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Inconsistency with the Internal Consistency Test

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INTRODUCTION

Taxpayers, rejoice. Maryland, pay up. The Supreme Court's recent holding in *Comptroller of the Treasury of Maryland v. Wynne* triggered some harsh consequences, which included Maryland paying taxpayers nearly $200 million in tax refunds.[1] The implications of the Court's decision, however, were hidden underneath a murky analysis of the constitutionality of a Maryland tax law.[2] The Supreme Court ultimately struck down the law for violating the dormant Commerce Clause,[3] which in turn caused the state to make large payouts of refunds to taxpaying residents, who, the Court held, had collectively paid millions in unconstitutional state taxes.[4]

Wynne has immediate practical consequences for states and taxpayers, and a glimpse into the Maryland aftermath gives an indication of what other states might encounter. After the Supreme Court struck down Maryland's partial tax credit law, determining that it violated the internal consistency test, the state cured the unconstitutionality by amending the law to now offer a full tax credit.[5] Additionally, Maryland chose to apply this change retroactively, thus offering a refund to any taxpayer who

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1. Bill Turque, *Court: Maryland has Been Wrongly Double-Taxing Residents Who Pay Income Tax to Other States*, WASH. POST (May 18, 2015), https://www.washingtonpost.com/local/md-politics/supreme-court-rules-maryland-income-tax-law-is-unconstitutional/2015/05/18/1e92ee7a-d16f-11e4-ab77-9646eea6a4c7_story.html [https://perma.cc/93DX-7SZH].

2. *See infra* Part II.C.

3. Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1795 (2015).

4. Although the *Wynne* decision provided no discussion on whether the decision would apply retroactively, the Court articulated its rule on retroactivity when discussing the application of the *Armco* decision. *See* Armco, Inc. v. Hardesty, 467 U.S. 638 (1984). *See also* Ashland Oil, Inc. v. Caryl, 497 U.S. 916 (1990). In *Ashland*, the Court stated the general rule that "constitutional decisions apply retroactively to all cases on direct review." *Id.* at 918. Exceptions to the general rule exist, as articulated in *Chevron Oil Co. v. Huson*. 404 U.S. 97, 106 (1971). Because *Wynne* likely falls under the general rule and not an exception, Maryland chose to apply *Wynne* retroactively, thus offering refunds.

5. H.B. 72, 2015 Leg., Reg. Sess. (Md. 2015), http://mgaleg.maryland.gov/2015RS/bills/hb/hb0072f.pdf [https://perma.cc/24P7-KEDZ] (codified as amended at MD. CODE ANN., TAX–GEN. § 10-703(a) (West 2016)). *See Wynne*, 135 S. Ct. at 1806.

overpaid taxes under the unconstitutional law.[6] This decision will cost Maryland an estimated $200 million in refunds,[7] and it also means that Maryland will collect nearly $40 million less in tax revenue going forward.[8] This tax revenue decrease means budget cuts for Maryland counties, which might result in cutting some services offered to residents.[9] These changes in Maryland are just the beginning. Some commentators have speculated that New York tax law might encounter a challenge similar to the one in *Wynne*,[10] while Kansas has already issued guidance on its tax law changes under *Wynne*.[11] The consequences in Maryland, New York, and Kansas foreshadow what other states will likely suffer if and when their similar tax laws are challenged.

Unfortunately, the broader legal implications of *Wynne* are far less clear than its practical ones for the resident taxpayers of Maryland and other states. *Wynne* presented the Court with the opportunity to clarify a historically confusing and ambiguous area of dormant Commerce Clause doctrine, but the Court's opinion in *Wynne* failed to meet this challenge.[12]

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6. Bill Turque, *Maryland, Opponent of* Wynne *Tax Case, Now Encouraging Residents to Seek Refunds*, WASH. POST (Sept. 28, 2015), https://www.washingtonpost.com/local/md-politics/2015/09/28/657e4c4c-6613-11e5-8325-a42b5a459b1e_story.html [https://perma.cc/44PK-45KW]. *See supra* note 4 and accompanying text.

7. Turque, *supra* note 6. *See supra* note 4 and accompanying text. After Maryland's decision to apply its tax amendment retroactively, Maryland instructed taxpayers to collect any authorized refunds for any taxes overpaid to Maryland. The Maryland comptroller office issued a bulletin informing Maryland taxpayers of the required action for collecting refunds. *Comptroller of the Treasury of Maryland v. Wynne: Frequently Asked Questions*, COMPTROLLER OF MD., http://taxes.marylandtaxes.com/Individual_Taxes/Individual_Tax_Types/Income_Tax/Tax_Information/Wynne_Case/Initial_Wynne_FAQs.pdf [https://perma.cc/K7WF-PBCW] (last updated Dec. 7, 2015).

8. Turque, *supra* note 1.

9. Bill Turque & Donna St. George, *Leggett Proposes $50 Million in Cuts to New Montgomery Budget*, WASH. POST (July 9, 2015), https://www.washingtonpost.com/local/md-politics/leggett-proposes-50-million-in-cuts-to-new-montgomery-budget/2015/07/08/652fb730-25b8-11e5-b77f-eb13a215f593_story.html [https://perma.cc/8P2L-Z9AA].

10. Ashlea Ebeling, Wynne *Decision Boon To NYC Pied-A-Terre Owners*, FORBES (May 21, 2015, 7:59 AM), http://www.forbes.com/sites/ashleaebeling/2015/05/21/wynne-decision-boon-to-nyc-pied-a-terre-owners/#2715e4857a0b50a0d40f5502 [https://perma.cc/ZKV6-QQUM].

11. Brian Kirkell, *Kansas DOR Provides Guidance in Response to* Wynne, RSM (Aug. 11, 2015), http://rsmus.com/what-we-do/services/tax/tax-alerts/kansas-dor-provides-guidance-in-response-to-wynne.html [https://perma.cc/7TRC-RZF4].

12. *See, e.g.*, Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 149

Recent history of state taxation cases shows the Court wavering between two tests—the *Complete Auto* test and the internal consistency test—with little rhyme or reason.[13] In deciding whether the Maryland tax violated the dormant Commerce Clause, the Court in *Wynne* applied the internal consistency test without satisfactory explanation as to why and failed to specifically repudiate its past inconsistencies. As a result, lower courts must grapple with *Wynne*'s future legal implications: does it actually announce a new controlling standard, or does it simply perpetuate the confusion that its predecessor cases had sown?

Honing in on the Court's confusing jurisprudence, this Comment argues that *Wynne* should be read as identifying the internal consistency test as the leading standard for state taxation analysis. Even in light of the test's shortcomings, which the four dissenting Justices identified, the benefits of the internal consistency test make it the preferable choice—namely because of its simplicity, its broad scope, and its consistency with state autonomy. In endorsing the internal consistency test, however, the majority opinion in *Wynne* still had its weaknesses, leaving questions open for courts applying the test in future state taxation cases.

Part I of this Comment provides an overview of the erratic history of state taxation under the dormant Commerce Clause. Part II explains the divided Supreme Court's most recent analysis in *Comptroller of the Treasury of Maryland v. Wynne*. Finally, Part III argues that the Court correctly chose the internal consistency test as the leading standard but should have presented its final decision more clearly.

I. THE CONFUSED STATE OF STATE TAXATION

Courts often evaluate challenged state tax laws within the framework of the dormant Commerce Clause doctrine. In light of that focus, this Comment first provides a brief overview of the dormant Commerce Clause doctrine and then explains more specifically the doctrine's role in state taxation cases.

(2002) (noting that "the [Supreme] Court's state tax decisions over the past century have hardly followed a consistent or logical path").

13. *See infra* note 50. For an overview of the internal consistency test's application over time see Walter Hellerstein, *Is "Internal Consistency" Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1 (2007) [hereinafter *Is "Internal Consistency" Dead?*].

A. Overview of the Dormant Commerce Clause

Although the Commerce Clause explicitly grants Congress the power to regulate interstate commerce,[14] the Supreme Court has long recognized that this affirmative grant of power also implies a negative command that prohibits states from burdening interstate commerce.[15] The negative command is known as the dormant Commerce Clause[16] and directs that states do not have the ability to regulate interstate commerce absent congressional action to do so.[17]

In general, the dormant Commerce Clause prohibits states from enacting laws that favor commerce within their own borders to the detriment of other states, thus addressing a fear that dates back to the beginning of the Union.[18] This action by the states is known as "economic protectionism"—that is, protection of intrastate economic interests while burdening interstate interests.[19] Throughout history, courts have used the dormant Commerce Clause to strike down state laws that burden interstate commerce, either on the face of the law or through the effects of the law.[20]

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14. U.S. CONST. art 1, § 8, cl. 3 (granting Congress the power "to regulate commerce . . . among the several States").

15. *See, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984); Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

16. *Okla. Tax Comm'n*, 514 U.S. at 179–80 (discussing the dormant Commerce Clause).

17. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015).

18. *Id*. *See also* Dan T. Coenen, *Why* Wynne *Should Win*, 67 VAND. L. REV. EN BANC 217, 241–42 (2014). Coenen discusses the history of the dormant Commerce Clause, stating that "the spirit that lay behind replacing the Articles of Confederation . . . was not centered on preserving the powers of the states, particularly with regard to local disruptions of free-flowing interstate trade." *Id*. He notes that Alexander Hamilton echoed that same notion in *The Federalist No. 22*, "condemning the very set of laws at which the dormant Commerce Clause continues to take aim." *Id*.

19. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008).

20. *See* Jennifer L. Larsen, Comment, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 854 (2004) (discussing the modes of discrimination in the dormant Commerce Clause). Larsen distinguishes between three modes of discrimination: discrimination on the face of the statute, discrimination in the effects of the statute, and discrimination in the purpose behind the statute. *Id.* Discrimination in effect and discrimination in the purpose operate similarly with similar outcomes and thus could be categorized together. *Id.*

Bacchus Imports provides a good example of the dormant Commerce Clause in action. In *Bacchus Imports, Ltd. v. Dias*, the Court struck down a Hawaii liquor tax that offered a special exemption to liquor companies using okolehao in their products.[21] Okolehao was a local plant grown only in Hawaii and thus any liquor company eligible for the tax exemption would likely be a Hawaiian company.[22] The Court found that although this law did not facially discriminate against interstate commerce, by perhaps specifically offering the tax exemption to "Hawaiian liquor companies only," the law essentially had a discriminatory effect by offering the exemption based on the usage of a local plant.[23] Decisions like *Bacchus Imports* highlight the Court's ongoing commitment to eliminate intrastate protectionism and ensure a free flow of economic activity between and across state borders.[24]

B. State Taxation Under the Dormant Commerce Clause

Many constitutional challenges to state laws relate to state taxation, as seen in *Bacchus Imports*. The Supreme Court has noted that although a state may have the appropriate authority to tax a certain taxpayer, the tax imposed may not be imposed in a manner that "unduly burden[s] interstate commerce."[25] To determine whether a state tax law "unduly burdens" interstate commerce, courts have historically analyzed the law under the dormant Commerce Clause.[26] The Court's analysis, however, has not always been clear, thus creating a storied history for state taxation analysis under the dormant Commerce Clause.[27]

1. Two Tests: Complete Auto *and Internal Consistency*

In recent years, the Court has utilized two tests to analyze state taxation questions under the dormant Commerce Clause: the *Complete*

21. Bacchus Imports, Ltd. v. Dias, 468 U.S. 264, 263−64 (1984).
22. *Id*. at 265.
23. *Id*. at 271.
24. *See Dep't of Revenue of Ky*., 553 U.S. at 337–38 (discussing economic protectionism).
25. Quill Corp. v. N.D., 504 U.S. 298, 313 n.7 (1992).
26. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); *Quill Corp*., 504 U.S. 298 (1992).
27. For discussion of the Court's early approach to state taxation see Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282–85 (1977).

Auto test[28] and the internal consistency test.[29] Under the *Complete Auto* test, a state tax survives a dormant Commerce Clause challenge if the tax is applied to an activity with a sufficient nexus to the state; is fairly apportioned; is not discriminatory against interstate commerce; and is fairly related to services the state provides.[30] Under the internal consistency test, a court asks whether interstate commerce would be burdened if every state imposed the same tax law as the challenged law; a tax passes this test if interstate commerce would not be so burdened.[31]

Although the factors of the *Complete Auto* test are interrelated and overlapping,[32] each factor is discrete. The "sufficient nexus" factor requires that the taxed activity be closely connected to the taxing state.[33] For example, the taxing state has a sufficient nexus to the sales of a local restaurant because all the sales occur within the state.[34] The nexus is more obtuse, however, when an out-of-state seller has only minimal contacts with a state, such as when the seller merely sends mailings to in-state residents.[35] The "fairly apportioned" factor requires that a state tax only the value of the activity that occurs within the state.[36] If a taxpayer had property situated on the Louisiana–Mississippi state line, with half the property located in Louisiana and the other half in Mississippi, Louisiana could tax the revenue generated from the portion of the property located in Louisiana. Likewise, Mississippi could tax only the revenue generated

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28. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995) (referencing the *Complete Auto* test and its application in a line of cases); Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 196−97 (1998).

29. *Is "Internal Consistency" Dead?*, *supra* note 13, at 2–9 (discussing the development of the internal consistency test). *See also* JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION 4-190–4-246 (3d ed. 1998) (discussing the application of the internal consistency test).

30. *Complete Auto Transit*, 430 U.S. at 279.

31. *Okla. Tax Comm'n*, 514 U.S. at 185.

32. Choper & Yin, *supra* note 28, at 199 (discussing the problem with the *Complete Auto* test).

33. *See Okla. Tax Comm'n*, 514 U.S. at 184 (stating that "it has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State").

34. *Id.*

35. *See* Quill Corp. v. N.D., 504 U.S. 298, 311 (1992). Just determining whether a sufficient nexus exists is often problematic and requires very fact-intensive inquires. For more information on finding a sufficient nexus see Julie Roman Lackner, *The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income*, 48 B.C. L. Rev. 1387 (2007).

36. *See, e.g.*, Joondeph, *supra* note 12, at 150.

from the property located within its borders. Fair apportionment thus helps to ensure that each state taxes only its "fair share" of interstate activity or transactions.[37] The "nondiscriminatory" factor prohibits states from imposing a larger tax burden on interstate actors than intrastate actors.[38] Finally, the "fairly related" factor requires that the tax be imposed only on taxpayers who benefit from services that the taxing state provides.[39]

The Court created the *Complete Auto* test to require courts to go beyond scrutinizing the plain language of a statute and consider the practical effects of a tax, thus recognizing that the practical effects are most relevant when assessing burdens on interstate commerce.[40] Although the Court has applied the *Complete Auto* test in a variety of state taxation cases,[41] it has inexplicably varied its approach in others.[42]

The second test used by the Court in state taxation cases is the internal consistency test. The internal consistency test is simpler in form than the multi-factor *Complete Auto* test. The internal consistency test asks whether interstate commerce would be burdened if every state imposed the same tax law as the particular state law under review.[43] For example, if every state imposed a tax on out-of-state visitors based on the number of days the visitors remained in the state, many citizens would minimize their visits to other states. As a result, citizens would engage in less interstate activity, such as staying in hotels and eating at restaurants in other states, and instead remain in their own states when possible.

In contrast to the *Complete Auto* test, the Court, in applying the internal consistency test, has emphasized the importance of focusing on the structure of the law, and not on the practical consequences.[44] Focusing on the structure of the tax, however, directly conflicts with the rationale underlying the

37. Goldberg v. Sweet, 488 U.S. 252, 260−61 (1989).

38. *See id.* at 265–66 (discussing the third factor of the *Complete Auto* test).

39. *Id.* at 266–67.

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

41. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 183 (1995) (referencing the *Complete Auto* test and its application in a line of cases); Choper & Yin, *supra* note 28, at 196. *See, e.g.*, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upheld severance tax on coal); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) (upheld corporate franchise tax); *Okla. Tax Comm'n*, 514 U.S. 175 (upheld gross receipts tax on transportation ticket sales).

42. *See Is "Internal Consistency" Dead?*, *supra* note 13; HELLERSTEIN & HELLERSTEIN, *supra* note 29.

43. *Okla. Tax Comm'n*, 514 U.S. at 185.

44. *Id*. *See also* 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, 272 (2015) (citing *Okla. Tax Comm'n*, 514 U.S. at 185).

Complete Auto test, which focuses on the practical effects of a tax.[45] Additionally, when the Court initially introduced the internal consistency test, it stated that internal consistency functioned as a component of fair apportionment,[46] thus implying that the two tests could and should work together in guiding state taxation analysis.[47] After its formal introduction, however, the internal consistency test began to operate outside of the fair apportionment context, sometimes being used as a freestanding test of its own[48] and at other times being used to supplement other factors of the *Complete Auto* test.[49]

2. Application of the Tests

Although the *Complete Auto* test and the internal consistency test have existed concurrently, the Court has provided no guidance as to when each test applies and has wavered between the two tests in recent history.[50] *American*

45. *Okla. Tax Comm'n*, 514 U.S. at 185. *See also* Knoll & Mason, *supra* note 44, at 272.

46. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). A Westlaw query evidences the Court first introduced the actual terminology "internal consistency" in this case.

47. *See* Joondeph, *supra* note 12, at 149.

48. *Is "Internal Consistency" Dead?*, *supra* note 13, at 2–9 (discussing the development of the "internal consistency" test).

49. *See, e.g.*, *id.* at 4 (noting the Court's application of the "internal consistency" test to evaluate whether a tax discriminated against interstate commerce in *Armco*).

50. Justice Scalia implicitly recognizes this issue in his concurrence in the later *American Trucking* case, stating that he concludes the tax in question does not violate the dormant Commerce Clause "without adverting to various tests from our wardrobe of ever-changing [dormant] Commerce Clause fashions," listing the *Complete Auto* test and internal consistency test as two separate items in the wardrobe. Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Scalia, J., concurring). Below is a timeline showing the Court's pattern of applying the two tests erratically:

Year	Case	Test
1977	*Complete Auto Transit*, 430 U.S. 274	Birth of *Complete Auto* test
1983	*Container Corporation*, 463 U.S. 159	Birth of internal consistency test
1984	*Armco*, 467 U.S. 638	Internal consistency
1987	*American Trucking I*, 483 U.S. 266	Internal consistency Lower court – *Compete Auto*
1988	*D.H. Holmes*, 486 U.S. 24	*Complete Auto*
1989	*Goldberg*, 488 U.S. 252	*Complete Auto*
1995	*Okla. Tax Comm'n*, 514 U.S. 175	*Complete Auto* and internal consistency
2005	*American Trucking II*, 545 U.S. 429	Internal consistency (exception)
2015	*Wynne*, 135 S. Ct. 1787	Internal consistency Lower court – *Complete Auto*

Trucking Associations, Inc. v. Scheiner, a case in which the Supreme Court used the internal consistency test and the lower court used the *Complete Auto* test, illustrates the confusion that the concurrency of the two tests creates.[51]

A few years before *American Trucking*, the Supreme Court decided *Complete Auto* and provided several factors and rules for future courts to consider when deciding state taxation cases under dormant Commerce Clause challenges.[52] Then, in *American Trucking*, the lower court followed the Court's lead in *Complete Auto* and applied the rules and factors from that decision.[53] The Supreme Court, however, despite the Court's *Complete Auto* decision and the lower court's analysis, applied the internal consistency test with no explanation whatsoever for its decision not to apply the *Complete Auto* test.[54] The Court continued to waver between the two tests until the 1990s when the two tests were combined.[55]

3. Merging of the Two Tests

After the Court utilized the internal consistency test as a freestanding analysis on state taxation, the Court in *Oklahoma Tax Commission* merged the two into one analysis.[56] In that case, the Court began by analyzing the challenged tax under the *Complete Auto* test, walking through each of the four factors and deciding whether the tax met each factor.[57] Upon arriving

51. Am. Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266 (1987).

52. *See id*. The Court mentioned *Complete Auto* only when listing general rules, *id.* at 295, or when addressing the lower court decisions. *Id.* at 277. Similarly, in *Armco, Inc. v. Hardesty*, the Court applied the internal consistency test to analyze a state tax without mention of the *Complete Auto* test. 467 U.S. 638 (1984). The majority references *Complete Auto Transit* only once in a footnote discussing the principle of fair apportionment. *Id.* at 643. *See also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987). The Court in *Tyler Pipe* yet again applied the internal consistency test with little mention of the *Complete Auto* test. *Id.*

53. *Scheiner*, 483 U.S. at 282; HELLERSTEIN & HELLESTEIN, *supra* note 29, at 4-193–4-195 (discussing the application of the internal consistency test).

54. *See supra* note 52.

55. *See, e.g.*, Goldberg v. Sweet, 488 U.S. 252 (1989) (tax on telephone calls analyzed using *Complete Auto*); D.H. Holmes Co. Ltd. v. McNamara, 486 U.S. 24 (1988) (use tax analyzed using *Complete Auto*); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (severance tax analyzed using *Complete Auto*); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995) (sales tax on bus transportation tickets analyzed using both *Complete Auto* and internal consistency).

56. *Okla. Tax Comm'n*, 514 U.S. at 185.

57. *Id*. at 184–200.

at the fair apportionment factor, the Court incorporated the internal consistency test.[58] Namely, in asking whether the tax was fairly apportioned, the Court turned to the internal consistency test.[59] Internal consistency, however, was not the only inquiry used for this factor.

When considering fair apportionment, the Court created a two-step analysis.[60] First, the Court asked whether the tax passed the internal consistency test.[61] Only if the tax passed the internal consistency test did the Court require the tax to pass a separate, "external consistency" test.[62] The external consistency test asks whether the law imposes a tax only on the portion of interstate activity "fairly attributable to [the] economic activity" occurring within the taxing state.[63] Per the Court's analysis in *Oklahoma Tax Commission*, if a tax passes both the internal consistency test and the external consistency test, the tax is deemed to be fairly apportioned, thus satisfying that factor of the *Complete Auto* test.[64]

Despite the step-by-step analysis provided in *Oklahoma Tax Commission*, in which the Court used both the *Complete Auto* test and the internal consistency test, the Court reverted to its old ways and intermittently applied a freestanding internal consistency test unmoored from the *Complete Auto* test.[65] Moreover, as the next Section illustrates, the Court seldom paused to explain its departures in this respect.

4. Ignoring the Internal Consistency Test

Further complicating the state taxation analysis, ten years after *Oklahoma Tax Commission*, the Court seemingly retreated from the internal consistency test altogether in *American Trucking Associations, Inc. v. Michigan Public Service Commission* when it upheld a Michigan state flat tax[66] that did in fact violate the test.[67] In this case, Michigan

58. *Id*. at 185.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*. (citations omitted).
64. *Id*.
65. *See* Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005).
66. Although Michigan characterized the levy on truckers as a "fee," the Court analyzed the levy as a "tax" and identified the levy as a tax throughout the opinion. *See, e.g.*, *id*. at 438. For example, the Court states that "Michigan's fee . . . does not seek to *tax* a share of interstate transactions." *Id.* (emphasis added).
67. *Id*. at 437–38 (applying the internal consistency test). *See also* HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.

imposed an annual flat tax of $100 on trucks that engaged in intrastate operations in Michigan.[68] Under the law, any trucker who made any local haul in Michigan, such as from Michigan City A to Michigan City B, owed the flat tax regardless of whether the trucker made one local haul per year or 100 local hauls per year.[69] The challengers argued that the tax burdened interstate truckers and benefited Michigan truckers because local Michigan truckers made frequent hauls in Michigan and likely paid less per haul than interstate truckers who made infrequent hauls in Michigan.[70]

On this question, the Court agreed with the petitioners, concluding that the tax did in fact violate the internal consistency test.[71] According to the Court, if all states imposed this challenged tax law, interstate truckers who carried both interstate and local hauls would be taxed more per haul than intrastate truckers who carried only local hauls—and thus interstate commerce would be burdened because truckers would be encouraged to carry only local hauls.[72] Notwithstanding this finding, however, the Court held that the tax did not violate the dormant Commerce Clause, emphasizing that the burden on interstate commerce resulted from trucking companies choosing to engage in intrastate business—local hauls in Michigan—rather than choosing to engage in interstate business.[73] Thus, the Court applied the internal consistency test—not the *Complete Auto* test—but ignored the result, essentially making an exception to the rule.

The Court's ad hoc application of the *Complete Auto* test and the internal consistency test, in addition to the unprecedented result reached in *American Trucking*, has left many questions open for courts analyzing state taxes under dormant Commerce Clause challenges. Although Maryland's tax law presented the Supreme Court with the opportunity to clarify the analysis, the Court in *Wynne* did little to clear up this murky area of law.

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68. HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.

69. *See Am. Trucking Ass'ns*, 545 U.S. at 431–32.

70. HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.

71. *Am. Trucking Ass'ns*, 545 U.S. at 438. The Court stated, "We must concede that here, as petitioners argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to 'top off' its business by carrying local loads in many (or even all) other States." *Id.* Fundamentally, the Court refused to strike down a flat tax on local business under the internal consistency test, even when it logically failed the test. HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.

72. *Am. Trucking Ass'ns*, 545 U.S. at 438.

73. *Id*. at 438.

II. THE WIN FOR THE WYNNES

In *Wynne*, the Court applied the internal consistency test to strike down a Maryland state tax law.[74] The Court gave little explanation for its decision to apply the test, despite the lower court's thorough analysis under the *Complete Auto* test that resulted in the same conclusion. The doctrine concerning dormant Commerce Clause limits on state taxation was ripe for clarification in *Wynne*, but the Supreme Court let the opportunity go to waste.

A. Facts: Taxing the Wynnes

The *Wynne* case involved a challenge to Maryland's personal income tax law.[75] The Maryland law included three distinct parts: a tax on the income of Maryland residents earned within the state, consisting of a "state" portion and a "county" portion; a tax on the income of Maryland residents earned outside the state; and a tax on the income of nonresidents earned within the state, consisting of a "state" portion and a "special nonresident tax" portion.[76] Additionally, Maryland offered a partial tax credit for taxes that its residents paid to other states for income earned in that other state.[77] Maryland law, however, allowed this credit to offset only state taxes owed to Maryland rather than both state and county taxes, making it a partial tax credit.[78]

Maryland residents John and Jane Wynne earned personal income in multiple states because of their investment in an S corporation.[79] The income earned by the corporation passed through to the Wynnes as shareholders, meaning that for tax purposes, the Wynnes earned income in as many states as the corporation earned income.[80] When filing their Maryland tax return, the Wynnes claimed a full income tax credit for all the income taxes they paid to other states on behalf of the corporation.[81] Under the Maryland tax law, however, the Maryland comptroller assessed a tax deficiency for the Wynnes, citing the Maryland law that offered only

74. HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.
75. Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1792 (2015).
76. *Id*.
77. *Id*. MD. CODE ANN., TAX–GEN. § 10–703(a) (West 2016).
78. *Wynne*, 135 S. Ct. at 1792; MD. CODE ANN., TAX–GEN. § 10–703(a).
79. *Wynne*, 135 S. Ct. at 1793. Under the laws of S corporations, any income the corporation earns passes through to its shareholders who are then taxed on the income. *Id.*
80. *Id*.
81. *Id*.

a partial tax credit for taxes paid to other states rather than a full tax credit.[82] Specifically, the Maryland tax law allowed the Wynnes to apply the credit against only state taxes owed to Maryland, but not against county taxes owed.[83]

B. The Lower Courts' Analysis of Maryland's Tax

The Wynnes challenged the comptroller in the Maryland tax court, claiming the tax violated the dormant Commerce Clause.[84] The court affirmed the tax deficiency and upheld the tax law.[85] On appeal, the Circuit Court for Howard County reversed the tax court decision, finding that the Maryland law violated the dormant Commerce Clause because it failed to offer a full tax credit on taxes paid to other states.[86]

The Court of Appeals of Maryland, Maryland's highest court, evaluated the tax under the *Complete Auto* test and affirmed the lower court's decision that the law violated the dormant Commerce Clause.[87] The Wynnes did not dispute that the tax satisfied the first and the fourth requirements of the test, recognizing that a sufficient nexus existed between the tax and Maryland and that the tax was fairly related to services Maryland provided.[88]

The court limited its analysis to the remaining two requirements of the *Complete Auto* test: that the tax be fairly apportioned and that it be nondiscriminatory.[89] To determine whether the Maryland tax was fairly apportioned, the court applied the internal consistency and external consistency tests, as the Supreme Court did in *Oklahoma Tax Commission*.[90] Under the internal consistency test, the court asked whether interstate commerce would be burdened if every state imposed a state tax that offered only a partial tax credit for income taxes paid to other states.[91] The court answered this question affirmatively, reasoning that residents with interstate

82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*.
87. State Md. Comptroller of Treasury v. Wynne, 64 A.3d 453, 457 (Md. 2013). *See* discussion *supra* Part I.B (discussing the *Complete Auto* test).
88. *State Md. Comptroller*, 64 A.3d at 463. Because of the Wynnes' concession of the first and fourth factors, Brief for Respondents at 21, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1793 (2015) (No. 13-485), 2014 WL 4681795, the Court provided no explanation as to how these two requirements were fulfilled. *State Md. Comptroller*, 64 A.3d at 463.
89. *State Md. Comptroller*, 64 A.3d at 463–71.
90. *Id.* at 464.
91. *Id.*

income would pay double taxes on a portion of their income, while residents with only intrastate income would not—thus burdening interstate commerce by encouraging taxpayers to work only within their own states.[92] In light of the *American Trucking* decision, the court recognized the possibility that a tax might fail the internal consistency test yet still be valid under the dormant Commerce Clause.[93] Although scant, the court distinguished *American Trucking*. The court identified the annual trucker flat tax in *American Trucking* as a "toll on in-state activity," which is uniformly assessed on all businesses engaged in local activity, whereas the Maryland tax was on "business performed and income earned" outside the state.[94]

Although courts need to address the external consistency test only if a tax first passed the internal consistency test, the court addressed external consistency as a matter of prudence.[95] Under the external consistency test, the court asked whether the portion of interstate income Maryland taxed was fairly attributable to the intrastate portion of the revenue-earning activity, that is, fairly attributable to activity occurring within the state.[96] In this case, the revenue-earning activity would be the corporation's business and operations—most of which occurred outside of Maryland.[97] Given that fact, the court found that the tax was not fairly attributable to any intrastate portion of the revenue-earning activity because the tax applied to income the corporation earned outside the state of Maryland.[98] Despite the court's finding that the Maryland tax failed the fair apportionment requirement by being both internally and externally inconsistent, and thus likely violated the dormant Commerce Clause, the court still went on to apply the final requirement of the test, which required that the tax be nondiscriminatory.[99]

The court concluded that Maryland's tax was discriminatory by analogizing the tax scheme to prior cases in which the Supreme Court found tax laws discriminatory; the primary case considered was *Fulton*

92. *Id.* at 464–66 (presenting a hypothetical scenario that demonstrates the double tax burden on resident income earned outside an individual's state of residence). The court concluded that "[i]n effect, it acts as an extra tax on interstate income-earning activities," thus failing the internal consistency test. *Id.*

93. *Id.* at 466.

94. *Id.*

95. *Id.* at 467 n.21.

96. *Id.* at 467.

97. *Id.* at 459.

98. *Id.* at 467.

99. *Id.* at 468.

Corporation v. Faulkner.[100] In *Fulton*, North Carolina imposed a tax on the value of corporate stock that North Carolina residents owned, but reduced the tax if the corporation's income was subject to a North Carolina tax.[101] The *Fulton* Court found that this tax discriminated against out-of-state corporations because the residents who owned stock in corporations that conducted business in North Carolina received a greater tax benefit than those residents owning stock in corporations that conducted business in another state.[102] Following the logic of *Fulton*, the court ruled that the Maryland tax law had the same effect as North Carolina's tax scheme, and differed only in form, because both laws resulted in higher tax rates on interstate activity than intrastate activity.[103] North Carolina fundamentally raised its own tax rate on interstate activity by offering a tax reduction to qualified shareholders, whereas Maryland's tax rate on interstate activity was raised because of the interaction between other states' income taxes and Maryland's failure to grant a full tax credit for those taxes paid.[104] Finding that the Maryland tax failed the fair apportionment and nondiscrimination requirements, the court struck down the Maryland tax for failing the *Complete Auto* test and held that it violated the dormant Commerce Clause.[105]

C. The Supreme Court's Analysis

The Supreme Court granted certiorari[106] and ultimately held that the Maryland tax scheme violated the dormant Commerce Clause.[107] The Court found that the tax failed the internal consistency test and supported its conclusion by analogizing to prior cases on point.[108]

1. Application of the Internal Consistency Test

The Court began its analysis by applying the internal consistency test to the Maryland tax law to determine whether the tax burdened interstate commerce.[109] The Court stated that the virtue of the internal consistency

100. *Id.* at 469.
101. *Id.*
102. *Id.*
103. *See id.*
104. *Id.*
105. *Id.* at 470.
106. Comptroller of the Treasury of Md. v. Wynne, 134 S. Ct. 2660 (2014).
107. Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1792 (2015).
108. *Id.* at 1794–95.
109. *Id.* at 1801−02.

test is that it helps courts distinguish between two distinct categories of taxes:

> (1) [those] that inherently discriminate against interstate commerce without regard to the tax policies of other states, and (2) [those] 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.[110]

Any state tax law that falls into the first category, the Court emphasized, will generally qualify as a violation of the dormant Commerce Clause.[111]

The Court concluded that Maryland's tax inherently discriminated against interstate commerce[112] by asking whether interstate commerce would be burdened if every state adopted a law like Maryland's tax law, which offered only a partial tax credit for income taxes paid to other states.[113] The Court found that the tax burdened interstate commerce because state residents would likely choose to work within their own state if possible to pay less in taxes.[114]

In advancing this analysis, the majority dismissed the dissent's suggestion that its holding would create an unwanted "rule of priority" between residence-based taxes and source-based taxes.[115] Residence-based taxes refer to the taxes imposed by the state where the taxpayer resides, while source-based taxes refer to taxes imposed by the state where the taxpayer earns income.[116] The *Wynne* outcome seemingly creates a rule of priority, whereby source-based taxes will always trump residence-based taxes on the same income.[117] By holding that the Maryland tax violated the dormant Commerce Clause, the Court struck down the residence-based tax and allowed the source-

110. *Id*. at 1802.
111. *Id*.
112. *Id*. at 1804.
113. *Id*. at 1805.
114. *Id*. Specifically, state residents who earned income outside their resident states would be required to pay taxes to two different states on a portion of that income because of the partial tax credit. The Court further explained the economics of the Maryland tax scheme, comparing the total tax burden placed on (1) intrastate actors, such as a Maryland resident earning income solely in Maryland with (2) interstate actors, such as a Maryland resident earning income in Maryland and another state. *Id.* at 1803–05. The result of this comparison is that the first resident would pay less taxes overall, even if both earned the same amount of income. *Id*.
115. *Id*. at 1805, 1813.
116. *See id*. at 1805.
117. *See id*. at 1813.

based taxes to survive.[118] The majority, however, denied that *Wynne* established a rule of priority by offering the unsatisfactory explanation that Maryland could cure its unconstitutional tax scheme and keep its residence-based tax by offering a full tax credit.[119]

2. Support from Precedent

The Court also emphasized that precedent supported its conclusion.[120] The Court explained that contrary to the dissent's argument, the *Wynne* case was not distinguishable from the prior case law, despite two apparent differences: a tax on gross receipts versus net income and a tax on individuals versus corporations.[121] The three prior cases all concerned a tax on the gross receipts of corporations, whereas the *Wynne* case concerned a tax on the net income of individuals.[122] A tax on gross receipts is imposed on a transaction before accounting for any expenses or losses, thus affecting a transaction "irrespective of whether it is profitable."[123] A tax on net income, however, is imposed on a transaction only if a "gain is shown over

118. *See id*. at 1805.

119. *Id*.

120. *Id*. at 1794–95. The Court discussed the three cases in which the Court ruled on state income tax laws consistent with the *Wynne* decision: *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938) (holding that a state tax law that did not offer corporations a tax credit for taxes paid to other states violated the dormant Commerce Clause); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939) (holding that a state tax law imposed on income a corporation earned from shipping product outside the state violated the dormant Commerce Clause); and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (holding that a state tax law imposed on income a corporation earned from its services provided outside the state violated the dormant Commerce Clause). *Wynne*, 135 S. Ct. at 1794–95. The decision to invalidate all three state laws turned on the threat of double taxation to the taxpayer and the discriminatory effect of the laws on interstate commerce. *Id.* at 1795. An important point is that the Court in these three cases applied the internal consistency test without explicitly referring to the test because it decided the cases before the phrase was coined. *Id*. at 1802. *See also* Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 123 J. TAX. 4, 5 (2015) [hereinafter *Deciphering the Supreme Court's Opinion in* Wynne] (explaining that the cases relied on by the *Wynne* Court did not use the internal consistency test because the "doctrine would not be articulated for another 40 years" but "nevertheless, in substance, reflected the application of the doctrine").

121. *Wynne*, 135 S. Ct. at 1795–98.

122. *Id*.

123. U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 329 (1918).

and above expenses and losses."[124] The second difference is less technical: a tax on an individual means a tax on an individual taxpayer, whereas a tax on a corporation means a tax on a separate business entity, that is, the corporation.

The Court rejected the gross receipts–net income distinction in favor of a more practical approach that allows courts to consider the effects of the tax rather than the form of the tax.[125] The Court explained that this distinction between gross receipts and net income was rooted in the discarded historical distinction between direct and indirect burdens on interstate commerce.[126] Historically, "direct and immediate" burdens on interstate commerce were impermissible, although "indirect and incidental" burdens were permissible.[127] Under this rule, the Court explained that taxes on gross receipts were an impermissible direct burden, although taxes on net income were a permissible indirect burden.[128] Because these distinctions provided unreliable guidance for lower courts, they were expressly rejected, as evidenced in a series of cases.[129] The Court in *Wynne* thus regarded the gross receipts–net income distinction as ultimately irrelevant to its constitutional analysis.[130]

Regarding the distinction between individuals and corporations, the Court rebutted the dissent's claim that individuals deserve less protection than corporations because individuals already have protection in the form of voting rights.[131] Although individual taxpayers have voting rights, the right to vote hardly provides protection to individuals burdened under the Maryland law because the tax likely applies to only a minority of residents earning interstate income.[132] Additionally, the dissent suggested that individuals deserve less protection from taxation because they reap the benefits of state services, such as such as police, roadways, and fire departments—and thus should pay the price for those benefits.[133] The Court noted, however, that both individuals and corporations reap these benefits and thus both should pay the same price and receive the same protection under the dormant Commerce Clause.[134]

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124. *Id*.
125. *Id*. at 1795–96.
126. *Id*. at 1796.
127. *Id*. (citing *U.S. Glue*, 247 U.S. at 328–29).
128. *Wynne*, 135 S. Ct. at 1796.
129. *Id*.
130. *Id*. at 1795–96.
131. *Id*. at 1797–98.
132. *Id*.
133. *Id*. at 1795–97.
134. *Id*.

D. The Dissent

The four dissenting Justices in *Wynne*[135] criticized the internal consistency test as applied by the majority, asserting the inconsistency of the test in both its application and results.[136] First, the dissent argued that the majority's opinion was inconsistent with prior dormant Commerce Clause jurisprudence. Second, the dissent claimed that the majority did in fact create a rule of priority with its final decision.

1. The Inconsistency of the Internal Consistency Test

Justice Scalia contended that *Wynne* contradicted principles the Court has articulated in its prior state taxation analyses, which he explained is problematic simply because it perpetuates instability.[137] For example, the Court in *Oklahoma Tax Commission* made clear that the economic equivalence of a tax to another tax previously struck down is not dispositive of its constitutionality.[138] Nevertheless, according to Justice Scalia, the majority in *Wynne* "strikes down a tax in part because of its economic similarity" to a tax the Court previously struck down.[139] Additionally, he noted that the Court in *United States Glue Company* found the distinction between a tax on gross receipts and a tax on net income to be "manifest and substantial," whereas the majority in *Wynne* had discarded the same distinction.[140]

Justice Ginsburg argued that the outcome in *Wynne* could not be reconciled with the Court's decision in *American Trucking*, which had upheld a tax that failed the internal consistency test.[141] Justice Ginsburg explained that the Court decided to uphold the tax in *American Trucking* because of the "sufficiently close connection between the tax at issue and the local conduct that triggered the tax."[142] Following this notion, Justice Ginsburg stated that the tax at issue in *Wynne* was materially indistinguishable from the flat tax in

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135. *Id*. at 1807–23.

136. *Id*. at 1820–23 (Ginsburg, J., dissenting) (stating that "for two decades, the Court has not insisted that a tax under review pass the internal consistency test and has not struck down a state tax for failing the test in nearly 30 years") (citations omitted).

137. *Id*. at 1810.

138. *Id*.

139. *Id*.

140. *Id.* (citing U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328 (1918)).

141. *Id*. at 1821.

142. *Id*. (citing Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (2005)).

American Trucking, and therefore the Maryland tax should overcome the Wynnes' challenge.[143] Justice Ginsburg explained that the only difference between a flat tax and an income tax is the taxpayer's ability to pay, which she concluded should have been immaterial in these circumstances.[144] Justice Ginsburg thus concluded that a flat tax based on residency and an income tax based on residency should have both survived under *American Trucking*, as both were imposed on taxpayers "to cover the costs of local services that all residents enjoy."[145]

2. The Creation of a Rule of Priority

The dissent remained unconvinced by the majority's argument that *Wynne* does not establish a rule of priority that favors source-based taxes over residence-based taxes.[146] The dissent recognized that as did the resident state of Maryland, the source states also failed to offer a tax credit that could have exempted the Wynnes from paying source-based taxes because of income taxes already paid to Maryland.[147] The majority chose to strike down the Maryland tax law, as opposed to the other states' tax laws, despite the fact that both lacked a full tax credit.[148] By striking down the residence-based tax imposed by Maryland, the dissent believed a rule of priority was created, giving preference to source-based taxes, which ultimately hinders a state's ability to tax its residents—and taxes paid by residents are an important source of revenue that helps the state provide benefits to residents.[149] The dissent explained that because "more is given to the residents of a State than to those who reside elsewhere . . . more may be demanded of them."[150]

III. THE INTERNAL CONSISTENCY TEST FOR THE WIN

Although the Court's decision in *Wynne* provided an unclear articulation of the applicable standard, the Court was correct in applying the internal consistency test. Despite the test's shortcomings identified by the dissenting Justices, the benefits of the internal consistency test support it as the leading standard. In endorsing the internal consistency analysis, however, the

143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*. at 1813.
147. *Id*.
148. *Id*. at 1813–14.
149. *Id*. at 1814.
150. *Id*.

weaknesses in the majority opinion left lingering questions for courts applying the test in future state taxation cases.

A. Internal Consistency as the Leading Standard

In choosing how to resolve *Wynne*, the Court had several options: apply the internal consistency test as the majority did, apply the *Complete Auto* test as the Court had previously done, or create a new test entirely. The Court correctly chose to apply the internal consistency test and endorse it as the leading standard for dormant Commerce Clause challenges to state taxation. Courts can apply the test to a broad range of taxes, and the test preserves federalism by avoiding what would otherwise be a more intrusive, nationally focused orientation of state and local taxation schemes.

1. The Internal Consistency Test Applies Simple Mathematics

Courts confronted with a state taxation dormant Commerce Clause challenge after *Wynne* should apply the internal consistency test as *Wynne* applied it, asking whether interstate commerce would be burdened if every state imposed the same taxing scheme as the challenged scheme. More specifically, the test poses a simple mathematics question: if all 50 states imposed the challenged tax law, would a taxpayer pay more taxes if they derived income from out-of-state as opposed to in-state sources? If a taxpayer would pay more taxes because the taxpayer earned out-of-state income, interstate commerce would be burdened because individuals would be deterred from taking business or job opportunities outside their own state and instead be encouraged to pursue business opportunities within their own state. By evaluating challenged state taxes under the internal consistency test, *Wynne* forces courts to consider interstate commerce from a mathematical standpoint, which allows for objective, predictable, and consistent results.

2. The Internal Consistency Test Applies to a Wide Range of Taxes

In choosing the internal consistency test, *Wynne* rejected a number of categorical distinctions as immaterial, enabling courts to apply the test to a wide variety of taxes.[151] The Court rejected the distinction between state and local taxes, gross receipts and net income taxes, and individual and corporation taxes.[152] Analytically, the broad scope means that courts can apply this one test in a variety of state taxation cases, simplifying an

151. *See Deciphering the Supreme Court's Opinion in* Wynne, *supra* note 120, at 4.
152. *See* discussion *supra* Part II.C.

already complex area of the law and developing valuable jurisprudence for future applications. Practically, the broad scope means eliminating distinctions that are not material in the reality of taxation.

Wynne first repudiates the distinction between "state" and "local" taxes, as categorized by state governments. In addressing the distinction, the Court confirmed prior jurisprudence and made clear that distinguishing between state and local taxes is immaterial because state and local taxes are all considered state taxes under a dormant Commerce Clause analysis.[153] Accordingly, all income taxes paid to other states, whether labeled "state" taxes or "local" taxes, must be considered under the internal consistency test. Further, as *Wynne* held, a tax law that offers only a partial tax credit that offsets state taxes, but not county taxes, fails the internal consistency test. Rejecting this distinction is consistent with history because counties are considered "subordinate arms of [the] state government."[154] Additionally, rejecting this distinction is consistent with reality because from a practical standpoint, taxpayers likely consider the total amount of income taxes they owe in a given year, regardless of whether the taxes are paid to the county or the state. Therefore, if taxes create any pressure to conduct business interstate or intrastate, reasonable taxpayers will consider their total tax burden when making the decision regarding where to conduct business.

Wynne also announced that the internal consistency test applies to taxes on gross receipts and taxes net income, with no reason to distinguish between the two.[155] Although courts historically distinguished between the two types of taxes, *Wynne* acknowledged the insignificance of the distinction, "particularly in light of the admonition that [courts] must consider not the formal language of the tax statute but rather its practical effect."[156] This declaration broadens the scope of the internal consistency test, allowing courts to apply the test whenever a challenge to either type of tax, gross receipts or net income, presents itself.

Last, *Wynne* also declared that the distinction between a tax on individuals and a tax on corporations is immaterial for purposes of the internal consistency test because both deserve the same taxation, or the

153. *Wynne*, 135 S. Ct. at 1792 (stating that "[d]espite the names that Maryland has assigned to these taxes, both are State taxes, and both are collected by the State's Comptroller of the Treasury").

154. Nat'l League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976) (noting that when services are provided by local government, it is "as if such services were provided by the State itself").

155. *Wynne*, 135 S. Ct. at 1795 (citations omitted).

156. *Id*. (citations omitted).

same protection, under the dormant Commerce Clause.[157] As the majority discussed, both individuals and corporations enjoy benefits of the state.[158] Corporations enjoy the benefits of the state by using city utilities services and roadways just as individuals enjoy these same benefits. Therefore, corporations should be just as responsible for paying state taxes, and should receive no additional protection under the dormant Commerce Clause than individuals receive. Eliminating these three artificial distinctions allows courts to apply the internal consistency test to a broad range of challenged state taxes.

3. The Internal Consistency Test Ensures that States Maintain Taxing Control

In addition to its simplicity and broad application, the internal consistency test preserves federalism and autonomy of state control over its own taxing regime. The test provides for the evaluation of a challenged tax in isolation, rather than in unison with other state tax laws. The internal consistency test considers each state tax law in isolation by honing in on the structure of the challenged tax rather than the practical effects of the tax in unison with other state's taxing schemes.[159] The test evaluates a state tax law independently, thus allowing states to impose their taxes autonomously and regardless of the taxes other states have imposed. Although double taxation may result for some taxpayers,[160] the internal consistency test as applied in *Wynne* avoids coordination of state taxes on a national scale, which would likely involve the federal government synchronizing the taxing regimes of all 50 states.

For example, suppose Maryland imposed a 5% source tax, requiring taxpayers earning income in Maryland to pay Maryland 5% taxes on that income.[161] At the same time, Delaware imposed an 8% residence tax, requiring taxpayers residing in Delaware to pay Delaware 8% taxes on income earned anywhere.[162] A Delaware resident may be taxed in Delaware by virtue of his or her status as a resident and taxed in Maryland for the portion of income he or she earns in Maryland. If these states are considered in isolation, as the internal consistency test requires, both taxes pass the internal consistency test and therefore would survive a dormant Commerce Clause

157. *Id*. at 1796; *see* discussion *supra* Part II.C.2. *See also* Coenen, *supra* note 18, at 226–27.

158. *See* discussion *supra* Part II.C.2.

159. *See, e.g.*, Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). *See also* Knoll & Mason, *supra* note 44, at 272.

160. *See infra* note 163.

161. Knoll & Mason, *supra* note 44, at 282.

162. *Id*.

challenge under *Wynne*.[163] Maryland's tax would survive because if all 50 states imposed the Maryland tax law, interstate commerce would not be burdened; Delaware's tax law would likewise survive because if all 50 states imposed the Delaware tax law, interstate commerce would not be burdened. The result of double taxation, which would occur when an individual lives in Delaware and works in Maryland, is irrelevant under the internal consistency test. Rather, each state tax, when considered in isolation, passes the test. Also, Delaware in this example survives a dormant Commerce Clause challenge because, unlike *Wynne*, Delaware did not impose a tax on non-residents.

If the Court intended to eliminate double taxation, however, then internal consistency as applied in *Wynne*, which takes a purely state-focused approach, would not be the solution. The only way to avoid double taxation would be to infringe on the states' autonomy by controlling each state's taxing regime. Avoiding double taxation would require that the Court impose a national approach, such as a rule of priority, that coordinates the tax laws of all 50 states, which would likely require that all taxes on state income be either residence based or source based.

B. Criticism for the Court: Lingering Questions for Lower Courts

Succeeding in selecting the best standard for future state taxation cases does not mean that the *Wynne* opinion was entirely satisfactory. Rather, the opinion lacked critical explanations and answers, ones that lower courts will now have to tackle independently.

1. Failing to Explain the Rule of Priority

The *Wynne* majority denied adopting any rule of priority among competing income taxes,[164] but the denial was poorly explained and appears contrary to logic. As the dissent discussed, a rule of priority would be one that prioritized source-based income taxes over residence-based

163. *See id.* This example reaches into the internal consistency analysis, which is required to determine if a tax is discriminatory. But if a court assumed that every state imposed a hypothetical source tax like Maryland, interstate commerce would not be burdened. The law passes the internal consistency test and therefore does not discriminate against interstate commerce. The same is true if the court conducted the same analysis to the Delaware law. These would be two internally consistent, and thus nondiscriminatory laws, that results in double taxation.

164. Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1805 (2015) (stating that the Court "establish[es] no such rule of priority" as the dissents claims).

income taxes.[165] The majority provided only one example to serve as the entire explanation for why *Wynne* did not create a rule of priority—the Court suggested that Maryland could offer a full tax credit instead of a partial one for income taxes paid to other states.[166]

The example the majority provided, however, is seemingly consistent with a rule of priority. Although a full tax credit might allow Maryland to keep collecting income taxes from residents in some instances, whenever a taxpayer owes income taxes to both Maryland and to the other state where the taxpayer earned the income, the other state's tax will trump. Maryland will collect income taxes from residents earning income out-of-state only when the source state does not impose an income tax or when the source state imposes an income tax that is less than Maryland's. Therefore, whenever the source state's income tax and Maryland's income tax compete, the full tax credit will offset some or all of what Maryland can collect from its own resident. Thus, the majority's example is an application of the rule of priority. Had the Court further explained itself, however, Maryland potentially could have cured the unconstitutionality by removing its tax on non-residents in lieu of expanding its tax credit.

Because of this disconnect, the Court should have more clearly explained why *Wynne* does not create a rule of priority. The complexity of state taxation should compel the Court to err on the side of clarity and explain further why no rule was adopted, beyond offering only one example. The Court likely denied adopting a rule of priority because doing so would interfere with federalism. It appears, however, that the majority spoke too quickly and too broadly.

2. Failing to Address the External Consistency Test

Wynne's acceptance of the internal consistency test leaves lower courts guessing on the applicability of the external consistency test. The Court's silence could be interpreted as making the internal consistency test the sole inquiry, or it could be interpreted as having no effect on the second tier of the test adopted in *Oklahoma Tax Commission.* The second possibility remains viable, as *Wynne* did not necessitate the follow-up inquiry regarding external consistency because the tax failed the internal consistency test. Whether the Court failed to acknowledge the test because it determined the test unnecessary or because it sought to expunge the test will be determined by future litigation.

165. *See id*. at 1813 (Ginsburg, J., dissenting).
166. *Id*. at 1805 (majority opinion).

Nevertheless, the external consistency test is not necessary to evaluate state taxation appropriately under dormant Commerce Clause challenges; it would also add confusion to an already complicated area of the law. The internal consistency test, as it currently stands, properly evaluates state taxation for interstate commerce burdens, as the simple mathematics illustrates. Thus, courts should interpret the *Wynne* decision as requiring internal consistency as the sole inquiry.

3. Failing to Clarify the American Trucking *Decision*

After the Court boldly refused to strike down a tax that failed the internal consistency test in *American Trucking*, some commentators suspected that the internal consistency test might be completely dead.[167] *Wynne* proves, however, that the internal consistency test is still alive, and now turns the tables by casting doubt on the continued validity of *American Trucking*.[168] Specifically, the *Wynne* Court failed to clarify the standing of its earlier decision by poorly distinguishing the case rather than overruling it. This failure should lead lower courts to view *American Trucking* as an exception to the internal consistency test—that is, a tax may fail the internal consistency test but nevertheless be upheld under *American Trucking*.

Recall that the Court in *American Trucking* upheld the challenged flat tax under the dormant Commerce Clause because companies would be burdened only if they chose to engage in intrastate business, rather than burdened if they chose to engage in interstate business.[169] In reconciling *Wynne* and *American Trucking*, these cases create a non-contradictory rule: if a tax fails the internal consistency test because it burdens interstate commerce, but that burden results from the taxpayer choosing to engage in intrastate business, the tax does not violate the dormant Commerce

167. *See, e.g.*, *Is "Internal Consistency" Dead?*, *supra* note 13, at 1–2; HELLERSTEIN & HELLERSTEIN, *supra* note 29, at 4-196–4-198.

168. Although the Court upheld a tax that failed the internal consistency test in *American Trucking*, the Court applied the test again in *Wynne*. *See* discussion *supra* Part II.C.1. Nevertheless, as explained by the dissent, in *Wynne* the Court did not repudiate *American Trucking*, but rather distinguished the two cases. *Wynne*, 135 S. Ct. at 1820 n.6 (Ginsburg, J., dissenting). Thus, this approach by the majority means that if a future court appropriately analogizes to *American Trucking*, a tax might be upheld even if it fails the internal consistency test.

169. *See* Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (2005).

Clause.[170] This is the exception that the Court created by its rulings in these two cases.

In her dissent, Justice Ginsburg analogized *Wynne* to *American Trucking*, finding that a flat tax based on residency in Maryland, rather than an income tax on Maryland residents who earned income in other states, might have been upheld under the *American Trucking* exception to the internal consistency test.[171] A flat tax would apply to any resident living within the state's boundaries, unrelated to any income earned. Following Justice Ginsburg's reasoning, the Maryland taxpayer's choice to live in Maryland is the equivalent of the choice to engage in intrastate business.[172] Furthermore, she believed the analogy should not stop at flat taxes, but that courts should consider applying *American Trucking* in cases beyond a flat tax. Consider the Maryland tax in question in *Wynne*. If the Wynnes were considered interstate actors because of their residence in one state and investment in multiple other states, their choice to live in Maryland is the choice to engage in intrastate activity. The choice to engage in intrastate activity could trigger the *American Trucking* exception. Specifically, the Wynnes suffer the consequences of the partial tax credit only because they chose to live in a state that offered only a partial tax credit, much like the truckers in *American Trucking* suffered the consequences of the flat tax only because they chose to conduct activity in Michigan.

Justice Ginsburg, however, overstated the analogy and missed a relevant difference. Unlike the choice of doing business within a state, a taxpayer has no choice but to reside in one state. Therefore, claiming that the taxpayer chooses to engage in intrastate activity by simply residing in one state is not the same as claiming that a taxpayer chooses to engage in intrastate activity by operating his business in a certain state. Although the *American Trucking* exception functions properly under some circumstances, with the limits of the exception to be determined by future litigation, the exception cannot reach as far as Justice Ginsburg suggested.

CONCLUSION

Taxation causes judges, scholars, states, and taxpayers enough confusion. Historically, the Supreme Court has done little to simplify this inherently complex area, wavering between the *Complete Auto* test and internal consistency test when analyzing state taxation under the dormant

170. *See id.*
171. *See Wynne*, 135 S. Ct. at 1821 (Ginsburg, J., dissenting).
172. *See id*.

Commerce Clause. *Wynne* gave the Court the opportunity to refine its jurisprudence, and the Court failed to do so clearly. However, this Comment sheds light on the murky opinion and interprets the opinion as endorsing the internal consistency test as the reigning standard. This effective and straightforward test applies to a wide range of taxes while still giving states autonomy in imposing state taxes. Choosing the leading standard does not come without criticism, however, as the majority's opinion in *Wynne* suffered from other weaknesses of poor explanations and illogical analyses. Nevertheless, with refunds for taxes and at least some clarity in the law, taxpayers and courts alike can rejoice.

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