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Comptroller of the Treasury v. Wynne: Bridging the Gap Between Strands of Jurisprudence on State Income Taxation

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COMPTROLLER OF THE TREASURY v. WYNNE: BRIDGING THE GAP BETWEEN STRANDS OF JURISPRUDENCE ON STATE INCOME TAXATION

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In *Comptroller of the Treasury v. Wynne*[1] the United States Supreme Court upheld a Maryland Court of Appeals decision in holding that the State of Maryland's[2] "county tax" on income earned out of state, without a credit for taxes paid to the host state, violated the Commerce Clause.[3] The majority opinion, authored by Justice Samuel Alito, is the culmination of a long-standing strand of Commerce Clause jurisprudence arguing that the Court should use the Commerce Clause actively in order to protect interstate commerce from discrimination by double taxation.[4] The principal dissent, on the other hand, authored by Justice Ruth Bader Ginsberg, follows an equally valid strand of jurisprudence in arguing for the states to retain the sovereignty to tax all of their residents' income and to defer to the political process whenever possible.[5] The competition between these strands of jurisprudence has resulted in staggeringly inconsistent decisions on state taxation issues.[6] Rather than bridging the gap between these distinct pillars of Supreme Court jurisprudence to create a test that generates replicable results, the *Wynne* Court simply chose to reprise its long-at-odds strands of jurisprudence.

By holding that Maryland's tax scheme violated the dormant Commerce Clause, the Supreme Court, in *Wynne*, granted tax refunds to

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1. 135 S. Ct. 1787 (2015).

2. The State of Maryland is hereinafter referred to as "Maryland" or the "State."

3. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

4. *See infra* Part III.A. This collection of jurisprudence will be referred to as the "*Wynne* majority strand" of jurisprudence and the "*Wynne* majority wing" of the Court.

5. *See infra* Part III.A. This collection of jurisprudence will be referred to as the "*Wynne* dissent strand" of jurisprudence and the "*Wynne* dissent wing" of the Court.

6. *See infra* Part II.

more than 55,000 Maryland residents.[7] The Court's decision to strike down this instance of double taxation was incorrect[8] and has created a significant burden on both the State of Maryland and its counties.[9] By failing to reconcile the competing strands of jurisprudence, the Court missed an opportunity to create a consistent and predictable method for deciding state tax-related Commerce Clause cases[10] by incorporating the fundamental principles that each strand of jurisprudence values[11] as well as the central aspects of their Commerce Clause decisions.[12]

Montgomery County, the jurisdiction most severely impacted by the Court's desire to eliminate all instances of double taxation, will foot the bill for over half of the expected $200 million that will be paid out to taxpayers in refunds.[13] Montgomery County Executive Isaiah Leggett warned that the *Wynne* decision would create an economic situation in his county that would "in some ways be worse than the recession" and would cause "a permanent hit" to the state budget.[14] There is even talk of raising other taxes in the county in order to offset the lost revenue.[15] However, Maryland is not the only state affected by the *Wynne* decision. States such as New York, Pennsylvania, Indiana and Ohio, with tax laws similar to that of Maryland, might also be forced to credit their residents for moneys owed.[16]

7. Brian White, *Hogan Urges Eligible Md. Residents to Apply for Tax Refund*, BALT. SUN (Sept. 28, 2015), www.baltimoresun.com/news/nation-world/sns-bc-md—supreme-court-maryland-income-tax-20150928-story.html.

8. *See infra* text accompanying notes 149–151.

9. Bill Turque, *Maryland Prepares for $200 Million Hit from Supreme Court Tax Case*, WASH. POST (Apr. 10, 2015), https://www.washingtonpost.com/local/md-politics/maryland-prepares-for-200-million-hit-from-supreme-court-tax-case/2015/04/10/be832130-def2-11e4-a500-1c5bb1d8ff6a_story.html.

10. *See infra* Part IV.A.

11. *See infra* Part IV.B.

12. *See infra* Part IV.C.

13. Turque, *supra* note 9.

14. *Id.*

15. *Id.* Although Montgomery County officials lamented the decision, Maryland's Governor, Larry Hogan, vehemently voiced his support for the Supreme Court's decision despite the hit to Maryland's budget. White, *supra* note 7. Hogan stated, "I wholeheartedly believe that this money will do more good in the hands of our citizens that it will do in the hands of government." *Id.* The state created a website, wynnetaxrefund.maryland.gov, in order to give residents information about how to collect their refund. *Id.*

16. John Fritze & Luke Broadwater, *Supreme Court: Md. Has Double Taxed Some Income*, BALT. SUN (May 18, 2015), http://www.baltimoresun.com/news/maryland/politics/blog/bal-supreme-court-md-has-double-taxed-some-income-20150518-story.html.

I. THE CASE

A. The Wynnes and Maryland's Income Tax

In 2006, Bryan Wynne was one of seven owners of an "S-Corporation,"[17] Maxim Healthcare Services, Inc. ("Maxim"), that earned income in thirty-nine states.[18] Mr. Wynne owned 2.4% of the company's stock.[19] Because Maxim was treated as an S-corporation, the company's income "passed-through" to its owners for income tax purposes under Maryland law, and the Wynnes reported such pass-through income on their 2006 Maryland tax return.[20]

> Maryland law imposes a three part income tax on individuals:
>
> (1) [a] State income tax (the 'state tax') at a rate set by the Legislature in statute,[21] (2) a county income tax that applies to only residents of each county [and Baltimore City] (the 'county tax') at a rate set by the county within the range allowed by statute,[22] and (3) a tax on those subject to State income tax but not the county tax (the "Special Non-Resident Tax" or "SNRT") at a rate equal to the lowest county tax . . . .[23]

Consequently, as individual taxpayers, the Wynnes were subject to both the state tax and the county tax.[24] Importantly, "a resident may claim a credit only against the State income tax for a taxable year in the amount determined under Tax General Article § 10-703(c) for State tax on income

17. "A subchapter S corporation or 'S corporation' is a corporation—often a relatively small business—that meets certain requirements set forth in the Internal Revenue Code and makes an election to pass through its income and losses, for federal tax purposes, to its shareholders." Comptroller of the Treasury v. Wynne, 431 Md. 147, 157, 64 A.3d 453, 459 (2013) (citing DOUGLAS A. KAHN ET. AL., CORPORATE INCOME TAXATION 220–21 (6th ed. 2009)). Each shareholder reports his or her share of the S corporation's income and losses on their individual tax returns and is assessed federal income tax at the shareholder's individual rate. In that way, the income that the S corporation generates to its owners is taxed at one level—similar to the taxation of a partnership—rather than at two levels (corporate and shareholder) as is otherwise typically the case. To accomplish this, the character of any item of income or loss of an S corporation 'passes through' to its owners 'as if that item were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation. 28 U.S.C. § 1366(b). The income of an S corporation [also] "passes through" and is attributed to its shareholders for purposes of the Maryland income tax law. *See* TG § 10-104(6); *see also* TG §§ 10-102.1, 10-304(3); *Wynne*, 431 Md. at 157–58, 64 A.3d at 459.

18. *Wynne*, 431 Md. at 159, 64 A.3d at 459–60.

19. *Id.* at 158, 64 A.3d at 459.

20. *Id.* at 159, 64 A.3d at 459–60.

21. *Id.* at 155, 64 A.3d at 457–8 (footnote omitted) (citing Tax General Article ("TG") § 10-105).

22. *Id.* at 156, 64 A.3d at 458 (citing TG §§ 10-103 and 10-106).

23. *Id.* (citing TG § 10-106.1).

24. *Id.* at 156, 64 A.3d at 458.

paid to another state for the year."[25] However, Maryland did not offer a credit for income taxes paid in other states against the county tax.[26]

B. Procedural Posture

During the 2006 tax year, the Wynnes claimed their pro rata share of Maxim's income taxes paid to other states as a credit against their 2006 Maryland individual income tax.[27] Subsequently, in 2006, the Maryland Comptroller audited the computation of the Wynne's local tax owed and revised the amount credited to the Wynnes for taxes paid to other states.[28] As a result of this review, there was a deficiency in the amount of Maryland taxes that the Wynnes paid. Consequently, the Comptroller issued an assessment, which the Wynnes subsequently appealed.[29] The Hearings and Appeals Section of the Maryland Comptroller's office affirmed the prior assessment with slight revisions on October 6, 2008.[30]

The Wynnes then filed an appeal to the Maryland Tax Court, where they argued that "the limitation of the credit to the State tax for tax payments made to other states discriminated against interstate commerce in violation of the Commerce Clause."[31] However, on December 29, 2009, the Tax Court rejected the Wynne's contentions and affirmed the assessment, upon which the Wynnes sought judicial review.[32] In a decision issued on June 29, 2011, the Circuit Court for Howard County reversed the decision and remanded it to the Tax Court for further development and to give the Wynnes a credit for taxes paid to Maryland on out-of-state income.[33] On July 22, 2011, the Wynnes appealed to the Maryland Court of Special Appeals, however, the Maryland Court of Appeals granted certiorari prior to the hearing and decision in the intermediate appellate court.[34]

25. *Id.* (quoting TG § 10-703(a)).

26. *Id.* at 157, 64 A.3d at 458 (citing TG § 10-703(a)).

27. *Id.* at 159, 64 A.3d at 460.

28. *Id.*

29. *Id.*

30. *Id.* The Comptroller determined that the Wynnes used the local tax rate for Carroll County rather than Howard County in error. The "hearing officer upheld the Comptroller's revised computation, a decision that the Tax Court affirmed. The Wynnes did not further appeal that issue." *Id.* at n.12, 64 A.3d at 460.

31. *Id.* at 159–60, 64 A.3d at 460.

32. *Id.* at 160, 64 A.3d at 460.

33. *Id.*

34. *Id.*

C. Appeal to the Maryland Court of Appeals

On appeal to the Maryland Court of Appeals, the Wynnes reprised their argument from the Tax Court.[35] In response, the Comptroller argued that the county portion of the state income tax scheme is not intended to impact interstate commerce and that the Wynnes failed to allege such an impact resulting from the State's failure to grant a credit for taxes paid to other states.[36] The court answered the Comptroller's assertion, stating that the dormant Commerce Clause applies more widely than solely when physical goods move across state lines.[37] In fact, the court argued, a tax is subject to scrutiny under the dormant Commerce Clause when it "substantially affects interstate commerce."[38]

The court then turned to the question of whether the application of the county tax without a credit violates the dormant Commerce Clause.[39] The court determined that a state tax survives a dormant Commerce Clause challenge under the *Complete Auto Transit, Inc. v. Brady*[40] test if it: "1) applies to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) is not discriminatory towards interstate or foreign commerce; and 4) is fairly related to the services provided by the state."[41] Because the Wynnes did not dispute the first or fourth prongs of the *Complete Auto* test, the court focused on the requirement of fair apportionment and the prohibition of discrimination against interstate commerce.[42]

In order to assess the fairness of apportionment of the Maryland county tax, the court looked to whether the tax was "internally consistent" as well as "externally consistent."[43] In order to measure internal consistency, the court answered the following hypothetical question: "If each state imposed a county tax without a credit in the context of a tax scheme identical to that of Maryland, would interstate commerce be disadvantaged compared to intrastate commerce?"[44] According to the court, "the answer is yes" because Maryland taxpayers who earn income

35. *Id.* at 161, 64 A.3d at 461. The Wynnes again alleged that "the limitation of the credit to the State tax for tax payments made to other states discriminated against commerce in violation of the Commerce Clause of the United States Constitution." *Id.* at 160, 64 A.3d at 460.

36. *Id.* at 162, 64 A.3d at 462.

37. *Id.*

38. *Id.* at 163, 64 A.3d at 462.

39. *Id.* at 165, 64 A.3d at 463.

40. 430 U.S. 274, 279 (1977).

41. *Wynne*, 431 Md. at 165, 64 A.3d at 463 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

42. *Id.*

43. *Id.* at 166, 64 A.3d at 464 (citing Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995)).

44. *Id.* at 166–67, 64 A.3d at 464.

outside of Maryland would be taxed at higher rates than Maryland taxpayers who earn income entirely in Maryland.[45]

In order to measure the external consistency of the county tax, the court assessed "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[46] The court concluded that because Maryland does not give a credit towards the county tax for income earned and taxed out of state, Maryland may tax income doubly, giving further indication that the application of the county tax in these circumstances violates the dormant Commerce Clause.[47]

Finally, the court assessed whether the county tax discriminated against interstate commerce under the third prong of the *Complete Auto* test.[48] The court likened Maryland's county tax to other taxes that the Supreme Court found to be discriminatory in *Fulton v. Faulkner*[49] and *Haliburton Oil Well Co. v. Reily*[50] while distinguishing it from a non-discriminatory statute in *Amerada Hess v. New Jersey Dept. of the Treasury*.[51] The court held that "the failure of the Maryland income tax law to allow a credit against the county tax for a Maryland resident taxpayer with respect to pass-through income of an S corporation that arises from activities in another state and that is taxed in that state violates the dormant Commerce Clause of the federal Constitution."[52] The Maryland Court of Appeals remanded the case to the Tax Court with instructions to recalculate the Wynnes' tax liability.[53] The Comptroller of the Treasury of Maryland filed a Petition for a Writ of Certiorari with the United States Supreme Court on October 13, 2013.[54] The Supreme Court granted certiorari on May 27, 2014 in order to determine whether Maryland's decision not to grant its taxpayers a credit against the Maryland county tax for taxes paid on income earned out of state violated the dormant Commerce Clause.[55]

45. *Id.* at 167, 64 A.3d at 464.

46. *Id.* at 171, 64 A.3d at 467 (quoting Goldberg v. Sweet, 488 U.S. 252, 262 (1989)).

47. *Id.* at 172, 64 A.3d at 467–68.

48. *Id.* at 173, 64 A.3d at 468.

49. 516 U.S. 325, 333 n.3 (1996) (holding the "North Carolina property tax on intangibles that taxed investments in out-of-state businesses at a higher rate violated the Commerce Clause").

50. 373 U.S. 64, 72–73 (1963) (holding that a "Louisiana state had the discriminatory effect of imposing a greater tax on goods manufactured outside Louisiana than on goods manufactured within that state, thereby creating an incentive to locate the manufacturing process within Louisiana").

51. 490 U.S. 66, 78–79 n.10 (holding that "a state tax may not discriminate against a transaction because the transaction has an interstate element or because the transaction or incident crosses state lines").

52. *Wynne*, 431 Md. at 176–77, 64 A.3d at 470.

53. *Id.* at 178, 64 A.3d at 471.

54. Petition for Writ of Certiorari, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485).

55. *Id.*

II. LEGAL BACKGROUND

The United States Supreme Court's dormant Commerce Clause jurisprudence regarding state taxation demonstrates a long-standing tension between those intent on using the dormant Commerce Clause to prevent economic isolation amongst the states and those who value the autonomy of the states and the political processes over political objectives. Part II.A of this Note discusses the development of the strand of Supreme Court jurisprudence that favors an active use of the dormant Commerce Clause in order to invalidate state tax schemes that present the possible burden of double taxation. Part II.B of this Note addresses the development of the competing strand of Supreme Court jurisprudence that values the sovereignty of the states to tax its residents' income over an active use of the dormant Commerce Clause.

The United States Constitution authorizes the federal government to "regulate commerce . . . among the several states."[56] However, this statement has long been held to include a "further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject."[57] Since the initial recognition of the dormant Commerce Clause, the Supreme Court has considered multiple challenges to state tax schemes alleged to be discriminatory to interstate commerce.[58] These cases have developed starkly contrasting views within the Court regarding its role in using the dormant Commerce Clause to strike down state tax schemes. This dichotomy is the result of competing values evident in the two strands of dormant Commerce Clause jurisprudence regarding state taxation. When a state tax-related Commerce Clause case comes to the Supreme Court, the winning line of cases typically has been determined simply by the swing of votes on the Court. There is no particular observable pattern creating "periods" of the Court as one might find in other areas of Supreme Court jurisprudence.

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56. U.S. CONST. art I, § 8, cl. 3.

57. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 179 (1995).

58. *See* J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 308 (1938) (deciding "whether the Indiana Gross Income Tax Act of 1933 as construed and applied burden interstate commerce"); *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 274 (1977) (deciding whether "Mississippi runs afoul of the Commerce Clause, when it applies the tax it imposes on 'the privilege of . . . doing business' within the State to appellant's activity in interstate commerce"); Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 660 (1948) (deciding whether New York may "[claim] the right to tax the gross receipts from transportation which traverses New Jersey and Pennsylvania as well as New York" under the commerce clause of the federal constitution); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 435 (1939) (deciding "whether a Washington tax measured by the gross receipts of appellant from its business of marketing fruit shipped from Washington to the places of sale in various states and in foreign countries is a burden on interstate and foreign commerce prohibited by the commerce clause of the federal constitution").

The *Wynne* majority strand of jurisprudence is more likely to strike down state taxes as discriminatory against interstate commerce. It believes that the dormant Commerce Clause is meant to prevent economic Balkanization actuated by unfair double taxation amongst the states.[59] The other strand of jurisprudence, evidenced by the principal dissent in *Wynne*, takes a more limited view. It argues that the dormant Commerce Clause may not interfere with the State's right to tax its residents' income.[60] The Supreme Court jurisprudence on the constitutionality of state tax schemes under the dormant Commerce Clause has vacillated between these competing principles without reconciling them.

A. The Wynne *Majority Strand of Supreme Court Jurisprudence Used the Dormant Commerce Clause to Invalidate State Taxes That Create a Burden of Multiple Taxation*

A significant group of Supreme Court cases that have struck down state tax schemes under the Commerce Clause have utilized the premise that a state may not "impose a tax which discriminates against interstate commerce . . . by subjecting [it] to the burden of 'multiple taxation.'"[61] The Court's resistance to double taxation originated in the late 1930s and 1940s with three cases, *J.D. Adams Manufacturing Co. v. Storen*,[62] *Gwin, White & Prince, Inc. v. Henneford*,[63] and *Central Greyhound Lines, Inc. v. Mealey*,[64] in which the Court struck down state tax schemes that could have created multiple, or "double" taxation systems that directly burdened out-of-state interests in favor of in-state interests.[65]

These cases discarded the Supreme Court's previous distinction between gross-receipt and net-income taxes.[66] These cases also reflect the *Wynne* majority strand of jurisprudence's insistence that "the generality and nondiscriminatory character of the exaction" of a tax "will not save the tax if it directly burdens interstate commerce."[67] In 1977, this strand further solidified its commitment to striking down state tax schemes that might burden interstate commerce in *Complete Auto Transit v. Brady*.[68] The *Brady* Court found that, in order to strike down a state tax law under the

59. Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979).

60. Okla. Tax. Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995).

61. Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

62. 304 U.S. 307 (1938).

63. 305 U.S. 434 (1939).

64. 334 U.S. 653 (1948).

65. *See supra* note 58.

66. U.S. Glue Co. v. Oak Creek, 247 U.S. 321, 326–29 (1918). The Supreme Court found that a gross receipts tax creates a "[direct] burden on interstate commerce" whereas a net-income tax "only indirectly affects the profits or returns from such commerce." *Id.* at 326.

67. *J.D. Adams Mfg. Co*., 304 U.S. at 312.

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

dormant Commerce Clause, there must be "a showing of discrimination against interstate commerce."[69] Notably, the *Complete Auto* test also gave rise to the internal consistency test. The *Wynne* majority strand of jurisprudence has since used the *Complete Auto* test, along with other means, to strike down state tax schemes under the dormant Commerce Clause.

1. The Complete Auto *Test and the Rise of the Internal and External Consistency Tests*

The Supreme Court codified a test for determining the constitutionality of state taxes under the Commerce Clause in *Complete Auto.*[70] Under this test the Court should sustain a tax against a "Commerce Clause challenge when 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."[71] The *Complete Auto* test has subsequently been applied in multiple cases challenging state laws under the Commerce Clause.[72] When utilizing the *Complete Auto* test in determining the constitutionality of a state tax scheme, the Court has typically required that each prong be satisfied explicitly, creating a factor test rather than a balancing test.[73]

In determining whether a tax is fairly apportioned under *Complete Auto*, the Court uses the internal consistency test in which the Court "looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[74] The internal consistency test was first introduced in 1983 in *Container Corp. of America v. Franchise Tax Board.*[75] This test, originally used to apportion the income of a unitary

69. *Id.* at 280.

70. *Id.* at 279.

71. *Id.*

72. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310–11 (1994) (finding that "a state tax on foreign commerce will not survive Commerce clause scrutiny if the taxpayer demonstrates that the tax" fails the *Complete Auto* test); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 183 (1995) (applying the "criteria" of the *Complete Auto* test to the tax before the Court); Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 372 (1991) (applying *Complete Auto*'s "four part test").

73. *See* Goldberg v. Sweet, 488 U.S. 252, 257 (1989) (finding that an Illinois tax does not violate the Commerce Clause if it satisfies all four prongs of the *Complete Auto* test); *Jefferson Lines*, 514 U.S at 183 (applying "*Complete Auto*'s four-part test"); D.H. Holmes Co. v. McNamera, 486 U.S. 24, 31 (1988) (finding that the application of a Louisiana tax "does not violate the Commerce Clause if the tax complies with the four prongs of *Complete Auto*"); Commonwealth Edison Co. v. Mont., 453 U.S. 609, 614 (1981) (finding that the Montana tax in question must be "scrutinized under the *Complete Auto* test").

74. *Jefferson Lines*, 514 U.S. at 185.

75. 463 U.S. 159, 169 (1983).

business within and without a state,[76] has been used as part of the *Complete Auto* test multiple times since its inception in order to strike down state tax schemes deemed discriminatory against interstate commerce.[77] For instance, in *Tyler Pipe Industries v. Washington State Department of Revenue*,[78] the Court applied the internal consistency test in order to strike down a facially discriminatory Washington State tax that "exposes manufacturing or selling activity outside the State to a multiple [sic] burden from which only the activity of manufacturing in-state and selling in-state is exempt."[79] However, the fair apportionment prong of the *Complete Auto* test looks not only to the internal consistency of the tax scheme, but also to its external consistency.[80] In assessing the external consistency of a state tax scheme, the Court looks to the "economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state."[81] The external consistency test is often thought of as the "more difficult requirement" of the two.[82]

2. *The* Wynne *Majority Strand of Jurisprudence Has Also Used Other Means to Invalidate State Tax Schemes*

The United States Supreme Court, in favor of an active use of the dormant Commerce Clause, has utilized tools beyond the *Complete Auto* test in order to strike down state tax schemes that create the potential for double taxation. First, the Court has analogized such state taxes to tariffs, which it considers "the paradigmatic example of a law discriminating against interstate commerce."[83] While states have avoided imposing direct tariffs on other states, the Court has carefully monitored and struck down

76. *Id.* ("Having determined that a certain set of activities constitute a 'unitary business,' a State must then apply a formula apportioning the income of that business within and without the States. Such an apportionment formula must, under the Due Process and Commerce Clauses, be fair. The first . . . component of fairness in an apportionment formula is what might be called internal consistency . . . .").

77. *See* Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984) (applying the internal consistency test "where the allegation is that a tax on its face discriminates against interstate commerce"); Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266, 284–85 (1987) (applying the internal consistency test to a challenge of a Pennsylvania flat tax under the Commerce Clause); Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 240 (1987) (noting that "a tax must have 'what might be called internal consistency'"); Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1803 (2015) (applying the internal consistency test to a Maryland state tax scheme).

78. 483 U.S. 232 (1987).

79. *Id.* at 248.

80. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995).

81. *Id.*

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

83. W. Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994).

state schemes attempting to impose tariffs by less direct means.[84] For instance in *Bacchus Imports, Ltd. v. Dias,*[85] the Supreme Court invalidated a Hawaii state law that authorized a functional tariff granting a tax exemption to in-state producers of certain liquors in order to create an advantage for local production.[86] In doing so, the Court reasoned that "states may not 'build up [their] domestic commerce by means of unequal and oppressive burden upon the industry and business of other States.'"[87]

On multiple occasions, the members of the Court in favor of an active use of the dormant Commerce Clause have asserted their right to strike down laws despite the fact that the laws are not facially discriminatory.[88] Many instances of double taxation are facially discriminatory. For instance, a state income tax on a resident's out-of-state income at ten percent and on their in-state income at five percent is facially discriminatory. However, this wing of the Court goes beyond striking down only facially discriminatory tax schemes. As the *Tyler Pipe* Court reasoned, "the fact that [a] tax 'has the advantage of appearing nondiscriminatory,' does not save it from invalidation."[89]

B. A Competing Strand of Supreme Court Jurisprudence

The other wing of the Supreme Court looks to uphold potentially discriminatory state tax laws based on their belief in the "well established principles of interstate and international taxation . . . that a jurisdiction . . . may tax *all* the income of its residents, even income earned outside the taxing jurisdiction."[90] Such deference to a state's sovereignty was substantiated by a number of cases in the Supreme Court's jurisprudence in which the Court upheld a state's ability to tax the income of its residents, regardless of where residents earned it, on both Commerce Clause and other constitutional grounds.[91]

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84. *Id.* at 193–94. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935) (striking down a New York law that set up a system of minimum prices to be paid by dealers to producers).

85. 468 U.S. 263 (1984).

86. *Id.* at 265.

87. *Id.* at 273 (quoting Guy v. Baltimore, 100 U.S. 434, 443 (1880)).

88. *See* Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 248 (1987) (overruling *GMC v. Washington*, 337 U.S. 436 (1964), in which the Court found that a tax appearing non-discriminatory saved it from invalidation); Maine v. Taylor, 477 U.S. 131, 138 (1986) (finding that a state law can "discriminate against interstate commerce 'either on its face or in practical effect'" (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979))).

89. *Tyler Pipe*, 483 U.S. at 248 (quoting G.M.C. v. Washington, 377 U.S. 436, 460 (1964) (Goldberg, J., dissenting)).

90. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995).

91. *See* Maguire v. Trefry, 253 U.S. 12 (1920) (upholding a tax on payments received from a trust located in a different state); *see also* State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942) (finding that a state can impose a tax upon a transfer by death of shares of a corporation despite the fact that the decedent was domiciled in another state); Curry v. McCanless, 307 U.S. 357, 373

Proponents of this strand of cases argue that the State's ability to tax its residents' income within and outside its borders is a "well established principle" of interstate taxation, and thus, state sovereignty.[92] The responsibility of a state's residents to share in the burden of taxes on income earned interstate results from resident's "enjoyment of the privileges of residence within [a] state, and the attendant right to invoke the protection of its laws."[93]

1. The Wynne *Dissent Strand of Jurisprudence*

In order to defend against the Court's overreach into questions pertaining to state sovereign decisions, this wing of the Supreme Court believes that "it is not a purpose of the Commerce Clause to protect state residents from their own state taxes."[94] Rather than using the dormant Commerce Clause to strike down such a state tax, this wing of the Court has espoused its belief that the existence of in-state interests negatively affected by a state tax are sufficient either to legitimize the scheme or require use of the political processes to end the system.[95] As Justice Marshall stated, "security against the abuse of [the taxing] power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."[96]

The Court has applied its reluctance to interfere in taxation schemes to state regimes as well, arguing that state legislatures are best equipped to make significant changes to established tax schemes.[97] Adhering to this view, the Justices have argued that not only should state taxation be relatively free from federal interference but also free from the interference of other states' taxation decisions. In fact, the proponents argue "the right of the several states to exercise the widest liberty with respect to the imposition of internal taxes has always been recognized by this Court."[98]

(1939) (declining "to press to a logical extreme the doctrine that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single sate by attributing to them a situs within that state"); Guar. Trust Co. v. Virginia, 305 U.S. 19, 23 (1938) (finding that "the mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders").

92. *Chickasaw Nation*, 515 U.S. at 462.

93. Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932).

94. Goldberg v. Sweet, 488 U.S. 252, 266 (1989).

95. W. Lynn Creamery v. Healy, 512 U.S. 186, 200 (1994) ("The existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." (quoting Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 473, n.17 (1981))).

96. McCulloch v. Maryland, 17 U.S. 316, 428 (1819).

97. Paddell v. New York, 211 U.S. 446, 448 (1908) ("The fact that the system [of taxation] has been in force for a very long time is of itself a very strong reason . . . for leaving any improvement that may be desired to the legislature.").

98. Shaffer v. Carter, 252 U.S. 37, 51 (1920).

This wing of the Court prefers to defer to states' decisions regarding whether to offer a credit for income taxes paid to other states, rather than preempting such state sovereignty by invalidating the tax under the dormant Commerce Clause.[99]

2. The Wynne *Dissent Wing and the Loose Application of the Internal Consistency Test to State Tax Regimes*

Although the internal consistency test has been strictly applied in some state taxation cases, the *Wynne* dissenting wing of the Court upheld a state tax scheme despite it admittedly appearing internally inconsistent.[100] For instance, in *American Trucking Associations Inc. v. Michigan Public Service Commission*, the Supreme Court upheld a Michigan fee on Michigan trucks under the Commerce Clause although the fee concededly appeared to fail the internal consistency test.[101] However, the Court noted that the internal consistency test is "typically used where taxation of interstate transactions is at issue."[102] The Court found that the tax "focuse[d] on local activity" and was "assessed even handedly" despite the fact that the application of the tax in all other states would force trucks traveling in interstate commerce to "pay fees totaling several hundred dollars."[103] Relying on the "principles and precedents" of Commerce Clause jurisprudence, the *American Trucking* Court decided that there was nothing "suggesting that Michigan's fee operates in practice as anything other than an unobjectionable exercise of the State's police power."[104] Crucially, the Court stressed that such "neutral, locally focused" fees and taxes are consistent with the Commerce Clause.[105]

99. Okla. Tax Comm'n v Chickasaw Nation, 515 U.S. 450, 463 n.12 (1995) ("Although sovereigns have authority to tax all income of their residents, including income earned outside their borders, they sometimes elect not to do so, and they commonly credit income taxes paid to other sovereigns. But 'if foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations.'" (quoting *Federal Income Tax Project: International Aspects of United States Income Taxation*, A.L.I. 6 (1987))).

100. *See* Am. Trucking Ass'ns v. Mich. Pub. Ser. Comm'n, 545 U.S. 429, 438 (2005) (upholding a state tax that appeared on its face to be internally inconsistent).

101. *Id.*

102. *Id.* at 437.

103. *Id.*

104. *Id.* at 434.

105. *Id.*

III. THE COURT'S REASONING

A. Justice Alito's Majority Opinion

In *Comptroller of the Treasury v. Wynne*,[106] the United States Supreme Court affirmed the decision of the Maryland Court of Appeals, holding that the Court "has long held that States cannot subject corporate income to tax schemes similar to Maryland's and we see no reason why income earned by individuals should be treated less favorably."[107] Thus, the county tax aspect of Maryland's tax scheme violated the U.S. Constitution.[108]

Justice Alito, writing for the majority,[109] began by addressing three cases: *J.D. Adams Mfg. Co. v. Storen*,[110] *Gwin, White & Prince, Inc. v. Henneford*,[111] and *Central Greyhound Lines, Inc. v. Mealey*.[112] In these cases the Supreme Court struck down state tax schemes that opened up the possibility for the double taxation of income earned out of state and that discriminated against interstate commerce in favor of in-state commerce. Upon its review, the Court found Maryland's tax scheme similarly unconstitutional.[113] Although the principal dissent distinguished the aforementioned cases because they focused on a gross receipts tax rather than on net income, the majority found no reason why such a distinction should matter, given the fact that the Court must consider the "practical effect" of a tax statute rather than its "formal language."[114]

The Comptroller argued that *J.D. Adams*, *Gwin*, and *Central Greyhound* were distinguishable because they involved the taxation of corporations, rather than individuals.[115] The Comptroller claimed that tax schemes should treat individuals differently than they treat corporations because individuals receive services from the states and because residents

106. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

107. *Id.* at 1792.

108. *Id.*

109. *Id.* at 1792–1808. Justice Alito delivered the opinion of the Court in which Justices Roberts, Kennedy, Breyer and Sotomayor joined. Justice Scalia filed a dissenting opinion in which Justice Thomas joined as to Parts I and II. Justice Thomas filed a dissenting opinion in which Justice Scalia joined, except as to the first paragraph. Justice Ginsburg filed the principal dissenting opinion in which Justice Scalia and Justice Kagan joined.

110. 304 U.S. 307 (1938) (holding that Indiana violated the dormant Commerce Clause in taxing all residents and non-residents who derive income from Indiana).

111. 305 U.S. 434, 439 (1939) (holding that a Washington State tax on income on a Washington corporation earned exporting goods to other states "discriminates against interstate commerce, since it imposes upon it . . . the risk of a multiple burden to which local commerce is not exposed").

112. 334 U.S. 653, 662 (1948) (holding that a New York tax on a New York bus company's gross receipts derived from out-of-state business violated the dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce).

113. *Wynne*, 135 S. Ct. at 1795.

114. *Id.* (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

115. *Id.* at 1797.

of the state have a say in the political process and thus can vote to change Maryland's tax laws.[116] The majority countered by arguing that the dormant Commerce Clause provides the same protections to corporations and individuals because both enjoy state services and that a tax is discriminatory to interstate commerce regardless of whether or not the person being taxed by a state is a resident of that state.[117] The Court concluded that it would be "particularly incongruous in the present case to disregard our prior decisions regarding the taxation of corporate income because the income at issue here is a type of corporate income."[118]

Next, the Court responded to the principal dissent's claim that the "Commerce Clause imposes no limit on Maryland's ability to tax the income of its residents, no matter where that income is earned."[119] The Court reasoned that Maryland's tax scheme violated the dormant Commerce Clause despite its ability to tax its residents' income earned out of state because the results of such a tax scheme would be "untenable."[120]

After distinguishing two cases upon which the principal dissent relies, *Shaffer v. Carter*[121] and *West Publishing Co. v. McColgan*,[122] the Court went on to apply and discuss the internal consistency test. The Court used the internal consistency test to determine which state tax schemes discriminated against interstate commerce by looking "to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[123] The Court concluded that Maryland's tax scheme failed the internal consistency test because the tax scheme is inherently

116. *Id.*

117. *Id.*

118. *Id.* at 1798.

119. *Id.*

120. *Id.* at 1799.

121. 252 U.S. 37 (1920). The Court distinguishes *Shaffer* from the facts *sub judice* because the Court "did not adjudicate anything like the double taxation argument that was accepted in later cases and is before us today." *Wynne*, 135 S. Ct. at 1800.

122. 328 U.S. 823 (1946). The Court found that the dissent's citation to *West Publishing* holds little precedential value because it is a summary affirmance, which "is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." *Wynne*, 135 S. Ct. at 1800–01 (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)).

123. *Wynne*, 135 S. Ct. at 1802 (quoting Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995)). The Court justified its use of the internal consistency test, stating:

> [B]y hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme. This is a virtue of the test because it allows courts to distinguish 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.

Id.

discriminatory to interstate commerce and functions as a tariff.[124] Despite this conclusion, a state like Maryland that taxes interstate commerce at a higher rate than it does intrastate commerce could still cure such an indiscretion by "lowering the high rate, raising the lower rate, or a combination of the two."[125]

Finally, the Court countered the assertions of both Justice Scalia and Justice Thomas, voiced in separate dissents, that the dormant Commerce Clause is "a judicial fraud."[126] The Court did so by espousing the history of dormant Commerce Clause jurisprudence, arguing that this doctrine has been applied numerous times by numerous justices.[127]

B. Justice Ginsburg's Principal Dissent

In the principal dissent, Justice Ginsburg stated that "nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary State or the source State, must recede simply because both have lawful tax regimes reaching the same income."[128] Justice Ginsburg first reasoned that because the residents of a state take advantage of expensive services provided by that state, the Court should not fault the state for obligating its residents to pay taxes on income earned out of state, regardless of what tax obligations a person has to *other* states.[129] Justice Ginsburg further claimed that the Commerce Clause need not protect residents of a state from their own state's taxes in this case because residents of Maryland possess the ability to prevent abuse of state power to tax via utilization of state political processes.[130]

In advocating for the constitutionality of Maryland's county tax, Justice Ginsburg asserted that "a taxpayer living in one state and working in another gains protection and benefits from both—and so can be called upon to share in the costs of both States' governments."[131] Rather than a constitutional question, the principal dissent insists that the Court made a policy choice between "legitimate but competing tax policy objectives."[132] Justice Ginsburg stressed that it has long been the responsibility of the states and Congress to strike a balance between competing policy objectives.[133] She argued that the question facing the Court is, in fact, a

124. *Id.* at 1804.
125. *Id.* at 1806.
126. *Id.* (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).
127. *Id.*
128. *Id.* at 1813 (Ginsburg, J., dissenting).
129. *Id.* at 1814.
130. *Id.*
131. *Id.* at 1816.
132. *Id.*
133. *Id.* The principal dissent argues that states making this policy choice "might prioritize obtaining equal contributions from those who benefit from the State's protection in roughly

matter of tax policy that "state legislatures and the Congress are constitutionally assigned and institutionally better equipped to balance."[134] The principal dissent also established historical precedent for Maryland's tax scheme, emphasizing that "since almost the dawn of the modern era of state income taxations, other states have taken the same approach as Maryland does now."[135]

Justice Ginsburg went on to criticize the Court's application of the internal consistency test, arguing that the Court had not applied the internal consistency test to a tax under review for two decades.[136] Further, the principal dissent argued against the Court's position that "Maryland's tax scheme is internally inconsistent because Maryland simultaneously imposes two taxes: the county income tax and the special nonresident tax."[137] Yet, the Wynnes are only liable for the county tax.[138] Justice Ginsburg reasoned that "because it is the interaction between [the county tax and the special nonresident tax] that renders Maryland's tax scheme internally inconsistent, Maryland could eliminate the inconsistency by terminating the special nonresident tax—a measure that would not help the Wynnes at all."[139]

C. Justices Scalia and Thomas's Dissents

Justice Scalia dissented separately in order to note his belief that there is not a dormant Commerce Clause in the Constitution and that the internal consistency test is not derived from the text or structure of the Constitution.[140] Justice Scalia also argued that that the dormant Commerce Clause is "[incompatible] with the judicial role" because it requires the Court "to balance the needs of commerce against the needs of state governments" which is "a task for legislators, not judges."[141] In arguing that Maryland's tax scheme should be upheld, Justice Scalia concluded that "nothing in the Constitution precludes Maryland from deciding that the benefits of its tax scheme are worth the costs."[142]

Justice Thomas also wrote separately in dissent, reprising his consistent view that "the negative Commerce Clause has no basis in the text

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similar ways. Or a State might prioritize ensuring that its taxpayers are not subject to double taxation. A State cannot, however, accomplish both objectives at once." *Id.*

134. *Id.* at 1823.

135. *Id.*

136. *Id.* at 1820.

137. *Id.* at 1822.

138. *Id.*

139. *Id.* ("Maryland could, in other words, bring itself into compliance with the test at the heart of the Court's analysis without removing the double tax burden the test is purportedly designed to 'cure.'").

140. *Id.* at 1808 (Scalia, J., dissenting).

141. *Id.* at 1810.

142. *Id.* at 1811.

of the Constitution, makes little sense, and has proved virtually unworkable in application, and consequently, cannot serve as a basis for striking down a state statute."[143] Justice Thomas argued that the Court's dormant Commerce Clause jurisprudence has greatly "departed from the actual conception of the Commerce Clause" in finding that Maryland's tax scheme should be upheld.[144]

IV. ANALYSIS

In *Comptroller of the Treasury v. Wynne*,[145] the United States Supreme Court held that Maryland's failure to offer its residents a credit for taxes paid to other states caused its county tax to violate the dormant Commerce Clause.[146] In deciding the constitutionality of Maryland's state tax scheme under the dormant Commerce Clause, the majority opinion, authored by Justice Alito, afforded the internal consistency test undue deference by applying it strictly.[147] Justice Ginsburg's dissent, on the other hand, correctly argued that the State should be able to tax all of its residents' income regardless of the internal consistency of the tax.[148] The two opinions, both supported by significant Supreme Court jurisprudence, did nothing to relieve the historical contention between these two competing strands of jurisprudence.[149]

Here, the *Wynne* Court, including both the majority and the principal dissent, erred by failing to compromise. Rather than reprising the opinions of their long-standing strands of jurisprudence that have created inconsistent results, the Court should have incorporated some of the principles of each strand of jurisprudence in order to create a Bridge Test, as devised below.[150] Although the rise of the *Complete Auto* test and the internal consistency test allow the *Wynne* majority to defeat Maryland's tax scheme, the legitimate principles, developed through significant Supreme Court precedent, and upon which the *Wynne* dissent relies, were not adequately reconciled and not applied to Commerce Clause cases as often

143. *Id.* at 1811 (Thomas, J., dissenting) (quoting McBurney v. Young, 133 S. Ct. 1709, 1721 (2013) (Thomas, J., concurring)).

144. *Id.*

145. 135 S. Ct. 1787 (2015).

146. *Id.*

147. *Id.* at 1803.

148. *Id.* at 1821 (Ginsburg, J., dissenting).

149. *See supra* Part III.A–B.

150. It is true that even a new test incorporating aspects of both strands of jurisprudence likely would not have received the support of all nine Supreme Court justices. Both the majority and the principal dissent acknowledge the existence of the dormant Commerce Clause and have incorporated it into their judicial decisionmaking on issues of state taxation. In their dissents, Justices Scalia and Thomas both deny the existence of the dormant Commerce Clause and thus, would likely decline to subscribe to any new test that the Court or this Note might propose.

as those of the *Wynne* majority strand of jurisprudence, the principles adopted by the *Wynne* dissent strand of jurisprudence are far-reaching and can be legitimately applied in conjunction with those of the *Wynne* majority. In many respects, *Wynne* presents the perfect fact pattern with which to bridge the gap and end the competition between them.

The Court has had ample time to recognize both that their respective principles can be reconciled, and the necessity for creating a unifying test with criteria that allow for more consistent decisions going forward. Instead of doing so, the *Wynne* majority and principal dissent respectively decided to stand on its preferred principles, eschewing the opportunity to create a compromise that would lead to consistent results. Part IV.A. of this Note introduces a new test for deciding issues of state taxation under the Commerce Clause. Part IV.B. discusses the ways in which this new test incorporates the fundamental principles of both strands of jurisprudence in order to bridge the gap between them. Finally, Part IV.C. discusses the various ways in which this new test incorporates aspects of each wing of the Court's past decisions in order to create a compromise that produces consistent and replicable results.

A. The "Bridge Test": Bridging the Gap Between the Competing Strands of State Tax-Related Commerce Clause Jurisprudence

In order to resolve the long-standing dormant Commerce Clause conflict between two strands of jurisprudence, the Court should have created a test that incorporates significant aspects of both strands. The "Bridge Test" proposed in this Note, in contrast, creates a consistent and unifying method for deciding issues of state taxation under the Commerce Clause.

Importantly, the Bridge Test adopts the principle espoused in *American Trucking Associations Inc. v. Michigan Public Service Commission*, in which the Court upheld a Michigan state tax that appeared to be internally inconsistent.[151] In *American Trucking II*, the Court was "obviously uncomfortable with [the] implications" of a strict application of the internal consistency test and decided to apply it leniently.[152] The implications of the *Wynne* Court's strict use of the internal consistency test are equally troubling,[153] so the Bridge Test adopts a similarly lenient application.

151. Am. Trucking Ass'ns. Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (2005). This case is commonly referred to as "*American Trucking II*."

152. Walter Hellerstein, *Is "Internal Consistency" Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1, 26 (2007). A "strict application" of the internal consistency test is one in which a failure causes the tax to be deemed unconstitutional. A "lenient application" of the internal consistency test is one in which a failure can be overcoming based on the satisfaction of other decisive factors.

153. *See* text accompanying *supra* notes 3–16.

The Bridge Test is designed to replace the *Complete Auto* test that has failed to resolve the division between competing strands of jurisprudence.[154] In utilizing the Bridge Test, the Court should first consider whether the state's tax scheme passes the internal consistency test. If the tax scheme is internally consistent, it is constitutional under the dormant Commerce Clause. If it is not internally consistent, there is a rebuttable presumption that the tax scheme is unconstitutional. However, a state's tax scheme can overcome such a presumption of unconstitutionality if it passes the following factor test:[155] (1) the tax is not facially discriminatory towards out-of-state interests; (2) the interests most directly burdened by the tax have a remedy in the political process; and (3) the tax is externally consistent. In applying the Bridge Test to the facts in *Wynne*, the Maryland tax scheme is constitutional.

B. The Bridge Test Unites Two Competing Strands of Jurisprudence by Incorporating the Fundamental Principles That Each Wing of the Court Values

The majority and principal dissenting opinions in *Wynne* represent two individual and long-standing strands of Supreme Court jurisprudence on constitutional taxation issues. Justice Alito's majority opinion advocates for an active use of the dormant Commerce Clause and the internal consistency test in striking down instances in which a state's tax scheme might create the possibility of double taxation.[156] Justice Ginsburg's principal dissenting opinion relies on the "'well established principle of interstate and international taxation' that 'sovereigns have authority to tax all income of their residents, including income earned outside their borders.'"[157]

Although these strands of jurisprudence are well supported by precedent in their own right, they have not been reconciled. Importantly,

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154. *See supra* notes 40–41 and accompanying text.

155. The author has titled this test the "Bridge Test."

156. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1803 (2015) ("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.'" (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959))). Justice Alito stated that the Court should utilize the internal consistency test to "identify tax schemes that [discriminate] against interstate commerce" and cites instances in which the Court has used it. *Id.* at 1803; *see also* Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 247 (1987) (noting that "a tax must have 'what might be called internal consistency'"); Armco, Inc. v. Hardesty, 467 U.S. 638, 644 (1984) (applying the internal consistency test "where the allegation is that a tax on its face discriminates against interstate commerce"); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (applying the internal consistency test in order to apportion income of a business "within and without the State").

157. *Wynne*, 135 S. Ct. at 1817 (Ginsburg, J., dissenting) (citing Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 470, n.12 (1995)).

each strand of jurisprudence has utilized the principles central to their idea of appropriate state taxation in order to rule on instances of potential double taxation. For instance, the majority relies upon *JD Adams*, *Gwin*, and *Central Greyhound*,[158] in which the Court "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" on both Due Process Clause and Commerce Clause grounds.[159]

On the other hand, the *Wynne* dissent emphasizes the ruling in *Shaffer v. Carter*,[160] in which the Court upheld "a tax on a nonresident's in-state income" that "exposed taxpayers to the . . . risk of double taxation."[161] In *Shaffer*, the *Wynne* dissent wing of the Court relies on its fundamental principle of respect for the sovereignty of the states to tax their residents' income and resolves the case on Due Process Clause grounds, avoiding the Commerce Clause entirely.[162] The *Shaffer* Court refers to its "fundamental principles" in asserting that states have "complete dominion over all persons, property, and business transactions within their borders . . . [States] have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses."[163]

The majority and principle dissent in *Wynne* clarify their respective strands of jurisprudence but make no effort to bridge the gap between them. Consequently, the Bridge Test proposed in this Note incorporates the fundamental principles of both strands of jurisprudence as well as the legal values that they each hold in order to create a manageable and consistent method for deciding issues of state taxation in the future. Part IV.B.1–2 of this Note discusses how the Bridge Test assuages the *Wynne* majority wing of the Court's desire to invalidate instances of harmful economic protectionism and to limit instances of double taxation under the dormant Commerce Clause. Part IV.B.3 discusses the ways in which the Bridge Test incorporates the *Wynne* dissent wing of the Court's desire to respect a state's sovereign ability to tax all of its residents' income within the confines of the Constitution. Part IV.B.4. analyzes the ways in which the Bridge Test eschews meaningless distinctions in order to bring together the two strands of jurisprudence.

158. *See supra* note 58.

159. *Wynne*, 135 S. Ct. at 1795.

160. 252 U.S. 37 (1920).

161. *Wynne*, 135 S. Ct. at 1818 (Ginsburg, J., dissenting). In her dissent, Justice Ginsburg also cites *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946), in which the Court rejected the argument that a California tax on net income from interstate commerce violated the Commerce Clause. *Id.*

162. *Shaffer*, 252 U.S. at 58–59.

163. *Id.* at 50.

1. The Bridge Test Satisfies the Wynne *Majority Wing's Desire to Invalidate Instances of Harmful Economic Protectionism*

In his majority opinion, Justice Alito clearly asserts that the Commerce Clause was intended to "avoid the tendencies toward economic Balkanization"[164] among the states and to eliminate "the risk of double taxation . . . which the commerce clause forbids."[165] The *Wynne* majority wing of the Court can satisfy such interests while still upholding Maryland's controversial tax scheme under the Bridge Test.

There are no provisions in the Bridge Test that impede the Court's ability to root out economic protectionism. When assessing if a statute risks economic protectionism under the dormant Commerce Clause, courts must decide whether the tax scheme is "designed to benefit in-state economic interests by burdening out-of-state competitors."[166] For instance, under the Bridge Test, the Court would have no problem replicating the result in *Bacchus Imports Ltd. v. Dias*,[167] in which it struck down a state law that grants tax exemptions to in-state producers of a good in order to benefit in-state producers of that good at the expense of out-of-state producers.

However, under the Bridge Test, the Court would have come to a different decision in *Wynne* while still respecting the wing of the Court that believes that the dormant Commerce Clause prohibits economic protectionism. The Maryland state tax scheme does not implicate the *Wynne* majority wing of the Court's desire to utilize the Commerce Clause to root out instances economic protectionism simply because it alone does not engage in unconstitutional economic protectionism. Presumably, a protectionist tax scheme is one that "provid[es] a direct commercial advantage to local businesses" or "subject[s] interstate commerce to the burden of 'multiple taxation.'"[168] However, by levying a tax on income earned out of state without offering a credit for taxes paid to other states on that income, Maryland's tax scheme actually burdens many in-state interests and does not directly burden out-of-state interests. Maryland residents who have to pay taxes in two states are the actors truly burdened by the tax scheme. These Maryland residents have a direct remedy within the political process. There is no need for the Commerce Clause to strike down what is essentially an internal state matter. Residents of states other

164. *Wynne*, 135 S. Ct. at 1794 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26, (1979)). Economic "Balkanization" is a symptom of economic protectionism that results when "barriers [are] so high between the states that the stream of interstate commerce cannot flow over them." H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 554 (1949).

165. *Wynne*, 135 S. Ct. at 1795 (quoting J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938)).

166. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

167. 468 U.S. 263 (1984).

168. *Wynne*, 135 S. Ct. at 1974 (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

than Maryland are free to earn income in Maryland and pay Maryland income taxes at the same rate that Maryland residents do. Further, Maryland itself does not subject interstate commerce to double taxation. Whether or not the income earner's home state decides to offer a credit is not Maryland's concern. Consequently, the Bridge Test allows the Court to utilize the Commerce Clause in instances in which it is the only available tool to prevent economic protectionism. The Bridge Test would uphold Maryland's tax scheme without infringing upon the Commerce Clause's fundamental anti-protectionist purpose.

However, there are many who argue that Maryland's tax scheme results in economic protectionism that would make "any rational resident decide to seek employment solely in-state, or to avoid investing in interstate partnerships and S-corporations."[169] Although the Maryland tax scheme may well be bad economic policy, such issues are to be determined by state legislatures, and thus, the people.[170] Clearly, "it is not . . . a purpose of the Commerce Clause to protect state residents from their own state taxes."[171] Yet, even if those who agree with the *Wynne* majority wing are correct, a protectionist statute can nevertheless be "justified by a valid factor unrelated to economic protectionism."[172]

The Bridge Test incorporates such a justification by allowing a state tax to overcome a failure of the internal consistency test if the interests directly burdened by the tax have a remedy in the political process.[173] Although this aspect of the Bridge Test does impinge slightly on the *Wynne* majority wing's strong view of the Commerce Clause and the internal consistency test, it does not significantly damage it. The Bridge Test would still allow the Court to utilize the Commerce Clause to strike down instances of economic protectionism where the interests primarily impacted by a state tax scheme did not have a remedy in their state's political process. For instance, in *Kassel v. Consol. Freightways Corp.*,[174] the Court struck down an Iowa statute that "restricts the length of vehicles that use its highways" as violating the Commerce Clause.[175] Assume, for purposes of this example, that rather than a restriction on the length of trucks, Iowa imposed a tax on all trucks over sixty feet in length that traveled into the state. Applying the Bridge Test, the Court would still find this facially neutral tax unconstitutional. First, the tax scheme would fail the internal consistency test. If applied by every state in the country, all trucks over

169. Supplemental Brief for Respondents at 13, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485).

170. *Wynne*, 135 S. Ct. at 1815 (Ginsburg, J., dissenting).

171. *Id.* at 1814 (quoting Goldberg v. Sweet, 488 U.S. 252, 266 (1989)).

172. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992).

173. *See infra* Part IV.C.2.

174. 450 U.S. 662 (1981).

175. *Id.* at 665.

sixty feet traveling in interstate commerce would be at a distinct disadvantage. To overcome the presumption of unconstitutionality that accompanies a failure of the internal consistency test, the tax must pass three factors. First, the tax must not be facially discriminatory. Here, the tax applies evenly to all trucks over sixty feet. Second, those primarily impacted by the tax must have a remedy in the political process. Here, the tax fails. The burden of this tax primarily lies upon the trucking companies who are located in states outside of Iowa and thus have no potential remedy in the Iowa political process. Consequently, the tax fails the Bridge Test and is unconstitutional.

2. The Bridge Test Satisfies the Wynne *Majority Wing's Desire to Limit Instances of Double Taxation*

The *Wynne* majority believes that the Commerce Clause forbids instances in which interstate commerce is "subjected to the risk of a double tax burden to which intrastate commerce is not exposed."[176] The Bridge Test proposed by this Note would allow the *Wynne* majority wing of the Court to strike down many instances in which a state tax creates the risk of double taxation under the dormant Commerce Clause, while upholding state taxes that create a risk of double taxation but do not offend the dormant Commerce Clause's purpose.

As it is oft noted by proponents of the principal dissent, there is no direct constitutional provision against double taxation.[177] The *Wynne* majority itself even admits that there are "permissible arrangements that might result in double taxation" when such double taxation is the result of "two different but nondiscriminatory tax schemes."[178]

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176. J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

177. The Constitution does not:

> [R]equire one State, in this case Maryland, to limit its residence-based taxation, should the State also choose to exercise, to the full extent, its source-based authority. States often offer their residents credits for income taxes paid to other States, as Maryland does for state income tax purposes. States do so, however, as a matter of tax "policy."

Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1813–14 (2015) (Ginsburg, J., dissenting) (citing Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 n.12 (1995)). The "rationales for a State taxing its residents' worldwide income are not diminished by another State's independent interest in 'requiring contributions from [nonresidents] who realize current pecuniary benefits under the protection of the [State's] government.'" *Wynne*, 135 S. Ct. at 1816 (quoting Shaffer v. Carter, 252 U.S. 37, 51 (1920)).

178. *Id.* at 1804. The *Wynne* majority argues that Maryland's tax scheme is "inherently discriminatory" because it fails the internal consistency test. *Id.* at 1805. However, the Bridge Test proposed in this Note allows Maryland's tax scheme to overcome a finding of internal inconsistency. As a result, under the Bridge Test, any risk of double taxation can be seen as resulting from the interaction of Maryland's valid tax scheme with the valid tax schemes of other states.

Double taxation is primarily objectionable when it "cause[s] inequalities between different taxpayers."[179] Maryland's tax scheme does not cause inequalities between tax payers because "the same tax is levied on 1) residents who earn income in State, 2) residents who earn income out of State, and 3) nonresidents who earn income in-State."[180] Accordingly, the *Wynne* majority wing utilizes the internal consistency text to cure tax schemes that "place interstate commerce at a disadvantage as compared with commerce intrastate."[181] By incorporating the internal consistency test as a threshold aspect of the Bridge Test, the *Wynne* majority wing of the Court will still be able to strike down many instances of economic protectionism that result in taxpayer inequalities. It is only when all three of the remaining prongs of the Bridge Test are satisfied that a tax resulting in inequalities amongst taxpayers would be upheld. However, because not all instances of double taxation are inherently unconstitutional, the Bridge Test leaves room for tax schemes like Maryland's to remain valid.

3. The Bridge Test Satisfies the Wynne *Dissent Wing's Desire to Respect a State's Sovereign Ability to Tax Resident Income Within the Confines of the Constitution*

In her principal dissenting opinion, Justice Ginsburg articulates a principle fundamental to her strand of jurisprudence: a state may "tax '*all* the income of its residents, even the income earned outside the taxing jurisdiction.'"[182] Because the Bridge Test allows a presumptively unconstitutional tax to be deemed valid, the level of scrutiny in assessing state tax schemes is increased.

There is nothing in the Constitution, or in Supreme Court jurisprudence that requires one of two taxing states to "recede simply because both have lawful tax regimes reaching the same income."[183] For instance, the Court in *Moorman Manufacturing Co. v. Bair*[184] found that the disparity between two taxing states "can only be the combined effect" of both statutes and the state in which the income was earned "is not responsible."[185]

By applying the internal consistency test strictly, the *Wynne* Court found that Maryland's tax should be the one to recede, despite the fact that it would be constitutional without the presence of the other state's tax

179. Carl C. Plehn, *Double Taxation*, 11 PUB. POL'Y 284, 286 (1904).

180. *Wynne*, 135 S. Ct. at 1804.

181. *Id.* at 1803.

182. *Id.* at 1798 (quoting Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995)).

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

184. 437 U.S. 267 (1978).

185. *Id.* at 277 n.12.

scheme. The Bridge Test, however, would not force Maryland "to limit its residence-based taxation,"[186] and thus, its sovereign ability to tax. On the contrary, it affords states the sovereignty to tax its residents' income earned out of state without having to worry about how the other states choose to tax. Here, a state's ability to tax is limited only by the principles underlying the dormant Commerce Clause or a tax that discriminates on its face and affords no remedy for those burdened in the political process.

It must be noted, however, that a lenient application of the internal consistency test means only that a failure can be overcome by the satisfaction of multiple other factors. Should one of the remaining factors not be satisfied, the state tax scheme is unconstitutional. For instance, if Maryland taxed residents of other states earning income in Maryland at a higher rate than Maryland citizens earning income at home, the tax would fail both the "facially discriminatory" and the "political process" prongs of the Bridge Test and be unconstitutional.

State governments have a multitude of financial and economic responsibilities to their tax-paying residents.[187] In fact, "States long favored their residents over non-residents in the provision of local services."[188] As such, Maryland's financial and economic rationales for "taxing its residents' worldwide incomes are not diminished by another State's independent interest in 'requiring contributions from [nonresidents] who realize current pecuniary benefits under the protection of the [State's] government.'"[189] Consequently, a state can hardly afford for its tax, which would be constitutional if assessed independently of other states' commensurate taxes, to be deemed invalid under the Commerce Clause.[190]

The Bridge Test also restricts the Commerce Clause to its proper scope. In *Goldberg v. Sweet*[191] the Court held that "it is not a purpose of the Commerce Clause to protect state residents from their own state taxes."[192] By granting states greater autonomy in taxing all of their residents' income, the Bridge Test works within the confines of the dormant Commerce Clause while respecting the *Wynne* dissent wing of the Court's desire to maintain state sovereignty to tax.

186. *Wynne*, 135 S. Ct. at 1813–14 (Ginsburg, J., dissenting).

187. *Id.* at 1814 ("According to the State's Comptroller, for example, in 2012 Maryland and its local government spent over $11 billion to fund public schools, $4 billion for state health programs, and $1.1 billion for the State's food supplemental program—all programs available to residents only.").

188. *Id.*

189. *Id.* at 1816 (quoting Shaffer v. Carter, 252 U.S. 37, 51 (1920)).

190. The *Wynne* decision leaves Maryland "and its counties on the hook for as much as $200 million in refunds" and will cause it to face "significant cuts in revenue." Turque, *supra* note 9.

191. 488 U.S. 232 (1989).

192. *Id.* at 266.

4. The Bridge Test Eschews Meaningless Distinctions in Order to Bring Together the Two Strands of Jurisprudence

One of the *Wynne* Court's major failings is that the majority and principal dissent adopt their strand of jurisprudence's long-held positions. Rather than bridging the gap between them, the majority and principal dissenting opinions spar over legal disputes that appeared to be settled. The Bridge Test allows bygones to be bygones simply by accepting what has been decided when there is no significant case law to refute the conclusion. Such acceptance causes divisions between the strands of jurisprudence to vanish, helping to bring about a consistent way to decide issues of state taxation.

The *Wynne* majority points to three cases, *JD Adams*, *Gwin*, and *Central Greyhound* as central cases in which the Court "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."[193] However, the principal dissent attempts to distinguish these cases on the ground that they involved a tax on gross receipts rather than a tax on net income.[194] Although the distinction was once meaningful,[195] taxes on gross receipts and net income have now been "placed on an equal footing."[196] Purposefully, the Bridge Test makes no mention of such a distinction in order to eliminate it, once and for all.

In furtherance of its strand of jurisprudence's desire to eliminate tax schemes that "[operate] as a tariff,"[197] the majority opinion likens Maryland's tax scheme to a tariff and considers it "inherently discriminatory" on that basis.[198] While the majority is clear in characterizing tariffs as "the paradigmatic example of a law discriminating against interstate commerce,"[199] the majority failed to mention what a tariff actually *is*. A tariff "taxes interstate activity at a higher rate than it taxes the same activity conducted within the state"[200] and "handicap[s] out-of-state competitors." Consequently, the Bridge Test's provision causing a state tax scheme to be unconstitutional if it is facially discriminatory will stamp out

193. *Wynne*, 135 S. Ct. at 1795.

194. *Id.*

195. *Id.* at 1796 (Noting that the "distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible 'direct and immediate burden' on interstate commerce, whereas a tax on net income is merely an 'indirect and incidental' burden" (quoting U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328–29 (1918))).

196. 2 C. TROST & P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 2D § 9:1, at 212 (2003).

197. *Wynne*, 135 S. Ct. at 1804.

198. *Id.*

199. *Id.* (quoting W. Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994)).

200. *Id.* at 1821 (Ginsburg, J., dissenting).

instances of impermissible state tariffs.[201] However, Maryland's income tax scheme taxes its residents' income "at precisely the same rate, whether income is earned in or out-of-state."[202] Thus, it is quite clear that, despite the *Wynne* majority's forceful contention, Maryland's tax scheme is not functionally equivalent to a tariff.

C. The Bridge Test Creates a Consistent and Unifying Method for Deciding the Constitutionality of State Tax Schemes

In order to bring together two long-standing strands of state tax-related Commerce Clause jurisprudence, the Bridge Test selects valued principles from each strand in order to create a consistent way to decide state taxation cases in the future. In order to create a test agreeable to both sides, the Bridge Test incorporates some of the fundamental aspects of both strands so that neither has significant aspects of their ideology left out. In an attempt to satisfy the *Wynne* majority's strand, the Bridge Test incorporates the internal consistency test as a threshold and the external consistency test as a backup plan of sorts. In order to satisfy the *Wynne* principal dissent's strand, the Bridge Test allows a failure of the internal consistency test to be overcome by certain factors that prevent the tax from being overly burdensome on interstate commerce or those for whom the tax principally affects. Part IV.C.1 discusses the way in which the Bridge Test applies the internal consistency test leniently. Part IV.C.2 discusses how the Bridge Test allows for a state tax to overcome a presumption of unconstitutionality if it is not facially discriminatory and if the interest most directly burdened by the tax has a remedy in the political process. Part IV.C.3 of this Note discusses the way in which the Bridge Test's use of the external consistency test ensures that any state tax scheme under review fairly reflects a state's taxing interest.

1. The Bridge Test Applies the Internal Consistency Test Leniently

In deciding the constitutionality of Maryland's state tax scheme under the dormant Commerce Clause, the *Wynne* Court focuses almost entirely on the internal consistency test. The Court plainly stated that, "Maryland's income tax scheme fails the internal consistency test."[203] However, the Court does not consider that, based on Supreme Court jurisprudence, there are situations in which the internal consistency test need not be applied strictly.

201. *W. Lynn Creamery*, 512 U.S. at 193.
202. *Wynne*, 135 S. Ct. at 1822.
203. *Id.* at 1803.

In *American Trucking Associations, Inc. v. Michigan Public Service Commission*,[204] Michigan imposed a flat fee on trucks transporting interstate goods.[205] The taxpayers engaged in the interstate commerce challenged the fee on the grounds that it "bore more heavily on trucks engaged in interstate commerce . . . than on trucks engaged only in intrastate commerce."[206] The Supreme Court upheld Michigan's fee under the Commerce Clause despite the fact that it "concede[dly]" failed the internal consistency test.[207]

The Bridge Test proposed in this Note adopts a similarly lenient use of the internal consistency test as that in *American Trucking II*.[208] Under the Bridge Test, an internally inconsistent state tax scheme is *presumptively* unconstitutional. However, such a presumption can be overcome by the satisfaction of other factors,[209] reflecting a situation in which a state tax does not violate the fundamental purposes of the dormant Commerce Clause.

It is true that the internal consistency test is beneficial in assessing the constitutionality of tax scheme. Some would argue that the *Wynne* Court's use of the internal consistency test prevented the states from gaining the "tools to 'Balkanize' the national economy."[210] Because the Bridge Test utilizes the internal consistency test as a critical threshold, it incorporated the *Wynne* majority's desire to prevent instances of double taxation that result in economic isolationism amongst the states. A failure of the internal consistency test can only be overcome in a narrow set of circumstances that implicate the fundamental purpose of the dormant Commerce Clause to protect the burdened out-of-state interests without a voice in the political process.

A strict use of the internal consistency test when assessing the constitutionality of state tax schemes that create a potential burden of double taxation would be inappropriate. The internal consistency test looks

204. 545 U.S. 429 (2005).

205. *Id.* at 431.

206. Hellerstein, *supra* note 152, at 26.

207. *American Trucking II*, 545 U.S. at 438.

208. It is clear that the ruling in *American Trucking II* itself would not have had an impact on the decision in *Wynne* absent the Bridge Test. The Bridge Test uses the principles espoused in *American Trucking* in order to reach a different conclusion in *Wynne*. Hellerstein, *supra* note 152, at 34 ("*American Trucking* does not appear to have any direct impact on decisions holding that an insufficiently protective tax credit fails to provide a remedy for an internally inconsistent tax. There is certainly nothing in *American Trucking II* that can be read to modify the basic proposition that tax credits ordinarily provide a defense to any claim that a tax is internally inconsistent.").

209. *See infra* Part IV.C.2.

210. Michael S. Knoll & Ruth Mason, Comptroller v. Wynne*: Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax*, 163 U. PA. L. REV. ONLINE 267, 283 (2015).

to "the structure of the tax at issue to see whether its identical application by *every state in the Union* would place interstate commerce at a disadvantage when compared with commerce intrastate."[211] However, this speculative assumption in the *Wynne* case creates a hypothetical situation that is impossible to exist.

Assume that forty-nine states in the Union taxed as Maryland did before the *Wynne* decision. In the real world, the only state that did not tax as Maryland did would never decide to change its taxing scheme to conform with the other forty-nine. Accepting the logic of the *Wynne* majority, the lone state would surely be a haven for businesses that wish to operate in interstate commerce and avoid "oppressive" double taxation. The *Wynne* majority itself claimed not to "decide the constitutionality of a hypothetical tax scheme . . . because such a scheme is not before us."[212] By allowing a failure of the internal consistency test to be overcome, the Bridge Test follows the *Wynne* majority's own advice.

The Court's ruling in *American Trucking II* makes it clear that a lenient application of the internal consistency test is permissible. Noted tax scholar, Professor Walter Hellerstein, indicated that "the Court's disposition of the internal consistency claim in *American Trucking II* marks a clear retreat from the internal consistency doctrine as explicated in earlier cases."[213] Because the Court in *American Trucking II* "looked the implications of the internal consistency doctrine square in the eye and blinked" it tacitly gives the Court the ability to do so in other decisions.[214] The Bridge Test proposed in this Note endorses this move by the Court.

The facts in *Wynne* present an instance in which the Court should again blink at the implications of a strict application of the internal consistency test. A strict application would most directly result in an overreach into the political process[215] and an erosion of a state's sovereignty to tax,[216] especially in a situation that implicates the purpose of the Commerce Clause to protect burdened out-of-state interests without a voice in the political process.

211. Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995) (emphasis added).

212. *Wynne*, 135 S. Ct. at 1806.

213. Hellerstein, *supra* note 152, at 26.

214. The author acknowledges that the facts in *American Trucking II* and *Wynne* are not analogous. This Note does not attempt to liken the two cases. The Bridge Test simply adopts the idea that a tax's failure of the internal consistency test should not automatically result in that tax's unconstitutionality.

215. *See infra* Part IV.C.2.

216. *See supra* Part IV.B.3.

2. The Bridge Test Allows a State Tax to Overcome the Presumption of Unconstitutionality

The internal consistency test is simply intended to ensure "fairness in an income tax apportionment formula."[217] However, this test "asks nothing about the degree of economic reality reflected by the tax" and has "evolved into a robust doctrine barring any state tax" that fails.[218] Consequently, the Court needs a safety valve for when the internal inconsistency test overreaches, as it does in the *Wynne* case.

The Bridge Test allows the internal consistency test to be overcome if a state tax scheme is not facially discriminatory. It is clear that "state laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'"[219] Facially discriminatory taxes "'mollif[y]' some of the 'in-state interests [that] would otherwise lobby against' it."[220]

Even-handed taxes, or, those that are not facially discriminatory,[221] are typically upheld because "the existence of major in-state interests adversely effected . . . is a powerful safeguard against legislative abuse."[222] Because the Commerce Clause is intended to protect the free flow of commerce amongst the states, the Court need not have a hand in striking down a law that primarily burdens in-state actors when the legislature and thus, the people, could do so themselves.[223] The double taxation burden that the *Wynne* majority wing of the Court warns of here is actually on the in-state interests with a voice in the political process, *not* on interstate commerce itself.[224]

Consequently, the Bridge Test's inclusion of a provision respecting the political process allows the state the sovereignty to make an independent policy decision.[225] However, the *Wynne* majority need not fear. A state

217. Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

218. Hellerstein, *supra* note 152, at 2.

219. Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996) (quoting Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

220. *Wynne*, 135 S. Ct. at 1815 (Ginsburg, J., dissenting) (quoting W. Lynn Creamery v. Healy, 512 U.S. 186, 200 (1994)).

221. *Id.* (holding "state efforts to tax residents at a higher rate for out-of-state activities than for in state activities (or to exempt from taxation only in-state activities)" constitutes a facially discriminatory tax scheme, whereas even handed taxes, as their name suggests, tax everyone at the same rate).

222. *Id.* (quoting *W. Lynn Creamery*, 512 U.S. at 200).

223. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) ("The people of a state . . . give to their government a right of taxing themselves and their property, and as exigencies of government cannot be limited, they proscribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard then against its abuse.").

224. *Wynne*, 135 S. Ct. at 1814–15 (Ginsburg, J., dissenting).

225. *Id.* at 1816 ("States deciding whether to tax residents' entire worldwide income must choose between legitimate but competing tax policy objectives. A State might prioritize obtaining equal contributions from those who benefit from the State's protection in roughly similar ways.

very well "might prioritize ensuring that its residents are not subject to double taxation"[226] in order to create incentives for economic activity. A great many states with economic needs different from those of Maryland will surely make that choice. However, it is not the responsibility of the Court to "[strike] the right balance between these two [tax] policy objectives."[227] Such a responsibility has "belonged to the States" for "at least a century."[228] The Bridge Test respects that tradition of state sovereignty by allowing for the internal consistency test to be overcome when the purpose of the dormant Commerce Clause is not implicated.

3. The Use of the External Consistency Test Ensures That Any State Tax Scheme Under Review Fairly Reflects a State's Taxing Interest

Under the *Complete Auto* test, the external consistency test[229] looks to the "economic justification for the State's claim upon the value taxed, to discover whether the State's tax reaches beyond that portion of the value that is fairly attributable to economic activity within the taxing state."[230] However, because the external consistency test is traditionally only used when a tax has already passed the internal consistency test,[231] the *Wynne* Court ended their analysis after finding that Maryland's tax scheme was internally inconsistent.

In ensuring whether a tax is fairly apportioned, both the internal and external consistency of a tax should be considered. Under the Bridge Test, should a tax be considered internally inconsistent and thus presumptively unconstitutional, such a finding can be overcome in part by a finding that the tax is externally consistent.

The utilization of the external consistency test satisfies the goals of the Bridge Test because it incorporates significant values that each of the strands of jurisprudence hold. It satisfies the *Wynne* majority wing by giving it yet another tool by which it might strike down a state tax scheme that creates the possibility of double taxation.[232] On the other hand, it

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Or a Sate might prioritize ensuring that its taxpayers are not subject to double taxation. A State cannot, however, accomplish both objectives at once."); *see also id.* ("For at least a century, responsibility for striking the right balance between these two policy objectives has belonged to the States (and Congress), not this Court.").

226. *Id.*

227. *Id.*

228. *Id.*

229. *See supra* text accompanying notes 80–82.

230. Okla. Tax. Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995).

231. Md. State Comptroller of the Treasury v. Wynne, 431 Md. 147, 171 n.21, 64 A.3d 453, 467 n.21 (2013).

232. In Nw. Energetic Services, LLC v. Cal. Franchise Tax Bd., 159 Cal. App. 4th 841, 864 (2008), the court found that a California levy LLC registered in state violated the external

satisfies the *Wynne* principal dissent's wing by allowing it to further define exactly what value is fairly attributable to a state's economic activity.[233] Frankly, both strands of jurisprudence might appreciate the Bridge Test's inclusion of the external consistency test because there has not been a significant amount of Supreme Court jurisprudence applying it.[234] For instance, *Wynne* did not reach the issue of external consistency and the Maryland Court of Appeals touched on external consistency only briefly.[235] As such, each wing of the Court is likely to see the external consistency test as malleable and able to be mended to suit their own interests.

Although not decided in the Supreme Court,[236] it is the opinion of this Note that, given the Supreme Court jurisprudence on the issue as well as the facts at hand, the Maryland tax scheme is externally consistent. Because the *Wynne* Court concedes that "Maryland could remedy its infirmity in its tax scheme by offering, as most States do, a credit for income taxes paid to other states,"[237] it acknowledges that income earned out of state by Maryland residents is "fairly attributable to economic activity within the taxing state"[238] and thus, can reasonably be taxed. Importantly, the Court does not argue that Maryland's county tax is not fairly attributable because it may not tax its residents' income earned out of state at all.

In *Oklahoma Tax Commission v. Jefferson Lines*,[239] the Court laid out some of the boundaries of the external consistency test. Most relevant to the discussion at hand was the Court's proclamation that "the threat of real

consistency test because the levy was "based on non-California income, not attributable to activities in California" and amounted to "extraterritorial taxation."

233. Given its interest in state sovereignty, the *Wynne* dissent wing would likely seek to ensure that a broad range of economic value is attributable to a state's economic activity. Of course, depending on the votes on the Court, such a definition could swing the other way, allowing the *Wynne* majority wing to narrowly define what economic value is fairly attributable to a state's economy.

234. *See* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 380 (1991) (finding that the external consistency test can be applied to the apportionment of a value added tax); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 180–81 (1983) (applying the external consistency test to a California corporate franchise tax that applied the "unitary business principle" in apportionment); Goldberg v. Sweet, 488 U.S. 252, 262 (1989) (applying the external consistency test to an Illinois state tax on interstate telecommunications); Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185–89 (1995) (applying the external consistency test to an Oklahoma sales tax on the price of bus travel from Oklahoma to another state).

235. The Supreme Court in *Wynne* only mentions external consistency in reference to the Maryland Court of Appeals' holding. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1793 (2015). The Maryland Court of Appeals opined that "the operation of the county tax appears to create external inconsistency." *Wynne*, 431 Md. at 172, 64 A.3d at 467.

236. *Wynne*, 431 Md. at 172, 64 A.3d at 467 (holding the issue of external consistency was, however, decided in the Maryland Court of Appeals). Contrary to the assertions of this Note, the Court of Appeals found that "the operation of the county tax appears to create external inconsistency." *Id.*

237. *Wynne*, 135 S. Ct. at 1805.

238. *Jefferson Lines*, 514 U.S. at 185.

239. *Id.*

multiple taxation . . . may indicate a State's impermissible overreaching."[240] However, the Court has not yet discussed exactly what threats of multiple taxation might result in impermissible overreaching in the context of overlapping state taxes. In their *Wynne* decision, the Maryland Court of Appeals even noted that, despite finding the Maryland tax scheme internally inconsistent, it would discuss external consistency "given the possibility that dormant Commerce Clause jurisprudence will continue to develop" on this issue.[241]

Consequently, the issue becomes whether the interaction of Maryland's tax scheme with that of other states creates the possibility of multiple taxation that constitutes "impermissible overreaching."[242] Although *Jefferson Lines* implies that such an overreach may occur broadly, its scope is clearly defined in both *Container Corp. of America v. Franchise Tax Board*[243] and *Japan Line Ltd. v. County of Los Angeles.*[244] The Court in *Japan Line* narrowly construed the context in which a tax might be deemed to impermissibly overreach, stating that the "overlapping of a tax" is a problem that "might be deemed *de minimis* in a domestic context."[245] Here, the state tax scheme, justified both by the fact that it is not facially discriminatory and that those primarily burdened have a voice in the political process, can safely avoid the label of an impermissible overreach.

Further, in *Container Corp.*, the Court argues that it should not undergo the "essentially legislative" task of eliminating *all* overlapping taxation.[246] A task, it adds, that would require the Court to "establish not only a single constitutionally mandated method of taxation, but also rules regarding the application of that method to particular cases."[247]

V. CONCLUSION

In *Comptroller of the Treasury v. Wynne*, the United States Supreme Court concluded that Maryland's "county" tax was unconstitutional because it discriminated against interstate commerce and failed the internal consistency test by subjecting Maryland residents earning income out of state to double taxation.[248] The two competing strands of Supreme Court jurisprudence on issues of state taxation, exemplified by the majority and

240. *Id.*

241. *Wynne*, 431 Md. at 171 n.21, 64 A.3d 453.

242. *Jefferson Lines*, 514 U.S. at 185.

243. 463 U.S. 159 (1983).

244. 441 U.S. 434 (1979).

245. *Id.* at 456 (holding the problem of an overlapping tax assumes a far greater importance "when sensitive matters of foreign relations and national sovereignty are concerned").

246. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 171 (1983).

247. *Id.* Like *Japan Line*, the Court in *Container Corp.* asserts "a more searching inquiry is necessary when confronted with the possibility of international double taxation." *Id.*

248. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

principal dissent in *Wynne*, continued their long-standing Commerce Clause fight. In order to prevent the continuance of two different types of decisions on the same state taxation issues, this Note proposes a Bridge Test that incorporates the constitutional principles as well as the common deciding factors of each of the strands of jurisprudence.[249] The *Wynne* majority favored the a strict use of the internal consistency test too greatly and incorrectly ignored the holding in *American Trucking II* that would have allowed it to utilize the internal consistency test more leniently.[250] Consequently, the Bridge Test proposed in this Note allows a failure of the internal consistency test to be overcome when the tax scheme is not facially discriminatory and the interests directly burdened have a remedy in the political process.[251] Such flexibility allows a state tax, such as the Maryland tax at issue in *Wynne*, to survive constitutional challenges based on the dormant Commerce Clause because the potential burden of double taxation no longer violates the dormant Commerce Clause.[252] Further, the Bridge Test incorporates the external consistency test in order to give courts an extra tool to determine whether or not the state tax scheme in question is fairly apportioned.[253]

Under the Bridge Test, Maryland's county tax would be constitutional, allowing it and similar states the sovereignty to tax without fear that another state's tax might invalidate their own. The Bridge Test brings together two long-at-odds strands of Supreme Court jurisprudence, creating a consistent and replicable method for applying the Commerce Clause to issues of state taxation now and into the future.

249. *See* text accompanying *supra* note 155.
250. *See supra* Part IV.C.1.
251. *See* text accompanying *supra* note 155.
252. *See supra* Part IV.C.2.
253. *See supra* Part IV.C.3.