon realize that support for the determination of the residence of a trust on Founder-State Trust principles features the convergence of a number of justifying arguments.

The Founder-State Trust theory begins by looking at the donor or settlor of the trust, but it promptly moves from the settlor to the probate court in which the settlor’s will is probated. In the case of a testamentary trust, the probate court records will make the existence of the trust and the identity of the trustee a matter of public record and thus easily available to the taxing authorities. This certainly assists in the administration and enforcement of the income tax laws. However, the administrative convenience of the aspects of publicity and easy identification of trust and trustee is not the primary prize won by connecting the Founder-State Trust to the probate court that is administering the estate in which the trust is created. Basing taxability on the \textit{continuing} jurisdiction, and not merely on the jurisdiction, of the probate court, seems to imply more than mere administrative convenience, because the determination of trust residence and taxability

\textsuperscript{102} Perhaps inter vivos trusts, at least those whose income is not taxable directly to the settlor or is not exempt from tax, are not yet a significant source of taxable income; but even if this doubtful claim is true, such trusts seem on the way to coming into more general use. As they do so, justifying treatment of inter vivos trusts will assume greater importance and demand more attention.

\textsuperscript{103} See \textit{Chase Manhattan Bank} v. \textit{Gavin}, 733 A.2d 782, 801-03 (Conn. 1999), where permitting the Founder-State Trust pattern to be applied to a New York administered inter vivos trust is justified because the non-contingent beneficiary of the accumulated income is a Connecticut resident. The court admits, as suggested below, that the probate court reasoning has no application to the inter vivos trust.

\textsuperscript{104} It is hard to see how the argument from the “continuing” jurisdiction of the probate court has any relevance to inter vivos trusts, unless one ignores the facts that such trusts have neither the publicity of testamentary trusts nor are historically tied into the legal infra-structure of the probate court.
as a resident seems to follow from the traditional nature and structure of probate court proceedings and jurisdiction.

The Founder-State Trust theory’s appeal to such broader norms of probate court jurisdiction has to shift emphasis in a subtle way; the emphasis moves from the residence of the decedent to the jurisdiction of the court which, as a result of the decedent’s residence at the time of death, has jurisdiction over the administration of the decedent’s estate. Siting the trust where its trustor died is, in fact, to look away from the testamentary trustor and toward the probate court and its continuing jurisdiction over the trust.

This is of substantial significance because the shift of emphasis from settlor to probate court tends to mask the great weakness of the Founder-State Trust theory. It is the probate court’s claim over the trust, and not the relation between settlor and the trust he or she settled, that represents the continuing and current presence in the state that is attributed to the trust; and it is that current presence that forms an appropriate basis for state taxation under the “state benefit” theory, one which is capable of sustaining the Founder-State Trust approach to current taxation of the trust as a resident. The continuing availability of the probate court as a forum, which is so emphasized by the Gavin majority, ignores the reality that the settlor, in general, establishes a trust at a single moment of time by the single operative act of donation or settlement. In the case of the testamentary trust, it is the will as a disposition of property that takes effect on the death of the testator that is the instrument of trust creation.

Because courts that have upheld the Founder-State Trust theory are impressed by the “continuing jurisdiction” of the probate court, they more easily overlook the fact that a settlor is always totally separated from the trust he or she once established. The decedent, after all, must leave the trust behind, and it is the words of the trust created by the settlor that continue to govern the trustee and the beneficiaries in important ways, and neither the settlor nor the probate court. It is clear that to support taxability based on a probate court’s continuing jurisdiction over a testamentary trust created under the terms of a will probated in such court, one must rhetorically magnify the importance of the continuing jurisdiction of the probate courts and, just as rhetorically, de-emphasize or even suppress the disconnect that exists from the moment of the trust’s creation between the settlor or the probate court, on the one hand, and the trust, on the other. The courts that have remained unimpressed by the probate court argument, on the other hand, are very conscious of the essential irrelevance of the settlor after the trust
is set up, and they do not find any very large benefit in the "continuing jurisdiction" of the probate court.

To buttress a Founder-State approach, therefore, it would be helpful if the Founder-State Trust doctrine has important practical consequences in avoiding an otherwise serious administrative and policy problem for the state that adopts it. The pure Founder-State Trust concept, it happens, does provide such a practical benefit, for the doctrine minimizes the opportunity for forum-shopping for a low tax state, in which to settle the trust. Where the residence of the trustee is relevant to determining the residence of a trust, choice of a foreign trustee may obtain the resident settlor the benefit of foreign tax laws which impose little or no tax on the trustee as trustee.

For the same reason, a Founder-State Trust approach, as in Connecticut, from one point of view at least, helps to protect local trustees. For the competitive position of persons within the taxing state who are available to serve as trustees for citizens within that state achieve a level playing field as to trustees offering such services in other states, and even in states where trusts are exempted from tax or are subject only to a very low tax-rate. Moreover, since the chief alternative test of income taxability to the Founder-State Trust doctrine is that trust income is taxable in the state in which the trustee is resident, a citizen of a Founder-State Trust state must avoid appointing a trustee resident in such a state, for it exposes trust income to double taxation. Both that the Founder-State Trust doctrine tends to remove the question of taxability from choice of a trustee (and trust situs) and that it minimizes forum shopping look away from juridical to practical categories.

I have now identified a theme of legalistic justification for the Founder-State approach in determining resident trust income taxation and suggested two closely related themes that are at least compatible with the Founder-State Trust concept and provide pragmatic support for its adoption. There is, however, in any assessment of the Founder-State Trust concept another and separate theme, which must be considered along with the above. This last theme is one that argues for or against Founder-State Trust theory because it prolongs the claims of the trust settlor's state of original residence over the trust assets and continuing history of the trust assets. Beyond the technical argument of continuing probate court jurisdiction, this theme calls attention to making taxability

105. By a "pure" trust I mean one where every testamentary trust created by a domiciliary of the state is fully taxable as a resident of that state. The implications of a modified Founder-State Trust approach, as in New York law under the 1992 regulations, are different and will be separately addressed later. See infra Part II.C.4, New York Brew.
of trust income dependent in an open-ended manner on the settlor’s immediate and possibly adventitious and short-term relation to the trust and to the probate court in which the settlor’s estate was probated. Looked at in this way, the settling of a trust irreversibly ties the settlor’s money in trust to that particular state; its situs is forever beyond the settlor’s power to move those assets freely without terminating the trust. And it is similarly beyond the power of trustees or beneficiaries, short of terminating the trust altogether.

The first theme, based on traditional legal arguments of jurisdiction and governing law, I call the Theme of Legality. This is the explicit justification for Founder-State Trust taxation. The interrelated themes of pragmatic justification, I call the Theme of Evading Evasion. What we focus on at this point, is whether the settlor has the power to choose a trustee and the trustee’s (and trust’s) situs and to shop among competing states capable of assuring the limitation or absence of taxes. Trustees might like to offer prospective settlors a tax haven, but if they cannot do that in a Founder-State Trust state, at least they are able to say that neither they nor any Trustee in another state can either trigger or prevent taxation in the state of the settlor’s domicile. The Theme of Evading Evasion avoids complaints from banks and others offering professional trustee services that the practical consequence of a state’s using the residence of the trustee as the criterion of residence of the trust for tax purposes, places them at a disadvantage vis-a-vis trustees in other states. But that criterion in turn leads us to the last theme because that last theme dwells precisely on the irreversible consequences of the settlor’s domicile under the Founder-State Trust approach and can be called the Theme of the Founder’s Forfeit.

1. The Theme of Legality
The traditional conflicts maxim mobilia sequuntur personam (personal property accompanies its owner) is still accepted as the background governing rule for identifying the tax situs of securities, intellectual property, and other intangibles; translated, it rests on the perceived fairness of treating such property as located wherever the owner is located, for unlike tangible property, it is not experienced as being in any particular place. It is this conventional, but still-controlling doctrine of conflicts of law that is a significant support to the effective operation of both the Founder-State Trust doctrine and to the choice (made by many other states) to insist that income from intangibles is located wherever the trustee is resident based on the premise that the
trustee holds title to the trust properties. This has the fortuitous, but useful result that intangibles are all located wherever the owner is located, and it is then a shorter step to a state’s concluding that a Founder-State Trust’s global income or a resident trustee’s global income is properly attributable to that state. In the case of states where global taxation turns on residence of the trustee, this is obvious. As already noted, in the process of localizing Founder-State Trusts, the settlor’s domicile (at the moment of trust creation and the decedent’s own demise) is thereafter only indirectly relevant; it is relevant only because that domiciliary moment is the ground for jurisdiction. Relying on the trustee’s residence seems much more direct than relying on the residence of the settlor, as a key to localizing intangibles. It is the trustee who becomes, under trust law, the center of powers and obligations, and it is the trustee who has legal title to the assets of the trust, including intangibles.

The Founder-State Trust analysis, on the contrary, relates entirely to the operations of the probate court that had jurisdiction over the administration of the decedent-settlor’s estate. The settlor’s domicile at the critical moment when probate court jurisdiction attached to the trust, is, it is true, the basis for probate court jurisdiction. The continuing relevance of the historical fact of the settlor’s domicile at that moment (without regard to any other fact about the settlor or the trust) is only indirectly relevant to the Theme of Legality by reason of its being, ultimately, the original source of probate court jurisdiction. Instead, all turns on the continuing relevance of the probate court.

Historically, primary jurisdiction over the administration of trusts developed in the Chancery Court, devolved on the appropriate successor courts of equity in England and the United States, and, from them, to the present identity and status as the body of equitable principles administered by courts of general jurisdiction under modern procedural law.

106. Other states look, not to the trustee’s domicile, but to the place where the trustee’s practical administration of the trust is carried out; this is an alternate identification of the trustee’s “residence” that makes a legal move analogous to determining the “principal place of business” of a corporation that has little or no actual presence in the state of incorporation. Both are versions of looking to the trustee’s residence and, just as the Founder-State theory is attached to probate court jurisdiction, is linked to a broader legal principle for the trustee has legal title to the assets.

107. That Founder-State Trust reasoning shifts from situs of the decedent to situs of the probate court, does not imply that such reasoning was seen as unusual. Indeed, for some courts, it has seemed just what was to be expected. See Harrison v. Comm’r, 172 N.E. 605 (Mass. 1930) (refusing to tax the trust where there was a Massachusetts trustee because the trust was within the jurisdiction of the New York Surrogate’s Court).
The probate court has a much more modest lineage than the courts of equity. In England, until the middle of the nineteenth century, the work of dealing with the personal estate of the decedent was a matter for ecclesiastical courts, a task that was confirmed to them by the Statute of Distribution in 1670. The American states needed a secular court that would carry out the same, largely ministerial but important, functions of probating wills, appointing and supervising personal representatives, inventorying and gathering the decedent’s assets, and approving the distribution of the decedent’s property. The probate court was created for that purpose.

It is likely that arguments for the extension of the probate court’s exclusive jurisdiction over the interpretation of testamentary trusts stemmed from assimilating the trustees to the fiduciaries of the estate, administrators and executors, who are in theory much more subject to direct probate court jurisdiction; in fact, control over these fiduciaries lie at the heart of that jurisdiction. There was a body of law that held that the situs of the probate court was the official residence of estate fiduciaries, without regard to the actual personal residence of those quasi-officers of the probate court. Thus, the Founder-State Trust concept is bottomed on an extension of the official residence theory about estate fiduciaries to the trustees of testamentary trusts. 108

In New York, for example, the Surrogate’s Court in each county was originally introduced by the Surrogates’ Courts Code of 1880, although the Surrogate, originally a minor clerk in the courts, had earlier been selected to carry out the administration of decedents’ estates in the Revised Statutes of New York of 1830. Special courts or even particular administrative officers were given the same functions previous to that time. 109 The jurisdictional grants to the probate court were often

108. Some authors, even while reporting the line of argument, have found the extension dubious. See Robert C. Brown, The Taxation of Trust Property, 23 Ky. L.J. 403, 412-16 (1935). The Founder-State Trust provisions in New York must not only stretch the concept of situs where the probate court is located from estate fiduciaries to testamentary trustees, but also further from testamentary trustees to trustees of inter vivos trusts.

109. See ROBERT LUDLOW FOWLER, DECEDENT ESTATES LAW OF NEW YORK (1911). The New York State Constitution of 1938, as amended, now describes the constitution of the Surrogate’s Court in each county in Article VI, § 12. Section 12-d reads:

The surrogate’s court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the Supreme Court as may be provided by law.
extremely limited. The law reports of most states are full of decisions that dwell on the limited and subordinate position of the probate court (often treated as a quasi-administrative arm of the state’s courts of general and equity jurisdiction, to which appeal from decisions sometimes lay) and that insist on the “purely statutory” nature of the probate court jurisdiction.

But the probate court was, also, as Willie Sutton would have said, where the money was. It became the contested site for jurisdiction over matters relating to the wills of decedents and the testamentary trusts established by those wills. Among its more important functions was to provide a place—often, a hospitable place—for submitting trustees’ accounts for review and approval. The availability of the probate court for other matters relating to the administration of trusts varied with the time and the place. In Connecticut, for example, the courts for some time concluded that the probate court lacked jurisdiction to give damages even if a hearing on the trust accounting showed that such damages were due. In New York, it was only with “adoption of article six of the state constitution effective September 1, 1962, [that] the last vestige of a constitutional barrier to the conferring of equity jurisdiction upon the Surrogate’s Court was removed.”

But for those courts which have accepted the reasoning of the Founder-State Trust approach, the jurisdiction of the probate court over testamentary trusts (often a non-exclusive jurisdiction) must seem to confer special benefits on the trustee and the beneficiaries of the trust,

110. N.Y. CONST. art. XII, § 12-e indicates the limited nature of the court when it adds that the Surrogate’s Court will have only “such equity jurisdiction as may be provided by law.”
112. In the effectiveness of the demand for administration of the property of decedents, and in the compelled disclosure and publicity about the decedent’s financial affairs, which accompany that administration, may be seen, perhaps, one of the administrative roots of the Founder-State Trust concept. The Mills Committee Report, supra note 95, notes that, under the then existing realities of personal property taxation, “widows and orphans” were almost alone in paying, full freight, the property tax due on intangibles.

When the chief bread-winner dies, a record of his property must be filed in the, where it is easily accessible to the tax assessors. Here it is caught and taxed, while similar property held by others is untaxed. [And] it is taxed at a rate which makes the personal property tax in this case one of the most barbarous to be found in any country. Cases are frequent where as high as 25 to 50 per cent of the total income set aside for the support of widows and orphans is taken by this tax.

Id. at 45.
113. Dettenborn 185 A. at 84.
114. David D. Siegel & Patrick M. Connors, Practice Commentaries, in N.Y. SURR. CT. PROC. ACT § 201, at 50 (McKinney, 1994).
for it is these benefits which must justify the state's assertion of the power to tax. Even for such courts, however, the nexus between the trusts and the probate court is admittedly attenuated; the probate court is no more than the court, in whose public records are found the documents that define the trust and which often does no more than offer an appropriate forum for accounting and otherwise administering the trust without need of independently grounding jurisdiction over parties. This is the language of Justice Borden, speaking for the majority in the Gavin case:

For purposes of due process of law, we see nothing less compelling about the benefits and opportunities provided by Connecticut to these trusts by its legal and judicial systems than those benefits provided by states in which either the trustee or the administration of a trust might be located . . . . Just as the vitality of the trust as an economic entity is inextricably intertwined with the administration of the trust assets by a trustee located in New York, the viability of the trust as a legal entity is inextricably intertwined with the benefits and opportunities provided by the legal and judicial systems of Connecticut, and the legal viability is inextricably intertwined with its economic viability. Neither its economic vitality nor its legal viability trumps the other for purposes of due process and taxation. These contacts with Connecticut are sufficiently 'fiscal' in nature to satisfy the due process clause, and gave the testamentary trusts fair warning that they were subject to its tax jurisdiction.\textsuperscript{115}

To this argument, Justice McDonald, dissenting in Gavin, responds:

The majority, in sum, justifies a tax on the entire income of the trusts based on the fact that the Connecticut probate courts are open for accounting and trust administration . . . . The fact that the courts are open and available to nonresidents hardly would justify a Connecticut income tax on all of the income of New Yorkers or Canadians, simply because they may have a case within the subject matter jurisdiction of the Connecticut courts.\textsuperscript{116}

2. The Theme of Evading Evasion

The Theme of Evading Evasion is not mentioned by the majority in the Gavin case. The Theme of Legality alone, as the opinion is written, is taken as enough to justify the taxation of the testamentary trusts in the case. This opinion takes the Founder-State Trust statute in Connecticut as fully justified by these formal relations, but the opinion is not without

\textsuperscript{115} Chase Manhattan Bank v. Gavin, 733 A.2d 782, 795, 799-800 (Conn. 1999).

\textsuperscript{116} Id. at 807 (McDonald, J., dissenting).
covert reference to the Theme of Evading Evasion. The majority prominently state that the trusts in question have not paid any income tax in the past, and certainly not in New York, the state of residence of the corporate trustee. What Chase-Manhattan as trustee is seeking in Gavin is not fairness in tax, but immunity from all tax, and to achieve that result it will take advantage of the Founder-State Trust provisions of the New York income tax law to excuse it from paying income tax on accumulated trust income to New York and, then, turn around to seek to bar application of the same Founder-State Trust concept to the trust in Connecticut income tax law by dwelling on the inadequacies of the Founder-State Trust approach to taxation.

Serving as trustee has long been a major business.117 Although a number of complicating factors make it difficult to say with confidence the amount of assets under control of private testamentary trust trustees, it is clear that the amount of such assets is very substantial and the income generated by such trusts prior to deductions for distributions to beneficiaries are also substantial. Taking all these factors into consideration, it appears in 1997, nationally, more than the 1400 trustees of private trusts earned in excess of $600,000 in fees, employed some 8000 employees and paid approximately $190,000 in payroll.118 New York is a leader in providing corporate trustee services.119

117. See generally Lawrence M. Friedman, The Dynastic Trust, 73 YALE L.J. 547 (1964). As early as 1836 Mr. Justice Joseph Story could say that in America businesses had developed which actively sought to perform the services of trustees, with the result that charging and paying trustees' fees was quite common in America, while the reverse is true in England, where such services were characterized as typically performed by private persons as one of the more arduous burdens of friendship. See generally JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1.8 (1972 reprint.). Story identifies Farmers Fire Insurance & Loan Co., chartered in New York in 1822 and entering, under an amended charter, into the trust business by 1826 as the first corporation to offer such services. JOHN G. SMITH, THE DEVELOPMENT OF TRUST COMPANIES IN THE UNITED STATES (Holt & Co. 1928) pushes the beginning of the business further back, citing Massachusetts Hospital Life Insurance Company, incorporated in Massachusetts in 1822, as having begun to solicit trust business immediately, obtaining an amendment empowering the company to invest monies "held by them . . . in trust for or during the lives of any person or persons . . ." Such endowments in trust thereafter became the main business of the company; Smith lists Farmers Fire Insurance & Loan Co. as the first corporation to obtain explicit authority to accept property on trusts and to carry them out.


119. In 1998 a total of over 73,000 trusts and other fiduciaries (Form IT-205) reported over six and a half billion dollars of income to the state of New York. See 1998 NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, OFFICE OF TAX POLICY, Individual Income Tax Statistical Reports for 1998, Table 57 at http://www.tax.state.ny.us/stat_pit/pit98/PIT98_Table_57.htm (last visited Oct. 20, 2002). Available statistics do not break this figure down into trusts, on the one hand, or estates, on the other hand. In addition, the trusts that filed either merely had New York source income or were New York State
Corporate trusteeship, like other service businesses, is a competitive one. Trustees in various states are competitive with those in other states, and one of the bases for such competition is the legal environment in which such trustees operate. One need not believe in the tort of negligent trust situs,\textsuperscript{120} to recognize how competition among corporate trustees for new and old trust business also involves a competition among the states, to provide a hospitable environment with respect to the powers and liabilities of the trust.\textsuperscript{121}

But just as the trustee in \textit{Gavin} sought to avoid both New York and Connecticut taxes although it had to adopt inconsistent attitudes to Founder-State Trusts to do so, so settlors and their advisers also aim to avoid \textit{all} taxes, not just unfair taxes. It would be foolish to overlook the active participation, not only of taxpayers seeking to avoid all tax, but of the service professions who affirmatively work to minimize taxes for their clients and even to reach the nirvana of total tax immunity, such as the lawyers and accountants, for whom tax minimization has been a residents under the modified Founder-State Trust tax rules that are applicable in New York. For these reasons and reasons discussed in the text, the income figure may both or either understate or overstate and, thus, fail to accurately reflect the amount of private trust assets under management by New York trust companies.

\textit{A Theme From Saenz}

120. See Michael J. Myers & Rollyn H. Samp, \textit{South Dakota Trust Amendments and Economic Development: The Tort of “Negligent Trust Situs” at its Incipient Stage?}, 44 S.D. L. REV. 662 (1999). The law, generally, seems to be that a trustee is not even obliged to resign from the trust in order to avoid taxes. However, it is clear that legislatures and courts often facilitate relocation of trustees for tax-related reasons. See N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(2) (McKinney Supp. 2002); \textit{In re Dombush}, 627 N.Y.S.2d 232 (Sur. Ct. 1995).

121. “As the financial capital of the world, New York has the individuals best qualified to serve as trustees. New York has the most comprehensive and thorough development of caselaw of trusts and a Surrogate Court system second to none.” Charles F. Gibbs & Colleen F. Carew, \textit{Trusts Leaving New York, Situs in Cyberspace: Time for Legislation, N.Y.L.J.}, Dec. 20, 2002, at 3, (arguing for tax relief to stem the outflow of New York trusts); \textit{Matter of Margaret Hitchcock}, (Nassau Surr. 1999), N.Y.L.J., Sept. 7, 1999, at 34 (Surrogate Radigan announces he will send a copy of his opinion permitting the transfer of twelve New York trusts out-of-state for tax reasons to the New York legislature for its consideration). Competition among states in terms of legal environment is not limited to matters of state taxation policies. The current hot topics are the dubious attempts to create “asset protection trusts,” intended to compete with international tax havens as well as with the other states of the union, and the repeal of the Rule Against Perpetuities and enablement of the dynastic or perpetual trust. A fair sampling of the literature can be found in the happy circumstance of serious articles about the two topics in a single issue of \textit{Real Property, Probate and Trust Journal} for No. 3 of Vol. 35, Fall 2000. Henry J. Lischer, Jr., \textit{Domestic Asset Protection Trusts: Pallbearers to Liability?} 35 REAL PROP. PROB. & TR. J. 479, 530-32 (2000), considering the argument that enactment of “asset protection trust” enabling statutes “provides stimulus to the Financial Services Sector of the APT State,” and Joel C. Dobris, \textit{The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay}, 35 REAL PROP. PROB. & TR. J. 601, 605 (2000) (“[S]ome U.S. states and foreign jurisdictions, especially some island nations hungry for out-of-jurisdiction trust business, have exhibited willingness to repeal the Rule Against Perpetuities.”).
major business at least since the introduction of income and inheritance taxes in the early part of the twentieth century. Such service professions also include professional trustees. In the case of trustees, the issue achieves a particular piquancy because such trustees must recognize that—in any state where the residence of the trustee or the locale of administration is a criterion—they themselves are very relevant to the determination of the tax liabilities of settlors, beneficiaries and the trust.  

Trustees, then, are committed to keeping taxes on trusts at a minimum. This is both in keeping with a professional desire, along with lawyers and accountants, to provide tax minimization for their clients, but for trustees it is also in their own interest, for if the trust is taxable because of the trustee, or something connected with the trustee, the very viability of the trust business is put at risk. Trustees are expected to be, and mostly they are, vigilant to minimize taxes.

But the phrase Evading Evasion means not only the trustee's zeal to achieve maximum tax avoidance, it also means that taxes on the trust and on the beneficiaries can often be avoided by means of the choice of the trustee, it is evasion through the trustee. There is a very strong argument for the Founder-State Trust because in states where that rule applies, the possibility of shopping for the state with the most advantageous tax laws is limited to re-settling the settlor's domicile. Such tax planning is surely possible, but it requires willingness on the part of the settlor to make substantial changes in life style. On the other hand, in states where trusts are taxable based on the residence of the trustee, the settlor is in a position to shop around and to choose a tax situs where the law exempts the trustee from tax without any change in life-style. Taxpayers are vigilant to find such opportunities for forum shopping. That vigilance triggers a violent response in tax administrators and commentators. The Hellersteins criticize the Murphy decision, both as a matter of reading the law as it has developed in the United

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123. Mercantile-Safe Deposit & Trust Co. v. Murphy, 15 N.Y.2d 579 (1964).
States Supreme Court and as a matter of policy. On the latter point, they feel it is enough to say that “tax avoidance may result [for] the decisions of the Missouri and New York courts tend to invite manipulation of the income of trusts and estates in a manner that gives the parties investment advantages and encourages tax avoidance. The Vermont and California holdings eliminate the opportunities for such manipulation.”

3. The Theme of the Founder’s Forfeit

Finally, we come to the Theme of Founder’s Forfeit. This is my poetic phrase to describe a bad tendency that lies at the heart of the Founder-State Trust tax law. It is the state’s insistence on a persistent liability to taxation of a person who has otherwise severed some or all ties with the state that is imposing the tax. The state, in so acting, is seeking to immobilize the settlor’s wealth in ways that it could never immobilize the settlor. As such, it sounds a very faint echo of a wrong about which America, a nation of emigrants from many other countries, has always been sensitive.

The wrong in question is insistence that a citizen of a state cannot, without the permission of the state, sever its connections with that state. Let me mention, first in the order of history, the wrong of impressment. At the very beginning of our history as a nation, England insisted that it could summarily seize American seamen of British birth, for involuntary service in the Royal Navy; for England they were still

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124. See Hellerstein & Hellerstein, supra note 2, § 20.09[2].
125. See In re Swift, 727 S.W.2d 880 (Mo. 1987); Westfall v. Dir. of Revenue, 812 S.W.2d 513 (Mo. 1991).
127. The Hellersteins have in mind McCulloch v. Franchise Tax Board, 390 P.2d 412 (Cal. 1964) which imposes a tax on the trust on the basis of the ultimate beneficiary’s residence in the state. See Hellerstein & Hellerstein, supra note 2, § 20.09[3]. Such taxation, under California law, is in substitute for Founder-State Trust taxation, while the Vermont case does involve Founder-State Trust taxation. Perhaps the way to put it is, the authors must have in mind a tax system that involves insuring that at least one state taxes the trust accumulations. Unfortunately, their solution does not prevent more than one state from doing so.
129. The United States, which recognizes the right of its citizens, to repudiate their citizenship, still insists that a citizen who merely lives abroad, however long, continues to owe obligations of citizenship to the United States, including liability to military service and to continuing tax liability. But an American can repudiate U.S. citizenship by following required procedures, and the voluntary repudiation puts an end to either liability.
Englishmen, no matter what American law said. From there, the basic position of perduring bonds with the country of nativity gave birth to the long dispute that, in fact, attended emigration from Europe to America. Many European countries insisted that, as a matter of domestic and international law, its citizens could not voluntarily repudiate their citizenship. This insistence that a person cannot voluntarily sever connections with their native country had a contemporary revival, in the case of Russian Jews in the 1970s and 1980s, who had such trouble in obtaining exit visas to leave the country because they were alleged to owe the Soviet State indefinite service in return for the upbringing and education they had received there.

Finally, a more moderate and, perhaps, defensible variation on the Founder's Forfeit are the numerous past and present financial regulations that are aimed at preventing local investments and savings free flight from the country. Free financial transfers has been a goal of treaty organizations since at least the Bretton Woods Agreement of 1946. Retention of the right to limit such transfers is still regarded as an ordinary aspect of sovereignty, under the discipline of the international markets.

The Theme of the Founder's Forfeit can be understood as yet another version of this latter principle, and it gives rise to the case where the right to leave is admitted, but the right is qualified by subjecting the emigrating individual to unusual continuing tax liabilities taxation. Founder-State Trust taxation amounts to a state's taking the position that

130. As my colleague, Peter Spiro, has written:

Refusing to accept the legal fact of naturalization as diminishing obligations to the Crown—a November, 1807 proclamation warned that 'no such letters of naturalization, or certificates of citizenship, or certificates of citizenship, do, or can, in any matter divest our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their lawful Sovereign'—the English navy would impress the naturalized Americans at sea into its service on the grounds that they had never been released from their obligations to their country of birth.... British impressment policy was an important contributing factor in the outbreak of war in 1812.

In the wake of that conflict and the obvious costs of continued impressment, Britain desisted from extraterritorial efforts to return would-be former subjects by force. But as was true of the may other states that refused to recognize expatriation, they remained subjects in the eyes of the birth country.

Peter J. Spiro, Dual Nationality and the Meaning of Citizenship, 46 EMBRY L.J. 1411, 1422-23 (1997) [hereinafter Dual Nationality]. Spiro goes on to chart (somewhat more speculatively) the development, through a stage still widely accepted today, where new citizenship bonds can be undertaken, but at the cost of relinquishing the earlier allegiance, to what he argues for as the proper rule today, that is acceptance of dual citizenship. See also Peter J. Spiro, The Citizenship Dilemma, 51 STAN. L. REV. 596 (1999); Peter J. Spiro, Questioning Barriers to Naturalization, 13 GEO. IMMIGR. L.J. 479 (1999).

131. See Dual Nationality, supra note 130, at 1420.
a settlor’s action in founding a trust results in the perpetual liability of the assets and income of that trust to local taxation.\footnote{132}

Here there are two questions. Is there any evidence that such motivations entered into the formulation of the Founder-State Trust definition? And if there is some evidence of such motivation, of what relevance is it.

Certainly it is not implausible that administrative ease was the primary reason for adopting the rule. It would not be implausible to believe that administrators, equally fearing they would have little way to find many nonreporting trusts, especially those that were not administered by professional companies and, also, thinking that putting the public records of the Surrogate’s Courts to work, was a brilliant stroke. But avoidance of trustee shopping and the reduction, if not elimination, of competitive disadvantage for an important trust company services industry would be additional reasons for adopting the rule.

Indeed, it also seems plausible that the Founder-State Trust provisions would seem to many simply a natural expansion of a desire to hold onto existing wealth. After all, some believe that the Surrogate’s Court desires to keep exclusive jurisdiction of well-monied trusts precisely because they would then be constrained to pay fat fees to local lawyers. In the years that preceded enactment of the New York personal income tax in 1919, many in New York, perhaps with more reason than in most states,\footnote{133} were leery that introduction of an income tax might lead to emigration of wealthy taxpayers to “commonwealths which seek to attract to themselves much of the wealth.”\footnote{134}

Nothing more can be said. We have little evidence of actual intentions and policies relating to the 1919 income tax, as we have

\footnote{132. So far as the Founder-State Trust liability raises memories of a more radical rule which encouraged immigration, while denying or limiting the citizens’ rights to take their wealth with them or even expropriating that wealth, such as we would find in the extraordinarily miserable status of Jews in Nazi Germany during the 1930s and at other times and places under orders of expulsion. See generally Saul Friedlaender, Nazi Germany And The Jews: The Years Of Persecution 1933-1939 (1997).

133. During the Civil War, four Northeastern states, New York among them, provided thirty percent of revenue produced by the wartime income tax. The concentration of wealth in New York had not declined over the following decades, and that accounted for the state’s resistance to the 1894 Federal income tax. In connection with the passage of that Act, William Jennings Bryan admitted that it would sit heavily (and, he would say, for the first time) on monied individuals in states like New York. He read, “with relish,” a list of more than 100 millionaires resident in New York City. See Ratner, supra note 66, at 172, 175, 219-21; Powell, supra note 63. For similar accounts of the introduction of taxation at this time, see generally Clifton K. Yearley, The Money Machines: The Breakdown And Reform Of Governmental And Party Finance In The North 1860-1920 (1970); Seligman, supra note 65, at 420.

134. Seligman, supra note 65, at 420.}
shown, for we do not have an effective legislative history of the 1919 tax act and have not been able to identify a model for the Founder-State Trust concept. Intentions such as I have referred to under the name of the Founder’s Forfeit might indeed lie behind the statute that, without explanation or prior model, introduced the Founder-State Trust theory of trust residence into New York. Such intentions are largely unknowable unless openly admitted and the possibility of their presence may not be directly relevant, from a legal point of view, provided that the statute can be adequately justified on other grounds.

But in arguing for the state in the Murphy case, counsel have this to say about the policy of the Founder-State Trust provisions:

Here, the donor of this inter vivos trust was domiciled in New York at the time of its creation and remained so until death, with his power of revocation unexercised. This constitutes the requisite jurisdictional nexus to impose ... subsequent [income] taxes upon the trustee thereafterwards .... It is irrelevant for plaintiff to seek to equate the taxability of trusts which, as this is, is fixed and immovable, with the taxation of individuals and their mobility during a given taxable period. Different taxing concepts pertain. As to the trusts, the statutes do not nor have they ever contemplated ‘floating’ ones which would deprive this State of its comprehensive and continuing taxing jurisdiction solely by reason of the donor’s death, which ... it concededly had during his lifetime ....

... .

This State had jurisdiction then by virtue of [the donor’s] New York domicile and it has not lost it now .... The only effect death had on the taxability of such trust income was to foreclose the exercise of the donor’s power of revocation over the trust .... His death as a New York domiciliary permanently continued this trust as a New York resident trust ....

As this language suggests, one could, with little difficulty, as I hope I have shown, assign a desire for the Founder’s Forfeit as one of the motivations for the otherwise unexplained insertion of the Founder-State Trust provisions in the 1919 Act. After all, in the end, the state could not trust trust companies: if the new income tax cut too deeply into their business, they could and would move out of state and perhaps take the earnings of their trust assets with them. Second, it is clear that concern for wealth leaving the state was near the surface in debates that led up to

135. Murphy Brief, supra note 63, at 13-14 (emphasis added).
enactment of the individual income tax. The Founder-State Trust provision certainly does try to make sure that some of that wealth, especially, in the case of the New York income tax, the whole existing portfolio of New York trusts would not be able to move in a way that would be likely to defeat the state’s income tax; in the end this aspect of the Founder-State Trust provision as having extracted the Founder’s Forfeit cannot be wholly denied.

4. A New York Brew

All that has been said relates to the “pure” Founder-State Trust doctrine, that is, to income taxation of trusts that imposes global tax liability on any testamentary trust that was founded by a decedent who died resident in New York. Since at least 1964, New York, of course, the pure Founder-State Trust doctrine has been invalidated. We do not know how the New York income tax was administered until the adoption of the present regulations\(^\text{136}\) in 1992, but since then New York trusts are those (and only those) Founder-State Trusts where there are other specified New York contacts.\(^\text{137}\)

Thus the present New York law brews together two types of liability. No trust with a New York trustee is taxable as a resident unless it is also a New York Founder-State Trust; and no New York Founder-State Trust is taxable as a resident unless it has one of the specified local connections. As a result the New York modified version of the Founder-State Trust doctrine, the New York brew, as it were, has lost a chief benefit of the pure version of the Founder-State Trust doctrine. New York law no longer bars New York settlors’ attempts to evade New York tax. Unless more strenuous devices are necessary because the

\(^{136}\) See supra note 37 and accompanying text.

\(^{137}\) First, the regulation makes no provision for apportionment, and by that failure alone might be constitutionally challenged. Second, even if the Department is authorized to rewrite New York law in this fashion, does the regulation they have adopted validly specify the circumstances in which a New York Founder-State Trust should be taxable as a resident? As it stands, the regulation makes no provision for apportionment of trust income as to trusts with several trustees resident in several states or with assets located or income sourced both inside and outside New York; but as noted above, see supra notes 53-54 and accompanying text, such apportionment may be constitutionally required. Moreover, I do not see how the existence of trust income sourced in New York, which on the face of it merely makes the trust subject to tax on that income as a nonresident trust, can be made the predicate for the additional liability for tax as a resident trust. The reference to local assets may echo the holding in \textit{Westfall v. Dir. of Revenue}, 812 S.W.2d 513 (Mo. 1991) (Founder-State Trusts are not taxable without a further nexus to the taxing state, but it is sufficient that the trust, founded by a Missouri decedent but otherwise unrelated to the state, owned a small parcel of real estate in Missouri and under certain contingencies, Missouri charities would receive distributions). I raise, without pursuing, whether the adventitious presence of a minor trust asset or some remote beneficiary is an appropriate basis for finding tax liability under the Constitution.
proposed trust has New York beneficiaries or New York assets, a New York resident can look about for a trustee and a trust situs in a state that has more hospitable income tax laws than those of New York.

At the same time, another effect of the New York income tax law, as it currently exists, is that it permits out-of-state settlors to establish trusts with New York trustees without worrying about incurring New York State income tax. It does not greatly matter whether this was or was not the legislative intent of the adoption of the Founder-State Trust provisions, it seems likely that this consequence has to be considered an element in keeping the Founder-State Trust provisions on the books. It is, therefore, not surprising to find trust professionals demanding that New York meet competition from other states by changing its tax and other laws.

This would not be the first instance New York has responded to the needs of the substantial New York trust industry. Long since, New York adopted a Constitutional provision limiting taxation of "moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner" when in the hands of a nonresident of the state. It is a constitutional assurance that the state will not levy a property tax or estate taxes based on the "presence" of a securities and other intangibles; that, except for so-

138. "Consistent with long-standing policy of encouraging the import into New York of nonresident financial business, the Tax Law does not impose income tax on trusts created by non-domiciliaries with New York banks and individuals as trustees, other than New York source income, thereby disregarding the location, or situs, of such trusts." Gibbs & Carew, supra note 121. Consideration of the important New York trust services industry must play a role in answering the question why, despite the Murphy and Taylor cases, the Founder-State Trust provisions of New York law have not been modified. A switch to income taxation on the basis of trustee domicile would not only reduce the competitiveness of New York trust companies for future trust businesses, it would affect hundreds of millions of dollars in trust assets already in the hands of New York trustees.

139. See Gibbs & Carew, supra note 121: "It is illogical public policy to encourage nonresidents to bring their assets to New York banks and trust companies while, at the same time, driving resident trusts out of the state."


141. The provision reads:

Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs
called business situs intangibles, New York will honor the principle that intangible value should be taxable for all purposes (including death taxation) in the state of the domicile of the owner. Concern for the trust business is then made express, because the constitutional provision goes on to state that such property “if held in trust, shall not be deemed to be located in this State for purposes of taxation because of the trustee being domiciled in this State.”

It is the more likely that concern for impact on a trust industry has something to do with New York’s acquiescing in a modified form of the Founder-State Trust definition of trust residence because, otherwise, New York has a justified reputation for paying aggressive attention to possible revenue sources, as the next section of this article shows.

D. Residence and Domicile: Double Taxation

The passions that are expressed in seeking the Founder’s Forfeit can be found in other provisions of state tax laws, as the desire to require fair participation in the burdens of government shades into a desire to hold departing citizens and commuting workers to ransom. I want to take a look at two examples of penalizing particular taxpayers for leaving the state.

We introduced at an early point in this Article the complementary concepts of an income tax based on source of income and that based on some variation of domicile, residence or presence in the state, and the danger that the two modes of taxation will result in double taxation. In most cases, the danger of double taxation is averted by provisions in many state laws for a credit against taxes paid on some or all income to within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed.

N.Y. Const. art. XVI, § 3 (1939).

142. See Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287 (1998) (Privileges and Immunities Clause (Article IV, Section 2) denies states the power to refuse all nonresidents a deduction for alimony payments in circumstances where resident taxpayers get such a deduction); City of New York v. New York State, 94 N.Y.2d 577 (2000) (City could not impose a local income tax on City source income only of those nonresidents who were also non-domiciliaries of New York; such a tax impermissibly burdened interstate commerce).

143. As George Altman and Frank Keesling expressed it many years ago, there is taxation of income “Without Reference to the Person” (taxation based on source of income) and “With Reference to the Person” (taxation of an individual on his or her global income). See GEORGE T. ALTMAN & FRANK M. KEESSLING, ALLOCATION OF INCOME IN STATE TAXATION 29, 30 (1946).
another state or states.144 These provisions, dependent on the actions of each of the states involved, do not always achieve their goals of avoiding double taxation. Moreover, in some cases, the results of the tax provisions in one or more interacting states make it highly likely that the tax-credit “safety-net” will not work. One such tax provision was highlighted by a Report of the Committee of Personal Income Taxation of the Association of the Bar of the City of New York in 1993.145 We will use the work of the authors of this Report since none of the involved states has provided any effective relief in the intervening decade.146

The problem can be explained by reference to New York’s double definition of individual resident taxpayers as those persons who are domiciled in the state and those, not domiciled in the state, who are nevertheless counted as New York resident taxpayers.147 As long ago as 1946, the authors of a classic work on allocation of taxes among the states noted that “the terms ‘domicile’ and ‘residence’ have often been used interchangeably in cases involving jurisdiction to tax” and, again, in counter-distinction from each other.148 The fact is that many states impose global taxation on the income of individuals who are “resident” taxpayers in the state in not one, but in two quite different senses. Individuals are globally taxed if they are domiciliaries; they are also globally taxed, if, though not domiciliaries, they are resident.149 The term “resident” in this context is statutorily defined (typically in the manner of the New York definition).

This statutory definition substitutes for, or adds to, the usual definition of domicile a more mechanical test, which turns on a set of limited, but significant contacts with the state. The usual factors are the number of days or months present within the state during a year, and the existence within the state of some place of abode. Both items are relevant to the test of “residence” in New York under the New York

144. See, e.g., N.Y. TAX LAW § 620-A(a) (McKinney 2002) and authorities cited supra note 7.
146. An inquiry to the two major authors of the Report resulted in an email as follows:
   Thanks for your note. We received one letter from NY which suggested that we had been unduly harsh in asserting that there was double taxation without relief of certain types of income. The writer, the then chair of the State Tax Commission suggested that an adversely affected taxpayer could specially petition for relief. There was no suggestion of any broader change that was appropriate. The other jurisdictions did not comment.
147. See Individual Double Taxation, supra note 145, at 721; N.Y. TAX LAW § 605(b) (McKinney 2002).
148. ALTMAN & KEESLING, supra note 143, at 31-32.
149. See N.Y. TAX LAW § 605 (McKinney 2002).
The New York State Tax Law defines a "resident individual" as an individual:

(A) who is domiciled in this state . . . or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state . . . .

Item (B) at the same time it defines this new sense of residence, excludes any individual who is domiciled in New York. There is a great difference between these two bases, each of which makes an individual taxpayer subject to the New York tax on his or her global income. The difference stems from the fact that domicile implies, in the strongest way, a unique tie to the domiciliary state. There can be only one domicile. A "resident" individual, on the other hand, implies absolutely nothing about picking out a preferred unique situs. On the contrary, a section 605(b)(1)(B) resident is defined in a way that, by the very form of the definition, assures that he or she, not being a domiciliary of New York, is domiciliary of another state. At the same time, the provision defines a person whose connection to the state is sufficient to justify global taxation, that is, tax on income from all sources, without regard to the fact that the individual is also a resident, and even a domiciliary, of another state.

Taxation of the nondomiciliary resident on his or her global income has long been part of New York law and the law of other states imposing a general income tax. Although it carries, as is suggested below, a potential for double taxation, the courts have, until the present time, rejected any claim that states imposing such a tax are breaching constitutional limits as a result of the possibility or even the fact of double taxation that results. In People ex rel. Ryan v. Lynch the taxpayer was a domiciliary of Minnesota, but admitted he had a permanent place of abode within New York and had spent more than

150. See id. § 605(b)(1).
151. See id. Certain exceptions, not here relevant, are also listed in subparts (A) and (B). For adoption of a similar definition for local government income taxes, see N.Y. TAX LAW § 1305(a)(1)(2) and N.Y. GEN. CRRY LAW § 25-a (McKinney 1999).
152. It is fair to say that when conflicting claims of domicile have arisen, they have created a near crisis. See infra notes 298-310 and accompanying text for a discussion of the Due Process Clause objections to double domicile. See also infra notes 233-73 and accompanying text for a discussion of the earlier Cases Allocating Intangibles. Both sets of cases assume that, in principle, there is only one domicile. See also ALTMAN & KEESSLING, supra note 143, at 31-32.
153. See N.Y. TAX LAW § 605(b)(a).
154. 262 N.Y. 1 (1933).
seven months of the relevant taxable year here, as the statute required. The taxpayer resisted paying the tax because he claimed that the constitution, and specifically the Due Process Clause, requires that only a resident and domiciliary in a state is subject to tax in this way. Judge Pound, for the court, disagrees. He sets aside the cases the plaintiff had cited as dealing estate taxes and says:

The definition of "resident"... has no legitimate bearing upon any question raised under the Federal constitution. The decision depends upon the general operation and effect of the statute....

The statute in itself is quite valid under the Federal Constitution, as giving a legitimate definition to the word "resident."¹⁵⁵

To establish the legitimacy of the statutory definition, Judge Pound cites a then recent federal tax case, Bowring v. Bowers,¹⁵⁶ which held that a long-term British resident of the United States was subject to federal tax as a "resident alien" even though he intended ultimately to return to Britain and was not, therefore, a domiciliary. With that, Judge Pound dismissed the case as not presenting a question of constitutionality.¹⁵⁷

Where the taxpayer in Ryan fruitlessly relied on the Due Process Clause, in the recent New York case of Tamagni v. Tax Appeals Tribunal,¹⁵⁸ the taxpayer also attempted to rely on the Interstate Commerce Clause and the protection of a nonresident's privileges and immunities found in Article IV, section 2 of the Constitution.

There the state of New York imposed a tax because the taxpayer, an investment banker in a New York City firm, had long maintained his main family residence in New Jersey. He and his wife were, as a result, admittedly domiciled in New Jersey, but he and his wife maintained a small apartment in the City; and he could not prove that he was not physically present in the City for at least a few minutes on a preponderance of the days (184 days) of the year. At that point, Tamagni became liable for a tax on his income from all sources, including income from personally owned securities, income that was also taxed by New Jersey because he was domiciled there.

¹⁵⁵. Id. at 3-4.
¹⁵⁶. 24 F.2d 918-19 (2d Cir. 1928).
¹⁵⁷. See People ex rel. Ryan v. Lynch, 262 N.Y. 1, 4 (1933). Judges Lehman and O'Brien dissented without opinion. The case is dismissed jurisdictionally, rather than on the merits, since the plaintiff was seeking review of a confirmation of the administrative decision in the Appellate Division below on the ground that the confirmation involved a constitutional question. Although the constitutional claim was raised below, there is no evidence that it was the ground of decision.
In a way, although, Tamagni’s case does present the issue implicit in the nonunique status of global “resident” taxation, it does not present it in its harshest form. The Tamagni’s may not have suffered the maximum pain that doubly taxing such securities income potentially implied. Although such securities income does not have a source in any particular state, New Jersey, the other (and domiciliary) state in a position to tax that income, is alone in the nation in giving a credit for other state income taxes whenever another state tax is paid and—what New York refuses to do—without regard to whether the income so taxed had a source within the state against whose tax the credit is claimed. Therefore Tamagni may pay the New York taxes due and then claim the amount of the New York taxes paid as a credit against his New Jersey income tax (up to the amount of such New Jersey income tax paid). Of course, if such a credit is not constitutionally required, New Jersey’s generous tax credit policy could be changed at any time that such a change seems desirable to the New Jersey legislature.

In fact, were Tamagni’s situation reversed, that is, if New Jersey were imposing the tax on Tamagni because he satisfied the minimal contacts of being a nondomiciliary resident there, while New York rightly regarded him as a domiciliary, New York would not provide Tamagni with any credit against his New York tax bill for taxes paid in this way to New Jersey. The New York credit is limited to the amount of income taxes paid to another state as a nonresident state tax imposed on income from what New York considers to be sources within the other state.

159. Now that Connecticut has an income tax, there must be some Connecticut commuters into New York who are paying tax on global incomes to both states. Neither Connecticut nor New York will give a credit for taxes paid to the other in these circumstances.

160. Some insight into the motivation from New Jersey’s more generous tax credit policy was recently given by Robert K. Thompson, director of the Division of Taxation, who says that New Jersey;

prevents our taxpayers from getting whipsawed. Mr. Thompson said New Jersey provides an automatic credit so that a taxpayer with a dilemma like Professor Zelinsky’s would not be doubly taxed . . . .

In essence, it is a situation where the New Jersey resident never gets hurt, but the New Jersey treasury gets hurt.

Mr. Thompson, the interviewer further reported;

said he understands and appreciates New York’s position; the state is not eager to allow taxpayers to pick and choose their taxing jurisdiction since New York’s taxes are higher than those of surrounding states. At the same time, however, he said, “it is the kind of thing, especially in today’s economy, where states have to work together and reach understandings that take into consideration the various states’ tax policies and take into consideration their taxpayers as well.”


161. See infra notes 167-69 and accompanying text.
The New York limitation on the availability of a credit against income tax paid to another state is much more common than is the New Jersey provision. In fact, when New York asserts a resident income liability against a domiciliary of Connecticut, the tax paid in neither New York nor in Connecticut, will qualify as a tax credit against the tax paid in the other state. The result will be that the hypothetical Connecticut domiciliary would have to pay two taxes on his or her global income, without any offsetting credit. This is, classically, double taxation.

Tamagni attempted to object to this potential double taxation (which, under the facts of a case, will not occur unless New Jersey modifies its interstate income tax credit rules). From a constitutional point of view, he argues, to permit both New Jersey and New York to tax the same income results in a discrimination against and a burden on interstate commerce. In the course of responding to this argument, Judge Wesley, speaking for the Court, says:

The current statute can be traced back to chapter 425 of the Laws of 1922, which first defined residence for tax purposes in terms of maintenance of a permanent place of abode in New York and presence in this State for seven months... At the time the statute was enacted the Income Tax Bureau noted in its memorandum in support of the legislation that, “[w]e have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes... but they... claim to be nonresidents”... The statutory residence provision serves the important function of taxing those “who, while really and [for] all intents and purposes [are] residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents”... In short, the statute is intended to discourage tax evasion by New York residents.

Judge Wesley then rejects the argument that this variety of commuter tax requires apportionment. The New York and New Jersey
taxes, he says, are different taxes because New York is taxing the taxpayer as a resident while New Jersey is taxing him as a domiciliary. It is a strange argument, indeed! It is like saying the self-same stick is really two sticks because it is too long for some purposes and too short for others. The problem with Judge Wesley’s argument is that the claims of domicile and “residence” are both rooted in the quantity of the taxpayer’s enjoyment of civil society in the respective states. Admittedly, both the nondomiciliary resident and the domiciliary receive substantial benefits from the existence of civil government in New York and New Jersey, respectively.

But receipt of such benefits cannot be the answer to all the questions that could be raised on these facts. Whether such benefits are received is not the only question that could be posed here. It is easier to point to the benefits received from each of the states, as justifying that state in asserting some tax liability, than it is to conclude that those benefits justify double taxation, potential or actual, due to the facts of persistent presence in both states in the form of a spread-out or extended presence that stretches across several states.

Recently a second case arising in New York has brought forward, on quite different facts, issues parallel to those raised by the nondomiciliary resident in Tamagni. The case is one that a Cardozo School of Law Professor, Edward Zelinsky, is currently litigating through the New York courts. Professor Zelinsky is a regular faculty member at Cardozo, a New York City institution, but he commutes from New Haven, Connecticut, where he is domiciled. He insists that his income from Cardozo is not entirely income that is sourced in New York, but should be treated, in part, as income from sources outside of New York. The issue here is whether income from the Law School should be treated as Connecticut-sourced income to the extent that his work for the school is in fact performed in Connecticut at Professor Zelinsky’s home office; he insists he carries out many of his job-related functions there. New York does not deem the salary allocable between the two states and insists Zelinsky owes it tax on the whole amount of the Cardozo salary. At the same time, under its own allocation rules, Connecticut does deem the salary allocable, in part, to the extent of work done in New Haven. Moreover, Connecticut, since it treats the Cardozo income partly as Connecticut income, will not give Professor Zelinsky a credit for all of the tax paid to New York as a nonresident taxpayer since (Connecticut says) a portion of the salary in question is Connecticut income, and not New York income. Professor Zelinsky insists he is thus caught in a “whipsaw” between the two states.
Professor Zelinsky is litigating the issue in New York. He has lost at the administrative level and more recently before the New York Appellate Division. But his lawsuit has attracted considerable attention, not least because Professor Zelinsky has effectively posed his issue as one arising from the new technology that allows more flexibility for work, through the Internet, while at home; he correctly points out that his is an issue that will increasingly arise with the spread of telecommuting. Moreover, the contest is drawing strange comment from New York and Connecticut taxing officials. In a December 5, 2001 article John Caher quotes from officials of the two states, each openly suggesting that the other state ought to provide accommodation.

Should the double taxation in either case be permissible, constitutionally permissible? If it is, we would have, as the statements quoted by Judge Wesley show, to accept that the Founder’s Forfeit, the insistence that a taxpayer cannot escape New York’s taxation even if, in reliance on the promise of our Federal Union, he or she extends expansively into another state or other states, each of whom may seek to tax. I am writing to test if such double taxation—either so motivated or having such an effect—should not, consistent with existing constitutional language and strong constitutional policy, be permissible without requiring, as a matter of constitutional mandate, some provision for a credit against taxes paid in one state or the other.

167. See Zelinsky v. Tax Appeals Tribunal, 2002 WL 31720595 (N.Y. App. Div. 3d. Dept., Dec. 5, 2002). The court finds that New York’s attribution rules are admittedly unusual and subject to criticism, but also finds no constitutional defect in them under either the Due Process Clause or the Commerce Clause and turns the matter over to “Congress or the Legislature.” Id. Professor Zelinsky intends to seek review by the Court of Appeals. See Letter from Edward Zelinsky to Author, dated Dec. 9, 2002, on file with author.


170. Of course, the Founder-State Trust concept does not bring us immediately to double taxation; in itself, it is only a bizarre extension of a tenuous claim to taxability, one that only makes political sense, perhaps, in light of the Founder’s Forfeit. But the Founder-State Trust concept does, in fact, raise exactly the same risk of double taxation in the absence of an adequate tax credit safety-net as does the global taxation of both domiciliaries and nondomiciliary residents. Other states may or will impose global taxes on the basis of the local domicile of the trustee or beneficiaries; if they do, the scene is set for double taxation.

171. The question is a pragmatic one. If the states have moderated the impact of the double tax then its mere possibility should not be enough to demand constitutional discipline. The states deserve that much leeway. Supreme Court opinions have insisted, several times, that the mere existence of double taxation is not, per se, a violation of the Due Process Clause, but the occurrence of such double taxation is objectionable where the Court can see a viable way of avoiding such a
Before we directly address that question in this Article, we must turn to a long and checkered history of the effect of American federalism and the federal Constitution on “double taxation,” a very ambiguous, but persistent term in American constitutional law, first under general considerations of fairness and later, by incorporating those fairness considerations as an aspect of the Due Process Clause.

III. DUE PROCESS AND THE SITUS OF TAX

The constitution has offered grounds for taxpayer hopes from early on.172 In McCulloch v. Maryland173 the Court opened a long and not yet finished history of tax immunities by declaring the immunity to state tax of the Bank of the United States as a Federal instrumentality.174 Moreover, the Court’s protection of interstate commerce from state regulation and taxation, which was at first near absolute and subsequently more nuanced, has been and continues to be a major resource for taxpayers complaining of state taxes. But the Constitution has offered other resources, for far beyond the language of the Constitution there has been a persistent objection to some state taxes which is not grounded in specific constitutional language. The objection is that the taxes in question were beyond the jurisdiction of the state.175

result, by allocation, apportionment or tax-sharing. The other two reported cases I have found on this issue of non-domiciliary resident income tax involved cases where the “other” (domiciliary) states do not impose any income taxes; the taxpayer in one case had Nevada as a domicile and in the other, Florida (although Florida’s intangibles tax is sufficiently significant that it itself poses a double taxation question). The older, partially-left-behind states, Minnesota and Michigan, at least can take the argument that they should be able to tax former domiciliaries until the new domiciliary states also impose an income tax since the taxpayers are snow-birds who do not sever all connections with their old states. See Stelzner v. Comm’r 621 N.W.2d 736, 737 (Minn. 2001); Luther v. Comm’r, 588 N.W.2d 502, 504 (Minn. 1999).

172. In Hylton v. United States, 3 U.S. (3 Dall.) 171, 172-73 (1796), it was argued that Congress’ Act June 5, 1794, 1 Stat. 373, imposing an excise on carriages throughout the country, violated the Federal constitution because it was a direct tax within the meaning of Article I, § 9. The tax was upheld.


174. See id. at 317.

175. In McCulloch v. Maryland, as an incident to denying the State of Maryland the right to tax the Maryland branch of the Bank of the United States, Chief Justice Marshall soothingly assured that the state still retained the power to tax, so far as exercise of that power did not threaten the United States or its instrumentalities, and that that power “is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation . . . .” 17 U.S. (4 Wheat) 316 (1819). But the Chief Justice then concludes: “but those over which it does not extend, are, upon the soundest principles, exempt from taxation.” Id. at 429 (emphasis added).
The rhetorical example, never found in practice, is a state’s purporting to lay an ad valorem tax on land located outside the state. This sounds like a matter of state constitutional law, appropriately addressed to the courts of the state, but the argument has found a place in the Supreme Court reports also. Perhaps the entire concept mirrored rules of international law and comity and was linked to the same considerations that led to the refusal of sister states to open their courts to the enforcement of tax laws of another state. More recently, Justice Powell has suggested a framework rationale for such action, which, still without being attached to specific constitutional language, fits more neatly within the language of contemporary constitutional argument.

A. Situs and Domicile

In the immediate aftermath of the Civil War the concept of attempting to tax property with a situs beyond the state’s jurisdiction

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176. See, e.g., Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). The point is that imposing an ad valorem tax on extra-territorial land was so universally condemned that an actual attempt to do so would never arise. But see Senior v. Braden, 295 U.S. 422, 423 (1935) (illustrating a state’s attempt to tax shares in a trust that held only extra-territorial real property).

177. Justice Reed speaking for the Court in Braniff Airways v. Nebraska State Board, 347 U.S. 590, 599 n.18 (1954), stated: "[T]he common-law concept of situs was recognized by this [the U.S. Supreme] Court as a limitation on state power to tax... prior to invocation of the Fourteenth Amendment as a defense to such taxation [but]... no consistent constitutional principle was applied." See also for the same point, Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); Central R.R. Co. of Pa. v. Pennsylvania, 370 U.S. 607, 620 (1962) (Black, J., concurring in the result). See F.J. Goodnow, Congressional Regulation of State Taxation, 28 POL. SCI. Q. 405, 417-18 (1913), often cited as the first work to note the existence of constitutional objections not tied to the Due Process Clause.

178. Speaking of the threatened findings of conflicting domicile for the late Howard Hughes by both California and Texas in Cory v. White, 457 U.S. 85, 100-01 (1982), Justice Powell dissented from the invocation of sovereign immunity to prevent the estate’s bringing a suit in the nature of interpleader, on the grounds that it was the necessary basis for protection of a constitutional right, for:

multiple taxation based solely on conflicting determinations of domicile not only is unfair, but... taxation on this basis by at least one of the States must lack the only predicate asserted to justify its levy under the Due Process Clause... The threat of multiple taxation based solely on domicile simply is incompatible with the structural principles of a federal system recognizing as "fundamental" a constitutional right to travel.

Id. at 100-01. Justice Powell was joined on this point by Justices Brennan, Marshall and Stevens, and the Court as a whole did give California leave to file an original action against Texas alleging potential harm from the latter’s insistence that Hughes was domiciled there. See California v. Texas, 457 U.S. 174 (1982). We will have reason to return to Justice Powell’s language that links the structure of the Union to the concededly fundamental right to travel freely.
A THEME FROM SAENZ

was used by Supreme Court majorities in two long-forgotten cases. These were successive cases dealing with Pennsylvania’s attempt to withhold part of the interest being paid nonresident holders of bonds issued by in-state railways. The first case, *North Central Railroad Co. v. Jackson*, was an action to recover interest due on a bond coupon brought by a nonresident bond owner against the debtor railroad, which refused to remit the full amount of the dividend, withholding 15 percent under the claimed tax mandates of the United States and Pennsylvania. The tax mandates were parallel, for under the federal provision the railroad was to withhold 5 percent of the dividend, and under the state, 10 percent.

The Pennsylvania tax was on “money owing” at three mills to the dollar of the principal amount of bonded indebtedness, to be withheld from interest payments. The railroad’s tracks lay 67 percent to 75 percent within Pennsylvania, and the rest in Maryland. A mortgage on the line as a whole secured the bonds. The Pennsylvania courts had held the tax was not a tax on nonresident aliens; accepting that, Mr. Justice Nelson reasoned the tax must then be a tax levied “on the security [for] the bond, which is in the hands of the nonresident holder.” With that characterization in hand, the Court focused on the effect of a tax on the unapportioned and integral security of a railroad line located in two states, though part of single road. For Justice Nelson, the tax was laid on a security interest in real property located in two separate states. That was a fatal flaw in the tax: “to permit the deduction of the tax from the coupons in question, would be giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction,” that is, upon the portion of the mortgaged property that was located in Maryland. The tax is overturned, and the nonresident alien obtains the full dividend. The reliance on the general principle


180. 74 U.S. (7 Wall.) 262 (1868).

181. *Id.* at 267.

182. *Id.* Under the Act of June 20, 1864, Congress, by one section imposed an income tax on residents and nonresident citizens, and by another required railroad companies to deduct five percent from bonded indebtedness, without mentioning any limitation of the character of the recipients. *See id.* at 269. The Court rules that the withholding was not intended to apply nonresident alien owners. It notes, however, that Congress explicitly authorized withholding against nonresident aliens in later acts. The Court expressly reserved judgment on whether “it is competent for Congress to impose [the tax].” *Id.* In the event, the Court never reached that issue. In a series of cases coming before the Court, in which the main issue was usually the termination date of the tax, the Court chose to avoid the issue of such competence. *See generally* *Barnes v. The Railroads* 84 U.S. (17 Wall.) 294 (1872); *United States v. B.&O. R.R. Co.*, 84 U.S. (17 Wall.) 322 (1872);
that a tax that attempts to reach beyond the jurisdiction is void, seems complete.\(^{183}\) Although the language of “giving effect to the acts of the legislature of Pennsylvania” vaguely points to some hypothetical refusal to give faith and credit to the Pennsylvania law, the holding has no anchor in the language of the U.S. Constitution.

In the once-celebrated *State Tax on Foreign-Held Bonds Case (Cleveland, P. & A. R.R. v. Pennsylvania),*\(^{184}\) a different version of the same Pennsylvania tax came before the Court. Once again, it was struck down. But this time, the Court was closely divided; and the dissenting four\(^{185}\) were not afraid to insist that Pennsylvania had not violated any provision of the Federal constitution. For the dissenters, absent expressly applicable constitutional constraints, the state can tax “the property of persons which it can reach and lay its hands on, whether these persons reside within or without the State.”

Mr. Justice Fields, a fierce proponent of property rights, wrote for the Court in that case. Once again, the defect in the state tax is that it reaches beyond the jurisdiction. But this time, what is remote are the bonds, those invisible commercial obligations, which are to be safely identified with their nonresident owners. That principle is central to the disposition of the case. Because the bonds in the hands of the nonresident holders are “beyond the jurisdiction of the taxing power of

Stockdale v. Ins. Cos., 87 U.S. (20 Wall.) 323 (1873); Railroad Co. v. Rose, 95 U.S. (5 Otto) 78 (1877); Railroad Co. v. Collector, 100 U.S. (10 Otto) 595 (1879); United States v. Erie Ry. Co., 106 U.S. (16 Otto) 327 (1882). When the issue of Congress’ competence to tax nonresident bondholders was finally presented in the *Erie Railway* case in 1882, the majority disposed of the case as involving a tax on the corporation, not on the bondholders. See *Erie Ry. Co.*, 106 U.S. at 330-31. Only Justice Field dissented from the result in *Erie Railway*. See id. at 330. But Justice Bradley concurred in the result only; for him Congress clearly imposed the tax on the bondholders. Although, as he sardonically remarked, “it might create complications with foreign governments, it is true, and involve the country in war,” Congress’ competence to impose the tax on nonresident bondholders was beyond question. In *DeGanay v. Lederer*, 250 U.S. 376, 382-83 (1919), a unanimous court upheld a United States income tax on a citizen and resident of France in respect of income from securities of American companies and mortgages of American land on the ground that the evidences of these holdings were held for the taxpayer by an American agent under a power that permitted sale and reinvestment. The Court self-consciously manipulates the “fiction” of situs, saying the securities are integrated both with their certificates and into a course of United States business. “It is difficult to conceive how property could be more completely localized in the United States.” Id. The Court does not cite or distinguish *State Tax on Foreign Held Bonds*. The laws governing national power to tax aliens differs from the power of the states to do so.

\(^{183}\) See *North Central R.R. Co. v. Jackson*, 74 U.S. at 268. But almost immediately, a special niche was carved out that permitted states to localize all shares of stock of a national bank, whether held by residents or not, in the state where the bank was operating. See Nat’l Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 326 (1869); Tappan v. Merchants’ Nat’l Bank, 86 U.S. (19 Wall.) 490, 491 (1873).

\(^{184}\) 82 U.S. (15 Wall.) 300 (1872).

\(^{185}\) Justice Davis’ opinion was joined by Justices Clifford, Miller and Hunt. See id. at 326.
the state," the tax cannot be sustained simply as a tax on nonresidents with respect to present property, e.g., like land owned by a nonresident, but located in Pennsylvania, and since the tax must therefore be a kind of license tax on the borrowing and was not a condition of the issuance of the bonds (in which case the creditors could have negotiated to have the debtor bear the tax), the order to the debtor corporation to withhold a portion of the dividend impairs the obligation of the contract under which the bonds were issued, in violation of Article 1, § 10. But the impairment argument assumes that a straight-forward tax on dividends payable to nonresidents is not possible.166 The case was understood to deny the states the right to tax intangible obligations owing to nonresidents.

In time the Due Process clause was called on to constitutionalize Justice Field's intuition of limits on state taxing powers "beyond its jurisdiction," and in aid of the invocation of the (unexercised) Congressional power over interstate commerce. It happened that the tendencies of arguments made under both clauses resulted in the issue's being stated, more and more often, in terms of the situs of the "object" of a tax law, for instance, it was taken as a given that a state could not tax real property that was not within the state. For a very large part of constitutional history, again, no state could lay a tax "on" interstate commerce, but could require participants in that commerce to pay non-discriminatory taxes on property and operations "within the State."  

186. As Justice Davis said in dissent, state courts had determined, long before these bonds were issued, that a tax of just this sort was validly imposed on the nonresident creditors, on the ground that they were receiving benefits from the state that would allow enforcement of their rights as creditors. See id. at 327.

187. Although Justice Black correctly claims, in his concurrence in Central Railroad Co. of Pa. v. Pennsylvania, 370 U.S. 607, 620 (1962), that the first case relying on the Due Process Clause when striking down a tax as "beyond the jurisdiction" was Louisville & Jeffersonville Ferry Railway v. Kentucky, 188 U.S. 385 (1903), the clause was sooner cited. See, e.g., Savings & Loan Soc'y v. Multnomah County, 169 U.S. 421 (1898).

188. The word "situs" seems to have been introduced into the law in JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAW 309, 463 (1972 reprint); see also "situs" in the OXFORD ENGLISH DICTIONARY.

189. See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 204-05 (1905).

190. The centerpiece of pedagogy in state taxes and constitutional law is the rejection of interstate commerce immunity and the emergence of the obligation of that commerce to pay its way under a "practical" set of four limitations in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The four limitations are that tax must not discriminate against interstate commerce and, moreover, must be based on a transaction or asset that has a substantial nexus with the taxing state, must be fairly apportioned to intra-state property or operations, and is fairly related to the services provided by the state.
But the term “situs,” a term that had been introduced as part of the law of the conflict of laws as to personal property generally and, especially, as to jurisdiction over the disposition of such property after the owner’s death,\textsuperscript{191} appeared in cases where its limitations as a criterion for the taxability of property other than land were soon pointed out by critics. Traditionally, personal property was subject to an old maxim, \textit{mobilia sequuntur personam}. The Latin, which literally speaks of movables as trailing along behind the person, pointed to a legal conclusion, that, e.g., for purposes of distribution or administration after death, all personal property was treated as if it were located wherever the owner was.\textsuperscript{192} It was a fiction. And, as a fiction, it was already recognized as inappropriate in many cases by Joseph Story in the early part of the nineteenth century.\textsuperscript{193} Mr. Justice Gray dismissed the concept as out-of-date by saying that it “grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself.”\textsuperscript{194} Treating all property as in the presence of its owner was a fiction that “yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined.”\textsuperscript{195}

\textbf{B. Tangible Personalty}

In the case of tangible personal property, its situs, its physical location, seems to offer an easy alternative to the fiction that attributes tangible personal property to wherever the owner happened to be; there are greater difficulties with intangible assets.\textsuperscript{196} However, even tangible property can be moved about in various ways and for various purposes.

The Court did work out a more or less stable pattern for the ad valorem taxation of tangible personal property, but even so, given the tenacity of American lawyers, it did so only slowly. Why was this important? Not only because it validated a tax on personal effects and art objects, on herds and flocks. But because it validated a tax that was relatively easy to administer (the property lay open to view for the most

\begin{itemize}
\item \textsuperscript{191} See \textit{Story, supra} note 188, Chs. IX and XIV.
\item \textsuperscript{192} See id. at 311-12.
\item \textsuperscript{193} See id. at 462.
\item \textsuperscript{194} See \textit{Pullman Palace Car Co. v. Pennsylvania}, 141 U.S. 18, 22 (1891).
\item \textsuperscript{195} \textit{Story, supra} note 188, at 462, quoted in \textit{Pullman Palace Car Co.}, 141 U.S. at 22.
\item \textsuperscript{196} There remains an ambiguity about the situs of even realty and tangible personality. Property remains a legal convention; it is the apparatus of law that confirms ownership, and our rights to exclude, use and transfer that are most valued. These too are “intangible” and “incorporeal.”
\end{itemize}
part) and was to be imposed on a mass of new wealth, that is, the wealth that is a by-play of the logistics, the planning, preparation and operation at the level of great industrial operations that emerged with the remarkable growth of the country as an industrial nation before and, especially, in the half-century after the Civil War. The wealth that the states sought to tax was, among other things, inventory of all sorts, raw materials and farm products that were waiting for processing or distribution, and it was the supplies, equipment, and facilities of the new age: ships, wagons, machinery, even telegraph poles and wires, and above all, throughout this period, the rolling stock of the railroads, engines, boxcars, tank cars, refrigerator cars, coaches, and Pullman cars. In the twentieth century airplanes offered a new field in which the rules must be worked out.

The first cases involved the right to tax ships, and these were allocated to the home port, and the home-port state, a species of mobilia sequuntur personam, that barred taxation by all other states, in part on the ground that federal law required them to be registered at a home port. Then, leaving ships aside, new rules were worked out for railroad rolling stock, whether or not used in interstate commerce. Such cars were limited to specific tracks and yards, were used for the most part in scheduled runs, and in principle could be located and tracked. The first rule that departed from taxation of all such rolling stock at the home state of the owner, was the rule that, if the rolling stock was permanently in one state, it was taxable there in full, without regard to the domicile of the owner. If the stock was regularly used on runs in several states, it was taxable in each state where it was in regular use on some pro rata basis, usually in proportion to in-state track mileage. The taxing power of the taxpayer’s home state, i.e., the state of incorporation or domicile, however, correspondingly shrunk. If tangible personal property had a “permanent” status elsewhere, that permanent status was exclusive of any home state right to tax. Thus, the Court has, in principle, allocated

198. See id. at 1097.
199. See id.; Pullman Palace Car Co., 141 U.S. at 23.
201. See id. at 22.
202. See id. at 26.
203. See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 211 (1905) (Justice Holmes concurring in the result, but “hardly understand[ing] how it can be deduced from the Fourteenth Amendment”); Frick v. Pennsylvania, 268 U.S. 473, 500 (1925) (same exclusion of domiciliary state taxation of tangible personalty in another state extended to inheritance tax measured by the value of such personalty); Treichler v. Wisconsin, 338 U.S. 251, 257 (1949).
tax jurisdiction over a broad spectrum of taxes that are levied on or measured by the value of tangible property.

Where tangible personality has not acquired a permanent situs in some other state, however, because, like ships, some rolling stock and aircraft, for example, it is almost always in transit and not permanently located anywhere, the home state can tax the whole fleet; and it certainly can do so if no one else is doing so. 204 Northwest Airlines v. Minnesota 205 held that the home state could do so as to aircraft. The plurality opinion in that case admitted that other states might be taxing some portion of the fleet’s value, on an apportionment theory, but denied there was anything in the record that showed that was the case. 206

In later cases, nondomiciliary states were permitted to establish a statistical basis for an apportioned taxation of a transportation equipment, e.g., train-day “equivalents,” without showing that such equipment was present in-state with the duration and regularity that was arguably implicit in earlier talk about a fixed situs. 207 It is likely that the law of taxation of such equipment requires, both under the Commerce Clause and under the Due Process Clause, that a state resort to reasonable apportionment formulas whenever the taxpayer can show that, otherwise, it would be subject to taxation, 208 double taxation or, even, state taxation of values not present therein, that is, taxation beyond the state’s jurisdiction. 209 It certainly continues to be the law that

204. See Union Refrigerator Transit, 199 U.S. at 196.
205. 322 U.S. 292 (1944).
206. See id. at 294-95.
208. In Central Railroad Co. v. Pennsylvania, 370 U.S. 607 (1962) six Justices (Frankfurter and White did not participate in the case) split over whether Pennsylvania could tax the plaintiff’s rolling stock even though, statistically, it was outside Pennsylvania for almost ninety percent of the time. The burden was on the plaintiff, Justice Harlan argued, to show other states than Pennsylvania constitutionally could tax the pool of out-of-state cars, and mere statistical evidence of being out-of-state and nothing else, was not an adequate showing. See id. at 613. Justice Douglas, on the other hand, thought that after Braniff, the statistics were all that was needed to show potential double taxation. Thus, six Justices agreed that double taxation was constitutionally prohibited under both the Due Process Clause and the Commerce Clause. There was also a consensus that the constitutional problem could be avoided if each state appropriately apportioned its tax claim according to a reasonable formula. The actual disposition of the Central Railroad case was decided by Black’s joining the trio for whom Harlan wrote, but on Commerce Clause grounds only. See id. at 619. Black continued to believe that the Due Process Clause cannot bar state tax laws.
209. See id. at 619-21.
domiciliary state taxation of tangible property permanently located outside that state is barred.210

C. Double Taxation Affirmed

If the post-Civil War economic growth had led to an explosive increase of valuable property and equipment, the overall values represented by investment multiplied by many orders of magnitude more. It is a commonplace that most value today is represented by financial rights and claims. And these rights and claims are of the most diverse sorts: bank accounts and loans of all sorts, from ritualized public issuance of bonds and notes to loans to a brother-in-law, securities and mutual funds, mortgages and mortgage pools, markers and lottery tickets, notes, bonds, debentures, partnership interests, pieces of the action, contract rights and "mere" contract rights, trust funds, accrued commissions and credits, retirement rights and insurance policies, to say nothing of intellectual property and the value of credit and credit lines. All of this diversity, however, is, to a greater or less degree, alike in consisting of rights or claims against another rather than relating to concrete assets. Even our money, which certainly seems tangible and "in hand," is in reality a circulating medium, our paper currency no longer even bothers to make the circular promise that it may be redeemed in legal tender, for where currency is concerned, authenticity, that is, credit, is important, not content. All these are intangibles.

Here the maxim mobilia sequuntur personam seems less gothic than when applied to, say, property regularly left in a vacation home when the owner is not there. Where else is an intangible, save as an aspect of the owner? That notion certainly dominated Justice Field when he was striking down the Pennsylvania state tax on foreign bonds.211 But the Pennsylvania court whose validating opinion Justice Field rejected, had seen it differently. In Maltby v. Reading & Columbia Railroad Co.,212 the Pennsylvania court had upheld the withholding tax on railroad bond dividends, even as to nonresident holders

because civil government is essential to give value to any form of property, without regard to the ownership, and taxation is

211. See State Tax on Foreign Bonds Case, 82 U.S. (15 Wall.) 300 (1872). See, for example, Field's insistence that the bond cannot be deemed the property of the debtor, so as to have a situs where the debtor is located. When it has suited the Court, this case has been made to turn on the assimilation of the bonds to the paper by which they were evidenced.
212. 52 Pa. (2 Smith) 140 (1866).
indispensable to civil government.... Is it not apparent that the intrinsic and ultimate value of the loan as an investment rests on state authority—that it is the state which made it property and preserves it as property? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the state government. 213

The argument that the state need only show some benefit or opportunity extended to the individual will ultimately come to be folded into the modern theory of the Due Process Clause as applicable to state taxation. 214

The pressure from debtor states seeking to tax intangible property of various sorts when held by out-of-staters continued after Justice Field’s striking down the Pennsylvania withholding tax on interest payments made on railroad bonds. By the 1890s, Oregon successfully assessed the “interest” of a mortgagee as part of the value of real property. 215 So much of the property, to the extent of the unpaid amount of the debt not in excess of the value of the land, was then assessed to the out-of-state lender. The tax on the value of the mortgage security was upheld notwithstanding that even the actual mortgage documents were in California. 216 The latter is relevant because, during this same time, two more generalized forms of localization came to be applied to debts and similar intangibles. On the one hand, various kinds of intangibles—notes, bonds, and other securities—were treated as if the property right were integrated into the paper (the note, the bond, the certificate), and the state could tax when the paper was kept locally. 217 By extension, bank accounts were treated as located at the actual banking offices. 218 Later, where it could be shown that the credits were part of a revolving fund employed by a nonresident within a state, through an agent or otherwise, the credits were said to have a business situs within the state and were taxable by the state where the business was being carried on. 219

213. Id. at 146.
214. See infra notes 311-31 and accompanying text for a discussion of the benefit theory.
216. See id. at 427 (quoting Dundee Mtg. Co. v. Sch. Dist. No. 1, 19 F. 359, 367-68 (C.C.D. Or. 1884) (“[T]he mere fact that the instruments has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial.”)).
217. New Orleans v. Stempel, 175 U.S. 309 (1899), which, ironically, distinguished State Tax on Foreign Bonds as proceeding on the basis that the paper representing the bonds in question was located abroad. See id. at 319-21.
218. See id. at 322; Fid. & Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 54-55 (1917).
219. See Liverpool & London & Globe Ins. Co v. Bd. of Assessors, 221 U.S. 346, 356-57 (1911). There was always some uncertainty whether intangibles were being "localized" as a part of
Between the developing doctrine of business situs and through assimilation to tangible objects, the property taxation of intangibles had been opened up to the states. By the 1890s, however, attention was shifting from annual property taxes to tax on the devolution of property at death. It was a case involving such a succession or inheritance tax that soon gave Mr. Justice Holmes the opportunity of giving the purest expression to the withdrawal of judicial limits on a large repertory of taxable objects available to the state.

The case was *Blackstone v. Miller*. With only one dissent, Holmes upheld New York's inheritance tax as imposed on the New York assets of a decedent who died domiciled in Illinois. The New York assets subjected to the tax are a debt due from a New York securities firm and a deposit of $4.84 million held, waiting disposition, by New York Trust as proceeds of a sale of bonds. The decedent's estate had already paid inheritance tax in Illinois, where his estate, as the estate of a domiciliary, had included the large deposit as subject to tax. Holmes held that here, where the amount on deposit with New York Trust was held for more than a year prior to the decedent's death, New York was justified in imposing the tax because "the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise [by reason of the state's] ... power over the person of the debtor ... the place where the debtor is will make him pay." Thus, New York has as much power over the account as it has over tangible personalty located there, and "the fiction [of *mobilia sequuntur personam*] must give way."

Beyond upholding the New York nonresident inheritance tax with respect to intangibles with a barely plausible connection to the state, Holmes' relatively brief opinion stated two further principles. First, as so often with Holmes, the appeal, in rhetoric at least, was to the brute force of business operations in state (the business situs doctrine) or as part of some passive local object, the paper evidencing debt, or the bank buildings of the bank in which the account was held. See, for example, the contrasting analyses of Justices Holmes and McKenna in *Wheeler v. Sohmer*, 233 U.S. 434 (1914). The business situs doctrine was never repudiated by the Court. See id.

220. See the discussions in *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898), and *Knowlton v. Moore*, 178 U.S. 41 (1900).

221. 188 U.S. 189 (1903).

222. Justice (not yet C.J.) White noted his dissent from the judgment without opinion. See id. at 207.

223. Id. at 203, 205. Holmes indulges in a thought experiment that resonates with the law of abatement and of the comity of conflict of laws, suppose New York laid down the law that a debt disappeared when the creditor died, then "the right of the foreign creditor would be gone." Id. at 206.

224. Id. at 206.
of the state: it was New York that would have to provide the forum and remedy if the estate were to have the large deposit repaid.225 But, of course, that fact is not necessarily dispositive of the case; rather, Holmes' opinion admitted, implicitly and explicitly, that the deposit, if merely in a New York bank for a short period of time (and not for over a year, a more than transitory period), would be beyond New York's jurisdiction to tax.226 Holmes' claim that New York law made possible the enforcement of the decedent's claim against the New York bank holding the decedent's deposit, is only a qualified one. The argument about the importance of New York law would be the same, no matter how transitory the deposit; but Holmes admits that, despite his reference to that argument, no New York estate tax would be payable if the claim in question, though against a New York debtor, was only transitory.227

Second, Holmes meets the fact of double taxation head-on. Such double taxation is no violation of Full Faith and Credit Clause, the privileges and immunities of a citizen of another state (Art. IV § 2), or the Fourteenth Amendment.228 "No doubt this power on the part of two states to tax on different and more or less inconsistent principles, leads to some hardship... But these inconsistencies infringe no rule of constitutional law."229 Admission that judicial power is not capable of harmonizing double taxation and its related conceptual inconsistencies—being in two places at one time, as it were—reflects, of course, a statement of the limits of judicial competence. Accepting the possibility of several states taxing the same or closely related property interests was not novel with Holmes,230 although it may have fit his fancy to emphasize it more than most Justices.231

After Blackstone v. Miller and Kidd v. Alabama, nondomiciliary state property and inheritance taxes on intangible values were upheld a
number of times, relying on varied state connections to the values in question and often on the clear understanding that double taxation could result.\footnote{232}

D. The Cases Allocating Intangibles

Despite the fact that numerous Justices, before the \textit{Blackstone} case was decided\footnote{233} and afterward,\footnote{234} have accepted the fact of multiple taxation based on conflicting state approaches as an ineradicable aspect of federalism, it is also true that the Court has concerned itself and continues to concern itself with avoiding multiple taxation more than Holmes would admit. In \textit{Union Refrigerator Transit v. Kentucky},\footnote{235} the Court had prohibited the state of incorporation from taxing, on a domiciliary theory, rolling stock that was permanently out-of-state and taxable elsewhere.\footnote{236} The inverse of the same principle was kept alive in cases where intangibles had only a transitory presence elsewhere.\footnote{237} In 1923, the old rule was given new force when it was applied in a striking

\begin{itemize}
\item \footnote{232} See \textit{Corry v. Mayor}, 196 U.S. 466, 479 (1905) (Baltimore imposes a tax on a nonresident owner of shares in a local corporation, measured by the value of the stock, with the corporation (B&O) to pay the tax); \textit{Scottish Union & Nat'l Ins. Co. v. Bowland}, 196 U.S. 611, 621 (1905) (U.S. bonds deposited, as required, with the superintendent of insurance as a condition of doing business in Ohio); \textit{Metro. Life Ins. Co. v. New Orleans}, 205 U.S. 395, 402 (1907) (business situs); \textit{Liverpool & London & Globe Ins. Co. v. Bd. of Assessors}, 221 U.S. 346, 351 (1911) (business situs); \textit{Wheeler v. Sohrer}, 233 U.S. 434 (1914) (nonresident inheritance tax assessed on notes held there, but made and payable in a third state); \textit{Bullen v. Wisconsin}, 240 U.S. 625 629, 631 (1916) (Illinois as well as Wisconsin taxed lapse of a power to revoke an inter vivos trust); \textit{Fid. & Columbia Trust Co. v. City of Louisville}, 245 U.S. 54, 57 (1917) (tax on local bank accounts of a nonresident); \textit{Maguire v. Trefy}, 253 U.S. 12, 13 (1920) (income tax on money received by a beneficiary from a Pennsylvania trust); \textit{Citizens Nat'l Bank v. Durr}, 257 U.S. 99, 106 (1921) (Ohio can tax a seat on the New York Stock Exchange as local property of a resident); \textit{Blodgett v. Silberman}, 277 U.S. 1, 18-19 (1928) (New York and Connecticut both have imposed inheritance taxes on the same assets).
\item \footnote{233} See supra notes 212-18 and accompanying text.
\item \footnote{234} Notably in \textit{Cream of Wheat Co. v. County of Grand Forks}, 253 U.S. 325, (1920), where Justice Brandeis dismisses the inconsistency and the metaphor of being in two places at once, by responding, "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." \textit{Id.} at 330.
\item \footnote{235} 199 U.S. 194 (1905).
\item \footnote{236} \textit{See id.} at 211. Holmes concurred while expressing a doubt that the Due Process Clause could be extended to achieve this result. \textit{Id.} See also \textit{Citizens National Bank}, 257 U.S. at 110-11, where Holmes writes on the assumption that a stock exchange seat cannot be taxed out of New York if it is conceptualized as a right to operate on the floor of the Exchange. He also joined without comment in \textit{Frick v. Pennsylvania}, 268 U.S. 473, 486 (1925), and \textit{Brooke v. Norfolk}, 277 U.S. 27, 28 (1928).
\item \footnote{237} In \textit{Buck v. Beach}, 206 U.S. 392 (1907) (notes temporarily sent from an Ohio office to an unrelated Indiana office in an effort to avoid taxation in the former state could not be taxed in the latter) and in Holmes' opinion in \textit{Blackstone v. Miller}, 188 U.S. at 205, the same reservation was made.
\end{itemize}
case to prevent Pennsylvania, the steel magnate's domiciliary state, from imposing an inheritance tax on the Frick art collection located then as now in New York City; the state could not tax the item that was only "transitorily" present. The works had no tax situs in Pennsylvania, even though the tax, as an inheritance tax, was an excise tax on the disposition rather than a property tax.

And in 1929, in Safe Deposit & Trust Co. of Baltimore v. Virginia, the case we began with in this Article, the Court held that Virginia could not reach the undistributed trust property of Virginia beneficiaries when it was held by a Baltimore trust company as trustee. Justice McReynolds makes it very clear what is bothering him about the application of the Virginia tax on intangibles:

"It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two states . . . and because of this to uphold a double and oppressive assessment."

This declaration that the Court will not always acquiesce in double taxation was the beginning of an offensive designed to end the inheritance taxation of nonresident decedents' intangibles. In the next two years, a majority of the Court decided four cases on the explicit basis of barring double taxation by adopting a course of allocating a unique situs for tax purposes to intangible property, just as the Court had done in the cases of tangible personalty from Union Refrigerator Transit to Frick v. Pennsylvania. That effort invoked the Due Process Clause, and it appears at the politically-charged zenith of political opposition to the Court's insistence on interfering with many state policy initiatives by invoking that clause. Our background to the problem of the Founder-State Trust, so far as judicial intervention is concerned, will be completed when we have described this attempt to

238. See Frick, 268 U.S. at 494.
239. 280 U.S. 83 (1929).
240. See id. at 93.
241. Id. at 94.
242. Justice Stone, with Justice Brandeis, concurs in the result, but backs away from Justice McReynolds' language, choosing to find a basis in the fact that assessment did not seek to tax an apportioned beneficial interest in the trust. See id. at 95. Justice Holmes dissented. See id. at 96.
243. 199 U.S. 194 (1905).
244. 268 U.S. 473 (1925).
allocate tax situs and the retreat from the Court’s free use of the Due
Process Clause in defense of property and enterprise in this instance.245

The four cases embodying this effort,246 the Cases Allocating
Intangibles, as we will call them, are quickly told. In Farmers Loan &
Trust Co. v. Minnesota,247 the state of Minnesota attempted to collect an
inheritance tax on Minnesota municipal securities held in New York, in
the estate of a New York resident, whose estate was being probated
there. After hesitating, the Minnesota Supreme Court concluded that the
recent case of Blodgett v. Silberman248 justified the state’s imposition of
the tax based on the location of the issuing municipalities.

Six Justices put Blodgett aside as dealing only with tax by the
domiciliary state249 and explicitly overruled the double taxation aspect of
Blackstone v. Miller.250 The Court declares that the sole situs of a bonds
for tax purposes is the state of the bondowner’s residence; and, as in
Frick, the property tax rule is extended to cases of an inheritance tax.251
Justice Stone concurred in the result, but on the basis that, although
Minnesota’s law supported the underlying debt contract, those laws had
no significant role in the transfer at death. So far as inheritance is
concerned, Minnesota cannot claim to provide any benefit. Justice
Holmes, joined by Justice Brandeis, dissented; he saw Minnesota as the
debtor’s home state as possessing the requisite power to impose the
tax.252

Although there had been in the legal literature a number of calls for
judicial action against double taxation during the years before Farmers

245. Of course, it was not the allocation of estate tax opportunities among the states that led to
FDR’s proposal of the Court-packing plan, but the New Deal appointments to the Court—for
example, Justices Black, Reed, Frankfurter, Douglas, Murphy and Jackson—originally, and in some
cases always, saw this small eddy of cases in the same light as Lochner v. New York. 198 U.S. 45
(1905) and its progeny, the Child Labor case and the frustration of New Deal initiatives, as beyond
Congress’ power over interstate commerce, which the Court had effected in Schechter and in Carter
Coa.

246. See generally Farmers’ Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Baldwin v.
Missouri, 281 U.S. 586 (1930); Beidler v. S. C. Tax Comm’n, 282 U.S. 1 (1930); First Nat’l Bank
of Boston v. Maine, 284 U.S. 312 (1932).

247. 280 U.S. 204 (1930).

248. 277 U.S. 1 (1928).

249. In Blodgett, it was clear that the same assets had already been taxed by New York, the
nondomiciliary state. See id. at 4-5.

250. “The practical effect of [Blackstone’s rule permitting several States to tax the same
intangible] has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by
resort to reciprocal exemption laws.” Farmers’ Loan & Trust Co., 280 U.S. at 209.

251. See id. at 206.

252. See id. at 216-17.
 Loan & Trust, the Court does not review this literature. Instead, it prominently quotes Justice Field writing in The State Tax on Foreign Bonds Case.

In Baldwin v. Missouri, the newly developed rule that only the domiciliary state could tax intangibles was applied to bar Missouri’s inheritance tax on a nonresident with respect to bank accounts in Missouri banks and mortgage-notes owed by Missouri debtors and secured by Missouri land. The mortgage notes are physically in Missouri, but they are merely evidence of the obligation. The accounts and the mortgage-notes, then, are mere intangibles, and taxable only in the domiciliary state. Holmes, dissenting, treats the case as just another case of the free use of the Due Process Clause “to embody our economic and moral beliefs.” Justice Stone argues the traditional case for a power to tax nonresident obligors by the debtor state, that is, the importance of the Missouri courts in enforcement of the obligations. Justice Stone also takes seriously, but the majority does not, Missouri’s argument that, without a power to tax nonresident estates with respect to such property, the possibility of widespread tax evasion, with assets being taxed by neither state, is opened up.

253. See generally Charles L.B. Lowndes, Jurisdiction to Tax Debts, 19 GEO. L.J. 427 (1931) [hereinafter Jurisdiction to Tax Debts].
254. See generally NATIONAL TAX ASS’N; REPORT OF THE COMMITTEE OF NATIONAL TAX ASSOCIATION ON DOUBLE DOMICILE IN INHERITANCE TAXATION 201 (1935), [hereinafter TAX COMMITTEE REPORT]; Brady, supra note 140, at 532; Jurisdiction to Tax Debts, supra note 253.
255. Justice McReynolds does, however, refer to this literature obliquely: The practical effect of multiple taxation has been “stoutly assailed on principle.” Farmers’ Loan & Trust Co., 280 U.S. 586 (1930).
256. How this case was read has proven to be a measure of the Court’s attitude, from time to time, to limits on state taxation. “This case has been all things to all men,” says Boris Bittker, Taxation of Out-of-State Tangible Property, 56 YALE L.J. 640, 648 n.26 (1946) and refers the reader to a detailed history of its “variegated explanations” in ARTHUR L. HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME 29 (1933).
257. 281 U.S. 586 (1930).
258. See id. at 593.
259. The Court concludes that Missouri is not claiming that the debts have a business situs in Missouri. See id. at 592.
260. Id. at 595.
261. See id. at 597.
262. “Taxation is a practical matter [and] becomes increasingly difficult if the securities of a nonresident may not be taxed where located [and] where the courts are not open to the tax gatherers of the domicil.” Id. at 598.
263. See id. at 598.
Early in the next term, the Court, this time with Justice Stone acquiescing in the opinion, the new rule is applied to prevent South Carolina as the debtor’s state from imposing an inheritance tax where the decedent is a nonresident. The case actually involves loans to the decedent’s closely-held South Carolina corporation. Here the “business situs” question is once more left open. As a result, although the new rule is extended to open credits, it is not clear that the Court is prepared to bar taxation of a nonresident’s claims on local residents, when those claims have a local business situs, that is, are part of permanent business operations by the taxpayer.

In the 1932 term, the new rule was extended one more time, when it was applied to prevent inheritance taxation by the state of incorporation as to shares owned by a nonresident decedent. Again, a number of older cases had to fall.

A review of these decisions would serve no useful purpose ... [Cases] that give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state ... has ceased to have other than historic interest.

Despite this bold statement, Justice Sutherland’s opinion for the Court shows signs of an attempt to respond to the objections of amici curiae in the case. The decision implicitly confirms that policy considerations of fairness and simplicity drive the Court toward the rule that the domiciliary state is the only state that ought to have power to impose an inheritance tax; in each other state, he then ends by saying, “there is wanting any real taxable relationship to the event which is the subject of the tax.” This simple conclusory statement hardly adds to the policy argument that double taxation deprives taxpayers of due process of law.

Once more in dissent, Justice Stone taxes the majority with the inadequacy of their “logic,” which amounts to no more than the Court’s “ascribing a situs to the shareholder’s intangible interests which, because

264. See Beidler v. S.C. Tax Comm’n, 282 U.S. 1, 7-8 (1928).
265. See id. at 6.
266. See First Nat’l Bank of Boston v. Maine, 284 U.S. 312 (1932). At the same time, the Court recognizes that Maine can impose a transfer tax when the shares of the Maine corporation are actually reissued to those who take under the will the Massachusetts shareholder, but that does not preclude the application of the new rule in the case of inheritance taxation. A stock transfer tax is usually a relatively trivial tax.
267. Id. at 322.
268. Id. at 329.
of the very want of physical characteristics, can have no situs... Situs of an intangible, for taxing purposes, as the decisions of this court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.269

The legal literature was suddenly full of critiques and defenses270 in response to the Cases Allocating Intangibles, but it was also full of speculation about the possible extensions of the rule allocating a unique situs to intangibles for taxation. Legal writers were quick to see questions left open by the Cases Allocating Intangibles,271 in particular, with respect to the treatment of state income taxes, as more and more states enacted such laws.

For us, of course, the suspense has long left this story. Before the decade was out, a new majority, with the new appointees, Black, Frankfurter, Reed and Douglas, joining Justice Stone, twice voted to permit a state to levy nonresident inheritance taxes on property passing through the decedent’s exercise of powers over a trust.272 These decisions did not, for the moment, displace the Cases Allocating Intangibles in their specific holdings, but they did replace the rule that those cases had been designed to stand for, the newly-minted rule that only the domiciliary state had the power to tax the intangible wealth of the decedent.273

The two cases came down on the same day. Curry v. McCanless274 upheld an Alabama inheritance tax on the value of an Alabama inter vivos trust, which is appointed by the will of the settlor, who was a Tennessee resident both at the time she established the trust and at her

269. See id. at 332.

270. See generally ARTHUR L. HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933), reviewed by Simeon E. Leland, Harding on Double Taxation, 24 CAL. L. REV. 379 (1936); FREDERIC J. STIMSON, JURISDICTION AND POWER OF TAXATION (1933); Charles L.B. Lowndes, Bases of Jurisdiction in State Taxation of Inheritances and Property, 29 MICH. L. REV. 850 (1931); Jurisdiction to Tax Debts, supra note 253; Charles L.B. Lowndes, The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock, 45 HARV. L. REV. 777 (1932); Charles L.B. Lowndes, Spurious Conceptions of the Constitutional Law of Taxation, 47 HARV. L. REV. 628 (1934) [hereinafter Spurious Conceptions]; Maurice H. Merrill, Jurisdiction to Tax—Another Word, 44 YALE L.J. 582 (1935).


274. 307 U.S. 357 (1939).
And *Graves v. Elliott* held, on the strength of *Curry v. McCanless*, that New York could impose an estate tax on a New York resident’s relinquishment, at death, of power to revoke a trust of intangibles held by a Colorado trustee. Colorado has already imposed an inheritance tax measured by the Colorado trust assets.

Yet, before analyzing Justice Stone’s opinion in *McCanless*, it is important to step back to consider two lines of cases decided between 1932 (*First Nat’l Bank of Boston v. Maine*) and 1939 (*McCanless*). They suggest, I think, that the story is more complicated than might appear. Justice Stone refers to one of those lines of cases when he says in *McCanless*, that, after the Cases Allocating Intangibles were decided “more recently this Court has declined to give the doctrine . . . that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state . . . completely logical application.”

The point that Justice Stone is making is that the very Justices who had decided the Cases Allocating Intangibles had been unwilling to extend their rigid code. The decisive issue he had in mind was the reach of state income taxes. In the early 1920s, it was established with respect to the then novel state income taxes that there was no bar to collection of income tax from nonresidents on income from in-state employment or rents and profits from local lands. But the decisions in the Cases Allocating Intangibles established that an inheritance tax, although on the transfer of property rather than on property itself, was in fact to be determined by the situs of the property transferred. By analogy, the question was whether the legality of an income tax would be decided by the nature and situs of each item of income. Such a decision would make it possible to allocate the income taxable by the states among the states, just as the disposition on death of property, tangible and intangible, was allocated among the states.

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275. See id. at 360, 372-73.
277. See id. at 386-87.
278. See id. at 385.
279. See *McCanless*, 307 U.S. at 363.
280. See *Schaffer v. Carter*, 252 U.S. 37, 52 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920). *In Schaffer*, the Oklahoma tax on oil royalties from local wells was upheld not only against the Due Process claim, but also against Interstate Commerce, Privileges and Immunities and Equal Protection claims. See *Schaffer*, 252 U.S. at 55-57.
281. And by the same Cases Allocating Intangibles the situs of such intangibles was uniquely allocated to the state of the owner’s domicile.
The issue came up very quickly. In *Lawrence v. Mississippi State Tax Commission*, the Court upheld, in an opinion by Justice Stone and with only Justice Vandevanter dissenting, Mississippi’s tax on a Mississippi resident income from construction contracts wholly carried out in Tennessee. Justice Stone emphasized the intangible nature of the contract income right, although the taxpayer’s operations clearly had a business situs in Tennessee. The reasoning of the case is not elaborate, but he says that denial of Mississippi’s right to tax this income would be “anomalous.”

The issue was presented again in *Senior v. Braden*. And now the Court struck down a state property tax imposed on a resident beneficiary’s income interest in share certificates of an out-of-state land trust, whose assets were out-of-state realty. The Court looked through the trust and treated the beneficiaries as having a direct interest in out-of-state trust assets. It was a decision, said Roger Traynor in his classic article, *State Taxation of Trust Income*, that would, absent *Lawrence*, make “jurisdiction to tax income . . . dependent upon jurisdiction to tax the property from which derived . . .” But the threat passed when in *New York ex rel. Cohn v. Graves*, the Court held that New York could impose a tax on a resident’s income, even though that income was derived from the rent of real properties in New Jersey and mortgage loans on New Jersey property. *Senior v. Braden* was read as a property tax case where income was treated the same as a tax on property by “concession of counsel.” Only Justices Butler and McReynolds dissented, arguing that a tax on rents was a tax on land.

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283. See id. at 279-80.
284. See id. at 281.
286. See id. at 422, 429.
287. See id. at 432-33.
289. See Traynor, supra note 24, at 274.
290. 300 U.S. 308 (1937).
291. See generally id. (holding that the state court was correct in holding that a state may tax a resident upon income received from rents of land within the state, and from interest on bonds physically within the state, and secured by mortgages upon lands similarly situated).
292. See id. at 316.
293. See id. at 317-18. Calling on the case that had, in 1895, temporarily disabled the United States from enacting an income tax, *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), the dissent insisted on the identity of property and its income. The authority, however, was both compromised by this time and not directly in point, since that case decided only that taxes both on property and its income were sufficiently similar so that the latter was also a “direct Tax” within the meaning of the constitutional provision. See id. at 315.
In *Guaranty Trust Co. v. Virginia*, Justice McReynolds wrote for a unanimous Court in upholding a Virginia income tax on a Virginia beneficiary's receipt of income from a trust established with New York trustees, even if "the identical income in the hands of her Trustees had been assessed with income taxes by the state of New York . . . ." 294 He went on to reject very explicitly the argument that "double taxation" of income was always prohibited by the Constitution. 295 Referring to the Cases Allocating Intangibles as well as to cases establishing the state of situs as the unique state with power to impose a property tax on real or tangible personal property, McReynolds wrote:

Those cases go upon the theory that the taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them. Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders. After much discussion the applicable doctrine was expounded and applied in *Lawrence v. State Tax Comm'n . . .* and *New York ex rel. Cohn v. Graves.* 296

The very Justices who had decided the Cases Allocating Intangibles were not prepared to extend the doctrine, developed to limit inheritance tax, to analogous income tax situations; not even if the result was to permit double taxation. 297

**E. The Double Domicile**

The decade of the 1930s disclosed another problem with taking the program suggested by the Cases Allocating Intangibles to its broadest reach. The notion of siting all intangibles for tax purposes solely in the state of the taxpayer's domicile obviously depends on the dogma that there is a unique state of domicile. It also depends on a determination by

294. See *Guaranty Trust Co. v. Virginia*, 305 U.S. 19, 21-22 (1938). The real problem of the taxpayer here is, precisely, a problem of the interstate nature of the income. Income taxed to the trustee should in principle be without tax on distribution to the beneficiary, and distribution to a New York beneficiary would be without tax. But here Virginia had never received a tax from the trustee, New York had. See id.

295. See id. at 22-23.


297. In addition to the income tax cases, Justice Stone, in *Curry v. McCanless*, noted that the Court had upheld nondomiciliary state property taxation of intangibles, where the credits were involved in a local business. See *supra* note 232 and text following note 265 *supra*, which indicates that the majority in the Cases Allocating Intangibles declined to overrule these "business situs" cases.
the relevant courts fixing that state of domicile. These presuppositions soon became apparent in a context that brought the Justices face to face with a fatal flaw in their program.

Despite the implicit assumption that an individual necessarily always possesses a unique domicile, there is no, or only a very limited, remedy available to the estate of a decedent which finds itself faced with conflicting determinations of domicile by two or more states, each of which finds the estate’s decedent was domiciled there. Such an estate may find itself liable to double inheritance taxes on the entire estate levied by each state which has found the decedent to have died domiciled there.

We begin with the fact that the Full Faith and Credit Clause of the U.S. Constitution does not require a state to accept the finding of domicile of any other state. Moreover, before the issue of conflicting findings of domicile can be raised in the inheritance tax context, the taxpayers face major procedural difficulties in effectively presenting the question in federal court. First, the appropriate Federal question must be

298. See Francis C. Nash, And Again Multiple Taxation?, 26 GEO. L.J. 288, 341 (1938).

299. See id. In addition to Professor Nash’s detailed article on the problems of conflicting state determinations of domicile, we can also consult the contemporary Tax Committee Report, supra note 254, at 201-12, and the relatively recent revisiting of the issues by Kathleen Leslie Roin. See Kathleen Leslie Roin, Note, Due Process Limits on State Estate Taxation: An Analogy to the State Corporate Income Tax, 94 YALE L.J. 1229 (1985).

300. To begin with, the taxing authorities of State B were not parties to the litigation in which the taxing authorities of State A had won a finding that the decedent died domiciled in State A. But at a deeper level, domicile is in these proceedings a jurisdictional fact. That no state is bound by the finding of domicile by another state has long been the Federal rule established in probate matters. But for our generation, the same rule was laid down in Williams v. North Carolina (Williams II), 325 U.S. 226, 227 (1945), where North Carolina bigamy convictions were upheld against a couple who, both married to others in North Carolina, had gone to Nevada to get divorces, married in Nevada, and were arrested on their almost immediate return to North Carolina. A jury could properly disregard the Nevada divorces if it found that, contrary to the finding of the Nevada divorce proceedings, the pair were never domiciled in Nevada.

If this [the U.S. Supreme] Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicile—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction.

Id. at 234 (Frankfurter, J.); see also Sosna v. Iowa, 419 U.S. 393, 410 (1975) (upholding a durational requirement of one year’s residence before permitting a resident to bring an action for divorce); Saenz v. Roe, 526 U.S. 489, 505 (1999) (reaffirming the holding of Sosna).
framed and insisted upon below.\textsuperscript{301} Second, the affected individuals cannot seek a Federal interpleader, without the consent of both states, because each of them can claim immunity.\textsuperscript{302}

Even if the states are willing to abide the decision of the United States Supreme Court as to which state is the domiciliary state, they have, on the face of it, no clear case or controversy as between them since it is the taxpayer, and not the states, who suffer pecuniary loss unless the assets of the estate are inadequate to satisfy all of the tax claims.\textsuperscript{303} Thus by the time that the Supreme Court departed, in \textit{Graves v. Elliott}\textsuperscript{304} and \textit{Curry v. McCanless},\textsuperscript{305} from the initiative of the Cases Allocating Intangibles, the unreliable nature of a finding of domicile has already become painfully clear.\textsuperscript{306} The effort of the Cases Allocating Intangibles turned out to have the least stable foundation that could be found. If domicile were to be the basis for avoidance of double taxation, the Court itself must be prepared to take the extreme step of intervening to resolve conflicting judgments by a de novo\textsuperscript{307} and that binding determination would now be based only on a claim that the Due Process Clause itself does not permit conflicting findings of domicile. It is clear

\begin{footnotesize}
\begin{enumerate}
    \item 301. John Dorrance, who lived both in New Jersey and in Pennsylvania, died possessing a large fortune in 1930. Pennsylvania found he died domiciled in Pennsylvania, and New Jersey, that he died domiciled in New Jersey. Each State proceeded to levy a full inheritance tax, without credit or deduction. Throughout a decade-long litigation, the estate failed to get a hearing in lower federal courts because of its failure to raise the federal question appropriately, and the Supreme Court refused to hear the matter. \textit{See Nash, supra note 298, at 318-42; Tax Committee Report, supra note 254, at 201-12.}
    \item 302. \textit{See Cory v. White, 457 U.S. 85, 91 (1982)} (the Eleventh Amendment bars the statutory impleader sought in this particular case); \textit{Worcester County Trust Co. v. Riley, 302 U.S. 292, 299-300 (1937)}.
    \item 303. \textit{See Massachusetts v. Missouri, 308 U.S. 1, 15, 17, 20 (1939)} (denying leave to file original action to determine domicile); \textit{Texas v. Florida, 306 U.S. 398, 398 (1939)} (granting leave where estate is not adequate to satisfy claims of four different states that the decedent was domiciled there at the time of her death).
    \item 304. \textit{307 U.S. 383 (1939).}
    \item 305. \textit{307 U.S. 357 (1939).}
    \item 306. The concept of domicile, based as it is on intent, often calls for a difficult and controversial resolution of questions of fact and law. There is no concept, as Justice Rutledge says in dissent in \textit{Williams v. North Carolina (Williams II)}, \textit{325 U.S. 226, 245-46 (1945)}, which is "as variable and amorphous as 'domicile' ... [which must be] established only by proof from which, as experience shows, contradictory inferences may be made as strikes the local trier's fancy." \textit{Id. at 245-46; see also Nash, supra note 298, at 290-91.}
    \item 307. It must be a de novo finding because, as the \textit{Williams} case decides, two states could, drawing inferences within the realm of the reasonable, make conflicting findings about domicile on the same facts. \textit{See Williams, 325 U.S. at 239.}
\end{enumerate}
\end{footnotesize}
that in the 1930s the Court was not prepared to take this step. It is perhaps interesting that one aspect of the Court's disposition of the case is that, in the interpleader below, the estate had argued that Hughes died a resident of Nevada, when that state did not then impose any inheritance tax. That claim disappeared once the case was relegated to litigation between Texas and California.

F. Double Taxation Denied

Both the re-affirmation of the possibility of double taxation in the case of individual income tax and the extremely unstable nature of a finding of domicile, make it clear that the arbitrary and rigid approach of the Cases Allocating Intangibles was unsustainable from the beginning. It is no surprise that new appointees to the Supreme Court, already deeply committed to the sharp reduction of the power of the Court, under the rubric of Due Process, to set aside major legislative efforts, should abandon the effort to allocate tax situs in the case of inheritance taxes. Both Curry and Graves announced the end of that effort. State Tax

308. The death of the reclusive Howard Hughes under circumstances where he was arguably domiciled in any of several states has since led to a slight amelioration of this result. In the Hughes case, California sought to invoke the original jurisdiction of the Supreme Court against Texas, seeking to resolve conflicting claims of domicile. Leave to file was denied in a brief per curiam, California v. Texas, 437 U.S. 601, 602 (1978), but with two separate concurring opinions in which four Justices joined. The burden of the concurrences was that California lacked a justiciable claim, but that the estate should be able to get a determination by initiating interpleader in the Federal court. The estate followed the suggestion, but found itself barred by Eleventh Amendment immunity. See Cory v. White, 457 U.S. 85, 86, 91 (1982). At the same time, however, the Court granted leave for California to file its petition in the nature of interpleader as an original action in the Supreme Court. See California v. Texas, 457 U.S. 164, 164-65 (1982). Before any further proceedings were taken, the states of California and Texas shared in agreed proportions, more or less a single inheritance tax. Mr. Justice Powell, joined by Justices Marshall and Stevens, dissented in Cory, 457 U.S. at 92. The ground of Justice Powell's dissent is that "the Due Process Clause provides the right to be free of multiple taxation of intangibles based on domicile; accordingly, he would allow the taxpayer to raise the question—now of constitutional dimensions in a Federal interpleader action." Id. at 101 (Powell, J., dissenting). Concurring with the majority in Cory, Justice Brennan agrees that Due Process protects against conflicting findings of domiciliary taxation in several states, but believes that no remedy in interpleader need be available if, as is the case here, the same issues would be litigated in an original proceeding between the conflicting state claimants. Thus, on the one hand, these cases present a strong revival in striking circumstances of the same principle that lay behind the Cases Allocating Intangibles, but, like the earlier initiative, this tantalizing principle is obscured, this time by the Court's refusal to give the affected taxpayer a clear and direct remedy. Although the Court granted California leave to appeal under the pressure of the concurring and dissenting opinions in Cory, they did so without formally dispensing with the notion that the dispute is one among the states and becomes justiciable when the estate may not be rich enough to pay both taxes.


Commission of Utah v. Aldrich\textsuperscript{311} closed out the story of the Cases Allocating Intangibles in 1942 by explicitly overruling First National Bank of Boston v. Maine.\textsuperscript{312} It is now time to draw out the rationale of Justice Stone's ruling in McCanless and the arguments of the majority and minority in Aldrich, so as to draw the weak conclusions presented by story of the waxing and waning of a concern with avoiding double taxation.

Justice Stone begins his opinion, as we have seen, by insisting that the Court had already backed off from the claim of Justice Sutherland that older cases permitting double taxation of intangibles had only a historical interest.\textsuperscript{313} We have just reviewed those instances of backing off. The premise of the taxpayer in Curry, as in the Cases Allocating Intangibles, was that there was some unique situs of intangibles, such that two states could not simultaneously tax them.\textsuperscript{314} But situs reasoning will not always be appropriate:

> when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, ... [and] there are many circumstances in which more than one state may have jurisdiction to impose a tax ... \textsuperscript{315}

To try to limit these relations to a single state result in "unwarranted curtailments of state power" where, as here, there is "no more [plausible] ground" for giving tax rights to one state or the other.\textsuperscript{316} Here each state is seen as providing "the benefit and protection of [its] laws enabling the owner to enjoy the fruits of his ownership and [simultaneously has] the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax."\textsuperscript{317}

Justice Stone states:

> Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary


\textsuperscript{312} 284 U.S. 312 (1932).

\textsuperscript{313} See supra note 297 and accompanying text.


\textsuperscript{315} Id. at 367-68.

\textsuperscript{316} Id. at 368, 370.

\textsuperscript{317} Id. at 364.
interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, exclusive jurisdiction to tax.\footnote{318}

This opinion certainly vindicates Stone's earlier insistence that situs is a fiction and, in itself, does not compel any result, but simply represents one possible way of stating a conclusion reached on other grounds. The conclusion reached by the Cases Allocating Intangibles, stripped of its fictions, was that the substantial autonomy and the demands, even if reasonable demands, of several states to receive taxes from a taxpayer must, in general, give way when it will result in \textit{unfair} double taxation.\footnote{319} The issue is now reformulated to demand a comparison of the claims of the several states with the harm to the taxpayer, once unfair double taxation ceases to be determinative.\footnote{320}

The conclusion reached by Justice Stone, however, also rests on assumptions that are less than transparent. First of all, it carefully continues the constitutionally mandated regime of allocating tangible property solely to the state in which it is "located."\footnote{321} Second, although Justice Stone properly elevates the claims of the states to which the taxpayer has a substantial relation, even if those claims result in the taxpayer's paying more taxes in the aggregate than he would pay to either state alone, the reach of those state claims are not well articulated. We are told only that the taxpayer himself chose to "extend himself" into relations with both states, but the relations themselves are described only as "the protection and benefit of the laws of another state," to which is added the contingent fact that the relations are such as "to bring [the taxpayer's] person or property within the reach of the tax gatherer."\footnote{322}

Stone's argument suggests something more than the mere passive availability to the taxpayer of civic life in the two states; it suggests a quantifiable extension of local benefits. Moreover, it seeks to buttress

\footnote{318. Id. at 369.}
\footnote{319. See supra Part III.D.}
\footnote{320. See Curry, 307 U.S. at 373.}
\footnote{321. Justice Stone is criticized for limiting taxation of tangible property to the state in which is located in Boris Bittker, \textit{The Taxation of Out-Of-State Tangible Property}, 56 YALE L.J. 640, 648-653 (1947).}
\footnote{322. Curry, 307 U.S. at 367.}
the vaguely quantified benefits by also alluding to the power of the state, the physical power, to collect the taxes easily. It is hard to see how the allusion to power (twice repeated) is directly relevant. It is even harder to see how the “protection and benefit” is to be quantified. The judgment in *McCanless* may be correct, but it rests, as did the Cases Allocating Intangibles, on an unarticulated comparison of state claims with taxpayer harms.

Perhaps the point I am making about the ascendant “benefits” rule will be clearer if we consider *State Tax Commission of Utah v. Aldrich*, the case that consolidates the new rule. That case held that Utah could impose an inheritance tax on the value of shares of a Utah corporation, where the decedent and all other persons involved in the estate have nothing to do with Utah, and where the Utah corporation—Union Pacific Railroad—has both its principal place of business and its stock transfer functions elsewhere. *National Bank of Boston v. Maine* has to be overruled, and it is. The Cases Allocating Intangibles establishing a rule of immunity against taxation by more than one state, is “of recent origin” and against the weight of a long line of contrary precedents. “A state is free . . . [to tax anything] in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.” Justice Frankfurter concurs in the judgment. He emphasized the breadth of state taxing powers, but he also insisted there is some limit on these powers imposed by the Due Process Clause. Tactically admitting the unfairness of the doctrine that all states with colorable claims to impose taxes, could do so, he suggests that legislative action, state and Congressional action should resolve the conflicts.

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323. This reference to state “power” is reminiscent of Justice Holmes, whose language often suggested the claim to right of a robber baron collecting tolls from hapless transients. I put the ultimate reach of such language to one side, for the main weight of the argument rests, here and in other cases, on the state’s creation of the conditions of civilization and (tacitly) on the extent to which the taxpayer has relied upon those conditions.

324. 316 U.S. 174 (1942).

325. See id. at 181-82. In this case, it is also true that imposing a tax on $1 MM in Union Pacific bonds costs the estate nothing, since the full amount of the tax will be a credit against domiciliary taxes in New York.

326. 284 U.S. 312 (1932).


328. See id at 182 (Frankfurter, J., concurring).

329. See id. at 183 (Frankfurter, J., concurring).

330. See id. at 184 (Frankfurter, J., concurring).
Justice Frankfurter’s unease with the decision resonates with Justice Jackson’s dissent. With his usual wit, Jackson notes that Justice Douglas could be read as saying that any tax that is collectible, is legitimate, but he hopes the Due Process Clause requires more than such power. Each of us is “a very real debtor” of every state, but he does not think that we would not agree we should be taxed by each. In particular, he feels the particular decision is wrong and amounts to trading one fiction, that is, the unique situs of intangibles in the Cases Allocating Intangibles, for another equally unreal claim. For the majority assumes that the state of incorporation stands in substantial contact with every shareholder, when in fact it is sometimes (and here) an irrelevant accident. Echoing the language of the Cases Allocating Intangibles and arguing that National Bank of Boston should not be overruled, he warns the decision will “intensify the already unwholesome conflict and tension between the states” in tax competition.

If Jackson’s dissent in Aldrich echoes the Cases Allocating Intangibles, it also resonates with the stubborn judicial resistance to double taxation in the particular case of airplanes. As noted above, the majority in Northwest Airlines, Inc. v. Minnesota refused to concern itself with the possibility of double taxation when it permitted the home state of Northwest Airlines to impose an ad valorem tax on the total value of the air fleet, but, nevertheless, rules of apportionment have taken over in taxation of this kind. In the same limited way, one can say that the dilemma of conflicting double state determinations of domicile has finally called forth a remedy, even if a limited and uncertain one. If the Cases Allocating Intangibles failed of their particular objective, it seems clear that, despite the broad language of Justice Stone in McCanless and Justice Douglas in Aldrich, avoidance of double taxation is still a viable argument in all taxation cases. Just how strong that argument is in any particular case, is a nice matter of judgment, but that judgment may be aided by further articulation of what goes into the mix as “fairness.” In the last part of this Article we will turn to consider the relevance, in assessing that fairness, of the privileges or immunities of our national citizenship. Those privileges or

331. See Aldrich, 316 U.S. at 199 (Jackson, J., dissenting).
332. See id. at 200 (Jackson, J., dissenting).
333. See id. (Jackson, J., dissenting).
334. See id. at 191 (Jackson, J., dissenting).
335. 322 U.S. 292 (1944); see supra notes 204-06.
336. See supra notes 207-08.
337. See supra note 308.
immunities are inherent in the structure of the Constitution and gained, against the states, additional strength and protection through the Fourteenth Amendment's insistence that they should not be abridged. To put our effort more concretely, we will try to show there are reasons, rooted in avoiding the Founder's Forfeiture, to revive Colgate v. Harvey as an extension of Saenz v. Roe's concern for persons who are, as is their right, moving about among the states.

IV. INTERLUDE: THE OTHER HALF NOT HERE CONSIDERED

I have now pursued the old cases for a considerable time; and I will return to tax cases before the United States Supreme Court to round off my discussion of the legality of the taxation of Founder-State Trusts. But in the meantime, I must recognize—I cannot treat—an entire other dimension that affects the understanding of this and related issues. Legal controversy is always complicated by the fact that all parties involved have to be understood as independent, mutually and reciprocally related forces. We need to know, not only what the Court did, but what the main parties, the states and the taxpayers did or will do. Although neither a state nor its taxpayers have the same commitment to reasoned principle as do the courts, we are not without some resources to understand and map those reactions.

We have argued that, despite the Supreme Court's exhibiting a strong theme of respect for total state autonomy in choosing what to tax, the existence of the Union, and the constitution that binds it together,

338. 296 U.S. 404 (1935) overruled so far as concerns the validity of differential taxes on income from loans made in-state and out-of-state by Madden v. Kentucky, 309 U.S. 83 (1940). As said in that case, where the older privileges and immunities clause of Article IV, § 2 protected immigrants newly arrived from another state, the Fourteenth Amendment's protection against abridgment of national privileges or immunities protects the person who has, temporally or permanently, left his home state to operate in another state; it protects against vengeful and unjust treatment of self-exiles by their original state. "A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost forgotten clause of the Constitution." Colgate, 296 U.S. at 431.


341. And of course, even in the Courts, the commitment to principle is such that a lawyer knows better than to rely on "mechanical jurisprudence," however much it may benefit him to invoke it.
have resulted in significant restrictions on that autonomy. These restrictions have resulted in judicial invalidation of taxes. That invalidation, in turn, has sometimes been more than a mere denial of tax resources to a state. That denial has resulted from, or has been connected with, the Court's deciding, on whatever basis, to award another state or states a preferred access to particular taxables. This award or allocation has occurred in at least two forms:

Courts have sometimes allocated—winner take all—taxables to one state rather than to another. In other cases, the courts have approved and guided the states themselves engage in a voluntary and explicit form of cooperative allocation of taxables.

Such an allocation of taxables may take the form of statutory exemptions (or reciprocal statutory exemptions) or it may take the form of awarding tax deductions or credits for taxes paid in other states. It may also take the form of an apportionment of taxables, where several states, each with more or less plausible claims on a particular taxable item, share in the possible tax resource by way of limiting their access to no more than a portion of the particular taxables. The formidable task of finding a mutually accepted basis for such apportionment has been taken as incumbent on the states throughout our history. The motto for this Article—an assurance to the Court by Daniel Webster that taxation by the several states of the income and property of the Bank of the United States would not result in double taxation—took the form of an expectation of a state by state allocation of such property. It is easy to identify several modes, by way of which such apportionment was carried out. For example, states imposing taxes on railroad business or capital early made a voluntary apportionment of taxes by taxing that business or

342. See supra Part III.F.
343. This term, taxable, is the noun form of the adjective, that is, "one who or that which is subject to taxation; esp. in pl. persons or things liable to a tax." Its use as a noun is, according the Oxford English Dictionary, s.v, a U.S. innovation, dating from examples in the Law of the Proprietorship of Maryland in the seventeenth century.
344. See First Nat'l Bank, 284 U.S. at 326.
346. This is really a form of ceding a taxable to a competing state, but only to the extent that the other state actually imposes a relevant tax. If the competing state in fact imposes no tax, there is no reason for the accommodating state not to collect its taxes in full. No double taxation will result if it does so.
347. See supra note 1 and accompanying text.
property in proportion to the track mileage in each state; and the
apportionment was early approved by the Court.348

These cases were also the beginning of a long list of cases, which
explored in detail the appropriate ways in which a state could capture the
"excess value" of a company's doing business within a particular state,
that is, its value as a going business in operation and in excess of the
tangible assets it owned.349 These cases, in turn, stand as direct
progenitors to the development of the rules for allocating, calculating
and enforcing the apportionment of the full value of the income of a
"unitary" business among all the states in which the taxpayer's business
is carried on. These rules have been worked out by a combination of
mutual statutory accommodations (including a Uniform State Law),350
invocation of interstate agreements351 and reciprocal arrangements. These
efforts are sometimes aided by the discipline of the Supreme Court's
decisional law invoking both the Interstate Commerce Clause and the
Due Process Clause.

Another range of apportionment cases have developed to
accommodate multi-state taxation of mobile equipment, such as river
barges, airplanes, trucks and the rolling stock of railways.352 Where such
stock is not permanently located in any one place, statistical allocation
on some basis is widely looked to.353 Finally, a different kind of
allocation has been that of apportioning the income of trusts subject to
state income taxation has been approved by the Supreme Court, where
the basis on which the tax was imposed was the local residence of one of
several trustees in the taxing state.354

All of these arrangements have crucially involved decisions in
many state capitals, both with and without, and even against,355
suggestions by the Supreme Court. In trying to winkle out what is really
going on in state tax cases, it is necessary to understand such state

348. See cases cited supra note 345.
350. See Uniform Division of Income for Tax Purposes Act, 1957 adopted as of July 1999 in
352. See supra Part III.B.
353. See Powell, supra note 197, at 1098.
354. See Greenough v. Tax Assessors of Newport, 331 U.S. 486, 498 (1947). A similar self-
chosen apportionment occurs, for example, under California law when the trust is taxable on the
basis of being the local residence of less than all beneficiaries. See CAL. REV. & TAX. CODE § 17742 (Deering 2002).
355. One complaint against the Cases Allocating Intangibles is that they rendered pointless the
substantial progress of allocation by voluntarily adopted state rules of exemption or reciprocal
exemption of such intangibles. See supra notes 270-71 and accompanying text.
actions and both their potential and their limits. Initially, I had hoped to sketch the historical waxing and waning of state tax cooperation and competition.\footnote{356. See generally Leo Brady, \textit{Death Taxes—Recent Statutory and Judicial Solutions of Multiple Taxation}, 16 A.B.A.J. 532 (1930); Warren Freedman, \textit{Practical Aspects of Multiple State Taxation of Intangibles of Nonresident Decedents Since the Aldrich Case}, 24 \textit{NOTRE DAME LAW.} 41 (1948-49); Roin, supra note 299.}

Today the opportunities for doing that are much better than they have been in the past, for legal scholars have provided new tools for doing so, borrowed from historians, political scientists and philosophers, and economists. Any such account today is obliged to seek access to some of the economic and political approaches to evaluating and predicting the patterns, which are complex and not always even coherent, of such cooperation and competition. Economic analysis, and the quasi-economic analysis of motivations provided by public choice theory could and should be ransacked to see what insight they provide into the historical sketch of these interactions.

Indeed, even the slightest reflection on the interaction of state and Federal actions with respect to state taxes, even the reflection that our case-oriented analysis affords, is adequate to demonstrate that the states and the United States Supreme Court (but hardly Congress) are locked, in the matter of state taxation and state taxables, in an extremely complex and many-sided dialogue. That dialogue provides many examples of fair offers and of provocations and responses to such fair offers and to such provocations, by states and the Court to each other.\footnote{357. See supra Part III.}

It also provides a continuous set of interactions of both states and Court to the taxpayers who in turn manage their affairs with respect to those moves. Indeed, state action in the area of taxation gives a concrete meaning for the sound of one hand clapping. State action in this area will only be really discernible—audible in terms of our metaphor—when the hands of the other actors join in, that is, the states and taxpayers in the states. And yet one hand clapping has a role to play.

Indeed, one of the personal discoveries I made while reviewing these old cases, and the rise and fall of the Cases Allocating Intangibles is that both the rise and failure of the doctrine in those cases was, in substantial part, attributable to the maturing of the long slow change in tax policies brought on by the obvious failure of local ad valorem taxation to capture the swiftly growing wealth represented by securities, credits and other intangibles and the inadequacy of the existing property tax structure to meet the growing demands of the states and localities for...
adequate revenues. The very slowness with which new taxes—the income, estate and gift and sales taxes—were devised and adopted meant that intangible properties, and income from them, as well as large earnings, had a long tax holiday.

During this long holiday, some Justices failed to notice that excise, inheritance and income taxes had brought that tax holiday to an end, and others, were too quick to jump to an attack on such relatively novel taxes, and to the defense of previously sheltered income, under the rallying cry of double taxation. The legal history of taxing intangibles supports the argument that imposing judicial discipline on state taxes cannot be understood without some sense of what state action with respect to the question has been, or is likely to be.

Any such stroke and counter-stroke of state governments and national judiciary is itself incomplete without reckoning with the taxpayer as a participant, not a passive object, in this multi-voiced process giving rise to the tax policies of the several states, and their never-ending formulation and reformulation. The tax laws are, to put it in yet one more metaphor, so many nets to catch the relevant taxpayers and their wealth. Nets are often cast, but they do not always fill up. The loose fish eludes. The taxpayer, and the taxpayer’s wariness, is always present as a conditioning function. The taxpayer seeks to escape tax—after all, by definition, an involuntary transfer—and the states, however else they formulate their tax policies, must take that evasiveness into account. The analysis of the motives and opportunities

358. See Spurious Conceptions, supra note 270, at 631. See also infra notes 407-09 and accompanying text.

359. See discussion supra Part III.

360. Congress has a role to play in this process, but plays it with great reluctance. See Goodnow, supra note 177, at 430-31; Kathryn L. Moore, State and Local Taxation: When Will Congress Intervene?, 23 J. LEGIS. 171 (1997).

361. This is an old story. In the times of Athens’ glory, rich men were expected, and in default, compelled, to make monetary contributions to fund most public purposes. That obligation was a leitourgia, a liturgy (the word we have developed from it), a public sacrifice. Even in those days, rich men often feigned poverty, to escape the liturgy. In appropriate circumstances, a rich man who has refused to make an expected liturgy, will be charged with avoiding the expense without justification. One of the tax evader’s resources was a procedure called the antidosis, literally, the exchange. The person charged with liturgy evasion, we would say tax evasion, could respond to the person denouncing him by offering to exchange his wealth for the denouncer’s wealth. If the other refused the exchange, then a court would decide who, as between the two, should perform the liturgy in question. See N.G.L. Hammond & H.H. Scullard eds., THE OXFORD CLASSICAL DICTIONARY 68, 613 (2d ed. 1970).

362. Few would say with Mr. Justice Holmes, “I like to pay taxes. With them I buy civilization,” quoted in RANDOLPH E. PAUL, TAXATION FOR PROSPERITY 277 (1947). See also Compania General de Tabacos v. Collector, 275 U.S. 87, 99, 100 (Holmes, J., dissenting). And even if they do say something like that, they do not always say it with the same conviction.
of the taxpayer must also be taken up, along with the analysis of public finance and public choice. A justification for seeking the Founder’s Forfeit is that the taxpayer in question is attempting to evade, without justification, taxes that are due.\textsuperscript{363}

Taxpayer motivation, in its projected and actual response to state action, is often now arranged about a thesis that takes into consideration taxpayer mobility among the states, to liken the tax policies of the several states to competing objects in a great market. Under the thesis associated with the name of Charles M. Tiebout, an American regional economist, the possibility of taxpayer migration forms a decisive part of an analysis of state tax competition and cooperation.\textsuperscript{364}

But—alas—it is clear to me that this necessary part of an overall discussion of the limits of state taxation, and in our particular case, state trust taxation, is an effort that is too expansive to be included as a brief digression in the development of my attempt to apply the National Privileges or Immunities Clause to Founder-State Trusts. It certainly deserves its own, article-length development. States’ competing or cooperating tax policies, and the provocations and responses of individual taxpayer to the various development stages of those ever-evolving policies, must, in this Article, remain in the deep background. Since the doctrinal arguments, and the policies that animate them, are intelligible without the development of this mass of—mostly political and economic—arguments and analyses, the former are what I will conclude with. The other—states and taxpayers and the springs of their actions—will be left to a later effort.

V. THE FOURTEENTH AMENDMENT AND AN INDIVIDUAL’S MOBILITY

A. The Supreme Court and State Taxation

One of the persistent themes of American federalism has been the Supreme Court’s supervision of state taxation in the name of the Union and the rights accorded to individuals as a result of that Union. That supervision can properly be called fitful, as it has varied in rationale and waxed and waned in intensity almost from its first exercise. The exercise of that supervision has often been sought by taxpayers, invoking a variety of grounds, not all of them successful. At the beginning of our

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\textsuperscript{363} See supra Part II.C.2 and note 165 and accompanying text for the language used in Judge Wesley’s decision in the \textit{Tamagni} case.

constitutional history, in *McCulloch v. Maryland*, the Court's supervision was made part of an equal assurance, to each state and to the federal government, that the Court recognized the power of each to tax; it was an assurance that was—as to the states—without textual basis, but was confidently seen as arising from the central importance of such a power to sovereignty. The power to tax was recognized in each, but it was a limited power; it was limited, in *McCulloch* itself, by the immunity of the federal government and its instrumentalities from taxation by the states.

Our own study began with several cases, just after the Civil War, arising out of Pennsylvania's requiring in-state issuing railroads to withhold, as tax, a portion of bond interest payments. The withholding applied to all interest paid, but it was contested as applied to interest payable to nonresident bondholders. In two cases, the Supreme Court of the United States narrowly held for the taxpayers in confusing opinions in which notions of the "situs" of the bondholders' property as located outside the state played a dominant role. Beginning with these cases limiting states' power to tax, the Court then, over the course of almost fifty years, nevertheless found a large number of ways of expanding the list of state taxables, so as to permit the states to subject to tax the claims held against residents by nonresidents.

To the trend of these cases, the Cases Allocating Intangibles made a notable, if brief and contested, exception. The Cases Allocating Intangibles invoked the Due Process Clause, and they were swept away in the general—if temporary—turn from substantive due process. Ultimately, the Cases Allocating Intangibles were all overruled in *State Tax Commission of Utah v. Aldrich*. Justice Douglas' expansive opinion in *Aldrich*, basing state power to tax on the existence of in-state benefits, even if attenuated, has often been cited as expressing the current state of the law regarding the capacity of states to tax.
In my own review of the historical sweep of these cases, I do not believe I have turned up anything new, but I do believe that, stirring around in the old mud, I have found a basis for a different conclusion from that of many commentators on State Tax Commission of Utah v. Aldrich. My conclusion is that there are limited and contested, but important, restrictions on state power to tax, which were (and still are) conceptually derived from a bare intuition about the scope of state power to tax. In the early cases mentioned above, it is perhaps equally important that that intuition or presupposition is both expressed or referred to by the majority and, in each case, contested by the dissent’s sturdy insistence on legislative control in the definition of taxables. I can show, I believe, that the core intuition remains a thematic concern in cases of state taxation although it can never be reduced to a rule, due to the operation of other, conflicting considerations. Moreover, I believe that it is the desire of preventing a particular form of double taxation that underlies and is the vital nerve of this conceptual intuition. That concern is very much present in those early cases.

Double or multiple taxation is a slippery idea. The common theme is that someone has to pay “the same tax twice (or more times).” What does it mean to pay the same tax twice? Moreover, as Edwin Seligman said in his still relevant essay on the subject, a double tax is often justified or difficult to avoid from the increasing complexity of the economic and political world in which we live. After all, double taxation can be found within a single tax jurisdiction. A tax on mortgage

374. This intuition operates also in international law and is still sometimes referred to as the “legislative jurisdiction” of states. See, e.g., Willis L.M. Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587 (1978); Robert L. Palmer, Toward Unilateral Coherence in Determining Jurisdiction to Tax Income, 30 HARV. INT’L L. J. 1 (1989).


376. Justice Davis dissenting in The State Tax on Foreign Held Bonds Case, says that a state is free to tax any “property of persons which it can reach and lay its hands on . . .” 82 U.S. at 328. The affirmation and denial of that statement neatly sets the bounds of the debate that has formed the law in this area.

377. Maltby v. Reading & Columbia R.R. Co., 52 Pa. 140 (1866), the Pennsylvania case that the dissenters in The State Tax on Foreign Held Bonds Case, supra note 375, relied on, is both more circumspect about its powers to control legislative action and explicit in its treatment of legislative authority and its limits. The tax on nonresident bondholders, it says, may be “extravagant, especially in view of the taxation to which the owner is exposed in the place of his residence,” but that argument, that Court equally goes on to insist, is addressed to the legislature. Id. at 147 (emphasis added).

378. See ESSAYS IN TAXATION, supra note 87, at 98.

379. See id.
debts, when the property securing the debt pays taxes on full value was a double tax that set off a storm of protest in Massachusetts a century ago. The question whether there is a double tax when a tax at different rates is levied on the same "item," e.g., the varying marginal rates of all current income taxes, has, perhaps, been answered more in practice than in theory. A similar question whether it is not a double tax to tax the property and the income it produces similarly seems to be put at rest.

But if the tax is doubled because it is levied by two different tax jurisdictions, the question becomes easier to answer. After all "double taxation" as a hindrance to international trade has produced whole volumes of international tax treaties and a fertile field of tax legislation and tax practice. In general, the understanding is that, by way of exemption or tax credit and by way of coordinating the definition of taxables among nations, taxes on businesses that are transnational will not have a heavier tax burden than they would under at least one of the involved nations.

A similar concern to avoid double taxation in this sense, if on a more modest scale, is reflected among the states in the United States. And here the Supreme Court has also had a role to play. It has encouraged individual and cooperative state action, as indicated above, by the possibility of its intervening to strike down a double tax and it has actually intervened to strike down the tax because it was a double tax.

I can begin with what the Supreme Court has often meant, even in those cases when it expressed or admitted its willingness to permit double taxation without intervening. For double taxation certainly exists where there is the imposition of comparable taxes in different states on the same individual, not only lifting the aggregate tax paid, but singling out that individual for a treatment that is to be invidiously compared to that of other individuals who differ only in lacking connections to numerous states. Thus, in Blackstone v. Miller, both Illinois and New

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380. See id. at 103.
382. See, e.g., Palmer, supra note 374, at 15.
383. See id. at 7, 15-16.
384. See Seligman, supra note 87, at 115.
385. For examples other than the Cases Allocating Intangibles, I offer the treatment of tangible personality in tax cases, supra Part III.B, and the demand for "internal consistency" for taxes imposed on interstate operations. See infra note 419 and accompanying text.
386. See Blackstone v. Miller, 188 U.S. 189, 207 (1903).
York collected an estate tax on the five million dollar deposit with a New York bank by Timothy Blackstone, the Illinois decedent. Without appropriate relief from the tax system of one state or the other, the tax paid by Blackstone’s estate will be larger than either that paid by another Illinois decedent who kept her money in a local bank or that paid by a New York decedent who kept his deposit in the same bank as Timothy Blackstone.

Again, the estate of John C. Dorrance was doubly taxed when it paid two taxes, each as a domiciliary, to Pennsylvania and to New Jersey and so, absent resolution of the claims of Texas and California, the estate of Howard Hughes would have paid a double estate tax. In these cases, double taxation is not just a way of comparing tax experiences; the term in the context of the Supreme Court usage, connotes a situation that ought not to exist in justice and fairness.

And yet it is precisely this scenario in Blackstone, and a large number of similar scenarios, that provoked the vain effort undertaken in the Cases Allocating Intangibles. And although the Court refused to intervene in the Dorrance case, the Hughes case saw a different result. Although in both cases, Blackstone and Dorrance, double taxation was, in the circumstances, permitted without judicial intervention, when such cases occur without some appropriate state response, we may see such intervention. We are looking for cases of multi-state taxation where the practical effect of not intervening results in the imposition of a significant tax penalty on the person who does not arrange his affairs to stay within the confines of a single state.

That is the scenario that obtains in the case of income taxes imposed on “nondomiciliary residents” and in cases of sharply differing applications by two states of a generally consistent and harmonious taxing scheme, as in the Zelinsky case reported above, involving different sourcing rules in New York and Connecticut, without available tax relief in either state. It is also the case, more directly, when the tenuous connection of “continuing jurisdiction” in a state probate court holds a trust in perpetual thrall, as in the case of Founder-State

387. See id. at 202-03.
388. See Nash, supra note 298, at 318.
390. See supra note 308.
391. See supra notes 142-66 and accompanying text.
392. See supra notes 167-71 and accompanying text.
Trusts. Here the penalty is not the tax resulting from moving away from home, but is explicit in the structure of the taxing statute itself. 393

B. At Home in the "States"

In our own review of state taxation cases we have seen taxpayers assail overreaching state taxes, and, in some cases, succeed in striking them down on various Constitutional grounds and on none. 394 Clauses invoked, in addition to the sovereign immunity arguments authorized in McCulloch, have been the Duties and Imposts Clause of Article I, Section 10, 395 the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, and, most persistently, the Interstate Commerce Clause. 396

Almost all of these provisions have been relied on by the Court in a number of state tax cases, but the National Privileges or Immunities Clause of the Fourteenth Amendment 397 has been relied on by the Court only once in a tax case, and for a result from which the Court quickly backed away. In this section I will attempt to revive the underlying rationale of that case, Colgate v. Harvey, 398 and to lay out an argument that the National Privileges or Immunities Clause should play a role that is both gap-filling and integrative in requiring states, at a minimum, to provide taxpayer relief from double taxation (double taxation of global income) of persons who have, in one way or another, established themselves in more than one state. The aim should be that no person shall pay substantially more in income taxes than the amount at most of the highest levy at the highest rate that is imposed by any of the states involved. The relief should also be crafted in such a way that it cannot

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393. Moreover, the existence of other, and conflicting, modes of state income taxation of trusts, such as taxes imposed by the state of residence of the trustee, or the place of administration of the trusts, makes the possibility of double taxation directly possible.


395. “[N]o State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it’s inspection laws.” Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 453 (1827); see also Mager v. Grima, 49 US (8 How.) 490, 494 (1850).


397. Amendment XIV (1868), Section 1 reads: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

easily be employed to immunize the taxpayer from fair taxation in each state.

At a remove, the same rationale has a role to play in compelling the discarding of the Founder-State Trust concept of a trust’s residence for income tax purposes, with its wholly inappropriate attempt to immobilize assets within a state that the trustee, donor, beneficiaries have long since left.

I will use the argument first advanced in *Colgate v. Harvey* that one function of that clause was to fill a “gap” left by the Privileges and Immunities Clause of Article IV, § 2 by offering a federal guarantee that each citizen would be free to absent herself from her home state without incurring penalties imposed by the home state’s resentment of the move. 399 Where the clause in Article IV reinforces the American federal union by protecting incomers, who carry on activities in a neighboring state without losing their connection to their home state, the Fourteenth Amendment functions to affirm that Union by also protecting the right of citizens of one state to sever, partially or wholly, the bonds of its old citizenship while putting down new roots in another state or, more exactly—given today’s extended living habits—even when the new roots are put down without wholly or even at all pulling out the older roots, so that the old form of domiciliary status itself requires rethinking and the uniqueness of domicile is put into question. 400

The several rights connected to the privileges and immunities of citizenship, state and national, taken together, turn out to be exemplified by the unquestioned American right to pick up and go *ad libitum* and to move freely, temporarily or permanently, from one state to another and back again—occasionally, sporadically, habitually. 401 More, they limn the possibility of an extended home and an extended self for someone who can be said, with equal accuracy, to be a domiciliary—to be at home or close to it—simultaneously under two sovereigns. Just how valuable and central the unnamed liberty, which our law captures as the right to travel, is, will be explicated from the opinion of Mr. Justice Stevens in *Saenz v. Roe* 402 and a quick and sketchy trip through that liberty’s multiple appearances and multiple roles in American constitutional law. As applied to the case of state taxation, the protection of the rights to travel and to be at home throughout the Union must, however, be accommodated with the problem of migration (or the

399. See id. at 409.
400. See id.
401. See id. at 449.
illusion of migration) for the purpose of evading taxes in one state or another or even to evade state tax altogether. When so accommodated, taxpayers will have a constitutional right, judicially enforceable, to insist on reasonable state measures to limit double taxation, properly understood, and to require state mechanisms to avoid double taxation arising from multiple state living and working arrangements. It will also demand the substitution of a more rational approach to income taxation of trusts as resident than the Founder-State Trust approach. The remedy if those measures and mechanisms are not put in place is an appeal to the federal judiciary as a constitutional referee.

Our brief investigation of the introduction, at the opening of the twentieth century, of national and state income taxation has to be read against the long procession of tax cases, of all sorts, that have proceeded through the constitutional testing process both before and after the introduction of income taxes, that is, the first part of this Article must be read against the second. What emerges from the reading of the two, I believe, is a persuasive history of the period, whose underlying theme is of a political development, which accompanied the growth of industrialization after the Civil War, saw increased government expenditures and responsibilities at every level of government, and, with some difficulty, found the necessary means to permit governments to meet the burden of such responsibilities and expenditures.

During the period when the political will to introduce income taxes was growing, but had not yet come to the point where such taxes could be introduced, there was a long, golden era when income from salaries and non-real estate investments were substantially under-taxed in comparison to the burden of real estate subject to ad valorem taxes and the burden of indirect taxes on goods and services. Although in theory, ad valorem taxes, administered at the county level, for the benefit of both state and local government, applied equally to property of all sorts, including tangible and intangible personality, the tax on the latter was seldom effectively collected, as a long line of state commissions and committees reported. Political acceptance of income taxation at graduated rates brought this era of under-taxation of the most dynamic

403. See SELIGMAN, supra note 65, at 432-34.
404. See id.
forms of wealth to an end. This is the story told by most historians, and by reformers who were active during the periods in question.

It is in the context of this fiscal history and development, that one ought to see the history of constitutional law relating to state taxation over the same period. The Court was first sensitive to under-taxation and, later, to the impact of increasing taxation. Writing in 1934, Charles L.B. Lowndes, said that previously the Court thought that the most serious problem was that intangibles would escape taxation everywhere, and so it justified double taxation; but now the tide was running the other way and the threat of double taxation was viewed by many as serious so that a new Court turned from the cases encouraging a variety of state taxes and discounting the risks of double taxation, to a new concern with preventing double taxation. For Lowndes, an astute student of the issue, that new judicial concern had its roots in both “a rapidly mounting tax burden [and] the writings of students of taxation” who were reacting to the same impact on individuals.

The result of this sea change in the attitude of a majority of the Courts to state taxation and the threat of double taxation, resulted in what proved to be the brief adventure reflected in the Cases Allocating Intangibles, whose rise and fall—a twelve year cycle—we have followed above. Those cases were an attempt to make an authoritative allocation of intangibles among the states, and it failed. It failed, among other reasons, because it was based on the uncertain touchstone of a unique domicile. The domiciliary allocation was not extended to income taxes; and a little later the Court first refused and then only hesitantly undertook to resolve conflicting determinations of domicile contested by the states themselves in the John Dorrance, Harold Hughes and other double domicile cases. The Cases Allocating Intangibles were overruled within the decade of their completion.

406. Mills Committee Report, supra note 95; see SELIGMAN, supra note 65, at 432-34.
408. In a series of articles in the early 1930s leading up to Spurious Conceptions of the Constitutional Law of Taxation, supra note 270, Lowndes came to provide some of the best analyses of the issues involved in the Cases Allocating Intangibles. Then a young man, Lowndes went on to join the Duke law faculty and to become a recognized authority in estate planning until his death thirty-five years later.
410. See supra notes 156-206 and accompanying text.
411. See Nash, supra note 298.
Finally, in \textit{State Tax Commission of Utah v. Aldrich},\(^{413}\) Mr. Justice Douglas allowed Utah to impose an estate tax on the value of shares of a Utah corporation, where the decedent and other persons involved in the estate have nothing to do with Utah, and where the Utah corporation has both its principal place of business and its stock transfer functions elsewhere. In doing so he dismissed the Cases Allocating Intangibles as "of recent origin" themselves and reaffirmed \textit{Blackstone v. Miller},\(^{414}\) going out of his way to insist that "double taxation" was not constitutionally prohibited.

Even here, however, there was dissent and demurrer. Justice Frankfurter concurred in the result in \textit{Aldrich}, but warned that there were real Due Process limits on state taxation, however wrongly they had been expressed in the Cases Allocating Intangibles; but he also supposed that judges were not well situated to make the judgment as to where that Due Process line was to be drawn and hoped, with little justification, that Congress would act to accommodate conflicting state taxes.\(^{415}\) Mr. Justice Jackson opposed the \textit{Aldrich} majority more robustly; he urged that there were constitutional limits on the invention of taxable events by the states that should have been applied to bar the taxes in the present case.\(^{416}\) With rhetorical force he argued that the majority might be construed as saying that, "any [state] tax that is collectible is legitimate," and he forcibly insisted that that was not the case within the Union.\(^{417}\)

In the sixty years since \textit{Aldrich} has decided, it is Justice Jackson rather than Justice Douglas who has been vindicated. The Court has accorded the states assurances of broad discretion in the formulation of tax policies, the Cases Allocating Intangibles have not been revisited, and the Court has attempted to craft its rules, so as to reduce the possibility that they would enable some taxpayers to avoid taxes altogether or would trigger undue competition among the states. Nevertheless, the Court has continued to supervise state taxation with a view to avoiding double taxation.

With the notable dissent of Justices Scalia and Thomas,\(^{418}\) the Court has developed the test of "internal consistency" in interstate commerce
cases, in order to avoid the possibility of double taxation. The Court has also supervised, in addition, two major programs of constitutional allocation of taxables, with the same view of avoiding double taxation in mind without permitting participants in the state's economic life to avoid their fair share of the tax burden. First, under the rubric of the Interstate Commerce Clause it has overseen the apportionment of state income and corporate franchise taxes among the states in reasonable proportion to the business done as part of a multistate unitary operation in the taxing jurisdiction and elsewhere. And it has continued the line of cases through which, under the Due Process Clause, the Court has continued to insist on allocating rolling stock—railroad cars, trucks, ships, airplanes—on the basis of "presence" of the stock within the state. In such activity the Court is not only assisting taxpayers, it is also mediating conflicts between the states. Such conflicts still clearly continue to arise, as the newspaper treatment of New York's aggressive local sourcing of income, treated above, shows. The point of the present argument is to urge on the Court its undertaking another supervisory burden if the states—and New York among them—do not move promptly to remove some of those sources of conflict.

We must begin where all discussions of the judicially determined meanings of the National Privileges or Immunities Clause must begin, The Slaughterhouse Cases. Counsel in that case confronted the Court with a demand for judicial intervention in a local licensing dispute in New Orleans, asking for judicial enforcement of a national right against the state award of monopoly on police power grounds. The majority of the Court rejected the notion of such an enhanced federal right to pursue a "common calling" and also rejected the argument that such a right was included in an indefinite list of privileges or immunities of United States citizens under the newly enacted Fourteenth Amendment. Mr. Justice Miller, speaking for the Court, responded to that demand by insisting that the nation had not entirely replaced the states as a source of and

420. See Armco Inc., 467 U.S. at 644.
423. 83 U.S. (16 Wall.) 36 (1872).
424. See id. at 66.
limit on individual rights by reason of the National Privileges or Immunities Clause.\textsuperscript{425} Having concluded that the plaintiffs in error were mistaken in seeking federal protection against a state monopoly when such a right existed, if at all, under the law of that state, Justice Miller, in dictum, did go on to point to a right that did arise out of national citizenship.\textsuperscript{426} It was the right to free travel beyond the state’s boundaries and within the Union that he had already vindicated in the strongest terms, speaking for the Court,\textsuperscript{427} a few years before in the case of \textit{Crandall v. Nevada}.\textsuperscript{428} There the Court had struck down a poll tax on persons leaving that state just because it was inconsistent with that right. Justice Miller’s right to travel has been derided as trivial and trivializing,\textsuperscript{429} but he did not think so, and reflection and experience has suggested that the right is neither trivial nor trivializing.

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\textsuperscript{425} The argument for such a right (and others) is given, in different versions, in the dissenting opinions of Justices Field, Bradley and Swayne, in contemporaneous critical comment after the case was decided, e.g., William M. Royall, \textit{The Fourteenth Amendment: The Slaughter-House Cases}, 4 S. L. REV. 558, 569, 578 (1879), and notably by Justice Black dissenting in \textit{Adamson v. California}, 332 U.S. 46, 68 (1947). The various critical voices differ in many respects: certainly, Justice Black finds the expansive natural rights reasoning of Justices Field and Bradley objectionable. All three share, however, disagreement with Justice Miller’s insistence that the provision protects only the rights of national citizenship from abridgement by the states and that the states remain both the source and the protector of “the privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union.” \textit{Slaughterhouse Cases}, 83 U.S. at 76 (Miller), quoting Justice Bushrod Washington sitting, on circuit, in \textit{Corfield v. Coryell}, 6 Fed. Cas. 546, 551 (C.C.ED. Pa. 1823). Justice Black and Bradley equally agree, for example, that the rights guaranteed by the amendment from state abridgement, include those rights previously established against the federal government by the first eight amendments to the constitution, although Justice Bradley would go further and express confidence that those same \textit{and other rights} appropriate to citizenship (including a protection against monopoly) are part of national citizenship. National citizenship, for them, in a reversal that is accomplished by the first sentence of the Fourteenth Amendment, is now “primary” while state citizenship rights have become only marginal at best.

\textsuperscript{426} See \textit{Slaughterhouse Cases}, 83 U.S. at 47.

\textsuperscript{427} Justice Clifford and Chief Justice Chase were alone in insisting the poll tax in that case should fall only because it violated federal control over interstate \textit{commerce}.

\textsuperscript{428} 73 U.S. (6 Wall.) 35, 48-49 (1867).

\textsuperscript{429} See \textit{Charles Fairman, Reconstruction and Reunion}, 864-88, at 1354 (Vol. VI of O.W. Holmes Devise History of the Supreme Court (Paul A. Freund ed.)) (Miller’s opinion trivialized the National Privileges and Immunities Clause). Justice Miller is widely condemned for his opinion, but a generation ago he was a hero to Fred Rodell for his rejection of unlimited judicial power, for the list of rights called for by the plaintiffs in error and the dissenters would have been judicially defined. Rodell said, “Samuel Miller, of Iowa, humanitarian and unlegalistic realist, became, despite the fact that history has largely overlooked him, one of the Court’s few top-flight Justices [and in \textit{The Slaughterhouse Cases}] produced perhaps the finest and certainly the most important opinion of his admirable . . . career on the high bench.” \textit{Fred Rodell, Nine Men: A POLITICAL HISTORY OF THE SUPREME COURT from 1790 to 1955}, at 137, 160 (1955).
The prime evidence against the charge that the right to travel is a "trivial" one, begins with the Interstate Commerce Clause and its central importance in American constitutional structure. From the New Jerseyites being ferried over to Manhattan in *Gibbons v. Ogden* in the 1820s travelers have come under the protection of the national power over their interstate journey. That protection also supports federal prosecution for a conspiracy to interfere violently with such travel. Finally, in 1964 Congress relied on its power over the conditions of interstate travel to end customary racial segregation throughout the country.

Straining to see the full importance of Justice Miller's right to travel, allows one to reject a slight feeling of moral uneasiness that the end of overt segregation in public places in America had to rest on an over-extended use of the Interstate Commerce Clause. Although such a revolutionary change can now better be placed on a straight reading of the Thirteenth Amendment than by invoking Congress' power over interstate commerce, and although the decisions in *Heart of Atlanta* and *McClung* do not lack precedents, there was and is a sense that turning to that clause meant relying on a mere jurisdictional hook and the expectation of a collective judicial wink. The strongest proponents of the invocation of the commerce power in the context—Charles L. Black and Laurence Tribe—do not deny that. Although he now emphasizes the renewed congressional interest in the scope of its power under the Fourteenth Amendment, in his second edition Tribe, in justifying these

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433. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968), circumvented both the "state action" bars raised to such a statute in *The Civil Rights Cases* (1883) and the unpredictable gaps in Federal jurisdiction which might follow from a vaguely inadequate invocation of Congressional power over "commerce" in the Civil Rights Act of 1964. The *Jones* case accepted the reasoning that exclusion of most forms of racial, religious and ethnic discrimination could be proscribed by Congressional action to enforce the end of chattel slavery in the United States under section 2 of the Thirteenth Amendment. See id. The argument may, with some push of analogy be extended to gender discrimination; it is not clear that that rationale should go further.
435. See Tribe Third, supra note 51, at 811-24, 922, 936 where he locates *Heart of Atlanta* and *McClung* in an era of judicial deference to Congress in contrast to the era of heightened scrutiny
cases under the Interstate Commerce Clause, cautiously alludes to this feeling of unease by a reference to Charles Black’s 1968 Edward Douglass White lectures.\textsuperscript{436}

In the printed version of those lectures,\textsuperscript{437} Black insists that the Interstate Commerce Clause analysis is justified,\textsuperscript{438} but goes on to deplore the “rhetoric” of such a reliance.

“There remains a certain indirection, an inaptness of the logic to cover the whole result . . . . [T]he discrepancy between justification and result remains, requiring constant explanation, and suggesting, though in my view erroneously, possible disingenuousness [and] there hangs about all of these a feeling that the tool employed, though its use was licit and it did the job, was not the perfectly adapted tool.”\textsuperscript{439}

I think that positioning the Commerce power in the context of the rights of a citizen of the Union to be at home anywhere in the Union will help to show the deep grasp of the structure of our polity that the draftsmen of the 1964 Act displayed, even if that grasp was floated on what was perceived as a jurisdictional fiction.\textsuperscript{440} The case to look at here is \textit{Edwards v. California}.\textsuperscript{441}

Fred Edwards was a California resident who was convicted of driving his brother-in-law, Frank Duncan, an out-of-work and indigent Texan, back to California with him; his brother-in-law went on (federally funded) relief shortly after arriving in Marysville, California.\textsuperscript{442} Edwards appeals from his conviction on the ground that California cannot punish him for helping his brother come to California suggested by \textit{United States v. Lopez}, 514 U.S. 549 (1995), before reverting to the same blend of cases to justify \textit{Heart of Atlanta} as a case of congressional regulation of the “channels of commerce,” while \textit{McClung} depends on the more tenuous “cumulative effect” analysis. See id. at 827, 815.

\textsuperscript{436} See TRIBE Second, supra note 434, § 6-39, at 312 n.5. Tribe cites Black’s book, ostensibly as supporting his Commerce Clause analysis, but the passage cited, also, as the text here shows, evinces a feeling of unease with the constitutional strategy involved.

\textsuperscript{437} See BLACK, supra note 434, at 55, 57-58.

\textsuperscript{438} It is justified because there is an “unimpeachable chain of reasoning” that goes from seeing that “it is fact and not fiction that once in a while any restaurant open to the public will attract traveler” and that “the only way to be sure [the interstate traveler] will not be discriminated against is to forbid racial discrimination altogether.” Id. at 56.

\textsuperscript{439} Id. at 57-58. His answer is that Congress should forthrightly declare “its power to declare and give effect to the rights of citizenship as positive rights to full membership in the community, without segregation and isolation.” Id.

\textsuperscript{440} For more of the confusion that Black alludes to, see generally, Note, The Civil Rights Act of 1964—Source and Scope of Congressional Power, 60 NW. U. L. REV. 574 (1965) and Robert R. Bebermeyer, Comment, Public Accommodations and the Civil Rights Act of 1964, 19 U. MIA\textsc{m}i L. REV. 456 (1965).

\textsuperscript{441} 314 U.S. 160 (1941).

\textsuperscript{442} See id. at 170-71.
under these circumstances. A majority of the Court held that the criminal statute was invalid as a law burdening interstate commerce, leaving for another day the question whether the "the Elizabethan poor laws [any] longer [fit] the facts." Edwards is thus one of the true forerunners of both Shapiro v. Thompson and Saenz v. Roe.

In concurring, Justice Jackson conceded that the majority's grounds were "permissible ones under applicable authorities." He went on to state:

But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.

Both Justice Jackson and Justice Douglas, the former more cautiously, place the right to travel of, Fred Edward's brother-in-law, squarely on the privileges or immunities of national citizenship. Justice Douglas insists that "the right of persons to move freely from state to state occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." Douglas then rehearses the unbroken line of cases which, as Justice Miller had said in The Slaughterhouse Cases, go back beyond the ratification of the Fourteenth Amendment. It was recognized, Douglas

443. See id. at 173.
444. James Byrnes, newly appointed to the Court, wrote the opinion which Chief Justice Stone and Justices Roberts, Reed and Frankfurter joined. The decision is in fact unanimous with the other Justices concurring in the result in opinions by Mr. Justice Douglas, joined by Justices Black and Murphy, and Mr. Justice Jackson. See id. at 170, 177, 181.
445. See infra note 459.
446. Edwards, 314 U.S. at 173, 174. At the same time, all the Justices, the majority and the concurring opinions alike, insist that, whatever the right that supported Frank Duncan's moving to California, mere indigence is not a qualification on it. The majority is careful to repudiate a dictum in New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) to the effect that the right might be subject to an exception for "paupers."
448. Id. at 182 (Jackson, J., concurring).
449. But Jackson after saying that "instances of valid 'privileges or immunities' must be but few," says that if citizenship does not mean at least this right of free movement, it is "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." Id. at 183, 186.
450. Id. at 177 (Douglas, J., concurring).
451. See id. at 178-81 (Douglas, J., concurring).
points out, by Justice Moody in *Twining v. New Jersey*\(^{452}\) and Justice Miller in *The Slaughterhouse Cases*, but also, and more eloquently in Justice Miller’s opinion in *Crandall v. Nevada*\(^{453}\) and even more eloquently, by Chief Justice Roger Taney in the 1849 *Passenger Cases*.\(^{454}\) The right is not exhausted by a narrow right to travel to the national capital, as was suggested in an infamous later case, *United States v. Wheeler*.\(^{455}\)

The importance of the national right to travel freely emerges as a much broader right. Eighty years apart, both Justice Miller and Justice Douglas have no better way of making this clear than by repeating the language of Chief Justice Taney in 1849:

\(^{452}\) 211 U.S. 78 (1908). This case, denying that the Privileges or Immunities Clause made the Federal rules relating to self-incrimination applicable to the states, will later be heavily criticized by Justice Black, in his effort, in *Adair v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting), to read the Bill of Rights into that clause, but he does not disagree about the right to travel. He joins Douglas in *Edwards*. See id.

\(^{453}\) 73 U.S. (6 Wall.) 35 (1867). In that case, Nevada had levied a dollar tax on every person departing the state by train or coach. Crandall, a coachman, had refused to report persons leaving or collect the tax. Miller distinguishes a tax on the privilege of traveling by coach or train and, as in this case, a tax on the passenger for the privilege of leaving the state. The “government has a right to call . . . its citizens” throughout the Union, and a state may not interfere with that power, and “the citizen also has correlative rights” to travel throughout the Union. *Id.* at 36, 40, 43, 44.

\(^{454}\) *The Passenger Cases (Smith v. Turner, Norris v. Boston)*, 48 U.S. (7 How.) 283, 471, 492 (1849), invalidated New York and Massachusetts laws imposing a head tax on immigrants. In dissent, Taney sharply distinguished between aliens and citizens; the states, in his opinion, ought to be able to tax the entry of aliens, but not of American citizens. As Justice Miller calculated, writing in *Crandall*, 73 U.S. at 48, at least four “and perhaps . . . more” of the Justices in *The Passenger Cases* assented to a citizen’s right to travel that was beyond the control of the states.

\(^{455}\) 254 U.S. 281 (1920). This case upheld, with only one dissent, dismissal of a federal prosecution, as a conspiracy to deprive others of a “right or privilege secured . . . by the Constitution or laws of the United States,” in the Bisbee Deportation case of 1917. *Id.* at 292. Chief Justice Taft’s opinion was forced to treat *Crandall v. Nevada* as justified as a violation of the Interstate Commerce Clause and no more. (It was only later that *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), did invalidate a similar head tax on entry and exit as a violation of the Interstate Commerce Clause.) The Bisbee Deportation referred to events that created a national sensation. On April 26, 1917, soon after the United States entered World War I, the Industrial Workers of the World called a strike of copper miners in Cochise County, Arizona. On July 12, 1917, the county sheriff led a posse of over 200 that rounded up and herded into box-cars nearly 2000 Wobblies, whom they ultimately abandoned in the New Mexico desert. Before the *Wheeler* case, a state prosecution of posse members for kidnapping had resulted in a not guilty verdict. The state case, *State v. Wootton*, Crim. No. 2685 (Cochise County, Ariz. Sept. 13, 1919), is reported in Comment, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 Ariz. L. Rev. 264 (1961), and is a rare case where a defense of “necessity” to act (to prevent violence on the part of the Wobblies) was successfully raised.
We are all citizens of the United States and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own states.456

The Edwards case sets the scene for the reemergence of the National Privileges or Immunities Clause of the Fourteenth Amendment in the guise of the right of free travel throughout the United States for citizens. In Shapiro v. Thompson,457 the issue was whether the states could impose a durational residence requirement of one year before permitting new residents to obtain welfare assistance. This presented squarely the issue that was present, but avoided, in Edwards v. California.458 Elizabethan poor laws, for long the model of state welfare provisions, essentially imposed a local obligation on local governments to care for their own residents, and an unintended consequence of this system was a local determination to prevent the arrival or settlement of persons likely to become charges on the community.459

Justice Brennan wrote an opinion, joined by six Justices, that, although invoking the right to travel, nevertheless did not rest its holding on that right directly.460 Instead, it held that imposition of the year’s durational period, as a measure of bona fides in establishing in-state residence, violated the Equal Protection Clause because it impermissibly set new residents in a class apart from longer established residents.461

Why was the case put on Equal Protection Clause grounds? Certainly one possible reason for that grounding is that Congress had apparently permitted the durational residence requirements, and the welfare laws of the District of Columbia, required just such a year’s wait. A majority of the Court was not prepared to say that the right of

458. See id. at 630 n.8.
460. See Shapiro, 394 U.S. at 641-42.
461. See id. at 541. Chief Justice Warren’s dissent argued that such a requirement, corresponding to state responsibilities under national welfare aid laws, was an appropriate one, and not an undue indirect burden on the right to travel. See id. at 649. The dissents of both Chief Justice Warren and Justice Harlan insisted on the fact that the Court was striking down, not only state laws, but the Federal laws that accommodated the state laws also. See id. at 650-51, 664-65. Justice Harlan, who found the right of travel a right that due process subjected to reasonable state and federal regulation, also agreed with the Chief Justice that the burden on the right to travel was both indirect and not undue. See id. at 676.

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travel as such was beyond Congressional control. Yet, because the
durational requirement “impinged” on the right to travel, the standard
governing the permissibility of the classification imposed by the Equal
Protection Clause was a compelling state interest, under strict scrutiny. The Shapiro case is the stem of a number of cases considering state
imposition of durational residence requirements as a condition of
receiving state benefits. It is the invocation of that higher standard of
scrutiny, not in respect to a “suspect class,” but in defense of an
uncertain group of “fundamental rights,” that has been most
controversial about the Shapiro case.

In 1999, three decades after Shapiro, Saenz v. Roe reached the
Supreme Court. It tested California’s new provision of separate
treatment for new residents applying for welfare before they had been in
California for a year. Such residents were eligible for relief, but only at
the same level they would have received in the state from which they
had come. Speaking for a majority of seven Justices, Justice Stevens
responded with a new analysis and appreciation of the right to travel and
a firm location of that right as one of the privileges or immunities of
citizens of the United States, that is, a nationally held right. Neither
Congress nor the states can “abridge” that right. Since he concluded that
the California law’s separate treatment of new residents from residents

462. See id. at 634.
463. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (registering to vote); Fortson v.
services); Sosna v. Iowa, 419 U.S. 393 (1975) (suit for divorce).
464. Justice Steward added, in a concurrence, additional language about the right to travel as a
“fundamental right.” The case presents the strange spectacle of Justice Stewart’s quoting from
United States v. Guest that the right to travel was an unmentioned right under the Constitution that
“is quite independent of the Fourteenth Amendment” and refusing to found it, as a Federal right, as
Justice Harlan does, on the Due Process Clause binding on the Federal government in the Fifth
Amendment. See id. at 642-43.
466. See id. at 493.
467. See id. The provision was an effort to meet Shapiro’s concern that refusal of any aid
meant that the new residents were worse off for having moved. By classifying such residents with
residents in their old state California could make an argument that the new residents were not worse
off for the move. The practical answer may well be that the equivalence with other state benefits
ignored the impact of such things as comparative costs of living in the two states. In any event, the
penalty was obviously less draconian than that in issue in Shapiro. See id. at 499. It was also
expressly approved by a provision of federal welfare reform law, the Personal Responsibility and
468. See id. at 491. The Justices joining Justice Stevens included Justices O’Connor, Scalia and
Kennedy as well as Justices Souter, Ginsberg and Breyer. Chief Justice Rehnquist and Justice
Thomas dissented. See id.
of longer duration, for purposes of providing need-based assistance impermissibly abridged that right, both the provisions of the California law and of the Personal Responsibility and Work Opportunity Act must fall.\textsuperscript{469} The understanding of national citizenship in relation to state citizenship controls, and the Equal Protection Clause is irrelevant. Federal law, Justice Stevens says, cannot authorize violations of the Fourteenth Amendment, but that silently presupposes that Congress, at least in this case, lacks power to redefine national citizenship in any relevant way.\textsuperscript{470}

In focusing on the national right of citizens, newly resident and so newly citizens of the state to which they have moved, to equal treatment with all other citizens of that state, Justice Stevens expresses the protection of the national right to travel as follows:

The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.\textsuperscript{471}

State citizenship back home protects, as a national matter (Article IV, Section 2), the visitor, and national citizenship (protected from abridgment by the Fourteenth Amendment) protects the immigrant.\textsuperscript{472} Although it looms very much in the background, the vigorous Fourteenth Amendment scholarship of the last two decades is not actually the focus of the case. That scholarship has elucidated the structured forcefulness of radical abolitionist legal doctrine before and during the Civil War and a related agenda that is, it argues, aimed at in the Fourteenth Amendment.\textsuperscript{473} Instead, the emphasis is on consensus, Saenz recognizes that in the right to travel it is dealing with what is "common ground" between "fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment."\textsuperscript{474} Locating the right to travel as one of the privileges or

\textsuperscript{469}. See Saenz, 526 U.S. at 506-07.
\textsuperscript{470}. See id. at 507.
\textsuperscript{471}. Id. at 500.
\textsuperscript{472}. See id. 501-04.
\textsuperscript{473}. As exemplified in two wonderful works of lawyers using history: see generally MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998), a more prophetic book by CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1997) and work, both historical and doctrinal, by others.
\textsuperscript{474}. Saenz, 526 U.S. at 503.
immunities of national citizenship does, however, open up the issue of the substance of that citizenship, and its role in American politics and federal-state relations, but it also opens up the implications of the American right to travel. Those implications are already as diverse, deeply rooted and tangled, as the different contexts in which the legal right has emerged. The right is not a trivial one.

C. The Colgate Case

The right to travel has profound implications for federal relations within the United States. Since the right to travel arises, not from particular language of the Constitution, but from the structure of the Union, commentators have asked what calling the right a privilege or immunity of national citizenship adds. But the first sentence of the Fourteenth Amendment makes it clear that each American has a dual citizenship, national and state, and that state citizenship belongs to each national citizen at election. But for our federalism that means that a state has no control whatever over which of the citizens of the United States are also citizens of the state. This clear consequence of the right to travel and its location as a national privilege is in tension with the

475. As Laurence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?, 113 HARV. L. REV. 110 (1999) [hereinafter Saenz Sans Prophecy], elegantly shows. The imaginative structure of American federalism that is revealed is breath-taking. Unfortunately, the grasp of such a vision is lamented, rather than celebrated, by Professor Tribe. He rejects such a structuralism; it is not complete enough for him, for he demands allegiance to rights, deeply personal rights, other than those dependent on our federal structure; and he regrets, and even disdains, the Justices who accept only the structure of federalism, however carefully that structure is elaborated. With a demeaning reference to a cartoon in which the Founding Fathers admit “Religious Freedom is my immediate goal, but my long-range plan is to go into real estate,” Tribe concludes:

Rather than a glimpse into a future written in terms of privileges or immunities, the Saenz decision seems to me to have offered a window into the present and the recent past. Saenz revealed a Court far more comfortable protecting rights that it can describe in architectural terms, especially in terms of federalism, than it is protecting rights that present themselves as spheres of personal autonomy or as dimensions of constitutionally mandate equality—even by modes of analysis that are in essence structural. Ours is more than an era of structure over substance. It is an era of largely unexamined preferences for structure in the service of geography and organization over structure in the service of human rights as such.

Id. at 198, 198 n.357.


477. See Saenz, 526 U.S. at 504.
other—the non-national and federative—side of the American polity: states are independent (if ultimately subordinate) centers of policy making for their own citizenship and insist upon peculiar and, to some extent, exclusive rights to gather resources from and extend benefits to those citizens. The Court is deeply involved in accommodating that tension. Our thesis is that fully portable welfare rights and a wholly free and individual labor mobility, on the one hand, and limits on the reach of state taxing statutes, on the other hand, are, from this perspective, all part of the same governmental adjustment.

It is appropriate then that a fourth aspect of the right to travel, added to Justice Stevens’ three, arises in the context of the invalidation of a state tax by invocation of the National Privileges or Immunities Clause and the right to travel and relocate. The fourth aspect of the right to travel is the right to leave a state, even a state of birth or long residence, and to take with one elsewhere the benefits won in that state, without hindrance or penalty.

Colgate v. Harvey begins as a petition in the Vermont courts for relief from the alleged unconstitutionality of the state’s 1931 Income and Franchise Tax Law. The tax statute imposed separately computed taxes on “business” (Class A) and “intangible” (Class B) income. The taxpayer had lost money in business, but he stood to pay “a large sum on account of Class B income, which came very largely from dividends on foreign corporations doing little or no business in this state.” He attacked the tax as violating the federal Constitution, citing the Interstate Commerce Clause, the Privileges and Immunities Clause of Article IV, Section 1 and the Fourteenth Amendment. The Vermont Supreme Court rejected the petitioner’s claims and sustained the tax, citing the broad discretion for choosing and classifying items of taxation and exemption that have been accorded to legislatures by both the highest
courts of the states and the United States Supreme Court. On appeal, the decision of the state supreme court was generally upheld, but a majority of the Court fixed on a single aspect of the case, which had not been clearly decided below. Under the Vermont statute, Class B income included corporate dividends and interest, but excluded interest income from in-state loans at no more than five percent or dividends from Vermont corporations.

As a result the tax on Class B income was struck down. Justice Sutherland suggests, without holding, that the tax would fail even under an Equal Protection attack. A greater likelihood of local investment or the legislature's aiming at "some unnamed public interest" does not provide a rational basis. In the end, however, he prefers (perhaps because he is not comfortable with his Equal Protection Clause argument) to put the case on the National Privileges or Immunities Clause. The second sentence of the Fourteenth Amendment, completes the paramount position of national citizenship established by the first sentence of the Amendment and thus, fills a gap left by the earlier Privileges and Immunities Clause of Article IV, Section 2 by protecting the national rights of one already a citizen of the offending state.

Having laid down the major, Justice Sutherland then supplies, as minor, that the right to travel in any state is a national privilege, and that right includes the right to do or engage in business in any state. He concluded that the Vermont tax on interest from out-of-state loans must

483. See Colgate v. Harvey, 175 A. 352, 353-54 (Vt. 1934). The Court insists a tax will not be disturbed without "a flagrant and palpable inequality between the burden imposed and the benefit received" and the unquestioned right to tax the income from intangibles owned by a Vermont resident, even though from out-of-state sources, carefully citing Justice Sutherland in First National Bank of Boston v. Maine, 284 U.S. 312 (1932), expressly in light of the Supreme Court's then current "zeal to avoid the evils of multiple taxation." Colgate, 175 A. at 353-54, 356. First National Bank of Boston, of course, had then just recently completed the Cases Allocating Intangibles.

484. See Colgate, 296 U.S. at 436.

485. See id. First, a tax on net income attributable to the state does not burden interstate commerce. See id. at 422. Second, the classification that distinguishes between dividends from in-state and out-of-state corporations (which themselves pay franchise and property taxes) is justified, as is the varying availability of a personal exemption. See id. at 422-23.

486. Justice Sutherland wrote the opinion, and he was joined by Chief Justice Hughes and Justices VanDevanter, McReynolds, Butler and Roberts.


488. Justice Sutherland is clear in his own mind: The interest income classification, he complains, does not even require the locally lent money to be invested in-state. In the latter case, perhaps it could be argued that such investments increased "the actual wealth of the state"; but in the absence of such a provision, there is no rational basis for the distinction. See id. at 424.

489. See id. at 426.

490. See U.S. CONST. amend. XIV.

fall, because its being linked to a more favorable rate on loans made in-state had “the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship.”

Justice Stone, joined by Justices Brandeis and Cardozo, dissents from this last point; he would, as had the Vermont Supreme Court, uphold the entire tax. He insists that creation of the exemption for in-state lending has a rational basis under existing Equal Protection Clause precedents. And he thunders against the invocation of the National Privileges or Immunities Clause. He characterizes the Clause as “almost forgotten” and otiose. He lists, in a single footnote, forty-four unsuccessful attempts to insist that state statutes have abridged those privileges or immunities; in all those cases, “[u]ntil today none has held that state legislation infringed that clause.” And well that they did.

If its restraint upon state action were extended... it would enlarge judicial control of state action and multiply restrictions upon it to an extent... sufficient to cause serious apprehension for the rightful independence of local government. That was the issue fought out in the Slaughter House Cases...

Justice Stone's dissent in Colgate v. Harvey turned out to have a substantial impact upon at least the language of the Supreme Court for the next two generations. His footnote was to reappear, not only in Madden v. Kentucky, which, four years later, was to overrule Colgate,
but in his refusal to go along with the invocation of the National
Privileges or Immunities Clause in the context of First Amendment
rights in \textit{Hague v. Committee For Industrial Organization}.\textsuperscript{499} It is clear
that, to Justice Stone as to Fred Rodell, Justice Miller was a hero in the
struggle to restrain judicial activism.\textsuperscript{500}

\section*{D. Founder-State Trusts}

I do not defend the particular holding of \textit{Colgate v. Harvey}. Neither
Justice Sutherland's disingenuous refusal to find a rational basis for the
exemption of "money loaned within this State" (while having no trouble
at all in justifying the exemption for dividends from in-state
corporations)\textsuperscript{500} nor Justice Stone's elaborate deference to the Vermont
legislature, nor his statement that a state was free "[to] favor domestic
interests by granting exemptions in the exercise of its taxing power,"\textsuperscript{500}
comport with the complexities of the Court's current attitude to taxes
that discriminate between in-state and out-of-state taxables. Despite the
approval of Justice Stone's dissent by the majority in \textit{Madden}, which
permitted a state tax imposing very different tax rates on a depositor's
deposits in in-state in out-of-state banks, it is not at all clear whether
either tax would survive today under a reinvigorated Equal Protection
Clause\textsuperscript{500} and the increasingly close scrutiny of the argument, under the

\begin{itemize}
\item \textit{purposes to charitable contributions made to local charities}. \textit{See id. at 92, n.17-20. Colgate is}
\textit{expressly overruled "as repugnant to the line of reasoning adopted here." Id. at 93.}
\item \textit{499. 307 U.S. 496, 520-21 n.1 (1939).}
\item \textit{500. \textit{See supra note 429. When Justice Stone admitted that, for him, there was a continuing
role for judicial intervention, it was to the Due Process Clause he turned in the footnote reservation.
See United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). "There is little doubt that the
Colgate decision and the danger it created for state regulation of business inspired Justice Stone's
narrow interpretation of the privileges or immunities clause even where political liberties were at
stake . . . ." TRIBE Second, supra note 434, at 557 (omitted in parallel passages in TRIBE Third). The
path from there to Justice Black's dissent in \textit{Adamson v. California}, 332 U.S. 46, 71 (1947) (arguing
that the National Privileges or Immunities Clause had imposed the first eight Amendments as
binding on the states), and the academic response to that effort, Charles Fairman, \textit{Does the
Fourteenth Amendment Incorporate the Bill of Rights?}, 2 STAN. L. REV. 5 (1949) and RAOUl
BERGER, \textit{GOVERNMENT BY JUDICIARY} (1977), led in turn to books by Michael Kent Curtis, Charles
L. Black and Akhil Reed Amar and the potential "revival" of the Clause as the intended bearer of
the Bill of Rights as fixed, judicially, on the states.}
\item \textit{501. Justice Stone says, "the considerations which have led to upholding the one exemption
would not admit of condemning the other." Colgate v. Harvey, 296 U.S. 404, 437 (1935).}
\item \textit{502. Id. at 439. Justice Stone strangely defends state support for local economic activity by a
comparison to national trade barriers, "a Constitution that has known a protective tariff for more
than one hundred years." Id.}
Ward}, 38 STAN. L. REV. 1 (1985).}
\end{itemize}
Interstate Commerce Clause, that such taxes, although discriminatory on their face, can be justified only if the can be shown to be "compensatory" in nature.\footnote{504. See Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996) (seems to be almost on all-fours with both Colgate and Madden, and to be inconsistent in result with the latter).}

Instead, what I wish to take from Colgate, read in the light of Shapiro v. Thompson and Saenz v. Roe, is precisely a vision of the individual's mobility throughout all of the states, while assigning value to citizenship in that state in which he elects to reside. How that vision of mobility and loyalty is to be accommodated, is far from having been worked out in those two cases,\footnote{505. We need only to think of Justice Stevens' questionable distinction in respect of state benefits between those that are "portable" and those that are not as justifying continuing state barriers to in-state college tuition or state jurisdiction over divorce proceedings.} which deal only with the narrow issue of denying states' desires to avoid incentives to indigent immigration.

The "privileges and immunities" of the original Constitution dealt with the obvious problems that attended the visiting trader, and the "privileges or immunities" of the Reconstruction Congress perfected Article Four, Section 2 by including anything that it had failed to include.\footnote{506. "At this point, the majority's analysis became a bit wobbly, exposing a gap in its argument." Saenz Sans Prophecy, supra note 475, at 129-34.} It has been argued that both clauses are implicit in the "split atom"\footnote{507. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Reconstruction was also the era when, after many Americans had been torn between the two loyalties—to state and to nation—the triumphant national government insisted that the Union was, as Chief Justice Chase said in Texas v. White, "an indestructible Union, composed of indestructible States." 74 U.S. (7 Wall.) 700, 725 (1868).} of American federalism. In any case, the right to travel, without explicit anchor in the Constitution, has taken on a life and shape. That shape requires that one is to be protected against one's own state as well as those one does not claim.\footnote{508. This is what Professor Tribe means when he says that, in Saenz, "the right of an individual to migrate to any state that she chooses and make that state her home fits into [the] overall design . . . by providing a measure of political accountability to the citizens of those states." Saenz Sans Prophecy, supra note 475, at 156.} One state's resentment at your relations with other states, is proscribed and, as with the hospitality of the newly chosen state, the state that is left is required to provide an even-handed approval.

One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment . . . was to bridge the gap left by [Article IV, Section 2] so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality
of treatment in respect of the exercise of their privileges of national citizenship in other states . . . When [a citizen] trades, buys, or sells, contracts or negotiates across the state line, when he loans money or takes out insurance in New Hampshire, whether in doing so he remains in Vermont or not, he exercises rights of national citizenship which the law of neither state can abridge . . . .

This protection is, in the final analysis, not based on the Interstate Commerce Clause after Saenz, but on national citizenship, the right to travel and National Privileges or Immunities Clause of the Fourteenth Amendment. Thus the question of whether the requirement of avoiding discrimination or burdening of those who have moved, personally, from one state to another, is applicable in such noncommercial contexts, is not relevant. At least as high a standard of protection is or ought to be available under the Fourteenth Amendment.

The “nondomiciliary resident” has led a magic life without serious constitutional interrogation. It is now widely adopted among the states as a basis for global, as opposed to source-based, taxation. The statutory language is designed, precisely, to capture those people whose relation to the state is marginal, and stubbornly refuses to fall within the old pigeon-holes. The provision even carries with it a tradition of aggressive enforcement. And yet, when once someone has been identified as a resident, no consideration is given to the marginal nature of the residency. This is wrong. Surely, some form of apportionment is appropriate. These are, today, not going to be the Dorrances, Fricks and Howard Hughes of this world, nor are they primarily tax evaders (and there is no question in my mind that the nondomiciliary resident was invented as a proxy for rich, but evasive quarries).

510. See, e.g., Saenz Sans Prophecy, supra note 475, at 153-58. The current Court “has become committed to the elaboration of a system with sovereign, self-governing states at its heart.” Id. at 156. On constitutional structure as part of constitutional analysis, see AMAR, supra note 473, where structure provides an archaeologist’s clue to the full meaning of the Bill of Rights; Lawrence Lessig, Fidelity In Translation, 71 Tex. L. Rev. 1165 (1993); Steven G. Calabresi, We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment, 87 Geo. L.J. 2273 (1999) (reviewing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)) (it is structure that provides the source of Amar’s most enlightening arguments).
511. See supra note 152 and accompanying text.
512. For example, in counting the days of presence within the state, only a few minutes’ presence is needed to charge a whole day’s presence; leaving later than midnight makes the night at the theater count for two days.
513. See discussion supra Part II.D.
514. See supra note 165 and accompanying text.
nondomiciliary residents are commuters—long and short-range, stay-at-home workers in e-commerce, and snowbirds. The decent application of rules should require greater care than in the past. Perhaps the incidence of tax should not depend on whether the tax credit mechanisms of the commuter’s non-New York home impose direct double taxation, as in the case of the Connecticut statute, or express the patient submission in the New Jersey tax credit provisions. Nor should it depend on the lucky chance that snowbirds can claim a state that attracts new residents by refusing to have an income tax, as do Florida and Nevada.

The same response is appropriate in the guerrilla warfare between Connecticut and New York that is holding Professor Zelinsky hostage. His claims, too, demand a more “welcoming” attention from both states, to be paid to his unusual and potentially unduly costly situation. The bite of the state “double taxation” that is inconsistent with national citizenship is that it becomes due solely by reason of the several states’ indifference to the taxpayer’s reasons for assigning residential and work places in different states.

What is the apportionment solution? That is much more difficult to say, and within the self-imposed scope of this Article, perhaps impossible. Perhaps it is time to demand of Daniel Webster that he deliver on his assurance, so glibly and fruitlessly proposed nearly two centuries ago, to assure that every state apportion their taxes appropriately. It is up to the states to suggest ways to limit taxation to the income that, in light of the contesting claims, can be said to “belong” to it; certainly, allocation is more likely to be the correct solution than apportionment. It is a territorial question, because states are territorial but the commitment of the states of the Union is that they will make the effort to make sure that neither state makes a demand

515. See supra notes 160-163 and accompanying text.
516. Both Connecticut and New Jersey long accommodated New York’s aggressive tax policies by refusing to enact income tax statutes, until the inadequacy of the local real property tax to fiscal realities became too clear to ignore. The history of the adoption of the income tax in each state is an interesting reflection of the forces that shape fiscal policy.
517. See supra notes 167-71 and accompanying text.
518. Justice Stevens speaks of the transient’s “right to be treated as a welcome visitor rather than an unfriendly alien.” Saenz v. Roe, 526 U.S. 489, 500 (1999). By transposition, the expatriate should be welcomed by each state.
519. See supra text accompanying note 165.
520. See generally D.J. Farage, Multiple Domcils and Multiple Inheritance Taxes—A Possible Solution, 9 GEO. WASH. L. REV. 375 (1941) (efforts, not always persuasive, to find a fair basis for allocating inheritance taxes to states having different relations to the decedent).
that the totality of the facts will not sustain. Of course, to adopt one of the commonplaces of tax law, absolute equality is not to be hoped for. Different states have different levels of fiscal demand, and there is scope for legislative choice in deciding who is, as a matter of public policy, to bear a larger or smaller share of the fiscal burden. Even where there are roughly similar levels of taxation and roughly similar taxing policies, the complexities of modern economic life and the fine-meshed net of taxes that is thrown over that life, make it impossible to assure, in every case, the same tax experience, or no worse, for every one that is, in some sense, similarly situated.

And, last of all, the Founder-State Trusts, the puzzling term, and more puzzling choices to which it refers, that began this exercise and impelled me to learn more about taxes, our restless federalism and the dual citizenship we bear so easily. The Founder-State Trust concept is like a “Pelagian wall” in an otherwise contemporary edifice; it can be dismissed as a curiosity, but if we do so, we lose sight of much understanding. But if we pause long enough, we can see how the original authors of New York’s early income tax perceived the linkage to the trust, as entity, through the probate courts. What was originally, perhaps, a useful proxy for in-state presence, however, over time became a perpetual claim over assets that could outlive every other, more functional connection to the taxing state.

There is really no justification to the Founder-State Trust model of taxation: the asserted contact of a potentially available forum in the local probate court is too tenuous to justify the significant result of full tax liability (subject to rules relating to trust distribution of income to beneficiaries). Invocation of this concept in the case of an inter vivos trust seems totally indefensible. And the claim that jurisdiction based on the settlor’s death as a resident is a perpetual and unchanging commitment to that state is insupportable. Yet counsel for the New York State taxing authorities were not ashamed to insist on the fixedness, the

522. The Pelagian Wall is a part of the Parthenon structure in Athens, “crudely hewn blocks of limestone” that form part of the abutment of that famous structure, and are the remains of a Mycenaean citadel on the Acropolis. The classic Greeks, perceiving the strangeness of these ancient structures when they found them, called such dressed stone structures “cyclopean” and were content to dismiss them as useful relics, to be used as foundations or other inconspicuous parts of the works in which they appeared and not calling for further investigation. For the modern historian, of course, the ancient stone-work points the way to a whole different culture, and its history. See, e.g., FRIEDRICH MATZ, THE ART OF CRETE AND EARLY GREECE 13 (1962).

perpetuity of trust taxability based on the original domicile of the decedent under whose will the testimonial trust was established.\textsuperscript{524}

I was originally impressed by the baneful symbolism of the unyielding hold that assertion of a Founder's Trust domicile is intended to imply. I must admit that all the images of some tyrant of a jealous native land that is not willing to permit individuals to leave as they wish, without payment of a forfeit, a Founder's Forfeit, if you will, is difficult to eradicate. History gives too many examples, from Pharaoh hardening his heart against the cries of the Jews who wished only to leave, to the refuseniks and the Berlin Wall of our own history. Nor is it credible that that motive does not play some role in legislative thinking. It seems very likely that the probate court contact was fixed on, in part, because the probate court, with its public records, gave easy access to the creation of every testamentary trust.\textsuperscript{525} Probate courts long functioned as sporadic traps for the unwary in the long, evasion marked history of the property taxation of intangible property. In any event, this relic deserves to be put at rest; and taxable events that are more attuned to the current status of trusts, from time to time should be selected and employed.\textsuperscript{526} The Founder-State Trust is inconsistent with the relations of states of the American Union and with the reality, and realistic expectations, of the citizens of each state. Of course, in my home state, New York, the pure Founder-State Trust doctrine has long been abandoned, and the choices and problems inherent in the "New York brew" are different.\textsuperscript{527}

\textsuperscript{524} See supra note 136 and accompanying text.
\textsuperscript{525} See supra Part II.C.2.
\textsuperscript{526} In the selection of new taxable contacts as more appropriate than the Founder-State Trust model, states may well consider what they will or can do about tax havens. The very evasion of evasion that still partly justifies the Founder-State model argues for this. Perhaps more direct steps could be taken to prevent tax-haven shopping for tax-free trustees. That possibility suggests, as does a reasonable concern about putting local trustees at a disadvantage, that other, less manipulable contacts should be given consideration. The domicile of possible or actual beneficiaries, present or future, offer one area that should be explored; contacts of that nature, if not productive of much likelihood of multiple taxation, would make sense. But, given the reality that trusts are almost always taxable only on their undistributed income, the beneficiaries in question may not be identifiable. In turn, any proxy for such unidentified or even unborn beneficiaries would be extremely conventional in nature, perhaps once more a retreat the Founder-State Trust or to some other factor that raises the possibility of multiple state claims and double taxation.

\textsuperscript{527} See supra Part II.C.4. Given the New York brew, if New York law has a constitutional infirmity, it is not so much that it may violate the National Privileges or Immunities Clause, as that it may offend the Equal Protection Clause. It subjects to full global income tax an arbitrary selection of New York trustee trust. As such, it allows New York trustees to seek out-of-state business on the representation that trusts established with New York trustees will not be subject to New York State income tax, while they can tell New York residents that their trusts will be no worse off than are the settlors themselves. The existing New York State regulations are trustee friendly, but in an arbitrary way. The rule can easily subject two trusts, which differ only in the state of residence of
the settlor, to very different New York tax results. The Equal Protection Clause question, of course, is whether there is a rational basis for this expression of an implicit policy choice to forego some tax revenue in return for improving the competitiveness of New York trustees. It is clear that the increasing success of states that are aggressively wooing New Yorkers to establish non-New York trusts will soon make the New York legislature reconsider the definition of resident and nonresident trusts for income tax purposes. The legislature will be under pressure to protect local trustees from their present disadvantages vis-à-vis states the promise to exempt locally organized trusts from income tax liability. See Gibbs & Carew, supra note 121 (arguing for tax relief to stem the outflow of New York trusts); Matter of Margaret Hitchcock, (Nassau Surr. 1999), N.Y.L.J., Sept. 7, 1999, at 34, (Surrogate Radigan sends copy of his opinion permitting the transfer of twelve New York trusts out-of-state for tax reasons to New York legislature). The legislature should consider its options carefully.
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