1-1-2014

Why Wynne Should Win

Dan T. Coenen
UGA School of Law, coenen@uga.edu

Why Wynne Should Win

*Dan T. Coenen**

I. INTRODUCTION

In *Maryland State Comptroller of the Treasury v. Wynne,*[1] the Court could reshape core features of dormant Commerce Clause law. Maryland's theory in the case is that it can lay an income tax on every penny of an individual resident's income even if some of that income is earned entirely outside the state and therefore, in keeping with standard state practice, already taxed elsewhere. On its face, this approach exposes interstate income earners to overlapping income taxation. Maryland's scheme thus violates a cardinal principle of dormant Commerce Clause law, "forbidding" state laws that expose interstate commerce "to the risk of a double tax burden to which intrastate commerce is not exposed."[2] Indeed, this principle applies with the greatest possible force in this case because Maryland does not

* University Professor and Harmon W. Caldwell Chair in Constitutional Law, University of Georgia School of Law. The author thanks Walter Hellerstein for thoughtfully reviewing a draft of this paper and P.J. Wilkie for providing helpful research assistance.

1. 64 A.3d 453 (Md. 2013), *cert. granted*, 134 S. Ct. 2660 (2014).
2. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

merely expose taxpayers engaged in interstate commerce to the risk of a double tax burden or even "serious concerns of double taxation."[3] Maryland essentially guarantees double taxation by taxing its residents' out-of-state income in all-out fashion while giving only partial credit for taxes paid elsewhere on that same income. Nor can Maryland defend its taxing system on the ground that, although unorthodox, it is "evenhanded."[4] It is not evenhanded because Maryland, while positing that residence alone should count with regard to taxing the income of Marylanders, simultaneously taxes non-Marylanders when they generate income in Maryland. When it comes to taxing interstate activity, Maryland thus seeks to have its cake and eat it too. In such circumstances, if any, the overriding safeguard against "multiple taxation" of interstate income must and does apply.[5]

II. THE BACKDROP OF THE *WYNNE* CASE

Lurking in the shadows of *Wynne* are complicating elements that might seem to lend Maryland's position a veneer of credibility. A few snippets of language in earlier Supreme Court opinions give Maryland something (if not much) to work with in defending its program.[6] There is a dissenting opinion in the Maryland Court of Appeals that seeks to leverage these passages in the name of states' rights.[7] In a curious development, the Solicitor General has weighed in with an amicus brief that supports Maryland's parochial taxing scheme.[8] And overhanging the case is the recurring insistence of Justice Thomas that the dormant Commerce Clause principle should be abandoned altogether.[9]

3. Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 386 (1991).

4. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 200 (1994).

5. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 433 (1980).

6. *See infra* notes 31, 36 and accompanying text.

7. Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 471–77 (Md. 2013) (Greene, J., dissenting).

8. To be sure, the Supreme Court sought the views of the Solicitor General in the case. What is surprising, as we will see in more detail below, is the position taken by the Solicitor General in the case. Also surprising was the Solicitor General's endorsement of Maryland's request for Supreme Court review in this case because no conflict in the lower courts existed on the relevant legal question and no other clear justification for Supreme Court intervention was present.

9. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 610–20 (1997) (Thomas, J., dissenting). Justice Scalia, while also expressing serious concerns about the principle, has relied on stare decisis in concluding that the Court should continue to honor certain core features of the principle. *See, e.g., West Lynn Creamery*, 512 U.S. at 210 (Scalia, J., concurring in the judgment) ("I will, on *stare decisis* grounds, enforce a self-executing 'negative' Commerce Clause in two situations: (1) against a state law that facially discriminates

But the dormant Commerce Clause principle should not be abandoned. And if it is not abandoned, Wynne should win this case because the challenged state law departs sharply from longstanding practice and settled law. It departs in particular from a series of Supreme Court decisions that have specifically rejected state efforts to tax out-of-state activity on an unabated basis simply because of the taxpayer's residence in the state.[10] And the deeper underlying principle—that a state cannot, by imposing duplicative taxation, exert "inexorable hydraulic pressure" on a taxpayer to engage in intrastate, rather than interstate, commerce[11]—has been endorsed by the Court for more than a century.[12] It may not be too much to suggest that our entire national economy is built on this principle, which is fundamental to any system of open cross-border trade. To be sure, states enjoy great latitude in structuring their own taxing systems. But when a state law ineluctably exposes interstate income to multiple taxation, it violates the dormant Commerce Clause. And that is the situation here.

Understanding why this is so requires only a basic recognition of how state income taxation works, how it has long worked, and why it has worked and does work this way. Assume, for example, that Caroline Rezzy lives in North Carolina. When her father passes away, she inherits a renewable leasehold interest in income-producing farmland located in Georgia. Under well-settled principles, Caroline Rezzy is potentially subject to taxation in both Georgia and North Carolina on the income produced by the operation of this Georgia farm.

It bears noting that this state of affairs is very accommodating to the interests of the state of residence. After all, it is hardly self-evident that North Carolina should have any taxing jurisdiction with regard to income that is generated entirely through activities conducted in another state. But our legal tradition countenances this exertion of state power. And, in a bow to federalism, our dormant

against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.").

10. *See* Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 445–46 (1980) (finding "no reason in theory" why a domiciliary state's power to tax "should be exclusive when [taxed] dividends reflect income from a unitary business, part of which is conducted in other states"); Central Greyhound Lines of N.Y. v. Mealey, 334 U.S. 653, 662 (1948) (applying anti-duplicativeness principle to an income-based tax as imposed on a resident corporation); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 314 (1938) (applying the principle to a state resident corporation); *see also* Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939) (reaffirming and again applying the *J. D. Adams* principle).

11. *See* Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 286–87 (1987).

12. *See* W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 256 (1938) (tracing the principle to *In re* State Freight Tax, 82 U.S. 232, 280 (1872)).

Commerce Clause doctrine does so as well. Neither tradition nor law, however, permits North Carolina to tax the income generated by the Georgia farm without any limitation whatsoever when that income also is taxed by Georgia because it is actually earned there. That is why every state that taxes its residents on all of their personal income provides relief from double taxation in these circumstances[13]—a pattern of lawmaking that reflects both the requirements and the sensibility of the dormant Commerce Clause.[14] Moreover, the form of relief from double taxation afforded in each instance is a credit given by the state of residence for amounts paid to the state of source.[15] In short, the prevailing norm in the United States—and throughout most of the world—is that the state that is the source of taxed income may (to put things simply) go first.[16] And so, when the state in which income has its source exercises its taxing power, the state of residence must in some way yield, thus ensuring that double taxation of income earned outside its borders does not occur.[17]

This outcome does more than comport with basic fairness; it also is essential to ensuring the sound operation of our constitutionally safeguarded "national common market."[18] After all, if Caroline Rezzy is subject to double state taxation on the income earned from her Georgia farmland, she is not likely to renew her lease on that out-of-state acreage; rather, she will rent comparable North Carolina farmland that does not subject her to the burdens of duplicative taxation. The resulting problem is evident. The core purpose of the dormant Commerce Clause is to forestall exactly this sort of shifting of business and capital from interstate to intrastate markets in response to commerce-distorting state laws.[19] An attentiveness to basic principles may help clarify the key point: No one doubts that a state may choose to lift a burden from taxpayers—and thus collect far less revenue—by reducing its income tax rate in an

13. 1 JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 20.10 (3d ed. 1998).

14. Indeed, as we soon will see, even Maryland affords some measure of credit for taxes paid to other states.

15. HELLERSTEIN ET AL., *supra* note 13.

16. *See* AM. LAW INST., FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION 6 (1987).

17. *See* John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity,* 33 VA. TAX REV. 209, 224–25 (2013) (noting that both "constitutional principles" and "established practice" dictate that "the state of the taxpayer's residence must yield to the state of the income's source to avoid the risk of multiple taxation" in light of the "stronger claim on the basis of source" for taxing-power priority).

18. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (internal quotation marks omitted).

19. *See, e.g.*, McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944).

across-the-board fashion or by imposing no income tax at all. And that is true even if such a move is designed to (and in fact does) entice businesses to locate in that state. *Wynne*, however, is not a case that involves anything like that sort of state tax-policy choice. Rather, it is a case in which a state does impose an income tax and then structures that tax so that it exposes interstate commerce to a greater burden than it imposes on intrastate commerce.[20] Because (among other things) such a scheme strongly pressures citizens to abandon interstate economic activity in favor of intrastate economic activity, there is a direct clash with dormant Commerce Clause principles that safeguard "tax-neutral decisions"[21] so as to ensure "free trade among the several States."[22] Just such a clash is what we have here.

III. THE MARYLAND TAX

A clear understanding of the issue in this case may be clouded by the details of the challenged Maryland scheme. But in fact the details of that scheme are not of consequence to the proper resolution of this case. In essence, Maryland imposes a two-part income tax, one part of which is constitutionally unobjectionable and the other part of which is constitutionally untenable. With regard to the first part of the Maryland income tax (the so-called "state tax")—which generates money that remains in the state's own coffers—Maryland affords the ordinary and requisite tax credit for income from sources outside the state. But for the second part of the tax (the so-called "county tax")—which generates money that Maryland chooses to channel to local counties pursuant to a state-created revenue-sharing program—the state affords no comparable credit, or indeed any credit or other tax relief of any kind at all. Assume, for example, that a Maryland resident, Harriet Homedecorator, earns a total of $100,000 during the relevant tax year, that 20% of that income comes from work done in Maryland, and that 80% of that income comes from work done in a neighboring state. Assume also that both the neighboring state and

20. Consider again the case of Caroline Rezzy. Assume she has a next-door neighbor who, by curious happenstance, inherited a farm on exactly the same day as Rezzy. Assume further that the farm is identical in every respect to Rezzy's farm (including in terms of income earned from operations) except for one thing: the neighbor's farm is located not in Georgia, but just across the border in North Carolina. A North Carolina income taxing system that gave Rezzy no credit for income taxes paid to Georgia would lead to far greater taxation of Rezzy (who would have to pay two full state taxes) than her neighbor (who would pay just one) even though the two of them are identically situated, except for the interstate-versus-intrastate nature of their commercial activity. Such a result is what the dormant Commerce Clause has long condemned.

21. Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 331 (1977).

22. Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 402 (2002).

Maryland impose income taxes at the 5% level—with half of the 5% Maryland tax attributable to its "state tax" and the other half of the 5% tax attributable to its "county tax." Harriet will pay $4,000 in taxes to the neighboring state (i.e., 5% of the $80,000 of income that is attributable to the income-generating activity she conducted there). She will also owe, prior to any credits, $5,000 in taxes to Maryland (that is, 5% of her total income of $100,000) because she is a resident of that state. To be sure, Maryland will give Harriet a measure of credit for taxes paid to the neighboring state. But it will give her a credit only against the "state tax" she otherwise owes, and not against the "county tax." For this reason, Harriet will not have to pay any "state tax" because her $4000 in credit for paying out-of-state taxes exceeds her otherwise applicable $2500 "state tax" bill. But she will have to pay the full $2500 in Maryland taxes attributable to the "county tax" because Maryland affords no credit at all with respect to it.

The bottom line is that Harriet—contrary to the mandate of the dormant Commerce Clause principle—must pay $1500 more in state income taxes "merely because interstate commerce is being done."[23] After all, if she had performed exactly the same amount of work so as to generate exactly the same income solely in Maryland, rather than across state borders, she would have owed only $5,000 in income taxes (i.e., 5% of her Maryland income) instead of the $6500 she must pay in combination to Maryland and the neighboring state.

To be sure, the operative percentages have been adjusted and simplified in our Harriet Homedecorator hypothetical, so as to demonstrate how the Maryland system works. But the substance of the problem is the same, regardless of the actual numbers. The problem is that Maryland does not provide any credit for the "county" portion of its income tax. This failure inevitably exposes taxpayers like Harriet—who must pay $1500 more in income taxes than her neighbor who earns exactly the same amount of income based on wholly in-state home-decorating work—to stark and substantial double taxation. In substance, Brian Wynne stands in exactly the same position as Harriet Homedecorator. He must pay more state income taxes than an identically situated income earner engaged solely in intrastate commerce because Maryland refuses to give him any relief from the "county tax" portion of his Maryland tax bill.[24]

23. Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939).

24. To be sure, Brian Wynne is an S Corporation shareholder, rather than a sole proprietor of a business. But Maryland itself takes the position that this difference is not legally significant because the relevant share of the S Corporation's income flows directly through to him.

There are a number of points about this state of affairs that place the Maryland taxing scheme in an especially negative light. First, the dual taxation that Brian Wynne faces is not the result of the imposition by other states of rates that exceed the overall rate imposed by Maryland. (Note that in our Harriet Homedecorator case, both Maryland and the neighboring state taxed income at the same 5% rate.) Nor is this double taxation attributable to any other form of overreaching by other states; after all, source-based taxation is a uniform practice among the 40 states (including Maryland) that impose income taxes.[25] Maryland's system also has a quality that puts it in especially great tension with the constitutional norm of facilitating interstate commerce: The degree of double taxation increases directly with the extent of the interstate activity in which that business operator engages. Perhaps most important of all, if every state adopted Maryland's system—thus refusing to give a full credit to their own residents situated similarly to Harriet Homedecorator—massive double taxation of interstate business operations would result in every corner of the nation.[26] For all of these reasons, Maryland's taxing scheme, even on its face, wholly lacks the earmarks of "equality" and "equal treatment" that the dormant Commerce Clause doctrine demands.[27]

One can characterize the manner in which the Maryland taxing system operates in different ways. One might say, for example, that Maryland provides only a partial credit for income taxes paid out of state. Or one might say that Maryland imposes two separate income taxes, for only one of which it provides a credit based on tax payments to other states. But the way one chooses to describe the system does not matter. What does matter is that Maryland does not dispute the exposure to double taxation that its system creates. Instead—and, no doubt because its system creates such an obvious double-taxing effect—Maryland advances an entirely new and far-reaching principle in defense of its taxing program. It argues that a state can tax its residents on all their income at the full state income-tax rate even if some, most, or all of that income is simultaneously taxed by other states. In other words, Maryland asserts that it can view residence as

25. *See* HELLERSTEIN ET AL., *supra* note 13, ¶ 20.03.

26. *See infra* note 70 and accompanying text.

27. Henneford v. Silas Mason Co., 300 U.S. 577, 583 (1937); Frey v. Comptroller of the Treasury, 29 A.3d 475, 509 (Md. 2011). The Supreme Court has used the term "internal consistency" to capture the idea that state systems are improper if their replication in all other states would necessarily produce overlapping taxation of interstate activity. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). The Maryland taxing system plainly runs afoul of the internal consistency requirement.

an all-controlling taxing trump card, which allows the state to tax 100% of its residents' income regardless of all other considerations, including (1) the actual source-based situs of that income, (2) the actual (and wholly legitimate) taxation of that same income by other states, (3) the longstanding, all-but-universally-followed credit-providing taxing practice of the states, and (4) the manner in which the state itself taxes nonresident income (which in fact Maryland does tax in full measure on a source-based theory). The key point is apparent: What is at issue in this case is not this or that detail of Maryland's unusual state/county income taxing program; what is at issue is Maryland's novel, no-holds-barred theory of state taxing power with regard to resident income. That theory—as the *Wynne* case itself demonstrates—is untenable because it inevitably produces duplicative taxation.[28] Indeed, Maryland does not deny that its system gives rise to double taxation and that double taxation has occurred in particular in the case of Brian Wynne. So how can Maryland defend its program?

IV. MARYLAND'S ARGUMENTS AND WHY THEY FAIL

Maryland seeks to avoid dormant Commerce Clause strictures against multiple-state taxation in three ways. It urges that: (1) in fact, Supreme Court precedent supports the unrestrained taxation of resident income, at least if the taxpayer (as here) is an individual resident, rather than a corporate resident, of the state; (2) upon close inspection, none of the tests of state-tax-law disqualification set forth in *Complete Auto Transit, Inc. v. Brady*[29] is triggered here; and (3)

---

28. It makes no difference for dormant Commerce Clause purposes that the challenged portion of the tax here is called a "county" tax, rather than a "state" tax. One reason why is that—regardless of its name—the tax has been established and is assessed by the state, rather than by individual counties. *See* Frey v. Comptroller of the Treasury, 29 A.3d 475, 492 (Md. 2011). In any event the Court has repeatedly held that laws that otherwise violate the dormant Commerce Clause are intolerable even if (unlike here) they emanate from states' political subdivisions. *See, e.g.*, Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951); C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 389 (1994). Occasionally, it is suggested that the justification for this well-established legal rule is not ironclad. With regard to a county-imposed rule, for example, the argument is that, when such a law disadvantages out-of-county interests, it simultaneously burdens both out-of-state interests and out-of-county-but-in-state interests, so that the latter can serve as surrogate protectors of the former in the statewide political arena. *See* United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of Camden, 465 U.S. 208, 231 (1984) (Blackmun, J., dissenting) (advancing a similar argument with regard to the operation of the Privileges and Immunities Clause). But this argument (which has been repeatedly rejected in any event) has no application here because Maryland's "county tax" scheme does not create a situation in which harmed out-of-county intrastate actors naturally have a strong incentive to protect the interests of persons who are engaged in interstate commerce precisely because it is imposed both by and throughout the state.

29. 430 U.S. 274, 279 (1977).

previously unrecognized policy reasons, rooted largely in political process considerations, support a *per se* rule of judicial passivity when commerce-disrupting burdens on interstate commerce are directed at state residents, as opposed to anyone else. Each of these arguments falls far short of winning the day.

A. State Residence

Can it be that Maryland's taxing scheme—even if it is otherwise incompatible with dormant Commerce Clause law—is immunized from challenge by Brian Wynne solely because he is a resident of Maryland? Maryland urges that Supreme Court precedent supports this result. In particular, it relies on the Court's statement in *Goldberg v. Sweet*[30] that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes."[31] But this argument misses the forest by focusing on a single, small tree.[32] To begin with, Maryland wrenches this passage from its context. It is true that a state does not violate the dormant Commerce Clause simply by taxing a resident taxpayer in a draconian fashion or by treating some in-state taxpayers much worse than other in-state taxpayers; in such a case, as *Goldberg* suggests, the proper remedy is to seek to "change the tax through the [state] political process."[33] But nothing in *Goldberg* indicates that the dormant Commerce Clause can never be invoked by a state resident to challenge a state tax regime—especially when the state scheme threatens far-reaching distortions of free interstate trade.[34] Indeed, in upholding the challenged tax in *Goldberg* itself, the Court emphasized that, on the facts presented there, "the risk of multiple taxation is low, and *actual multiple taxation is precluded by the credit provision*."[35] Just the opposite is true in this case.[36]

---

30. 488 U.S. 252 (1989).

31. *Id.* at 266.

32. What is more, even the single, small tree on which Maryland focuses was felled seven years later in *West Lynn Creamery v. Healy*, 512 U.S. 186, 203 (1994) (noting 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" (emphasis added)).

33. *Goldberg*, 488 U.S. at 266.

34. *See supra* Part III (discussing Maryland's tax and its implications for interstate commerce).

35. *Goldberg*, 488 U.S. at 265 (emphasis added). In addition, this case is distinguishable from *Goldberg* because the challenged Maryland law obviously shifts the tax burden from home-state activity to non-home-state activity, thereby raising an inevitable "difficulty [in] effecting legislative change" for those singularly disadvantaged residents engaged in interstate activity. *Id.* at 266. *See generally infra* notes 83–88 and accompanying text (developing this point).

36. The other snippet of language on which Maryland primarily relies is a passage in a footnote in *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450 (1995). That passage

Perhaps for this reason, Maryland chooses to invoke the *Goldberg* dictum in only a half-hearted way. It floats the idea, in seeming contravention of the very words that it quotes, that *Goldberg* does not in fact bar challenges to a state tax by all "state residents"; rather, Maryland suggests that *Goldberg* forecloses challenges to state taxes only by *individual* state residents, and not by *corporate* state residents.[37] This idea raises a host of problems.[38] One of them is that it runs counter to the Court's handling of the *Goldberg* case itself, because the principal plaintiffs in that case were themselves individual-taxpayer residents of the state whose law was being attacked. To be sure, the Court rejected the constitutional challenge raised in that case. But in doing so, it never suggested that these plaintiffs were ipso facto foreclosed from bringing a dormant Commerce Clause challenge. Rather, the Court fully examined their claims under ordinary dormant Commerce Clause principles, applying in full measure the overarching *Complete Auto Transit* test.[39]

In any event, this effort to distinguish between natural and artificial persons makes no sense. Indeed, the effort is perverse

---

states: "[i]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations." *Id.* at 463 n.12 (quoting AM. LAW INST., FEDERAL INCOME TAX PROJECT, *supra* note 16). But this passage merely recognizes that a state has "jurisdictional" power based on a taxpayer's residence to include in its tax base income sourced in other jurisdictions, together with the discretion to "exempt" from that tax base out-of-state sourced income if it wishes to do so. In other words, *Chickasaw Nation* does not speak in any way to what dormant Commerce Clause rules apply when the state does not (as with the Maryland tax) exempt out-of-state sourced income from a resident's tax base, but instead exerts its "jurisdiction" to include in that base all income, wherever it is earned. The *Chickasaw Nation* footnote in no way suggests that a state can tax such income without according any attention to taxes imposed by other states. Indeed in the very next footnote the Court emphasized that there was no complaint in the case that "Oklahoma fails to award a credit against state taxes for taxes paid" elsewhere. *Id.* at 464 n.13. What is more, the very source that the Court in *Chickasaw Nation* quoted on the law of "jurisdiction" and "exemption" goes on to make clear that "[w]hen one [jurisdiction] taxes on the basis of domiciliary jurisdiction and another . . . taxes on the basis of source . . . it is incumbent on the domiciliary jurisdiction to alleviate this double taxation by some reasonable means." AM. LAW INST., FEDERAL INCOME TAX PROJECT, *supra* note 16. In short, the *very* source on which the Supreme Court *squarely* relied in *Chickasaw Nation* cuts directly *against* the theory of taxation that Maryland espouses in this case.

37. *See* Brief for the Petitioner at *25 n.12, Md. Comptroller of the Treasury v. Wynne, No. 13-485 (U.S. July 29, 2014), 2014 WL 3749508; Reply Brief for the Petitioner at *9–10, 10 n.5, Md. Comptroller of the Treasury v. Wynne, No. 13-485 (U.S. Dec. 10, 2013), 2013 WL 6513766; *see also* Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 472 (Md. 2013) (citing *Goldberg*, 488 U.S. at 266).

38. Among other things, there is the question of how to deal with non-corporate entities other than individual proprietorships, such as partnerships and limited liability companies. There is also the problem that this case actually involves pass-through income obtained from a so-called "S corporation." Why, then, should any supposedly special treatment afforded to corporate income by the dormant Commerce Clause not apply in this very case?

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

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 the case that "corporations are people."[40] 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. Put simply, the freedom to participate without penalty in interstate commerce "is a right which *every citizen* of the United States is entitled to exercise"[41]—not merely (and oddly) every corporate citizen.

No less important, the drawing of such a distinction would defeat, rather than promote, the underlying purposes of the dormant Commerce Clause. The essential reason why is both simple and central: The dormant Commerce Clause protects our "national common market"[42]—not some especially favored subgroup of corporate legal stepchildren. If a state obstructs the operation of the common market by imposing an interstate-commerce-thwarting burden on a resident—whether individual or artificial—the Court's task is to remove and remedy that obstruction. The Court has recognized this principle over and over again, whether the challenger is a resident, a nonresident, a corporation, or an individual—or a partnership, a charitable entity, or any other sort of person.[43] This is so, among other

40. Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry Over His Tax Policy,* N.Y. TIMES, Aug. 12, 2011, at A16, *available at* http://www.nytimes.com/2011/08/12/us/politics/12romney.html?_r=0, *archived at* http://perma.cc/Z53A-SKNQ. For two modern cases that touch on this idea, see *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010), and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

41. Dennis v. Higgins, 498 U.S. 439, 448 (1991) (quoting Crutcher v. Kentucky, 141 U.S. 47, 57 (1891)) (emphasis added).

42. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (internal quotation marks omitted).

43. In particular, the Court has always applied dormant Commerce Clause limits in full fashion to cases in which state residents challenged their own state laws as improperly disrupting the interstate market. *See, e,g.*, Sporhase v. Nebraska, *ex rel.* Douglas, 458 U.S. 941 (1982) (challenge by individual resident of state directed at restrictions on groundwater export). What is more, the Court has followed this pattern from its earliest applications of the dormancy doctrine in cases that have involved both state regulations and state taxes, as well as in cases that have involved both successful and unsuccessful legal challenges. *See* Austin v. State of Tennessee, 179 U.S. 343, 364–65 (1900) (regulatory law; unsuccessful challenge by individual resident); Schollenberger v. Pennsylvania, 171 U.S. 1, 3 (1898) (regulatory law; successful challenge by individual resident); Brimmer v. Rebman, 138 U.S. 78, 79 (1891) (*see* Motion of Brimmer, Sergeant, & Co., to Advance the Cause Upon the Docket at 1 (No. 1608, 1154); indicating state residency) (regulatory law; successful challenge by individual resident); Welton v. Missouri, 91 U.S. 275 (1875) (*see* Transcript of Record at 9 (No. 180); indicating state residency) (tax law; successful challenge by individual resident). In none of these cases did the Court even hint at the idea that in-state residency would fence out an individual from invoking the protections of the dormant Commerce Clause. Nor did the Court offer any such hint when it meticulously examined a dormant Commerce Clause challenge brought by an individual state-

reasons, because "[t]he dormant Commerce Clause protects markets and participants in markets"[44]—which individuals such as Brian Wynne most emphatically are.

B. The Complete Auto Transit *Test*

Maryland also seems to suggest that its taxing scheme cannot be invalidated under the governing principles laid down in the seminal *Complete Auto Transit* case. There, the Court famously declared that that the relevant inquiry in dormant Commerce Clause taxation cases is whether "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[45] To say the least, this embracing formulation was not meant to signal a retreat from long-recognized limits on state laws that saddle interstate business with overlapping tax exactions. Rather, as the Supreme Court reaffirmed some two decades after its ruling in *Complete Auto Transit*: "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*."[46] As we have seen, the risk of "multiple . . . taxation" posed by Maryland's taxing scheme is so intrinsic and palpable that this basic prohibition should apply in this case if it applies anywhere at all.

---

resident taxpayer only six years ago in *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008). In keeping with this same idea, the Court has never suggested that out-of-state residency is a critical prerequisite to asserting a dormant Commerce Clause challenge in cases that actually involve nonresidents. In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), for example, the person prosecuted for violating a ban on exporting Oklahoma minnows was not a resident of that state. But in striking down the export ban as applied to him, the Court never suggested that the thus-burdened individual's state of residency mattered in any way. Nor should it have. After all, the difficulty with the export ban was that it offended the overmastering dictate that "our economic unit is the Nation," *id.* at 339 (internal quotation marks omitted), and that would have been true whether the ban targeted only residents, only nonresidents, or both. Indeed, in *Hughes*, the Court specifically "overruled" its earlier decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), which the Court described as "essentially on all fours" in factual terms with *Hughes*. *Hughes*, 441 U.S. at 335. But, on Maryland's state-residents-don't-get-dormant-Commerce-Clause-protection theory, the Court would have had to distinguish *Geer* and left the result reached in the case in place because the challengers of the state law there were, as here, residents of the law-imposing state. *See* Transcript of Record at 7, Geer v. Connecticut, 161 U.S. 519 (1896) (No. 87).

44. General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997); *see also* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 312 (1992) (noting that dormant Commerce Clause focuses on "structural concerns about the effects of state regulation on the national economy").

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

46. MeadWestvaco Corp. *ex rel.* Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008) (emphasis added).

In any event, the Maryland taxing program falls squarely within at least two zones of proscription laid down in the *Complete Auto Transit* case because: (1) Maryland's scheme embodies and engenders "discrimination against interstate commerce"; and (2) the Maryland taxing program lays its burden on multistate income in a way that is not "fairly apportioned."[47]

1. Discrimination

As to discrimination, Maryland argues that its method of taxing income is facially neutral and thus unobjectionable, because the county tax bears on all its residents at the same 100% level. Given the relevant baselines at work in this setting, it is far from clear that the "facially neutral" label fairly fits what Maryland has done.[48] Even if the Court were to apply that label, however, it would not render the Maryland taxing scheme nondiscriminatory for dormant Commerce Clause purposes. This is so because, in this field of law, the Court has long and rightly recognized that a challenged statute can have an intolerable "discriminatory effect" even if it is not discriminatory on its face.[49] In *Hunt v. Washington Apple Advertising Commission*,[50] for example, the Court invalidated a North Carolina statute that imposed exactly the same apple-crate-labeling rules on every apple seller who sold apples in the state. Even so, there was a violation of the dormant Commerce Clause because, in light of special and costly labeling requirements instituted by the state of Washington, the challenged North Carolina act had "the practical effect of not only burdening interstate sales of Washington apples, but also *discriminating against*

47. I do not pause to consider whether the Maryland taxing scheme might offend the "fair relation" requirement. This limit was reined in *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), but that case did not involve a situation in which a state taxes income at the 100% level even when that income is plainly associated with state-provided benefits afforded by other states that lay their own income-tax levies. Whether an all-out tax imposed by the state of residence is *fairly* related to the benefits afforded by the state of residency in such circumstances is beyond the scope of this article.

48. One difficulty in this regard is that Maryland, like all other states, previously adhered to the background norm of providing a tax credit for taxes paid to other states in administering both the "state tax" and "county tax" components of its income taxing program. Maryland thereafter repealed the credit for its "county tax." In other words, as stated by Maryland's highest court in *Frey v. Comptroller of the Treasury,* 29 A.3d 475 (Md. 2011), Maryland "amended the income tax statutes to prohibit specifically the application of the *out-of-state tax credit* to county income tax." *Id.* at 492 (emphasis added). Because the targeted disadvantaging of "out-of-state" activity—in a sharp departure from the baseline of ordinary taxing principles—imposed a harm only on persons engaged in interstate commerce by its very terms, it seems plausible to say that this amendment discriminated against interstate commerce even on its face.

49. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n.15 (1981).

50. 432 U.S. 333 (1977).

them."[51] The idea that discrimination can lurk in facially neutral legal rules comports with common-sense themes that run throughout American law.[52] And although *Washington Apple Advertising Commission* did not involve a dormant Commerce Clause challenge to a tax law, that fact is beside the point. Indeed, the Court has applied the same discrimination-in-effect approach to state tax cases for more than a century.[53]

Maryland seeks to parry this thrust by arguing that any unequal tax treatment faced by taxpayers such as Brian Wynne is attributable to the taxing laws of other states, rather than the laws of Maryland. Any argument along these lines faces a major problem from the get-go: The critical difficulty with the Maryland taxing scheme does not arise simply because of the income taxes that other states actually impose; rather, the difficulty is that the internal structure of the Maryland taxing scheme gives rise to a built-in "risk" of overlapping multijurisdictional taxation.[54] To repeat: Maryland suggests that the double taxation experienced by people such as Brian Wynne is properly viewed as the result not of its taxing program, but instead as the result of overlapping source-based income taxes imposed by other states. But it will not "lie in the mouth" of Maryland[55] to lay blame on other states for engaging in supposedly duplicative, and thus harm-inflicting, source-based taxation when they are not doing anything different than what Maryland itself does without apology or reserve—that is, place an income tax on source-based nonresident income.

In any event, settled doctrine stands firmly against the idea that judges called on to apply the dormant Commerce Clause must close their eyes to the environment of real-world legal regulation in which a challenged state law operates.[56] Such an approach would fail

51. *Id.* at 350 (emphasis added).

52. *See, e.g.,* Britton v. Turner, 6 N.H. 481 (1834) (emphasizing "unequal treatment" created by a rule that, in an ostensibly equal and facially neutral manner, denies unjust enrichment recovery to any contract breacher because, in practical effect, such a rule is much harsher on the late-stage breacher than the early-stage breacher). For a few of the constitutional cases that recognize this notion outside the dormant Commerce Clause context, see *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) and *Tennessee v. Lane*, 541 U.S. 509 (2004).

53. *See* DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 323 (2003) (noting the Court's application of the anti-discrimination principle to "facially non-discriminatory charge placed on door-to-door sellers, sometimes called 'drummers' "); *see also* Armco Inc. v. Hardesty, 467 U.S. 638, 644–45 (1984) (indicating that a severely unapportioned tax "discriminates against" interstate commerce); Gwin, White & Prince v. Henneford, 305 U.S. 434, 439 (1939) (same).

54. *See infra* notes 70–71 and accompanying text.

55. Cavender v. Cavender, 114 U.S. 464, 471 (1885).

56. *See* Kassel v. Consol. Freightways Corp. 450 U.S. 662, 670–71 (1981) (plurality opinion) (invalidating Iowa truck length law because "Iowa's law is now out of step with the laws of all

to pay heed to the Court's insistence that the law in this area must take account of how a tax works "in practice,"[57] in its "practical impact"[58] and in its "practical effect."[59] In keeping with these ideas, the Court has not hesitated to invalidate state laws that distort the operation of our "federal free trade unit"[60] because they depart from

---

other Midwestern and Western states"); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959) (noting, in invalidating an Illinois mudguard law for trucks, that it was inconsistent with the laws of 45 states); S. Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945) (noting, in invalidating Arizona train length limits, that freight car limit reached beyond the laws of all but one other state and that passenger car limit was stricter than that of every other state); *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) (recognizing authority for "invalidat[ing] statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations" in different states; and citing *Kassel* and *Southern Pacific* in support of this assertion); *id.* at 94, 95 (Scalia, J. concurring) (finding no need for further analysis in light of majority's proper holding that challenged statute neither discriminated nor created such a risk of "inconsistent regulation by different States"). Indeed it is commonplace in many areas of constitutional law for the Court to consider the outlier status of the challenged state rule as one consideration that tends to cut against its validity. *See e.g.,* Burch v. Louisiana, 441 U.S. 130, 138 (1979) ("We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."); *see generally* Dan T. Coenen, *A Constitutional Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1719 (2001) ("[D]octrines of this kind are commonplace in our law."); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 597 (1993) (noting that the Court "turns time and again to a head count of states" and that this "technique [is] prevalent throughout constitutional cases"); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 6 (1996) ("Frequently the Court takes a strong national consensus and imposes it on relatively isolated outliers."); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 367–69 (2009) (noting that Eighth Amendment law that focuses on a challenged law's correspondence to general state practice "is not all that different from what the Court does in other constitutional contexts," including in areas that range from "due process to equal protection" and "from the First Amendment to the Fourth and Sixth").

57. Am. Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 278 (1987).

58. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

59. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Notably, Maryland's sharp departure from other states' approach to crediting source-based income taxes, even on its own, raises constitutional red flags. In many contexts, the Court has considered the outlier character of challenged state laws and practices in assessing their constitutionality—perhaps because, at least in part, there is reason to question the state-interest-based justification for a law that most other states have eschewed. There is no apparent reason why the Court should not take the same approach here. *See, e.g., Bibb*, 359 U.S. at 530. In fact, the reason for suspicion is greatly compounded when, as here, the laws of other states set the stage for an unfair and distorting form of cost-shifting. In *Kassel*, for example, the Court invalidated Iowa's ban on 65-foot double-trailer trucks precisely because virtually every other state permitted their use. *Kassel*, 450 U.S. at 665. That framework of other states' laws positioned Iowa to gain an advantage precisely because its more restrictive approach operated to divert problematic through-state truck traffic to neighboring jurisdictions. Much the same problem is present here. Non-Maryland residents who do business in Maryland uniformly get the benefit of income tax credits applied in those other states for Maryland-sourced income—thus assuring that their operations are not "deflected" away from Maryland. But Maryland residents—because of the background realities of the taxing schemes of other states—must pay a double tax, thus effectively allowing Maryland to free-ride on business activity that occurs outside its borders.

60. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949).

"standard practice"[61] in that they are "inconsistent with" the laws of all or most other states.[62] Under these principles, it is clear that Maryland's tax effectively discriminates against interstate commerce precisely because it departs from routinely-employed income-tax credit rules under which the state that taxes income on a source-related basis is given primacy over the state of residence.[63]

2. Fair Apportionment

Even if the discrimination label somehow failed to fit this case, Maryland's taxing scheme runs afoul of the separate mandate of "fair apportionment."[64] In ordinary circumstances, the term "apportionment" applies when the entire body of income earned by a taxpayer is divided up into pieces, each of which is assigned for taxing purposes to a particular state. But, as this case illustrates, income also can be divided up in the manner Maryland itself employs in assessing the "state" portion of its income tax—that is, by taxing all resident income at the operative state income tax rate, while affording a credit for source-based income taxes paid elsewhere. A credit scheme thus "apportions" income in the relevant sense of "distributing [it] on an equitable, or suitable basis" among various taxing jurisdictions.[65] Indeed, the Supreme Court endorsed this notion in no uncertain terms in *D.H. Holmes Co. v. McNamera*, when it declared that the challenged "Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other states."[66] Here, in contrast, the Maryland county tax is *not* fairly apportioned because it does *not* provide such a credit. The gist of the problem is that Maryland's "county tax" takes no account whatsoever of the earning or taxing of income in other states. And if any state method of taxation fails to provide "fair apportionment," it must be one—such as this one—that thus affords no apportionment at all.

The United States, appearing as amicus curiae, seeks to dodge this point by directing attention to *Moorman Manufacturing Co. v. Bair*.[67] At the time that case arose, most states used a three-factor formula for apportioning corporate income—that is, a formula that

61. S. Pac. Co. v. Arizona, 325 U.S. 761, 771 (1945).
62. *Bibb*, 359 U.S. at 524.
63. *See* HELLERSTEIN ET AL., *supra* note 13.
64. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 171 (1983).
65. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (1993).
66. D.H. Holmes Co. v. McNamara, 486 U.S. 24, 31 (1988).
67. 437 U.S. 267 (1978).

took account of the location of corporate sales, employees, and tangible property. Iowa, however, took a different approach by apportioning corporate income based on only one of these factors—namely, sales. The effect of this method of income apportionment was to favor businesses that located property (for example, plants) and personnel (for example, the people who worked in those plants) within the state. This advantaging of in-state activity occurred because businesses that located property and personnel in Iowa were not disadvantaged by doing so under that state's sales-only apportionment formula, even as they reduced taxation in other states whose three-factor formulas laid weight on the property and personnel factors. As a result, challengers of the Iowa approach argued that it afforded a preference to in-state over out-of-state commercial activity in violation of the dormant Commerce Clause. The Court, however, upheld the one-factor formula because (1) it would not have resulted in any multiple taxation if every other state had adopted it[68] and (2) this methodology comported with federalism-based norms of state experimentation in crafting state-tax apportionment systems.[69] But the tax at issue in *Wynne* presents an altogether different case. With regard to the county component of its income taxing system, however, Maryland—unlike Iowa—has not experimented with a new income-tax apportionment mechanism; instead, it has refused to apportion multistate income in any way at all. No less important, as was previously discussed, if every state deployed Maryland's taxing scheme, wide-ranging double taxation of interstate commerce would result.[70] For these reasons, *Moorman* is readily distinguishable from this case. There is no fair apportionment or anything like it here; and accordingly, the Maryland taxing scheme runs afoul of the dormant Commerce Clause.[71]

68. *See id.* at 279.

69. *See id.* at 278–79.

70. This is the case because Maryland, through its county tax, simultaneously (1) taxes residents at the 100% level on a residence-based theory and (2) also taxes nonresident income on a pro tanto basis on a source-based theory. It is obvious that, if every state adopted this scheme all cross-border income earners would be doubly taxed on out-of-state income—first by the state of residence and second by the state of source; meanwhile, purely intrastate income would be taxed only once.

71. Along the way, Maryland seems to suggest that this sort of "internal consistency" analysis is beside the point, or essentially so, in light of the Supreme Court's rulings in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987) (*American Trucking I*), and *American Trucking Associations, Inc. v. Michigan Public Service Commission*, 545 U.S. 429 (2005) (*American Trucking II*). In the former case the Court confronted a $180 Pennsylvania license tax imposed on the operation of any truck within the state. In finding a constitutional violation, the Court invoked the "internal consistency test," under which "a state tax must be of a kind that, 'if applied in every jurisdiction, there would be no impermissible interference with free trade.' " *Am. Trucking Ass'ns*, 483 U.S. at 284. The critical problem, the Court suggested, was that if every state imposed a flat fee (as did Pennsylvania) for any amount of in-state operation,

C. Arguments from Policy

Faced with these difficulties, Maryland claims that underlying considerations of tax policy, not evident on the face of things, justify a major reworking of now-governing dormant Commerce Clause doctrine. It advances two main arguments along these lines: First, that judicial rejection of its theory of full-bore, unabated residence-based income taxation will lead to intolerable results; and second, that principles of representation-reinforcement theory counsel against judicial disruption of its approach to income taxation.[72] Even assuming that these sorts of considerations might otherwise trump settled dormant Commerce Clause law, neither one of Maryland's supposed policy arguments carries any real force in this case.

---

then interstate operators would pay far more in taxes than intrastate operators even though both of them covered exactly the same number of total miles. *See id.* at 283–84 & n.16 (noting this problem); *id.* at 297 (noting that unapportioned fees might be justifiable if apportionment is "impracticable," but requiring mileage-based apportionment in light of its effective use in other contexts; "[a]lthough out-of-state carriers obtain a privilege to use Pennsylvania's roads that is nominally equivalent to that which local carriers receive, imposition of flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory"). In *American Trucking II*, the Court confronted a Michigan flat-fee truck tax that took hold only if the truck operator engaged in some purely intrastate shipments. The Court acknowledged that, when all of an interstate operator's activity was considered, there was something of an "internal consistency" problem because a cross-border operator (even if engaged in some non-cross-border hauls) would still have to pay two or more flat taxes, whereas the purely local operator who drove the same total distance would remain susceptible to only one flat-fee charge. But *American Trucking II* did not negate the relevance—or even come close to negating the relevance—of "internal consistency" analysis. Central to the Court's conclusion was the fact that "Michigan imposes the flat $100 fee only upon intrastate transactions," and that the tax "does not reflect an effort to tax activity that takes place, in whole or part, outside the State." 545 U.S. at 434. Such a tax, the Court explained, was closely analogous to license fees charged to other in-state business operators and thus amounted to a charge that one "normally expects to pay." In short, the Court acknowledged that it had "typically used" the " 'internal consistency' test" in cases "where taxation of interstate transactions is at issue" and that *American Trucking I* was distinguishable precisely because Michigan did "not seek to tax a share of interstate transactions." *Id.* at 437–38. Just the opposite is true here, however, so that the narrow qualification of the internal consistency approach directed at only truck fees for purely local activity offers no support for Maryland's position. To be sure, Maryland might be understood to argue here that all-out taxation of income on the basis of residence, regardless of the out-of-state situs of such income, cannot involve taxing "a share of interstate transactions" because residence is intrinsically an intrastate matter. But any such effort at characterization involves just the sort of "legal fiction," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), rooted in "artificial and formalistic" reasoning, *id.* at 328, that the Supreme Court has vigorously condemned. *See id.* at 336 (emphasizing that "this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law" (internal citations omitted)).

72. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1981) (setting forth and developing the representation-reinforcement approach to constitutional interpretation).

1. Supposedly Intolerable Results

With its first policy-based argument, Maryland marches out a parade of horribles. It suggests that states must be able to engage in unmitigated residence-based income taxation—without any regard to overlapping source-based income taxes imposed in other states—because otherwise an unacceptable prospect would loom. Absent such a power, Maryland asserts, some state residents (for example those residents whose income is entirely sourced in other high-tax-rate states) will be able to escape income taxation by the state of residence altogether. And this cannot be because those residents, precisely because they are residents, obviously benefit from many state-provided programs, such as free public education for their children and reduced tuition at state universities.

This argument for supposedly "fair" tax treatment of resident taxpayers, however, obscures many critical points. To begin with, Maryland wants to have it both ways. It taxes nonresidents on income earned in Maryland on a source-based theory, but when Maryland residents are taxed elsewhere on income earned in other states, Maryland turns around and says: "We don't care!" Maryland thus ignores the fact that, for every dollar of out-of-state resident income the lower court's ruling keeps it from taxing, it can and does impose a tax on nonresidents for their activity in the state, even though those nonresidents do not get the benefit of Maryland-supplied free public education, low-cost university tuition, and the like.

What is more, Maryland ignores the fact that even as Marylanders have to pay source-based income taxes in other jurisdictions, those same Marylanders do not receive the benefits of such things as free or lower-priced education in those states. In these circumstances, there is nothing "anomalous" in Brian Wynne's invocation of broadly endorsed income-attribution principles that favor source-based over residence-based taxation.[73] The real anomaly lies in Maryland's insistence that it can snub its nose at long-accepted income taxing principles, so as to burden and distort the free, cross-border movement of people, products, and money within our national economy. Put another way, it is entirely true that, when it comes to state taxation, interstate commerce must "pay its way."[74] But it is equally true that a state may not insist that interstate commerce must

73. Brief for the United States as Amicus Curiae in Support of Petitioner at *11, Md. Comptroller of the Treasury v. Wynne, No. 13-485 (U.S. Aug. 1, 2014), 2014 WL 3811118.

74. Nw. States Portland Cement Co. v. Minnesota 358 U.S. 450, 464 (1959) (internal quotation marks omitted).

pay far *more* than its way—as does Maryland here by taxing nonresident income on a source-related basis even while simultaneously taxing all resident income at the 100% level, for purposes of the "county tax," regardless of whether some or all of that income is both sourced and taxed in other states. If the ban on cross-border-trade-distorting taxation means anything at all, it must mean that Maryland cannot double-dip on interstate commerce with this sort of heads-we-win-tails-you-lose approach.

Seeking to escape this problem, the United States as amicus curiae defends the Maryland taxing scheme by trumpeting the underlying premises of the market participant exception to the dormant Commerce Clause rule.[75] The underlying idea seems to be that the exception permits states to favor residents in distributing state-created benefits, because residents primarily fund the state treasury; thus all state residents can rightly be forced to fund the state treasury by being subjected to taxation of all their income, without any abatement, due solely to their local residence. But in fact the driving principle of the market participant exception cuts strongly against, rather than in favor of, the state action challenged here. The market participant exception supports nothing more than the ability of states to favor state residents through the operation of "discrete" state programs that give local actors a special form of marketplace choice[76]—such as by offering cement produced by a state-owned plant for sale only to state residents.[77] Indeed, the core idea of the exception is that it operates only when the state does *not* engage in coercive behavior through the taking of "regulatory and taxing actions," which were (unlike state marketplace actions) targeted by the Framers as a part of the "constitutional plan."[78] It is also a matter of no small consequence that even the specialized protection of non-coercive state activities afforded by the market participant exception is "subject to an array of important limitations"[79] so as to ensure the continued vibrancy of our system of free-flowing interstate trade.[80] But whatever category of state laws the market-participant rule might serve to justify, that category most assuredly does not include a broad-based

75. *See generally* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

76. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 594 (1997).

77. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 432–33 (1980).

78. *Id.* at 437.

79. *See* COENEN, *supra* note 53, at 306.

80. *See Camps Newfound/Owatonna*, 520 U.S. at 592–94.

compulsory income tax law that operates directly to disadvantage those who engage in interstate, rather than intrastate, commerce.[81]

There is yet another problem with Maryland's parade of horribles argument. In essence Maryland suggests that, if states must grant exemptions based on the imposition of source-based income taxes by other states, it will be left without power to lay any income-related tax on some state residents whose income is sourced entirely in other jurisdictions. But this is not true. Maryland, for example, might impose a head tax—that is, a uniform tax imposed on each person—on all its residents, while exempting low-income earners. Maryland might make its income tax rate higher than the rates imposed in other states, so that credits for taxpayers paid elsewhere will not offset their entire Maryland tax bill. Or Maryland might devise a multi-factor income-apportionment formula that takes account of residence (and thus non-residence) as one relevant

81. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988) (stating that even though "the tax credit scheme has the purpose and effect of subsidizing a particular industry," that purpose "does not transform it into a form of state participation in the free market"). Perhaps the United States really means to argue that the Maryland taxing scheme is sustainable under the "state self promotion" rule recognized in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330 (2007). *See generally* Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541 (2010). In that case, the Court recognized that in some circumstances the State may compel local residents to deal with (and thus pay money to) its own service-providing entities—there a government-owned waste handling facility, which was said to be unfairly advantaged over other waste-handling facilities located in other states. The principle of *United Haulers*, however, is not even remotely applicable here. That case involved the provision of a specific government service for which a targeted charge, carefully calibrated on the extent of the service provided, was imposed by the state. The service provided was a discrete and narrow one that was designed to address a "solid waste crisis," 550 U.S. at 334 (internal quotation marks omitted), and involved only garbage handling—which, the Court emphasized, was "typically and traditionally a local government function." *Id.* at 354 (internal quotation marks omitted). The Court viewed this state program as involving the sort of particularized experiment in the provision of government services that our system of federalism encourages. *See id.* at 336 (detailing recycling, composting and other specialized work done at the facility). And particularly important was the fact that the requirement to use the local facility was directed in an entirely equal fashion at "all solid waste generated within the Counties," *id.*, so that the program did not generate in its nature any sort of double-charge distinctively borne by persons engaged in interstate operations. *See also id.* at 345 (emphasizing that "the Counties' flow control ordinances . . . treat in-state private business interests exactly the same as out-of-state ones"). In any event, a decisive plurality of the Court took care in *United Haulers* to emphasize that the rule endorsed there went no further than to exempt the challenged law from the "virtually *per se* rule of invalidity" that applies when a state law discriminates against interstate commerce. *Id.* at 338 (internal quotation marks omitted); *see id.* at 346–47 (applying *Pike* balancing analysis to challenged scheme despite Court's determination that state-self-promotion exception negated characterization of the challenged must-use rule as discriminatory). Thus in a case like this one, where governing law dictates invalidation of the challenged state law whether or not the discrimination label applies, *see supra* notes 64–71 and accompanying text, the *United Haulers* rule would seem to be beside the point in any event.

apportionment criterion. Nor should it be forgotten that state residents make many state tax payments outside the income-taxing system—most prominently through the payment of state property, sales, and excise taxes (on gasoline, tobacco, and alcohol). In any event, the vast majority of Maryland taxpayers do pay Maryland income taxes; indeed, even giving full effect to the disputed tax credit that Brian and Karen Wynne have claimed in this case, they will have paid $123,434 in Maryland income taxes during the operative tax year.[82]

In essence, Maryland implores the Court to abandon the core Commerce Clause restraint on multiple, cross-border taxation to deal with the out-of-the-ordinary problem (if one can call it a problem) of the resident taxpayer who is so heavily burdened by income taxes imposed by other jurisdictions that the taxpayer, upon receiving a proper credit, will owe no residence-based Maryland income taxes at the end of the day. But sound constitutional principles must surely look askance at this sort of effort to kill only a pesky ant (assuming it even merits description as pesky) with a hydrogen bomb. And that is all the more the case when Maryland can devise alternative (and much fairer) ways to ensure that residents who engage in interstate commerce pay some base-level measure of taxes to the state.

2. Representation Reinforcement Theory

Maryland's alternative policy-driven argument builds on the reasoning of the dissenting opinion in the Maryland Court of Appeals. In that opinion, Justice Greene (joined by Justice Battaglia) sought to invoke what he saw as deep matters of constitutional structure and theory. His reasoning reached all the way back to "perhaps the greatest of our constitutional cases,"[83] *McCulloch v. Maryland*.[84] There, the Supreme Court considered another Maryland tax—one directed at the operations of the recently re-chartered Bank of the United States. The Court struck down that tax under the principle that a state could not disrupt the operations of the central government through use of the state taxing power. Justice Greene sought to leverage *McCulloch* by suggesting that the Maryland income tax imposed on the Wynnes, unlike the tax at issue in *McCulloch* itself, is unobjectionable because it targets the Maryland legislature's own

82. *See* Brief for Respondents at *7, Md. Comptroller of the Treasury v. Wynne, 134 S. Ct. 2660 (Sept. 19, 2014) (No. 13-485), 2014 WL 4681795.

83. CHARLES LUND BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 15 (1969).

84. 17 U.S. (4 Wheat.) 316 (1819).

"constituents,"[85] who thus can readily protect their interests as voting participants in the Maryland political process.[86]

This effort to rely on *McCulloch* is unavailing; indeed, it turns the logic of that case on its head. *McCulloch*, after all, invalidated a Maryland taxing program even though it directly targeted state residents. Indeed, the tax-challenging litigant in the case was James W. McCulloch, the Maryland resident who worked as the cashier of the local Baltimore branch of the national bank. This Maryland resident personally faced far-reaching exactions because he individually failed to honor the duties that the Maryland legislature had imposed on him.[87] What is more, the Maryland bank tax at issue in *McCulloch* imposed significant burdens on many other Marylanders by disrupting the national bank's operations, including local employees of the bank, local borrowers from the bank, and local investors in the bank. The real point of *McCulloch* is that federal courts should intervene—even when some local residents are disadvantaged—in cases where parochial legislation operates to impose costs on activities that have an important national (that is, interstate) character, so as to advantage activities that have a local (that is, intrastate) character.

The dormant Commerce Clause has long embodied this same notion. Outright tariffs, for example, burden in-state residents in that they inevitably drive up the costs for goods purchased by in-state

85. *Id.* at 428.

86. Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 471–72 (Md. 2013) (Greene, J., dissenting).

87. *McCulloch*, 17 U.S. at 321. The Supreme Court's opinion in *McCulloch* does not specifically address whether James was a Maryland resident, but census records indicate that he in fact resided in Baltimore. *See* 1820 U.S. Census, Census Place: Dist. 1, Baltimore, Md. at 192 (set forth at http://search.ancestrylibrary.com/cgi-bin/sse.dll?indiv=1&db=1820us); *see also* National Register of Historic Places Inventory–Nomination Form for Hilton, Catonsville Community College (rec'd Feb. 20, 1980) (stating in "Significance" section that ""[t]he large stone farmhouse [in Baltimore County, Maryland] was by all indications built between 1818 and 1825 by James W. McCulloch . . . cashier of the Baltimore Branch of the Bank of the United States"). In any event, it did not matter one whit to the Supreme Court in the National Bank case whether McCulloch was a Maryland resident or not; even if he was—and thus could vote in Maryland elections—that fact did not render him unable to invoke the protections of federal legal limits on the state's power to pass state tax laws. As to the extent of the burden imposed on McCulloch, the relevant statute provided that "the . . . cashier . . . shall forfeit the sum of $500 for each and every offense" in failing to pay the state stamp tax payable in connection with each bank note. The constitutional historian Charles Warren reported that the action began as "an action of debt by one John James, suing as an informer . . . to recover $100 from James W. McCulloch . . . for circulating a banknote unstamped, in violation of the Maryland taxing statute," 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 506 (1922), but the Court in *McCulloch* itself indicated that "if the court should be of opinion, that the plaintiffs are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for $2500, and costs of suit." *McCulloch,* 17 U.S. at 320.

residents by granting favorable tax treatment to less efficient in-state producers. But that does not mean that tariffs are constitutional; rather, they are unconstitutional—and rightly so from a political-process perspective—because, while both in-state and out-of-state commercial interests are harmed by such laws, the out-of-state interests face special obstacles when it comes to fighting in-state political battles. Exactly the same point applies here. As illustrated by the "Caroline Rezzy" Georgia farmland hypothetical, the Maryland taxing scheme rewards, and thus incentivizes, intrastate business activity to the disadvantage of interstate business activity. More particularly, such a scheme disadvantages not only the doubly-taxed interstate-actor resident but also all of those out-of-state commercial actors who deal with and support that resident's out-of-state income-generating activity. In our case involving Ms. Rezzy, for example, these out-of-state actors would include the lessor of the Georgia farmland and every worker, supplier and buyer in Georgia who has dealings with Rezzy's Georgia farming operations.

Justice Greene urges that local cross-border-business-doing state residents can protect their own interests—and thus the proper operation of the national common market—by participating in Maryland elections. But that assertion does not hold water. Common experience suggests that the vast majority of individual Maryland residents do not engage in farming in Georgia or other interstate income-generating activity. Moreover, every dollar taken into the state treasury as a result of such interstate activity is one less dollar that the vast majority of individual Maryland residents must pay on their own wholly intrastate income-generating conduct. Will the vast majority of Maryland voters suddenly decide that it is a good idea to risk the imposition of a new tax burden on themselves by granting relief to the Brian Wynne, so as to facilitate and encourage commerce in other states? Hardly.

There is another point, too: If the Supreme Court upholds the Maryland county tax, it stands to reason that voter majorities in other states will follow Maryland's lead—thus triggering just the sort of domino effect of common-market-fracturing parochial legislation that the dormant Commerce Clause was designed to prevent.[88]

---

88. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (declaiming the "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation").

D. Opposition to the Dormant Commerce Clause

In a last-gasp effort to defend its challenged law, Maryland argues that any market disruption it causes can be remedied by Congress, so that the Court should stay its hand and uphold the Maryland taxing scheme. This, however, is not an argument for the Maryland taxing scheme. It is an argument against the dormant Commerce Clause principle, because the whole point of that principle is that the Court can and should police self-serving state laws even when the commerce power is dormant—that is, unexercised by Congress. What really matters here is that Congress can revisit Maryland's claims about the merits of its taxing program if and when that program is struck down. In other words, the dormant Commerce Clause doctrine reflects a special measure of judicial moderation precisely because Maryland is not left remediless in the face of judicial intervention.[89] If the Maryland taxing scheme is really a fine taxing scheme despite its obvious common-market-distorting effects, then Maryland—with the support of other fine-taxing-scheme-favoring states—should be able to convince Congress of that fact. That is how the dormant Commerce Clause principle operates.

And so now enters the elephant into the room. Should the dormant Commerce Clause principle be overturned? This question is a large one to say the least—far too large for full treatment here. But the following three paragraphs at least begin to point the way to why the right answer to this question is no.

For starters, the dormant Commerce Clause principle has sturdy roots in the text and history of the Constitution. The authors of *The Federalist*, for example, recognized that some grants of federal power are in their nature exclusive.[90] Building on this idea, as well as the then-understood meaning of the constitutionally operative term "regulate," a unanimous Court launched the dormant Commerce Clause principle in *Gibbons v. Ogden*, reasoning that "[t]here is great force in this argument."[91] The author of *Gibbons* was the great Chief Justice John Marshall himself,[92] whose understanding of the Framers' intentions in this regard sprang in no small part from his first-hand

89. *See generally* COENEN, *supra* note 53, at 292–96 (discussing congressional-consent exception to the dormant Commerce Clause rule).

90. *See, e.g.,* THE FEDERALIST No. 32 (Alexander Hamilton).

91. Gibbons v. Ogden, 22 U.S. (1 Wheat.) 1, 209 (1824).

92. *See also* Mayor, Aldermen, & Commonalty of New York v. Miln, 36 U.S. 102, 158 (1837) (Story, J., dissenting) (noting Chief Justice Marshall's endorsement of the dormant Commerce Clause).

personal service as a delegate to the Virginia Ratification Convention.[93]

Modern-day Justices have not hesitated to look to the "spirit of the Constitution" in extrapolating from it safeguards of state autonomy[94]—and certainly the Framers did mean for the states to retain significant autonomy within our federal system. But the spirit that lay behind replacing the Articles of Confederation with the Constitution of the United States was not centered on preserving the powers of the states, particularly with regard to local disruptions of free-flowing interstate trade. Indeed, just the opposite is true. James Madison—who is rightly viewed as the "father of the Constitution"—wrote, even before the Convention, of the need to establish "*compleat* authority" in the central government "in all cases which require uniformity; such as the regulation of trade . . . ."[95] Reflecting even more directly on the spirit of our founding charter, Alexander Hamilton in *The Federalist No. 22* defended the Commerce Clause as a bulwark against the "interfering and unneighborly regulations of some States *contrary to the true spirit of Union*"—thus condemning the very set of laws at which the dormant Commerce Clause continues to take aim.[96] Critics might say that such passages do not endorse the dormancy principle in explicit terms. But, whether or not that is true, they lend much support to the principle because they endorse the underlying idea of economic union on which it is built. And the case for the doctrine gains still more force when it is recalled that the entire constitutional project was undertaken because of a rising unwillingness to countenance just the sort of self-serving, commerce-impeding state legislation against which the doctrine stands.[97]

---

93. *See, e.g.,* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the Constitution,* 2009 U. ILL. L. REV. 457, 477 (2009). For a more extended "originalist" defense of the dormant Commerce Clause that covers some, though not all of the points made here, see Barry Friedman and Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011).

94. *See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (citing McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 421 (1819)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 585 (1985) (O'Connor, J., dissenting) (citing *McCulloch*, 17 U.S. at 421).

95. Letter from James Madison to George Washington (Apr. 16, 1987), *reprinted in* 5 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 145–47 (Abbot and Twohig eds. 1997). *See also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 547 (Max Farrand ed. 1937) (setting forth post-Convention reflections of James Madison, in which he noted the Framers' desire for "a general power over Commerce" so as to counteract the "rival, conflicting and angry regulations" of the states that the lack of a centralized control had produced) (quoted in H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949)).

96. THE FEDERALIST NO. 22 (Alexander Hamilton) (emphasis added).

97. *See H.P. Hood*, 336 U.S. at 533–35.

In any event, the dormant Commerce Clause principle has won out in the testing ground of our national experience. Over the long course of American history, this guiding norm has held firm at the center of our constitutional law. Should many hundreds of Supreme Court rulings that have safeguarded our national common market now be overturned? Not if our precedents about precedent are honored. Indeed, this is so for at least three reasons. First, if ever there were an instance of a long-accepted and repeatedly reaffirmed rule of constitutional law, it is presented by the dormant Commerce Clause principle;[98] generation after generation of Supreme Court Justices, almost always in unanimous fashion, have joined together in recognizing the controlling nature of this norm.[99] Second, there has been (to put things mildly) extensive reliance on the dormant Commerce Clause rule, as well as on the rich mix of judicial decisions that the rule has spawned. Indeed, it is not too much to say that vast domains of American law have grown up around dormant Commerce Clause doctrine, and that vast domains of private business activity have in turn been shaped both by the general principle of open cross-border commerce and by the many decisional rules and pieces of legislation to which that principle has given rise. In sum, there are present here, in the most extreme degree, precisely the sort of reliance interests that cut sharply against the overruling of judicial precedent.[100] Finally, there is a special reason for the Court not to wield its overruling power in this context. Congress, as we have seen, can displace otherwise operative dormant Commerce Clause doctrine,[101] and it has done just that.[102] Consequently, as with rulings based on statutory interpretation, the Court should hold back in overruling its earlier work in this field because—unlike with ordinary constitutional decision-making—a congressional corrective is at hand.[103]

---

98. *See, e.g.,* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 85 (2001).

99. Notably, even Chief Justice Taney—the member of the Court most often associated with opposition to the principle—joined the Court's opinion in *Cooley v. Board of Wardens,* 53 U.S. 299 (1851), in which the principle was squarely endorsed.

100. *See, e.g.,* Flood v. Kuhn, 407 U.S. 258, 282 (1972).

101. *See* COENEN, *supra* note 53, at 292–96.

102. *See, e.g.,* Prudential Insurance v. Benjamin, 328 U.S. 408 (1946).

103. *See* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 320 (1992) (Scalia, J. concurring) (reasoning that *stare decisis* principles have "special force" in dormant Commerce Clause cases because "Congress remains free" in this context "to alter what [the Court] has done" (internal quotation marks omitted)).

V. CONCLUSION

The dormant Commerce Clause principle is not merely some curious-sounding, esoteric part of our constitutional and economic landscape. To the contrary, it is the driving force that lies behind our national-common-market system. As Justice Jackson explained in *H.P. Hood & Sons v. Du Mond*,[104] "[t]he material success that has come to inhabitants of the states which make up this federal free trade unit is the most impressive in the history of commerce."[105] Any legal norm that has fostered such results is not to be taken lightly, much less jettisoned in its entirety. That is especially true in this case. Wynne should win because the Maryland taxing scheme—and, even more emphatically, the theory of taxation that underlies it—are at odds with the constitutional safeguard against state rules that, by engendering duplicative taxation, inevitably operate to favor intrastate over interstate commerce. That safeguard should and does control here because it rightly ensures that every business operator—including the Maryland resident who has brought this case—"will have free access to every market in the Nation."[106]

104. 336 U.S. 525 (1949).
105. *Id.* at 538.
106. *Id.* at 539.