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Deciphering the Supreme Court's Opinion in Wynne

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In *Wynne*, the Supreme Court held that Maryland's personal income tax regime violated the dormant Commerce Clause because it taxed income on a residence and source basis without giving a credit to residents for income taxed on a source basis by other states. The Court suggested, however, that a state may tax residents on all their income without providing a credit for taxes paid by other states if the state did not tax nonresidents on income from sources within the state, even though such a taxing regime might result in double taxation of interstate commerce.

In *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015), the U.S. Supreme Court granted certiorari to consider the following question: "Does the United States Constitution prohibit a state from taxing all the income of its residents–wherever earned–by mandating a credit for taxes paid on income earned in other states?"[1] Stated somewhat more broadly, the question before the Court in *Wynne* was whether, in the face of overlapping claims to the same income by the state of residence and the state of source, the former must yield to the latter as a matter of federal constitutional law to avoid double taxation.

The short answer that the Court gave to this question in *Wynne* was "no," even while holding that Maryland's tax regime violated the Commerce Clause. In response to a dissenting opinion's contention that the Court's decision "requires a State taxing based on residence to 'recede' to a State taxing based on source," the Court in *Wynne:* declared: "We establish no such rule of priority." Indeed, the Court went on to suggest, although it explicitly did not hold,[2] that under a properly designed tax regime Maryland could constitutionally tax its residents on all of their income without providing any relief from taxes imposed by other states.[3] Moreover, although Maryland was not constitutionally required to adopt a tax regime under which residence yielded to source, the Court made it clear that Maryland could have avoided the Court's ultimate ruling had Maryland in fact adopted such a regime. So what did the Court actually hold in *Wynne*, why did it take the analytical route it chose to reach its conclusion, and what are the implications of that choice? This article addresses those questions.

WYNNE: THE SHORT VERSION

Maryland imposes an income tax on its residents with respect to all income earned regardless of source. The tax has both a state and a county component, although both levies are state taxes,[4] with the rate of the county component depending on the taxpayer's county of residence, and ranging from 3.2% to 1.25%. Although both the state and county components of the tax apply to the resident's income regardless of source, and thus potentially to income that is taxable in other states, Maryland limited the credit it granted for taxes its residents paid to other states to the state portion of the tax, and it provided no credit for any tax imposed by other states for the county portion of the tax. Maryland also taxes nonresidents on income from sources within the state. Like the tax on residents, the tax on nonresidents has both a state and county component, with the county component levied at the lowest county rate, to wit, 1.25%. The state component of the tax was unproblematic from a Commerce Clause standpoint, because of the full credit granted against the state component for taxes paid to other states.[5] Consequently,the focus of the Court's opinion was on the county portion of the state tax.

Brian and Karen Wynne were Maryland residents. During the year at issue (2006), Brian Wynne owned stock in a Subchapter S corporation, which filed state income tax returns in 39 states. The Wynnes earned income passed through to them from the S Corporation, and they reported the income on their individual Maryland income tax returns, claiming a credit for income taxes paid to other states.[6] When the Maryland Comptroller of the Treasury allowed the credit for the state portion of the tax but denied it for the county portion of the tax, the Wynnes challenged the denial under the Commerce Clause. Although the Court adverts to the pass-through nature of the Wynnes' income, its opinion proceeds on the premise that the income in question is personal income earned by resident individuals as distinguished from "corporate" income that is included in an individual shareholder's tax base pursuant to the S corporation election.

The Court's Opinion in *Wynne*

At first blush, the Court's opinion in *Wynne* appears simple and straightforward. After briefly reviewing the familiar history of the Court's dormant Commerce Clause doctrine, and with a perfunctory nod to Justice Scalia's and Justice Thomas's revisionist views as to the legitimacy of that doctrine,[7] the Court declared that "our existing dormant Commerce Clause cases all but dictate the result," namely, the unconstitutionality of Maryland's taxing regime. The Court found "[t]hree cases involving taxation of the income of domestic corporations ... particularly instructive." All three cases—*J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, (1939), and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)—struck down unapportioned gross receipts taxes on the ground that they burdened interstate commerce by exposing it to the risk of a double or multiple tax burden to which intrastate commerce was not exposed. The Court summarized the import of these cases, and their implications for Maryland's tax regime, as follows: "In all three of these cases, the Court struck down a state tax scheme that might have resulted in double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity. ... Maryland's tax scheme is unconstitutional for similar reasons."

The Court further observed that although these cases did not invoke the Court's "internal consistency" doctrine—which was hardly a surprise because the doctrine would not be articulated for another 40 years[8]—they nevertheless, in substance, reflected the application of the doctrine. As the Court later described the doctrine in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995): "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the economic reality reflected by the

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1 Petition for Certiorari i, *Comptroller of the Treasury v. Wynne* (No. 13-485).

2 As described more fully below, the Court's reasoning in *Wynne* suggests that Maryland could "remedy the unconstitutionality of its tax scheme" by adopting a scheme that taxed only on the basis of residence. The Court was quick to observe, however, that "we do not decide the constitutionality of a hypothetical tax scheme that Maryland might adopt because such a scheme is not before us."

3 See text accompanying notes 28-30 *infra*.

4 This is true as a matter of state law, see *Frey v. Comptroller of the Treasury*, 29 A.3d 475 (Md., 2011), and would have been true as a matter of federal constitutional law, even if the county-level tax were independent of the state-level tax for state law purposes. For federal constitutional purposes, the distinction between state and local taxes has no meaning—they are all exercises of "state" power insofar as the Constitution is concerned. See Hellerstein, Hellerstein, and Swain, *State Taxation*, Third Edition (Thomson Reuters/WG&L, 2015 rev.), ¶ 19.02[9] (hereinafter Hellerstein, *State Taxation Treatise*); Hellerstein, "Federal Constitutional Restraints on State Property Tax Assessment Limitations: An Analysis of Florida's 'Portability' Proposals," State Tax Notes, 6/11/07, pp. 789, 790-791 (elaborating on proposition that federal constitutional restraints are evaluated at the state level, not the local level). This issue is further explored below. See text accompanying notes 43-46 *infra*.

5 The term "full credit" as used in the text means a credit against a tax on income that is subject to tax both by Maryland and by the state where it is earned in an amount not to exceed the tax imposed on such income by Maryland. This is the Is the way virtually all income tax crediting regimes operate. See Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 20.10; Section 904 (federal foreign tax credit limitation).

6 The states employ a variety of means for assuring that nonresident S corporation shareholders pay taxes on their pass-through income from sources within the state, often by conditioning pass-through treatment on the nonresident shareholders' agreement to file returns or by having the S corporation withhold taxes from (or pay taxes on behalf of) their shareholders. See Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 20.08[2][a][iii].

7 See Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 4.12[2] (discussing Justice Scalia's and Justice Thomas's challenge to the Court's dormant Commerce Clause doctrine).

8 The Supreme Court first suggested that the principle of "internal consistency" constrained state taxing power in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983). See generally Hellerstein, "Is 'Internal Consistency' Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation," 87 Mich. L. Rev. 138 (1988); see also Hellerstein, "Is 'Internal Consistency' Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation," 61 Tax L. Rev. 1 (2007); Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 4.16[1] (discussing "internal consistency" doctrine).

tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with intrastate commerce."

Maryland's taxing regime indisputably flunked the internal consistency test, and the Court so held. After noting that application of the internal consistency test required that Maryland's taxing scheme be evaluated as a whole (i.e., it must include consideration of (1) the county portion of the tax on income that Maryland residents earn in Maryland, (2) the county portion of the tax on income that Maryland residents earn in other States, and (3) the special nonresident county portion of the tax on income that nonresidents earn in Maryland: the Court illustrated the internal consistency of Maryland's by the following example:

> 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."

If this were all there was to *Wynne*–that the Court's "existing Commerce Clause cases all but dictate the result" under a simple application of the internal consistency principle–it would hardly merit an article in THE JOURNAL. Nor would it explain why the Court took the case in the first place, which remains a mystery in any event;[9] nor why it took the Court 28 pages to explain the supposedly preordained result; nor why the case produced four different opinions together with a bitter 5-4 split on the outcome. For at least a partial explanation of these questions, the article explores the "Unabridged Version" of the Court's opinion in *Wynne* below. Before that task is undertaken, however, the article explores an alternative path that the Court might have taken to its decision that would have led to a much shorter opinion and raised fewer questions than the Court's longer opinion has left in its wake.

THE ROAD NOT TAKEN[10]

There was a straighter path than the one the Court took in *Wynne* to the result that it reached. In the interest of full disclosure, it was a path suggested by the Brief of the Maryland Chamber of Commerce as *Amicus Curiae* in support of the taxpayers, a brief that the author of this article helped write, but it also reflects views that the author has long held,[11] and that, as the ensuing discussion hopefully will demonstrate, are still of some relevance, notwithstanding the Court's opinion in *Wynne*. The straighter path was based on the fundamental proposition that longstanding Commerce Clause doctrine requires states taxing income on a residence basis to yield their taxing rights to states taxing the same income on a source basis to avoid the inexorable double or multiple taxation that would result from the simultaneous exercise of both states' taxing rights.

> Had the Court in *Wynne* followed its earlier decisions requiring states taxing on the basis of residence to yield to states taxing on the basis of source, decision would have followed easily.

The Dormant Commerce Clause Forbids the Risk of Multiple Taxation

For more than 75 years, the Supreme Court has steadfastly adhered to the doctrine that the dormant Commerce Clause forbids state taxes that expose interstate commerce to a risk of multiple taxation to which intrastate commerce is not exposed.[12] In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court first articulated the basic proposition that while interstate commerce must "pay its way," the dormant Commerce Clause protects interstate commerce from "bear[ing] cumulative burdens not imposed on local commerce." Shortly thereafter, in striking down a levy on dormant Commerce Clause grounds, the Court in *J.D. Adams* reiterated that fundamental principle: "Interstate commerce would ... be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Gwin, White & Prince*, the court likewise condemned a tax under the dormant Commerce Clause because it exposed interstate commerce to "the risk of a multiple burden to which local commerce is not exposed." *J.D. Adams* and *Gwin, White & Prince*, of course, were the very precedents the Court invoked in *Wynne* as "all but dictat[ing]" the result in the case.

The Court has never wavered from its commitment to this basic tenet of its dormant Commerce Clause jurisprudence that is indispensable to the protection of free trade from burdensome taxes.[13] Again, *Wynne* reflects

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the same commitment to the avoidance of multiple tax burdens.

Residence-Based Claims Must Yield to Source-Based Claims to Avoid Multiple Taxation

Over the years, the Court has considered a number of cases addressing the risk of multiple taxation that arises because of the conflicting claims of (1) the state of a taxpayer's residence to tax 100% of a taxpayer's income or property, regardless of its geographical source or location, and (2) the state where the income or property is earned or located to tax the portion of the income or property with its source or location (hereafter simply "source") in that state.[14] The problem arises because, apart from the dormant Commerce Clause and the interests in free trade that it protects, the claims of both the state of residence and the state of source are legitimate. Although *Wynne* involved income rather than property, the underlying Commerce Clause question—how to deal with competing claims based on residence and source in light of free trade concerns—are common to both contexts, and the Court's underlying reasoning in both contexts, at least prior to *Wynne*, appeared to be interchangeable.

The Court has long recognized the states' power to tax income and property on the basis of residence and source. Thus, in the context of income taxation on the basis of residence, the Court has observed: "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation."[15] Accordingly, "[a]s to residents [a State] may, and does, exert its taxing power over their income from all sources, whether within or without the State... "[16] The rationale for allowing states to tax residents on their income without regard to source is "founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received,"[17] as well as his "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws."[18]

The states' power to tax on the basis of source is no less well recognized than their power to tax on the basis of residence.[19] However, because the power to tax based on source derives only from the protection that the states provide to "persons, property, and business transactions *within their borders*,"[20] it is necessarily more circumscribed than the power to tax that flows from "[d]omicil itself."[21] Consequently, when states seek to tax nonresident individuals and corporations using source as their sole jurisdictional basis, their power extends only to the nonresidents' "property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."[22] It is worth observing that there is nothing in *Wynne* that undermines the foregoing principles. Indeed, *Wynne* fully embraces them. It is in the reconciliation of these principles in light of the Commerce Clause prohibition of the risk of multiple taxation that *Wynne*'s approach deviates from the Court's approach in its pre-*Wynne* case law as described below.

When both the state of residence and the state of source have a legitimate claim to tax income, there are widespread understandings that the state of residence ordinarily yields to the state of source to avoid double taxation. This is true as a matter of national and international practice.[23] Indeed, it is also true as a matter of subnational practice in the United States, a point the Court acknowledged in *Wynne*. The Court recognized that states taxing income on the basis of residence yield to states that tax the same income on the basis of source, observing that "the near-universal

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9 If the Court's "existing Commerce Clause cases all but dictate the result reached in this case by Maryland's highest court," as the Court declared, one may wonder why the Court did not simply deny the Comptroller of the Treasury's petition for certiorari. On its face, the case seemed to meet none of the criteria that the Court has established for determining whether to grant certiorari from a state court decision, namely, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" or "a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court Rule 10, available at www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf.

10 With apologies to Robert Frost for suggesting that poetry and tax law have anything in common.

11 See, e.g., Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 20.10[2][b] (constitutional restraints on the denial by a taxpayer's state of residence of a credit for personal income taxes paid to other states); Swain and Hellerstein, "State Jurisdiction to Tax 'Nowhere' Activity," 33 Va. Tax Rev. 209 (2013). Needless to say, the next revision of the treatise (cumulative supplement 2015-2, summer 2015) will modify the cited discussion, as appropriate, to reflect the Court's opinion in *Wynne*.

12 See generally Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 4.09 (tracing development of doctrine).

13 See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) ("It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause."); *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980) (recognizing and addressing claims that the dormant Commerce Clause bars tax that "imposes a burden on interstate and foreign commerce by subjecting ... income to a substantial risk of multiple taxation"); *Exxon Corp. v. Wisconsin Dep't. of Revenue*, 447 U.S. 207 (1980) (recognizing and addressing a claim that the dormant Commerce Clause bars tax that "subjects interstate business to an unfair burden of multiple taxation"); *MeadWestvaco Corp. v. Illinois Dep't. of Revenue*, 553 U.S. 16 (2008) ("The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation.").

14 For ease of exposition, the term "source" is used to mean a location, other than the residence of the taxpayer, where a state may assert the power to tax based on its relationship to the income or property in question. In the context of income taxation, the term "source" is normally used to describe the location where income is earned and thus is taxable by a jurisdiction other than the taxpayer's residence; in the context of movable or intangible property taxation, the term "situs" or "business situs" rather than "source" is typically used to describe the location where such property is situated and is thus taxable by a jurisdiction other than the taxpayer's residence.

15 *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937).

16 *Shaffer v. Carter*, 252 U.S. 37 (1920).

17 *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932).

18 *Cohn*, *supra* note 15.

19 *Curry v. McCanless*, 307 U.S. 357 (1939) ("[I]ncome may be taxed both by the state where it is earned and by the state of the recipient's domicile. Protection, benefit, and power over the subject matter are not confined to either state.").

20 *Shaffer*, *supra* note 16 (emphasis supplied).

21 *Cohn*, *supra* note 15.

22 *Shaffer*, *supra* note 16.

23 American Law Institute, Federal Income Tax Project, *International Aspects of United States Income Taxation* 6 (1987) ("[u]nder internationally accepted practice, it is incumbent on the domiciliary jurisdiction to alleviate ... double taxation by some reasonable means").

state practice is to provide credits against personal income taxes for ... taxes paid to other States."[24]

If both the state of residence and the state of source could tax income or property associated with interstate commercial activity, the risk of multiple taxation would be inevitable. Accordingly, at least prior to *Wynne*, the Court, in accord with the widespread understanding that the state of source has the stronger tax claim, consistently interpreted the dormant Commerce Clause as requiring the state of residence to yield to the state of source whenever allowing both claims to prevail would result in multiple taxation of interstate commerce.

The Court articulated the underlying principle in *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952). The taxpayer, an Ohio-based corporation, owned boats and barges that it employed for the transportation of oil along the Mississippi and Ohio Rivers. The vessels, though registered in Cincinnati, made only occasional stops in Ohio for repairs. Their main terminals were in other states. Ohio assessed an ad valorem personal property tax on 100% of the value of the vessels. The Court, however, in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), had recently sustained the power of a nondomiciliary state to impose a source-based tax on an apportioned share of the value of vessels that operated within that state. Ohio contended that *Ott* did not deprive the domiciliary state of the power to tax the entire value of the vessels, a power the domiciliary state thought it possessed under the Court's earlier doctrine. The Court flatly rejected Ohio's contention, holding that the state of residence had to yield to the state of source to avoid the risk of multiple taxation: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. Otherwise there would be multiple taxation of interstate operations ... ."[25]

Prior to *Wynne*, the Court faithfully adhered to the view that the dormant Commerce Clause bar against multiple taxation requires that the power of one state to tax all of an interstate enterprise's property or income on a residence basis must yield to the power of other states to tax the same property or income on a source basis. Thus, in *Central R.R. Co. v. Pennsylvania*, 370 U.S. 607 (1962), the Court sustained the power of the domiciliary state to impose a tax on the full value of the taxpayer's rolling stock, but *only* because it had failed to establish that it was subject to an apportioned source-based tax in other states. As the Court observed, "a State casts no forbidden burden upon interstate commerce by subjecting its own corporations, though they be engaged in interstate transport, to nondiscriminatory property taxes." However, the Court squarely reaffirmed the teachings of *Standard Oil*, declaring that "'multiple taxation of interstate operations' ... offends the Commerce Clause," and that "multiple taxation is possible ... if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax."

In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the Court endorsed the same principle, observing that "[i]n order to prevent multiple taxation of interstate commerce, this Court has required that taxes must be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value." Turning to potential conflicts between source-based and residence-based taxation of the same property, the Court reiterated the source-trumps-residence principle in no uncertain terms: "The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. 'The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. ... Otherwise there would be multiple taxation of interstate operations.' *Standard Oil Co. v. Peck*, 342 U.S., at 384–385."

In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), the Court applied the same rule in the income tax context, reasoning that the dormant Commerce Clause precludes one state from taxing all of a taxpayer's income on a residence basis when another state has the power to tax an apportioned share of that income on a source basis. In *Mobil*, the question was whether Vermont could tax on a source basis an apportioned share of the dividends that Mobil Oil Corporation, a New York domiciliary, received from its foreign subsidiaries. One of the arguments advanced by Mobil was that Vermont could not tax an apportioned share of such income because it would expose Mobil to the risk of multiple taxation in light of New York's alleged power as Mobil's commercial domicile to tax the dividends on an unapportioned basis.

The Court rejected the underlying premise of Mobil's argument. It first reiterated the basic principle that the dormant Commerce Clause would not tolerate the multiple taxation that would result from imposition of a tax on Mobil's dividends both "by apportionment" on a source basis and "by allocation to a single situs" on a residence basis. As the Court put it, "[t]axation by apportionment and by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained." While multiple taxation of the same income was constitutionally unacceptable, the Court was nevertheless willing to "assume, for the present purposes, that the State of commercial domicile has the power to lay *some* tax on the appellant's dividend income."[26] However, when it came to the ultimate question whether the state of residence trumps the state of source in the face of conflicting claims to the same income, the Court reaffirmed the rule that residence must yield to source. Thus, although the state

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24 For this proposition, the Court cited Hellerstein, *State Taxation Treatise* ¶ 20.10, pp. 20-163 to 20-164.

25 Although *Standard Oil* technically raised only a due process issue, the language of the Court's opinion plainly speaks to dormant Commerce Clause concerns. In subsequent opinions, the Court explicitly incorporated the principle of *Standard Oil* into its dormant Commerce Clause doctrine, as the ensuing discussion reveals.

26 Emphasis added.

27 See Brief of Tax Economists as *Amici Curiae* in Support of Respondents 4.

of commercial domicile has the power to tax "some" of the appellant's dividend income, "there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method." In short, a residence-based tax "allocating" a taxpayer's entire income to a single state did not prevail over a source-based tax apportioning a taxpayer's income to the states in which it does business.

Had the Court in *Wynne* followed its earlier decisions requiring state taxes based on residence to yield to state taxes based on source, the decision would have followed easily. Maryland's taxing regime created precisely the risk of multiple taxation identified in the Court's earlier decisions. Maryland imposed a tax on all the income earned by its residents and on all the income earned in Maryland by nonresidents. It failed to provide full relief against its residence-based tax (whether by a credit, apportionment, or exemption) for taxes imposed by other states when the income Maryland taxed is earned in those states and is also taxed there on a source basis. As a consequence, the risk of multiple taxation for residents who cross state lines to engage in economic activity was indisputable. Accordingly, under the settled law reflected in the Court's pre-*Wynne* dormant Commerce Clause doctrine, Maryland, as the state of residence, would have had to yield to claims of the state or states of source, in order to avoid the multiple taxation that would–and in the case of the Wynnes did–otherwise result.

WYNNE: THE UNABRIDGED VERSION

As noted at the outset of this article, the Court in *Wynne* explicitly repudiated the proposition that its opinion "requires that a State taxing based on residence to 'recede' to a State taxing based on source." This raises the questions of why the Court rejected that proposition; where the Court's opinion leaves the dormant Commerce Clause, in general, and more specifically, the pre-*Wynne* dormant Commerce Clause law (as we knew it) addressed to multiple taxation; whether the changes that *Wynne* arguably made in the pre-*Wynne* law are significant as a theoretical and practical matter; and what questions are likely to be encountered in light of *Wynne*. It is to these questions that the balance of this article is directed.

The Rejection of the Commerce Clause Doctrine That Source Trumps Residence

Perhaps the most specific–and surprising–aspect of *Wynne* was its rejection of the generally accepted proposition, which appeared to be solidly grounded in the Court's dormant Commerce Clause precedents, 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. The question thus arises why the Court adopted this position, especially in light of its own recognition that the source-trumps-residence principle reflected "the near-universal state practice," at least in the context of state personal income taxation. Although one can only speculate about the answer, the most plausible explanation is that this concession was essential to getting a majority of votes needed to invalidate the tax. Evidently there are some Justices who are uncomfortable with the Court "legislating" a rule of priority–no matter how widely accepted that rule may be in theory, in practice, and (prior to *Wynne*) in federal constitutional law.

So, faced with the reluctance of some Justices to adopt a rule of priority, what did the Court do? It shoehorned the case into a doctrinal mode with which the wavering Justices would feel more comfortable, namely, that the Maryland scheme "discriminated" against interstate commerce. This maneuver permitted the Court to strike down the tax without "legislating" a rule of priority and to condemn Maryland's regime as a tax that fell within a familiar–perhaps the most familiar–dormant Commerce Clause rule invalidating state taxes, namely, a tax that discriminates against interstate commerce.

How did the Court accomplish this doctrinal solution? It did so by adopting a definition of "discrimination" advanced by some well-respected academic economists, albeit a definition with which state tax lawyers (or, at least, this state tax lawyer) were generally unfamiliar. Specifically, the economists argued that the way to determine whether a tax is discriminatory is to compare a tax on wholly domestic income (defined as a tax that a resident pays on in-state source income) with the combined tax on outbound income (the tax the resident pays on income from sources in other states) and inbound income (the tax the nonresident pays on income from sources within the taxing state). If the tax on the cross-border income (inbound and outbound) exceeds the tax on domestic income, there is tax discrimination. The economists characterized this discrimination as equivalent to "an import or export tariff,"[27] perhaps the quintessential violation of the Commerce Clause.

Interestingly, the Court never described the economists' precise methodology for determining whether a tax is discriminatory. Instead, it simply relied on the characterization of the disparity identified by the economists as a "tariff," noting that "th[e] identity between Maryland's tax and a tariff is fatal because tariffs are [t]he paradigmatic example of a law that discriminates against interstate commerce," and that "tariffs ... are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one." Moreover, the Court noted that "when asked about the ... analysis made by *amici* Tax Economists ... counsel for Maryland responded: 'I don't dispute the mathematics. They lose me when they shift from tariffs to income taxes.'" However, the Court saw no reason why "our analysis should change because we deal with an income tax rather than a formal tariff." Furthermore, the Court noted that "[n]one of our dissenting colleagues dispute this economic analysis."

Most significantly, the Court's embrace of the economists' definition of tax discrimination allowed the Court, without adopting a priority rule for source over residence, to invoke the internal consistency test as the appropriate metric for "translating" the economists' definition of discrimination into familiar constitutional doctrine that would result in the condemnation of the Maryland tax. As the Court, observed, "the internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax is inherently discriminatory and operates as a tariff." And in case the reader missed the observation the first time the Court made it, the Court subsequently reiterated that "the internal consistency test and economic analysis ... confirm that the tax scheme operates as a tariff and discriminates against interstate commerce."

In short, the Court's doctrinal approach allowed it to invalidate the Maryland tax scheme under a familiar constitutional principle (the internal consistency test) based on bedrock dormant Commerce Clause jurisprudence (discriminatory taxes, in general, and tariffs, in particular, constitute virtually per se Commerce Clause violations) without "requir[ing] a State taxing based on residence to 'recede' to a State taxing based on source." If such doctrinal legerdemain was the price of attracting five votes to condemn a tax regime that violates sound and widely accepted norms of cross-border tax policy, perhaps one should simply be grateful for the result and not pursue this issue any further. After all, there is the old adage about not looking a gift horse in the mouth.

The Dormant Commerce Clause Prohibition of Taxes Creating the Risk of Multiple Tax Burdens After *Wynne*

Despite the temptation to leave well enough alone, the Court's approach does raise a number of additional questions that warrant further exploration. Perhaps the most fundamental question raised by the Court's opinion in *Wynne* is this: Does the Court's full-throated endorsement of the internal consistency principle for identifying unconstitutional "double taxation ... that discriminate[s] in favor of intrastate over interstate activity," along with its rejection of judicially articulated "priority" rules (such as source over residence) for avoiding cumulative tax burdens, mean that internal consistency is the *only* principle (apart from extraterritorial taxation or "external consistency"[28]) for determining whether a tax imposes an unconstitutional risk of cumulative tax burdens in violation of the Commerce Clause?

Such a reading of *Wynne* is certainly plausible. While the Court was careful "not to decide the constitutionality of a hypothetical tax scheme that Maryland might adopt," its analysis relied almost entirely on the internal consistency test in evaluating the constitutionality of alternatives to Maryland's tax regime. Moreover, the Court's repeated invocation in *Wynne* of *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), in distinguishing between "(1) tax schemes that inherently discriminate against interstate commerce, without regard to the tax policies of other states" and "(2) tax schemes" like those in *Moorman* "that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes" can be read as reflecting the Court's belief that an internally consistent tax creating the risk of multiple tax burdens does not offend the dormant Commerce Clause.[29]

In *Moorman*, the Court rejected the taxpayer's argument that Iowa's single-factor sales formula, considered in conjunction with the similar three-factor formulas of property, payroll, and sales employed at that time by 44 of the 45 states other than Iowa, exposed the taxpayer to an unconstitutional risk of multiple taxation in violation of the Commerce Clause. In so holding the Court declared:

> The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income. Accepting appellant's view of the Constitution, therefore, would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula. The asserted constitutional flaw in that formula is that it is different from that presently employed by a majority of States and that difference creates a risk of duplicative taxation. But a host of other division of income problems create precisely the same risk and would similarly rise to constitutional proportions.

If the Court believes that *Moorman* controls the outcome in *Wynne*, internal consistency may well be a *sine qua non* of a claim[30] that a tax that creates the risk of multiple taxation prohib-

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28 "The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process Clause and Commerce Clauses that there 'be some definite link, some minimum connection between a state and the person, property, or transaction it seeks to tax.'" *Allied-Signal, Inc. v. Director, Division of Tax'n*, 504 U.S. 768 (1992) (internal citation omitted). As the Court observed in *Allied-Signal*, "[t]he reason the Commerce Clause includes this limit is self-evident: In a Union of 50 States, to permit each state to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subject to severe multiple taxation." The Court has also articulated the same principle under the "external consistency" requirement. See Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 4.16[2] (discussing "external consistency" doctrine). The limits on extraterritorial or externally inconsistent taxes, however, do not, in and of themselves, prevent the states from taxing out-of-state values on a residence basis, because, as was noted earlier, the justification for residence-based taxes rests on the "[e]njoyment of privileges of residence in the state and the attendant right to invoke the protection of its laws," not on the relationship of the state to values taxed. *Cohn*, *supra* note 15.

29 The Court later reiterates this point citing *Moorman* for "distinguishing 'the potential consequences of the use of different formulas by two States,' which is not prohibited by the Commerce Clause, from discrimination that 'inhere[s] in either State's formula,' which is prohibited."

30 Apart from extraterritorial taxation or external consistency. See *supra* note 28.

31 Emphasis added.

32 Emphasis added.

33 See *supra* note 28.

ited by the dormant Commerce Clause in a post-*Wynne* world. However, if *Wynne* is so read, it reflects a significant departure from prior precedent. *Moorman*, after all, involved a conflict between different states' sourcing rules, namely, determining the source of corporate income by formula. Although the risk of multiple taxation may have been palpable in the light of the then-existing configuration of states' apportionment formulas, the risk of multiple taxation, at least in principle, was adventitious. While a taxpayer with all its sales in Iowa but all its property and payroll in other states with three-factor formulas would pay tax on 167% of its income (100% to Iowa and 67% to states where its property and payroll were located), a taxpayer with all its property and payroll in Iowa and all its sales in other states with three-factor formulas would pay a tax on only 33% of its income (0% to Iowa and 33% to states where its sales were made). In short, a conflict between internally consistent, but divergent, sourcing rules can lead to overtaxation or undertaxation, assuming that exposure of 100% of the taxpayer's tax base (no more or no less) is the appropriate norm, which is the assumption reflected in the internal consistency principle.

Wynne, by contrast, involved a conflict between one state's residence-based rules and another state's source-based rules, where the risk of multiple taxation was *inexorable* not adventitious. Wholly apart from the specific question raised in *Wynne* (whether residence must yield to source in the taxation of personal income), the more fundamental question is whether a state seeking to tax 100% of a tax base on some plausible basis (e.g., residence, location of economic activity, location of property) must yield to the tax claims of other jurisdictions seeking to tax a portion of that tax base on some plausible basis (e.g., source, location of economic activity, or location of property).

Prior to *Wynne*, the Court generally resolved those conflicts, without resort to the internal consistency principle, by requiring the state seeking to tax the entire tax "pie" to yield to the state seeking to tax only a "slice" of that "pie." As the Court put it in *Mobil Oil Corp.* (discussed above), "[t]axation by apportionment and by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former *cannot* be sustained."[31] Accordingly, the Court sustained the more limited (but stronger) claim of the state seeking to tax the apportioned "slice" of the pie rather than the unapportioned "pie" in its entirety. Insofar as *Wynne* abandons this preference in favor of internal consistency, paying equal respect to states' claims to all of a tax base and states' competing claims to only a portion of a tax base, as long they do not seek to tax both bases simultaneously (in violation of the internal consistency principle), *Wynne* has made a noteworthy modification in dormant Commerce Clause law.

Further thoughts on Commerce Clause restraints on cumulative tax burdens and internal consistency. Although the foregoing reading of *Wynne* is plausible, it is not the only way to read the Court's opinion. In this connection, it is worth taking a closer look at the Court's invocation of its gross receipts tax precedents from the late 1930s and 1940s in support of its conclusion. It will be recalled that the Court declared that its decisions in *J.D. Adams* (1938), *Gwin, White & Prince* (1939), and *Central Greyhound* (1948) were "particularly instructive" precedents as "three cases involving the taxation of *domestic* corporations"[32] in which the Court struck down a state tax scheme that "might have resulted in double taxation of income earned out of the State and that discriminated in favor of domestic over interstate state commerce." The Court further noted that "we held that those schemes could be cured by taxes that satisfy what we have subsequently labeled the 'internal consistency' test."

The Court's description of these cases, while in service to an understandable objective–condemning Maryland's residence-based tax as discriminatory for failure to satisfy the internal consistency test–does not provide a complete picture of their import. Although these cases involved "domestic" corporations, and thus "residents" of the states in question, the taxpayers' residence was of no relevance to the cases, and any implication that the cases involved residence-source conflicts (like the conflict at issue in *Wynne*) would be mistaken. In *J.D. Adams*, the Court explicitly noted that "[t]he tax is not an excise for the privilege of domicile alone"; rather it was "a tax upon gross receipts from commerce." Similarly, in *Gwin, White & Prince*, although the tax was imposed upon a Washington corporation, that fact had no bearing on the Court's analysis, which turned on the measure of the tax "imposed upon appellant's activities in Washington." In *Central Greyhound*, the Court did not even mention the residence of the corporation (the *Wynne* Court had to cite the dissent for that point), and the issue in the case was simply whether New York could tax all the receipts from "points within the State but over routes that utilize the highways of Pennsylvania and New Jersey." To repeat: Not one of these cases involved, as did *Wynne*, an unalloyed attempt to tax all of an individual's or entity's income or receipts simply because that individual or entity was domiciled or resident in the state.

Furthermore, although the Court properly invoked these cases as supporting, with the benefit of hindsight, the internal consistency principle, a fair reading of these cases does not support the proposition that the "internal consistency" is the *exclusive* test (apart from extraterritoriality or external consistency[33]) for determining the risk of the exposure to unconstitutional multiple tax burdens under the dormant Commerce Clause. Instead, these cases represented a repudiation of the restrictive and formalistic Commerce Clause doctrine that created a tax-free zone of immunity for interstate commerce and adopted instead a more pragmatic approach that "must accommodate itself to the double demand that interstate commerce must pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local businesses."[34] Indeed, the Court recognized in *Wynne* that "beginning with Justice Stone's seminal opinion in *Western Live Stock* … , and continuing through cases like *J. D. Adams* and *Gwin, White & Prince*, the direct-indirect burdens test was replaced with a more practical approach that looked to the economic impact of the tax."

Accordingly, while *J.D. Adams*, *Gwin, White & Prince*, and *Central Greyhound* contain language that anticipates the internal consistency principle, the cases may also be read for the broader proposition that reflected, and arguably continues to reflect, the Court's dormant Commerce Clause jurisprudence. Thus, *J.D. Adams* held that Indiana could not impose a tax on the unapportioned gross receipts that an Indiana taxpayer received from its sale of machinery manufactured in Indiana to purchasers in other states because the states in which the sales were made could also tax such receipts, thus creating a risk of a multiple tax burden on interstate commerce to which intrastate commerce would not be subjected. Similarly, *Gwin, White & Prince* held that Washington could not impose a tax on the unapportioned gross receipts that a Washington taxpayer received from the marketing of fruit shipped from Washington to other states and foreign countries because the states to which the fruit was shipped could also tax such receipts, thus creating a risk of a multiple tax burden on interstate commerce to which intrastate commerce would not be subjected. Likewise, *Central Greyhound* held that New York could not tax the unapportioned gross receipts from transportation that were also subject to tax in other states, thus creating a risk of a multiple tax burden on interstate commerce to which intrastate commerce would not be subjected. These cases can fairly be read as standing for the proposition that states that seek to tax 100% of a tax base on an unapportioned basis must yield to states that can tax the same receipts on some other plausible basis, whether or not the unapportioned taxes are internally inconsistent.[35]

Finally, whatever one may say about post-*Wynne* dormant Commerce Clause doctrine prohibiting income and gross receipts taxes that create the risk of multiple taxation, it seems clear that the rule requiring residence to yield to source remains true in the context of tangible personal property (based on the precedents discussed above), to which the *Wynne* Court makes no reference. The explanation for this difference lies in part in the fact that the cases involving tangible personal property implicate Due Process Clause as well as Commerce Clause concerns, even though (as noted above) the Court has assimilated its Due Process Clause precedents involving tangible personal property into its Commerce Clause cases involving the same issue.[36] Thus, in contrast to cases involving income and intangible property, where the Court has made it clear that the Due Process Clause does not bar double taxation by the state of residence and the state of source,[37] the Court's precedents limiting states' power to tax tangible personal property on the basis of residence when other states have power to tax such property on the basis of source or "situs" may be explained on the theory that tangible personal property cannot, as a matter of principle, be "located" in two states at once and the source state's power to tax such property effectively "removes" that property from the state of residence, without establishing a "priority" rule over legitimate claims based on source and residence to the same tax base. Although such analysis may seem somewhat strained, and Boris Bittker in a characteristically trenchant critique has argued that it is not analytically defensible under the Due Process Clause,[38] the "priority" of source over residence appears to be alive and well in the context of state taxation of tangible personal property.

Other Commerce Clause Questions Addressed in *Wynne*

In the course of its opinion in *Wynne*, the Court addressed and resolved a number of subsidiary questions that are worthy of brief discussion.

Taxes on gross receipts versus taxes on net income. As already observed, the Court in *Wynne* relied heavily on gross receipts taxes (*J.D. Adams*, *Gwin, White, & Prince*, and *Central Greyhound*) in determining the appropriate analytical framework for adjudicating the constitutionality of a net income tax. In response to Justice Ginsburg's claim in dissent that the Court had traditionally distinguished between gross receipts and net income taxes, the Court rejected the claim as inconsistent with its contemporary approach to state taxation under the Commerce Clause: "We see no reason why the

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34 *Western Live Stock v. Bureau of Revenue*, 303 U.S. 240 (1938). See generally Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 4.09 (tracing development of multiple taxation doctrine).

35 Although one might also say that such taxes simply violate the requirement that a state not impose extraterritorial, unfairly apportioned, or externally inconsistent taxes, see *supra* note 28, that would be no answer in the case of a tax based on residence nor, one might argue, on some other local event that was arguably connected to all of a taxpayer's income or gross receipts.

36 See text accompanying notes 14-25 *supra*.

37 See Swain and Hellerstein, *supra* note 11, at 221, 226.

38 Bittker, "The Taxation of Out-of-State Tangible Property," 56 Yale L. J. 640 (1947). Bittker's analysis did not address Commerce Clause restraints on state taxation.

39 "In mathematics, a binary operation is commutative if changing the order of the operands does not change the result.... Most familiar as the name of the property that says '3 + 4 = 4 + 3' or '2 x 5 = 5 x 2'." See en.wikipedia.org/wiki/Commutative_property#Commutative_operations_in_everyday_life.

40 Hellerstein, et al., "Commerce Clause Restraints on State Taxation After *Jefferson Lines*," 51 Tax L. Rev. 47 (1995). See also Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 18.09[3][d].

41 As Mitt Romney famously declared. See www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

42 Professor Coenen put the relevant point this way:

> [T]his effort to distinguish between natural and artificial persons makes no sense. Indeed, the effort is perverse because it would strip the law's aid from ordinary individuals, while affording all-out constitutional protection to corporate titans. It may or may not be that "corporations are people." But one thing is for sure: People are people. And on no sound theory should actual people be deprived of dormant Commerce Clause protections, even as those protections operate to afford complete shelter to artificial entities who owe their very existence to the munificence of the state. Coenen,

"Why Wynne Should Win," 67 Vand. L. Rev. En Banc 217, 226-27 (2014).

distinction between gross receipts and net income should matter, particularly in light of the admonition that we must consider 'not the formal language of the tax statute but rather its practical effect.'" In the Court's view, "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."

One intriguing question raised by the Court's repudiation of the "discarded distinction" between gross receipts and net income taxes, which justified the Court's reliance in *Wynne* on gross receipts tax precedents to evaluate the constitutionality of a net income tax, is whether this doctrinal development is subject to the commutative principle,[39] so that net income tax precedents may now be invoked in evaluating the constitutionality of gross receipts taxes. This question is particularly relevant to the question of fair apportionment. Although *J.D. Adams, Gwin, White, & Prince,* and *Central Greyhound* strongly support the proposition that gross receipts taxes, like net income taxes, are subject to the Commerce Clause demands of fair apportionment, the Court in fact has been less than rigorous in implementing those demands when adjudicating the constitutionality of gross receipts taxes measured by *inbound* sales as distinguished (at least in *J.D. Adams* and *Gwin, White & Prince*) from gross receipt taxes measured by *outbound* sales.

In a series of cases involving Washington's gross receipts tax–the tax at issue in *Gwin, White & Prince*–the Court sustained taxes measured by the unapportioned gross receipts from interstate activity over the objections that the levies were unfairly apportioned. Thus in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the Court sustained, over Commerce Claus objections, the state's tax on all the gross receipts that General Motors derived from its sales of cars to Washington retailers, despite the fact that manufacturing and assembly occurred outside the state. The Court's rationale for sustaining the tax was that it was imposed on "instate activity." Similarly, in *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975), involving the application of Washington's tax to the unapportioned gross receipts from sales that an out-of-state supplier made to the Boeing Company, the Court declared that "the tax is on the gross receipts from sales made to a local consumer, which may have some impact on commerce ... . Yet ... it is 'apportioned exactly to the activities taxed,' all of which are intrastate." Subsequently, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), involving the application of Washington's tax to the unapportioned receipts from sales that an out-of-state manufacturer made to an in-state customer, the Court declared: "Washington taxes the full value of receipts from in-state wholesaling...; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the [business and occupation] tax, Washington is taxing the unitary activity of manufacturing and wholesaleing ... [T]he activity of wholesaling–whether by an in-state or an out-of-state manufacturer–must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax."

The Court's decisions in *General Motors, Standard Pressed Steel*, and *Tyler Pipe* are difficult, if not impossible, to square with a principled implementation of the fair apportionment principle. As Justice Brennan observed in his dissent in *General Motors*–a dissent that applies equally to the Court's decisions in *Standard Pressed Steel* and *Tyler Pipe* –"if commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax regime must be apportioned to reflect the business activity within the taxing State." Indeed, the present author has argued at length elsewhere that the Court's analysis in the Washington cases is unfaithful to the fair apportionment requirement as reflected in the Court's net income tax precedents, in addition to being in tension with its gross receipts tax rulings in *J.D. Adams, Gwin, White & Prince*, and *Central Greyhound*.[40] The purpose here, however, is not to reargue the case, but simply to suggest that *Wynne* may have given the argument a new lease on life. After all, the rhetoric of *Wynne* obliterates the distinction between gross receipts and net income taxes. Furthermore, the Court's opinion in *Wynne* reinvigorates the application of the fair apportionment principle to gross receipts taxes both directly (by its reliance on *J.D. Adams, Gwin White & Prince*, and *Central Greyhound*) and indirectly by suggesting that precedents requiring fair apportionment of net income are equally applicable to gross receipts taxes.

Taxes on individuals versus taxes on corporations. In justifying its reliance on *J.D. Adams, Gwin White & Prince*, and *Central Greyhound*–all of which involved corporations–to invalidate Maryland's personal income tax scheme, the Court rejected the contention that dormant Commerce Clause principles provided less protection to individuals than to corporations. The Court found it "hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations," since any tax, whether imposed on a corporation or an individual, may burden interstate commerce, and there was no basis for distinguishing between the two classes of taxpayers based on the services they received from the state. So whether or not "corporations are people,"[41] it seems fair to conclude that, insofar as Commerce Clause protections are concerned, people are corporations, or at least cannot be treated worse than corporations when it comes to taxes on interstate activity.[42]

The Commerce Clause protects residents from their own state taxes. The Court in *Wynne* had another opportunity to consider its observation in *Goldberg v. Sweet*, 488 U.S. 252 (1989), that "[i]t is not a purpose of the Commerce clause to protect state residents from their own state taxes." As the Court observed in *Wynne*, it had earlier "repudiated that dictum in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), where we stated that '[s]tate taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional.'" Notably, the dissenting opinions of both Justice Scalia and of Justice Ginsburg sought to resuscitate the Court's remark in *Goldberg* in challenging the residents' attack on Maryland's taxing scheme. For the second and, one would hope, the last time, the Court repudiated its ill-considered dictum in *Goldberg*, noting that it had entertained many dormant Commerce Clause challenges brought by state residents, including in *Goldberg* itself.

Impact of *Wynne* on Local Income Taxes

One question not addressed in *Wynne*–although it might have seemed relevant because of the opinion's focus on the "county" portion of the tax–was the impact of the case on local income taxes. As explained above,[43] this was not an issue in *Wynne* itself, because the county portion of the tax was, in fact, a "state" tax as a matter of state law. The important point here, as also noted, is that this would have been true as a matter of federal constitutional law, even if the county portion of the tax were independent of the state portion of the tax for state law purposes, because, for federal constitutional purposes, the distinction between state and local taxes has no meaning–they are all exercises of "state" power insofar as the Constitution is concerned.[44] Indeed, the Maryland Court of Appeals made this very point in its opinion below: "whether the tax is nominally a state or county tax is irrelevant for purposes of analysis under the dormant Commerce Clause because a state may not unreasonably burden interstate commerce through its subdivisions any more than it may at the state level."[45] Brief elaboration on this point may nevertheless be useful because of the differences in the ways that local taxes treat nonresidents as well as in the way that states grant credits for taxes imposed by other states' localities, and the implications of *Wynne* for this differential treatment.

First, to restate the governing principle, there is no distinction for federal constitutional purposes between state and local taxes for dormant Commerce Clause purposes. The principle was clearly articulated in a case raising the question of whether an out-of-state vendor, which had sufficient nexus with a state to enable the state to require the vendor to collect the state's use tax, could also be required to collect local use taxes in local jurisdictions where, if the locality were viewed as a state, the taxpayer would not have sufficient nexus for use tax collection purposes. In *Aldens, Inc. v. Tully*, 49 N.Y.2d 525, 404 N.E.2d 703 (1980), an out-of-state, mail-order business was licensed to do business in New York and, through a wholly owned subsidiary, maintained offices and employees at four different locations in the state. The taxpayer challenged the right of the state to require it to collect local, as distinguished from state, use taxes on goods sold and delivered by it to purchasers in every locality within the state, because its only contact with many of the localities was by mail and common carrier.

After noting that the statute clearly required any vendor maintaining a place of business in the state to collect local as well as state use taxes, the New York Court of Appeals rejected the taxpayer's constitutional objections to the imposition of the local use tax collection obligation. The court acknowledged that an out-of-state vendor whose only contact with a state was through the mail or common carrier could not be required to collect the state's use tax. The court then declared:

> Petitioner argues by wishful extrapolation that the imposition of the duty of collection of all local use taxes within the State on a seller which is located only in particular counties within the State and whose only connection with buyers in other local tax areas is by mail or by common carrier is similarly infirm. However, simply because there are constitutional limitations on the burdens that may be placed on interstate commerce, it does not follow, nor is there any precedent for holding, that burden is to be measured by further compartmentalization of each state into its municipal subdivisions. No historical predicate is advanced to indicate that in assuring protection of commerce among the several States, any such intrastate partitioning was contemplated, and petitioner cites no Supreme Court cases so holding.[46]

What does this mean for the constitutionality of "local" income taxes after *Wynne*? Because local income taxes are simply state taxes for dormant Commerce Clause purposes, the appropriate way to analyze such taxes is to consider them as part of the state's tax structure (as in *Wynne*). So, for example, if a locality (like New York City) imposes an income tax solely on its residents without giving any credit for income taxes that its residents pay to other states, such a tax would be treated as part of New York's state tax structure. That tax structure would be viewed as imposing a conventional (and internally consistent) statewide income tax on all residents and nonresidents of the state, with a credit for taxes that residents pay on income earned in other states, along with an unconventional (but internally consistent) tax confined to New York City residents with no credit for taxes that such city residents pay to other states. If internal consistency is the only dormant Commerce Clause requirement for assuring that a tax does not impose a risk of multiple tax burdens, an issue we have addressed above, the New York regime would survive constitutional scrutiny.

By contrast, for example, if a locality (like Kansas City, Missouri) imposes an income tax on residents and nonresidents but denies a credit for income taxes that its residents pay to other states, such a tax would be treated as part of Missouri's state tax structure. That tax structure (analogous to the tax structure at issue in *Wynne*) would be viewed as imposing a conventional (and internally consistent) income tax on all residents and nonresidents of the state, with a credit for taxes that residents pay on income earned in other states, along with an unconventional (and internally inconsistent) tax regime confined to Kansas City residents, and to nonresidents of the city earning income within the city, but with no credit for the income tax that Kansas City residents pay on income earned in other states.

Finally, it is worth considering the obligation of a state like Kansas to provide a credit against its state income tax for the income taxes that its residents pay to Kansas City, Missouri. Following the logic of the preceding discussion, assuming Kansas generally imposes a tax on the income that its residents earn from all sources, as well as a tax on income that nonresidents earn from sources in Kansas, Kansas would be required, under internal consistency analysis, to provide a credit against the Missouri tax (including the tax imposed by localities in Missouri).

This is because if every state adopted a tax regime that imposed a tax on all of the income that its residents earned from all sources and all of the income that nonresidents earned from sources within the state, but gave a credit only for the portion of other states' taxes that were labeled "state" rather than "local" taxes, a taxpayer confining her activity to a single state would pay only the taxes levied by a single state (whether denominated "state" or "local") whereas a taxpayer who ventured across state lines would pay both the "state" tax to her state of residence as well as the portion of the other state's tax denominated a "local" tax.

Wynne and Internally Inconsistent Definitions of Resident

The personal income taxes of many states define as residents (taxable on all of their income, regardless of source) not only those individuals who are domiciled in the state but also individuals who exceed a specified threshold of presence in the state (so-called "statutory" residents). New York, for example, defines a "resident individual" for personal income tax purposes as someone "who is not domiciled in this state but maintains a permanent place of abode in this state ... ."[47] and spends in the aggregate more than one hundred eighty-three days of the tax year in this state. If every state adopted New York's definition of "resident," taxpayers who maintained their domicile in one state but spent more than 183 days in another, where they maintained an abode, would be exposed to a greater tax burden than taxpayers who confined their activities to a single state. The former would be treated as a resident of two states, subject to tax on all their income without regard to source and, to the extent that the income did not have its source in another state (e.g., income from intangible investments not connected with a trade or business), often without any credit for the taxes paid to the other state. The latter, by contrast, would pay taxes on a residence basis to a single state only and, even if they paid taxes to other states, would receive a credit for such taxes that (by hypothesis) would be imposed on the basis of source. Hence such statutes clearly flunk the internal consistency test.

Nevertheless, the few courts that have addressed taxpayers' claims that internally inconsistent definitions of resident for personal income tax purposes are invalid under the dormant Commerce Clause have rejected these claims.[48] They have done so, however, not on the ground that the residency definitions survive scrutiny under the internal consistency test, a determination that would be difficult, if not impossible, to square with the test. Rather, these courts have held that the taxpayers' claims do not implicate the Commerce Clause at all. Thus, in *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 695 N.E.2d 1125 (N.Y., 1998), the New York Court of Appeals dismissed the "internal consistency" attack on New York's residency definition by a New Jersey domiciliary who worked in New York, where he maintained an abode, and was thus a New York resident under New York's statute, because the personal "income tax does not fall on any interstate activity, but rather on a purely local occurrence—the taxpayer's status as a resident of New York State."[49] The Minnesota Supreme Court rejected a similar attack on Minnesota's residency definition on the ground that the claim was not cognizable under the Commerce Clause because it did not involve interstate commerce.[50]

The holdings of the New York and Minnesota courts were open to serious question even prior to *Wynne*. Thus, as the author argued elsewhere long before *Wynne* was on the horizon, the New York Court of Appeals's rationale—that taxing a resident on all of his or her income raises no Commerce Clause issue because it falls "on a purely local occurrence"—"cannot be reconciled with the U.S. Supreme Court's repudiation of a similar argument advanced by the taxing authority in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*."[51] In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Court held that the Commerce Clause applied to a claim that a local property tax statute discriminated against interstate commerce by denying a property tax exemption to charitable institutions that

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43 See *supra* note 4.

44 *Id.*

45 *Maryland State Comptroller of the Treasury v. Wynne*, 431 Md. 147, 64 A.3d 453 (Md., 2013).

46 Compare to *City of Hoover v. Oliver & Wright Motors, Inc.*, 730 So.2d 608 (Ala. 1999) (sustaining over due process objections state's authority to permit municipalities to impose local Alabama sales tax outside their corporate limits but within their police jurisdiction, because state could delegate to municipalities power to levy taxes that was coextensive with the state's taxing power).

47 N.Y. Tax Law § 605(b)(1)(B).

48 *Luther v. Commissioner of Revenue*, 588 N.W. 2d 502 (Minn., 1999); *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 695 N.E.2d 1125 (1998).

49 See also *Noto v. New York State Dep't of Tax'n and Fin.*, 2014 NY Slip Op 30578(U) (Trial Order) (Sup. Ct., Suffolk Cty., 3/3/14) , available at www.checkpoint.thomsonreuters.com (double taxation of investment income of taxpayers, who were residents of both Connecticut and New York under each state's law, did not violate Commerce or Due Process Clause).

50 *Luther*, *supra* note 48.

51 Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 20.03[1] ("Constitutionality Under the Commerce Clause of 'Internally Inconsistent' Definitions of 'Resident'").

were operated principally for nonresidents. In so holding, the Court rejected the taxing authority's claim that the dormant Commerce Clause was inapplicable because a local real estate tax was at issue: "A tax on real estate, like any other tax, may impermissibly burden interstate commerce." Moreover, the Court continued "[t]o allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides." In short, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." A personal income tax regime that exposes taxpayers who cross state lines to greater tax burdens than those who stay at home would seem to implicate the Commerce Clause, even though the discrimination depended on "a purely local occurrence"–the taxpayer's status as a "resident."

Whatever the force of these arguments prior to *Wynne*, *Wynne*, at a minimum, has provided taxpayers with additional ammunition to attack internally inconsistent definitions of residence for personal income tax purposes. The Court in *Wynne* relied extensively on *Camps Newfound*, referring to the case no less than eight times in the opinion and quoting the case for the proposition that "'[a] tax on real estate, *like any other tax*, may impermissibly burden interstate commerce' (emphasis added)," to rebut the suggestion that a personal income tax somehow enjoys immunity from Commerce Clause strictures. Moreover, as already noted, when two states tax an individual on a residence basis, even though both states will generally provide a credit for taxes that their residents earn from sources in other states,[52] the credit will not extend to income that does not have its source in another state, such as a taxpayer's investment income. Indeed, this description fit the taxpayer in *Tamagni*, an investment banker who lived in New Jersey but commuted to work in New York, where he maintained an apartment. To be sure, one might argue that the internal consistency problem confronted by taxpayers such as Tamagni do not implicate the Commerce Clause because they are caused by a personal decision to live in one state and work in another.[53] Nevertheless, *Wynne* has almost certainly increased the vulnerability of internally inconsistent definitions of residence to attack under the dormant Commerce Clause, and it is only a matter of time before those attacks are launched.[54]

CONCLUSION

Perhaps the most significant questions raised by *Wynne*, which has been saved to the end to reward readers who have had the perseverance to read this far, are what practical impact the decision is likely to have and what the case (and the various opinions it spawned) says about the health of the dormant Commerce Clause and its prospects for future. As a practical matter, it seems quite unlikely that the case will lead to significant changes in what the Court described as "the near-universal state practice to provide credits against personal income taxes for ... taxes paid to other States." Although in principle states might abandon their internally consistent residence-credit regimes, which tax on the basis of residence and source, for an internally consistent residence-only scheme, that eliminates the source-based tax,[55] this seems highly improbable in light of the reaction of voting residents to the adoption of such a regime. At the local level, however, *Wynne* is likely to have more of a practical impact because "many states and municipalities do not grant a complete credit to their residents for all income taxes paid in other jurisdictions."[56] It remains to be seen whether states and localities respond to the problem that *Wynne* creates for such regimes by adopting credits for taxes for their residents, eliminating the source-based tax on nonresidents, or some other internally consistent alternative.

As for the health of the dormant Commerce Clause, it seems to have survived *Wynne* essentially intact, with relatively minor doctrinal effects, some of which may actually have strengthened its condition. Thus while the Court may have weakened dormant Commerce Clause restraints on internally consistent taxes that create the risk of multiple taxation, it may have strengthened the clause in rejecting distinctions (advanced by the dissenting opinions) between gross receipts taxes and net income taxes and between corporations and individuals. Moreover, while Justice Scalia and Justice Thomas reaffirmed their abiding hostility to basic dormant Commerce Clause doctrine, seven Justices agreed it has a continuing role to play in restraining state tax power, even if only five Justices believed that free trade principles outweighed principles of state sovereignty in *Wynne* itself. For the moment at least, the Court has stayed the course of the dormant Commerce Clause. ■

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52 Hellerstein, *State Taxation Treatise*, *supra* note 4, ¶ 20.10[2] ("Limitation of Credit to Income Derived from Sources in Other States").

53 Compare to Reg. 1.262-1(b)(5) (commuting expenses are nondeductible personal expenditures for federal income tax purposes); *Flowers*, 326 U.S. 465 (1946) (same).

54 See, e.g., Rosen, "*Wynne*, Cloud Computing, and State's Deference to Another," State Tax Notes, 6/8/15, p. 745 ("New York state taxpayers should be cognizant of the Wynne decision and should consider filing refund claims if they have paid–or will pay–tax to New York State as a statutory resident ....").

55 This assumes that the *Wynne* should be read as endorsing such a regime, which, as suggested above, is a plausible, but not the only plausible reading that Wynne may be given. See text accompanying notes 28-37 *supra*.

56 Brief of the International Municipal Lawyers Association, The United States Conference of Mayors, The National Association of Counties, The International City/County Management Association and The Maryland Association of Counties as *Amici Curiae* in Support of Petitioner 16, Comptroller of the Treasury v. Wynne (No. 13-485).