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## The Chilling Realities of the Telecommuting Tax: Adapting Twentieth Century Policies for Twenty-First Century Technologies

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# The Chilling Realities of the Telecommuting Tax: Adapting Twentieth Century Policies for Twenty-First Century Technologies

Michael Kraich\*

## INTRODUCTION

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The commute is by no means a new or unexpected consequence of attempts by employers to attract employees to metropolitan areas. Following in the wake of this decades-old practice, breakthroughs in technology have developed around the ritual of going to and from the workplace. Generations of individuals that at one point relied upon trolleys enthusiastically welcomed innovations that made their commutes faster, safer, and more efficient. As a result, technologies that enable low cost transportation (automatic guide-way vehicles, also known as monorails), versatile transit alternatives (electric busses and dedicated busways), or rapid transit (high speed rail and air travel), have come to be extremely popular, especially amongst commuters. However, the underlying principle surrounding commuter transit has remained constant: transport individuals *physically* from one place to another.

Today, millions of people commute to and from work, thinking of their journeys as benign rituals to be observed out of necessity.<sup>1</sup> Often these individuals do their best to cut costs, either finding work close to home, looking to mass transit, purchasing fuel efficient vehicles, or even strategically purchasing gasoline in the more affordable states along their commute. After months or even years of performing this ritual, some are surprised to find that they were incorrectly allocating tax on their income; often due to the individual's inability to understand the nuances in how the individual's domicile state or employment state, where they differ, define the scope of their taxing powers. Much to the surprise of the modern

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\* J.D. Candidate, University of Pittsburgh School of Law, May 2016. The author would like to thank everyone that throughout the years has helped me keep my aims focused on the future.

<sup>1</sup> BRIAN MCKENZIE & MELANIE RAPINO, UNITED STATES CENSUS BUREAU, COMMUTING IN THE UNITED STATES: 2009, at 2–3 (2011), *available at* <http://www.census.gov/prod/2011pubs/acs-15.pdf> (collating U.S. Census Data where 119,393,000 individuals reported commuting to work daily via personal vehicle and another 6,922,000 commuting to work via public transportation, with an average time across all commuters being approx. 25.1 minutes (or 50.2 minutes total, daily)).

day commuter, their perceived place of employment surprisingly may not actually be their assumed place of employment.

Recognizing the growing trend of individuals who commute to work, some states responded by collecting commuter fees through various forms, such as user fees (e.g., tolls), taxes on commuter goods, or even clever income tax systems designed to capture income from individuals in foreign states. While commuting may drive the development of transportation technology, such as improvements on existing transportation methods or developing entirely new forms of transportation, until recently commuting principles remained the same. Amidst a stabilization period in the way society views commuting, states and commuters have come to understand how to coexist with these sometimes exceedingly complex fee collection structures.

Though little ambiguity remains as to how to tax “traditional” commuters, a new form of technology has spawned an alternative method of commuting. “Telecommuters,” or individuals working remotely, have altered, and arguably improved upon, the familiar practice of commuting. Instead of resorting to transit options, telecommuters remain at home, or relatively close by with the availability of a library or coffee shop. Commuters have heralded this as a wonderful advance, ultimately saving on the cost of transportation to the individual, the cost to the company of reserving office space, and arguably increasing the productivity and quality of life of each employee.

Any reduction in the population of 126 million commuters, combined with an increasing recognition of the benefits telecommuting provides—not only to employers but also the 5.9 million telecommuting employees—would seem to be a step in the right direction for the environment, economy, and the employee’s quality of life; but these positive results have not come without consequences.<sup>2</sup> States that originally profited from and depended on commuters now see these revenue streams threatened by this new form of commuting, potentially drawing significant funds away from established metropolitan area governments. As a result, some states have cleverly reworked how they define the various commuting infrastructures within their borders in an attempt to retain lost revenue, and, to the credit of drafters, have been largely successful.

While technology seems to be constantly evolving, either through the likes of faster data transfer rates or increasingly fuel-efficient automobiles, among others, what drives this evolution is demand. States in the short-term may benefit from specially tailored tax schemes, but society as a whole is harmed if telecommuting is

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<sup>2</sup> *Id.* (stating that approximately 5,918,000 individuals “[w]orked at home”).

subdued with multiple, jurisdictionally inconsistent, tax approaches. This Note examines specific instances of reform in commuter tax policy, focusing on how the law applies to, and ultimately affects, telecommuting in the twenty-first century.

Part I discusses the evolution of the commute from the days of horse and carriage to modern modes of transportation. Part II focuses on telecommuting, and the impacts of the new practice on society. Part III addresses how states have responded to commuters, specifically looking at state approaches to the application of state taxes. Part IV provides the current framework adopted by so-called “protectionist” states, which have expanded their conventional reach in order to increase or close state revenue gaps. Specifically, Part IV examines the legal analysis of three cases related to the New York metropolitan area, one of the most heavily trafficked areas in the United States. Part V speculates on the legal future of telecommuting, and what policies can be implemented to improve upon its current state. Part VI suggests possible solutions, and looks at previous, albeit unsuccessful, attempts by Congress to respond to issues raised in this Note.

## I. EVOLUTION OF THE COMMUTE

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In the mid 1800s, the state of technology forced individuals to walk to their destinations, whether it be the office or local grocery store.<sup>3</sup> As a result, commuting to work required no more than traveling a few miles on average.<sup>4</sup> With the advent of new transportation technologies and advanced means of ingress and egress into city centers, combined with the popularity of urbanization, workplaces were able to solicit individuals who lived farther from the place of employment.<sup>5</sup> Likewise, employees were able to work for employers located farther than had been previously possible.<sup>6</sup>

Increases in local and light rail traffic enabled millions to commute each year to major U.S. cities by the late 1800s.<sup>7</sup> Around the 1930s, cities began building expressways, marking a significant increase in the individual’s ability to travel. By the mid 1950s, the Eisenhower Interstate Highway System began to take shape,

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<sup>3</sup> Michael P. Corzen, *Chicago: Commuting in the Walking City in 1854*, CHICAGO HISTORY, <http://www.encyclopedia.chicagohistory.org/pages/1773.html> (last visited Oct. 17, 2014) [hereinafter Corzen, *Chicago*].

<sup>4</sup> *Id.*

<sup>5</sup> Michael P. Corzen, *Commuting*, CHICAGO HISTORY, <http://www.encyclopedia.chicagohistory.org/pages/323.html> (last visited Oct. 17, 2014) [hereinafter Corzen, *Commuting*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

connecting cities and regions across the United States like never before.<sup>8</sup> These new highways increased the ease with which people traveled, allowing more employees to realize the potential and benefits that mobility could bring to one's professional life.

In the 1940s, states began forming public transportation routes to satisfy the needs of expanding transportation networks throughout the greater metropolitan areas.<sup>9</sup> New Jersey, the “Crossroads of the Revolution” as well as the crossroads between New York and Philadelphia, established a transit system conglomerate in 1979 that today services over 5,325 square miles and operates with an annual budget of over \$3 billion.<sup>10</sup> Along with the NJ Transit system, the Port Authority of New York and New Jersey was formed as part of an agreement between the neighboring states to help facilitate movement between them, marking the beginning of a cooperative enterprise between individual states seeking to create a favorable metropolitan climate.<sup>11</sup> Similarly, cities such as Chicago, Washington D.C., and others have expanded their reach beyond the city limits into suburban territory.<sup>12</sup>

As a result of these new commuting practices, it becomes less clear as to how to handle individual movement between states, particularly for taxation purposes. Fortunately for these commuters, many states entered into “reciprocal agreements” with neighboring states, thereby making it easier to live in one state while working in another.<sup>13</sup> Some examples of these reciprocal agreements include reciprocity between Pennsylvania and New Jersey, Indiana, Maryland, Ohio, Virginia, and West Virginia.<sup>14</sup> Many of these reciprocal agreements remain in force, and have been key to the development of America's urban landscape.

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<sup>8</sup> Federal-Aid Highway Act of 1956, H.R. 10660, 84th Cong. (1956), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-70/pdf/STATUTE-70-Pg374.pdf>.

<sup>9</sup> NJ TRANSIT, *History and Structure* (last visited Mar. 2, 2015), available at [https://www.njtransit.com/tm/tm\\_servlet.srv?hdnPageAction=HistoryTo](https://www.njtransit.com/tm/tm_servlet.srv?hdnPageAction=HistoryTo); SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *History* (last visited Mar. 2, 2015), available at <http://www.septa.org/history>; CHICAGO TRANSIT AUTHORITY, *CTA Overview* (last visited Mar. 2, 2015), available at <http://www.transitchicago.com/about/overview.aspx>.

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

<sup>11</sup> *History*, PANYNJ, <http://www.panynj.gov/port/history.html> (last visited Mar. 2, 2015).

<sup>12</sup> *About Metro*, WMATA, [http://www.wmata.com/about\\_metro](http://www.wmata.com/about_metro) (last visited Mar. 2, 2015); see *History*, *supra* note 11.

<sup>13</sup> *NJ Income Tax—PA/NJ Reciprocal Income Tax Agreement*, STATE OF NEW JERSEY, <http://www.state.nj.us/treasury/taxation/njit25.shtml> (last visited Mar. 2, 2015).

<sup>14</sup> See *infra* note 27–28.

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## II. TELECOMMUTING: THE NEW RAT RACE

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More employers are embracing the idea of employees working from remote locations (or “teleworking”) for days, weeks, months, and even on a full-time basis.<sup>15</sup> This new model of employment has allowed companies to redefine the workplace, and this newly defined workplace often leads to both cuts both in costs and environmental waste formerly associated with daily transit.<sup>16</sup>

### A. *Environmental Implications*

In response to these new telecommuters, cities must adapt in an effort to attract remote employees who wish to work in alternate locations.<sup>17</sup> Also, while not always environmentally friendly, telecommuting has the potential to reduce carbon emissions where it is strategically implemented.<sup>18</sup> While its effects are still being studied, independent research reveals that, if fully implemented, telecommuting could “avoid 154 trillion miles of driving and save \$25 trillion in fuel purchases per year.”<sup>19</sup>

With such an incentive, local governments have even adopted pro-telecommuting policies to further the goal of reducing carbon emissions and fuel consumption. Notably, many state and local governments are beginning to embrace and even implement reduced or condensed workweeks for individuals, with Utah implementing a four-day workweek for approximately 80 percent of state employees and the University of Pennsylvania piloting a reduced workweek program for one month.<sup>20</sup> Other governmental bodies, such as the State of Vermont and the town of Lakewood Ranch, Florida, are considering implementing four-day workweeks for their civil servants as well.<sup>21</sup>

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<sup>15</sup> Eve Tahmincioglu, *The quiet revolution: telecommuting*, MSNBC (Oct. 5, 2007, 1:18 PM), [http://www.nbcnews.com/id/20281475/ns/business-future\\_of\\_business/t/quiet-revolution-telecommuting/#.VLWG3vL-Dg](http://www.nbcnews.com/id/20281475/ns/business-future_of_business/t/quiet-revolution-telecommuting/#.VLWG3vL-Dg).

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

<sup>17</sup> See Elizabeth Fazzare, *The Ten Best Cities for Working Remotely*, ARCHITIZER (Sept. 30, 2014), <http://architizer.com/blog/take-the-day-off-work-remotely-from-these-10-visitor-ideal-cities>.

<sup>18</sup> Brian Palmer, *Green Lantern: Environmental benefits of telecommuting are not universal*, WASH. POST (Sept. 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090305133.html>.

<sup>19</sup> HARRY GREEN PH.D. & REEM ABDELRAZEK, TENNESSEE ADVISORY COMMISSION ON INTERGOVERNMENTAL REGULATIONS, TELECOMMUTING: SAVING ENERGY AND PROMOTING PROGRESS (Sept. 2008), available at [http://tn.gov/tacir/PDF\\_FILES/Other\\_Issues/telecommuting.pdf](http://tn.gov/tacir/PDF_FILES/Other_Issues/telecommuting.pdf).

<sup>20</sup> *Id.* at 6.

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

### ***B. Telecommuting and the ADA***

Telecommuting has also brought the prospect of employment to those who formerly could not participate in the workforce. Even in its infancy, many saw telecommuting as a workable solution for those who were unable to access their place of employment due to a disability.<sup>22</sup> In 1990, the federal government passed the Americans with Disabilities Act (“ADA”) in an attempt to make the workplace accessible to disabled individuals.<sup>23</sup> The Act, however, could only be applied to employees who were able to get to their place of business.<sup>24</sup> And while companies did their best to provide the necessary accommodations under the ADA, not all employees could travel to work given their respective medical conditions.<sup>25</sup>

Where the government and companies fall short, telecommuting provides an avenue for disabled individuals to find gainful employment. Individuals whose physical presence is not necessary can now find employment with companies whose needs can be met by at-home employees. Though telecommuting is by no means a perfect solution to employing individuals with disabilities, it does enable participation in the workforce by those who wish to do so. As a result, instead of being forced to collect a disability check, many can now collect a paycheck.<sup>26</sup>

## **III. STATE RESPONSES TO COMMUTERS**

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### ***A. Reciprocating States***

As a result of the growing complexity of the commuting structure and the competition to attract employees from distances previously unimaginable, reciprocal agreements began to form around the traditional commuter model. For instance, states like Pennsylvania do not withhold Pennsylvania tax liabilities from non-residents so long as a reciprocating state’s employer is withholding income for that individual.<sup>27</sup> Likewise, reciprocating states generally do not withhold income

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<sup>22</sup> Eve Tahmincioglu, *By Telecommuting: the Disabled Get a Key to the Office, and a Job*, N.Y. TIMES (July 20, 2013), available at <http://www.nytimes.com/2003/07/20/jobs/by-telecommuting-the-disabled-get-a-key-to-the-office-and-a-job.html>.

<sup>23</sup> *The Americans With Disabilities Act of 1990*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/1990s/ada.html> (last visited Mar. 2, 2015).

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

<sup>25</sup> *Id.*

<sup>26</sup> See Tahmincioglu, *supra* note 22.

<sup>27</sup> See (PA) Employee’s Nonwithholding Application Certificate, PA REV-419 EX, available at <http://www.revenue.pa.gov/FormsandPublications/FormsforBusinesses/Documents/Employer%20With>

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tax for employees of affiliated states.<sup>28</sup> While these structures can be easily tailored between states as new metropolitan areas see an increase in the demand for skilled employees, the developed reciprocating relationships between agreeing states remain regional at best.<sup>29</sup>

Telecommuters who do not fall within these geographically constructed structures are finding themselves unable to take advantage of all the benefits telecommuting offers. Reciprocal agreements are not the norm, but rather the exception to standard tax structures. As of today, states are not required to efficiently handle commuters, but rather are only required to develop tax structures which are “internally and externally consistent.”<sup>30</sup>

### ***B. Commuter Law: The New York Approach***

While states that are part of most major metropolitan areas have entered into these reciprocal agreements, few notable states have not done so. One such notable jurisdiction is New York, specifically the New York City metropolitan area, which has opted for a rigid tax approach.<sup>31</sup> In particular, New York State only allows New York residents to apply for a credit on income tax paid to a different state while residing in New York, a policy generally used to offset income taxes levied by other states whose tax systems do not mirror New York’s “state source” tax system.<sup>32</sup> New York does not recognize any state as a reciprocal state, and as such taxes all individuals who “received [income] from a New York State source” at the same New York State income tax rates.<sup>33</sup> As a result of New York’s rigid tax

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olding/rev-419.pdf (Rev-419 Form, notwithstanding Pennsylvania personal income tax for reciprocal states (Indiana, Maryland, New Jersey, Ohio, Virginia, West Virginia)).

<sup>28</sup> See (NJ) Employee’s Certificate of Nonresidence in New Jersey, NJ-165, available at <http://www.state.nj.us/treasury/taxation/pdf/current/nj165.pdf> (outlining reciprocal exemption of New Jersey with Pennsylvania residents or military spouses).

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

<sup>30</sup> See *Goldberg v. Sweet*, 488 U.S. 252 (1989).

<sup>31</sup> Amy O’Leary, *Everybody Inhale: How Many People Can Manhattan Hold*, N.Y. TIMES (Mar. 1, 2012), [http://www.nytimes.com/2012/03/04/realestate/how-many-people-can-manhattan-hold.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/04/realestate/how-many-people-can-manhattan-hold.html?pagewanted=all&_r=0) (“If a whole city can be created and destroyed in a day, Manhattan comes close. During the workday, the population effectively doubles, to 3.9 million, as shown in a new report by the Rudin Center for Transportation Policy and Management of New York University. Day-trippers, hospital patients, tourists, students and, most of all, commuters, drain the suburbs and outer boroughs, filling streets and office space with life.”).

<sup>32</sup> See New York State Resident Credit (Part 2, Part 3), NY IT-112-R Form (2012), available at [http://www.tax.ny.gov/pdf/2012/fillin/inc/it112r\\_2012\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/2012/fillin/inc/it112r_2012_fill_in.pdf) (last visited Mar. 2, 2015).

<sup>33</sup> Nonresident and Part-Year Resident Income Tax Return, NY IT-201-I at 6 (2014), available at [http://www.tax.ny.gov/pdf/2014/inc/it203i\\_2014.pdf](http://www.tax.ny.gov/pdf/2014/inc/it203i_2014.pdf) (“If you were a nonresident of New York State, you are subject to New York State tax on income you received from New York State sources in 2014. If

structure for the commuters entering and exiting the state, other states are forced to find creative ways to make up lost revenue, such as imposing foreign commuter taxes on out of state individuals.<sup>34</sup>

In addition, New York has extended its rigid approach for income taxation to New York's distribution of state benefits, such as unemployment insurance.<sup>35</sup> Particularly for unemployment, an employee of a New York company must satisfy the definition of "employment" as is covered under NY Labor Law § 511.<sup>36</sup> As will be shown, despite the New York Court of Appeals attempt to distinguish unemployment eligibility from the payment of income tax, the logic behind this distinction is tenuous at best, particularly in light of the growing telecommuting market.<sup>37</sup>

With telecommuting, many legal questions arise with regard to what triggers the "income from a state source" tax requirement.<sup>38</sup> Logically, it would follow that the federal government will collect the appropriate percentage, having a uniform presence among all residents in the individual states, but what about each individual state? Just how far can a state go to collect income tax, and what must an employee do to derive income from that state source? As a result of the ambiguity surrounding these interesting legal questions, some states, such as New York and New Jersey, have begun to treat telecommuters as a potential new source of revenue, which has led to inquiries and allegations of double taxation.<sup>39</sup> This ambiguity will be analyzed further in Part IV.

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you were a resident of New York State for only part of 2014, you are subject to New York State tax on all income you received while you were a resident of the state and on income you received from New York State sources while you were a nonresident.”).

<sup>34</sup> Joseph F. Sullivan, *Jersey Abolishes Commuter Tax on New Yorkers*, N.Y. TIMES (June 9, 1983), available at <http://www.nytimes.com/1983/06/09/nyregion/jersey-abolishes-commuter-tax-on-new-yorkers.html>.

<sup>35</sup> See *In re Allen*, 794 N.E.2d 18, 22 (2003).

<sup>36</sup> *Id.*

<sup>37</sup> See *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840 (2003).

<sup>38</sup> See *Huckaby v. New York State Div. of Tax Appeals*, 829 N.E.2d 276, 285 (2005).

<sup>39</sup> JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* § 20.05 (3d ed. 1998); see also *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840 (2003) (holding that work performed by a non-New York resident employed by a New York entity outside the state not out of necessity was taxable activity by New York State); Nicole Goluboff, *Ending Unfair Telecommuter Taxes*, GIGAOM (Dec. 18, 2009), available at <https://gigaom.com/2009/12/18/ending-unfair-telecommuter-taxes/> (last visited Mar. 12, 2015).

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## REALITIES OF THE TELECOMMUTING TAX

### C. *Protectionist Schemes by Individual States*

Considering the gradual expansion of the Commerce Clause, outlying cases begin to frame the constitutional question as to these seemingly burdensome tax schemes. In *City of Philadelphia v. New Jersey*, the U.S. Supreme Court held that it was impermissible for one state to prohibit the import of most solid or liquid waste originating from out of state, rejecting the idea that a state had the ability to protect itself from the nation's commerce channels.<sup>40</sup> In that same opinion, Justice Stewart goes on to point out that acts of "protectionism" of a state in the context of commerce has generally been found to be unconstitutional, stating:

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.<sup>41</sup>

On its face, New York's tax structure appears to favor the interests of New York State and by extension New York residents, while putting others at a disadvantage. In analogizing *City of Philadelphia* with New York's tax scheme, a parallel can be drawn between taxation of waste as it enters the state and income as it leaves the state. In both instances, these states have cleverly designed laws to capture what it is they want traveling through interstate commerce, while avoiding what they do not. Specifically, *City of Philadelphia* was an attempt to preclude out-of-state waste from being patriated into the state while New York precluded payment of benefits to an out-of-state employee who paid New York income tax.<sup>42</sup>

## IV. THE MODEL PROTECTIONIST FRAMEWORK: *ALLEN* AND *ZELINSKY*

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### A. *Allen*

New York jurisprudence in this area has evolved significantly, and arguably in tension with holdings denouncing protectionism furthered by states, such as *City*

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<sup>40</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>41</sup> *Id.* at 623–24.

<sup>42</sup> *See In re Allen*, 794 N.E.2d 18 (2003).

of *Philadelphia*. More than 25 years after *City of Philadelphia*, the New York Court of Appeals handed down *Allen*, which held that an employee who telecommuted to New York from Florida had no substantial connection to the state under New York Labor Law § 511.<sup>43</sup> In particular, the New York Court of Appeals stated, “We hold that physical presence determines localization for purposes of interpreting and applying section 511 to an interstate telecommuter.”<sup>44</sup> Concluding that a Floridian telecommuter was not entitled to New York unemployment insurance benefits, the court went through an analysis of the Florida employee’s ties to New York, and set forth a New York telecommuter analysis. Although claimant worked remotely, connected to claimant’s employer’s server in New York, maintained a second telephone line in Florida (paid for by the employer), and “initiated [services] by making keystrokes on her laptop computer in Florida,” these ties to New York were not enough to satisfy the requirements of being a New York employee under the state’s labor laws.<sup>45</sup>

### B. *Zelinsky*

That same year, the New York Court of Appeals handed down *Zelinsky v. Tax Appeal Tribunal of State*, providing another interpretation on the definition of employment under New York labor law.<sup>46</sup> In *Zelinsky*, a professor at Cardozo Law School in New York, who worked from home two days a week in Connecticut, was held liable for New York State income tax for the entire workweek, including the days he worked from Connecticut.<sup>47</sup> The court reasoned that when comparing residents and non-residents, Mr. Zelinsky should not be allowed to, in a sense, game the system by working in a different state while New York state residents are unable to follow suit.<sup>48</sup>

The court went on to say in footnote six of the *Zelinsky* opinion that *Allen*, while similar in that it analyzed what it meant to be “localized,” required a different definition of the term “localized” for legal purposes.<sup>49</sup> It appears, at least facially,

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<sup>43</sup> *Id.* at 22.

<sup>44</sup> *Id.*

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

<sup>46</sup> *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840 (2003).

<sup>47</sup> *Id.* at 844.

<sup>48</sup> *Id.* at 847 (holding that since a New York resident would not be entitled to any special tax benefits for similar work performed at home, neither should a nonresident).

<sup>49</sup>

The taxpayer also maintains that he is a “telecommuter” who, pursuant to [*Allen*], may be taxed only according to the location in which he is physically

that the court rejected the notion that *Zelinsky* was fundamentally a telecommuter, and in doing so allowed the Court to define “localized” with respect to his commute type.<sup>50</sup> The court continues the opinion by stating that the New York and Connecticut systems, though overlapping and harboring “multiple taxations” in interstate commerce, served as a permissible “accidental incident of interstate commerce.”<sup>51</sup>

In contrasting both *Allen* and *Zelinsky*, it is worth noting that even a New York administrative law judge was unable to discern what New York required statutorily when evaluating employment. In pertinent part, the administrative judge determined that the “claimant had carried out job responsibilities for her employer *simultaneously in New York and Florida*; and that she was eligible for [benefits] in New York under Labor Law § 511 because her *work was directed and controlled from New York*.”<sup>52</sup> Similarly, in *Zelinsky*, the Court of Appeals reiterates that a tax, while subject to the Dormant Commerce Clause, will be upheld if it “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”<sup>53</sup> Although the plaintiff in *Zelinsky* chose only to argue the apportionment scheme, arguably the plaintiff could have succeeded by arguing that New York’s scheme places a burden on interstate commerce. Specifically, since the Supreme Court’s opinion in *General Motors v. Goodyear*, a decision handed down in 1997, telecommuters have evolved, representing more than what the Court of

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present on any given day. *Allen*, however, involved neither taxes, nor the Commerce Clause, nor apportionment. Rather, in *Allen* we analyzed whether an employee physically present in Florida who “telecommuted” to New York by linking her laptop computer to her employer’s Internet connection over telephone lines was “localized” in New York within the meaning of the Unemployment Insurance Law. In concluding that she was not, we emphasized that the relevant uniform statute contained a definition of “employment” that served in part to advance the purpose of allocating all the employment of an individual to one state and not to divide it “among the several States in which he might perform services.” Here, by contrast, the Commerce Clause requires that the tax be fairly apportioned among the various states from which one’s income is derived.

*Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840, 846 n.6 (2003) (citations omitted).

<sup>50</sup> *Id.* at 847.

<sup>51</sup> *Id.* at 848.

<sup>52</sup> *Allen*, 794 N.E.2d at 20 (emphasis added).

<sup>53</sup> See *Zelinsky*, 801 N.E.2d at 845 (citing *Complete Auto Tr., Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

Appeals referred to as workers who “cross state lines to do [] work at home.”<sup>54</sup> Today, telecommuters are seen as having a significant influence on interstate commerce, either through purchasing goods or services, or payment of user fees such as tolls. In light of this evolution in telecommuting, future telecommuting inquiries should consider the implications on not only the taxpayer, but the economy as a whole.<sup>55</sup>

It is also worth noting that the Court of Appeals, in determining whether plaintiff’s work was merely “convenient,” held that a law professor’s sole purpose is to “teach classes and meet with students.”<sup>56</sup> However, law professors not only teach, but are hired to operate in a research capacity as well (e.g., writing articles, facilitating legal clinics, etc.), an activity which can be performed both at the school and away.<sup>57</sup> This distinction, whether or not raised before the Court of Appeals, is an important one and necessary to a full analysis of telecommuters and their role in society.

### 1. *Internal Consistency*

In *Goldberg v. Sweet*, the Supreme Court states that a court must “determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.”<sup>58</sup> Under an internal consistency analysis, “if every State were to impose an identical tax, no multiple taxation would result.”<sup>59</sup> While the New York Court of Appeals has, to its satisfaction, reconciled the two cases, its justification is, at best, a tenuous reading of the New York labor statute. Specifically, *Allen* states that under New York’s scheme, physical presence is required to satisfy the definition of employment within the state,<sup>60</sup> while *Zelinsky* uses a “convenience of the employer” test to justify taxing work that is physically performed outside the state.<sup>61</sup>

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<sup>54</sup> See *Zelinsky*, 801 N.E.2d at 847 (citing *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (*Zelinsky* argues that *General Motors* precludes use of the Dormant Commerce Clause since the clause “protects markets and participants in markets, not taxpayers as such.”) (emphasis added)).

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

<sup>56</sup> *Id.* at 846.

<sup>57</sup> *Do I want to Be a Law Professor?*, COLUM. L. SCH., available at <http://web.law.columbia.edu/law-teaching/what-you-need-know-about-law-school-teaching/do-i-want-be-professor> (last visited Mar. 12, 2015).

<sup>58</sup> *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

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

<sup>60</sup> *Allen*, 794 N.E.2d at 22.

<sup>61</sup> *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840 (2003).

Looking to current New York tax law, if the individual from *Allen* lived in a jurisdiction that mirrored New York's law, the individual would be subject to double taxation. Under *Allen*, the individual would be deemed "localized" in the mirror state, and as such would have to pay tax to the mirror state.<sup>62</sup> At the same time, the individual would likely fail to satisfy *Zelinsky*'s "convenience of the employer test" and would also have to pay tax to New York.<sup>63</sup> Though the New York Court of Appeals rejects this distinction, it is difficult to think of a situation in which the mirrored state would not impose taxes on such an individual.

## 2. *External Consistency*

Under an external consistency analysis, New York's tax framework as applied to telecommuters becomes even tougher to defend as permissible. For a tax to be externally consistent, the tax must affect only the portions of revenue from interstate activity, which "reasonably reflects the in-state component of the activity being taxed."<sup>64</sup> It follows that a state that wishes to mimic New York's approach to taxing telecommuters must extend the *Zelinsky* approach to not only those whose employment activities physically occur within the state, but also any for whom working outside of the state is "convenient."<sup>65</sup>

## 3. *Ambiguity*

As a result of both *Allen* and *Zelinsky*, extreme ambiguity surrounds the state of telecommuter commerce. Combining both instances, the New York Court of Appeals has affirmed the state's practice of reaching outside the state for income tax purposes while simultaneously denying benefits to employees of the state who are not physically present.<sup>66</sup> While the New York Court of Appeals may not have realized the implications telecommuting would have on interstate commerce in 2003, the continual rise and attraction of telecommuting continues to grow beyond what may have been seen as negligible under *Zelinsky*.<sup>67</sup>

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<sup>62</sup> See *Allen*, 794 N.E.2d at 22.

<sup>63</sup> See *Zelinsky*, 801 N.E.2d at 846.

<sup>64</sup> *Goldberg*, 488 U.S. at 262.

<sup>65</sup> See *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840 (2003) (articulating the convenience to the employer test).

<sup>66</sup> *Id.*; see *In re Allen*, 794 N.E.2d 18 (2003).

<sup>67</sup> *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840, 847 (2003) ("The taxpayer's crossing of state lines to do his work at home simply does not impact upon any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause.").

### C. Telebright

Seven years after *Allen*, a New Jersey court upheld the state's new Corporate Business Tax Act ("CBT Act"), a New Jersey law which was directed at capturing telecommuters' employers as a source of revenue for the state.<sup>68</sup> In *Telebright*, the court found that a foreign corporation was subject to New Jersey's franchise tax where the foreign corporation employed a single person within New Jersey.<sup>69</sup> In particular, the employer, a software development company, "[did] not maintain an office in New Jersey, [maintained] no financial accounts in [the] State, and [did] not solicit sales [in the state]."<sup>70</sup> The employee, a software developer, moved to New Jersey, purchased a laptop with her own funds, and went about her day as follows:

A typical workday for [employee] begins at 9:00 a.m. when she uses her laptop computer at her New Jersey home to check e-mail from her project manager, an independent contractor [outside New Jersey] retained by Telebright. Her e-mail activity notifies the project manager that [employee] has begun work for the day. [Employee] receives daily work assignments from her project manager either by e-mail or telephone, and performs those assignments, mostly by writing software code, on her computer at home. When her assignments are complete, she uses her laptop computer to upload the finished project to a server maintained by Telebright. Her completed code becomes part of the web application provided by Telebright to its customers. [Employee] is available to her employer and supervisor by telephone and e-mail during the workday, which concludes at approximately 4:00 p.m. or 5:00 p.m. She works for Telebright from her home in this fashion five days a week. [Employee] is not paid by the hour and is expected to work forty hours a week. She completes

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<sup>68</sup> *Telebright Corp. v. Dir., Div. of Taxation*, 25 N.J. Tax 333, 340–41 (2010), *aff'd*, *Telebright Corp. v. Dir., New Jersey Div. of Taxation*, 38 A.3d 604 (N.J. Super. Ct. App. Div. 2012).

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

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

timesheets using her laptop computer and a web based program to which Telebright has access.<sup>71</sup>

At issue in the case was not whether the employee was required to pay New Jersey state income tax, since the defendant had been collecting and remitting her income tax to New Jersey, but whether the company itself had to pay a New Jersey tax based on the company's earnings, which the company was ultimately required to do.<sup>72</sup>

*Telebright* arguably demonstrates a response to, and furtherance of, protectionist tax schemes related to telecommuting. Though the CBT Act had been in force for decades, *Telebright* marks its first notable use for capturing extraterritorial income.<sup>73</sup> Previously, a company had to have some sort of tangible relation with the state, and, although this could be something as trivial as registering a vehicle in New Jersey, a company would be able to avoid creating these relations, thereby reducing that company's chances of being subject to New Jersey's state corporate taxes.<sup>74</sup> Just as New York sought to capture the apportioned income in *Zelinsky*, *Telebright* sought to capture proportionate income of a foreign corporation employing an individual in New Jersey, and proved successful in doing so.<sup>75</sup>

## V. THE FUTURE OF TELECOMMUTING

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*Telebright*, when painted against *Allen* and *Zelinsky*, arguably begins to establish a pattern of state protectionism that the Court in *City of Philadelphia*

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

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

<sup>73</sup>

Whether a foreign corporation is doing business in New Jersey is determined by the facts in each case. Consideration is given to such factors as: 1. The nature and extent of the activities of the corporation in New Jersey; 2. The location of its offices and other places of business; 3. The continuity, frequency and regularity of the activities of the corporation in New Jersey; 4. The employment in New Jersey of agents, officers and employees; 5. The location of the actual seat of management or control of the corporation.

Tamko Asphalt Products, Inc. of Maryland v. Glaser, 5 N.J. Tax 446, 453 (1983), *aff'd*, 6 N.J. Tax 342 (Super. Ct. App. Div. 1984).

<sup>74</sup> *Id.* (holding that salesmen who consult were acting within the state, creating a sufficient nexus between the state foreign to the corporation (New Jersey) and the Maryland corporation).

<sup>75</sup> *See Telebright*, 25 N.J. Tax 348.

denounced.<sup>76</sup> If not for the advent of technology such as Voice over Internet Protocol (VoIP) communications, which allows an employee to carry their work phone anywhere they can get an Internet signal, remote and virtual desktop clients, and third-party meeting platforms like GoToMeeting, taxes would be allocated using the established principal of proportioning with respect to time worked in each physical location.<sup>77</sup> However, as states have sought to close fiscal gaps and loopholes, a quilt of tax structures have fallen across the states, and although each may be individually internally and externally consistent, the fabric as a whole is not.

The question to answer is whether it is constitutional for a state to act in such a protectionist manner in the twenty-first century, with technology redefining the commute more so every year. Is it good public policy to allow states to enact laws that have foreseeably detrimental effects on commerce? When considering the amount of resources the country as a whole uses to maintain our current commuting infrastructure, should we penalize good faith attempts to reduce an individual's effect on that infrastructure?<sup>78</sup>

While states such as New York and New Jersey have taken an arguably anti-telecommuter protectionist approach, the legality of the tax scheme remains up for debate.<sup>79</sup> As the discussion in Part III suggests, states that tax telecommuters for work performed out of state are likely violating the overarching constitutional limitations.<sup>80</sup>

#### ***A. Chilling Effect of Protectionist Laws on the Economy***

In the wake of cases like *Zelinsky* and *Telebright*, many companies have to rethink their positions, not with respect to their competition or the market, but with

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<sup>76</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

<sup>77</sup> See *In re Allen*, 794 N.E.2d 18 (2003); *Zelinsky v. Tax Appeals Tribunal of State*, 801 N.E.2d 840, 847 (2003); *Telebright Corp. v. Dir., Div. of Taxation*, 25 N.J. Tax 333, 340–41 (2010), *aff'd*, *Telebright Corp. v. Dir., New Jersey Div. of Taxation*, 38 A.3d 604 (N.J. Super. Ct. App. Div. 2012).

<sup>78</sup> See William A. Galston, *Crumbling Infrastructure Has Real and Enduring Costs*, THE BROOKINGS INSTITUTE (Jan. 23, 2013), available at <http://www.brookings.edu/blogs/up-front/posts/2013/01/23-crumbling-infrastructure-galston> (last visited Mar. 12, 2015) (“in 2010, Americans spent a total of 4.8 billion hours stuck in traffic, wasting 1.9 billion gallons of fuel, at a total cost of \$101 billion”).

<sup>79</sup> Beverly Reyes, *Telecommuters and Their Virtual Existence in the Unemployment World*, 33 HOFSTRA L. REV. 785, 813 (2004).

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

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## REALITIES OF THE TELECOMMUTING TAX

the states in which they employ individuals and enter into transactions.<sup>81</sup> Many are becoming cognizant of the fact that states, in attempts to raise revenue, are finding creative ways to levy existing taxes on individuals and corporations.<sup>82</sup> While some believe that these policies will not have negative consequences, with companies still choosing to do business in these highly desirable metropolitan areas, the results will vary for companies of different size and strength.<sup>83</sup>

Further, it is worrisome that courts that uphold protective statutes continue to look to antiquated law to justify their holdings. Particularly, the New York Court of Appeals tailored a narrow holding in *Zelinsky*, relying on a 1997 U.S. Supreme Court decision which dealt with the tax on sales of tangible goods.<sup>84</sup> The *Zelinsky* transaction is arguably much more expansive, requiring an internal and external consistency analysis, than a simple sale of goods, and as such the interstate commerce implications should have been given more weight in the court's analysis.<sup>85</sup> Limiting the analysis of telecommuters to existing commuting precedent does a disservice to the extensive nature of telecommuting as a whole.

## VI. POSSIBLE REMEDIES

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Policies created around statutes, furthered by confusing common law analysis, only add to the already-confusing tax structures and cause frustration in commuters. In all likelihood, these individuals have no malicious intent to defraud the appropriate agencies of their tax revenue. However, as was the particular case in *Allen*, telecommuters, and state officials in turn, are left at a disadvantage when forced to interpret tax laws as they relate to telecommuters.

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<sup>81</sup> Nicole Goluboff, *Telecommuter Taxes: Commentary on the Recent Telebright Case*, GIGOM (July 7, 2010), available at <https://gigaom.com/2010/07/07/telecommuter-taxes-commentary-on-the-recent-telebright-case/> (last visited Mar. 12, 2015), citing *Special Report: 2010 Survey of State Tax Departments*, BNA INC. (Apr. 23, 2010, vol. 17, No. 4) (showing that in response to a BNA query thirty-five states responded that the employment of a single telecommuter would bring the company into the taxable scope of that state).

<sup>82</sup> Dave Johnson, *Beware of hidden taxes for telecommuters*, CBS NEWS (Mar. 27, 2012, 7:51 AM), <http://www.cbsnews.com/news/beware-of-hidden-taxes-for-telecommuters/>.

<sup>83</sup> *Telecommuters expose their employers to NJ tax, court says*, NJ BIZ (Mar. 6, 2012, 1:20 PM), <http://www.njbiz.com/article/20120306/NJBIZ01/120309884/Telecommuters-expose-their-employers-to-NJ-tax-court-says> [hereinafter *Telecommuters*].

<sup>84</sup> See *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (upholding a tax exemption on sales of natural gas in Ohio to local utilities).

<sup>85</sup> See *Zelinsky*, 801 N.E.2d at 845 (internal and external consistency analysis).

### A. *Positive Actions: Telecommuter Tax Fairness Act of 2004*

Congress has in the past recognized the public's need for uniformity and passed laws governing the ability of individual states to impose taxes upon interstate commerce.<sup>86</sup> With respect to telecommuting, Congress has even proposed bills that would require states to apportion tax with respect to a telecommuting individual's physical location.<sup>87</sup> Unfortunately, until Congress ratifies such a bill, individuals and corporations will be at the mercy of the courts; the same courts that today are reluctant to resolve telecommuter policy in favor of individuals.<sup>88</sup>

Particularly, certain members of Congress recognized this growing need for uniformity and clarity in proposing the Telecommuter Tax Fairness Act of 2004, a bill aimed at reinforcing a common sense approach to taxation.<sup>89</sup> Specifically, the proposed statute states, in pertinent part, that "in applying its income tax laws to the salary of a [telecommuter], a State may only deem such [telecommuter] . . . present . . . if such individual is *physically present in such State* . . . and such State may not impose [telecommuter taxes] on . . . [telecommuters present in another state]."<sup>90</sup>

<sup>86</sup> See 15 U.S.C. § 381 (2012) (restriction on "net income tax" of employees selling within a foreign state).

<sup>87</sup> See Telecommuter Tax Fairness Act of 2004 (not enacted), H.R. 5067 108th Cong. (2004), available at <https://www.govtrack.us/congress/bills/108/hr5067>; see also S. 2785 (not enacted) (2004), available at <https://www.govtrack.us/congress/bills/108/s2785>.

<sup>88</sup> *Huckaby v. New York State Div. of Tax Appeals*, 829 N.E.2d 276 (2005); see also Eric Rothenburg, *Telecommuting and Its Effect on State Income Taxes*, NYSSCPA (Mar. 2006), <http://www.nysscpa.org/cpajournal/2006/306/essentials/p56.htm> (discussing *Huckaby* applying a convenience to the employer test, holding that an individual's income, having worked physically 75% of the time in TN and 25% in NY, was all (100%) subject to NYS income tax).

<sup>89</sup> See Telecommuter Tax Fairness Act of 2004, *supra* note 87.

<sup>90</sup> See *Telecommuters*, *supra* note 83; (Proposed) Telecommuter Tax Fairness Act of 2004 (Prohibition on Double Taxation of Telecommuters).

Sec. 127. Prohibition on double taxation of telecommuters and others who work at home

(a) PHYSICAL PRESENCE REQUIRED—

(1) IN GENERAL—In applying its income tax laws to the salary of a nonresident individual, a State may only deem such nonresident individual to be present in or working in such State for any period of time if such nonresident individual is physically present in such State for such period and such State may not impose nonresident income taxes on such salary with respect to any period of time when such nonresident individual is physically present in another State.

(2) DETERMINATION OF PHYSICAL PRESENCE—For purposes of determining physical presence, no State may deem a nonresident individual to be present in or working in such State on the grounds that such nonresident individual is present at or working at home for the nonresident individual's convenience.

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## REALITIES OF THE TELECOMMUTING TAX

This proposed legislation brings clarity to telecommuting that is absent today. No longer would commuters face ambiguity in who to pay taxes to when working from home.

### **B. Judicial Action**

Alternatively, states should take it upon themselves to bring actions against their sister states. While few individuals have brought these issues to court in an effort to compel state judiciaries to define the constitutional boundaries with which states must operate, the few courts that have adjudicated such cases appear tolerant of the states extending their taxation reach. While legislation, particularly federal, would be a quick fix, courts can use the aforementioned conflicting judicial decisions to force states to rework their telecommuter tax policies. In particular, the incompatibility of *Zelinsky* with *Allen* leads to glaring faults, potentially necessitating reconsideration by a federal court.

## CONCLUSION

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Regardless of the approach, or proposed legislation, it is clear that telecommuters today are at a disadvantage. The law is unclear, the case law seems to allow states to reach beyond what common sense dictates, and many of them are either overpaying, underpaying, or not paying where necessary. While states may derive substantial revenue from taxing telecommuters and levying fees on improperly paid taxes, this emerging technology will likely not reach its maximum potential if these laws are allowed to remain as they exist today. As a result, the benefits of telecommuting, from environmental conservation to increased productivity and resource conservation, will not be fully realized.

The analyzed telecommuting cases have enabled stronger economic states to force weaker ones to succumb to their state's tax scheme. As a prominent example, New York State, in its authority over New York City, has effectively set tax policy for New Jersey, requiring the neighboring state to issue tax credits to avoid double taxation. This in turn has forced New Jersey to adapt to the lost revenue, crafting their own protectionist laws and diffusing the burden to other states.<sup>91</sup> Both the courts and legislatures have a responsibility to provide fair and clear tax policy for this new technology, and either voluntary reciprocity or federal telecommuter legislation is a step in the right direction.<sup>92</sup>

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<sup>91</sup> See *Telebright*, 25 N.J. Tax 340–41.

<sup>92</sup> See Alan Siegel, *Let's Simplify Legal Jargon!*, TED TALKS (Feb. 2010), available at [http://www.ted.com/talks/alan\\_siegel\\_let\\_s\\_simplify\\_legal\\_jargon](http://www.ted.com/talks/alan_siegel_let_s_simplify_legal_jargon) (last visited Mar. 13, 2015) (discussing the importance and movements to clarify law).