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## Comparing Wayfair and Wynne: Lessons for the Future of the Dormant Commerce Clause

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# Comparing *Wayfair* and *Wynne*: Lessons for the Future of the Dormant Commerce Clause

*Edward A. Zelinsky\**

## I. INTRODUCTION

This Article compares the Supreme Court's dormant Commerce Clause decisions in *South Dakota v. Wayfair*<sup>1</sup> and *Comptroller of the Treasury of Maryland v. Wynne*.<sup>2</sup> *Wayfair* and *Wynne* are both as important, as they were narrowly-decided. Despite (perhaps because of) their differences, they together tell us much about the current Court's divisions under the dormant Commerce Clause and about the future of the dormant Commerce Clause.

A comparison of *Wayfair* and *Wynne* indicates that the prospect of the Court jettisoning the dormant Commerce Clause altogether is unlikely. However, the Justices who would abandon the dormant Commerce Clause can exercise decisive influence in particular cases as they did in *Wayfair*.<sup>3</sup> The current Court's dormant Commerce Clause skeptics—Justices Thomas and Gorsuch—provided the crucial fourth and fifth votes in *Wayfair* to overturn *Quill*.<sup>4</sup>

It will continue to be rare for the Court to reverse its own dormant Commerce Clause decisions. Far from opening the floodgates, *Wayfair* indicates that the Court is reluctant to overrule its dormant Commerce Clause cases in light of Congress's ultimate constitutional power to regulate interstate commerce. However, when neither the Court nor Congress has spoken on a particular issue, the Court will consider extending the dormant Commerce Clause as it did in *Wynne*.<sup>5</sup>

Going forward, an important issue under the dormant Commerce Clause will be the double taxation which results when

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<sup>1</sup> 138 S. Ct. 2080 (2018).

<sup>2</sup> 135 S. Ct. 1787 (2015).

<sup>3</sup> See *Wayfair*, 138 S. Ct. at 2087.

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

<sup>5</sup> See *Wynne*, 135 S. Ct. at 1794.

an individual is deemed to be a resident for tax purposes, by two states, each of which taxes all of the dual resident's income. *Wayfair* and *Wynne* suggest that, despite the compelling arguments against the double state taxation of dual residents' incomes, the Court will be reluctant to set aside its precedents upholding the double state taxation of dual residents.<sup>6</sup>

Instead, the Court is more likely to extend dormant Commerce Clause protection when states are overly aggressive in taxing the income of nonresidents. In particular, the Court is more likely to apply the dormant Commerce Clause apportionment principle to curb New York's "convenience of the employer" doctrine to avoid New York's double state income taxation of telecommuters on the days they work at their out-of-state homes.<sup>7</sup>

## II. WAYFAIR

By a 5-4 vote, *Wayfair* overturned *Quill Corp. v. North Dakota*<sup>8</sup> as "unsound and incorrect."<sup>9</sup> In 1992, *Quill* confirmed the dormant Commerce Clause rule that a state could impose sales tax collection responsibilities on a retailer only if the retailer had a physical presence in the taxing state.<sup>10</sup> This physical presence rule had first been announced in *National Bellas Hess v. Department of Revenue* in 1967.<sup>11</sup> *Quill* and *Bellas Hess* were decided before the rise of the Internet and electronic commerce. These decisions severely limited the states' abilities to enforce their respective sales taxes on internet purchases by precluding the states from imposing sales tax collection duties on out-of-state internet and mail-order retailers.<sup>12</sup>

In *Wayfair*, Justice Kennedy advanced three basic themes for overturning *Quill* and thereby abolishing the physical presence rule.<sup>13</sup> The first of these *Wayfair* themes was the historic legitimacy of the dormant Commerce Clause which "imposes limitations on the States absent congressional action."<sup>14</sup> A second theme of *Wayfair* was the flaws of *Quill* and of the physical presence rule<sup>15</sup> which

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<sup>6</sup> See *Wayfair*, 138 S. Ct. at 2080; *Wynne*, 135 S. Ct. at 1787.

<sup>7</sup> See generally Edward A. Zelinsky, *New York's "Convenience of the Employer" Rule is Unconstitutional*, 48 ST. TAX NOTES 553 (2008).

<sup>8</sup> 504 U.S. 298 (1992), *overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

<sup>9</sup> *Wayfair*, 138 S. Ct. at 2099.

<sup>10</sup> See *id.* at 314.

<sup>11</sup> 86 U.S. 753 (1967), *confirmed by* *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), *and overruled by* *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

<sup>12</sup> For further background on these limitations, see Edward A. Zelinsky, *The Political Process Argument for Overruling Quill*, 82 BROOK. L. REV. 1177, 1180–84 (2017) and Andrew J. Haile, *Affiliate Nexus in E-Commerce*, 33 CARDOZO L. REV. 1803, 1806–12 (2012).

<sup>13</sup> See *Wayfair*, 138 S. Ct. at 2088–97.

<sup>14</sup> *Id.* at 2089.

<sup>15</sup> *Id.* at 2088.

*Quill* perpetuated under the dormant Commerce Clause. That rule, Justice Kennedy wrote, “is not a necessary interpretation” of the substantial nexus test developed under the dormant Commerce Clause.<sup>16</sup> Moreover, that rule “creates rather than resolves market distortions”<sup>17</sup> and embodies an “arbitrary, formalistic distinction”<sup>18</sup> between those types of in-state presence which are deemed to create substantial nexus with the state and those which are not. “In the name of federalism and free markets, *Quill* does harm to both.”<sup>19</sup> Third, Justice Kennedy concluded the Court should disregard the dictates of stare decisis and should itself overturn *Quill* rather than rely on Congress to overrule the “unfair and unjust”<sup>20</sup> physical presence rule.<sup>21</sup>

Concurring with Justice Kennedy’s majority opinion, Justice Thomas reiterated his view that the Court’s dormant Commerce Clause case law “can no longer be rationally justified.”<sup>22</sup> Also concurring, Justice Gorsuch did not go as far as Justice Thomas but, in a skeptical vein, noted that the validity of the Court’s dormant Commerce Clause case law is a “question[ ] for another day.”<sup>23</sup>

Thus, while Justices Thomas and Gorsuch provided the fourth and fifth votes in *Wayfair*, they bottomed their conclusions on different premises than those embraced by Justice Kennedy. For Justice Kennedy (joined by Justices Alito and Ginsburg) the dormant Commerce Clause is a legitimate enterprise which went astray in *Quill*.<sup>24</sup> For Justice Thomas (definitely) and for Justice Gorsuch (probably), *Quill* was not simply a mistake, but rather was the product of the misbegotten project that is the dormant Commerce Clause.<sup>25</sup>

As a matter of substance, Chief Justice Roberts was as critical of the physical presence rule as was Justice Kennedy. On behalf of himself and three of his colleagues, Chief Justice Roberts wrote that *Bellas Hess*, which originally announced the physical presence rule confirmed in *Quill*, “was wrongly decided.”<sup>26</sup> Consequently, not a single member of the *Wayfair* Court concluded that the physical

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<sup>16</sup> *Id.* at 2092.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2096.

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

<sup>21</sup> *Id.* at 2096–97.

<sup>22</sup> *Id.* at 2100 (Thomas, J., concurring) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 333 (1992)).

<sup>23</sup> *Id.* at 2100–01 (Gorsuch, J., concurring).

<sup>24</sup> *Id.* at 2087, 2097.

<sup>25</sup> *See id.* at 2100 (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring).

<sup>26</sup> *Id.* at 2101 (Roberts, C.J., dissenting).

presence rule was appropriate for an economy in which electronic commerce is now so prominent.

However, the Chief Justice and his three colleagues joining his *Wayfair* dissent concluded that Congress, not the Court, was the appropriate forum for overturning *Quill*'s rule that a state can impose sales tax collection responsibilities only on a retailer with in-state physical presence.<sup>27</sup> The revision of this rule, the Chief Justice argued, "should be undertaken by Congress."<sup>28</sup>

Congress, he observed, "has in fact been considering whether to alter the rule established in *Bellas Hess* for some time."<sup>29</sup> "[L]egislators may more directly consider the competing interests at stake."<sup>30</sup>

In sum, *Quill* reflected three different perspectives among the Justices of the Court. Four Justices (Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan) did not dispute the fundamental legitimacy of the dormant Commerce Clause or the unsoundness of the physical presence rule for imposing upon retailers the obligation to collect state sales taxes.<sup>31</sup> However, as a procedural matter, these four dissenting Justices preferred for Congress, rather than the Court, to make any changes to the physical presence rule announced in *Bellas Hess* and confirmed in *Quill*.<sup>32</sup> Three members of the Court (Justices Kennedy, Alito, and Ginsburg) defended the intrinsic validity of the dormant Commerce Clause, but concluded that *Quill* and its physical presence rule were properly overturned by the Court itself.<sup>33</sup> Two Justices (Justices Thomas and Gorsuch) expressed their skepticism about the dormant Commerce Clause and caused *Quill* to be overruled by joining with their three colleagues who, while more positive about the dormant Commerce Clause, supported *Quill*'s demise.<sup>34</sup> Hence, *Wayfair*, by a 5-4 vote, quashed *Quill*.

### III. WYNNE

Similar divisions were evident three years earlier in *Wynne*, another 5-4 dormant Commerce Clause decision.<sup>35</sup> *Wayfair* expanded state authority by abolishing the physical presence rule, thereby permitting states to impose sales tax collection responsibilities on

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<sup>27</sup> *Id.* at 2102 (Roberts, C.J., dissenting).

<sup>28</sup> *Id.* at 2101 (Roberts, C.J., dissenting).

<sup>29</sup> *Id.* at 2102 (Roberts, C.J., dissenting).

<sup>30</sup> *Id.* at 2104 (Roberts, C.J., dissenting).

<sup>31</sup> *See id.* at 2101–05 (Roberts, C.J., dissenting).

<sup>32</sup> *See id.* at 2102–04 (Roberts, C.J., dissenting).

<sup>33</sup> *Id.* at 2089–90, 2099.

<sup>34</sup> *See id.* at 2100 (Thomas, J., concurring); *id.* at 2100 (Gorsuch, J., concurring).

<sup>35</sup> *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1791 (2015).

out-of-state internet and mail-order retailers that lack in-state physical presence.<sup>36</sup> In contrast, *Wynne* curbed state taxing authority by requiring states to grant income tax credits to their residents for the out-of-state income taxes such residents pay.<sup>37</sup>

The tax at issue in *Wynne* was the county income tax imposed by Maryland law.<sup>38</sup> While the Maryland state income tax gave Maryland residents credits for the income taxes such residents paid to other states, Maryland did not extend a similar credit under the Maryland county income tax for out-of-state taxes paid by Maryland residents.<sup>39</sup> For a five Justice majority, Justice Alito held that this failure to grant residents a county income tax credit for out-of-state taxes discriminated against interstate commerce in violation of the dormant Commerce Clause.<sup>40</sup>

The four central themes of Justice Alito's opinion were the historic provenance of the dormant Commerce Clause, the analogy between a tariff and Maryland's failure to grant Maryland residents a credit under the Maryland county income tax for out-of-state taxes, the evils of double state taxation, and the "internal consistency" test developed under the dormant Commerce Clause.<sup>41</sup> Presaging his agreement with Justice Kennedy in *Wayfair*, Justice Alito in *Wynne* embraced the legitimacy of the dormant Commerce Clause, which "has deep roots."<sup>42</sup> "[A] state tariff," Justice Alito

<sup>36</sup> See *Wayfair*, 138 S. Ct. at 2099.

<sup>37</sup> See *Wynne*, 135 S. Ct. at 1792. As an alternative to providing its residents with income tax credits for out-of-state income taxes, a state can comply with *Wynne*'s nondiscrimination/internal consistency standard by eschewing the taxation of nonresidents' incomes earned within the state. An income tax imposed only on residents passes the test of internal consistency since, if adopted universally, such a tax only taxes income once—assuming that taxpayers are residents in only one state. See *id.* at 1822 (Ginsburg, J., dissenting). This possibility confirms the point made in the text: *Wayfair* expands state tax authority by permitting a state to impose sales tax collection responsibilities on out-of-state internet sellers. In contrast, *Wynne* restricts state tax authority by requiring states to grant credits to their residents for the out-of-state taxes such residents pay or by abandoning the taxation of nonresidents on the income they earn in the state.

<sup>38</sup> *Id.* at 1792. For more background on *Wynne*, see generally Edward A. Zelinsky, *The Enigma of Wynne*, 7 WM. & MARY BUS. L. REV. 797 (2016), which discusses the enigmatic effects of *Wynne* on future dormant Commerce Clause application, and Brannon P. Denning, *The Dormant Commerce Clause Wynnes Won Wins One: Five Takes on Wynne and Direct Marketing Association*, 100 MINN. L. REV. HEADNOTES 103 (2016), which compares *Wynne* to prior case law to help define its scope of impact.

<sup>39</sup> *Wynne*, 135 S. Ct. at 1792.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at 1794–95, 1802, 1804.

<sup>42</sup> *Id.* at 1794. Dissenting in *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 376 (2008), Justice Alito characterized his position in *Davis* and in *United Haulers Ass'n., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 356 (2007) as "proceed[ing] . . . on the assumption that the Court's established dormant Commerce Clause precedents should be followed . . ." This statement could be interpreted as leaving the door open to a reassessment of the Court's dormant Commerce Clause case law. However, Justice Alito's *Wynne* opinion and

wrote, was “the quintessential evil targeted by the dormant Commerce Clause.”<sup>43</sup> Maryland’s failure to grant residents a credit for out-of-state taxes “has the same economic effect” as a tariff.<sup>44</sup>

Maryland’s county income tax flouts the norms of the dormant Commerce Clause, Justice Alito wrote, because “Maryland’s tax scheme is inherently discriminatory and operates as a tariff.”<sup>45</sup> To advance this characterization, Justice Alito contrasted two hypothetical residents of a state which provides no credit for out-of-state taxes.<sup>46</sup> In this example, one of these residents earns all of her income in-state while the other resident earns his income out-of-state.<sup>47</sup> Because the state in which they live provides no credit for out-of-state taxes, the latter resident pays two state income taxes on his income, one tax to the state of his residence and a second tax to the state in which he earns his income.<sup>48</sup> On the other hand, the first resident pays a single state tax on her income since she earns all of her income in-state.<sup>49</sup> Like a tariff, this encourages residents to generate income at home rather than out-of-state so as to be taxed only once by the state of residence, rather than twice by the state of residence and simultaneously by the second state in which the income is earned.<sup>50</sup>

According to Justice Alito, a state tax scheme which provides no credit for the out-of-state taxes paid by residents violated the dormant Commerce Clause’s internal consistency test.<sup>51</sup> Under this test, the relevant inquiry is what would happen if all states adopted the tax being challenged under the dormant Commerce Clause.<sup>52</sup> Justice Alito answered that in such a theoretical world there are effectively state tariffs nationwide so an individual who ventures to earn out-of-state income in this hypothetical setting is always double taxed by the two states in which she lives and works.<sup>53</sup> In contrast, an individual who just earns income in her home state is taxed only once by her state of residence.<sup>54</sup> This, Justice Alito observed, unconstitutionally discriminates against interstate economic activity.

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his support for Justice Kennedy’s *Wayfair* opinion evince a stronger commitment to the dormant Commerce Clause.

<sup>43</sup> *Wynne*, 135 S. Ct. at 1792.

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

<sup>45</sup> *Id.* at 1804.

<sup>46</sup> *Id.* at 1803–04.

<sup>47</sup> *Id.* at 1803.

<sup>48</sup> *Id.* at 1803–04.

<sup>49</sup> *Id.* at 1804.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 1803.

<sup>52</sup> *See id.* at 1802.

<sup>53</sup> *Id.* at 1804.

<sup>54</sup> *Id.* at 1803–04.



For himself and Justice Thomas, Justice Scalia in *Wynne* excoriated the dormant Commerce Clause as “a judge-invented rule”<sup>55</sup> which contrasts with “the real Commerce Clause.”<sup>56</sup> The Commerce Clause, Justice Scalia informed us, is an affirmative grant of power to Congress, not a license for judges “to set aside state laws *they believe* burden commerce.”<sup>57</sup> Justice Scalia’s skepticism of the dormant Commerce Clause led him to conclude that, “[f]or reasons of *stare decisis*,”<sup>58</sup> he would strike taxes under the dormant Commerce Clause in only two cases: a state tax which “discriminates on its face against interstate commerce or [a tax which] cannot be distinguished from a tax [the] Court has already held unconstitutional.”<sup>59</sup> In contrast, Justice Thomas was (and is) unwilling to defer to existing dormant Commerce Clause case law in these two or in any other cases.<sup>60</sup>

Justice Ginsburg’s *Wynne* dissent, like Justice Alito’s majority opinion, accepts the legitimacy of the dormant Commerce Clause.<sup>61</sup> However, Justice Ginsburg concluded (joined by Justices Scalia and Kagan) that *Wynne* misapplied the dormant Commerce Clause.<sup>62</sup> Since the Wynnes are Maryland residents, Maryland can tax all of their worldwide income. The dormant Commerce Clause, Justice Ginsburg maintained, does not require Maryland as a state of residence to grant Marylanders like the Wynnes a credit for the out-of-state taxes they pay.<sup>63</sup> Such credits for out-of-state taxes may be wise as a matter of policy. But, Justice Ginsburg argued, there are competing concerns which justify states taxing their residents’ incomes without granting credits for the out-of-state taxes such residents pay: “More is given to the residents of a [s]tate than to those who reside elsewhere, therefore more may be demanded of them.”<sup>64</sup>

Moreover, Maryland residents do not need dormant Commerce Clause protection from their own state’s tax laws since they vote for the legislators and governors who tax them. In contrast, nonresidents need dormant Commerce Clause succor as they do not vote in the state which taxes them on the income they earn in the taxing state.<sup>65</sup> The majority in *Wynne*, Justice Ginsburg argued,

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<sup>55</sup> *Id.* at 1807 (Scalia, J., dissenting).

<sup>56</sup> *Id.* at 1808 (Scalia, J., dissenting).

<sup>57</sup> *Id.* (Scalia, J., dissenting).

<sup>58</sup> *Id.* at 1811 (Scalia, J., dissenting).

<sup>59</sup> *Id.* (Scalia, J., dissenting).

<sup>60</sup> *Id.* (Thomas, J., dissenting).

<sup>61</sup> *See id.* at 1815 (Ginsburg, J., dissenting).

<sup>62</sup> *See id.* at 1814 (Ginsburg, J., dissenting).

<sup>63</sup> *See id.* at 1816 (Ginsburg, J., dissenting).

<sup>64</sup> *Id.* at 1814 (Ginsburg, J., dissenting).

<sup>65</sup> *See id.* at 1814–15 (Ginsburg, J., dissenting).



erroneously constitutionalized “tax policy” better left to “state legislatures and the Congress.”<sup>66</sup>

#### IV. THE FUTURE OF DORMANT COMMERCE CLAUSE SKEPTICISM

An important takeaway from comparing *Wynne* and *Wayfair* is that the Justices who would abolish the dormant Commerce Clause are not close to constituting a majority of the Court. However, in particular cases, these dormant Commerce Clause skeptics can exercise critical influence on the Court’s decisions.

In *Wynne*, it was Justices Scalia and Thomas who scorned the dormant Commerce Clause.<sup>67</sup> In *Wayfair*, Justices Thomas and Gorsuch played the role of dormant Commerce Clause skeptics.<sup>68</sup> In *Wynne*, Justices Scalia and Thomas had no impact on the outcome of the case since five Justices concluded without them that the dormant Commerce Clause requires Maryland to provide a credit under its county income tax to Maryland residents for the out-of-state taxes such residents pay.<sup>69</sup> On the other hand, in *Wayfair*, Justices Thomas and Gorsuch proved critical to the Court’s outcome, giving Justice Kennedy the fourth and fifth votes he needed to overturn *Quill*.<sup>70</sup>

Two uncertainties complicate this situation for the future. First, we do not know whether Justice Kennedy’s successor, Justice Brett Kavanaugh, will share Justice Kennedy’s commitment to the dormant Commerce Clause or whether he will align himself with dormant Commerce Clause skepticism. Second, that skepticism, *Wynne* and *Wayfair* make clear, can come in different forms. Despite his doubts about the dormant Commerce Clause, Justice Scalia remained willing to strike taxes under that doctrine in either of two contexts: When, as a matter of stare decisis, a pending case was clearly controlled by a prior decision, or when discrimination against interstate commerce was apparent “on [the] face” of the challenged state tax.<sup>71</sup> An interesting possibility is that, had Justice Scalia lived, he might, in the interests of stare decisis, have provided Chief Justice Roberts with the fifth *Wayfair* vote for retaining *Quill*.

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<sup>66</sup> See *id.* at 1823 (Ginsburg, J., dissenting).

<sup>67</sup> See *id.* at 1808 (Scalia, J., dissenting).

<sup>68</sup> See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring); *id.* at 2100 (Gorsuch, J., concurring).

<sup>69</sup> See *Wynne*, 135 S. Ct. at 1791.

<sup>70</sup> See *Wayfair*, 138 S. Ct. at 2087.

<sup>71</sup> *Wynne*, 135 S. Ct. at 1811 (Scalia, J., dissenting).

Justice Thomas, by contrast, will in all cases refuse to apply the dormant Commerce Clause.<sup>72</sup> Justice Gorsuch's brief comments in his *Wayfair* concurrence<sup>73</sup> leave open for him either of these approaches and perhaps others.

In short, the dormant Commerce Clause enjoys broad support among the Justices currently serving on the Court. However, in particular instances, the Justices who are dormant Commerce Clause skeptics may play a pivotal role.<sup>74</sup> *Wayfair* was such a case.<sup>75</sup>

#### V. DOES *WAYFAIR* OPEN THE FLOODGATES?

Whenever the Court overrules a prominent precedent, the question arises: What is next? *Wayfair* makes clear that, in the dormant Commerce Clause context, the answer is: Not much. *Wayfair* does not open the floodgates to revision of the Court's dormant Commerce Clause case law.

This conclusion starts with the four Justices who would have left *Quill* standing despite the admitted unsuitability of the physical presence rule in a world of electronic commerce.<sup>76</sup> Since the Court's dormant Commerce Clause decisions can be revised or rejected by Congress, Chief Justice Roberts and his dissenting colleagues contended, the Court should let the Legislative Branch make whatever changes are required to overturn or modify the Court's dormant Commerce Clause case law.<sup>77</sup>

Moreover, Justice Kennedy made clear that he viewed the judicial overruling of *Quill* as uniquely compelling: "Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful."<sup>78</sup>

This is not an invitation for the Court to engage in wholesale revision of its dormant Commerce Clause case law. To the contrary, if it requires something on the order of "the Internet revolution" to justify overruling a dormant Commerce Clause precedent, such overruling will be rare.

Only Justice Thomas is committed to a thoroughgoing repudiation of the Court's dormant Commerce Clause oeuvre.<sup>79</sup>

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<sup>72</sup> See *id.* (Thomas, J., dissenting); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring).

<sup>73</sup> *Wayfair*, 138 S. Ct. at 2100 (Gorsuch, J., concurring).

<sup>74</sup> See *id.* at 2087.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* at 2101–05 (Roberts, C.J., dissenting). Chief Justice Roberts was joined by Justices Breyer, Sotomayor, and Kagan. See *id.*

<sup>77</sup> *Id.* at 2102 (Roberts, C.J., dissenting).

<sup>78</sup> *Id.* at 2097.

<sup>79</sup> See *id.* at 2100 (Thomas, J., concurring).

As just noted, Justice Gorsuch's views are still unarticulated and Justice Kavanaugh, who replaced Justice Kennedy, may or may not be a dormant Commerce Clause skeptic. But even a dormant Commerce Clause skeptic can, like Justice Scalia, temper his opposition to the dormant Commerce Clause with a commitment to stare decisis.<sup>80</sup>

Consider in this context Justice Kagan's positions in *Wayfair* and *Wynne*. In *Wayfair*, Justice Kagan joined the Chief Justice in contending that it was better for Congress, rather than the Court, to overturn or modify the physical presence rule confirmed in *Quill*.<sup>81</sup> In *Wynne*, Justice Kagan joined Justice Ginsburg's dissent which argued, *inter alia*, that Mr. and Mrs. Wynne needed no relief from the Court.<sup>82</sup> As Maryland voters, the Wynnes had recourse to Maryland's political process to relieve them of their double taxation under the Maryland county income tax. Strong deference to political processes, as manifested by Justice Kagan's positions in *Wynne* and *Wayfair*, counsels equally strong respect for precedent since such deference consigns the task of revising dormant Commerce Clause doctrine to the political institutions of government.<sup>83</sup>

## VI. TWO ISSUES FOR THE FUTURE

### A. The Double Taxation of Dual Residents

What are the implications of *Wynne* and *Wayfair* for particular issues the Court is likely to confront in the future? An important dormant Commerce Clause issue going forward is the double taxation of dual state residents.<sup>84</sup> In an earlier age, it was mainly very wealthy individuals whose peripatetic lifestyles caused two or more states to classify them as residents. When two (or more) states levying personal income taxes both assert that the same individual is a resident, this dual resident can be double taxed as both of these states claim the right to tax him on his worldwide income.<sup>85</sup> The double taxation of dual residents is, in practice, particularly pronounced as to a dual resident's

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<sup>80</sup> See *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting).

<sup>81</sup> See *Wayfair*, 138 S. Ct. at 2101–02 (Roberts, C.J., dissenting).

<sup>82</sup> See *Wynne*, 135 S. Ct. at 1816, 1823 (Ginsburg, J., dissenting).

<sup>83</sup> See *id.* at 1823 (Ginsburg, J., dissenting); *Wayfair*, 138 S. Ct. at 2101–02 (Roberts, C.J., dissenting).

<sup>84</sup> See Edward A. Zelinsky, *Double Taxing Dual Residents: A Response to Knoll and Mason*, 86 ST. TAX NOTES 677, 677 (2017) [hereinafter *Double Taxing*]; Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 534 (2014) [hereinafter *Apportioning*].

<sup>85</sup> See Zelinsky, *Apportioning*, *supra* note 84, at 536.

retirement income (taxed by both states claiming to be a state of residence)<sup>86</sup> and as to a dual resident's passive investment income, such as dividends and interests (similarly taxed by both states claiming to be this individual's state of residence).<sup>87</sup>

In the contemporary world, the phenomenon of dual state residence has spread to two career families maintaining residences in different states to accommodate both careers.<sup>88</sup> Dual state residence has also spread to “mass affluent” retirees who divide the year between different homes in different states. In these (and other) contexts, an individual spends part of the year living in two different states and thus can be income taxed as a resident by both of them.

It would be best for Congress to eliminate by federal legislation the double state income taxation of dual state residents, or for the states themselves to abate the problem of double taxed dual residents. Absent a political solution enacted by Congress or negotiated among the states, the courts will find themselves implored to grant relief from dual residents' double state income taxation under the dormant Commerce Clause.<sup>89</sup>

I favor a political solution to the problem of double taxed dual residents, either through federal legislation or through formal or informal arrangements among the states. If there is to be a judicial resolution of this issue, the dormant Commerce Clause principle of apportionment is the most compelling of the tools the courts can employ to eliminate the double taxation of dual residents.<sup>90</sup> Others think that the dormant Commerce Clause concept of nondiscrimination, and *Wynne* in particular, are the appropriate doctrinal handles for convincing the courts to bar double taxation of dual residents.<sup>91</sup>

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<sup>86</sup> 4 U.S.C. § 114(a) (2006) (“No State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).”).

<sup>87</sup> On the principle that intangible investment-based income is taxed by the taxpayer's state(s) of residence and the double state taxation of such income when an individual is a resident for tax purposes of two states, see Zelinsky, *Apportioning*, *supra* note 84, at 541, 548–49, which discusses the principle of *mobilia sequuntur personam*.

<sup>88</sup> Sue Shellenbarger, *Work & Family: Marriage From a Distance—More couples are living apart—here's what it takes to keep the relationship healthy*, WALL ST. J., Aug. 15, 2018, at A11 (“[O]f married people living apart . . . a sizable number do this for work.”).

<sup>89</sup> See, e.g., *Edelman v. New York State Dep't of Taxation & Fin.*, 80 N.Y.S.3d 241, 243 (App. Div. 2018); Edward A. Zelinsky, *The Noto decision and the double state income taxation of dual residents*, OUPBLOG (June 2, 2014), <https://blog.oup.com/2014/06/noto-decision-double-state-income-taxation/> [<http://perma.cc/TN5P-YEAAJ>].

<sup>90</sup> Zelinsky, *Double Taxing*, *supra* note 84, at 678; Zelinsky, *Apportioning*, *supra* note 84, at 570.

<sup>91</sup> See generally Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 ST. TAX NOTES 707 (2017).

*Wynne* indeed reflects a strong aversion to double taxation. But, as we have just seen, *Wynne* and *Wayfair* also reflect commitments by members of the Court to stare decisis and to deference to the political process.<sup>92</sup> Moreover, the Court has in the past condoned the double state taxation of dual residents.<sup>93</sup> *Wynne* and *Wayfair* suggest that the Court will be reluctant to construe the dormant Commerce Clause to forbid the double state income taxation of dual residents since this would entail the Court's repudiation of long-standing case law condoning such double taxation.<sup>94</sup>

Justice Kavanaugh, Justice Kennedy's successor, could play a pivotal role in this area. If Justice Kavanaugh is a dormant Commerce Clause skeptic, it will require near unanimity by the other six Justices of the Court to apply the dormant Commerce Clause to bar the double taxation of dual residents. Even if Justice Kavanaugh adheres to the dormant Commerce Clause, with Justices Thomas and Gorsuch both leery of the dormant Commerce Clause, it will require a strong consensus among the other seven Justices to declare the double taxation of dual residents unconstitutional. *Wynne* and *Wayfair*, both decided 5-4, indicate that strong consensus is not easily achieved today in the dormant Commerce Clause context.<sup>95</sup>

A counterargument is that the Court's decisions permitting the double taxation of dual residents—*Cory v. White*<sup>96</sup> and *Worcester County Trust Co. v. Riley*<sup>97</sup>—were decided under the Due Process Clause. Moreover, these cases involved state-imposed death taxes, rather than state income taxes. The Court could now possibly hold that the double taxation of dual residents is forbidden by the dormant Commerce Clause even though, per these earlier cases, a double state taxation is permitted as a matter of due process. Justice Alito did something similar in *Wynne* when he and four other Justices held that although the Due Process Clause permits states to tax all of their residents' worldwide incomes, the dormant Commerce Clause does not.<sup>98</sup>

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<sup>92</sup> See *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting).

<sup>93</sup> *Cory v. White*, 457 U.S. 85, 89 (1982); *Worcester Cty. Tr. Co. v. Riley*, 302 U.S. 292, 298 (1937).

<sup>94</sup> See *Wynne*, 135 S. Ct. at 1811 (Scalia, J., dissenting); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101–02 (2018) (Roberts, C.J., dissenting); see also *Worcester Cty. Tr. Co.*, 302 U.S. at 299.

<sup>95</sup> *Wayfair*, 138 S. Ct. at 2087; *Wynne*, 135 S. Ct. at 1791.

<sup>96</sup> 457 U.S. at 89.

<sup>97</sup> 302 U.S. at 292.

<sup>98</sup> *Wynne*, 135 S. Ct. at 1798–99.

Alternatively, the Court could conceivably cabin *Cory* and *Worcester County Trust Co.* to their particular facts (i.e., the double state taxation of dual residents' estates on their deaths).<sup>99</sup>

Moreover, the political process analysis is more ambiguous in the dual resident context than it was in *Wynne*. That ambiguity provides a stronger rationale for the judicial protection of statutory residents since these double-taxed individuals do not vote in the second state assessing the resident-based income tax against them. As Justice Ginsburg observed in *Wynne*,<sup>100</sup> the Wynnes sought tax relief from Maryland where they resided and voted.<sup>101</sup> Double-taxed dual residents are deemed to reside in two states but can vote in only one of them.

Much dual resident taxation is caused by “statutory residence” laws<sup>102</sup> which classify individuals who spend time in a state without being domiciled there as residents for state income tax purposes. A dual state resident will typically vote in the state of her domicile, thus leaving her without the vote in the state of statutory residence which imposes a second, residence-based income tax upon her.<sup>103</sup>

Even if two states both claim to be an individual's state of domicile, it is not likely that the individual can or should vote in both states. And when someone is a statutory resident of two states, he may vote in neither state because his state of domicile is a third state.

In the typical dual resident/double taxation situation, an individual is domiciled in and can vote in only one of the two states taxing her. This is different than the case of the Wynnes—who voted in and were taxed by Maryland—since a double taxed dual resident lacks the ability to vote in at least one of the states taxing her as a resident.

Voting of course is not the only form of political voice. A statutory resident can make political contributions in her state of statutory residence even if she cannot vote in that state because she is not domiciled there. Nevertheless, the political process concerns advanced by Justice Ginsburg in *Wynne*—the Wynnes were Maryland voters<sup>104</sup>—do not carry over to the double taxed dual resident who does not vote in her state of statutory

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<sup>99</sup> See *Cory*, 457 U.S. at 86; *Worcester Cty. Tr. Co.*, 302 U.S. at 294.

<sup>100</sup> *Wynne*, 135 S. Ct. at 1813–15 (Ginsburg, J., dissenting).

<sup>101</sup> *Id.* at 1814–15 (Ginsburg, J., dissenting).

<sup>102</sup> Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT'L L. 271, 274–75 (2017); Zelinsky, *Apportioning*, *supra* note 84, at 541–45.

<sup>103</sup> See, e.g., S.C. CODE ANN. § 7-1-25(A) (2011) (stating that for voting purposes, “[a] person's residence is his domicile”).

<sup>104</sup> *Wynne*, 135 S. Ct. at 1814–15 (Ginsburg, J., dissenting).



residence. Moreover, unlike the subject of internet sales taxation, which was a topic of substantial congressional debate,<sup>105</sup> Congress has given virtually no attention to the problem of double taxed dual state residents.

Considering the counterarguments, *Wayfair* and *Wynne*, on balance, indicate that those favoring the Court's intervention to stop the double state income taxation of dual residents face an uphill fight. Long-standing precedents approve double taxation when two states both claim to be the taxpayer's home state for tax purposes.<sup>106</sup> In certain contexts, some Justices conclude that individuals with political remedies do not need the protection of the dormant Commerce Clause.<sup>107</sup> Dual residents typically vote in the state of domicile, which is one of the states taxing them on their worldwide incomes. The Justices who are dormant Commerce Clause skeptics will not extend that doctrine to protect double-taxed dual residents. Consequently, those trying to convince the Court to stop such double taxation via the dormant Commerce Clause face a daunting challenge.

## B. Sourcing Nonresidents' Incomes: The Case of Employer Convenience

A second important dormant Commerce Clause issue for the future is the proper apportionment of individuals' nonresident incomes for those who work in multiple states. Like the sales tax controversy in *Wayfair*, this issue involves the adaption of older legal doctrines to the imperatives of modern technology. Particularly salient in this context is New York's so-called "convenience of the employer" test which has been used by the Empire State to tax nonresident telecommuters on the income they earn while working at their out-of-state homes.<sup>108</sup>

As Justice Ginsburg observed in her *Wynne* dissent, the states' jurisdiction to tax individual incomes rests on the concepts of residence and source.<sup>109</sup> A state of residence can exercise a form of *in personam* jurisdiction over an individual and, on that basis, can tax his entire worldwide income.<sup>110</sup> In contrast, a state of source can tax a nonresident's income on an *in rem* basis, that is, because the income arises within the state even though the nonresident/taxpayer does not live there.

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<sup>105</sup> See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2087, 2102 (2018) (Roberts, C.J., dissenting); see also *Zelinsky*, *supra* note 12, at 1189, 1197–98.

<sup>106</sup> See *Cory v. White*, 457 U.S. 85, 89 (1982).

<sup>107</sup> See *Wynne*, 135 S. Ct. at 1813–17 (Ginsburg, J., dissenting).

<sup>108</sup> See *Zelinsky*, *supra* note 7, at 1.

<sup>109</sup> *Wynne*, 135 S. Ct. at 1813–17 (Ginsburg, J., dissenting).

<sup>110</sup> *Id.* at 1814.



Source-based jurisdiction is limited to the income a nonresident earns within the taxing state.

In *Wynne*, Maryland taxed all of the Wynnes' income since the Wynnes were Maryland residents.<sup>111</sup> Many other states also taxed the income the Wynnes earned within those states since those states were the geographic settings within which the Wynnes earned such income.<sup>112</sup> In *Wynne*, there was no difficulty deciding which income was earned in which state of source.

However, modern technology often makes the source of income a contested question. In particular, modern technology permits what is sometimes labeled “telecommuting,” in which an individual works from home for an employer located in another state.<sup>113</sup> Nonresident states can be overly-aggressive in asserting their ability to tax income on the basis of alleged source-based jurisdiction. New York’s “convenience of the employer” doctrine is the paradigmatic instance of such overreaching.<sup>114</sup>

Consider a law professor who lives in Connecticut and teaches in New York.<sup>115</sup> On some days, he commutes to New York where he teaches classes and meets with students and colleagues.<sup>116</sup> On the other days of the week, he works at home doing research and scholarship as well as grading papers and exams. Modern technology facilitates these work-at-home days, by giving the professor access to legal databases for his research and by allowing him to stay in touch with his students and colleagues through email or other electronic forms of communication.

Connecticut taxes all of this professor’s income on the ground that he is a Connecticut resident.<sup>117</sup> New York also taxes all of this nonresident professor’s income on the theory that the

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<sup>111</sup> *Id.* at 1793.

<sup>112</sup> *See id.*

<sup>113</sup> Andrea Loubier, *Benefits of Telecommuting for the Future of Work*, FORBES (July 20, 2017, 11:58 AM), <https://www.forbes.com/sites/andrealoubier/2017/07/20/benefits-of-telecommuting-for-the-future-of-work/#7aecd0c516c6> [<http://perma.cc/P5DB-5H4W>].

<sup>114</sup> Edward A. Zelinsky, *Pass the Multi-State Worker Act Also*, 80 ST. TAX NOTES 719, 720 (2016); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in our National Economy*, 8 FLA. TAX REV. 885, 922 (2008).

<sup>115</sup> *See In re Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 843–44 (N.Y. 2003). On *Zelinsky*, telecommuting, and New York’s “convenience of the employer” rule, see WALTER HELLERSTEIN ET AL., STATE AND LOCAL TAXATION: CASES AND MATERIALS 399–401 (10th ed. 2014).

<sup>116</sup> *See Zelinsky*, 801 N.E.2d at 843–44.

<sup>117</sup> *See* CONN. GEN. STAT. § 12-701(a)(8) (2018) (“Connecticut taxable income of a resident’ means the Connecticut adjusted gross income of a natural person . . . .”); CONN. GEN. STAT. § 12-701(a)(20) (2018) (“Connecticut adjusted gross income’ means adjusted gross income . . . .”).

professor's days worked at home in Connecticut are not for the employer's convenience but are for the professor's lifestyle.<sup>118</sup>

Connecticut gives a credit against its income taxes for the New York taxes the professor pays with respect to the income allocable to the days he teaches in New York.<sup>119</sup> However, Connecticut (like most other states) will not grant a credit for the taxes New York assesses on the days the professor works at home in Connecticut, researching, writing, and grading.<sup>120</sup>

The net result is double taxation of the portion of the professor's income allocable to the days he works at home in Connecticut. New York taxes this nonresident income even though, on these days, the professor, a Connecticut resident, works at home and receives his public services from the Nutmeg State. Connecticut taxes all of the professor's income, grants a credit for the New York taxes allocable to the professor's days spent in New York, but grants no credit for the New York taxes attributable to the income earned on the professor's days working at home in Connecticut.<sup>121</sup>

*Central Greyhound Lines v. Mealey*,<sup>122</sup> critical to Justice Alito's opinion in *Wynne*,<sup>123</sup> indicates that under the dormant Commerce Clause New York cannot tax income earned outside its borders—such as the income the professor is paid for researching, writing, and grading while at home in Connecticut.<sup>124</sup> A nonresident telecommuter working at his out-of-state home is analogous to the bus in *Central Greyhound*, not taxable by the Empire State while the bus traversed the roads of Pennsylvania and New Jersey.<sup>125</sup>

Given the rise of work patterns denoted as telecommuting, the Court should address the import of *Central Greyhound* and the dormant Commerce Clause concept of apportionment in a world of telecommuting. States should only tax nonresidents on income they earn within the state, not income residents earn when they work at their out-of-state homes. Critical to this conclusion is the dormant Commerce Clause concept the Court has called “external consistency,” i.e., that state tax policies

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<sup>118</sup> See *Zelinsky*, 801 N.E.2d at 844–45, 848.

<sup>119</sup> See CONN. GEN. STAT. § 12-704(a)(1) (2018).

<sup>120</sup> See *Zelinsky*, 801 N.E.2d at 849 (“[I]t is Connecticut's refusal to provide a credit to its resident for all of the nonresident income tax that the taxpayer paid to New York that has created the threat of double taxation.”).

<sup>121</sup> *Id.* at 849.

<sup>122</sup> *Cent. Greyhound Lines v. Mealey*, 334 U.S. 653 (1948).

<sup>123</sup> See generally *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787 (2015).

<sup>124</sup> See *Cent. Greyhound*, 334 U.S. at 660–63.

<sup>125</sup> See *id.* at 660–64.

must, in practice, apportion their tax bases to reflect accurately where income is earned.<sup>126</sup>

As a counterargument, *Wynne* could be read as requiring Connecticut, as the state of residence, to grant a credit for the New York taxes assessed on this professor's work-at-home days. This, however, is the less persuasive reading of *Wynne*. *Wynne* required Maryland, as the Wynnes' state of residence, to avoid the implicit tariff of double taxation.<sup>127</sup> In particular, *Wynne* held that Maryland's county income "tax unconstitutionally discriminates against interstate commerce" because that tax failed to grant a credit for taxes imposed by other states on the income the Wynnes earned in those other states.<sup>128</sup>

However, Connecticut grants a credit to its residents for the income they earn in New York and other states.<sup>129</sup> Connecticut (like most other states) does not grant credits for taxes imposed by other states on income earned in Connecticut.<sup>130</sup> Thus, the double taxation under New York's so-called "convenience of the employer" doctrine stems, not from the resident state's refusal to grant a credit, but from the nonresident state's refusal to properly apportion and only tax the income earned within its boundaries.

Consequently, the Court's concern about double taxation manifested in *Wynne* should lead to the application of *Central Greyhound* and the external consistency test to the world of telecommuting. States like New York should only tax nonresident individuals on the income they earn in New York, not the income such individuals earn working at their out-of-state homes.

Political process concerns reinforce this conclusion. Like statutory residents, nonresidents do not vote in the states which tax them on a source basis. Aggressive practices, like New York's convenience of the employer doctrine, export New York's tax burdens onto nonvoting, nonresidents. This is an instance of political dysfunction, precisely the situation where the case for applying the dormant Commerce Clause is most compelling.

## VII. CONCLUSION

A comparison of *Wayfair* and *Wynne* indicates that the Court is unlikely to abandon the dormant Commerce Clause altogether. However, the Justices who would forsake the dormant Commerce

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<sup>126</sup> Zelinsky, *supra* note 38, at 808–10 (discussing the future of external consistency after *Wynne*).

<sup>127</sup> *Wynne*, 135 S. Ct. at 1792.

<sup>128</sup> *Id.* at 1797.

<sup>129</sup> See CONN. GEN. STAT. § 12-704(a)(1) (2008).

<sup>130</sup> See *In re Zelinsky v. Tax Appeals Tribunal*, 801 N.E.2d 840, 849 (N.Y. 2003).

Clause can exercise critical influence in specific cases as they did in *Wayfair*.<sup>131</sup> While *Wayfair* overturned *Quill*, *Wayfair* indicates that the Court is reluctant to overrule its dormant Commerce Clause cases.<sup>132</sup> On the other hand, when neither the Court nor Congress has spoken on a particular issue, the Court will consider significant extensions of the dormant Commerce Clause as it did in *Wynne*.<sup>133</sup>

*Wayfair* and *Wynne* suggest that, despite the persuasive arguments against the double state taxation of dual residents' incomes, the Court will be reluctant to overturn its long-standing precedents upholding the double state taxation of dual residents. The Court is more likely to extend dormant Commerce Clause protection when states are overly-aggressive in taxing the incomes of nonresidents such as New York's "convenience of the employer" doctrine.

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<sup>131</sup> See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring); *id.* at 2100–01 (Gorsuch, J., concurring).

<sup>132</sup> See *id.* at 2102 (Roberts, C.J., dissenting).

<sup>133</sup> See *Wynne*, 135 S. Ct. at 1797.