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In this report, Ben Carmel examines the basis for recasting nondomiciliaries as domiciliaries and looks at the foundational truth that for state income tax purposes, "resident" and "domiciliary" are synonymous.

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> "A phrase may be denoting, and yet not denote anything."
>
> - Bertrand Russell

## I. Executive Summary

The dominant issue in state income taxation of nondomiciliaries is the states' recasting of these taxpayers as domiciliaries. By virtue of that recasting, states allege that they are justified in taxing the nondomiciliaries' entire income from whatever source derived. And in concealing that these are nondomiciliaries, the states euphemistically label the nondomiciliaries as "statutory residents."

This report reaches past that euphemism to examine the basis for this recasting. We begin with the foundational truth that for state income tax purposes, "resident" and "domiciliary" are synonymous. Those terms were used interchangeably by early 20th century architects of state income taxes, by leading academics commenting on new and early-stage state income taxes, and, to this day, by the U.S. Supreme Court.

In 1922 New York suspected "faking" by multimillionaires domiciled in the state who treated themselves as nonresidents. But the state's legislative response missed the mark: Instead of targeting the fakers, the new law inappropriately recast and taxed nondomiciliaries as domiciliaries. Significantly, while New York's approach to taxing nondomiciliaries unjustifiably departed from state income tax principles, its utility for deriving revenue from nonvoters was undeniable. Other states' legislatures took note and, as of this writing, 40 states use 24 different methods for such recasting.

None of those 24 methods focus on whether the nondomiciliaries have an in-state footprint equivalent to that of state domiciliaries. In sharp contrast, for more than 200 years the U.S. Supreme Court has treated access to state services and resources as essential to taxation. The Court has labeled as "extortion" marked inequivalencies between the taxes imposed on nonresidents and the state services available to those nonresidents.

For taxpayers, the lesson is clear: Nondomiciliaries challenging being taxed as domiciliaries should expand their challenges to reference the history and principles analyzed below.



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## II. Introduction

Nobel laureate Bertrand Russell taught that a phrase may denote something with as much precision as anyone could want, yet still be describing or labeling something that does not exist.[1] For example, one could denote "the present King of the United States," even though there is no such person. And one could denote "the jewel-laden 24-carat-gold crown of the Queen of Iowa," even though no such crown or person exists. State laws can do the same. And while we might think we know exactly what the laws mean, these laws could in fact denote something nonexistent.

This report confronts such an issue by tracing the history of the widespread and wrong practice of denoting/recasting nondomiciliaries of a state as if they were domiciliaries of that state for personal income tax purposes. Under state laws in effect now for more than a century, the recasting of nondomiciliaries is unjustified. What is more, the recasting of nondomiciliaries as practiced by the states violates numerous provisions of the U.S. Constitution. (To avoid confusion, we shall identify here — without in any way endorsing — a euphemism that has become commonplace among practitioners when referencing nondomiciliaries whom states treat as domiciliaries for income tax purposes. This offending phrase is used to conceal that these people are nondomiciliaries and should be taxed as nondomiciliaries. The phrase, which will not be used again in this report, is "statutory resident.")

Tracing the history of this income tax practice reveals when and where the taxation of nondomiciliaries went wrong. In so doing, the analysis below expands and deepens the arguments available to nondomiciliaries objecting to being reclassified and taxed as domiciliaries.

This is important because, in case after case, commerce clause[2] internal consistency issues have been argued in depth, though unsuccessfully. And in 2019 the U.S. Supreme Court declined to grant certiorari in two New York cases involving internal consistency and whether state recasting of nondomiciliaries involves interstate commerce.[3] In still other cases, arguments under the due process clause of the 14th Amendment and other provisions of the Constitution have been raised and rejected. Furthermore, the reclassification of nondomiciliaries has been criticized in innumerable practitioner speeches and in article after article. But at the end of the day, improper[4] recasting of nondomiciliaries remains the law in states nationwide.

It is within this landscape that practitioners and policymakers must return to first principles.

## III. Historical Background Through 1910

We shall start at the beginning: When Adam was placed in the garden of Eden, he became mankind's first domiciliary. Adam was domiciled in the garden because he lived in the garden and had no intention to move from there. As far as he was concerned, the garden was his permanent home. The same was true of Eve. Unfortunately, their time in the garden before being banished was brief — as short as one day.[5]

Adam and Eve's circumstances are relevant here, as every state that imposes a personal income tax treats in-state domiciliaries as residents for purposes of that tax. Moreover, classification as a domiciliary is devoid of any durational requirement. As domiciliaries of the garden, Adam and Eve were subject to the garden's income tax on all their income for that one day. (Certainly, as a matter of proof, the duration of in-state contacts is significant for

[1] Bertrand Russell, "On Denoting," 14 *Mind* 4, 479-493 (Oct. 1905).

[2] U.S. Const. Art. I, section 8, cl. 3.

[3] *Chamberlain v. New York State Department of Taxation and Finance*, 166 A.D.3d 1112 (N.Y. App. Div. 2018), *leave to app. denied*, 128 N.E.3d 627, *cert. denied*, 140 S. Ct. 133 (2019); and *Edelman v. New York State Department of Taxation and Finance*, 162 A.D.3d 574 (N.Y. App. Div. 2018), *leave to app. denied*, 122 N.E.3d 557, *cert. denied*, 140 S. Ct. 134 (2019).

[4] The adverb "improper" is important. There was *and is* a proper way of recasting nondomiciliaries. This approach was recommended to a state legislature in 1922, but it was not adopted. This is addressed below.

[5] Talmud Bavli Sanhedrin 38b. The Talmud has been a component of the Constitution's history since the Constitutional Convention's ratification debates. In 1788 Benjamin Franklin cited the Talmud in his widely distributed commentary "K" on the "proposed Federal Constitution." K was first published as a letter to the editor of the Philadelphia *Federal Gazette* and was repeatedly republished in newspapers serving other locations. For an in-depth treatment of the intersection between the U.S. Constitution, the Talmud, and Franklin, see Daniel D. Slate, "Franklin's Talmud: Hebraic Republicanism in the Constitutional Convention and the Debate Over Ratification, 1787-1788," 1 *J. Am. Const. Hist.* 232 (2023).

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questions of domicile.[6] Therefore, any tax adviser for Adam and Eve — protecting against a possible attempt by the garden tax authority to classify them as domiciliaries — would prefer that their stay in the garden was merely one day rather than many years.)

In contrast, if Adam and Eve were not domiciled in the garden, no state's law would treat them as nondomiciliary residents based only on one day of presence in the jurisdiction.

Fast forward to the British colonies in the new world and, eventually, to the 18th and 19th centuries in the United States. Throughout these years, colonies and states failed in their attempts to impose personal income taxes. In *Democracy in America*, Alexis de Tocqueville matter-of-factly described how tax collection worked (or, more precisely, did not work) in 1830s America:

> In New England, the assessor fixes the rate of taxes; the collector receives them; the town-treasurer transmits the amount to the public treasury; and the disputes which may arise are brought before the ordinary courts of justice. This method of collecting taxes is slow as well as inconvenient, and it would prove a perpetual hindrance to a Government whose pecuniary demands were large.[7]

The leading study on colonial and 18th and 19th century state income taxation was, and might still be, the 1900 doctoral thesis submitted by Delos O. Kinsman, "The Income Tax in the Commonwealths of the United States."[8] That thesis offered the following frank assessment of U.S. state and local income taxation through 1900: "The experience of the states with the income tax warrants the conclusion that the tax, as employed by them, has been unquestionably a failure. It has satisfied neither the demands of justice nor the need for revenue."[9]

## IV. In 1911 Wisconsin Ushered in a New Era of Personal Income Taxation

In a 1910 trust tax case, the Wisconsin Supreme Court equated "resident" and "domicile." In that case, the court treated "resident decedent" and "domicile of the decedent" as relating to the same person and jurisdiction, without needing to define either term.[10]

In *Bullen*, the Wisconsin court addressed the question:

> Can the state of Wisconsin tax a contract made by one of its residents when in a foreign state, whereby he transfers property which is then in the foreign state, and which never has been in the state of Wisconsin, even though constructively the transfer was intended to take effect in possession or enjoyment at or after the death of the transferor?[11]

The relevant tax applied "when the transfer is of property made by a resident or by a nonresident when such nonresident's property is within [Wisconsin].[12] The state supreme court explained that:

> This statute was borrowed from New York. . . . Prior to its adoption here, the statute received judicial construction in New York, and it was held that in respect to personal property not within the state at the time of the resident decedent's death the court will apply the maxim, "Mobilia

[6] The present accepted spelling of "domicile" is as just shown. However, before about 1950 it was also spelled "domicil." Therefore, when this article directly quotes from a source, that source's spelling is adopted. Otherwise, we use the spelling now accepted.

[7] Alexis de Tocqueville, *Democracy in America*, Ch. V, subsection "Political Effects of the System of Local Administration in the United States" (1835).

[8] Delos O. Kinsman, "The Income Tax in the Commonwealths of the United States," 4(4) *Publ'ns Am. Econ. Ass'n* 1-128 (1903).

[9] *Id.* at 116; *see also* Kossuth Kent Kennan, "The Wisconsin Income Tax," 58 *Annals Am. Acad. Pol. & Soc. Sci.* 65 (1915) (before 1912, "the history of state income taxes in this country failed to disclose a single instance in which the tax had been successful as a revenue producer or had justified itself as a practical or desirable method of taxation."); *see also* "Genesis of Wisconsin's Income Tax Law: An Interview With D.O. Kinsman," 21(1) *Wis. Mag. Hist.* 3-15 (Sept. 1937) ("failure upon failure had marked all previous attempts of the sixteen states that endeavored to tax incomes since 1643, when Massachusetts began the movement. So complete and so dismal were these failures that the highest authorities on taxation were agreed and had repeatedly declared that a successful state income tax could not be framed.").

[10] *State v. Bullen*, 128 N.W. 109 (Wis. 1910).

[11] *Id.* at 518.

[12] *Id.* at 519.

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> sequuntur personam." The effect of this rule is to make the legal situs of the property at the domicile of the decedent.[13]

The court adopted this approach, holding that the property had situs in Wisconsin and its transfer was subject to Wisconsin tax.[14]

Months later, in 1911, Wisconsin's Legislature enacted the state's income tax.[15] Realistically, there was every reason to expect that the new tax would fail.[16] But it succeeded, and its success introduced a new era in U.S. state and local personal income taxation.

In general, Wisconsin's personal income tax subjected residents (domiciliaries) and nonresidents (nondomiciliaries) to fundamentally different methods for determining taxable income. Thus, domiciliaries were taxed on all their income, but nondomiciliaries were taxed on only so much of their income as was sourced to Wisconsin.[17]

Significantly, while the terms "resident," "residing," and "nonresident" were used throughout Wisconsin's new income tax law, the law did not define any of those terms. Also significant was that the terms "resident" and "resides" were used in three different contexts within a single section of the act creating the new income tax.[18] Under these circumstances, these terms had a consistent meaning throughout the new law.

Why weren't these terms defined in Wisconsin's new law? In a 25th anniversary retrospective on the law, Kinsman, the thought-leader and principal drafter of Wisconsin's income tax, explained:

> To provide Wisconsin an effective law many possibilities were studied and rationally tested. It was first concluded that the Wisconsin act should be carefully organized, clearly drawn, and technical terms used with the greatest exactness. The "persons" subject to the tax were definitely described as was the composition of gross income; the exact items to be deducted to determine net; the specific individual exemptions and so on.[19]

And why was "persons" defined but not "resident," "residing," and "nonresident"? Because, while "persons" had a technical meaning specific to the income tax ("any individual, firm, copartnership, and every corporation, joint stock company or association"[20]), "resident," "reside," and "nonresident" had nontechnical meanings.

## V. Domicile and Residence for Tax Purposes in The Early 20th Century

Wisconsin's income tax was not unique among the states in its use of terms. Indeed, the use of the term "residence" as a synonym for "domicile" occurred throughout 20th century American law. But as our concern here is with taxes, we discuss below tax-focused articles written contemporaneously with the development and early-stage maturing of the domiciliary/nondomiciliary issue in the world of state and local personal income taxation.

[13] *Id.* at 520 (internal citations omitted).

[14] No doubt, it would have been more convenient for us if the court had said that "resident is synonymous with domiciliary" or "residence is synonymous with domicile." But the court was deciding a case for which it needed to communicate that the phrases "resident decedent" and "domicile of the decedent" relate to the same person and jurisdiction. It succeeded in that task.

[15] 1911 Wis. Sess. Laws 984, ch. 658. Similar referencing appears in the opinions of the U.S. Supreme Court.

[16] *See, e.g.*, Kinsman, *supra* note 8.

[17] The success of Wisconsin's new law is credited to other innovations, as well. Often noted is that the new tax was administered by a state-level tax commission (unlike the New England method described by Tocqueville), even though 90 percent of the taxes collected were distributed to the county and the city, town, or village in which the tax was assessed. Administration at the state level increased taxpayer confidence that the tax would be administered fairly, and thus increased taxpayer compliance. These points and others are addressed by Kennan in "The Wisconsin Income Tax Law," 26(1) *Q.J. Econ.* 169-178 (Nov. 1911). Moreover, as is discussed below, this component of Wisconsin's income tax helps to explain why Wisconsin was not the leader in expanding the definition of resident to include nondomiciliaries.

[18] *See* 1911 Wis. Sess. Laws 984, ch. 658, section 1, using the terms to describe the two categories of state and local personal income taxpayers ("by every person residing within the state and by every nonresident of the state," new law section 1087m-2.3); to describe the filing obligations of trustees, guardians, and executors ("shall make and render to the assessor of incomes of the district in which such representative resides," new law section 1087m-10); and to identify who shall be on a county board of review ("The state tax commission shall appoint three resident tax payers of each county to serve as a county board of review," new law section 1087-14).

[19] "Genesis of Wisconsin's Income Tax Law," *supra* note 9, at 6.

[20] 1911 Wis. Sess. Laws 984, section 1087m-2.1.

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### A. 1911 Through the 1930s: For State Income Tax Purposes, Residence Means Domicile

In 1918 the *Iowa Law Bulletin* published professor Joseph H. Beale's article "Residence and Domicil."[21] The article opens with an observation that "residence" and "domicile" can and should have the same meaning:

> The word residence has often been used in statutes of various sorts, and its identity with or difference from domicil has been brought in question. There is no reason, so far as the meaning of the term goes, why the words should be differentiated.

Furthermore, Beale cautioned that for tax purposes, any definition of residence must ensure that: (1) everyone bears a fair portion of the tax burden; and (2) each person has only one residence. "Hence," he wrote:

> it is the universal rule, in construing revenue statutes, that, as a man must have a domicil or taxing residence somewhere, his old residence will be deemed his present one until a new one is acquired. If this were not the rule, a man might escape taxation altogether. It is therefore very generally agreed that the words "resident" or "inhabitant," in statutes referring to taxation, are synonymous with the legal term domicil; and that a man must pay his taxes as a "resident" at his place of domicil, although he has in fact left that place intending never to return, until he acquires a legal domicil elsewhere.[22]

Beale concluded his discussion of tax residence by unambiguously rejecting a distinction that would treat an individual as being domiciled in one jurisdiction while being treated as a resident and taxed in another jurisdiction:

> A few cases which appear to distinguish between domicil and residence for purposes of taxation, so that one may, for instance, be legally domiciled and vote in one place while he is held liable as an actual resident to pay his taxes in another, may be regarded as sporadic, and based upon a misconception.[23]

Several years later, a *Yale Law Journal* article by Edwin Kessler Jr. analyzed problems in state personal income taxation, including "Who are 'Residents.'"[24] The residency analysis all but repeats Beale's 1918 conclusion:

> Eminent authorities have said that if a person intends to remain where he is for some days, but not indefinitely, that place is his "residence"; his "domicile" is where he has his home and where he intends to live permanently or for an indefinite period, though he may be temporarily absent. But in this field "residence" is so generally used in the sense of "domicile" that I here use it in that sense without apology or shame.[25]

After touching upon nontax and 19th century cases addressing domicile and residence, Kessler reiterates that for state income tax purposes, residence means domicile:

> Suppose states Y and Z claim X as a *resident* and both states tax his entire net income. We have seen that a person may have only one *domicile* and that only the state of his domicile may tax income earned elsewhere. But how shall X seek relief? This question has never, within the writer's knowledge, come before the United States Supreme Court. Yet if the rules of *Shaffer v. Carter* are to be applied, some answer to the question must be found.[26]

Here, again, residence means domicile, and the question raised is, what is to be done when two states claim to be the taxpayer's domicile?

[21] Joseph H. Beale, "Residence and Domicil," 4 *Iowa L. Bull.* 3 (1918). Beale's credentials in legal circles are almost unmatched: He was the first dean of the University of Chicago Law School and was a professor at Harvard Law School before, during, and after his service in Chicago. His renown seems greatest in the realm of conflicts of laws, but, as will be evident within this article, his thoughts about tax domicile/residence are clear sighted, well informed, and merit a presumption that they describe sound state and local tax policy.

[22] *Id.* at 4-5 (footnote omitted).

[23] *Id.* at 6 (footnote omitted).

[24] Edwin Kessler Jr., "Some Legal Problems in State Personal Income Taxation," 34 *Yale L.J.* 759 and 863, 866 (1924-1925) (article published in two parts).

[25] *Id.* at 866-867.

[26] *Id.* at 868 (emphasis added).



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And as for double taxation, states' recasting of nondomiciliaries as domiciliaries has made the problem much worse than Kessler would have thought possible.

For additional insights we again look to Beale — this time, to his 1925 *Harvard Law Review* article, "The Progress of the Law, 1923-1924: Taxation."[27] The article opens with a discussion of tax developments and "Constitutional Limitations on Taxation," with a focus on property tax concepts. Beale then writes:

> Constitutional power to tax the person has not been greatly considered. In the earlier cases it was assumed that jurisdiction to tax a person depended upon the domicil of the person. It is true that in several of these cases the question before the court was the construction of a statutory provision that one should be taxed at one's "residence," or where one was an "inhabitant"; but the decision that the word should be construed to mean not a temporary or seasonal residence, but one having the qualities of a domicil, is in effect a decision that, according to the principles of law, a domicil and not a mere residence is necessary for jurisdiction.[28]

Beale analyzed certain state and federal taxes, and then said:

> The accepted doctrine, as has been said, permits the state of domicil to levy a personal tax. May the state of allegiance, which is not the domicil of a person, also lay a personal tax? . . . A single state can lay a personal tax only upon persons domiciled within it.[29]

Later in that piece, Beale addressed a circumstance in which a taxpayer is domiciled in one state but earns income in another state. He wrote:

> Reason has been given elsewhere for holding that an income tax is a tax on income as constituting property coming into existence during the year and therefore not taxable anywhere at the beginning of the year. If this is the case, the jurisdiction of a state to tax the income must depend either upon the domicil of the person within the state when the income was earned or upon the accrual of the income itself within the state. It would seem to follow that only so much of the income can be taxed as was either received within the state or was received by a person while he was domiciled within the state.[30]

So, there you have it. The matter is resolved.

Except, that is, for the fly in the ointment: New York state's opportunistic recharacterization of nondomiciliaries as domiciliaries. Moreover, this was no mere fly. Rather, it was massively more significant — a bait-and-switch attempt to create the tax equivalent of a perpetual motion machine: taxing nonvoters on all their income. When nonvoters are taxed, they have no voice in how they are taxed or how the government spends their taxes — the heart and soul of taxation without representation. The significance of taxing nonvoters to the states' recasting and taxing nondomiciliaries as domiciliaries is analyzed below.

### B. Why Did Wisconsin Tax Domiciliaries and Nondomiciliaries Differently?

The idea that people domiciled in a community generally receive more government services from that community than nondomiciliaries seems so obvious as to not require any support from studies or legal authorities. For the same reason, there is no serious dispute that domiciliaries should shoulder a greater portion of the cost of their community's services than nondomiciliaries.[31] This topic is

[27] Beale, "The Progress of the Law, 1923-1924: Taxation," 38 *Harv. L. Rev.* 281 (1924-1925).

[28] *Id.* at 283-284 (footnote omitted). Beale was emphasizing that the residency relevant for personal tax purposes is that which is equivalent to domicile.

[29] *Id.* at 285.

[30] *Id.* at 289-290 (footnote omitted). The forms of credit mechanisms were yet to be resolved.

[31] When domiciliaries are absent from a state for an extended period, their consumption of state and local resources is reduced. In these circumstances, states sometimes provide an exemption from tax residency status. *See, e.g.*, 72 Pa. Stat. and Cons. Stat. Ann. section 7301(p) ("'Resident individual' means an individual who is domiciled in this Commonwealth unless he maintains no permanent place of abode in this Commonwealth and does maintain a permanent place of abode elsewhere and spends in the aggregate not more than thirty days of the taxable year in this Commonwealth."); and N.Y. Tax Law section 605(b)(1).



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addressed below in the section discussing the U.S. Supreme Court decisions since the 1800s.

In 1905 the Supreme Court decided *Union Refrigerator*.[32] The opinion in *Union Refrigerator* opens by succinctly stating the constitutional issue and the relevant state statute:

> In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other states, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the 14th Amendment.
>
> Section 4020 of the Kentucky statutes, under which this assessment was made, provides that "all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, . . . shall be subject to taxation, unless the same be exempt from taxation by the Constitution and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."[33]

The opinion's fourth paragraph states a guiding principle that might well be posted at the entrance to every revenue department nationwide:

> The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares — such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature, and a taking of property without due process of law.[34]

That language, directed at a domiciliary state seeking to tax personal property located elsewhere, has even greater import when a nondomiciliary jurisdiction seeks to tax property or income sourced elsewhere.[35]

In *Union Refrigerator*, the Supreme Court included a lengthy quotation from Adam Smith that is highly relevant here:

> The subjects of every State ought to contribute towards the support of the Government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of Government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation.[36]

Significantly, *Union Refrigerator* did not declare that a precise cost-benefit analysis is necessary or even relevant to general taxes. The

[32] *Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 199 U.S. 194 (1905).

[33] *Id.* at 201-202.

[34] *Id.* at 202 (citations omitted).

[35] The Court presciently noted the difference between a domiciliary jurisdiction's inability to tax property located in another jurisdiction and the possibility that the domiciliary jurisdiction would tax income earned from that remote property. *See Union Refrigerator*, 199 U.S. at 204. That observation was ahead of its time, as it would be another six years before Wisconsin enacted its income tax and another eight years before the ratification of the 16th Amendment (authorizing a federal income tax).

[36] *Union Refrigerator*, 199 U.S. at 203 (quoting Smith, "Wealth of Nations," Book V, ch. 2, pt. 2, at 371).



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Court said as much regarding general property taxes:

> But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination [that is, inequalities]. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit.[37]

This statement applies to personal income taxes as well. Nevertheless, it is not an endorsement of improper or careless taxation, nor of the inequities created by a state's taxing nondomiciliaries as if they were domiciliaries.

The drafters of Wisconsin's income tax undoubtedly considered this 1905 case when they wrote the tax law. And in 1911 the Wisconsin Legislature would have known about *Union Refrigerator* when it enacted the state's income tax.

Wisconsin's income tax was created to generate revenue from domiciliaries to pay for the benefits that they receive from the localities in which they live. Therefore, by law, 90 percent of the taxes collected were allocated to the county and town, city, or village of the domiciliary's residence.[38] Moreover, with the tax being administered by a state-level agency,[39] and domicile likewise being determined at the state level,[40] there was little or no incentive for the state to attempt to reclassify nondomiciliaries as domiciliaries. As for nondomiciliaries, they were taxed on their Wisconsin-source income, which, as a general tax, was their payment for the smaller basket of benefits that they received from the localities and state.

In 1912 the Wisconsin Supreme Court considered a long list of challenges to the state's new income tax, including the differing taxation of domiciliaries and nondomiciliaries. In *Bolens*,[41] the court said:

> We come now to certain serious objections which are made to the provisions of sections 1087m-2, 1087m-3, and 1087m-3b. The first of these sections provides, in substance, that a resident shall be taxed upon all of his income arising from rentals, stocks, bonds, securities, or evidences of debt, whether the same be derived from sources within or without the state, but that the nonresident shall only be taxed on income derived from sources within the state. . . . The general purpose of the section is quite evident, namely, to tax a resident upon his whole income, and a nonresident only upon his income plainly derived from sources within the territorial jurisdiction of the state.[42]

The court rejected the challenge as not being ripe, adding that "in any event we are fully satisfied that the rejection of any or all of the provisions objected to in this section cannot reasonably be held to invalidate the whole act."[43]

In a 1913 article, a member of Wisconsin's Tax Commission who was also an economics professor at the University of Wisconsin explained that:

> The Wisconsin income tax originated in an effort to find an equitable and efficient method of personal taxation. . . . The property of many persons of wealth is situated in jurisdictions other than that in which they reside. These people, it was thought, owe some fiscal allegiance to the jurisdiction in which their persons are

[37] *Id.* at 203.

[38] 1911 Wis. Sess. Laws 984, ch. 658, section 1, new law section 1087m-23.

[39] 1911 Wis. Sess. Laws 984, ch. 658, section 1, new law sections 1087m-8, -9, and -10.

[40] 1911 Wis. Sess. Laws 984, ch. 658, section 1, new law section 1087m-2.3.

[41] *State ex rel. Bolens v. Frear*, 134 N.W. 673 (Wis. 1914).

[42] *Id.* at 516.

[43] *Id.* at 517.



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> protected and their children are educated. . . . The Wisconsin law is applicable to persons living in Wisconsin, to business transacted there and to income derived from property in the state.[44]

Step by step, the idea of taxing the entire income of in-state domiciliaries was gaining acceptance. That concept became ingrained in personal income tax policy no later than 1919, when the National Tax Association circulated a draft plan for a model system of state and local taxation. The NTA explained:

> Section 6. Study of the tax laws of the American states reveals the fact that there are three fundamental principles which have been more or less clearly recognized by our lawmakers, and have very largely determined the provisions of the enactments now standing on the statute books. The first is the principle that every person having taxable ability should pay some sort of a direct personal tax to the government under which he is domiciled and from which he receives the personal benefits that government confers. . . . State income tax laws usually proceed upon a similar principle.[45]

One can draw a more-or-less straight line from *Union Refrigerator* (in 1905) through the NTA's income tax proposal (in 1919) for the idea that the payment of personal income taxes by domiciliaries was for a basket of benefits provided by the community. This was again well stated in Kessler's previously discussed 1924 *Yale Law Journal* article, which included the *Union Refrigerator* extortion quote above. That article included the following essential corollary:

> It is quite as obvious that income earned without the state by a non-resident cannot be taxed; income as such, is not taxable by a state which has no relation towards it other than covetousness.[46]

With all the foregoing, there might seem to be no need to inquire further into why Wisconsin taxed domiciliaries on all their income and nondomiciliaries on only so much of their income as was sourced to the state. Therefore, it would seem, the analysis can end here.

And yet politics and human nature being what they are, we must proceed further.

## VI. New York Enacts Its Personal Income Tax

When New York state enacted its personal income tax law in 1919, it adhered to the taxation-of-domiciliaries principles described above. But in 1922 New York amended its statutes to shift more of the tax burden to nondomiciliaries. In doing so, New York's Legislature used imprecise language. This combination initiated a trend among states of improperly[47] reclassifying nondomiciliaries as domiciliaries. New York's amended law created unnecessary problems — and it continues to create unnecessary problems to this day.

The development of New York state's income tax law is described in a political science journal article written in 1919 by Edwin R.A. Seligman, one of the law's architects.[48] Further perspective is provided in a 1937 law review article written by the first assistant director of the New York State Income Tax Bureau, Roy H. Palmer.[49]

The 1919 article opens with a declaration of intention: "It is the purpose of this article to put

[44] Thomas S. Adams, "The Significance of the Wisconsin Income Tax," 28 *Pol. Sci. Q.* 569-570 (Dec. 1913).

[45] Preliminary Report of the Committee Appointed by the National Tax Association to Prepare a Plan of a Model System of State and Local Taxation, "Proceedings of the Annual Conference on Taxation Under the Auspices of the National Tax Association," Vol. 12, at 426, 429-430 (June 17-19, 1919).

[46] Kessler, *supra* note 24, at 863.

[47] As mentioned in the opening to this article, the use of "improperly" is important, as there was a defensible path to that reclassification by looking at the frequency of the nondomiciliary's presence in the in-state abode. As is discussed below, from the information in the bill jacket, this appears to have been the path New York intended to follow; at least, nothing in the bill jacket suggests that New York intended to follow a different path. (In New York state, bill jackets are compilations of government explanations of proposed legislation and interested parties' comments for and against the legislation. Bill jackets can be excellent resources for understanding how a bill was perceived during the legislative process. For more, see the New York State Library website, "Bill, Veto, and Recall Jackets.").

[48] Edwin R.A. Seligman, "The New York Income Tax," 34 *Pol. Sci. Q.* 521 (1919).

[49] Roy H. Palmer, "Administration of the Personal Income Tax Law in New York State," 22 *Iowa L. Rev.* 313 (1937).

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the law in its proper setting and to explain the wider aspects of a significant reform."

The 1937 article's purpose is described more expansively:

> The experiences of those states which have pioneered in this type of taxation should be of assistance to those coming after, and an exchange of ideas resulting from such experiences should be helpful to those states whose income tax laws are more or less contemporaneous.[50]

Moreover, the article explained:

> New York's experiences are especially important because New York (a) is the most populous state in the Union, (b) has the greatest wealth of any state, (c) has large manufacturing, mercantile and agricultural business, and (d) is the chief banking center in the United States, if not the world. Most of the problems which could arise in administering a tax law in any other state are thus met here.[51]

Undoubtedly, Palmer correctly assessed New York's influence on other states' formation of their tax laws.

Therefore, with both articles' purposes in mind — context and guidance — here is what happened, and what went wrong in New York.

From 1911 through 1919, only Oklahoma and Massachusetts followed Wisconsin's lead and enacted personal income taxes.[52] In January 1919 the 18th Amendment to the Constitution was ratified (bringing Prohibition). Consequently, New York's excise tax revenue from alcohol sales was eliminated (effective in 1920), and the state urgently needed a replacement revenue source. A personal income tax was viewed as "the most feasible and least objectionable" alternative and, in 1919, was enacted by the state.[53]

Seligman's 1919 article observed that "the question which has aroused perhaps the most discussion [was] the treatment of nonresidents."[54] In that piece, the author wrote that he recommended the tax method that became law, viz, "to subject residents to a tax on their entire income, from whatever source derived, and to subject non-residents to a tax on the income from land or other property situated within the state or from business, professions or occupations carried on within the state."[55] Regarding the statutory section permitting a credit to "persons other than residents" to avoid double taxation, the author thanked the counsel of the legislative committee for the "admirable clarity of the language here."[56]

That admirably clear section used the terms "resident" and "resides" four times. Obviously, the language of the section could be clear only if the meanings of those words were clear. In another section, the new law defined the word "resident" as follows:

> The word "resident" applies only to natural persons and includes . . . any person who shall, at any time on or after January first, and not later than March fifteenth of the next succeeding calendar year, be or become a resident of the state.[57]

Clear? Even though the definition used the term it was defining? Yes, because everyone knew that "resident" referred to domiciliaries.

For the same reason, even though Seligman's 1919 article ran 34 pages and used "residents" and "nonresidents" some 50 times, it never defined those terms. Plainly, this is because the author of the article, as architect of New York's law, likely knew that "resident" meant "domiciliary" and "nonresident" meant "nondomiciliary."

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 314.

[54] Seligman, *supra* note 48, at 532.

[55] *Id.* at 534.

[56] *Id.* at 534-535 (Footnote I).

[57] 1919 N.Y. Laws section 350, as quoted in "Administration of the Personal Income Tax Law in New York State," at 323 (in 1920 the phrase "on or after January first, and not later than March fifteenth of the next succeeding calendar year, be or become" was replaced with "during the last six months of the calendar year, be.").



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## VII. New York Bungles Attempt to Fairly Recharacterize Nondomiciliaries

Despite the author of the 1919 article's tax sophistication and political experience, he did not propose recasting nondomiciliaries into domiciliaries. Whether by chance or by choice (for example, he did not believe in the propriety of recasting), he apparently did not appreciate this as a politically expedient (perhaps costless) method of increasing tax revenue. In 1922 that is exactly what the New York tax department proposed. And, while the proposed change was unique among the states, what actually occurred was not merely unique but also radically changed existing law.

The bill jacket to A.B. Int. No. 514, Print No. 519, contains a memorandum in support of the bill, which provides:

> The other problem has been that of persons who, while really and to all intents and purposes are residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents. We have several cases of multi-millionaires who actually maintain homes in New York and spend ten months of every year in those homes; their offices are in New York; but they vote from their summer residences in New England or their winter residences in California or Florida and claim to be nonresidents.
>
> The addition of the words suggested to subdivision 7 of section 350 will do away with a lot of this faking and will probably result in a man's conceiving his domicile at the place he really resides.

New York justifiably treated the conduct it described as problematic: Apparently, some exceptionally wealthy taxpayers were living in New York homes for as many as 10 months of the year but for income tax purposes were treating themselves as nondomiciliaries of the state. This occurred even though they were enjoying New York benefits and using New York services as much as many acknowledged domiciliaries of New York.

Certainly, these people were vulnerable to being reclassified as domiciliaries. Today, that occurs when states audit such people and penalize them when they are found to have engaged in what sounds like borderline tax evasion.

However, in 1922 the audit resources required to develop the facts in each taxpayer's circumstance evidently made this an unattractive or impossible alternative for the state. Instead, the state sought a mechanical test that would, if a taxpayer was living in a New York place of abode for at least a statutorily established length of time annually, treat as taxable in New York their entire income (that is, the same as if the taxpayer were determined to be domiciled in New York based on the individual's facts and circumstances).

But New York's 1922 statutory amendment did not accomplish that goal. Nor did it accomplish the objective of "do[ing] away with a lot of this faking" by multimillionaires who lived in their New York homes for 10 (or nine, or eight, or any) months of the year. To the contrary, the amendment avoided any mention of the taxpayer actually staying in his New York place of abode. Rather, under the amendments, the time that the taxpayer spent in his New York place of abode was irrelevant to his being recast and taxed as a domiciliary. Likewise, the 1922 amendments failed to even approximate the resources consumed by those to whom it applied relative to the resources consumed by acknowledged New York domiciliaries.

Worse, there was never any reason to suspect that the amendment's language would accomplish such an equivalence. Rather, on its face, the statute's language drew a false equivalence between a New York domiciliary and a nondomiciliary who had a permanent place of abode in New York but who infrequently visited that abode while in New York.

Instead of adopting language fitted to the problem that the Department of Taxation declared it was addressing, the Legislature's revisions went much further. As enacted, the revised statute unjustifiably recharacterized and taxed nondomiciliaries as domiciliaries.

New York's new law failed as a matter of mechanics and as a matter of policy. But — and here is the real point of what transpired — as a potential generator of revenue from nonvoters, the amendments were a smash hit set for a run of

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more than 100 years on Broadway and every other street in New York state.

## VIII. Other States Followed New York's Lead and Unfairly Recharacterized Nondomiciliaries as Domiciliaries

Justice Oliver Wendell Holmes Jr. taught that "the life of the law has not been logic; it has been experience."[58] Holmes was addressing the realities of how judges decide cases. But that description also seems a fitting appraisal of this phase in personal income tax legislation: It was based on New York's experience with its recasting statute and the revenue needs (desires) of state legislatures throughout the United States.

In 1924, when the *Yale Law Journal* published Kessler's article declaring that "in this field (of state and local personal income taxation) 'residence' is so generally used in the sense of 'domicile' that I here use it in that sense without apology or shame,"[59] only New York state was recasting nondomiciliaries as domiciliaries. But other states realized that this was a no-lose approach to personal income taxation in which nonvoters with minimal political clout in a state could be taxed by that state on all their income. In 1931, when Georgia enacted a definition of resident that included nondomiciliaries who maintained a permanent place of abode in Georgia and spent in the aggregate more than six months of the year in Georgia,[60] the race to the bottom was on.

By 1941, when the *California Law Review* published Frank M. Keesling's article, "The Problems of Residence in State Taxation," the state income tax practice of characterizing nondomiciliaries as domiciliaries was widespread.[61] Therefore, among the "three paramount questions" that Keesling addressed was "who should be included in the category of residents taxable on their entire net income, including income from intangibles and income from sources outside the taxing state?"[62]

Keesling first made clear that "generally domicil and residence coincide," and then wrote that "instances of persons being domiciled in one state while residing in another are by no means infrequent."[63] In explaining why this is important, Keesling wrote:

> To tax the entire income of a person who was not in the state during the tax year, nor possibly for many years, simply because he is domiciled therein, and to exempt a person who actually resides within the state, enjoying the benefit and protection of its laws and government, from the obligation of making a contribution to the cost of such government based on his total income, simply because he does not intend to make his home there indefinitely or has not abandoned his previous home, appears arbitrary and capricious.[64]

Keesling analyzed possible tests for recasting nondomiciliaries as domiciliaries. He found each to be seriously flawed. For example, if recasting is based on continuous presence in the state, it is easily avoided by periodically leaving the state.[65] And while aggregating in-state time might appear to be a plausible response, it failed to match income received with the actual timing of the nondomiciliary's in-state presence. And any attempt at such matching would be "administratively inexpedient."[66]

Keesling considered whether this administrative inexpediency could be addressed by taxing the nondomiciliary's entire income — that is, by treating a nondomiciliary as a domiciliary. But, he observed, unless the presence threshold for that recasting is greater than six months, a nondomiciliary might be recast as a domiciliary in two or more jurisdictions (in addition to being taxed as a domiciliary in the

[58] Justice Oliver Wendell Holmes Jr., *The Common Law* (1881).

[59] Kessler, *supra* note 24, at 867.

[60] "Statutes of Georgia Passed by the General Assembly at the Extraordinary Session of 1931" (Jan. 6, 1931, to Mar. 26, 1931), Income Tax Act of 1931, No. 13, section 2(i) [Income Tax Act of 1931, Extra Sess., 24, 25].

[61] Frank M. Keesling, "The Problem of Residence in State Taxation of Income," 29 *Calif. L. Rev.* 706 (1941). The article identified 16 states that reclassified and taxed nondomiciliaries as domiciliaries, and six tests used by the states to accomplish those reclassifications. *Id.* at 719, n.15.

[62] *Id.* at 706.

[63] *Id.* at 720.

[64] *Id.*

[65] *Id.* at 721.

[66] *Id.*



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state in which he is domiciled). Moreover, there remained a question whether the state can tax income received by the nondomiciliary before he was present in the state.[67] These mechanical difficulties are important but, it seems, less important than the legality and policy questions regarding the recasting.

Keesling addressed these latter concerns by doubting that treating nondomiciliaries as domiciliaries matched the tax base with the benefits and protections received from the state:

> To provide that any taxpayer who is in the state for the prescribed length of time in any [12] month period should be taxable on his entire income for that period would be no remedy, since it would be impossible to fix with certainty the commencement and termination of the [12] month period, or to prevent an overlapping of the taxable periods in the various states.[68]

Keesling presented additional difficulties, and then he turned his attention to the "permanent place of abode" test used by some states. Here the flaws he identified involved unfairness and double taxation. Keesling concluded that those flaws were so profound that he flatly rejected abode-only tests: "A tax on income from such sources based simply on the maintenance of a place of abode unaccompanied by domicil or presence within the state would be clearly invalid."[69]

Keesling then made the following observations:

> Generally a person having a place of abode within the state will be present therein for at least a portion of the year. Accordingly, jurisdiction to tax his entire income might possibly be upheld on that ground. It is common knowledge, however, that many people maintain places of abode in several states, and it may happen that they may not occupy one or more of such places during a taxable year. Even if they should be present in each of such states sometime during the year, the possibilities of multiple taxation are apparent.[70]

This rejection is especially noteworthy, as elsewhere Keesling identifies eight states in which a nondomiciliary could be recast as a domiciliary based merely on the nondomiciliary's maintenance in the state of a permanent place of abode: Alabama, Arkansas, Colorado, Iowa, Maryland, South Dakota, West Virginia, and Wisconsin.[71] That is, in 1941, when the practice of recasting nondomiciliaries as domiciliaries was still in its infancy, Keesling counseled that these eight states' attempts to recast nondomiciliaries based only on an in-state place of abode was invalid.

## IX. A 1953 *Vanderbilt Law Review* Article Demonstrates the Misconception of What New York and Other States Actually Did

New York's 1922 maneuver created confusion even decades later. In 1953 the *Vanderbilt Law Review* published an article co-written by professor Willis L.M. Reese of Columbia Law School and Robert S. Green, a federal circuit court clerk.[72] In that article, the authors failed to recognize the difference between what New York wrote that it intended to do (see the description in bill jacket to A.B. Int. No. 514, Print No. 519 (quoted above)) and what New York and many other states actually did. Now, 100 years later, the truth of what was intended in 1922 is buried beneath a pile of multistate statutes, regulations, cases, rulings, and articles toeing the line of the errant approach reached via a literal reading of the residency recasting statutes.

While one cannot pinpoint when the recasting of nondomiciliaries as domiciliaries gained acceptance in academic and legal circles, Reese and Green's 1953 article was somewhere near the front of the line. The article is not tax focused; in this respect, it follows Beale's lead in his 1918 *Iowa Law Bulletin* article (discussed above). Indeed, Reese and Green took pains to commend Beale's

[67] *Id.* at 721-722.

[68] *Id.* at 724.

[69] *Id.* at 724-725.

[70] *Id.* at 725.

[71] *Id.* at 719, n.15.

[72] Willis L.M. Reese and Robert S. Green, "That Elusive Word, 'Residence,'" 6(3) *Vand. L. Rev.* 561-580 (Apr. 1953).



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earlier piece, which they called a trailblazer on the subject of residence and domicile. However, they characterized it as an "early article" that warranted "reexamination in the light of modern developments."[73]

The *Vanderbilt Law Review* article gives the reader confidence in its rigor and scholarship throughout its first 15 pages. And then, in a section titled "Residence as Meaning Something Other Than Domicil," it collapses. It does not merely stumble; it is wrong. And the reason it is wrong has everything to do with New York's 1922 bait and switch.

The authors wrote:

> Probably, the most significant statutes that fall within this area are those dealing with income taxation, attachment, constructive service on nonresident motorists, school privileges and the recording of chattel mortgages and conditional sales.
>
> Most state income tax statutes make it explicit on their face that they use residence in a sense other than domicil by providing that within their meaning, the word resident includes those domiciled in the state *as well as those who maintain a "permanent place of abode" within the state and, during the taxable year, stay there more than a specified time*, which normally is either six or seven months. [Emphasis added.]

The article's footnote 76 identifies 13 states[74] that the authors incorrectly believed required nondomiciliaries to "stay" in their in-state abode to be taxed as domiciliaries. Now, nearly 72 years later, it is no simple task to find the state tax statutes referenced by the article. However, we located six of the cited statutes, none of which required a nondomiciliary to be present in their in-state abode to be recast and taxed as a domiciliary.[75]

Apart from one conceivable justification, the article's erroneous text and nonsupportive citations in footnote 76 can be explained only if its authors misread statute after statute after statute. But authors at this level do not make such mistakes in a law review article. Furthermore, the peer review that likely occurred would not fail to catch such mistakes. And the student editors of a law review generally do not simply miss unsupported text and erroneous citations. None of these possibilities makes sense, and the possibility of all of them occurring is hard to fathom.

So what happened? The peculiar accumulation of "mistakes" suggests that perhaps there was no mistaken reading of the states' statutes at all. That is, everyone who contributed to the 1953 *Vanderbilt Law Review* article — the Ivy League law professor, the federal circuit court clerk, the peer reviewers, the student editors — read the income tax residence statutes correctly. However, the contributors to the article might have shared the interpretation that the statutes required actual presence in the specific in-state place of abode for the period indicated therein. Which is to say, for nondomiciliaries to be subject to the extraordinary recasting of their nonresidency, they had to be present precisely in the abode that they allegedly maintained in the state.

Why is this understanding of the states' residence recasting statutes sensible as a matter of tax policy, fairness, and law? Because it is a cardinal rule of statutory construction that the goal is to identify and further a legislature's intention in enacting a law. And when a legislature's objective is to match the circumstances of domicile with the ownership/lease/other maintenance of an abode in a state, one expects a lengthy presence in that abode. This goal was clearly expressed to New York's Legislature in 1922 when it considered the recasting law.

Academic and even taxpayer advocacy communities likely would have found merit in a comparison of a lengthy presence in an in-state abode to domicile in that state.[76] Therefore, it should not be a surprise that in 1953 the

[73] *Id.* at 562.

[74] Alabama, Arkansas, California, Georgia, Indiana, Louisiana, Maryland, Mississippi, New York, North Carolina, Utah, Virginia, and Wisconsin.

[75] Alabama, Arkansas, Georgia, Indiana, New York, and Virginia. We are unprepared to conclude that by chance we selected all the nonsupportive citations in footnote 76. To the contrary, it is far more likely that few if any of the remaining jurisdictions had laws applying a presence-in-the-abode test.

[76] Undoubtedly, some members of the academic and taxpayer-advocacy communities would have disagreed with a legislature's belief that presence plus place of abode was an acceptable comparison to domicile. So be it. Unanimous agreement among constituencies has never been a goal nor a test of a statute's legitimacy.



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conventional wisdom in interpreting the states' residence recasting statutes was that presence in that abode was required. This interpretation seems to explain what occurred when the *Vanderbilt Law Review* published footnote 76 and the attendant text in the body of Reese and Green's article. In contrast, the possibility that everyone who touched the draft article misread all the statutes in the 13 states seems quite remote.

The explanation that the authors, reviewers, and editors had a shared understanding regarding the required period of presence in the abode might not be wholly satisfactory, as Maryland's highest court had already rejected a "no presence" interpretation (but without clarifying the required extent of presence). In 1942 the Maryland Court of Appeals held that the state's recasting statute, which identified maintenance of an in-state place of abode for at least six months as the only requirement to recast a nondomiciliary as a resident, also implicitly included a requirement that the nondomiciliary's Maryland contacts be sufficient to bring that individual within the state's taxing jurisdiction. The court said:

> Whatever application the words "domicile" and "resident" may require elsewhere, under this statute the tax is imposed on incomes of every individual who for more than six months of the taxable year maintained a place of abode within the State, whether domiciled in the State or not. It is a provision contained in a large number of State income tax statutes. Maintenance of a place of abode, however, must involve at least a sufficient residence within the State to bring the individual within the taxing jurisdiction, otherwise the exaction might amount to a deprivation in violation of the Fourteenth Amendment of the United States Constitution.[77]

Notably, the court's language demonstrates that presence required at that time to satisfy jurisdictional standards was far less than being present in an in-state abode for 183 days. That is, while the decision rejected a "no presence" test, it does not shed further light on the extent of presence required to be treated as a domiciliary for personal income tax purposes.

## X. Today's 'Everything Goes' Recharacterizations Of Nondomiciliaries as Domiciliaries

The concept of recasting nondomiciliaries as domiciliaries was ill-born and has aged poorly. Now, a century later, there is no way to predict what mixture of a nondomiciliary's in-state presence or an in-state place of abode state legislatures will pounce upon to justify taxing all the nondomiciliary's income. As of this writing, there is a scattershot and wholly artificial universe in which 40 states recast nondomiciliaries as domiciliaries. If those 40 states are to be believed, all the 24 recasting tests in use as of November 2024 fairly reclassify a nondomiciliary as a domiciliary. (See the Appendix for a list of the tests.)[78]

There is a dizzying array of tests, ranging from:

1. those that consider only whether the nondomiciliary has a place of abode in the state for at least a specified amount of time and do not require the nondomiciliary to have any presence in the state;[79] to
2. those that do not require the nondomiciliary to have an abode in the

[77] *Wood v. Tawes*, 181 Md. 155, 160-161, *cert. denied*, 318 U.S. 788 (1943).

[78] In 1998 the New York Court of Appeals confirmed that recasting a nondomiciliary as a domiciliary required a counting of days in the state, not days in the permanent place of abode. The court contrasted New York's law with the laws of states requiring mere maintenance of a place of abode but not requiring any presence by the nondomiciliary. *See Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 535-536 (N.Y. 1998), in which New York's highest court stated:

> The vast majority of States join New York in utilizing definitions of residency for income tax purposes that include another category of taxpayers in addition to domiciliaries. In fact, by requiring both a permanent place of abode in this State, and presence for more than half of the year, New York's definition of "resident" is far less expansive than some. For example, Iowa, Louisiana and Maryland define residents to include people who maintain a permanent place of abode within the State, regardless of the amount of time actually spent within the State. [Footnote omitted.]

[79] For this person, property taxes are a proper method for collecting revenue needed to support the in-state contact. If this person is a renter, the property taxes are the landlord's responsibility.



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> state but consider only whether the nondomiciliary is present in the state for at least a specified amount of time.[80]

There are 22 variations between those poles. It is easy to predict that an advocate for recasting nondomiciliaries will be tempted to organize these 24 different tests into groups of "similar" tests, but doing so would serve only the sharp edges of those tests and the mess that New York wrought with its 1922 recasting law.

There are 24 tests precisely because these tests are unmoored from any attempt to approximate a typical domiciliary's in-state contacts and access to government resources. The tests make no attempt to match the in-state footprint of a domiciliary and, taken together, seem to stand for little more than each legislature's whim at a particular moment. As the Maryland Tax Court accurately wrote almost 50 years ago, "Maryland as well as most other states has selected six months *as the arbitrary period denoting residency*."[81] The states' long list of differing laws for recasting nondomiciliaries as domiciliaries is irredeemably, unnecessarily, and unconstitutionally arbitrary.

These tests themselves beg other tests. For example, what is meant by spending a day in a state? Does spending a day in a state include commuting to the state for a day's work? Does it include driving to the state to meet a prospective customer and then returning to the state of origination immediately thereafter? Does it treat as a full day in the state a nondomiciliary's in-state presence for even a slight portion of a day — as is done, for example, by New York, Connecticut, and Idaho?[82]

What about states that look at months or "aggregate" months in the state? Must one be in the state every day of the month? This would make it extremely easy to avoid being recast as a resident. Therefore, that cannot be what is intended. Must one be in the state for half the days of the month for six months? If yes, in-state presence for a mere 96 days (16 days for each of six months) is sufficient to tax a nondomiciliary as if he were a domiciliary. What about one day in the month? This mirrors New York's rule that a nondomiciliary's presence in the state for any portion of a day makes that day a New York day. See above. If one day in a month is sufficient to make an in-state month, then in-state presence in a year for a mere six days (1 day for each of six months) could permit recasting and taxing a nondomiciliary as if he were a domiciliary. Does "month" refer to 30 days, or does it refer to 28, 29, or 31 days? Does "six months" mean at least 179 days (the fewest number of days "six months" could mean)? Or does "six months" mean 186 days (the greatest number of days "six months" could mean)?

These are fundamental questions, and they go on and on. Which brings us back to the original question: Could anyone defend a position that *all* these tests are legitimate equivalents to domicile? While we are at it, could anyone defend *any* of these tests as being legitimate equivalents to domicile? If yes, which?

## XI. U.S. Supreme Court Decisions Equate Residency With Domicile

### A. 200 Years of Supreme Court Precedent

Since the 1800s, the U.S. Supreme Court has frequently addressed state and local taxation of individuals. The Court's decisions involve excise taxes, property taxes, wealth taxes, sales taxes, use taxes, income taxes, and other taxes designed to fund taxing jurisdictions.

Those decisions were controlled by principles set forth in *McCulloch*.[83] In the portion of *McCulloch* addressing Maryland's ability to tax a federally chartered bank, the Supreme Court said:

> Before we proceed to examine this argument and to subject it to test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of

[80] This person is a commuter and should be taxed only on his income earned within the state.

[81] *Varner v. Comptroller*, Income Tax 771 (Md. Tax Ct. Oct. 27, 1976) (emphasis added).

[82] *See* N.Y. Comp. Codes R. & Regs. tit. 20, section 105.20(c); Conn. Agencies Regs. section 12-701(a)(1)-1; and Idaho Code section 63-3013(1)(b).

[83] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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> Government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power, is found in the structure of the Government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> The people of a State, therefore, give to their Government a right of taxing themselves and their property, and as the exigencies of Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse.[84]

The Court continued:

> It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.
>
> This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation, but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.[85]

*McCulloch*'s primary contributions to the present issue seem to be the following foundational principles of state taxation:

- "The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents." This provides no help to nonresidents whom the state chooses to recast as residents. To the contrary, for nonresidents this is no security whatever. Instead, it establishes the conditions for what the Court said is an "extortion [rather] than a tax."[86]
- "All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are upon the soundest principles, exempt from taxation." Thus, in more contemporary phrasing, a state may tax all income of residents, but for nonresidents, the state may tax only income sourced to the state. A nonresident individual who does not have income sourced to the state is not subject to the state's personal income tax.[87]

Guided by these principles from *McCulloch*, we now focus on Supreme Court decisions involving state taxes upon individuals' income or wealth. Within these decisions there are two consistent themes: (1) "domiciliary"[88] and "resident" are synonyms; and (2) the tax must generally reflect the value of the benefits that the individual receives from the taxing jurisdiction. Examples of these decisions include an 1879 case involving Connecticut's tax, "in the hands of one of its resident citizens, [of] a debt held by him upon a resident of another State."[89] The Court began its opinion by citing *McCulloch* and repeating the "All subjects over which" quote analyzed above. The Court used the terms "resident" and "domicile of the person" (meaning "domiciliary") as referring to the same person[90] and said:

[84] *Id.* at 428.

[85] *Id.* at 429.

[86] *Union Refrigerator*, 199 U.S. at 203.

[87] Nonresidents might be exempt from such taxation because of personal jurisdiction principles as well as principles relating to state and local taxation. Recent efforts by states to "create" personal jurisdiction for business activity tax purposes by merely changing the state's income sourcing rules are analyzed, criticized, and rejected in David Uri Ben Carmel, "Personal Jurisdiction and Economic Nexus vs. Market-Based Sourcing," *Tax Notes State*, July 10, 2023, p. 95.

[88] Sometimes using a format of "domicile of the person" in a specific jurisdiction.

[89] *Kirtland v. Hotchkiss*, 100 U.S. 491, 498 (1879).

[90] In footnote 14 we observed that the Wisconsin Supreme Court used the phrases "resident decedent" and "domicile of the decedent" as relating to the same person and jurisdiction. As we observed there, "it would have been more convenient for us if the court had said that 'resident is synonymous with domiciliary' or 'residence is synonymous with domicile.'" The same applies to the Supreme Court decisions discussed here.



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> The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt . . . is property in his hands . . . [constituting] a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys.
>
> That debt, although a species of intangible property, may, for purposes of taxation, if not for all purposes, be regarded as situated at the domicile of the creditor.

Significantly, that Court treated "resident" and "domicile" (of the creditor, in that case) as synonymous and emphasized the relationship between taxation of a resident/domiciliary and the need to support "the government whose protection he enjoys."

In 1905 the Supreme Court decided *Union Refrigerator*, which is analyzed at length above and contains several strong statements regarding the need for approximate matching between the taxes imposed and the services received.

In 1914 the Supreme Court decided a case involving a resident of the city of Malden, Massachusetts, and the state's attempt to tax his ownership of shares of stock in a foreign corporation doing no business and having no property in the commonwealth.[91] As in previous cases, the Court treated "domicile" and "resident" as synonyms. It held that the resident/domiciliary was taxable on the stock, saying:

> It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed and the rulings in the state cases which we have cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the State of the owner's domicile, whether the corporations be foreign or domestic.[92]

In 1920 the Supreme Court decided *Shaffer*,[93] permitting states to tax nonresidents on income derived from local property and business. The Court said:

> Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution.[94]

The Court further observed that "Oklahoma has assumed no power to tax non-residents with respect to income derived from property or business beyond the borders of the state."[95]

In 1932 the Supreme Court decided a case involving Mississippi's net income tax and an objection by a "resident of Mississippi" that the state could not tax him on net income earned on a project in Tennessee.[96] Immediately after calling the taxpayer a "resident," the Court said:

> The obligation of one domiciled within a state to pay taxes there arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits.

In 1937 the Supreme Court decided a case involving New York's net income tax and a contention by a taxpayer (alternatively described as a New York resident and a New York domiciliary) that the state could not tax income earned on out-of-state real property.[97] The Court rejected the contention and said:

[91] *Hawley v. Malden*, 232 U.S. 1, 8 (1914).

[92] *Id.* at 9-10 (citations omitted).

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

[94] *Id.* at 51.

[95] *Id.* at 53.

[96] *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 279 (1932).

[97] *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937).



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> A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefit. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state.

In 1995 the Supreme Court held that "Oklahoma may tax the income (including wages from tribal employment) of all persons, Indian and non-Indian alike, residing in the State outside Indian country."[98] The Court once again treated "residence" and "domicile" (domiciliary) as synonyms, relying upon:

> a well-established principle of interstate and international taxation — namely, that a jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction: "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . These are rights and privileges which attach to domicil within the state. . . . Neither the privilege nor the burden is affected by the character of the source from which the income is derived."[99]

### B. The U.S. Supreme Court Has Never Approved Of State Personal Income Tax Laws Taxing a Nondomiciliary as a Domiciliary

Research revealed no instances in which the Supreme Court has approved of a state or local income tax's recasting of nondomiciliaries as domiciliaries. Nor do the primary briefs or amicus briefs filed in relation to two 2019 certiorari petitions cite any such authority.[100]

### C. *Comptroller v. Wynne*

In 2015 the Supreme Court issued its most recent decision involving state and local income taxation of residents and nonresidents.[101] The case focused on a complaint by Maryland residents who, because a portion of their income was subject to tax by two states without the availability of a credit preventing double taxation, were thus subject to double taxation. They asserted that this double taxation violated commerce clause internal consistency principles and therefore was unconstitutional. The Court agreed.

But it is Justice Ruth Bader Ginsburg's dissent (joined by Justices Antonin Scalia and Elena Kagan) that is particularly important to our analysis. The dissent objected that double taxation is not necessarily unconstitutional. And, while dissenting from the majority's internal consistency holding, Ginsburg included the two points on which we are focused here: First, for state income tax purposes, she considered "domiciliary" and "resident" to be synonymous. Second, she emphasized that because state government services available to state residents exceed those that are available to nonresidents, residents (that is, domiciliaries) must contribute more to the cost of that government.

[98] *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

[99] *Id.* at 462, 463 (quoting *Graves*, 300 U.S. at 312-313).

[100] *Chamberlain*, 166 A.D.3d 1112; *Edelman*, 162 A.D.3d 574.

[101] *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015).



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In the first two paragraphs of the dissent, Ginsburg referred to residents and domiciliaries interchangeably. She then opened the analytical portion of her opinion with the following observation:

> For at least a century, "domicile" has been recognized as a secure ground for taxation of residents' worldwide income. *Lawrence*, 286 U.S. at 279, 52 S. Ct. 556, 76 L. Ed. 1102. "Enjoyment of the privileges of residence within [a] state, and the attendant right to invoke the protection of its laws," this Court has explained, "are inseparable from the responsibility for sharing the costs of government." *Ibid.* "A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits." *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 57 S. Ct. 466, 81 L. Ed. 666 (1937).[102]

Thus, in the first sentence of her dissent, Ginsburg made the point that states may tax the worldwide income of their domiciliaries/residents. The back and forth between references to "resident" and "where a taxpayer is domiciled" are repeated throughout Ginsburg's opinion. And when later in her opinion she parried the majority opinion's mischaracterization of her position, she again clearly treated "domicile" and "residence" as synonyms: "Far from suggesting that States must choose between taxing residents or nonresidents, this Court specifically affirmed that the exact same 'income may be taxed [simultaneously] *both* by the state where it is earned *and* by the state of the recipient's domicile.'"[103]

In the remainder of that paragraph and throughout her dissenting opinion, Ginsburg focused on the greater access to government services enjoyed by residents/domiciliaries as contrasted with nonresidents and, consequently, the greater tax burden that can be imposed on residents/domiciliaries.

## XII. Concluding Thoughts

For more than a century, states have successfully taxed the income of their domiciliaries. From the beginning, it was known that "resident" and "residence" meant "domiciliary" and "domicile," respectively. The possibility that a state could impose its income tax on someone who merely maintained an abode in the state was dismissed as improper.

In the early 1920s, New York's Legislature learned that some multimillionaire domiciliaries were residing in their in-state abodes for as long as 10 months a year while claiming to be nonresidents. To end this "faking," the Legislature sought a mechanical test to reclassify these people as residents without having to make the detailed factual inquiry required in an audit of a taxpayer's domicile.

Instead of enacting the type of test the problem merited (that is, one that considered time spent in the New York abode), the Legislature created a reclassification test that took no note of whether or how often the nondomiciliary was present in the abode. Unfortunately, this law became a model of a sort for how to tax the worldwide income of nonvoters: that is, label them as residents for income tax purposes.

Other states followed New York's lead. As of this writing, 40 states use any one of 24 tests to tax nondomiciliaries as full-time residents. These tests are arbitrary and inconsistent, and their potential application is much too broad. Furthermore, they impose taxes on nondomiciliaries who do not have access to the state services their income taxes support. This is not an unexpected by-product of these reclassification laws. To the contrary, it is a result that many know, or should know, will occur.

The present system of recasting nondomiciliaries as domiciliaries is unjust. More than that, the system and these recasting laws seem clearly unconstitutional under the U.S. Constitution's due process clause, commerce clause, and possibly other provisions.

To date, taxpayers have not succeeded in their constitutional challenges to these recasting laws. Nevertheless, taxpayers should not abandon these challenges. Rather, their challenges should return to first principles: They

[102] *Id.* at 582-583.

[103] *See Curry v. McCanless*, 307 U.S. 357, 368 (1939); *Wynne*, 575 U.S. at 588-589 (emphasis in original).

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should understand and reference the development of state personal income taxation and how we arrived at a place where 24 different tests are used to improperly recast nondomiciliaries as domiciliaries.

## XIII. Appendix: State Abode and Presence Requirements for Recasting and Taxing a Nondomiciliary as a Domiciliary[104]

The following are the circumstances by which the state laws reclassify and tax nondomiciliaries as domiciliaries:

1. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than 270 days.[105]
2. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than 200 days.[106]
3. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than half of the year.[107]
4. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state at least 183 days.[108]
5. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than 183 days.[109]
6. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than seven months.[110]
7. The nondomiciliary maintains an in-state permanent place of abode *and* is present in the state more than six months.[111]
8. The nondomiciliary maintains an in-state permanent place of abode for at least 183 days (unclear requirement of presence).[112]
9. The nondomiciliary maintains an in-state permanent place of abode *or* is present in the state more than seven months.[113]
10. The nondomiciliary maintains an in-state permanent place of abode for more than six months (no requirement of presence).[114]
11. The nondomiciliary maintains an in-state permanent place of abode for more than 183 days.[115]
12. The nondomiciliary maintains an in-state permanent place of abode *or* is present in the state more than six months.[116]
13. The nondomiciliary is present in the state more than nine months (no requirement of a permanent place of abode).[117]
14. The nondomiciliary has at least 213 contact periods within the state (no requirement of a permanent place of abode).[118]
15. The nondomiciliary is present in the state more than 200 days (no requirement of a permanent place of abode).[119]
16. The nondomiciliary is present in the state more than 183 days (no requirement of a permanent place of abode).[120]
17. The nondomiciliary is present in the state at least 185 days (no requirement of a permanent place of abode).[121]
18. The nondomiciliary is present in the state at least 183 days during the preceding 365 days (no requirement of a permanent place of abode).[122]

[104] Based on a multistate chart prepared by RIA Checkpoint (Nov. 4, 2024).
[105] Idaho.
[106] Oregon.
[107] North Dakota.
[108] Minnesota.
[109] Connecticut, Delaware, Indiana, Iowa, Kentucky, Massachusetts, Maine, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and West Virginia.
[110] Nebraska.
[111] Arkansas and Colorado.
[112] District of Columbia.
[113] Alabama.
[114] Maryland.
[115] Virginia.
[116] Louisiana.
[117] Arizona, California, and Illinois.
[118] Ohio.
[119] Hawaii.
[120] North Carolina.
[121] New Mexico.
[122] Georgia.

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19. The nondomiciliary has been present in the state more than six months (no requirement of a permanent place of abode).[123]
20. The nondomiciliary has been present in the state more than seven months (no requirement of a permanent place of abode).[124]
21. The nondomiciliary lives in the state for at least 183 days or for more than half the days in a tax year of less than 12 months.[125]
22. The nondomiciliary resides in the state on a "more or less permanent basis" and is an actual resident of the state (no presence test).[126]
23. The nondomiciliary maintains a permanent place of abode in the state (no presence requirement).[127]
24. The nondomiciliary is in the state for other than a temporary or transitory purpose (no place of abode requirement).[128]
25. No recasting test.[129] ■

[123] Kansas.
[124] Oklahoma.
[125] Michigan.
[126] Mississippi.
[127] Montana.
[128] Illinois.
[129] South Carolina, Utah, and Wisconsin.

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