2018

Lessons from Wynne: Why New York City's Internally Consistent Income Tax Nonetheless Violates the Dormant Commerce Clause

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CONNECTICUT
LAW REVIEW

VOLUME 50 | DECEMBER 2018 | NUMBER 4

Note

Lessons from *Wynne*: Why New York City's Internally Consistent Income Tax Nonetheless Violates the Dormant Commerce Clause

ALEXANDER G. ANDREWS

In Comptroller of the Treasury of Maryland v. Wynne*, the United States Supreme Court held unconstitutional Maryland's refusal to allow a taxpayer to credit income taxes paid to other states against a purportedly local income tax. This holding could have important consequences for similar income tax schemes, namely New York's. This Note analyzes the New York City income tax in light of* Wynne*. Specifically, this Note evaluates the constitutionality of the New York City income tax when viewed in tandem with the State income tax (of which it is a part) in response to an as applied challenge to the law. It concludes that the State's refusal to allow taxpayers a credit for income taxes paid to other states against the New York City income tax is unconstitutional.*

Part I of this Note examines the history and roots of the dormant Commerce Clause doctrine. Part II narrows the discussion to the Court's application of the dormant Commerce Clause to state taxation of interstate commerce. Part III explains the intense opposition to the dormant Commerce Clause by a minority of justices on the Court. Part IV analyzes Wynne *with an emphasis on its application to the New York income tax statute. Part V explains that while the New York City income tax is internally consistent and non-discriminatory when viewed in isolation, that description is irrelevant to the constitutional analysis. This Part demonstrates that the New York City income tax is an integral part of the New York State income tax despite its label, which misleads the non-discrimination inquiry.*

Through examining the Court's discrimination case law and the relevant scholarly literature, this Note concludes that the internally consistent New York City income tax, when viewed in tandem with the New York State income tax (of which it is an organic part), nonetheless discriminates against interstate commerce and therefore violates the dormant Commerce Clause. This Note also analyzes general principles of international taxation and the Court's teaching in the sales and use tax context to determine that a residence state must grant a credit for income taxes paid to a source state to alleviate any resulting double taxation.

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INTRODUCTION

In *Comptroller of the Treasury of Maryland v. Wynne*, the United States Supreme Court held that Maryland's refusal to allow a credit for income taxes paid to other states against the county portion of the State income tax violated the dormant Commerce Clause.[1] While no other state has an income tax statute identical to that of Maryland, the *Wynne* holding could have important consequences for similar income tax schemes, particularly New York's. This Note analyzes the New York City income tax in light of *Wynne*. Specifically, this Note evaluates the constitutionality of the New York City income tax when viewed in tandem with the State income tax (of which it is a part) in response to an as applied challenge to the law. It concludes that the State's refusal to allow taxpayers a credit for income taxes paid to other states against the New York City income tax[2] is unconstitutional. The important questions this Note resolves are that: (1) an internally consistent tax may nonetheless be discriminatory, and (2) states taxing income based on residence must yield to states taxing income based on source by providing a credit to offset any double taxation that results when two sovereigns exercise their legitimate taxing powers.

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* University of Connecticut School of Law, J.D. Candidate 2019; University of Connecticut, *cum laude*, B.A. 2016. I am eminently grateful to Professor Ruth Mason, Professor Walter Hellerstein, Professor Edward A. Zelinsky, Steven N. Wlodychak, Timothy P. Noonan, Robert D. Plattner, and Dr. James W. Wetzler for reviewing an earlier draft of this Note and providing helpful commentary. I would like to extend further acknowledgements to my colleagues on the *Connecticut Law Review*—particularly our Editor-in-Chief Andrew Ammirati, Managing Editor Michael Rondon, and Assistant Managing Editor Elizabeth Santovasi—for their meticulous editing. Moreover, I am incredibly honored that the Judge John R. Brown Scholarship Foundation selected this Note as a finalist for the 2018 Brown Award for Excellence in Legal Writing. Most importantly, I would like to thank my parents (Corina and Drew Andrews), grandparents (Marie Andrews, Monika Norberg, and Forrest Norberg), and sister (Nicole Andrews) for their love and support in all of my endeavors. This Note is dedicated to my late grandfather George Andrews, who passed away shortly after my 1L year. The views expressed in this Note are solely those of the Author. Any errors or omissions are mine.

[1] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1792 (2015).

[2] *See* N.Y. TAX LAW § 1310 (McKinney 2018) (listing permissible credits against income taxes imposed by cities, which does not include income taxes paid to other states).

application of the dormant Commerce Clause to state taxation of interstate commerce. Part III explains the intense opposition to the dormant Commerce Clause by a minority of justices on the Court. This Part specifically explores the concerns of the late Justice Antonin Scalia, Justice Clarence Thomas, and recently confirmed Justice Neil Gorsuch. Part IV analyzes *Wynne* with an emphasis on its application to the New York income tax statute.

Part V explains that while the New York City income tax is internally consistent and non-discriminatory when viewed in isolation, that description is irrelevant to the constitutional analysis. This Part demonstrates that the New York City income tax is an integral part of the New York State income tax despite its label, which misleads the non-discrimination inquiry.

Through examining the Court's discrimination case law and the relevant scholarly literature, this Part concludes that the internally consistent New York City income tax, when viewed in tandem with the New York State income tax (of which it is an organic part), nonetheless discriminates against interstate commerce and therefore violates the dormant Commerce Clause. Part V analyzes general principles of international taxation and the Court's teaching in the sales and use tax context to determine that a residence state must grant a credit for income taxes paid to a source state to alleviate any resulting double taxation. This Note concludes that, in narrow circumstances, New York's refusal to grant a credit for income taxes paid to other states against the New York City income tax violates the dormant Commerce Clause.

I. THE DORMANT COMMERCE CLAUSE DOCTRINE

Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, . . . among the several states, and with the Indian tribes."[3]

The Commerce Clause expressly grants Congress the authority to regulate interstate commerce,[4] which allows it to preempt the states from doing so.[5] The United States Supreme Court has "further" interpreted the

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[3] U.S. CONST. art. I, § 8, cl. 3. This Note hereinafter refers to this constitutional provision's interstate feature as the "Commerce Clause." While interesting and sometimes relevant in other tax cases, the Foreign Commerce Clause and the Indian Commerce Clause are not within the scope of this Note. For an in-depth examination of the Indian Commerce Clause and state taxation, see Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010).

[4] U.S. CONST. art. I, § 8, cl. 3.

[5] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (citation omitted) ("Congress authorized the Secretary of Labor to set mandatory occupational safety and health standards applicable to all businesses affecting interstate commerce and thereby brought the Federal government into a field that traditionally had been occupied by the States.").

Commerce Clause to "contain a[n] . . . [implicit] negative command, known as the dormant Commerce Clause, [which] prohibit[s]" the states from impermissibly burdening interstate commerce "even when Congress has failed to legislate on the subject."[6] Consistent with the concept of preemption, however, Congress may consent to burdensome state regulation of interstate commerce that would, in the absence of congressional action, offend the dormant Commerce Clause.[7]

The dormant Commerce Clause doctrine traces its roots to the seminal case of *Gibbons v. Ogden*,[8] even though it would appear that the Court did not explicitly use the term until 1945.[9] The doctrine does not bar all state regulation of interstate commerce; it merely precludes states from enacting

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[6] *Wynne*, 135 S. Ct. at 1794; *see also* RICHARD D. POMP, STATE & LOCAL TAXATION 1-4 (8th ed. 2015) ("[T]he Commerce Clause does not explicitly proscribe state regulation or taxation of interstate commerce . . . . Th[e] [dormant Commerce Clause] doctrine asserts that some constraint on state taxation or regulation is required by the policies underlying the Commerce Clause, notwithstanding that Congress neither prohibited nor preempted the legislation at issue."). This Note hereinafter refers to the Commerce Clause's implicit negative command as the "dormant Commerce Clause."

[7] *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429–30 (1946) ("Obviously Congress' purpose [in enacting the McCarran Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation."). In *Wynne*, Justice Scalia criticized this concept. *See Wynne*, 135 S. Ct. at 1808 (Scalia, J., dissenting) (citation omitted) ("The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce. How could congressional consent lift a constitutional prohibition?"). His argument is rather strange. The dormant Commerce Clause is implicit, whereas the Commerce Clause is an explicit grant to Congress. Of course Congress can permit states to enact laws that would otherwise violate the dormant Commerce Clause—the *Commerce Clause* expressly authorizes it to do so.

[8] *See* Gibbons v. Ogden, 22 U.S. 1, 13 (1824) (explaining that the states have no general concurrent commerce powers and that Congress' commerce authority reigns supreme over that of the states in certain circumstances); Norman R. Williams, *The Dormant Commerce Clause: Why Gibbons v. Ogden Should be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817, 823 (2005) (emphasis added) ("But what about all the various regulatory laws, such as health inspection laws, that the states had adopted? They were manifestly not adopted pursuant to the state's taxation authority. Did not their existence and uncontested validity demonstrate that the states retained the power to regulate interstate commerce? [Chief Justice] Marshall's answer was no, and his explanation formed *the early framework for assessing dormant Commerce Clause challenges*."); POMP, *supra* note 6, at 1-5 ("In *Gibbons v. Ogden* . . . Chief Justice Marshall in dictum . . . supported a reading of the [Commerce] Clause that would grant Congress broad power to regulate 'commerce which concerns more states than one,' while allowing a state to 'regulate its police, its domestic trade, and to govern its own citizens,' even if that regulation had an impact on interstate commerce.").

[9] After searching both Westlaw and Lexis using the search term "dormant Commerce Clause" and the filter "United States Supreme Court cases," the earliest case in which the term appears is *Hill v. St. of Fla. ex rel. Watson*, 325 U.S. 538, 547–48 (1945) (Frankfurter, J., dissenting) (emphasis added) ("The same regard for the harmonious balance of our federal system, whereby the States may protect local interests despite the *dormant Commerce Clause*, allows State legislation for the protection of local interests so long as Congress has not supplanted local regulation either by a regulation of its own or by an unmistakable indication that there is to be no regulation at all.").

laws that impermissibly burden,[10] interfere with, or discriminate against[11] interstate commerce. The Court has expounded on the theory that the primary concern of the Commerce Clause is economic protectionism—that is, laws that act as tariffs on interstate commerce.[12] Some justices have vigorously disputed this theory,[13] but the majority of the Court remains comfortable with such an interpretation of this constitutional provision.[14]

In a dormant Commerce Clause inquiry, courts subject state laws that facially discriminate against interstate commerce to strict scrutiny review.[15] A facially discriminatory law will survive this level of scrutiny only if it serves a legitimate local purpose that the state cannot further by less discriminatory means.[16] Such laws are rare and will almost always fail the strict scrutiny test, thus violating the dormant Commerce Clause.[17] More common are facially non-discriminatory state laws that, in practical application, affect interstate commerce. Courts effectively subject these laws to a rational basis level of scrutiny[18] and they often survive.[19] Most

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[10] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[11] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100–01 (1994).

[12] *See Wynne*, 135 S. Ct. at 1794 ("By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce."); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)) ("Th[e] 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . ."); POMP, *supra* note 6, at 1-4 ("The Court has recently described the dormant Commerce Clause as serving the 'purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.' The provision thus 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'").

[13] *See infra* Part III.

[14] In *Wynne*, the only justices that indicated a willingness to revisit the doctrine were Justice Scalia and Justice Thomas. *Wynne*, 135 S. Ct. at 1808 (Scalia, J., dissenting); *id.* at 1811 (Thomas, J., dissenting); *see also* POMP, *supra* note 6, at 1-5 ("Justice Scalia and Justice Thomas are the two sitting justices most willing to re-examine the doctrine.").

[15] *Oregon Waste Systems*, 511 U.S. at 100–01.

[16] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581 (1997).

[17] *But see* Maine v. Taylor, 477 U.S. 131, 151 (1986) ("The evidence in this case amply supports the District Court's findings that Maine's [facially discriminatory] ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives.").

[18] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[19] *See* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) ("State laws frequently survive this *Pike* scrutiny. . . .").

have only an "incidental" impact on interstate commerce.[20]

II. THE DORMANT COMMERCE CLAUSE AND STATE TAXATION

Taxation is a common form of state regulation of interstate commerce. Consequently, the United States Supreme Court has applied the dormant Commerce Clause in numerous cases questioning the constitutionality of state taxation. The application of the doctrine to state taxation has substantially evolved.[21]

A. *The Court's Early Formalism Regarding State Taxation of Interstate Commerce*

Initially, the Court held that state taxation of interstate commerce "in any form" offended the Commerce Clause.[22] The Court's holding in *Leloup v. Port of Mobile* is an example of a dormant Commerce Clause holding in a state tax case prior to the Court's actual adoption of the term.[23] As Justice Samuel Alito explained in *Wynne*, the doctrine certainly has "deep roots"[24] in the context of state taxation.[25]

One year prior to *Leloup*, the Court rendered an even more expansive decision. In *Robbins v. Shelby County Taxing District*, the Court held that state taxation of interstate commerce is unconstitutional even when the state levies the same amount of tax on intrastate commerce.[26] Over time, the Court retreated from this per se formalistic approach, simply adopting another formal methodology.

This new methodology led the Court to hold unconstitutional "direct" state taxation of interstate commerce, such as direct taxation of gross

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[20] *Pike*, 397 U.S. at 142.

[21] *See* POMP, *supra* note 6, at 1-9 to 1-21 (detailing the evolution of the Court's state tax dormant Commerce Clause jurisprudence).

[22] *See* Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) ("In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.").

[23] *Id.*

[24] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015).

[25] Never one to miss an opportunity to use his caustic wit to emphasize a point, the late Justice Scalia compared these "roots" to "weeds." *See id.* at 1808 (Scalia, J., dissenting) (responding to the majority's argument that the dormant Commerce Clause "has deep roots" by countering, "[s]o it does, like many weeds").

[26] *See* Robbins v. Shelby Cty. Taxing Dist., 120 U.S. 489, 497 (1887) (emphasis added) ("Interstate commerce cannot be taxed *at all*, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.").

receipts from interstate commerce[27] and direct taxation of freight transported in interstate commerce.[28] Having adopted the rubric of direct taxation, the Court upheld an *indirect* franchise tax measured by gross receipts from interstate commerce.[29] Such a tax is substantively identical to a direct tax on gross receipts, but the Court honored form over substance—which, as discussed below, is the inverse of its thinking today.[30]

B. *The Erosion of Formalism: The Multiple Taxation Analysis*

Over time, the Court's formalistic thinking began to erode as new justices joined the Court. This erosion began in 1927 with Justice Harlan Stone's dissent in *Di Santo v. Pennsylvania*.[31] Justice Stone argued that the formalistic approach that the Court employed had lost its value.[32] He decried the formula as rigid and difficult to apply.[33]

While in the minority in *Di Santo*, Justice Stone shortly thereafter expressed his anti-formalism in his "famous"[34] *Western Live Stock v. Bureau of Revenue* majority opinion.[35] The tax at issue in *Western Live Stock* was a New Mexico franchise tax measured by gross receipts.[36] The appellant, Western Live Stock, published, edited, and prepared a livestock trade journal solely in that State.[37] The question in the case was whether New Mexico could constitutionally tax Western Live Stock's receipts from out-of-state advertisers.[38] Under previous precedent, the Court would have upheld the tax *solely* because the State labeled it an indirect franchise tax as opposed to a direct gross receipts tax—in *form*, a permissible *indirect* interference with interstate commerce.

Justice Stone took a more pragmatic approach. He first rejected Western Live Stock's claim that the Commerce Clause insulated the out-

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[27] *See* N.J. Bell Tel. Co. v. State Bd. of Taxes & Assessments of N.J., 280 U.S. 338, 339 (1930) ("It is therefore a direct tax on gross receipts derived from interstate commerce, and to that extent, an invalid regulation of or burden upon such commerce.").

[28] *See In re* State Freight Tax, 82 U.S. 232, 278–79 (1872) ("[The tax upon freight] must therefore be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State—a burden upon interstate intercourse.").

[29] Maine v. Grand Truck Ry., 142 U.S. 217, 228–29 (1891).

[30] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (announcing what has come to be known as the *Complete Auto* test).

[31] Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927) (Stone, J., dissenting).

[32] *See id.* at 44 ("[T]he traditional test of the limit of state action [that] inquir[es] whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value.").

[33] *Id.*

[34] POMP, *supra* note 6, at 1-12.

[35] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 253 (1938).

[36] *Id.* at 251–52.

[37] *Id.* at 252; *see* POMP, *supra* note 6, at 1-12 ("All the work in preparing the magazine took place in New Mexico.").

[38] *Western Live Stock*, 303 U.S. at 252.

of-state advertising receipts from taxation *simply* because they arose from an interstate contract.[39] Invoking concepts similar to today's state tax terms of art "nexus" and "unitary business," he held that New Mexico could tax the receipts from out-of-state advertisers because Western Live Stock prepared, printed, and published the magazine advertisements in that State.[40]

Even more presciently, Justice Stone identified the concept of apportionment as a mechanism for deciding whether New Mexico's taxation of the out-of-state advertisement receipts was impermissible because the interstate distribution of the magazine enhanced the value of those advertisements.[41] The Court responded to this question in the negative, holding that the purported burden on interstate commerce was "too remote and too attenuated."[42] Justice Stone found it decisive that no other state could duplicate the New Mexico tax; there was no potential risk of "multiple taxation."[43] The Court concluded that the Commerce Clause does not shield businesses engaged in interstate commerce from their fair share of a state's tax burden[44]—a rejection of prior precedent,[45] and a vitalization of the principle of fairly apportioned state taxation.

After *Western Live Stock*, the multiple taxation analysis seemingly became the rule.[46] In *J.D. Adams Manufacturing Co. v. Storen*, the Court held that an unapportioned gross receipts tax created a substantial risk of "a double tax burden," and therefore violated the Commerce Clause.[47] The Court concluded that other states could tax the receipts from interstate activities that Indiana taxed—for example, states where the goods were sold and manufactured—and thus held that the tax favored intrastate over interstate commerce.[48]

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[39] *Id.* at 253.

[40] *Id.* at 258.

[41] *Id.* at 254–55. The implication being that some other state (or states) should be allowed to tax the receipts because their value could be attributed to states other than New Mexico.

[42] *Id.* at 259.

[43] *Id.* at 260; *see* POMP, *supra* note 6, at 1-13 ("Justice Stone articulated a cumulative burdens or multiple taxation analysis . . . .").

[44] *Western Live* Stock, 303 U.S. at 254.

[45] *See* Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888) (holding that state taxation of interstate commerce in any form violates the Commerce Clause).

[46] *See* POMP, *supra* note 6, at 1-17 (explaining that the Court "seemed to have abandoned . . . the old 'direct-indirect' test . . . in *Western Live Stock*.").

[47] *See* J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938) (emphasis added) ("The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived from activities in interstate commerce; and that the exaction is of such character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.").

[48] *Id.*

Before finally settling Justice Stone's pragmatic multiple taxation approach in its jurisprudence, the Court briefly retreated to formalism.[49] Justice Felix Frankfurter, a diehard dormant Commerce Clause proponent,[50] took his last stand in *Freeman v. Hewit*[51] and *Spector Motor Service, Inc. v. O'Connor*.[52]

With Justice Frankfurter writing the majority opinion, the Court in *Freeman* held that an Indiana gross receipts tax imposed directly upon interstate sales was unconstitutional merely due to its form.[53] Similarly, in *Spector*, the Court held that a Connecticut tax on the privilege of doing business—as applied to businesses solely involved in interstate commerce—was unconstitutional.[54] The Court asserted that its holding in *Spector* did not conflict with prior decisions permitting states to tax the privilege of doing business where a taxpayer's business was both intrastate and interstate.[55] According to the Court, the Connecticut tax at issue was not facially invalid, but invalid as applied to *solely* interstate businesses.[56]

The multiple taxation analysis that the Court articulated in *Western Live Stock* returned shortly after *Spector*.[57] In *Northwestern States Portland Cement Co. v. Minnesota*, the Court held that, absent discrimination or unfair apportionment, a state may tax an out-of-state corporation's net income from its interstate operations.[58] The Court did not dispose of *Spector*, but instead opted to distinguish it on technical grounds.[59]

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[49] *See* POMP, *supra* note 6, at 1-16 (explaining that "the Court under the leadership of Justice Frankfurter started to back slide" toward formalism).

[50] *See id.* at 1-17 ("Justice Frankfurter [was] interest[ed] in a free trade zone . . . [protected] 'from interference by the States.'").

[51] Freeman v. Hewit, 329 U.S. 249 (1946).

[52] Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[53] *See Freeman*, 329 U.S. at 256 ("[A] seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.").

[54] *Spector*, 340 U.S. at 603.

[55] *Id.* at 609–10.

[56] *See id.* (footnote omitted) ("Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.").

[57] *See* POMP, *supra* note 6, at 1-19 ("*Northwestern States Portland Cement Co. v. Minnesota* abandoned Justice Frankfurter's views and . . . [the Court] return[ed] to its prior emphasis on multiple taxation . . . .").

[58] Nw. States Portland Cement Co. v. Minn., 358 U.S. 450, 461–63 (1959).

[59] *See id.* at 463–64 (quoting *Spector*, 340 U.S. at 603) ("[T]he tax [in *Spector*] was 'imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . .' . . . It was not a levy on net income but an excise or tax placed on the franchise of a foreign corporation engaged 'exclusively' in interstate operations.").

Eventually, the Court remedied this judicial fecklessness in *Complete Auto Transit, Inc. v. Brady* when it explicitly overruled *Spector*.[60]

C. *The Death of Formalism: The Complete Auto Test*

The death of formalism and the advent of a new test for subjecting state taxation to dormant Commerce Clause scrutiny arose in *Complete Auto*. The Court eliminated the *Spector* rule from its jurisprudence, proclaiming that it "has no relationship to economic realities" and acts simply "as a trap for the unwary draftsman."[61] The Court insightfully recognized that draftsmanship was the *only* distinguishing factor in *Northwestern States* and *Spector*, even though the cases had distinct outcomes.[62]

In *Complete Auto*, the Court methodically examined two cases that exemplified the flawed nature of the *Spector* rule—*Railway Express I*[63] and *Railway Express II*.[64] In *Railway Express I*, the Court held that Virginia's annual license tax on gross receipts for the privilege of doing business violated the Commerce Clause.[65] The Court determined that the tax was unconstitutional because it was a *direct* tax on the privilege of doing business as opposed to an *indirect* property tax.[66] To remedy this constitutional infirmity, Virginia redrafted its tax statute, labeling it a franchise tax on intangible property in the form of going concern value measured by gross receipts.[67] In *Railway Express II*, the Court upheld the constitutionality of the reworded statute.[68] Recognizing the preposterousness of the *Railway Express* cases and unwilling to continue to "attach[] constitutional significance to . . . semantic difference[s]" any longer,[69] the Court in *Complete Auto* essentially rationalized the analysis.

The Court has since interpreted *Complete Auto* as creating a four-pronged test for subjecting state taxation of interstate commerce to

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[60] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288–89 (1977).

[61] *Id.* at 279.

[62] *See id.* at 285 ("Thus, applying the rule of *Northwestern Cement* to the facts of *Spector*, it is clear that Connecticut could have taxed the apportioned net income derived from the exclusively interstate commerce. It could not, however, tax the 'privilege' of doing business as measured by the apportioned net income. The reason for attaching constitutional significance to a semantic difference is difficult to discern.").

[63] Ry. Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954) [hereinafter *Railway Express I*].

[64] Ry. Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959) [hereinafter *Railway Express II*].

[65] *Railway Express I*, 347 U.S. at 369.

[66] *See id.* ("We think we can only regard this tax as being in fact and effect just what the Legislature said it was—a privilege tax, and one that cannot be applied to an exclusively interstate business.").

[67] *Railway Express II*, 358 U.S. at 438.

[68] *Id.* at 441–42.

[69] *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 285 (1977) ("The reason for attaching constitutional significance to a semantic difference is difficult to discern.").

constitutional scrutiny. Under the *Complete Auto* test, state taxation survives the dormant Commerce Clause when it: (1) is applied to an activity with substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state.[70]

1. *Nexus*

Under the first prong of *Complete Auto*, a state can only tax activities that have a substantial nexus to it.[71] Prior to *Quill Corp. v. North Dakota*, Due Process Clause nexus and Commerce Clause nexus were identical.[72] The Court had never before examined nexus separately under the two different clauses.[73]

In *Quill*, the Court held that North Dakota could not compel a corporation without physical presence in the State to collect its use tax on sales made to North Dakota customers.[74] In so ruling, the Court held that the Commerce Clause, but not the Due Process Clause, requires physical presence nexus for a state to require a vendor to collect its use tax.[75] After *Quill*, Due Process Clause nexus became substantively identical to the "minimum contacts" nexus required for subjecting an individual to a state court's personal jurisdiction,[76] whereas the Commerce Clause set a higher bar.

Nonetheless, even after *Quill*, the Commerce Clause demanded a lower standard of nexus for the imposition of an income tax than for the collection of a use tax. Whereas the Commerce Clause commanded a *considerably* higher standard than the Due Process Clause for the collection of a use tax, it required only a *slightly* higher standard (economic nexus) for the imposition of an income tax.[77] While never decided by the

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[70] *Id.* at 279.

[71] *Id.*

[72] *See* Richard D. Pomp, *Revisiting* Miller Brothers*,* Bellas Hess*, and* Quill, 65 AM. U. L. REV. 1115, 1144 (2016) (explaining that prior precedent did not support the bifurcation of Due Process Clause and Commerce Clause nexus in *Quill*).

[73] *See id.* at 1145 ("As two leading scholars noted, the Court's failure to cite any other cases was not an oversight: 'the Court's discovery that '[d]espite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical' is more accurately viewed as a doctrinal epiphany than as a logical inference to be drawn from the careful reading of its precedents.'").

[74] Quill Corp. v. North Dakota, 504 U.S. 298, 311–12 (1992).

[75] *Id.*

[76] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[77] *See* KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 325–26 (Iowa 2010), *cert. denied*, 565 U.S. 817 (Oct. 3, 2011) ("We also doubt that the [United States] Supreme Court would extend the 'physical presence' rule outside the sales and use tax context of *Quill*."); Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13, 18 (S.C. 1993), *cert. denied*, 510 U.S. 992 (Nov. 29, 1993) ("We hold that by licensing intangibles for use in this State and deriving income from their use here, Geoffrey has a 'substantial nexus' [under the Commerce Clause] with South Carolina.").

United States Supreme Court, the majority of state supreme courts have held that economic nexus grants a state Commerce Clause permission to levy an income tax.[78] In this respect, the now defunct physical presence requirement of *Quill* never applied to income taxes.[79]

Twenty-six years later, the Supreme Court overruled *Quill*'s Commerce Clause holding in *South Dakota v. Wayfair, Inc.*[80] In *Wayfair*, the Court abrogated the physical presence rule and held that certain remote vendors' significant "economic and virtual contacts" with South Dakota satisfied *Complete Auto*'s substantial nexus requirement.[81] In so ruling, the Court set a much lower nexus standard—economic nexus—for the collection of a use tax.[82] It would appear that economic nexus now permits a state to both levy an income tax and compel remote vendors to collect its use tax under *Complete Auto*'s first prong.

2. *Fair Apportionment*

Under the second prong of *Complete Auto*, state taxation of interstate commerce must be fairly apportioned.[83] The Court has further articulated two subprongs of the fair apportionment prong—internal consistency and external consistency.[84]

A state tax is internally consistent if a taxpayer engaged in interstate commerce would not bear a greater *total* tax burden than a taxpayer engaged in intrastate commerce in a hypothetical world where every state

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[78] POMP, *supra* note 6, at 11-213 to -214.

[79] *Id.*

[80] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

[81] *Id.*

[82] *See id.* (internal citations omitted) ("In the absence of *Quill* and *Bellas Hess*, the first prong of *Complete Auto* asks whether the tax applies to an activity with a substantial nexus with the taxing state . . . . Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act only applies to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.").

[83] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[84] *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) ("For over a decade now, we have assessed any threat of malapportionment by asking whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well."). The internal consistency subprong first appeared in the Court's jurisprudence in Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (emphasis added) ("The first, and again obvious, component of fairness in an apportionment formula is what might be called *internal consistency*—that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed."). For an in-depth discussion of the merits of the internal consistency test and the Court's application of this subprong in pre-*Wynne* case law, see Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988) and Walter Hellerstein, *Is "Internal Consistency" Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1 (2007).

levied an *identical* tax.[85] An internally inconsistent tax fails the fair apportionment prong prima facie, and is therefore unconstitutional.[86] If a tax is internally consistent, inquiry into external consistency follows.

A tax is externally consistent if it does not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State."[87] There is no *innate or inherent* aspect of the external consistency inquiry, but *actual* multiple taxation may indicate external inconsistency.[88] One leading scholar believes that the *Wynne* holding may render external consistency obsolete.[89]

3. *Non-Discriminatory*

Under the third prong of *Complete Auto*, state taxation cannot discriminate against interstate commerce.[90] A state satisfies the non-discrimination prong if it taxes interstate commerce at the same rate as intrastate commerce, so that a taxpayer engaged in interstate commerce does not bear a greater *total* tax burden than one engaged in purely intrastate commerce.[91]

Internally inconsistent taxes are a priori discriminatory.[92] Importantly, an internally *consistent* tax is not necessarily *non-discriminatory*—a proposition the Court did not address in *Wynne*. The second prong of *Complete Auto* conflates with the third prong when a tax is internally *inconsistent*, but not necessarily when a tax is internally *consistent*.

For example, in *Westinghouse Electric Corp. v. Tully*, the Court held

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[85] *Jefferson Lines*, 514 U.S. at 185.

[86] *Id.* (emphasis added) ("A failure of internal consistency shows *as a matter of law* that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.").

[87] *Id.*

[88] *Id.*

[89] Edward A. Zelinsky, *The Enigma of* Wynne, 7 WM. & MARY BUS. L. REV. 797, 808–10 (2016).

[90] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[91] *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1805 (2015) ("The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer."); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 214 (1998) ("Under current doctrine, [the third prong] appears to be satisfied if the tax is applied at the same rate to intrastate and interstate business.").

[92] *See Wynne*, 135 S. Ct. at 1805 (holding that Maryland's internally inconsistent personal income tax regime was discriminatory and therefore violated the dormant Commerce Clause); Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984) ("In [*Container*], the Court [announced the internal consistency test]. In that case, the Court was discussing the requirement that a tax be fairly apportioned . . . A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."). *But see* Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (upholding an internally inconsistent Michigan flat fee on trucks engaged in commercial hauling because the State imposed the tax on purely local activity).

that New York's corporate franchise tax credit measured by the amount of exports shipped from an in-state location discriminated against interstate export shipping and therefore offended the dormant Commerce Clause.[93] Even though this provision was internally consistent—if every state adopted an identical credit, a New York corporation shipping exports from, say, Connecticut would *not* bear a greater total franchise tax burden than a New York corporation shipping exports from New York—the Court nonetheless held it to be discriminatory. Other examples of internally consistent state tax provisions that courts have nevertheless struck down as discriminatory include accelerated depreciation deductions limited to in-state property[94] and a corporate franchise tax credit for in-state investment.[95]

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[93] Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 407 (1984).

[94] R.J. Reynolds Tobacco Co. v. City of N.Y. Dep't of Fin., 667 N.Y.S. 2d 4, 9, 11 (App. Div. 1997); Beatrice Cheese, Inc. v. Wis. Dep't of Revenue, Docket Nos. 91-I-100, 91-I-101, 91-I-102, 1993 WL 57202, at *3 (Wis. Tax App. Comm'n Feb. 24, 1993).

[95] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 746 (6th Cir. 2004).

4. *Fair Relation to Services Provided by the Taxing State*

The fourth prong of *Complete Auto* requires state taxation to be fairly related to the services provided by the taxing state.[96] The Court effectively eviscerated this prong in *Commonwealth Edison Co. v. Montana*.[97]

Under current doctrine, the fair relation analysis is a rather spineless inquiry. State taxation will never fail this prong, as it requires no detailed measurements or calculations to prove the requisite fair relation.[98] Additionally, courts consider benefits wholly unrelated to the taxable event in the fair relation analysis.[99] Police protection, fire protection, and a state's "maintenance of a civilized society"—all three of which facilitate business transactions—will always satisfy the fair relation prong.[100] In a sense, the fourth prong conflates with the first—taxes that satisfy the nexus requirement will surely satisfy the fair relation requirement.[101]

III. CRITICISM OF THE DORMANT COMMERCE CLAUSE DOCTRINE

Originalist justices virulently oppose the dormant Commerce Clause, seeing it as unsupported by the text of the Constitution and a quintessential example of "judicially created" law.[102] Opponents of the dormant Commerce Clause include the late Justice Scalia, Justice Thomas, and (probably)[103] recently confirmed Justice Gorsuch.[104] Both the late Justice

[96] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[97] *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 627–28 (1981) (citations omitted) ("The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution. In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.").

[98] *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 199 (1995) ("The [fourth prong] requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity.").

[99] *Id.* at 199–200.

[100] *Id.* at 200.

[101] *See* Choper & Yin, *supra* note 91, at 215 (opining that the fourth factor of the *Complete Auto* test appears redundant in light of the first factor's nexus requirement).

[102] *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) (condemning the dormant Commerce Clause as a "judicial fraud" and a "brazen invention"); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (referring to the dormant Commerce Clause as "judicially created" law).

[103] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring) ("My agreement with the Court's discussion of the history of our dormant [C]ommerce [C]lause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile, our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day."); Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016)

Scalia and Justice Thomas have flamboyantly eviscerated the doctrine in dissents and concurrences.[105] Their criticisms are similar, but not identical.

Justice Scalia deeply respected stare decisis, whereas Justice Thomas gives it little to no weight.[106] Also, unlike Justice Thomas, Justice Scalia was willing to use the dormant Commerce Clause to strike down facially discriminatory state laws.[107] A deeper analysis of the late Justice Scalia's, Justice Thomas', and Justice Gorsuch's views with respect to the dormant Commerce Clause follows.

(Gorsuch, J., concurring) (emphasis added) ("[T]he Commerce Clause is found in Article I of the Constitution and it grants Congress the authority to adopt laws regulating interstate commerce. Meanwhile, in dormant commerce clause cases Article III courts have claimed the (*anything but dormant*) power to strike down some state laws even in the absence of congressional direction."). Professor Edward A. Zelinsky describes Justice Gorsuch as "leery of the dormant Commerce Clause" and believes that he "[]probably[]" views it as a "misbegotten project." Edward A. Zelinsky, *Comparing* Wayfair *to* Wynne*: Lessons for the Future of the Dormant Commerce Clause*, 22 CHAP. L. REV. (forthcoming 2018–2019) (manuscript at 5, 20) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249785).

[104] Previous justices have also expressed criticism of the doctrine, albeit with less forcefulness or "scholarly weaponry." *See* POMP, *supra* note 6, at 1-4 n.17 (explaining that "Justice [Hugo] Black expressed similar views to Justice Scalia," minus the intellectual ammunition); *id.* at 1-6 n.26 (describing "Chief Justice [Roger] Taney's rejection of the dormant Commerce Clause" and "similar views expressed . . . by Justice[] [William] Douglas and [Justice] Black."). Like Justice Thomas (but unlike Justice Scalia), Chief Justice Taney "would have upheld a tax that discriminated against interstate commerce." *Id.*

At the end of the Supreme Court's 2018 term, Justice Anthony Kennedy retired and President Donald Trump nominated then-Judge Brett Kavanaugh of the D.C. Circuit Court of Appeals to replace him. Mark Landler & Maggie Haberman, *Brett Kavanaugh is Trump's Pick for Supreme Court*, N.Y. TIMES, July 9, 2018, https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html. After a contentious and highly partisan confirmation battle, the Senate, by a narrow 50 to 48 vote, confirmed then-Judge Kavanaugh to the Supreme Court. Clare Foran & Stephen Collinson, *Brett Kavanaugh confirmed to Supreme Court*, CNN, Oct. 6, 2018, https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html. If Justice Kavanaugh shares the skepticism of the late Justice Scalia and Justices Thomas and Gorsuch with respect to the dormant Commerce Clause (which is no guarantee), the Court's state tax jurisprudence could change significantly. For example, three dormant Commerce Clause skeptics could join with just two of the Court's liberals to *uphold* state taxes similar to Maryland's in *Wynne*.

[105] *See infra* Part III.A (discussing Justice Scalia's criticism of the dormant Commerce Clause); *infra* Part III.B (discussing Justice Thomas' criticism of the dormant Commerce Clause).

[106] Adam Liptak, *Thomas Is Getting a New Chance to Break Precedent (if not Silence)*, N.Y. TIMES, Feb. 25, 2014, at A15.

[107] *E.g.*, Goldberg v. Sweet, 488 U.S. 252, 271 (1989) (Scalia, J., concurring); Justice Thomas, on the other hand, believes that the Constitution *expressly* proscribes the states from levying taxes that facially discriminate against interstate commerce under a different clause, the Import-Export Clause. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (citation omitted) ("[T]he Constitution [seems] to provide an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other states—not in the judicially created negative Commerce Clause, but in the Art. I, § 10, Import-Export Clause, our decision in *Woodruff v. Parham* notwithstanding.").

A. *The Late Justice Scalia*

The late Justice Scalia abhorred the dormant Commerce Clause, but was willing to both (1) use the doctrine to strike down facially discriminatory state laws,[108] and (2) refuse to overturn dormant Commerce Clause holdings in the spirit of stare decisis—especially because Congress could intervene via legislation to overturn such decisions.[109] Notwithstanding his concurrence in *Quill*,[110] Justice Scalia consistently articulated his displeasure with the dormant Commerce Clause in state tax cases.

In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, Justice Scalia concurred in the Court's opinion that an Oklahoma sales tax on the full price of a bus ticket purchased for interstate travel was consistent with the Commerce Clause.[111] Unlike the Court, however, Justice Scalia did not analyze the tax under the *Complete Auto* test.[112] He believed the tax was constitutional solely because it did not facially discriminate against interstate commerce.[113] Justice Scalia used the opportunity to mock both the dormant Commerce Clause[114] and the *Complete Auto* test—the latter of which he called "eminently unhelpful."[115] He ultimately implied that the dormant Commerce Clause is a counterfeit, illegitimate subversion of congressional authority.[116]

Likewise, in *Wynne*, Justice Scalia dissented to excoriate the dormant Commerce Clause.[117] He called the doctrine a "judicial fraud" and a

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[108] *Goldberg*, 488 U.S. at 271 (Scalia, J., concurring); *see also* POMP, *supra* note 6, at 1-6 n.26 ("Justice Scalia would not . . . have upheld a tax that discriminated against interstate commerce.").

[109] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 320 (1992) (Scalia, J., concurring) (citation omitted) ("I would not revisit the merits of [the Commerce Clause holding of *Bellas Hess*], but would adhere to it on the basis of *stare decisis*. Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has 'special force' where 'Congress remains free to alter what we have done.'"). The idea that the command of stare decisis is even stronger when Congress is free to act is a curious argument to hear from an originalist. For further discussion of the Court's now defunct physical presence nexus standard for state sales and use tax collection (which is beyond the scope of this Note), see Pomp, *Revisiting* Miller Brothers*,* Bellas Hess*, and* Quill, *supra* note 72.

[110] *Quill*, 504 U.S. at 319 (Scalia, J., concurring).

[111] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Scalia, J., concurring).

[112] *Id.*

[113] *Id.*

[114] *See id.* at 200 ("That seems to me the most we can demand to certify compliance with the 'negative Commerce Clause'—which is 'negative' not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution.").

[115] *Id.* at 201.

[116] *See id.* ("Under the *real* Commerce Clause . . . it is for Congress to make the judgment that interstate commerce must be immunized from certain sorts of nondiscriminatory state action . . . .").

[117] *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1808 (2015) (Scalia, J., dissenting) ("The principal purpose of my writing separately is to point out how wrong our negative

"brazen invention."[118] In paradigmatic Scalia fashion, he chastised the majority for its (albeit correct)[119] statement that the doctrine has "deep roots" in the Court's jurisprudence.[120] He further lambasted the *Complete Auto* test—particularly the concept of internal consistency—for its "ad hocery."[121]

These opinions shed some light on the late Justice Scalia's position on Congress' powers under the Commerce Clause. Justice Scalia believed that, when Congress does not legislate on a particular subject, the states are permitted to regulate interstate commerce via facially neutral statutes.[122] Instead of courts analyzing such laws under the dormant Commerce Clause, Justice Scalia would have preferred Congress to be the final arbiter. In his view, if Congress believes that a state regulation impermissibly burdens interstate commerce, it can simply preempt the state law at issue.[123] Under this interpretation of the Commerce Clause, *courts* should not apply the *Complete Auto* test because such determinations are *legislative* tasks for Congress to undertake.

B. *Justice Thomas*

Justice Thomas rejects the dormant Commerce Clause perhaps to an even greater degree than the late Justice Scalia.[124] He is also much more skeptical of stare decisis than his former colleague.[125]

Justice Thomas has openly expressed self-deprecatory regret for writing and joining dormant Commerce Clause opinions early in his tenure

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commerce clause jurisprudence is in the first place, and how well today's decision illustrates its error.").

[118] *Id.* at 1808.

[119] *See* Gibbons v. Ogden, 22 U.S. 1, 13 (1824) (explaining that the states have no general concurrent commerce powers and that Congress' commerce authority reigns supreme over that of the states' in certain circumstances).

[120] *See Wynne*, 135 S. Ct. at 1808 (Scalia, J., dissenting) (citation omitted) ("The Court claims that the [dormant Commerce Clause] 'has deep roots.' So it does, like many weeds.").

[121] *Id.* at 1809.

[122] *See id.* at 1808 ("The [Commerce] Clause says nothing about prohibiting state laws that burden commerce. Much less does it say anything about authorizing judges to set aside state laws *they believe* burden commerce.").

[123] *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 201 (1995) (Scalia, J., concurring) ("Under the *real* Commerce Clause . . . it is for Congress to make the judgment that interstate commerce must be immunized from certain sorts of nondiscriminatory state action—a judgment that may embrace (as ours ought not) such imponderables as how much 'value [is] *fairly attributable* to economic activity within the taxing State,' and what constitutes '*fair relation* between a tax and the benefits conferred upon the taxpayer by the State.'").

[124] *See, e.g.*, POMP, *supra* note 6, at 1-6 n.26 ("Justice Scalia would not . . . have upheld a tax that discriminated against interstate commerce . . . [,] but Justice Thomas apparently would.").

[125] Justice Scalia himself even stated that Justice Thomas "does not believe in *stare decisis*, period." Liptak, *supra* note 106, at A15.

on the Court.[126] In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[127] he took his "leave of the 'dormant' Commerce Clause" because, in his words, "it ceased to make sense to [him]."[128] In his *Wayfair* concurrence, Justice Thomas acknowledged that he should have joined Justice Byron White's dissent in *Quill*. That is, "adher[ing] to [dormant Commerce Clause] jurisprudence in [that case]" by joining Justice Scalia's concurrence was something he would never do today.[129] Now, he rejects "the Court's entire negative Commerce Clause jurisprudence."[130]

While typically employing a less vicious and sarcastic tone than the late Justice Scalia, Justice Thomas has similarly expressed disdain toward the dormant Commerce Clause in his opinions. He has referred to dormant Commerce Clause jurisprudence as "overbroad," "unnecessary," and "unmoored from any constitutional text."[131] Additionally, he has argued that the doctrine "has no basis in the text of the Constitution, makes little sense, and [is] virtually unworkable."[132]

Justice Thomas diverges from the late Justice Scalia in his view that even facially discriminatory state tax laws do not offend the Commerce Clause. According to Justice Thomas, the Court's interpretation that the Commerce Clause has an implicit negative command is inconsistent with the original meaning of the Constitution and thus the Court should *never* apply the doctrine.[133] He believes instead that another constitutional provision, the Import-Export Clause, *explicitly* proscribes facially discriminatory state taxation of interstate commerce.[134] Justice Thomas views the original meaning of that clause as prohibiting states from levying tariffs not only on goods imported from, or exported to, foreign nations,

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[126] *See Clarence Thomas Transcript*, Conversations with Bill Kristol, https://perma.cc/G9VN-A7FU (last visited Dec. 14, 2018) ("[W]hen I got to the Court, I wrote some 'dormant' Commerce Clause opinions; I went along with them because I [had not] thought it through.").

[127] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997).

[128] *Clarence Thomas Transcript*, *supra* note 126.

[129] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring). Presumably, Justice Thomas will never again write an opinion striking down a state law under the dormant Commerce Clause as he did in Or. Waste Sys., Inc. v. Dep't of Envt'l Quality of State of Or., 511 U.S. 93 (1994).

[130] *Wayfair*, 138 S. Ct. at 2100.

[131] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610 (Thomas, J., dissenting).

[132] *Id.*

[133] *See, e.g.*, McBurney v. Young, 569 U.S. 221, 237 (2013) (Thomas, J., dissenting) ("Though the Court has properly applied our dormant Commerce Clause precedents, I continue to adhere to my view that '[t]he negative commerce clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.'").

[134] *See Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610 (Thomas, J., dissenting) (citation omitted) ("[T]he Constitution [seems] to provide an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other States—not in the judicially created negative Commerce Clause, but in the Art. I, § 10, Import-Export Clause, our decision in *Woodruff v. Parham*, notwithstanding.").

but also other states.[135] He opines that, to the Framers of the Constitution, the terms "import" and "export" referred to trade amongst the states as well as with foreign nations.[136]

C. *Justice Gorsuch*

Prior to his appointment to the Supreme Court in 2017, Justice Gorsuch served as a judge on the Tenth Circuit Court of Appeals. As a circuit court judge, he was bound to follow Supreme Court precedent, making it impermissible for him to disregard the dormant Commerce Clause.

Nonetheless, in *Energy and Environment Legal Institute v. Epel*,[137] then-Judge Gorsuch mentioned the common criticisms of the doctrine.[138] Arguably,[139] the context of his *Epel* opinion shows that then-Judge Gorsuch positively acknowledged these criticisms by not dismissing them outright for being outside mainstream legal thought (as Justice Alito did in *Wynne*).[140] Additionally, in *Direct Marketing Association v. Brohl* (at the Tenth Circuit), then-Judge Gorsuch took an interesting jab at the doctrine, referring to it as "anything but dormant" because courts often employ it to strike down state legislation even absent congressional preemption.[141]

While Justice Gorsuch certainly aligns with many conservative legal theories,[142] opposition to the dormant Commerce Clause is one that divides the Court's conservative bloc. In *Wayfair*, his first dormant Commerce Clause case as a Supreme Court Justice, Justice Gorsuch could have clarified his views with respect to the doctrine.[143] Instead, he simply reiterated his previously expressed qualms[144] and decided that the overall

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[135] *Id.* at 621.

[136] *Id.*

[137] Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169 (10th Cir. 2015).

[138] *See id.* at 1171 (citations omitted) ("Detractors find dormant commerce clause doctrine absent from the Constitution's text and incompatible with its structure. But as an inferior court we take Supreme Court precedent as we find it and dormant commerce clause jurisprudence remains very much alive today . . . .").

[139] This Author believes that the context of the *Epel* opinion shows that then-Judge Gorsuch is implicitly criticizing the dormant Commerce Clause by explicitly mentioning the common criticisms of the doctrine.

[140] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1809 (2015).

[141] Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129, 1148 (10th Cir. 2016) (Gorsuch, J., concurring).

[142] *See, e.g.*, Jonathan H. Adler, *Justice Gorsuch's First Opinions Reveal a Confident Textualist*, WASH. POST, June 23, 2017 ("Associate Justice Neil Gorsuch has written three opinions . . . . All three show the Supreme Court's newest justice to be a confident, committed textualist with a distinctive writing style . . . ."). Justice Gorsuch also harbors deep skepticism of the *Chevron* doctrine, which even the late Justice Scalia favored. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Like the dormant Commerce Clause, *Chevron* is a judicially created doctrine.

[143] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch, J., concurring).

[144] *See id.* ("My agreement with the Court's discussion of the history of our dormant [C]ommerce [C]lause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine.

legitimacy of the doctrine is a "question[] for another day."[145]

IV. COMPTROLLER OF THE TREASURY OF MARYLAND V. WYNNE

A. *Background*

Brian and Karen Wynne, a wealthy Maryland couple, conducted business via a pass-through entity, and filed income tax returns in thirty-nine states.[146] As residents of Maryland, that State taxed the Wynnes on their worldwide income. Additionally, the other states in which the Wynnes conducted business taxed them on income sourced in those states.

The Maryland personal income tax scheme that the Wynnes challenged, in the words of Justice Alito, was rather "unusual."[147] Maryland imposed both a progressive "State" income tax and a flat "county" income tax that varied in rate.[148] Maryland also taxed nonresidents on their Maryland sourced income.[149] The State required nonresidents subject to the State income tax, but not the county income tax, to pay a "special nonresident" tax.[150] Maryland applied this tax at the lowest county income tax rate.[151]

Maryland allowed taxpayers a credit for income taxes paid to other states against the *State* income tax, but not the *county* income tax.[152] The Wynnes challenged this aspect of the statute as unconstitutional as applied in their specific case.[153]

Because they paid so much in income taxes to other states, the Wynnes had an excess credit that they argued should have reduced (or eliminated) their Maryland county income tax. For example, assume the Wynnes paid $100,000 in income taxes to other states and owed Maryland $100,000 in income taxes—$68,000 on the State portion and $32,000 on the county portion. They would use $68,000 of their $100,000 credit for income taxes

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The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile, our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day.").

[145] *Id.* at 2101.

[146] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1793 (2015).

[147] *Id.* at 1792.

[148] *Id.* The county income tax rates ranged from 1.25% to 3.2%. Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 2015 J. TAX'N 4, 5 (2015).

[149] *Wynne*, 135 S. Ct. at 1792.

[150] *Id.*

[151] *Id.* Therefore, the special nonresident tax rate was 1.25%. Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, *supra* note 149.

[152] *Wynne*, 135 S. Ct. at 1792.

[153] *Id.* at 1793.

paid to other states to eliminate the State portion of the Maryland income tax. Maryland, however, would not allow the Wynnes to use their excess credit of $32,000 to eliminate the county portion of its income tax.

The Maryland Tax Court held for the State, but the Circuit Court for Howard County reversed and held that the Maryland income tax scheme violated the dormant Commerce Clause.[154] The Court of Appeals of Maryland, the State's highest court, affirmed the trial court's holding after analyzing the tax under *Complete Auto*.[155] The State's highest court held that the tax was both internally inconsistent and discriminatory.[156] In so ruling, Maryland's highest court originally held that the tax was discriminatory *because of* Maryland's refusal to permit a credit for income taxes paid to other states against the county income tax, but later clarified that the State could use another "method of apportionment" to remedy this constitutional defect.[157]

B. *The Majority Opinion*

The United States Supreme Court, with Justice Alito writing for a 5-4 majority (a closer decision than many expected),[158] held that the Maryland income tax scheme "[had] the same economic effect as a state tariff," which is the "quintessential evil targeted by the dormant Commerce Clause."[159] Therefore, the Court affirmed the decision of Maryland's highest court and held that the State's income tax scheme was unconstitutional.[160]

The Court analyzed the Maryland income tax scheme doctrinally under *Complete Auto*.[161] The Court's analysis specifically focused on the internal consistency test,[162] with Justice Alito cogently articulating the internal

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[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See* Donald Williamson & Michelle M. Hobbs, *The Constitution's Dormant Commerce Clause Limits the Power of States to Tax Their Residents*—Comptroller of the Treasury of Maryland v. Brian Wynne et ux., AM. U. KOGOD SCH. OF BUS. RES. 1 (2015) (emphasis added) ("On May 18, the Supreme Court in a *surprisingly* close 5-4 decision found that Maryland's failure to grant a credit against its county income tax for out-of-state income taxes paid by Maryland residents violates the Constitution's Commerce Clause."). The four dissenters (Justices Scalia, Thomas, Ginsburg, and Kagan) were strange bedfellows. This Author believes that these four justices voted together to uphold the Maryland income tax scheme because Justices Scalia and Thomas abhor the dormant Commerce Clause, whereas Justices Ginsburg and Kagan are political liberals who support expansive state taxing power. The dormant Commerce Clause a priori restricts a state's taxing power. It would appear that judicial originalists and political liberals have reason to agree on this issue.

[159] *Wynne*, 135 S. Ct. at 1792.

[160] *Id.*

[161] *Id.* at 1803. The Court eschewed a traditional analysis of all four factors of *Complete Auto*, simply analyzing the Maryland tax scheme under the internal consistency test.

[162] *See id.* ("The Maryland income tax scheme fails the internal consistency test.").

inconsistency of the tax:

> A simple example illustrates [that Maryland's income tax scheme is internally inconsistent]. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.[163]

The Court also held that Maryland's income tax scheme impermissibly discriminated against interstate commerce by demonstrating how a person earning income derived from interstate commerce would bear a greater total income tax burden than one earning income purely intrastate.[164] This finding is rather unsurprising as an internally inconsistent tax is *inherently* discriminatory.[165]

Additionally, the Court responded to Justice Ruth Bader Ginsburg's assertion that the internal consistency test "requires a State taxing based on residence to 'recede' to a State taxing based on source."[166] For example, Justice Ginsburg was concerned that the Court's holding would compel Maryland to "limit its residence-based taxation" if it also chose "to exercise, to the full extent, its source-based authority [to tax]."[167] To establish internal consistency, Maryland would have to either: (1) grant a credit for income taxes paid to other states against the county portion of its income tax, (2) solely tax Maryland sourced income, or (3) eliminate the special nonresident tax. All three options would prevent the State from exercising unfettered authority to tax based on both residence and source.

Following the lead of Maryland's highest court, the Court attempted to rebuff (but did not directly address) Justice Ginsburg's claim. Justice Alito

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[163] *Id.* at 1803–04.

[164] *See id.* at 1805 ("The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer.").

[165] *See supra* Section II.C.3.

[166] *See Wynne*, 135 S. Ct. at 1805 (citations omitted) (Justice Ginsburg's "dissent claims that the [internal consistency] analysis requires a State taxing based on residence to 'recede' to a State taxing based on source. We establish no such rule of priority.").

[167] *Id.* at 1813–14 (Ginsburg, J., dissenting).

simply refused to "foreclose the possibility" that a state could employ methods other than offering a credit to remedy an internally inconsistent tax.[168] The Court declared, however, that allowing a credit against the county income tax *would* make Maryland's income tax scheme internally consistent.[169]

While not rigorously examined in the opinion,[170] the Court additionally held that the Maryland county income tax was an extension of the State taxing regime—a holding integral to the outcome of the case.[171] This important concept is relevant to this Note, as the New York City income tax (like the Maryland county income tax) is merely a creature of the New York State taxing regime.[172]

C. *Justice Ginsburg's Dissent*

Justice Ginsburg's dissent reads more like a policy paper than a rigorous doctrinal legal opinion, and contains multiple misstatements of law.[173] Nonetheless, Justice Ginsburg indicated a fact that is important to this Note: Maryland's income tax scheme would achieve internal consistency if the State were to repeal the special nonresident tax.[174]

In her first error, Justice Ginsburg conflated a state's authority to tax its own residents under the Due Process Clause with its obligations

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[168] *Id.* at 1806 (majority opinion).

[169] *Id.* at 1805. Besides allowing a credit, the Court offers no other explicit method of making the tax in question internally consistent. *See id.* at 1806 (citations omitted) ("But while Maryland could cure the problem with its current system by granting a credit for taxes paid to other States, we do not foreclose the possibility that it could comply with the Commerce Clause in some other way. Of course, we do not decide the constitutionality of a hypothetical tax scheme that Maryland might adopt because such a scheme is not before us."). The most obvious way of making the tax internally consistent without offering a credit would be to repeal the special nonresident tax (as Justice Ginsburg's dissent explains). *Id.* at 1822 (Ginsburg, J., dissenting). Maryland could also create internal consistency without providing a credit if it only taxed Maryland sourced income. Nonetheless, the context of the majority opinion implies that if a state adopts a credit, it must extend that credit against the county portion of its income tax.

[170] This issue is not rigorously examined in the opinion because the conclusion is clear. *See id.* at 1792 (majority opinion) (explaining that the county income tax is part of the State income tax despite its label).

[171] This explains Justice Alito's placement of quotation marks around the word "county" and his additional references to the tax as a *so-called* "county" tax throughout the opinion. *See, e.g.*, *id.* (internal citations omitted) ("The income tax that Maryland imposes upon its own residents has two parts: a 'state' income tax, which is set at a graduated rate, and a so-called 'county' income tax, which is set at a rate that varies by county but is capped at 3.2%. Despite the names that Maryland has assigned to these taxes, both are State taxes, and both are collected by the State's Comptroller of the Treasury.").

[172] *See infra* Section V.A.

[173] Described and examined in this Part, *infra*.

[174] *Wynne*, 135 S. Ct. at 1822 (Ginsburg, J., dissenting). This is precisely the structure of the New York City income tax. *See* N.Y. TAX LAW § 1302(a) (McKinney 2018) (providing that New York City does not tax nonresidents).

regarding such taxation under the Commerce Clause.[175] Under the Due Process Clause, a state indisputably may tax its residents on their worldwide income.[176] The Commerce Clause, however, requires that such taxation be fairly apportioned and non-discriminatory, inter alia.[177]

Additionally, Justice Ginsburg referenced Justice Thurgood Marshall's erroneous dictum in *Goldberg v. Sweet*[178]—that "[i]t is not . . . a purpose of the Commerce Clause to protect state residents from their own state taxes."[179] Furthermore, Justice Ginsburg distinguished gross receipts taxes from income taxes—a distinction the Court has long since discarded for most purposes.[180]

The most relevant recognition in Justice Ginsburg's dissent (at least for the purposes of this Note) is that Maryland's income tax scheme could achieve internal consistency even *without* allowing the Wynnes a credit for income taxes paid to other states against the county portion of the State income tax.[181] Instead, the State could simply repeal the special nonresident tax.[182] This appalled Justice Ginsburg,[183] but the majority dismissed it as an example of the multiple options available for a state to remedy unconstitutional discrimination—a concept known as either "level[ing] up" or "level[ing] down" in light of a constitutional infirmity.[184]

D. *The Anti-Dormant Commerce Clause Dissents*

As expected, both Justice Scalia and Justice Thomas used *Wynne* as another opportunity to condemn the dormant Commerce Clause. Justice

[175] *Id.* at 1813 (internal citation omitted) ("Today's decision veers from a principle of interstate and international taxation repeatedly acknowledged by this Court: A nation or State 'may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.'").

[176] *See* Shaffer v. Carter, 252 U.S. 37, 57 (1920) ("As to residents [a state] may, and does, exert its taxing power over their [worldwide] income . . . ").

[177] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[178] Goldberg v. Sweet, 488 U.S. 252, 266 (1989).

[179] *Wynne*, 135 S. Ct. at 1814 (Ginsburg, J., dissenting). The Court abandoned this dictum in *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203 (1994) ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional.").

[180] *See Wynne*, 135 S. Ct. at 1796 (citations omitted) ("The discarded distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible 'direct and immediate burden' on interstate commerce, whereas a tax on net income is merely an 'indirect and incidental' burden.").

[181] *See id.* at 1822 (Ginsburg, J., dissenting) ("Because it is the interaction between [the "county" income tax and the "special nonresident" tax] that renders Maryland's tax scheme internally inconsistent, Maryland could eliminate the inconsistency by terminating the special nonresident tax . . . .").

[182] *Id.*

[183] *See id.* ("There is, moreover, a deep flaw in the Court's chosen test . . . Maryland could . . . bring itself into compliance with the test at the heart of the Court's analysis without removing the double tax burden the test is purportedly designed to 'cure.'").

[184] *Id.* at 1806 (majority opinion).

Scalia took his last stand against the doctrine in this dissent, as he passed away shortly thereafter.[185] Ever so artfully,[186] Justice Scalia took the doctrine apart. He referred to it as a "judge-invented" rule,[187] and used numerous witty adjectives to display his scorn for the doctrine—calling it "[s]ynthetic," "[i]maginary," "incoherent," and a "brazen invention."[188]

As usual, Justice Thomas adopted a more civil approach in displaying his displeasure with the dormant Commerce Clause. Nonetheless, Justice Thomas occasionally employed sarcasm in his historical analysis of income taxation at the time of the Founding.[189] He distinguished the *dormant* Commerce Clause from the "*actual* Commerce Clause,"[190] doubting that the doctrine truly exists.[191] Overall, this dissent was nothing new from Justice Thomas. The opinion contained citations to his previous dissents and concurrences in dormant Commerce Clause cases,[192] and simply cemented his unique jurisprudential purity in opposition to the doctrine.[193]

V. THE NEW YORK CITY INCOME TAX IN LIGHT OF THE *WYNNE* HOLDING

A. *The New York Income Tax Statute*

New York State levies a personal income tax[194] consistent with the

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[185] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES, Feb. 14, 2016, at A1.

[186] At one point, he even invoked the famous philosopher Immanuel Kant to mock the internal consistency test. *See Wynne*, 135 S. Ct. 1787, 1809 (Scalia, J., dissenting) ("How did this exercise in counterfactuals find its way into our basic charter? The test, it is true, bears some resemblance to Kant's first formulation of the categorical imperative: 'Act only according to the maxim whereby you can at the same time will that it should become a universal law' without contradiction.").

[187] *Id.* at 1807. Justice Scalia is absolutely correct—the dormant Commerce Clause does not *explicitly* appear in the Constitution. Obviously (as the Court still applies the doctrine), the majority of the Court disagrees with Justice Scalia's belief that this judicial invention is dangerous.

[188] *See id.* at 1810–11 (referring to the dormant Commerce Clause as both the "Synthetic Commerce Clause" and the "Imaginary Commerce Clause"); *id.* at 1808 (referring to the doctrine as "incoherent" and a "brazen invention"). Justice Scalia was much less flamboyant in his criticism of the doctrine in *Tyler Pipe Industries, Inc. v. Wash. St. Dep't of Revenue*, 483 U.S. 232 (1987). *See id.* at 254–65 (Scalia, J., dissenting) (explaining the flaws of the internal consistency test and discussing his opposition to the dormant Commerce Clause).

[189] *See, e.g.*, *Wynne*, 135 S. Ct. at 1811 (Thomas, J., dissenting) (emphasis added) ("[T]he Court proves how far our negative Commerce Clause jurisprudence has departed from the *actual* Commerce Clause."); *id.* at 1813 ("Even if one assumed that the negative Commerce Clause existed . . .").

[190] *Id.* at 1811 (emphasis added).

[191] *See id.* at 1813 ("Even if one assumed that the negative Commerce Clause existed . . . ").

[192] *Id.* at 1811.

[193] *See supra* Section III.B (explaining that Justice Thomas would refuse to strike down any state law under the dormant Commerce Clause, even one that is facially discriminatory).

[194] N.Y. TAX LAW § 601 (McKinney 2018).

national pattern[195] of taxing residents on their worldwide income[196] and nonresidents on their sourced income.[197] New York also authorizes (by statute) cities with over one million inhabitants to levy a city income tax.[198] While New York provides taxpayers a credit for income taxes paid to other states against the State income tax,[199] it does not allow its resident taxpayers to credit income taxes paid to other states against the City income tax.[200]

Without statutory authorization from the State, New York City would not have the power to tax.[201] The New York Court of Appeals has held that under the New York Constitution: (1) "[t]he power to tax . . . rests solely with the Legislature;"[202] (2) "the exclusive power of taxation is lodged in the State Legislature;"[203] (3) "municipalities such as the City of New York have no inherent taxing power, but only that which is delegated by the State;"[204] and (4) "[a]ll taxing power in the State of New York is vested in the Legislature pursuant to section 1 of article III and section 1 of article XVI of [the] State Constitution."[205] While the State's taxing power is exclusive, "[t]he Legislature [can] . . . delegate authority to assess and collect taxes to a city . . .,"[206] but "th[at] delegation of State taxing power . . . must be made in express terms by enabling legislation."[207] New York State exercises this exact power of delegation by permitting New York City to impose a personal income tax via statute.[208] Therefore, the City income tax is part of, not independent of, the State income tax and thus directly subject to the ruling in *Wynne*, as there is no distinction between

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[195] MORGAN SCARBORO, TAX FOUNDATION, STATE INDIVIDUAL INCOME TAX RATES AND BRACKETS FOR 2018 (2018), https://taxfoundation.org/state-individual-income-tax-rates-brackets-2018/ ("Forty-three states levy individual income taxes.").

[196] N.Y. TAX LAW §§ 611(a), 612(a) (McKinney 2018).

[197] *Id.* § 631(a).

[198] *Id.* § 1301(a)(1).

[199] *Id.* § 620.

[200] *See id.* § 1310 (listing permissible credits against income taxes imposed by cities, which does not include income taxes paid to other states).

[201] *See* Castle Oil Corp. v. City of N.Y., 675 N.E. 2d 840, 842 (N.Y. 1996) ("Under our form of State government, the exclusive power of taxation is lodged in the State Legislature. A corollary to this basic rule is that municipalities such as the City of New York have no inherent taxing power, but only that which is delegated by the State.") (citing N.Y. CONST. art. XVI, § 1; *id.* art. IX, § 2).

[202] City of N.Y. v. State of N.Y., 730 N.E. 2d 920, 925 (N.Y. 2000); *see also* Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E. 2d 127, 130 (N.Y. 1993) ("The power to tax, of course, lies solely with the Legislature. This power is inherent in our form of government and justified by legislative accountability to the electorate.").

[203] Castle Oil Corp. v. City of N.Y., 675 N.E. 2d 840, 842 (N.Y. 1996).

[204] *Id.*

[205] Sonmax, Inc. v. City of N.Y., 372 N.E. 2d 9, 11 (N.Y. 1977).

[206] *Id.*

[207] *Castle Oil Corp.*, 675 N.E. 2d at 842.

[208] N.Y. TAX LAW § 1301(a)(1) (McKinney 2018).

state and local taxes for purposes of federal constitutional law.[209]

Moreover, the language of the statute authorizing New York City to levy a personal income tax demonstrates that the City income tax is part of the State taxing regime. The provision reads:

> Notwithstanding any other provision of law to the contrary, any city in this state having a population of one million or more inhabitants, acting through its local legislative body, *is hereby authorized and empowered* to adopt and amend local law imposing in any such city, for taxable years beginning after nineteen hundred and seventy-five: a tax on the personal income of residents of such city, at the rates provided for under subsection (a) of section thirteen hundred four of this article. . . .[210]

According to this statute, New York City, like most municipalities,[211] has no power to tax other than what the State expressly grants it.[212]

The administration and collection of the New York City income tax provide further evidence that it is inherently linked to, and part of, the State taxing regime. A New York City resident's City taxable income is identical

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[209] *See* Walter Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable?*, 83 ST. TAX NOTES 1091, 1092–93 (2017) (emphasis added) ("It is well settled . . . that any action by a political subdivision of a state is subject to the same restraints that would be imposed on the state if the state itself had taken the challenged action in question. Because political subdivisions of a state are creatures of the state, their exercises of tax power are treated as the exercise of state tax power and adjudicated according to the standards restraining the exercise of state tax power. In short, *that the state tax power is exercised by a political subdivision of the state rather than by the state itself is of no constitutional moment*."); Brief of Michael S. Knoll and Ruth Mason as Amici Curiae in Support of Respondents at 5 n.2, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485) ("The formal division by Maryland of its tax into 'state' and 'county' taxes has no effect on constitutional analysis.").

[210] N.Y. TAX LAW § 1301(a)(1) (McKinney 2018) (emphasis added).

[211] In some states, known as "home rule states," municipalities (in certain circumstances) are permitted to impose their own laws even absent express statutory approval from the state. *See* Jon D. Russell & Aaron Bostrom, *Federalism, Dillon and Home Rule*, WHITE PAPER 1 (2016). The majority of states, including New York, instead follow "Dillon's Rule." *Id.* at 8. Under Dillon's Rule, municipalities may enact their own laws only when the state expressly grants them the authority to do so via statute. *Id.* at 1. Furthermore, the United States Constitution speaks only of the sovereignty of states, not municipalities. *See* U.S. CONST. amend. X (emphasis added) ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or to the people."). While states may delegate authority to their political subdivisions, those subdivisions remain part of the state and are therefore subject to the same constitutional limitations as the state. *See* JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAINE, STATE TAXATION § 20.10 (5)(a)(i) (3d ed. 2001 & Supp. 2018-1) ("Insofar as federal constitutional restraints limit state taxation of cross-border economic activity, it is irrelevant whether the tax in question is imposed by the state itself or by one of its political subdivisions (for example, a city or a county). The federal constitutional restraints apply in the same manner to both.").

[212] The key phrase in the statute making this clear reads, "[New York City] is hereby authorized and empowered" in reference to a city's authority to levy an income tax. N.Y. TAX LAW § 1301(a)(1) (McKinney 2018).

to his or her State taxable income.[213] New York City residents pay both their State and City income tax to the New York State Department of Taxation and Finance on the same return:[214] a taxpayer's City income tax liability is added to the amount owed in State income tax and the total combined New York State and City income tax is paid in one amount to the State. The State then remits to the City its share of the tax.[215] Throughout the entire collection process, the State remains in complete control. The City is passive—a mere depository for its statutory share of income tax revenue collected by, and paid by, the State.

Additionally, the State delivers a notice of deficiency to allegedly delinquent taxpayers, and conducts all appeal proceedings related to City income tax liability.[216] New York City's Tax Appeals Tribunal only has jurisdiction over taxes "administered by the City of New York."[217] The New York City personal income tax is "administered by the [State] and therefore, [is] not within the jurisdiction of the [New York City Tax Appeals Tribunal]."[218] Likewise, the same statute of limitations applies to refund claims and income tax assessments related to the State and City income tax.[219] Furthermore, all civil penalties imposed on a taxpayer for failure to comply with State income tax laws are similarly imposed for the failure to comply with City income tax laws.[220] Finally, the New York State Department of Taxation and Finance issues regulations that apply to both the State and City personal income tax.[221]

The dispositive holdings of New York's highest court and the indicia evidencing State control over the City income tax support the conclusion that the New York City income tax is unambiguously part of the State income tax. In accordance with general principles of federal constitutional law, the constitutionality of the New York City income tax depends not on whether the tax is internally consistent and non-discriminatory *in isolation*, but instead on whether it is non-discriminatory when viewed in tandem

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[213] *Id.* § 1303.

[214] *Id.* § 1312(a). New York City even advertises this on its own self-help website. CITY OF NEW YORK, NEW YORK CITY PERSONAL INCOME TAX, https://perma.cc/7MJY-7H8H (last visited Dec. 14, 2018) ("The [New York City personal income tax] is administered and collected by the New York State Department of Taxation and Finance.").

[215] N.Y. TAX LAW § 1313(c) (McKinney 2018).

[216] *Id.* § 1312(a).

[217] *New York City Tax Appeals Tribunal Annual Report July 1, 2016–June 30, 2017*, NYC TAX APPEALS TRIBUNAL, http://www1.nyc.gov/assets/taxappeals/downloads/pdf/annual_report_2016-2017.pdf (last visited Dec. 14, 2018).

[218] *Id.*

[219] N.Y. TAX LAW § 1312(a) (McKinney 2018).

[220] *Id.*

[221] N.Y. COMP. CODES R. & REGS. tit. 20, § 290.2 (West 2018).

with the New York State income tax.[222]

B. *The New York City Income Tax Is Internally Consistent when Viewed in Isolation, but that Description Is Irrelevant to the Constitutional Analysis*

The New York City income tax is internally consistent when viewed in isolation,[223] which leads to confusion about the constitutionality of denying a credit for income taxes paid to other states. Even though New York City does not grant taxpayers a credit for income taxes paid to other states,[224] it refrains from taxing nonresidents[225]—exactly the hypothetical[226] Justice

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[222] *See* Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable?*, *supra* note 211, at 1097 (emphasis added) ("In addition to evaluating federal constitutional restraints on state and local taxation of cross-border economic activity at the state level . . . one should also evaluate these restraints in light of the state's tax structure as a whole. To avoid any misunderstanding of this point, it is important to make clear that when I say 'evaluate the tax in light of the state tax structure as a whole,' I mean only that the *constitutional analysis should view the exercise of tax power by the state or its political subdivisions collectively rather than subjecting each state or local exaction to an individualized inquiry without regard to the existence of other exactions imposed under state authority*.").

[223] Two leading scholars believe, however, that New York's rules for determining residency are internally *inconsistent* and therefore unconstitutional. This particular issue is outside the scope of this Note. For an in-depth analysis of the constitutionality of New York's tax residence rules, see Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 ST. TAX NOTES 707 (2017). Professor Zelinsky disagrees with important aspects of Professors Ruth Mason and Michael S. Knoll's constitutional analysis. *See* Edward A. Zelinsky, *Double Taxing Dual Residents: A Response to Knoll and Mason*, 86 ST. TAX NOTES 677, 678 (2017) ("I am thus less eager than Knoll and Mason to deploy *Wynne* and the dormant Commerce Clause nondiscrimination principle to remedy the double state income taxation of dual residents. It would be best for this problem to be solved by Congress or by the states themselves."). For Professors Mason and Knoll's response to Professor Zelinsky's argument, see Michael S. Knoll & Ruth Mason, *Dual Residents: A Sur-Reply to Zelinsky*, 87 ST. TAX NOTES 269 (2018).

[224] *See* N.Y. TAX LAW § 1310 (McKinney 2018) (listing permissible credits against income taxes imposed by cities, which does not include income taxes paid to other states).

[225] *Id.* § 1302(a). New York City used to tax nonresidents via a "Commuter Tax." *See New York's Highest Court Holds Commuter Tax Unconstitutional*, ROBERTS & HOLLAND LLP, Apr. 4, 2000, https://www.robertsandholland.com/news-page?itemid=87 ("For more than 30 years the New York City 'Commuter Tax' was imposed on individuals who worked in New York City but lived elsewhere."). Legislators from upstate New York succeeded in eliminating the Commuter Tax, but only for nonresidents of New York City who were New York State residents. *See id.* ("[B]owing to the exigencies of a tight Rockland County election, the State passed legislation to repeal the Commuter Tax for individuals living in the New York suburbs."). Under the amended Commuter Tax, New York City nonresidents living in, say, Connecticut or New Jersey (and working in New York City) were subject to the Commuter Tax, but New York City nonresidents living elsewhere in New York State (and working in New York City) were not. *See id.* ("Individuals who worked in the City but lived in New Jersey, Connecticut, or any other state were still required to pay the tax."). The New York Court of Appeals held the amended Commuter Tax unconstitutional under both the Privileges and Immunities Clause and the dormant Commerce Clause. City of N.Y. v. State of N.Y., 94 N.Y. 2d 577, 596, 598 (N.Y. 2000). Instead of reinstating the original Commuter Tax, the State decided to repeal it altogether. Thus, New York City no longer taxes nonresidents.

Ginsburg raised in her *Wynne* dissent.[227]

A simple example illustrates why the New York City income tax is internally consistent when viewed in isolation, and how New York City's decision not to tax nonresidents creates this internal consistency. Assume two unmarried taxpayers (Avril and Rob) are both residents of New York City. Avril earns $1,000,000 *solely* in New York City, whereas Rob earns $1,000,000 *solely* in a neighboring city, Newark, New Jersey. The assumption under the internal consistency test is that Newark has an *identical* income tax statute to that of New York City (if viewed in isolation)—that is, it does not tax nonresidents like Rob.

Under the New York State income tax statute, both taxpayers pay New York City income tax at an average rate of approximately 3.9 percent.[228] Thus, Avril and Rob each pay $39,000 in income taxes to New York City.[229] Avril, who is engaged in *intrastate* commerce, would bear an equal income tax burden as Rob, who is engaged in *interstate* commerce.[230]

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[226] *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1822 (2015) (Ginsburg, J., dissenting) ("Because it is the interaction between [the county income tax and the special nonresident tax] that renders Maryland's tax scheme internally inconsistent, Maryland could eliminate the inconsistency by terminating the special nonresident tax . . ."). For example, if Maryland were to repeal the special nonresident tax (as Justice Ginsburg suggests in this hypothetical), only Maryland residents would pay the county income tax. Nonresidents would pay the State income tax on their Maryland sourced income, but would not pay the county income tax at all. Similarly, New York State taxes nonresidents on income sourced in the State, but does not subject nonresidents to the City income tax (even on income sourced in New York City). Thus, the structure of Justice Ginsburg's hypothetical Maryland income tax scheme is identical to that of the actual New York income tax scheme.

[227] *See supra* Section IV.C (analyzing Justice Ginsburg's dissent in *Wynne*). This Author remains skeptical that Justice Ginsburg's so-called hypothetical was truly hypothetical. Justice Ginsburg was born in Brooklyn, graduated from Columbia Law School, and lived in New York City during law school. *Current Members*, SUP. CT. OF THE UNITED STATES, https://perma.cc/C5SN-7UFU (last visited Dec. 14, 2018). Her husband was the renowned tax lawyer Martin Ginsburg who practiced law at Weil, Gotshal & Manges—a prominent law firm founded and headquartered in New York City. T. Rees Shapiro, *Martin D. Ginsburg Dies at 78; Tax Law Expert, Supreme Court Spouse*, WASH. POST (June 28, 2010), https://perma.cc/9QFT-ET25. Furthermore, Justice Ginsburg and her husband litigated (and won) a famous tax case regarding gender discrimination in which the Tenth Circuit held a provision of the Internal Revenue Code unconstitutional under the Due Process Clause. Moritz v. Comm'r of Internal Revenue, 469 F.2d 466, 470 (10th Cir. 1972). Justice Ginsburg most likely has at least some knowledge of the New York City income tax because she probably paid it.

[228] N.Y. TAX LAW § 1304(a)(3)(A) (McKinney 2018); N.Y. STATE DEP'T OF TAXATION & FIN., NEW YORK CITY TAX RATE SCHEDULE, https://perma.cc/T66J-C8M5 (last visited Dec. 14, 2018). Under this subsection, resident unmarried taxpayers who earn over $50,000 owe "$1,813 plus 3.876% of excess over $50,000" to New York City in income taxes—approximately a 3.9 percent average tax rate. *Id.* For simplicity purposes, all examples herein will assume that Avril and Rob do not take any deductions.

[229] Rob is assumed to owe no income tax to Newark on his Newark sourced income. In an internal consistency inquiry, that City, like New York City, is presumed to refrain from taxing nonresidents altogether.

[230] After *Wynne* and *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, it is clear that Rob is engaged in interstate commerce. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1804 (2015) (emphasis added) (referencing the Maryland income tax scheme's "discriminatory

Consequently, the New York City income tax, taken in isolation, is internally consistent. Despite its label, however, the New York City income tax is part of the State income tax system. Therefore, the preceding inquiry is misleading because it is constitutionally irrelevant.

C. *The Internally Consistent New York City Income Tax is Nonetheless Discriminatory when Viewed in Tandem with the State Income Tax*

An internally consistent tax can nonetheless be discriminatory—a proposition that was *not* before the Court in *Wynne*.[231] A finding of internal consistency does not automatically end the constitutional inquiry. Even though the New York income tax scheme is internally consistent, New York's refusal to allow a credit for income taxes paid to other states against the City portion of its State income tax nonetheless discriminates against interstate commerce, violating the third prong of *Complete Auto*. An analysis of the Court's discrimination case law, the economic analysis the Court endorsed in *Wynne*, and the relevant scholarly literature that supports this conclusion follows.

1. *The Discrimination Case Law*

The third prong of *Complete Auto*—the discrimination prong—focuses on a tax's practical effects as opposed to its inherent structure, which is the subject of the internal consistency doctrine developed under the apportionment prong. Recognizing this important distinction, the Supreme Court, lower federal courts, and state courts have held internally consistent state tax provisions unconstitutional under *Complete Auto*'s discrimination prong.

For example, in *Westinghouse Electric Corp. v. Tully*, the Supreme

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treatment of *interstate commerce*," implying that the Wynnes' activities constituted interstate commerce); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) (explaining that the "transportation of persons across state lines . . . has long been recognized as a form of 'commerce.'").

[231] *See, e.g.*, HELLERSTEIN, HELLERSTEIN & SWAINE, *supra* note 213, at § 8.02(1)(ia)(ii) (3d ed. 2001 & Supp. 2018-1) (explaining that "a fair reading" of the cases cited by the *Wynne* majority "does not support the proposition that 'internal consistency' is the *exclusive* test . . . for determining the risk of the exposure to unconstitutional multiple tax burdens under the dormant Commerce Clause."); *id.* § 8.02(1)(ia)(i) (emphasis added) ("If the Court believes that *Moorman* controls the outcome in *Wynne*, then internal consistency may well be a *sine qua non* of a claim that a tax that creates the risk of multiple taxation is prohibited by the dormant Commerce Clause in a post-*Wynne* world. But if *Wynne* is so read, *it reflects a significant departure from our prior precedent*."). Professor Zelinsky, while skeptical of the Court's state tax discrimination jurisprudence, acknowledges that the internal consistency test is better served as a test of fair apportionment than as a test of discrimination. Zelinsky, *supra* note 90, at 810–12. For a further explanation of Professor Zelinsky's skepticism of the dormant Commerce Clause non-discrimination principle, see Edward A. Zelinsky, Essay, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653 (2007).

Court held that a corporate franchise tax credit measured by the amount of exports shipped from an in-state location discriminated against interstate export shipping and therefore offended the dormant Commerce Clause.[232] The Court explained that the credit "ha[d] the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their . . . shipping activities conducted from New York."[233] In so doing, the "tax scheme 'provide[d] a positive incentive for increased business activity in New York State,' . . . but also . . . penalize[d] increases in the [corporation's] shipping activities in other States."[234] This tax provision, albeit discriminatory, would nonetheless be internally consistent because if every state adopted an identical credit, a corporation shipping products from *any* state would receive the *same* corporate franchise tax treatment.

Additionally, in *Cuno v. DaimlerChrysler, Inc.*, the Sixth Circuit held that an Ohio corporate franchise tax credit for "purchases [of] new manufacturing machinery and equipment . . . [that] are installed in [Ohio]"[235] discriminated against interstate commerce, violating the dormant Commerce Clause.[236] The court agreed with the plaintiffs' argument that the investment tax credit "discriminate[d] against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state."[237] This tax provision, like that in *Westinghouse*, is nevertheless internally consistent. If every state adopted an identical credit, a corporation purchasing new manufacturing machinery and equipment would receive the credit regardless of where that corporation decided to install the machinery and equipment. The credit would be internally consistent, but nonetheless discriminatory.

Furthermore, in *Beatrice Cheese, Inc. v. Wisconsin Department of Revenue*, the Wisconsin Tax Appeals Commission held that an accelerated depreciation deduction from the corporate income tax limited to property located in Wisconsin discriminated against interstate commerce.[238] The commission explained that "the Wisconsin depreciation deduction statutes at issue [were] obviously 'designed to have discriminatory economic

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[232] Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 407 (1984).

[233] *Id.* at 400.

[234] *Id.* at 400–01.

[235] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 741 (6th Cir. 2004).

[236] *Id.* at 746. While the Supreme Court vacated the Sixth Circuit's holding in *Cuno*, it did so on standing grounds. Cuno v. DaimlerChrysler, Inc., 547 U.S. 332, 346 (2006). The Court never addressed the merits of the case.

[237] *Cuno*, 386 F.3d at 743; *see id.* at 746 ("In short, while we may be sympathetic to efforts by the City of Toledo to attract industry into its economically depressed areas, we conclude that Ohio's investment tax credit cannot be upheld under the [dormant Commerce Clause].").

[238] Beatrice Cheese, Inc. v. Wis. Dep't of Revenue, Docket Nos. 91-I-100, 91-I-101, 91-I-102, 1993 WL 57202, at *3 (Wis. Tax App. Comm'n Feb. 24, 1993).

effects' on corporations locating property outside the state by taxing such corporations more heavily than those locating such property in the state."[239] The accelerated depreciation deduction in *Beatrice Cheese* is yet another internally consistent state tax provision that a court nonetheless held to be discriminatory. If every state enacted an identical provision, all corporations would receive the favorable deduction for their property regardless of location. Thus, in an internal consistency inquiry, corporations engaged in interstate commerce would not bear a greater corporate income tax burden than corporations engaged in intrastate commerce, yet the court held the deduction to be discriminatory.

Likewise, in *R.J. Reynolds Tobacco Co. v. City of New York Department of Finance*, the Appellate Division of the New York Supreme Court held that "a corporate taxing provision of the New York City administrative code that disallow[ed] a[n] [accelerated] depreciation deduction for property placed in service out of New York, while allowing such a deduction for property located within New York"[240] discriminated against interstate commerce, violating the dormant Commerce Clause.[241] The court expressed that New York City's refusal to allow an accelerated depreciation deduction for out-of-state property "effectively reward[ed] . . . in-State business by postponing the full weight of the tax . . . [and] provide[d] a disincentive to invest a New York business'[] resources in property out of State."[242] This provision, albeit discriminatory, would satisfy the internal consistency test. In a hypothetical world where every state adopted an identical tax, all corporations would receive the favorable deduction regardless of the state in which they placed property into service. A New York corporation with property in New Jersey would bear no greater corporate franchise tax burden than a New York corporation with property in New York. Thus, the deduction would be internally consistent, yet discriminatory.

As the Supreme Court explained in *Boston Stock Exchange v. State Tax Commission*, discriminatory taxes are those that "'foreclose[] tax-neutral decisions' about where to transact business,"[243] which is the effect of New York's failure to provide a credit against the City income tax. The State's refusal to extend its credit for income taxes paid to other states against the City income tax also bears other indicia of a discriminatory tax, including: (1) "providing a direct commercial advantage to local

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[239] *Id.* at *4.

[240] R.J. Reynolds Tobacco Co. v. City of N.Y. Dep't of Fin., 667 N.Y.S.2d 4, 5 (App. Div. 1997).

[241] *Id.* at 9, 11.

[242] *Id.* at 9–10.

[243] Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 427 (1996) (quoting Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977)).

business;"[244] (2) "encourag[ing] the development of local industry by means of taxing measures that impose[] greater burdens on economic activities taking place outside the State than were placed on similar activities within the State;"[245] (3) "[inducing] 'business operations to be performed in the home State that could more efficiently be performed elsewhere;'"[246] and (4) "'provid[ing] a positive incentive for increased business activity [in-state],' [while] also . . . penaliz[ing] increase[d] [business activity] in other State[s]."[247]

The "Avril and Rob Discrimination Example" below illustrates the discriminatory nature of the New York income tax scheme in reality, as opposed to the imaginary cloned[248] world of internal consistency. Assume two unmarried taxpayers (Avril and Rob) are both New York City residents. Avril earns $1,000,000 solely in New York City, whereas Rob earns $1,000,000 solely in another state (the "Source State") where his average income tax rate is identical to that of the combined New York State and City rates. Avril and Rob each pay New York State and City income tax at an average combined rate of 10.7 percent.[249] Avril would pay $107,000 in combined income taxes to New York—$68,000 on the State portion and $39,000 on the City portion. Rob would owe $107,000 in income taxes to the Source State *and* $107,000 in combined income taxes to New York pre-credit—$68,000 on the State portion and $39,000 on the City portion. Rob could wholly eliminate the State portion of the New York income tax by using $68,000 of his $107,000 credit for income taxes paid to the Source State. New York law, however, does not permit Rob to apply his excess credit of $39,000 to eliminate the City portion of the New

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[244] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984).

[245] Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 404 (1984) (citing *Boston Stock Exch.*, 429 U.S. at 332).

[246] *Id.* at 406 (quoting *Boston Stock Exch.*, 429 U.S. at 336).

[247] Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 801 (1996) (quoting *Westinghouse*, 466 U.S. at 400–01).

[248] For the Court's use of the term "cloning" to describe the internal consistency test, see Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) (emphasis added) ("External consistency, on the other hand, looks not to the logical consequences of *cloning*, but to the economic justification for the State's claim upon the value taxed . . .").

[249] Avril and Rob each pay New York City income tax at an average rate of approximately 3.9 percent. N.Y. TAX LAW § 1304(a)(3)(A) (McKinney 2018); *New York City Tax Rate Schedule*, N.Y. ST. DEP'T OF TAXATION & FIN., https://www.tax.ny.gov/pdf/current_forms/it/nyc_tax_rate_schedule.pdf (last visited Dec. 14, 2018). Avril and Rob each pay New York State income tax at an average rate of approximately 6.8 percent. *See* N.Y. TAX LAW § 601(c)(1)(A) (McKinney 2018); *New York State Tax Rate Schedule*, N.Y. ST. DEP'T OF TAXATION & FIN., https://www.tax.ny.gov/pdf/current_forms/it/it201i_tax_rate_schedule.pdf (last visited Jan. 30, 2018) (requiring unmarried resident taxpayers with New York taxable income between $215,400 and $1,077,550 to pay "$13,825 plus 6.85% of excess over $215,400" in income taxes). Therefore, Avril and Rob each pay New York State and City income tax at a total average rate of 10.7 percent.

York income tax. As a result, Rob (who is engaged in interstate commerce) would bear a greater total income tax burden than Avril (who is engaged in intrastate commerce)—Rob pays a total of $146,000 in income taxes, whereas Avril pays a total of $107,000 in income taxes. In this simple example, the New York system discriminates in favor of in-state activity at the expense of out-of-state activity.

In its practical effects, not only is the New York income tax scheme essentially equivalent to an impermissible state tariff like the Maryland scheme in *Wynne*,[250] but it also bears further characteristics of a state tax that discriminates in favor of intrastate activity. In the Avril and Rob Discrimination Example above, New York's income tax favors intrastate commerce, which, like the discriminatory tax in *Boston Stock Exchange*, prevents Rob from having a tax-neutral choice about whether to engage in interstate or intrastate commerce. Additionally, like the tax the Court deemed discriminatory in *Bacchus Imports, Ltd. v. Dias*, the New York income tax scheme provides Avril with a direct economic advantage over Rob merely for earning income intrastate. It encourages Rob to earn income solely in New York by imposing a greater income tax burden on economic activities taking place out-of-state. Furthermore, like in *Westinghouse*, the New York income tax regime not only "provide[s]" Rob with "a positive incentive" to engage in intrastate activity, but also "penalizes" the activity he undertakes in other states.[251] Thus, consistent with the Court's discrimination case law, the New York City income tax discriminates against interstate commerce when viewed in tandem with the New York State income tax, of which it is a part.

2. *The Economic Analysis the Court Endorsed in Wynne*

In *Wynne,* the Court endorsed the "undisputed" economic analysis[252] that the tax economists and Professors Ruth Mason and Michael S. Knoll articulated in two separate amicus briefs.[253] This economic analysis further evidences the discriminatory nature of the New York income tax regime.

Both of these amicus briefs developed a formula that establishes whether a state tax discriminates against interstate commerce.[254] Professors

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[250] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1792 (2015).

[251] *Westinghouse*, 466 U.S. at 401.

[252] *See Wynne*, 135 S. Ct. at 1804 (citing favorably the "undisputed economic analysis" explained in the two amicus briefs).

[253] Brief of the Tax Economists as Amici Curiae in Support of Respondents, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485); Brief of Michael S. Knoll and Ruth Mason as Amici Curiae in Support of Respondents, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485).

[254] *Id.* at 14; Brief of the Tax Economists as Amici Curiae in Support of Respondents at 8–15, *Wynne*, 135 S. Ct. 1787 (No. 13-485). The tax economists' equation is identical to that of Professors Mason and Knoll, which is explained in greater depth and expressed as a mathematical formula in Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103

Mason and Knoll refer to this formula as "Competitive Neutrality,"[255] whereas Ryan Lirette and economist Alan D. Viard term it "Commerce Neutrality."[256] The Competitive Neutrality equation *often* reaches the same result as the internal consistency test, but it does not *always*.[257] Importantly, "[i]nternal consistency and Com[petitive] Neutrality diverge if the state makes its tax rate dependent on other states' tax policies."[258] The internal consistency test and the Competitive Neutrality framework thus yield different results "when a state . . . [provides a] credit . . . for taxes paid to other states."[259] New York State fits this description—it provides a partial[260] credit against its income tax for income taxes paid to other states.[261]

The New York income tax system, albeit internally consistent,[262] fails the Competitive Neutrality equation in the Avril and Rob Discrimination Example above. In order to satisfy Competitive Neutrality, "the sum of the tax rates on inbound and outbound transactions, minus an interaction term, must be less than or equal to the state's tax on its intrastate transactions."[263] The interaction term is simply the inbound tax rate multiplied by the outbound tax rate.[264] In the Avril and Rob Discrimination Example, New York's tax rate on: (1) inbound transactions to New York City is 6.8 percent,[265] (2) outbound transactions from New York City is 10.7

VA. L. REV. 309, 323 (2017) and Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J. L. & POL'Y 467, 483 (2016).

[255] Knoll & Mason, *The Economic Foundation of the Dormant Commerce Clause*, *supra* note 256, at 318–23.

[256] Lirette & Viard, *supra* note 256, at 470. Lirette and Viard probably use the term "Commerce Neutrality" instead of Competitive Neutrality to tie the formula to the dormant Commerce Clause. *See id.* at 545 (emphasis added) ("Commerce Neutrality puts the *commerce* back in the dormant [C]ommerce [C]lause.").

[257] *See id.* at 471 (emphasis added) ("*[I]n most circumstances*, Commerce Neutrality is identical to the Court's oft-used internal consistency test.").

[258] *Id.* at 499.

[259] *Id.* at 507.

[260] *See* N.Y. TAX LAW § 1310 (McKinney 2018) (listing permissible credits against income taxes imposed by New York cities, which does not include income taxes paid to other states).

[261] *Id.* § 620.

[262] *See supra* Section V.B (explaining that the New York City income tax is internally consistent).

[263] Lirette & Viard, *supra* note 256.

[264] *Id.*

[265] New York State taxes nonresidents on their income sourced in the State, but nonresidents are not subject to the New York City income tax. N.Y. TAX LAW §§ 631(a), 1302(a) (McKinney 2018). Using the same numbers as the Avril and Rob Discrimination Example, say Sam, an unmarried nonresident taxpayer, earns $1,000,000 in New York City. He would pay New York State income tax at an average rate of 6.8%, but would not pay *any* New York City income tax. *See id.* § 601(e)(2) (explaining that unmarried nonresidents are subject to the same personal income tax rates as unmarried residents); *id.* § 601(c)(1)(A) (detailing New York's personal income tax rates on unmarried resident individuals); *New York State Tax Rate Schedule*, N.Y. STATE DEP'T OF TAXATION & FIN., https://www.tax.ny.gov/pdf/current_forms/it/it201i_tax_rate_schedule.pdf (last visited Dec. 14, 2018)

percent,[266] and (3) intrastate transactions is 10.7 percent.[267]

Simple algebra demonstrates that the New York taxing scheme flunks the Competitive Neutrality equation in the Avril and Rob Discrimination Example. The sum of 6.8 percent (inbound tax rate) and 10.7 percent (outbound tax rate)[268] minus the product of 6.8 percent (inbound tax rate) and 10.7 percent (outbound tax rate)[269] results in competitive distortion, not neutrality.[270] Thus, the economic analysis that the *Wynne* majority endorsed reveals that New York's internally consistent taxing regime nonetheless discriminates against interstate commerce and therefore violates the dormant Commerce Clause.

3. *Scholarly Theories on Discriminatory State Tax Provisions*

There are three theories proposed by leading scholars to determine whether state business tax incentives that discriminate against interstate commerce violate the dormant Commerce Clause: (1) Professors Walter Hellerstein and Dan T. Coenen's Coercive Powers Theory;[271] (2) Professor Peter D. Enrich's Economic Distortion Theory;[272] and (3) Professor Philip M. Tatarowicz's Permissible Burdens Theory.[273] While these theories focus on business tax incentives, they can be similarly deployed to analyze the constitutionality of the New York City income tax, as both business tax incentives and the New York City income tax can be internally consistent.

(requiring unmarried resident taxpayers with New York taxable income between $215,400 and $1,077,550 to pay "$13,825 plus 6.85% of excess over $215,400" in income taxes). Thus, New York's tax rate on inbound transactions to New York City for purposes of the Competitive Neutrality equation would be 6.8%.

[266] In the Avril and Rob Discrimination Example, Rob represents a taxpayer paying tax on outbound transactions. He is an unmarried New York City resident who earns $1,000,000 solely in another state. He pays combined New York State and City income tax at an average rate of 10.7 percent. *See supra* Section V.C.1, note 251 and accompanying text (calculating Rob's average combined New York State and City income tax rate). Thus, New York's average tax rate on outbound transactions from New York City for purposes of the Competitive Neutrality equation would be 10.7 percent.

[267] In the Avril and Rob Discrimination Example, Avril represents a taxpayer paying tax on intrastate transactions. She is an unmarried New York City resident who earns $1,000,000 solely in New York City. She pays combined New York State and City income tax at an average rate of 10.7 percent. *See id.* (calculating Avril's average combined New York State and City income tax rate). Thus, New York's average tax rate on intrastate transactions for purposes of the Competitive Neutrality equation would be 10.7 percent.

[268] This equals 17.5 percent or 0.175.

[269] This equals 0.7276 percent or 0.007276.

[270] 16.7724 percent is *greater than*, not *less than or equal to*, 10.7 percent. Therefore, under the economic analysis that the Court endorsed in *Wynne*, the internally consistent New York income tax regime is nonetheless discriminatory.

[271] Hellerstein & Coenen, *supra* note 247.

[272] Enrich, *supra* note 243.

[273] Philip M. Tatarowicz, *Federalism, The Commerce Clause, and Discriminatory State Tax Incentives: A Defense of Unconditional Business Tax Incentives Limited to In-State Activities of the Taxpayer*, 60 TAX. LAW. 835 (2007).

For example, if every state offered an identical income tax credit to businesses that invest solely in-state, businesses engaged in interstate commerce would not bear a greater total income tax burden than businesses engaged in intrastate commerce. The tax incentive would satisfy the internal consistency test, but would nonetheless be discriminatory. A discussion of the scholarly literature follows.

i. Professors Walter Hellerstein and Dan T. Coenen's Coercive Powers Theory

In *Cuno v. DaimlerChrysler, Inc.*, the Sixth Circuit adopted a theory on discriminatory state tax incentives proposed by Professors Hellerstein and Coenen.[274] This theory focuses on the "coercive power of the state."[275] Under this Coercive Powers Theory, states impermissibly coerce taxpayers via tax incentives that apply to existing tax liabilities, but not through the use of tax incentives that apply to additional, or new, tax liabilities.[276] An example of a permissible non-coercive state tax incentive is a property tax exemption for the in-state construction of a new building.[277] The state's property tax would be an *additional* tax liability because the taxpayer would not be subject to the tax *unless* it engaged in in-state construction. The state is not offering to lower an already existing property tax liability in exchange for in-state development, but it is instead proposing a reprieve from "any additional property tax burdens."[278] Such a tax exemption would not implicate the coercive power of the state, and would not favor in-state over out-of-state investment in a "constitutionally []relevant" way.[279]

For current state residents, however, a personal income tax is an *existing* tax liability. Therefore, a state personal income tax provision that coerces taxpayers into earning income solely intrastate violates the Coercive Powers Theory, internal consistency notwithstanding. New York City residents are subject to the State and City income tax regardless of the source of their income, that is, the New York income tax is an *existing* tax obligation.

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[274] *See* Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 743–46 (6th Cir. 2006) (citing Professors Hellerstein and Coenen's theory affirmatively).

[275] Hellerstein & Coenen, *supra* note 247, at 806.

[276] *See id.* at 807 (emphasis added) ("At least one significant category of tax incentives, however, should escape invalidation: those tax incentives framed not as exemptions from or reductions of *existing* state tax liability but rather as exemptions from or reductions of *additional* state tax liability to which the taxpayer would be subjected only if the taxpayer were to engage in the targeted activity in the state. In our judgment, such incentives neither favor in-state over out-of-state investment (except in a sense that should be constitutionally irrelevant) nor do they rely on the coercive power of the state to compel a choice favoring in-state investment.").

[277] *See id.* ([A] real property tax exemption for new construction in a state would pass muster . . .")

[278] *Id.* at 808.

[279] *Id.* at 807.

Returning to the Avril and Rob Discrimination Example above, New York's defective partial credit results in a greater total income tax burden for Rob, a taxpayer engaged in interstate commerce, than for Avril, a taxpayer earning income solely intrastate. As a result, New York's refusal to grant a credit for income taxes paid to other states against the City portion of its State income tax impermissibly coerces taxpayers into earning income solely in New York. Consequently, New York's defective partial credit fails Professors Hellerstein and Coenen's Coercive Powers Theory, and thus, consistent with their theory, would impermissibly discriminate against interstate commerce.

ii. Professor Peter D. Enrich's Economic Distortion Theory

Professor Enrich's Economic Distortion Theory is more skeptical of the constitutionality of state business tax incentives than the Coercive Powers Theory. The Economic Distortion Theory views "business location incentives [as] virtually *per se* unconstitutional."[280] Under this theory, tax incentives that "distort[] economic decision[-]making in favor of in-state activity" would violate the dormant Commerce Clause.[281]

New York's refusal to grant a credit for income taxes paid to other states against the City portion of its State income tax violates the Economic Distortion Theory. In the Avril and Rob Discrimination Example above, a taxpayer engaged in interstate commerce (Rob) bears a greater total income tax burden than one earning income solely in New York (Avril), which impermissibly distorts economic decision-making in favor of intrastate activity. New York's defective partial credit encourages Rob to earn income in New York (as opposed to the Source State), as Avril, a taxpayer earning precisely the same amount of income, bears a lower total income tax burden *merely* because she earns that income in New York. Therefore, consistent with Professor Enrich's theory, New York's income tax regime discriminates against interstate commerce, violating the dormant Commerce Clause.

iii. Professor Philip M. Tatarowicz's Permissible Burdens Theory

Professor Tatarowicz's Permissible Burdens Theory is more deferential to state business tax incentives than either the Coercive Powers Theory or the Economic Distortion Theory. The Permissible Burdens Theory creates a constitutional "safe harbor" for "unconditional . . . business tax incentives . . . limited to [the] in-state activities of the taxpayer . . . used by a state to . . . primarily compete for economic development."[282] This theory does not address the constitutionality of state tax provisions

[280] Enrich, *supra* note 243, at 458.
[281] *Id.* at 456.
[282] Tatarowicz, *supra* note 275, at 882.

that fall outside of the safe harbor.[283]

The relevant provision of the New York income tax scheme does not fall within Professor Tatarowicz's safe harbor. The Permissible Burdens Theory therefore does not shield it from invalidation. Namely, New York's defective partial credit is not limited to in-state activities. It *both* rewards in-state economic activity *and* penalizes taxpayers by imposing a greater total income tax burden for earning income in another state. As a result, New York's defective partial credit does not receive per se protection from dormant Commerce Clause scrutiny even under this exceptionally deferential standard.

4. *Why Should New York Provide the Credit Instead of the Source State?*

Justice Ginsburg's dissent in *Wynne* raised the question of whether the residence state or the source state must address the possible double taxation that results when two sovereigns exercise their legitimate taxing authority over the same interstate activity.[284] One might ask why New York, and not the Source State, must address Rob's greater total income tax burden in the Avril and Rob Discrimination Example. The scholarly literature on international tax discrimination, general principles of international taxation, and the Court's teaching in the sales and use tax context provide support for the conclusion that a state taxing income based on residence must grant a credit for income taxes paid to a source state to alleviate any resulting double taxation.

i. Professors Ruth Mason and Michael S. Knoll's Competitive Neutrality Principle

Professors Ruth Mason and Michael S. Knoll's theory of tax discrimination is consistent with this Note's argument that New York, and not the source state, must address the double taxation that results from the imposition of an income tax by *both* the residence state *and* the source state. According to Professors Mason and Knoll, non-discrimination in both international and multistate taxation[285] requires "[C]ompetitive

[283] *Id.* at 839. Presumably, Professor Tatarowicz would prefer the courts to analyze taxes falling outside the safe harbor under *Pike*'s balancing test or *Complete Auto*. *See id.* ("[T]ax incentives falling outside the safe harbor . . . . are best left to the judicial process and its balancing of federalist interests in light of each controversy's unique facts and circumstances.").

[284] *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1813 (Ginsburg, J., dissenting) ("As I see it, nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary State or the source State, must recede simply because both have lawful tax regimes reaching the same income.").

[285] *See* Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014, 1108 (2012) ("A second preliminary question is whether there is any reason to think that the nondiscrimination principle in [the dormant Commerce Clause] would have the same meaning as the EU nondiscrimination principle. We suggest that there is."); Knoll & Mason, *The Economic*

[N]eutrality,"[286] which prevents states and foreign countries from adopting "tax systems [that] distort which people occupy particular jobs."[287]

States and foreign countries are competitively neutral if they "adopt worldwide [income] taxation with unlimited credits for source taxes."[288] Under such an income tax scheme, "source taxes become irrelevant to competition because they are effectively refunded by the residence state through the unlimited credit."[289] This is *precisely* why New York, as opposed to the Source State, must alleviate Rob's greater total income tax burden in the Avril and Rob Discrimination Example. New York taxes residents on their worldwide income, but only grants a *partial*, as opposed to an *unlimited*, credit for source taxes. As a result, it violates Professors Mason and Knoll's Competitive Neutrality principle—a concept they view as the "benchmark" of non-discriminatory taxation.[290]

ii. General Principles of International Taxation

Additionally, general principles of international taxation (and the Court's reference in *Wynne* to those same principles in the context of multistate taxation)[291] support the conclusion that states taxing income based on residence must defer to states taxing income based on source when both states have valid claims to taxing the same interstate activity.[292] In the international context, countries taxing income based on residence must "alleviate [the inevitable] double taxation" that arises when another country taxes income based on source.[293] For foreign sourced income, the "source country's economic environment is likely to have played a larger role in the production of [that] income than the economic environment of the residence [country]."[294] Therefore, as countries consider source

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Foundation of the Dormant Commerce Clause, *supra* note 256, at 318–23 (applying the Competitive Neutrality principle in the context of state and local taxation).

[286] Mason & Knoll, *What is Tax Discrimination?*, *supra* note 287, at 1014.

[287] *Id.* at 1053.

[288] *Id.* at 1060.

[289] *Id.*

[290] *Id.* at 1022.

[291] Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1801 (2015); *see* Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, *supra* note 149, at 9 (explaining that the Court "recogni[zed] [in *Wynne*] that the source-trumps-residence principle reflect[s] 'the near-universal state practice,' at least in the context of state personal income taxation.").

[292] Brief of The Maryland Chamber of Commerce as Amicus Curiae Supporting Respondents at 8–9, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015); *see also* Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, *supra* note 149 (referring to the principle that "a residence-based tax must yield to a source-based tax to avoid the multiple taxation that would result from honoring both taxing claims in full" as a "generally accepted proposition, which appear[s] to be solidly grounded in the Court's dormant Commerce Clause precedents . . .").

[293] AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION 6 (1987).

[294] RICHARD L. DOERNBERG, INTERNATIONAL TAXATION IN A NUTSHELL 204 (8th ed. 2009).

jurisdiction to be "primary,"[295] the residence country will almost always grant a credit for income taxes paid to the source country, which solves the double taxation quandary.[296] A credit against the residence country's income tax for income taxes paid to the source country both: (1) "improves the fairness of the income tax by equalizing the tax burdens imposed on U.S. persons engaged in [foreign commerce] with the tax burdens imposed on otherwise similarly situated U.S. persons engaged only in domestic [commerce],"[297] and (2) "promote[s] the efficient use of capital by U.S. persons by removing a tax penalty on income-producing activities otherwise subject to a double tax."[298] By providing a credit, the residence country remains neutral with respect to domestic and foreign commerce. It does not encourage domestic commerce at the expense of foreign commerce, and therefore does not impermissibly burden, or discriminate against, international commerce. This position is consistent with that of Professors Mason and Knoll.

The multi-jurisdictional issues that exist in international taxation are similarly present in multistate taxation. As a result, the international solution to the issue of double taxation—a credit against the residence country's income tax for income taxes paid to the source country—is equally applicable in the context of multistate taxation, a proposition the Court acknowledged in *Wynne*.[299] Importantly, New York recognizes this requirement and *does* provide a credit against its income tax for income taxes paid to other states. What New York fails to do, however, is provide a *full* credit for income taxes paid to other states, and, therefore, like Maryland in *Wynne*, New York offers taxpayers a defective *partial* credit. The Court implied in *Wynne* that the failure of a state to grant a full credit against its income tax for income taxes paid to other states discriminates against interstate commerce.[300] That principle compels the conclusion that

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[295] AMERICAN LAW INSTITUTE, *supra* note 295, at 7; *see also* DOERNBERG, *supra* note 296 (explaining that, for foreign sourced income, the source country has the "first crack at taxation, and if any adjustment is to be made, the [residence country] must make it.").

[296] AMERICAN LAW INSTITUTE, *supra* note 295, at 6.

[297] MICHAEL J. MCINTYRE, THE INTERNATIONAL INCOME TAX RULES OF THE UNITED STATES 4-101 (2d ed. 2000).

[298] *Id.* at 4-101–4-102.

[299] *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1801 (2015) (emphasis added) ("[A]s our Commerce Clause jurisprudence [has] developed, the States have almost entirely abandoned [protectionist regimes that favor intrastate over interstate commerce], perhaps in recognition of their doubtful constitutionality. *Today, the near-universal state practice is to provide credits against personal income taxes for such taxes paid to other States*.") (citing 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION 20-163–20-164 (3d ed. 2003)).

[300] *Id.*; *see also* HELLERSTEIN, HELLERSTEIN & SWAINE, *supra* note 213, at § 8.02(1)(a)(i) ("[W]e believe the Commerce Clause does not deprive the state of all power to tax value to which another state may lay a competing and stronger claim. Rather, the state retains the authority to exercise its well-established residence-based taxing rights, except to the extent that the exercise of such power in fact creates a risk of multiple taxation. A properly designed credit fully satisfies that obligation, and the

New York's defective partial credit fails dormant Commerce Clause scrutiny.

iii. The Court's Teaching in the Sales and Use Tax Context

Finally, in the context of state sales and use taxes, the Court has recognized that residence states, not source states, are tasked with alleviating the inevitable double taxation that arises when two states can tax the same underlying activity.[301] The state of purchase in the sales and use tax context is equivalent to the source state in the income tax context—taxpayers in both situations are *only* subject to taxation because of, and stemming from, the economic activities they conduct *in* a particular state. Likewise, the state of use for purposes of sales and use taxes is equivalent to the residence state for purposes of an income tax—taxpayers in both contexts are subject to taxation *merely* because of where they happen to maintain a residence.

In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the Court explained that when a consumer purchases goods in one state and transports those goods for use in another state, "that use of goods is taxed [by the state of use] only to the extent that their prior sale has escaped taxation."[302] While both states have a legitimate claim to tax the consumer's purchase of goods (either through a sales tax or use tax), due to "the primacy of taxes on sales," the state of use provides "a credit for [sales taxes] paid [to the state of sale]" to "free [the purchaser] from multiple taxation."[303]

Furthermore, as the Court proclaimed in *Henneford v. Silas Mason Co.*, an earlier case upholding the constitutionality of Washington's use tax:

> Equality is a theme that runs through all sections of the [sales and use tax] statute. There shall be a tax upon the use, but

Commerce Clause demands no more. Whatever doubts there may have been prior to *Wynne* about this proposition, *Wynne* has clearly removed them, at least in the context of personal income taxation by observing that 'Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States.'"). A "properly designed credit" is one that "in fact eliminates the residence-based tax on the same value that is subject to tax in a jurisdiction with the source-based or situs-based claim, up to the amount of the source-based or situs-based tax." *Id.* § 8.02(1)(a)(i) n.39.1. New York's credit is not "properly designed" because, in certain circumstances (like the Avril and Rob Discrimination Example), it fails to fully "eliminate[] the residence-based tax on the same value . . . subject to tax [by a source state]." *Id.*

[301] *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 194 (1995) (emphasis added) ("Since any use tax would have to comply with [the dormant Commerce Clause], the tax scheme could not apply differently to goods and services purchased out of state from those purchased domestically. Presumably, then, it would not apply when another State's sales tax had previously been paid, *or would apply subject to credit for such payment*.").

[302] *Id.*

[303] *Id.*

> subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to *another state by reason of use or purchase there*. No one who uses the property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.[304]

This concept ensures that "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates."[305] The logical extension of this principle to income taxation would mandate that the residence state provide a credit for income taxes paid to the source state to alleviate multiple taxation—something New York fails to do in *full*, as it only provides a credit for income taxes paid to other states against a *portion* of its income tax.

D. *New York State Should Not Fear a Significant Revenue Loss From Granting a Full Rather than a Partial Credit*

A constitutional challenge to the New York City income tax could only arise in a narrow scenario. A taxpayer challenging the New York City income tax would need an excess credit after crediting income taxes paid to other states against the State portion of the New York income tax. That is, the taxpayer must earn income sourced in a state with higher effective income tax rates than New York. Otherwise, the taxpayer would simply exhaust the credit by using it to reduce the State portion of his or her New York income tax burden.

For example, if Rob, an unmarried New York City resident, earned $1,000,000 of income sourced in a state where he paid income tax at an average rate of 6 percent, he would owe $60,000 in income taxes to the source state *and* $107,000 in income taxes to New York pre-credit—$68,000 on the State portion and $39,000 on the City portion. Rob would then exhaust his $60,000 credit for income taxes paid to the source state against the State portion of the New York income tax. New York City's refusal to grant a credit for income taxes paid to other states would be irrelevant because Rob would not have an excess credit to apply against his New York City income tax liability.

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[304] Henneford v. Silas Mason Co., 300 U.S. 577, 583–84 (1937) (emphasis added).
[305] *Id.* at 584.

In narrow circumstances, California, one of the very few states having higher income tax rates than New York,[306] could be the source state generating a constitutional challenge to the New York income tax scheme brought by a New York City resident. Certainly, *some* wealthy tech executives and entertainment figures are New York City residents (and nonresidents of California).

A challenge to the law would be factually straightforward. For example, assume Alex (an unmarried New York City resident) earns \$1,000,000 of California sourced income.[307] Further, assume Alex would pay California income tax at an average rate of 10.9 percent[308] and New York State and City income tax at an average combined rate of 10.7 percent.[309] He would owe \$109,000 in income taxes to California *and* \$107,000 in income taxes to New York pre-credit—\$68,000 on the State portion and \$39,000 on the City portion. He could use \$68,000 of the \$109,000 credit for income taxes paid to California to wholly eliminate the State portion of the New York income tax. Under New York law, however, Alex could not use his excess credit of \$41,000 to eliminate the City

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[306] Avril and Rob (individuals with \$1,000,000 of taxable income) would each pay California income tax at an average rate of approximately 10.9 percent. CAL. REV. & TAX. CODE § 17041(a)(1) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.); *see 2017 California Tax Rates and Exemptions*, STATE OF CAL. FRANCHISE TAX BOARD, https://perma.cc/NS83-34DA (last visited Dec. 14, 2018) (requiring unmarried taxpayers with income over \$551,473 to pay \$53,606.76 plus 12.3 percent of the excess over \$551,473 in income tax to California). For high earners, New Jersey's income tax rates are also higher than New York's. For example, Avril and Rob would each pay New Jersey income tax at an average rate of approximately 7.5 percent. *See* N.J. STAT. ANN. § 54A:2–1 (West, Westlaw through L.2017, c. 293 and J.R. No. 19); *New Jersey Tax Rate Schedules 2017*, STATE OF N.J. DEP'T OF THE TREASURY, DIVISION OF TAX'N, https://perma.cc/BF98-KGAU (last visited Dec. 14, 2018) (requiring unmarried taxpayers with income over \$500,000 to pay income tax on 8.97 percent of their income minus \$15,126.25). Unlike California, however, New Jersey's income tax rates are only *slightly* higher than New York's for wealthy individuals. The potential spoils of victory are likely to be too trivial in most cases to justify litigation. Therefore, New Jersey is unlikely to be the source state in a constitutional challenge to the New York income tax scheme brought by a New York City resident.

[307] The numbers used in this hypothetical are merely for simplicity purposes—a taxpayer challenging the law would likely have higher earnings. Otherwise, the costs of litigation might not be worth the potential reduction in income tax liability.

[308] CAL. REV. & TAX. CODE § 17041(a)(1) (West, Westlaw through Ch. 2 of 2018 Reg. Sess.); *see 2017 California Tax Rates and Exemptions*, STATE OF CAL. FRANCHISE TAX BOARD, https://www.ftb.ca.gov/forms/2017-California-Tax-Rates-and-Exemptions.shtml (last visited Dec. 14, 2018) (requiring unmarried taxpayers with income over \$551,473 to pay \$53,606.76 plus 12.3 percent of the excess over \$551,473 in income tax to California).

[309] N.Y. TAX LAW § 1304(a)(3)(A) (McKinney 2018); *New York City Tax Rate Schedule*, N.Y. STATE DEP'T OF TAXATION & FIN., https://www.tax.ny.gov/pdf/current_forms/it/nyc_tax_rate_schedule.pdf (last visited Dec. 14, 2018) (requiring unmarried resident taxpayers with New York taxable income over \$50,000 to pay "\$1,813 plus 3.876% of excess over \$50,000" to New York in New York City income taxes); N.Y. TAX LAW § 601(c)(1)(A) (McKinney 2018); *New York State Tax Rate Schedule*, N.Y. STATE DEP'T OF TAXATION & FIN., https://www.tax.ny.gov/pdf/current_forms/it/it201i_tax_rate_schedule.pdf (last visited Dec. 14, 2018) (requiring unmarried resident taxpayers with New York taxable income between \$215,400 and \$1,077,550 to pay "\$13,825 plus 6.85% of excess over \$215,400" to New York in state income taxes).

portion of the State income tax.

CONCLUSION

The Court in *Wynne* relied on the internal consistency test developed under the fair apportionment prong of *Complete Auto* to strike down Maryland's refusal to grant a credit for income taxes paid to other states against a purportedly local income tax. In so doing, the Court conflated the fair apportionment and non-discrimination prongs. Upon a finding of internal *inconsistency*, the Court deemed the Maryland income tax scheme *discriminatory* and therefore unconstitutional under the dormant Commerce Clause. The question of whether an internally *consistent*, and therefore fairly apportioned, tax may nonetheless discriminate against interstate commerce was *not* before the Court in *Wynne*.

The Court's discrimination case law and the relevant scholarly literature demonstrate that an internally consistent tax may nonetheless be discriminatory. Additionally, the scholarly literature and the Court's dormant Commerce Clause jurisprudence, combined with general principles of international taxation, establish that states taxing income based on residence must provide a credit for income taxes paid to a source state to offset the double taxation that may result when two sovereigns exercise their legitimate taxing authority over the same interstate activity. Consequently, New York's refusal to grant a credit for income taxes paid to other states against the New York City income tax violates the dormant Commerce Clause.