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Edward A. Zelinsky

Benjamin N. Cardozo School of Law, zelinsky@yu.edu

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Recommended Citation

Edward A. Zelinsky, *The Enigma of Wynne*, 7 Wm. & Mary Bus. L. Rev. 797 (2016).

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THE ENIGMA OF WYNNE

EDWARD A. ZELINSKY*

ABSTRACT

The five-justice Wynne majority used that case to make a major statement about the dormant Commerce Clause. In many respects, Wynne is an enigma that perpetuates an inherent problem of the Court's dormant Commerce Clause doctrine: the Court declares some ill-defined taxes as unconstitutionally discriminatory because they encourage in-state investment, while other economically equivalent taxes and government programs that similarly encourage intrastate economic activity are apparently acceptable under the dormant Commerce Clause.

Wynne is thus more important than the immediate situation it addresses, and will have consequences beyond the immediate circumstances it addresses. A decision as enigmatic as it is important, Wynne raises as many questions as it answers. Among these are the continuing viability of external consistency and apportionment, concepts that have been central to the Court's formulation of the dormant Commerce Clause. Wynne also undermines the Court's traditional tolerance of the double state income taxation of dual residents because such double taxation can encourage a dual resident to undertake single-taxed in-state economic activity rather than make investments subject to such double taxation.

* Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University.

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INTRODUCTION

Maryland's county income tax does not grant a credit to Maryland residents for the out-of-state income taxes such residents pay on the income they earn outside of Maryland.¹ In *Comptroller of the Treasury of Maryland v. Wynne*, the U.S. Supreme Court held that this failure causes the Maryland county income tax to violate the dormant Commerce Clause of the U.S. Constitution.² This result, while important, is self-contained: the states' personal income taxes generally extend credits to their respective residents for the out-of-state income taxes such residents pay. Consequently, such state income taxes already comply with *Wynne*.

Many local income taxes, like the Maryland county tax, do not grant credits for income taxes paid out-of-state.³ However, while local income taxes are important sources of municipal revenue in particular parts of the country, most Americans are not subject to a city or a county income tax, as were Mr. and Mrs. Wynne.⁴

On another level, *Wynne's* implications extend significantly beyond the particular facts of that case. Contrary to what this Author had anticipated,⁵ the five-justice *Wynne* majority used that case to make a major statement about the dormant Commerce Clause. In many respects, *Wynne* is an enigma that perpetuates an inherent problem of the Court's dormant Commerce Clause doctrine: the Court declares that some ill-defined taxes are unconstitutionally discriminatory because such taxes encourage in-state investment, while other economically equivalent taxes and government programs that similarly encourage intrastate economic activity are apparently acceptable under the dormant Commerce Clause.

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

² *Id.*

³ *Id.* at 1792.

⁴ *Id.*

⁵ This Author had anticipated the analysis reflected in Justice Ginsburg's *Wynne* dissenting opinion which received the support of only three members of the Court, Justices Ginsburg, Kagan, and Scalia. See 135 S. Ct. at 1813 (Ginsburg, J., dissenting); Edward A. Zelinsky, *Why Wynne Worries Me*, 67 VAND. L. REV. EN BANC 207, 211 (2014); Edward A. Zelinsky, *Wynne and the Double Taxation of Dual Residents*, 73 ST. TAX NOTES 259 (2014).

Wynne is thus more important than the immediate situation it addresses. Just as a mundane dispute over a minor presidential appointment gave rise to the U.S. Supreme Court's seminal statement of the power of judicial review,⁶ *Wynne* will have consequences beyond the immediate circumstances it addresses. A decision as enigmatic as it is important, *Wynne* raises as many questions as it answers. Among these are the continuing viability (or not) of external consistency and apportionment, concepts that have been central to the Court's formulation of the dormant Commerce Clause. *Wynne* also undermines the Court's traditional tolerance of the double state income taxation of dual residents because such double taxation can encourage a dual resident to undertake single-taxed, in-state economic activity rather than make investments subject to such double taxation.

I. THE SUPREME COURT'S *WYNNE* OPINION

Maryland's county income tax provides no credit to resident taxpayers for the out-of-state income taxes such residents pay.⁷ The Wynnes, residents of Howard County, Maryland, had income from an S-corporation that operates in thirty-nine states.⁸ In accordance with the provisions of Subchapter S of the Internal Revenue Code,⁹ the Wynnes reported their share of the corporation's out-of-state income on their Maryland state and county income tax returns.¹⁰ The Wynnes received a credit on their Maryland state tax return for the out-of-state taxes they paid on the income earned by their S-corporation outside of Maryland.¹¹ However, the Wynnes received no credit against their Maryland county income taxes for income taxes they paid to states other than Maryland.¹²

A five-justice majority—sustaining Maryland's highest court, the Court of Appeals—held that the Maryland county income tax violated the dormant Commerce Clause by failing to grant the

⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷ *Wynne*, 135 S. Ct. at 1792–93 (describing the facts of the case).

⁸ The Court's opinion says that the Wynnes' S-corporation "filed state income tax returns in 39 States." *Id.* at 1793.

⁹ *Id.* at 1793 n.1 (summarizing the operation of Subchapter S).

¹⁰ *Id.* at 1793.

¹¹ *Id.*

¹² *Id.*

Wynnes a credit for the out-of-state income taxes that the Wynnes paid.¹³ Justice Alito's opinion for the *Wynne* Court propounds several themes. Among the most important is the analogy between the creditless Maryland county income tax and a tariff: because there is no credit under Maryland's county income tax for out-of-state income taxes, the Maryland county tax "has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause."¹⁴ "[T]he Maryland tax scheme," because it does not grant a credit against the county income tax for residents' out-of-state income tax payments, "is tantamount to a tariff on work done out of State."¹⁵

Justice Alito further reaffirmed the dormant Commerce Clause principle of nondiscrimination, writing that "the dormant Commerce Clause precludes States from discriminating between transactions on the basis of some interstate element."¹⁶

[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation.¹⁷

Justice Alito's *Wynne* opinion places its chief reliance not on the Court's more recent dormant Commerce Clause cases, but on *J.D. Adams Manufacturing Co. v. Storen*,¹⁸ *Gwin, White & Prince, Inc. v. Henneford*,¹⁹ and *Central Greyhound Lines, Inc. v. Mealey*.²⁰ Each of these earlier cases, Justice Alito wrote, "struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity."²¹ Justice Alito also wrote, "Maryland's tax scheme is unconstitutional for similar reasons."²²

¹³ *Id.*

¹⁴ *Id.* at 1792.

¹⁵ *Id.* at 1806–07.

¹⁶ *Id.* at 1794 (internal citations omitted).

¹⁷ *Id.* (internal citations omitted).

¹⁸ *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

¹⁹ *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

²⁰ *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

²¹ *Wynne*, 135 S. Ct. at 1795.

²² *Id.*

[T]he tax schemes held to be unconstitutional in *J.D. Adams*, *Gwin*, *White*, and *Central Greyhound*, had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity.²³

Central to Justice Ginsburg's *Wynne* dissent²⁴ are the arguments that residents, like the Wynnes, benefit greatly from public services.²⁵ Furthermore, Justice Ginsburg argues that such residents vote for the Maryland officials who impose the creditless Maryland county income tax on the Wynnes.²⁶ Consequently, Justice Ginsburg argued, whether the Maryland county income tax should (or should not) grant a credit for out-of-state income taxes is a question of policy that should be decided through the political process.²⁷

In reply, Justice Alito pointed to the Court's dormant Commerce Clause cases protecting corporations from state income taxes.²⁸ "[I]t is," he concluded, "hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations."²⁹

Like residents, "corporations also benefit heavily from state and local services" including roads, police and fire departments, and schools which help to attract and retain employees.³⁰ Nevertheless, the dormant Commerce Clause constrains the states' ability to tax these service-receiving corporations.

Justice Alito also rejected Justice Ginsburg's contention that the Wynnes do not need the protection of the dormant Commerce Clause since, as Maryland residents, the Wynnes vote for the Maryland officials who tax them: "[I]f a State's tax unconstitutionally discriminates against interstate commerce, it is invalid

²³ *Id.* at 1801–02.

²⁴ *Id.* at 1813 (Ginsburg, J., dissenting).

²⁵ *Id.* at 1814.

²⁶ *Id.* at 1814–15.

²⁷ *Id.* This Author had expected the Court to agree with the argument that the Wynnes, as Maryland voters, were not entitled to dormant Commerce Clause protection from the taxes levied on them by the officials for whom they vote. See Zelinsky, *Why Wynne Worries Me*, *supra* note 5, at 213–14.

²⁸ *Wynne*, 135 S. Ct. at 1795.

²⁹ *Id.* at 1797.

³⁰ *Id.*

regardless of whether the plaintiff is a resident voter or nonresident of the State.”³¹

Writing for the Court, Justice Alito dismissed as “fanciful”³² “the notion that the victims of such discrimination have a complete remedy at the polls.”³³ The argument that the Wynnes can protect themselves in Maryland’s political processes “would leave no security where the majority of voters prefer protectionism at the expense of the few who earn income interstate.”³⁴ Moreover, “large corporations headquartered in the State”³⁵ have political influence but are nevertheless protected by the strictures of the dormant Commerce Clause rather than consigned to their political remedies.³⁶

Justice Alito’s *Wynne* opinion is thus a full-throated affirmation that the dormant Commerce Clause constrains the states’ ability to tax their residents’ incomes. Justice Alito distinguished between the requirements of the Constitution’s Due Process Clause and of the dormant Commerce Clause.³⁷ The Due Process Clause allows a state to tax all of its residents’ incomes.³⁸ However, the Commerce Clause constrains the state’s ability to tax its residents’ incomes. That is precisely the situation presented by *Wynne*: “[T]he fact that a State has the jurisdictional power to impose a tax [as a matter of Due Process] says nothing about whether that tax violates the Commerce Clause.”³⁹

³¹ *Id.*

³² *Id.* at 1798.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Justices Alito and Ginsburg also debated the significance (if any) of the fact that the Maryland county income tax is a tax on net income, while the taxes at issue in *J.D. Adams*, *Gwin*, and *Central Greyhound* were taxes on gross income. Compare *id.* at 1795–97 (Justice Alito’s majority opinion rejecting that the Commerce Clause distinguishes between taxes on net and gross income), with *id.* at 1819–20 (Ginsburg, J., dissenting) (“[T]he Court has routinely maintained that ‘the difference between taxes on net income and taxes on gross receipts from interstate commerce warrants different results’ under the Commerce Clause.”) (citation omitted).

³⁷ *Id.* at 1798–99.

³⁸ *Id.* at 1798.

³⁹ *Id.* at 1799.

Also central to Justice Alito's *Wynne* opinion is the dormant Commerce Clause test that has been denoted as "internal consistency."⁴⁰ That test makes the theoretical assumption that every state emulates the challenged law and then determines whether, in that hypothetical setting, double taxation would occur from that universally adopted law.⁴¹ This test

distinguish[es] between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. The first category of taxes is typically unconstitutional; the second is not.⁴²

The internal consistency test, Justice Alito wrote, proves that "Maryland's tax scheme is inherently discriminatory and operates as a tariff."⁴³

According to Justice Alito, it is possible for the Maryland county income tax to comply with the internal consistency test by means other than a credit for out-of-state taxes.⁴⁴ However, given the Maryland county income tax in its present form, the absence of a credit makes such county income tax unconstitutional.⁴⁵

The majority in *Wynne* cut across conventional ideological lines⁴⁶ and agreed on the single opinion authored by Justice Alito. In contrast, the *Wynne* dissenters were fragmented. In a dissenting

⁴⁰ *Id.* at 1802.

⁴¹ *Id.*

⁴² *Id.* (internal citations omitted).

⁴³ *Id.* at 1804.

⁴⁴ *Id.* at 1806. As discussed later in this Article, creditless compliance with the internal consistency test would require Maryland to forsake county income taxation of nonresidents on their Maryland source income. *See infra* Section II.E.

⁴⁵ *Wynne*, 135 S. Ct. at 1805–06.

⁴⁶ Justice Alito's *Wynne* opinion was joined by Chief Justice Roberts and Justices Breyer, Kennedy, and Sotomayor. *Id.* at 1791. Professor Hellerstein believes that *Wynne* reached the right result by requiring the jurisdiction of residence to provide a credit for the income taxes paid to the jurisdiction of source. However, he concludes that, to reach this correct result, *Wynne* engages in "doctrinal legerdemain." Walter Hellerstein, *Deciphering the Supreme Court's Opinion in Wynne*, 123 J. TAX'N 4, 10 (2015).

opinion largely joined by Justice Thomas, Justice Scalia adhered to his long-standing position that there is no “constitutional foundation” for the dormant Commerce Clause.⁴⁷ Justice Thomas, largely supported by Justice Scalia, similarly maintained his view that the dormant Commerce Clause “has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”⁴⁸ Justice Ginsburg, in conjunction with Justices Kagan and Scalia, accepted the existence of the dormant Commerce Clause but argued that “nothing in the Constitution or in prior decisions of this Court” requires the Maryland county income tax to grant a credit to the Wynnes for the out-of-state income taxes that they pay.⁴⁹

II. DISCUSSION

A. *Wynne’s Tariff Analogy Is Powerful and Limitless*

The tariff analogy, central to Justice Alito’s *Wynne* opinion, is both powerful and limitless: Justice Alito is correct that state-imposed tariffs are the quintessential evil against which the dormant Commerce Clause is aimed. The problem is that, in the modern world, everything state and local governments do creates a tariff-like effect, potentially creating “powerful incentive[s]”⁵⁰ for a resident to invest at home rather than out of state. The tariff analogy, critical to *Wynne*, thus perpetuates the fundamental incoherence of the dormant Commerce Clause concept of nondiscrimination. That concept arbitrarily labels some tax policies as unconstitutionally discriminatory because they encourage in-state investment while apparently permitting other economically equivalent tax and nontax policies that similarly encourage intrastate economic activity.

Suppose, for example, that Howard County exercises its authority to lower its general county income tax rate. This lower tax

⁴⁷ *Wynne*, 135 S. Ct. at 1809–10 (Scalia, J., dissenting). Attorney Jasper L. Cummings, Jr. concludes that the three dissenting opinions in *Wynne* “are all compelling.” Jasper L. Cummings, Jr., *Internal Consistency and the Federal Income Tax*, 77 ST. TAX NOTES 185, 186 (2015).

⁴⁸ *Wynne*, 135 S. Ct. at 1811 (Thomas, J., dissenting) (citations omitted) (internal quotation marks omitted).

⁴⁹ *Id.* at 1813 (Ginsburg, J., dissenting).

⁵⁰ *Id.* at 1801–02 (majority opinion).

rate encourages the Wynnes to invest at home rather than deploy their resources out of state. This rate reduction is “tantamount to a tariff”⁵¹ as Howard County thereby uses its tax authority to create a “powerful incentive”⁵² to retain the Wynnes’ investments at home. Alternatively, suppose that Maryland provides a low-interest loan to the Wynnes’ corporation to build a Maryland facility. Suppose further that this loan contains an increasingly common “clawback” feature under which the corporation must repay Maryland’s largesse if the corporation moves its facility to another state.⁵³ These policies are similarly “tantamount to a tariff,”⁵⁴ rewarding the Wynnes and their corporation for investing and remaining in Maryland, or penalizing them for moving resources out of state.

The list goes on and, indeed, encompasses virtually all taxes and public services. Assume that, as part of the package of incentives for the Wynnes’ corporation to build a plant in Maryland, Howard County and Maryland promise to construct new roads to the plant and also commit to provide state-subsidized job training for new employees at the plant. These incentives are designed to (figuratively speaking) construct walls (or moats) around Maryland to keep resources in-state.

As Justice Alito notes, better schools help employers to attract and retain employees.⁵⁵ The same is also true of good police and fire services. Everything the modern state or municipality does is “tantamount to a tariff,”⁵⁶ potentially creating “powerful incentive[s]”⁵⁷ for employers and investors to move or stay to receive such services. There is a broad consensus among tax experts that tax policies and direct expenditures are interchangeable; tax subsidies can be reformulated as direct outlay programs and vice

⁵¹ *Id.* at 1806–07.

⁵² *Id.* at 1801–02.

⁵³ See, e.g., Randle B. Pollard, “Was the Deal Worth it?: The Dilemma of States with Ineffective Economic Incentives Programs,” 11 HASTINGS BUS. L.J. 1, 21, 26 (2015) (“States will frequently include ‘clawback’ or recapture language in the contractual agreements that provide the incentives.”).

⁵⁴ *Wynne*, 135 S. Ct. at 1806–07.

⁵⁵ *Id.* at 1797.

⁵⁶ *Id.* at 1806–07.

⁵⁷ *Id.* at 1801–02.

versa.⁵⁸ Consequently, if some tax provisions that encourage in-state investment are deemed to be unconstitutionally discriminatory because of their tariff-like effects, so too all economically equivalent direct expenditure programs must also run afoul of the dormant Commerce Clause because of their identical, tariff-like effects.

In short, the tariff analogy is powerful in its imagery and limitless in its implications. It is unlikely that the five justices who comprise the *Wynne* majority believe that the dormant Commerce Clause precludes states and localities from improving their routine public services or from lowering their tax rates to attract and retain employers and residents. This Author similarly suspects that these justices would recoil from the prospect that the courts, under the rubric of dormant Commerce Clause nondiscrimination, should police conventional public services for their impact on interstate commerce.

However, the tariff analogy has no convincing limiting principle. If failing to grant a tax credit is unconstitutionally “tantamount to a tariff”⁵⁹ because of the “powerful incentive”⁶⁰ thereby created to invest at home, so too other routine tax and nontax policies and services which similarly encourage in-state investments are also unconstitutional because of their tariff-like effects. It is arbitrary to label as unconstitutionally discriminatory Maryland’s failure to grant the Wynnes a county income tax credit for out-of-state income taxes while treating as constitutional the remaining universe of tax and nontax policies which are economically equivalent in their potential to induce in-state investment.

The problem is not a failure of skill or effort. The craftsmanship and energy with which *Wynne* was constructed are evident as is the equally fine scholarship of the commentators who have labored unsuccessfully to bring coherence to the concept of dormant

⁵⁸ This consensus has largely been forged under the heading of “tax expenditure analysis.” See Edward A. Zelinsky, *The Counterproductive Nature of Tax Expenditure Budgets*, 137 TAX NOTES 1317, 1318–19 (2012) (summarizing tax expenditure analysis); Edward A. Zelinsky, *Winn and the Inadvisability of Constitutionalizing Tax Expenditure Analysis*, 121 YALE L.J. ONLINE 25, 26–29 (2011), http://www.yalelawjournal.org/pdf/994_mx3arnp9.pdf [<https://perma.cc/J58C-2674>].

⁵⁹ *Wynne*, 135 S. Ct. at 1806–07.

⁶⁰ *Id.* at 1801–02.

Commerce Clause nondiscrimination.⁶¹ The intractable quandary is that, in the modern state with its plethora of services and tax policies, the dormant Commerce Clause concept of nondiscrimination, despite its intuitive appeal and past service, is inherently incoherent. That concept randomly condemns some state tax policies as unconstitutional because they encourage in-state investment while giving a free pass to economically equivalent tax and nontax policies that similarly encourage in-state economic activity. *Wynne's* aggressive invocation of the tariff analogy perpetuates, rather than solves, this problem.

B. The Death of External Consistency?

A defender of *Wynne* might retort that state and local tax and nontax policies, despite their tariff-like effects, pass constitutional muster under the internal consistency test. If every state offered the same tax rates, the same loan subsidies with identical clawback features, the same roads and job training, and the same police, education, and fire services, the Wynnes and their S-corporation would have no incentive to invest in Maryland rather than in any other state. In the theoretical world of internal consistency, all state policies are identical.

This retort would highlight an enigmatic omission by the *Wynne* Court: the Court's silence⁶² on the subject of external

⁶¹ See, e.g., Brannon P. Denning, Essay, *Is the Dormant Commerce Clause Expendable? A Response to Edward Zelinsky*, 77 MISS. L.J. 623 (2007); Brannon P. Denning, Rebuttal, *The Dormant Commerce Clause Doctrine: Mend It, Don't End It*, 155 U. PA. L. REV. ONLINE 202 (2007), <https://www.pennlawreview.com/debates/index.php?id=7> [<https://perma.cc/5UGL-7LMW>]; Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996). For this Author's contrary views, see Edward A. Zelinsky, Essay, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653 (2007); Edward A. Zelinsky, *Davis v. Department of Revenue: The Incoherence of Dormant Commerce Clause Nondiscrimination*, 44 ST. TAX NOTES 941 (2007); Edward A. Zelinsky, Debate, *The Time Has Come to Abolish the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. ONLINE 196 (2007), <https://www.pennlawreview.com/debates/index.php?id=7> [<https://perma.cc/5UGL-7LMW>].

⁶² *Wynne* does acknowledge that Maryland's Court of Appeals applied the external consistency test. *Wynne*, 135 S. Ct. at 1793. After that single reference, however, *Wynne* makes no mention of external consistency. *Id.*

consistency. At one level, this silence is understandable. Once the *Wynne* Court declared that the creditless Maryland county income tax flunks the dormant Commerce Clause test of internal consistency, there was no need to subject that tax further to the test of external consistency. At another level, however, the Court's silence on the subject of external consistency leaves a puzzling gap in the Court's articulation of dormant Commerce Clause doctrine.

Container Corp. of America v. Franchise Tax Board introduced the twin tests of internal consistency and external consistency as a conjoined pair.⁶³ The test of internal consistency postulates a hypothetical world in which a challenged law is "applied by every jurisdiction."⁶⁴ The complementary test of external consistency is a "more difficult requirement" and asks whether the challenged tax law "actually reflect[s] a reasonable sense of how income is generated."⁶⁵ In effect, "the external consistency test is essentially a practical inquiry."⁶⁶

If we ask how tax rate reductions, industrial development subsidies, clawback provisions, and routine government activities such as police, fire, and education services actually work, they are all tantamount to tariffs in their practical impacts. They all potentially cause resources to be invested in-state rather than out-of-state. If the "practical inquiry"⁶⁷ of external consistency retains its substance in light of *Wynne*, that inquiry suggests that the powerful but boundless label "tantamount to a tariff"⁶⁸ applies to all tax and nontax policies pursued by states and localities. All such policies can, like a tariff, in practice bias the interstate playing field to attract and retain resources within the state that pursues such policies.

On the other hand, *Wynne*'s silence on the test of external consistency may reflect judicial discomfort with that test.⁶⁹ Justice Alito's *Wynne* opinion can be read as presaging a future formal

⁶³ *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989).

⁶⁷ *Id.*

⁶⁸ *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806–07 (2015).

⁶⁹ See *supra* note 62 and accompanying text.

repudiation of the external consistency test. While internally inconsistent taxes are “typically unconstitutional,”⁷⁰ that is not true of “tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.”⁷¹

The category of “internally consistent [tax] schemes”⁷² is where the external consistency test plays a role, looking at the practical consequences of taxes that pass the theoretical test of internal consistency. Justice Alito’s opinion indicates that these tax laws, because they pass the hurdle of internal consistency, are “typically [not] unconstitutional.”⁷³

If *Wynne* thereby signals judicial disenchantment with the external consistency test, *Wynne* portends a dramatic reduction of scrutiny under the dormant Commerce Clause as internal consistency is to be the end of the inquiry, which previously continued to the practical test of external consistency. If, on the other hand, *Wynne* leaves external consistency intact, *Wynne*’s robust embrace of the tariff metaphor implies that nothing states and localities do is beyond the judiciary’s dormant Commerce Clause supervision because state and municipal policies in practice are tantamount to tariffs, encouraging in-state investment and economic activity.

Thus, paradoxically and enigmatically, *Wynne* may either restrict the dormant Commerce Clause by jettisoning the practical test of external consistency, or broaden the test because all state and local tax and nontax policies are potentially tantamount to tariffs in their practical economic effects.

C. The Death of Apportionment?

A further quandary raised by the Court’s enigmatic decision in *Wynne* is that internal consistency is a test of apportionment. However, *Wynne* uses that test to condemn the Maryland county tax, not for failing to apportion, but for discriminating against

⁷⁰ *Wynne*, 135 S. Ct. at 1802.

⁷¹ *Id.* (parentheses in original).

⁷² *Id.*

⁷³ *Id.*

out-of-state activity. This implies either that the scope of the internal consistency test has been broadened to reach issues of discrimination or that the Court is collapsing discrimination and apportionment into a single dormant Commerce Clause concept.

Wynne acknowledges the much-cited four-part test articulated in *Complete Auto Transit v. Brady*.⁷⁴ Under this test, a state tax survives under the dormant Commerce Clause if “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.”⁷⁵

Until *Wynne*, internal consistency has been a test of fair apportionment.⁷⁶ *Central Greyhound* has been understood as a case about *Complete Auto*’s apportionment test.⁷⁷ This is also the most natural reading of *Central Greyhound*, in which the Court opined that New York’s gross receipts tax imposed on a bus company should be apportioned based on the ratio of buses’ in-state and out-of-state mileage.⁷⁸ *Central Greyhound* did not declare the New York gross receipts tax to be discriminatory, but instead required the tax to be “fairly apportioned.”⁷⁹ Similarly, the Court twice described the Indiana tax struck in *J.D. Adams* as levied “without apportionment.”⁸⁰

However, *Wynne* invokes internal consistency, *Central Greyhound*, and *J.D. Adams* to condemn the creditless Maryland

⁷⁴ *Id.* at 1793 (citing 430 U.S. 274, 279 (1977)).

⁷⁵ *Complete Auto*, 430 U.S. at 279. For more on *Complete Auto*, see Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 6, 10, 24 (2008).

⁷⁶ See *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (“[W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.”); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983) (discussing internal and external consistency as “component[s] of fairness in an apportionment formula”).

⁷⁷ See *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 186, 190 (1995) (discussing *Central Greyhound* as a matter of apportionment); *Goldberg*, 488 U.S. at 264.

⁷⁸ See *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662–63 (1948).

⁷⁹ *Id.* (internal quotation marks and citations omitted).

⁸⁰ *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311, 314 (1938). *Gwin, White* states that the Washington state business activities tax “in its practical operation discriminates against interstate commerce.” *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). However, the opinion also states that the tax “is not apportioned to [the taxpayer’s] activities within the state.” *Id.*

county income tax as unconstitutionally discriminatory, not as improperly apportioned. Again, this leaves us reading tea leaves. Is *Wynne* now suggesting that discrimination and apportionment are the same dormant Commerce Clause inquiries? If so, that would be a radical transformation of the *Complete Auto* formula that treats apportionment and discrimination as independent, separate hurdles, both of which must be surmounted for a tax to survive dormant Commerce Clause scrutiny. If not, it is perplexing that the *Wynne* Court, by deploying the internal consistency test, struck down the creditless Maryland county income tax as malapportioned without explicitly saying so.

D. Abandoning Source-Based Nonresident Taxation as an Alternative to Credits

As noted, Justice Alito's *Wynne* opinion indicates that Maryland can satisfy the test of internal consistency by means other than granting a credit to residents for their out-of-state taxes.⁸¹ It is, however, Justice Ginsburg's dissent that outlines the alternative by which Maryland can salvage its creditless county income tax as a matter of internal consistency: repeal the county tax for nonresidents on their Maryland source income.⁸²

Suppose that Maryland embraced this alternative approach, retaining for its residents a state income tax that grants a credit for out-of-state income taxes while also retaining for Maryland residents a county income tax without a credit for out-of-state taxes. As part of this approach, Maryland would abolish the county income tax, but keep the state income tax, for nonresidents who earn income in Maryland. The test of internal consistency hypothesizes that every other state will pursue this approach as well. If so, in this theoretical world, the Wynnes would pay the same total state and county income tax on their in-state investments in Maryland as they would pay on their out-of-state investments.

To illustrate this, consider the following example under this hypothetical regime. Suppose that Maryland assesses state income tax at a rate of 5 percent, payable both by residents on their worldwide incomes and by nonresidents on their incomes derived

⁸¹ *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806 (2015).

⁸² *Id.* at 1822–23 (Ginsburg, J., dissenting).

from Maryland sources. Every other state adopts an equivalent state income tax, taxing their respective residents on their global incomes at a rate of 5 percent while taxing nonresidents at that rate on in-state income. Suppose further that Maryland and every other state also levies a county income tax at the rate of 1 percent, payable only by residents on their respective global incomes. Assume also that Maryland (and every other state) grants a credit to residents against state (but not county) income taxes for the out-of-state income taxes those residents pay. To complete the example, assume that the Wynnes can make an investment in Maryland which will generate one hundred dollars or that they can invest in State X to earn that same one hundred dollars.

If the Wynnes, as Maryland residents, make the in-state investment in this theoretical world, they will pay a total income tax of six dollars: a five-dollar state income tax to Maryland plus a one-dollar Maryland county income tax. If the Wynnes instead earn these one hundred dollars in State X, under X's hypothesized tax system mirroring Maryland's tax regime, the Wynnes again pay six dollars in tax. In particular, they would pay a five-dollar state income tax to X which would be fully credited against, and thus completely offset, the Wynnes' five dollar state income tax liability as Maryland residents. The Wynnes would pay no county income tax in State X because there is no county income tax on nonresidents in Maryland or in X. Finally, the Wynnes, as Maryland residents, would pay a one-dollar county income tax in Maryland. The upshot again is six dollars in income tax; namely, five dollars to state X and one dollar to the Maryland county in which the Wynnes reside.

Thus, the Wynnes have—in this theoretical world—no tax incentive to invest in Maryland rather than in State X. Either way, the Wynnes' "total tax burden"⁸³ will be six dollars in combined state and local income taxes.

In the context of international income taxation, systems that tax solely on the basis of residence are often characterized as "capital export neutral."⁸⁴ If no tax is payable to the nation in

⁸³ *Id.* at 1805.

⁸⁴ REUVEN S. AVI-YONAH ET AL., U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS 281–83 (3d ed. 2011); CHARLES H. GUSTAFSON ET AL., TAXATION OF

which a nonresident earns income, an individual will pay the same single tax to his nation of residence wherever he earns that income. Hence, taxes play no role in the individual's decision whether to invest at home or abroad since he will pay the same income tax to his nation of residence either way.

In a similar vein, *Wynne* indicates that there is no tariff-like bias for in-state investment if a state or locality taxes its residents on their worldwide incomes, forsakes taxation of nonresidents on the income they earn within the state or locality, and grants no credit for taxes paid to other jurisdictions. If such a system were adopted universally, a resident would pay the same state and local income taxes whether she invests at home or out-of-state.

New York City implements this approach under that city's municipal income tax, which applies to residents but not to nonresidents.⁸⁵ Under the test of internal consistency as explicated by *Wynne*, New York City need not offer its residents a credit for out-of-state income taxes because New York City obtains internal consistency by not taxing nonresidents on their income earned in the city. The New York City tax is thus "capital export neutral" and passes constitutional muster under *Wynne*.⁸⁶

Wynne consequently offers states and localities two choices to comply with the requirements of the dormant Commerce Clause: either grant credits to residents for the out-of-state income taxes such residents pay or eschew nonresident income taxation.

E. What Kind of Credits Must Be Granted to Satisfy Wynne?

What kind of credit must be granted to resident taxpayers if a state or locality wants to tax nonresidents on their earnings within the state or locality? Not all credits are alike. A minority of states, including Maryland,⁸⁷ grant their residents income tax credits against any income tax such residents pay out-of-state.⁸⁸

INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 20–21 (4th ed. 2011).

⁸⁵ See N.Y. TAX LAW § 1301(a) (McKinney 2015).

⁸⁶ See *supra* note 84 and accompanying text.

⁸⁷ See MD. CODE ANN., TAX-GEN. § 10-703(a) (West 2015).

⁸⁸ See 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, 546 (2014).

However, most states only grant a credit for out-of-state taxes levied on income earned within the taxing state.⁸⁹

To see the importance of this distinction, suppose that the Wynnes make an investment in Maryland but that State X nevertheless taxes the income from that investment under an extraterritorial use of its taxing authority. Suppose, for example, that the Wynnes invest in a Maryland casino and that State X asserts that the Wynnes must pay X's income tax on their casino-based income because residents of State X drive into Maryland to gamble. The income tax asserted by State X in this context violates Due Process because this tax reaches extraterritorially beyond X's borders.⁹⁰ Nevertheless, some states persistently impose income tax beyond their respective boundaries despite the limitations constitutionally imposed upon them by the Due Process Clause.⁹¹

If so, need Maryland grant a credit to the Wynnes for State X's extraterritorial income tax? Today, Maryland is in the minority of states that grants a credit for any income taxes paid by a resident to another state without limiting its credit to taxes levied by

⁸⁹ See *id.* at 546–48.

⁹⁰ See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272–73 (1978) (stating that, in order to avoid extraterritorial taxation, Due Process requires that “the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State’”) (citation omitted); *Shaffer v. Carter*, 252 U.S. 37, 55 (1920) (explaining that a state may only tax a nonresident's income which “actually arises” in the state); see also WALTER HELLERSTEIN ET AL., *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 386–91 (10th ed. 2014).

⁹¹ The most important example today of a state taxing beyond its borders is New York's income taxation of nonresidents on days they telecommute from their out-of-state homes. For more on New York's so-called “convenience of the employer” taxation, see 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *ST. TAX'N* ¶ 20.05[4][e][i] (3d ed. 2015); HELLERSTEIN ET AL., *supra* note 90, at 391–402; Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in our National Economy*, 8 FLA. TAX REV. 885, 922 (2008); Nicole Belson Goluboff, *Back in Business with the Multi-State Worker Tax Fairness Act*, 72 ST. TAX NOTES 101, 102 (Apr. 14, 2014); Nicole Belson Goluboff, *State Tax Reform: The Modern Solution to Keep Workers Mobile and Businesses Resilient*, TAX MGMT. WKLY. ST. TAX RPT. 5, 8–11 (July 18, 2014); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash from Nonresidents, Part 2*, 42 ST. TAX NOTES 229, 238 (Oct. 23, 2006). For this Author's most recent comments on New York's employer convenience rule, see Edward A. Zelinsky, *Combining the Mobile Workforce and the Telecommuter Tax Acts*, 65 ST. TAX NOTES 319 (2012).

the second state on income arising within its own boundaries.⁹² Does *Wynne* require such a liberal credit, or could Maryland, like the majority of states, instead deny its resident a credit for an out-of-state tax levied on income that does not arise within the taxing state? *Wynne* does not say.

The majority rule satisfies the internal consistency test, but only if the taxing state itself assesses no tax on income arising outside its boundaries. To see this, let us modify in two respects the example of the Wynnes investing in a Maryland casino. First, let us assume that Maryland switches to the majority rule under which residents receive income tax credits only for out-of-state taxes paid on income arising within the taxing state. Second, let us assume that Maryland affirms that it will not assert state income taxes against a casino located in State X because Maryland residents cross the border to gamble there.

Under the internal consistency test, State X is hypothesized to adopt this approach also—i.e., an income tax credit for its residents only for taxes paid to another state on income earned within that state and no extraterritorial taxation of the income of an out-of-state casino because residents of X cross the border to gamble. Under these assumptions, the double tax problem disappears because State X, by assumption, no longer taxes the nonresident Wynnes on their Maryland casino-based income. Thus, Maryland need not extend any credit to the Wynnes for State X income taxes because X no longer taxes the Wynnes' income.

On the other hand, if the practical external consistency test still retains substance, the answer might be different. If, in practice, State X taxes the Wynnes on their Maryland casino income, we have a clash of constitutional principles. Due Process says that the extraterritorial tax levied by State X is unconstitutional.⁹³ *Wynne* implies that, in the face of such extraterritorial taxation, Maryland must grant the Wynnes a credit to avoid tariff-like double taxation. After *Wynne*, the Wynnes in this hypothetical world have a strong Due Process claim against State X to stop its extraterritorial taxation of their casino-based income earned in

⁹² MD. CODE ANN., TAX-GEN. § 10-703(a) (West 2015).

⁹³ See *Moorman Mfg. Co.*, 437 U.S. at 272–73 (1978); *Shaffer*, 252 U.S. at 55; see also HELLERSTEIN ET AL., *supra* note 90, at 386–91.

Maryland and a strong dormant Commerce Clause claim that Maryland must grant them an income tax credit for State X's tax. It is not clear in the face of *Wynne* how this clash should be resolved.

F. Wynne and the Double State Income Taxation of Dual Residents

Another important issue impacted by *Wynne* is the double taxation of dual residents. The dormant Commerce Clause doctrine articulated in *Wynne* undermines the Court's traditional tolerance of the double state income taxation of dual residents. Such double taxation can encourage a dual resident to undertake single-taxed in-state economic activity rather than make investments subject to such double taxation.

Wynne does not explicitly address the double state income taxation of dual residents, as the Wynnes are only residents of Maryland. Under the heading of domicile, an individual may, for income tax purposes, be deemed to be a resident of two (or more) states if both states conclude that it is the individual's permanent home.⁹⁴ "Domicile" is a subjective, fact-specific inquiry about an individual's relationship to a particular jurisdiction as his permanent home. It is "possible for the tax collectors in two states to look at the same facts and each conclude that an individual is domiciled in his state."⁹⁵ When this happens, the individual is taxed twice as a resident of both states that claim to be the taxpayer's place of domicile.

Alternatively, for income tax purposes, states have increasingly embraced the concept of "statutory residence."⁹⁶ Under their statutory residence laws, states assert the right to tax a non-domiciled individual as a resident based on such factors as the number of days the individual spends in the state and whether the individual has a permanent place of abode in the state.⁹⁷ When one state claims to be the state of domicile and another state

⁹⁴ Zelinsky, *supra* note 88, at 542–43.

⁹⁵ *Id.* at 543.

⁹⁶ *See id.* at 543–46.

⁹⁷ *See id.*

asserts statutory residence, both states will tax this individual as a resident on his worldwide income.⁹⁸

In the context of dual residence, frequently neither state will grant a credit for some nor all of the taxes paid by the dual resident to the other state of residence.⁹⁹ As just observed, most states grant their residents a credit for another state's income taxes only if those taxes are imposed on income that arises in that other taxing state.¹⁰⁰ Virtually all states, under the principle of *mobilia sequuntur personam*, attribute investment dividends, interest, and capital gains to themselves as the state of residence.¹⁰¹ In the context of a dual resident, the result is often double income taxation as both states assert the right to tax the individual's entire worldwide dividend, interest, and capital gain income on the basis of residence without extending a credit to avoid double taxation.¹⁰²

A similar problem of double state income taxation arises in the context of IRA, 401(k), and other pension distributions to dual residents.¹⁰³ Under federal law, only a state of residence may tax such retirement distributions.¹⁰⁴ However, if two states claim to be the distributee's state of residence for income tax purposes, double state income taxation again occurs as both states tax this dual resident's retirement distributions and neither state provides a credit for the taxes levied by the other.

In the past, the problem of the double state income taxation of dual residents was largely a quandary of the ultra-rich.¹⁰⁵ However, the problem is moving down the income scale as more

⁹⁸ See, e.g., *Noto v. N.Y. St. Dep't of Tax'n & Fin.*, No. 03392/2010, 2014 N.Y. Misc. LEXIS 1008, at *11 (N.Y. App. Div. Mar. 3, 2014) (discussing the double taxation of a taxpayer domiciled in Connecticut and statutory resident of New York); Edward A. Zelinsky, *The Noto decision and double state income taxation of dual residents*, OUPBLOG (June 2, 2014), <http://blog.oup.com/2014/06/noto-decision-double-state-income-taxation/> [<https://perma.cc/G7LR-7DTE>].

⁹⁹ See Zelinsky, *supra* note 88, at 546.

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 548. See, e.g., Ohio's codification of *mobilia sequuntur personam* stating that "[a]ll items of nonbusiness income or deduction taken into account in the computation of adjusted gross income for the taxable year by a resident shall be allocated to this state." OHIO REV. CODE ANN. § 5747.20(A) (West 2015).

¹⁰² Zelinsky, *supra* note 88, at 548.

¹⁰³ See *id.* at 560–61.

¹⁰⁴ 4 U.S.C. § 114(a) (2012).

¹⁰⁵ Zelinsky, *supra* note 88, at 556.

baby boomers retire and maintain second homes in another state and as more dual career couples maintain two residences in different states.¹⁰⁶ Thus, individuals increasingly find themselves taxed as residents in two (or more) states because both states deem themselves to be the individual's state of domicile or because one state is the state of domicile and another state is a state of statutory residence.¹⁰⁷ In either case, two states will tax this individual as a resident on his worldwide income, often with no credit being granted by either state to mitigate the double taxation of investment income.¹⁰⁸

Historically, the Supreme Court has held that double taxation from dual residence raises no constitutional issue.¹⁰⁹ *Wynne* challenges that traditional understanding, as the double state income taxation of a dual resident can be, in Justice Alito's words, "tantamount to a tariff,"¹¹⁰ creating a "powerful incentive"¹¹¹ for the dual resident to keep his capital at home to avoid double taxation.

Suppose, for example, that a dual resident is domiciled in New York and is a statutory resident of California, where she maintains a second home. Both states would tax this dual resident on her worldwide income. Each state, under the principle of *mobilia sequuntur personam*, would attribute to itself this individual's investment income from dividends, interest, and capital gains. While both states would grant a credit for income taxes assessed on business income earned in the other state, neither state would grant a credit to abate the double state income taxation of such individual's investment income from dividends, interest, and capital gains.

Suppose further that this dual resident must decide whether to put one hundred dollars into a New York business or to invest that same one hundred dollars in stocks and bonds. California would grant this dual resident a credit against its income tax for

¹⁰⁶ *Id.*

¹⁰⁷ An individual can also be a dual resident because she triggers the statutory residence requirements in two or more states. *Id.* at 546.

¹⁰⁸ *See id.*

¹⁰⁹ *Cory v. White*, 457 U.S. 85 (1982) (citing *Worcester Cnty. Trust Co. v. Riley*, 302 U.S. 292 (1937)).

¹¹⁰ *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806–07 (2015).

¹¹¹ *Id.* at 1801–02.

New York income taxes levied against New York business income. However, California would not grant a credit against its income tax for the New York income taxes assessed against the dividends, interest, and capital gains arising from the dual resident's investments in stocks and bonds because California would attribute that investment income to itself. The resulting double state income taxation to which this dual resident is subject acts as a tariff which, in this example, induces her to keep her money at home in a New York business rather than investing in stocks and bonds, the earnings of which are income taxed by both states.¹¹²

By placing her money in a New York business, this dual resident would be subject only to New York income taxes because California gives a credit against state taxes levied on business income earned in another state. If the dual resident instead uses her money to buy investment stocks and bonds, she will be subject to double taxation as a dual resident because, under the principle of *mobilia sequuntur personam*, both New York and California would tax the dividends, interest, and capital gains generated by these investments without providing any credit to abate double taxation. The same bias for in-state business activity would occur if this dual resident were choosing between single-taxed business income earned by a California business or double-taxed dividends, interest, and capital gains from investment stocks and bonds.

According to the *Wynne* Court, this kind of de facto tariff violates the dormant Commerce Clause by creating a "powerful incentive" for the dual resident to conduct in-state business in order to pay less state income tax. *Wynne* thus undermines the Court's traditional refusal to view the double taxation of dual residents as unconstitutional. The potential double taxation of dual residents can be tariff-like in its effects when the prospect of such double taxation encourages single-taxed business activity within the state rather than double state-taxed investments.

CONCLUSION

Wynne is an important and enigmatic decision with implications extending well beyond the particular facts of that case. The five-justice *Wynne* majority made a major statement about the

¹¹² Zelinsky, *supra* note 88, at 548–49.

dormant Commerce Clause. *Wynne* perpetuates an inherent problem of the Court's dormant Commerce Clause doctrine: the Court declares some ill-defined taxes as unconstitutionally discriminatory because they encourage in-state economic activity, while other economically equivalent taxes and government programs—which also encourage intrastate investment—are apparently acceptable under the dormant Commerce Clause.

Wynne raises as many questions as it answers. Among these are the continuing viability (or not) of external consistency and apportionment, concepts that have been central to the Court's formulation of the dormant Commerce Clause. *Wynne* also undermines the Court's traditional tolerance of the double state income taxation of dual residents because such double taxation can encourage a dual resident to undertake single-taxed in-state economic activity rather than make investments subject to such double taxation.

