WYNNE: LOSE OR DRAW?

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I. INTRODUCTION

In its 2014 October Term, the Supreme Court will hear what may be the most important state tax case[1] since its 1992 decision in

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1. David Sawyer, *Tax Observers Say* IBM *and* Wynne *Are Cases to Watch*, TAX ANALYSTS, ST. TAX NOTES MAGAZINE at 558 (Sept. 1, 2014) (quoting Ernst & Young representative as saying that *Wynne* "is probably the most important U.S. Supreme Court case that we'll hear in the last 30 years.").

Quill Corp. v North Dakota,[2] in which it reaffirmed the Commerce Clause's distinct role in preventing individual states from unduly burdening interstate commerce.[3] *Comptroller v. Wynne* pits a state's prerogative to fashion its own tax policy against a constitutional norm that such policies may not put interstate commerce at a disadvantage relative to intrastate commerce.[4] In *Wynne,* the Maryland Court of Appeals—that state's highest court—held that the state's refusal to provide a credit for taxes on income that was taxable both by Maryland and by the state in which the income was earned violated the Commerce Clause.[5] Because the Supreme Court does not usually grant certiorari to affirm lower court decisions,[6] observers expect the Court to reverse. We think that reversal would be a mistake, and, as explained below, we hope a majority of the Court does not weaken the long-standing constitutional protections against double taxation of income earned in interstate commerce. But if, in fact, the Court granted cert. to reverse the Maryland court's decision, our essay will engage in some speculation as to the decision's scope: Will the resultant decision be a minimalist one, operating at the margins of the dormant Commerce Clause doctrine; or will it be a maximalist decision, either repudiating the doctrine altogether or dramatically altering the doctrinal landscape?

Our commentary has four parts. First, we briefly sketch the doctrinal framework the Court has employed for several decades to evaluate the constitutionality of state and local taxes under the Commerce Clause. Second, we describe the facts of *Wynne* and summarize the state court's opinion. Third, we argue that the decision was consistent both with existing doctrine and constitutional principles limiting a state's ability to tax income earned outside its boundaries. Despite Maryland's protestations, it is the state, not the court, which seeks radically to unsettle constitutional law in claiming an unfettered power to tax the income of its residents, wherever

2. 504 U.S. 298 (1992).

3. *Id.* at 315–16 (reaffirming earlier holding that the Commerce Clause required a physical presence by a taxpayer in order for state to compel it to collect and remit sales and use taxes; rejecting arguments to extend no more protection under the Commerce Clause than existed under the Due Process Clause); *infra* Part II.

4. Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453 (Md. 2013), *cert. granted*, 134 S. Ct. 2660 (2014).

5. *See infra* notes 27–39 and accompanying text.

6. *See, e.g.*, Daniel Solove, *Some Thoughts on the Supreme Court's Reversal Rate*, CONCURRING OPINIONS (July 25, 2007), *available at* http://www.concurringopinions.com/archives/2007/07/some_thoughts_o.html, *archived at* http://perma.cc/TZD8-LA29 (noting that statistics show the Court reverses in around 75% of cases it hears, concluding "that the Supreme Court primarily takes cases it wants to reverse, with only a few exceptions.").

earned. The remainder of our essay speculates what avenues are open to a decision reversing the lower court, and which the Court is likely to take. A brief conclusion follows.

II. THE COMMERCE CLAUSE AND STATE TAXING POWER

The dormant Commerce Clause doctrine ("DCCD") consists of judicial decision rules limiting the power of state and local governments to discriminate against or unduly burden interstate commerce or commercial actors.[7] The DCCD's limits are inferred from the decision of the Framers to delegate the power to regulate interstate commerce to Congress in Article I and are enforced by courts even when Congress has not affirmatively acted.

The precise decision rules the Court has employed over the nearly two centuries the DCCD has been enforced have varied.[8] A stable doctrinal regime emerged, however, in the 1970s. For non-tax regulations of interstate commerce, the Court has since employed a two-tiered standard of review that turns on whether or not the law discriminates against interstate commerce. If it does, the Court employs a version of strict or heightened scrutiny: the government bears the burden of proving that the law serves a "legitimate" (that is, a nonprotectionist) interest and that there are no less discriminatory means available to effectuate that interest.[9] Note that discrimination need not be present on the face of the law. Laws that are discriminatory in effect or were passed with a discriminatory purpose are similarly subjected to this less deferential standard of review.[10] On the other hand, truly nondiscriminatory laws are subject to the eponymous *Pike* balancing test,[11] in which *challengers* must prove that the burden on interstate commerce clearly exceeds the local benefits claimed for the law.[12] *Pike* balancing is deferential to the point of

7. *See generally* BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 6.01–6.08 (2d ed. 2013) (presenting and analyzing precedent for the DCCD).

8. For a discussion of the doctrine's evolution, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine,* 50 WM. & MARY L. REV. 417, 427–48 (2008).

9. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

10. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (striking down tax exemption after concluding it was passed with discriminatory intent); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350–53 (1977) (striking down facially neutral law because in operation it had a discriminatory effect on interstate commerce).

11. Named for *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

12. *Id.* at 142.

being edentulous: the Court has not invalidated a law employing balancing in over thirty years.[13]

The Court's DCCD jurisprudence involving state and local taxes is, by contrast, a little more difficult to describe. After traveling a rather convoluted road, the Court in 1977 settled on a four-part test—the so-called *Complete Auto* test—for assessing the constitutionality of state taxes.[14] To pass muster, there must be (1) an adequate nexus between the taxing jurisdiction and the taxpayer; (2) the tax must not discriminate against interstate commerce; (3) the tax must be fairly apportioned; and (4) the tax must fairly relate to the services received by the taxpayer from the taxing jurisdiction.[15]

The Court has expounded on these requirements in subsequent cases. For example, in *Quill*, the Court held that a non-resident taxpayer lacking a physical presence in a taxing jurisdiction could not be compelled to collect and remit sales and use taxes to the state.[16] The Court has further held that fair apportionment has two dimensions: internal and external consistency. "External consistency" has been described by the Court as looking "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."[17] As the leading treatise observes, however, "the external consistency test in substance is nothing more than another label for the fair apportionment requirement."[18]

"Internal consistency," however, is a bit more complicated. According to the Court, an internally consistent tax will "add no burden to interstate commerce that intrastate commerce would not also bear" when one hypothesizes "the imposition of a tax identical to the one in question by every other State . . . ."[19] The test, the Court further explained, looks not to the "economic reality reflected by the tax," but rather "to the structure of the tax at issue to see whether its identical application by every State in the Union would place

13. *See* Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) ("The Illinois Act is also unconstitutional under the test of *Pike v. Bruce Church, Inc.*, . . . for even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." (internal citations omitted)).

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

15. *See, e.g.,* Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 311 (1992) (summarizing the *Complete Auto* test).

16. *Id.* at 317–18.

17. Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

18. 1 JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 4.16[2], at 4-244 (3d ed. 1998).

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

interstate commerce at a disadvantage as compared with commerce intrastate."[20]

Both tests are concerned with ensuring that interstate commerce is not placed at a disadvantage relative to intrastate commerce by being subject to double taxation by multiple taxing jurisdictions. The common remedy for internal inconsistency and double taxation is the provision of tax credits for taxes paid in other jurisdictions.[21]

Of the two remaining prongs of the *Complete Auto* test, the "fairly related" prong does almost no work. The Court has consistently refused to conduct a judicial inquiry into the value of services received from a taxing jurisdiction relative to the amount of taxes paid by the taxpayer.[22] The test's anti-discrimination prong, however, has more bite, and generally operates the same as it does in the two-tiered standard of review employed in non-tax cases.[23]

III. *WYNNE*'S FACTS AND DECISION

Maryland taxpayers are taxed on all of their income, wherever earned. In addition to a state income tax, Maryland taxpayers are also subject either to (1) a county income tax or (2) a special nonresident tax that is equal to the lowest county income tax rate.[24] While resident taxpayers are given a credit against the *state* income tax for taxes paid

20. *Id.*

21. HELLERSTEIN ET AL., *supra* note 18, ¶ 4.16[1][b], at 4-198 ("The provision of a tax credit for taxes paid to other states on the same tax base will generally provide a complete defense to any allegation that a tax is internally inconsistent.").

22. *See, e.g.,* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625–26 (1981) (upholding severance tax imposed on value of coal mined in the state; "fairly related" requirement measured not by "the *amount* of the tax o[r] the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities" but instead the proper question is whether "the *measure* of the tax [is] reasonably related to the extent of the contact" the taxpayer has with the taxing jurisdiction (emphasis in original)); *see also* HELLERSTEIN ET AL., *supra* note 18, ¶ 4.18[2][d], at 4-295 (approving of the Court's deferential inquiry: "the courts . . . have neither the constitutional power nor the institutional capacity to develop a proper accommodation of the competing interests in this domain . . . . [C]ourts are not equipped to determine the appropriate portion of a state's tax burden that ought to be borne by any segment of the state's industry" (footnote omitted)).

23. *Compare* DENNING, *supra* note 7, at § 6.06 (discussing discrimination in non-tax regulatory cases), *with* HELLERSTEIN ET AL., *supra* note 18, ¶¶ 4.14[1][a]-[1][c], at 4-83 to 4-84 (noting that in tax cases "discrimination" can occur on the face of a tax or in its purposes or effects).

24. Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 458 (Md. 2013), *cert. granted*, 134 S. Ct. 2660 (2014).

elsewhere on out-of-state income, "[n]o credit is given against the county tax for income taxes paid in other states."[25]

The Wynnes resided in Maryland, but owned stock in a Subchapter S corporation that filed tax returns in thirty-nine states. The income of the corporation passed through to the taxpayers, who were likewise "allocated . . . a pro rata share of taxes paid to the various states."[26] They sought a credit against their Maryland income taxes for the amounts paid in other states. A credit against the county taxes was, by statute, not available; the state assessed a deficiency against the Wynnes, and they filed suit. After losing in the tax court, the Wynnes won in circuit court. The state appealed, and the Maryland Court of Appeals affirmed the circuit court's decision.[27]

The court first considered whether the DCCD applied at all, concluding that "unless there is actual or prospective competition between entities in an identifiable market and state action that either expressly discriminates against or places an undue burden on interstate commerce" that is more than "incidental," the DCCD would not apply.[28] Maryland argued that the county income tax was "not directed at interstate commerce" and that the Wynnes could not "identify any interstate commercial activity affected by a failure to allow a credit against that tax . . . ."[29] The court of appeals sensibly rejected the state's argument, concluding that "the operation of the credit with respect to the county tax may affect the interstate market for capital and business investment and . . . implicate the dormant Commerce Clause."[30]

Applying the *Complete Auto* test, the court found that the failure to grant a credit for the county tax meant that the county tax was both improperly apportioned and discriminatory.[31] Examining apportionment, the court concluded that the income tax was internally and externally inconsistent. The "identical application" of Maryland's scheme by each state, the court wrote, would put interstate commerce at a disadvantage vis-à-vis intrastate commerce.[32] "If each state imposed a county tax without credit in the context of a tax scheme

25. *Id.* Taxpayers were able to apply a credit for out-of-state taxes paid until the legislature changed the law in 1975. *Id.* at 458–59.

26. *Id.* at 460.

27. *Id.* at 460, 471.

28. *Id.* at 461–62.

29. *Id.* at 462.

30. *Id.* at 463.

31. *Id.* The taxpayers didn't allege that either the substantial nexus or "fairly related" prongs of *Complete Auto* were violated. *Id.*

32. *Id.* at 464.

identical to that of Maryland," then "taxpayers who earn income from activities undertaken outside of their home states would be systematically taxed at higher rates relative to taxpayers who earn income entirely within their home state."[33] Those higher rates, moreover, "would be the result of multiple states taxing the same income."[34] The structure of the tax and credit combination, the court concluded, "acts as an extra tax on interstate income-earning activities."[35]

As for external consistency, the court framed the inquiry as whether "tax liability under the Maryland income tax code reasonably reflect[s] how income is generated[.]"[36] The court concluded that it failed external consistency because "when income sourced to out-of-state activities is subject to the county tax, there is a potential for multiple taxation of the same income."[37] Given the differences in total tax liability between taxpayers with exclusively intrastate income versus those with both inter- and intrastate income, the court also concluded that the structure of the income tax effectively discriminated against interstate commerce:

> The application of the county tax to the out-of-state pass-through income without application of a credit for out-of-state income taxes on the same income means that Maryland shareholders—the Wynnes in this case—may be taxed at a higher rate on income earned through [the corporation's] out-of-state activities than on income earned though [sic] its Maryland activities. This would appear to favor businesses that do business primarily in Maryland over their competitors who do business primarily out-of-state—at least in the context of ownership of a Subchapter S corporation.[38]

33. *Id.*

34. *Id.* The court assumed each state imposed a state tax of 4.75% on residents' income, a 3.2% county tax on residents' income, and a special nonresident tax of 1.25% on the income nonresidents earned within the state. *Id.* The court further assumed that credit for income taxes applied in each state could be applied only to a state's *state* (not county) tax. *Id.* at 464–65. The Court then described two taxpayers, Mary and John. Mary has $100,000 of income earned entirely within the State of Maryland. John, meanwhile, also has $100,000 in income, but earns half in Maryland and half in Pennsylvania. *Id.* at 465. Mary's tax bill would equal $7,950 ((.0475*$100,000) + (.032 *$100,000)). *Id.* John's tax bill, by contrast, would equal $8,575. Like Mary, John owes Maryland $7,950 because all of his income, wherever earned, may be taxed by the state. However, John also owes Pennsylvania $2,375 state income tax (.0475*$50,000) and $625 in the special non-resident tax (.0125 * $50,000), for a total of $3,000. *Id.* Moreover, John would receive credit for the $2,375 he paid to Pennsylvania only against his Maryland state income tax, reducing his Maryland tax bill to $5,575. *Id.* As the court observed, "a taxpayer with income sourced in more than one state will consistently owe more in combined state income taxes than a taxpayer with the same income sourced in just the taxpayer's home state" which could discourage taxpayers from engaging in interstate commerce, may discourage the formation of S corporations, or could encourage investment in purely Maryland businesses. *Id.*

35. *Id.* at 465–66.

36. *Id.* at 467.

37. *Id.* (footnote omitted).

38. *Id.* at 469.

The court concluded by observing that the obvious cure was to apply the credit to the county tax; the unavailability of the credit was what made the application of the income tax unconstitutional.[39]

IV. WHY THE WYNNES SHOULD, UH, WIN

The court of appeals's decision accurately reflects principles articulated in decades of Supreme Court case law as well as the principles underlying the DCCD itself. The petitioner's brief the State of Maryland filed with the Supreme Court, by contrast, is a farrago of conflation, misrepresentation, and apparent misunderstanding of the controlling principles of constitutional law. Despite Maryland's breathless protestations to the contrary, there was nothing "unprecedented," "novel," or "radical" about the court's application or analysis of the *Complete Auto* factors.[40] In the next Part, we consider why the Court may have decided to grant cert. in this particular case; we pause here, however, to critique the state's arguments for reversal. Before we discuss in detail the court of appeals's DCCD decision, it is

39. *Id.* at 471. Two judges dissented; their dissent, not unlike Maryland's argument to the Supreme Court, *infra* Part IV, either willfully distorts or misunderstands the DCCD as it applies to state and local taxes. Much of the dissent, actually, argues that the political process adequately protects taxpayers like the Wynnes. *See id.* at 472 (Green, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425, 428 (1819), for the proposition that abuses of the taxing power lie in the political process). The dissent also questioned whether the taxpayers had borne their burden of demonstrating that interstate commerce was implicated at all. *Id.* at 472, 477 n.5 (Green, J., dissenting) (arguing that the taxpayers "have not provided evidence that any markets or market participants, as opposed to taxpayers, have been disadvantaged by some taxpayers being required to pay slightly more in taxes"). The dissent seemed to conflate the two-tiered standard of review for non-tax regulations with the *Complete Auto* test, *id.* at 474 (Green, J., dissenting), and erroneously assumed that *explicit* discrimination is a necessary condition for invalidating a state or local tax. *Id.* at 475 (Green, J., dissenting) ("The fact that Maryland's tax scheme is not facially discriminatory is critical to the dormant Commerce Clause analysis . . . . In this case, there is no facial discrimination against interstate commerce, and thus, the burden of proving that the dormant Commerce Clause is implicated requires a higher level of proof."); *id.* at 476 (Green, J., dissenting) ("In the absence of facial or express discrimination, an undue burden on interstate commerce must be shown." (footnote omitted)). The dissent relegates discussion of apportionment to a footnote, observing that only "[s]ome unapportioned taxes could have a significant effect on interstate commerce such that they 'unduly' burden interstate commerce" thereby violating the DCCD. *Id.* at 477 n.5 (Green, J., dissenting). Here, according to Judge Green, the credit against state taxes "significantly diminish[es] any effect Maryland income taxes have on interstate commerce." *Id.* (Green, J., dissenting). The dissent closed by suggesting that because no one had challenged the credit disallowance against the county tax in the forty years since the statute had been amended, that should insulate it from invalidation. *Id.* at 477.

40. Brief for the Petitioner at *9, *10, *23, Md. State Comptroller of the Treasury v. Wynne, No. 13-485 (July 29, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2671 [hereinafter Petitioner's Brief].

necessary to rebut some of the irrelevant arguments that Maryland's brief puts forth.

A. A State's Taxing Power Is Subject to Distinct, Judicially-Enforced Constitutional Limitations

Maryland's brief frames the question presented as whether the *Constitution* prohibits states from taxing all income of its residents by requiring credits for taxes paid in other states.[41] This is curious because the only issue pressed by the Wynnes in state court was whether the disallowance of the credit violated the Commerce Clause.[42] The state's wide-angle approach, though, is explained when one reads further in the brief. It castigates the lower court decision for assuming "that taxpayers should be sheltered from multiple taxation,"[43] a principle the state claims is totally at odds with the "constitutional respect for independent taxing authority, even in the face of multiple taxation . . . ."[44] In fact, the state maintains that requiring a credit here would render state taxing authority a "virtual nullity"[45] or at least "severely diminish one of the core attributes of sovereignty . . . ."[46] In sum, much of the brief is an extended policy argument: because residents derive unique benefits from their state domicile,[47] and because political safeguards will prevent overreaching,[48] the state should be able to tax free from judicial scrutiny.[49]

41. *Id.* at *i.

42. *Wynne*, 64 A.3d at 461 ("The Wynnes do not contest the State's authority to tax their income, wherever earned, under the Due Process Clause.").

43. Petitioner's Brief, *supra* note 40, at *28.

44. *Id.* at *14.

45. *Id.* at *26.

46. *Id.* at *32.

47. *See id.* at *11 (observing that the taxing power "corresponds to the extraordinary benefits the states grant to . . . residents"); *id.* at *12 (upholding the lower court would "significantly alter th[e] bargain" between state and resident by "allowing certain taxpayers to enjoy all the benefits available to Maryland residents without contributing any income taxes in return"); *id.* at *14 (arguing that "[t]he constitutional respect for independent taxing authority" recognizes "that different states may provide benefits to a taxpayer for which each of those states can ask a fair return"); *id.* at *20 (noting that states have special obligations to its citizens, e.g., to educate them, to provide public assistance); *id.* at *23 ("It is not too much to ask . . . for Maryland residents to contribute more to the support of these State programs than is asked from nonresidents who merely earn income in Maryland and who do not benefit to the same extent from the programs and services provided by the State and its local governments."); *id.* at *30 (arguing that "residents receive special privilege from, and thus have special obligations to, their home states").

48. *Id.* at *12 ("The Court of Appeals' imposition of this one-sided arrangement is particularly unjustified, given the ability of Maryland residents to exercise their political power

The state's reliance on *McCulloch v. Maryland*[50] in support of the proposition that political safeguards are sufficient to guard against abuse of the taxing power is profoundly ironic.[51] Not only did Maryland lose *McCulloch*, but Chief Justice Marshall specifically rejected Maryland's argument that the political safeguards were sufficient to protect an instrumentality of the federal government.[52] The political safeguards that normally restrained legislatures who wielded that power, Marshall observed, were cold comfort to the Bank of the United States because the citizens who voted for the members of Congress who chartered the Bank had no say in electing Maryland's legislature. Legislators could destroy the Bank with little fear of political repercussions from constituents.[53] To allow Maryland to tax an instrumentality of the federal government out of existence would, he wrote, "arrest[] all the measures of the government, and . . . prostrat[e] it at the foot of the states."[54] Far from shoring up the state's case, then, *McCulloch* undermines it. The case stands for the proposition that state sovereignty is limited by the Constitution and that even an "incident of sovereignty" as important as taxation is subject to judicially-enforced constitutional limitations.

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to change unpopular tax policies."); *id.* at *16 ("[I]f Maryland residents are displeased with their taxes, they not only have the political capacity, as eligible Maryland voters, to press for changes to the State's tax laws, but they can also appeal to Congress."); *id.* at *24–25 (citing "the power of state residents to eliminate unpopular taxes through political means" as a safeguard against abuse).

49. Another benefit of its conflation of the Due Process Clause with the DCCD is that it enables Maryland to draw attention away from the tax scheme's compliance with the *Complete Auto* standard in favor of the more lenient due process standard, which asks whether "states have conferred benefits on the taxpayer for which the states can justifiably ask something in return." *Id.* at *30; *id.* at *38 (asserting that Maryland's income tax "satisfies any reasonable definition of fairness"); *see also* Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940) ("The simple but controlling question is whether the State has given anything for which it can ask return.").

50. 17 U.S. (4 Wheat.) 316 (1819).

51. Petitioner's Brief, *supra* note 40, at *25 (citing *McCulloch,* 17 U.S. (4 Wheat.) at 428); *see also* Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 471–72 (Md. 2013) (Greene, J., dissenting), *cert. granted* 134 S. Ct. 2660 (2014) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 425, 428).

52. 17 U.S. (4 Wheat.) at 428–30.

53. *Id.* at 431 ("Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? . . . In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.").

54. *Id.* at 432.

B. The Irrelevance of the Due Process Clause

Neither the Wynnes nor the state court disputes that the Due Process Clause permits double taxation of income.[55] The DCCD was the only basis for the court of appeals's decision. And yet, Maryland's brief repeatedly cites to and quotes from Supreme Court decisions upholding taxes under the Due Process Clause. These due process cases are simply irrelevant to the real issue in the case—whether Maryland's refusal to grant a credit against the county tax violates the DCCD, which protects different constitutional values than does the Due Process Clause. The Court has made that point clear, most recently in *Quill*.

Rejecting arguments that the coverage of the two limits was coextensive, *Quill* held that while the two clauses were related, they "pose *distinct limits* on the taxing powers of the States. [W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, *imposition of the tax may nonetheless violate the Commerce Clause*."[56] As Justice Stevens explained the difference:

> Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. *In contrast, the Commerce Clause . . . [is] informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy*. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.[57]

Justice Stevens then traced the evolution of its DCCD tax jurisprudence, culminating in the *Complete Auto* test. As he explained, "[t]he second and third parts of that analysis, which require fair apportionment and non-discrimination, *prohibit taxes that pass an unfair share of the tax burden onto interstate commerce*."[58]

Maryland, and oddly, the United States, both reject the notion that different provisions of the Constitution can impose distinct limitations on state power. Their briefs argue that that the court below "[d]espite paying lip service to the principle that a state of residence may tax all the income of its residents . . . rendered that principle largely meaningless" by holding the income tax scheme

55. *See supra* note 42 and accompanying text.

56. Quill Corp. v. North Dakota *ex rel.* Heitkamp, 504 U.S. 298, 305 (1992) (emphasis added).

57. *Id.* at 312 (emphasis added).

58. *Id.* at 313 (emphasis added).

violated the DCCD.[59] As *Quill* amply demonstrates, however, there is nothing novel about a holding that one constitutional provision prohibits what another permits, especially if the two provisions protect different interests. There would be no Commerce Clause objection to a law banning the interstate shipment of material critical of the federal government, for example.[60] That such a law would likely be unconstitutional under the First Amendment[61] hardly nullifies or renders meaningless Congress's commerce power; it merely qualifies it or subordinates it to another constitutional principle.

The real question then is not whether Maryland's taxing regime satisfies "fundamental fairness," "fair notice," or "warning," values that the Due Process Clause safeguards; but whether the disallowance of the credit for local taxes discriminates against or otherwise impermissibly burdens interstate commerce, principles protected by the DCCD. The DCCD's limit on a state's taxing power does not nullify the freedom to tax that the Due Process Clause permits to states, it merely qualifies it. Not every tax will implicate the DCCD; Maryland's does by virtue of its attempt to shift an "unfair share of the tax burden onto interstate commerce."[62]

C. The Failure to Offer Credit Against the Local Income Tax Does Not Satisfy the Complete Auto *Test*

When its brief finally reaches the Commerce Clause issue, Maryland argues that (1) its income tax was constitutional because it wasn't facially discriminatory,[63] and (2) apportionment is not constitutionally required for income taxation of residents' income.[64] The lower court, the state charged, made up its DCCD standard,

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59. Petitioner's Brief, *supra* note 40, at *13; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at *7, Md. State Comptroller of the Treasury v. Wynne, No. 13-485 (August 1, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2685 ("If the Commerce Clause required States to forgo residential income-tax revenue whenever a resident pays out-of-state income taxes, a longstanding and significant principle of this Court's state-taxation jurisprudence would be a virtual dead letter.") [hereinafter Brief for the U.S.].

60. Champion v. Ames, 188 U.S. 321, 363 (1901) (upholding criminalization of interstate shipment of lottery tickets).

61. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 845–46 (1995) (invalidating viewpoint-based restriction on University program designed to promote production and dissemination of student publications, but which excluded work that promoted particular religious viewpoints).

62. *See supra* note 58 and accompanying text.

63. Petitioner's Brief, *supra* note 40, at *10 ("The court . . . ignored the fact that Maryland treats a resident's income exactly the same regardless where it is earned.").

64. *Id.* at *9 (claiming that the internal consistency test has never been applied by the Court to "individual taxes based on residency").

"assembling it from parts drawn from negative Commerce Clause jurisprudence"[65] and wrongly assuming that *Complete Auto* was the correct test.[66] Because Maryland's income tax was "strictly neutral"[67] as to the source of the income and drew no distinctions based on geography, the state argued, it could not be labeled discriminatory.[68] Moreover, the brief argued, "the court simply assumed that an individual tax based on residency had to be apportioned among different states."[69] The Supreme Court, the state stressed, "has never applied the internal consistency test to a state tax based on an individual's residency . . . ."[70] Nor should it, Maryland maintained: fair apportionment is not an issue when, as here, the tax is based on residency as opposed to income, because none but the domiciliary state has the right to tax on the basis of residency.[71]

In its discussion of the DCCD, Maryland makes two specious claims. First, Maryland argues that the DCCD is inapplicable because the taxpayers are Maryland residents. The DCCD, Maryland intoned, "never intended to 'protect state residents from their own state taxes.' "[72] The problem with the quotation from *Goldberg v. Sweet*[73] is that, as the leading treatise states:

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65. *Id.* at *32.

66. *Id.* at *33.

67. *Id.* at *35.

68. *Id.* (citing cases in support of the proposition that only those taxes that "openly favored"—facially discriminated against—interstate commerce have been held unconstitutional); *id.* at *36 (seeming to equate "discriminatory" with "facially discriminatory"). The state did seem to concede that a tax could be discriminatory without being facially discriminatory if it was enacted with a protectionist purpose, *id.* at *40, but says that because neither discriminatory intent or protectionist purpose drove the Maryland income tax, it could not be characterized as discriminatory on that ground either. *Id.* at *16 (writing that the "clear purpose of Maryland's decision to provide partial credits was to make sure that all Maryland residents provide some income tax support for governmental programs"); *id.* at *40 ("Not surprisingly, no indication of 'economic protectionism' is present here.").

69. *Id.* at *37; *id* at *15 ("The object of taxation, residency status, is unlike the income of a unitary business, because there is no need for it to be apportioned among various taxing states in order to assure that each state is taxing only its rightful share.").

70. *Id.* at *38; *see also id.* at *39 (arguing that an income tax based on residency does not tax economic activity but rather the privilege of residing in the state, even if measured by income).

71. *Id.* at *37 ("When a state bases its taxing jurisdiction on an individual's residency, the state is necessarily taxing a status—being a resident—that no other state has jurisdiction to tax."). Of course, as Ed Zelinsky points out in his contribution, Maryland's argument ignores the problem of statutory residents who are domiciled elsewhere. *See* Edward A. Zelinsky, *Why* Wynne *Worries Me*, 67 VAND. L. REV. EN BANC 207, 211–15 (2014).

72. Petitioner's Brief, *supra* note 40, at *2 (internal citations omitted). *See id.* at *42 (same)

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

> [T]he Court could not have meant what it said. If a state imposes a tax on state residents' purchases of out-of-state but not in-state goods, the tax would be struck down in short order. A more blatant discrimination against interstate commerce in violation of the 'free trade' principles under the Commerce Clause is difficult to imagine.[74]

In the authors' view, "the Court repudiated its ill-considered dictum (at least implicitly)"[75] in *West Lynn Creamery* v. *Healy*.[76]

Second, Maryland errs in its assertion that taxes may not be invalidated for being anything other than facially discriminatory.[77] Discrimination in effect is sufficient to trigger invalidation under the DCCD. The Court has stated that it has the "duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce."[78] A discriminatory purpose, too, will doom a facially-neutral tax.[79] Therefore, the fact that Maryland's tax made no overt distinction between in-state and out-of-state income is irrelevant.[80]

As the court of appeals carefully demonstrated,[81] the lack of a credit against the county income tax will result in Maryland residents who earn out-of-state income paying more in taxes than a resident who earns all of her income in Maryland. At the very least, this constitutes effective discrimination against the earning of out-of-state income and provides some incentive for taxpayers to confine their income-earning activities to Maryland. The Court has invalidated taxes that created similar incentives in the past.[82]

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74. HELLERSTEIN ET AL., *supra* note 18, ¶ 4.14[1][f], at 4-85.

75. *Id.*

76. 512 U.S. 186, 203 (1994) ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional.").

77. *See supra* Part II.

78. Best & Co. v. Maxwell, 311 U.S. 454, 455–56 (1940) (invalidating tax imposed on persons or corporations that are "not a regular retail merchant in the state" who rent or occupy hotel rooms to take retail orders; holding that the tax effectively discriminates against out-of-state retailers and is unconstitutional).

79. Bacchus Imports, Ltd v. Dias, 468 U.S. 263, 270 (1984) (stating that invalidation under the DCCD can occur "on the basis of either discriminatory purpose . . . or discriminatory effect" (internal citations omitted)).

80. *See supra* note 23 and accompanying text; *Maxwell*, 311 U.S. at 455 ("The commerce clause forbids discrimination, whether forthright or ingenious.").

81. *Supra* note 34.

82. *See, e.g.,* Fulton Corp. v. Faulkner, 516 U.S. 325, 333 (1996) ("A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce."); Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 406 (1984) ("Whether the discriminatory tax diverts new business into the State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that forecloses tax-neutral decisions and . . . creates . . . an advantage for firms operating in New York by placing a discriminatory

This leaves the issue of fair apportionment. The state was sharply critical of the claim that the cure for double taxation is for Maryland to credit taxes paid elsewhere against both the state and county income taxes. "If a state has jurisdiction to tax all its residents' income . . . nothing in the Constitution compels the state to subordinate its exercise of that lawful authority to the taxing authority of other states," it wrote.[83] Determining which state's taxes should be given "priority" is "an insurmountable problem" to which the Constitution offers no solution.[84] In the state's view, the Constitution certainly does not prescribe the "rule of enforced priority . . . [that] the Court of Appeals attempt[ed] to invent . . . ."[85]

Maryland is correct that the Supreme Court has never heard a case involving individual income taxes, but it is clear in corporate tax cases that the Commerce Clause requires apportionment so that "no more than all of the unitary business's income" is taxed even if multiple states applied the same taxing scheme.[86] It is equally clear that "[t]he provision of a tax credit for taxes paid to other states on the same tax base will generally provide a complete defense to any allegation that a tax is internally inconsistent."[87]

With individuals, too, the power of two states to tax 100% of a domiciliary's income and 100% of a nonresident's income earned in the state "exposes a taxpayer to the risk of multiple taxation."[88] As is true in the corporate context, the possibility of multiple taxation raises constitutional issues under the Commerce Clause.[89] As Hellerstein and Swain observe:

> A state has no more power under the Commerce Clause to tax individuals on 100 percent of their income earned from commercial activities that are taxable in other

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burden on commerce to its sister States." (internal quotation marks omitted)); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 336 (1977) ("[T]he flow of securities sales is diverted from the most economically efficient channels and directed to New York. This diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with . . . the Commerce Clause.").

83. Brief of Petitioner*, supra* note 40, at *13.

84. *Id.* at *14; *see also id.* at *26, *30 (arguing that the Constitution does not require subordination of lawful taxing authority to the taxing authority of other states; and that neither the Due Process Clause nor the Commerce Clause "provide[] tools for answering" which taxing jurisdiction should give way when multiple taxation results).

85. *Id.* at *27.

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

87. HELLERSTEIN ET AL., *supra* note 18, ¶ 4.16[1][b], at 4-198. *See, e.g.,* Tyler Pipe Industries v. Washington Dept. Rev., 483 U.S. 232 (1987).

88. 2 HELLERSTEIN ET AL., *supra* note 18, ¶ 20.04[1][a].

89. *Id.* ("Under the Commerce Clause . . . such a risk of multiple taxation raises a serious constitutional question, at least in circumstances in which it is clear that the tax substantially affects interstate commerce." (footnotes omitted)).

> states than it has to tax corporations on 100 percent of their income earned from commercial activities that are taxable in other states.[90]

The remedy seems obvious: a credit for taxes paid.

Maryland and the United States, however, ask for an exception to the DCCD for state and local income taxes imposed on individuals by virtue of their residence in the state. Specifically, they both argue that the DCCD does not prevent a state from taxing all of the income of its *residents* as part of its individual income tax.[91] In essence, they seem to be drawing an analogy to personal jurisdiction: in the same way that two or more states may assert personal jurisdiction over a person, one by virtue of the person's residence and the others by virtue of the person's contacts with the state, two or more states may tax an individual's income.[92]

This *Pennoyer v. Neff*-like theory of income taxation, however, creates a dilemma for the United States and the State of Maryland. If the state in which an individual resides may tax 100% of that individual's income regardless of where that income was generated, then either double taxation will take place or the states in which the income is earned must be disabled from taxing some or all of the Maryland residents' income. Neither proposition can be squared with existing Supreme Court case law.

Take the notion that states may not tax the income of non-residents generated within that state. That will surely be unhappy news to some states, such as New York, Pennsylvania, and even, dare we say it, Maryland, where a substantial amount of income generated in the state is earned by individuals who reside outside the state. More importantly, as even Maryland concedes, there is no reason to think that the U.S. Constitution gives priority to one state over another regarding taxation—i.e., there is no reason why New Jersey should have the right to tax 100% of the income of its residents who work in New York City, while New York is constitutionally disabled from taxing that income. If anything, one might think that the state in which the income is earned has a greater constitutional claim to tax

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90. *Id.*

91. Brief for the U.S., *supra* note 59, at *9.

92. *Compare* Pennoyer v. Neff, 95 U.S. 714, 723–24 (1878) ("If [a] non-resident ha[s] no property in the State, there is nothing upon which the tribunals can adjudicate."), *with* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (internal quotation marks omitted)).

that income than the state in which the person earning the income resides. These are *income*, not *residence*, taxes after all.[93]

For that reason, both the United States and Maryland embrace the alternative: the Constitution does not prohibit multiple taxation where individuals earn income from sources outside their state of residence. Though cast as a limited exception to the DCCD for the taxation of residents, this position, if embraced by the Court, would significantly alter the Court's dormant Commerce Clause doctrine. First and most notably, accepting the validity of double taxation of individuals' income would impose a substantial burden upon interstate commerce. As the Maryland Court of Appeals correctly noted, a Maryland resident who earns 100% of her income in Maryland pays only the Maryland income tax; however, a Maryland resident who earns 100% of her income from outside the state (say, from an S Corporation located in Arizona) would pay income tax on the whole amount both to Arizona and to Maryland. Thus, a state resident pays more income tax if he or she earns her income from outside the state than inside the state. As a result, residents will be discouraged from engaging in interstate commerce: it is far better for a Maryland resident to invest in a business in Maryland than for that resident to invest in a business in Arizona. That the dormant Commerce Clause forbids such crass economic protectionism has, until *Wynne*, been one of the few principles of American constitutional law to draw virtually universal assent.[94]

Maryland and the United States respond that, because individuals receive benefits (police protection, sound governance, etc.) in both their state of residence as well as the state in which they earn income, they should not be heard to complain of double taxation. In so arguing, however, Maryland and the United States create a straw man. No one contests Maryland's right to tax the income of its residents; rather, the key question is whether the Constitution requires Maryland to apportion the income subject to its taxation. Or

93. As an *amicus* brief from the Council on State Taxation ("COST") states, "a state can tax its residents on 100 percent of their income, but when another state taxes some of the same income that was earned and appropriately sourced to that second state, then the 'residence' principle must give way to the 'source' principle (through a credit mechanism) to avoid a constitutional impairment." Brief for the Council on State Taxation as Amicus Curiae Supporting Respondent at *25, Md. State Comptroller of the Treasury v. Wynne, No. 13-485 (September 26, 2014), 2014 WL 4895277. COST's brief went on to note that Maryland was an outlier in its refusal to apply the credit to the county tax: "every state with a broad-based individual income tax provides a credit for taxes paid to other states." *Id.* at *27 & n.12.

94. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.").

to ask the same question differently, may Maryland tax 100% of the income of its residents, even if other states have a justifiable claim to tax some (or all) of that income?

When it comes to corporate and other business taxes, the answer to that question has been clear: a state may not tax 100% of the income of a corporation that earns some of that income outside the state of domicile of the corporation but must instead apportion that income. To be sure, the requirement that income be apportioned is a complicated one that has kept a generation of CPAs gainfully employed. Different states use different apportionment formulas. While the Court has accepted that different apportionment formulas may be used (even if the use of different formulas may result in overlapping taxation of some income), the Court has been adamant that states apportion income so as to avoid the double taxation of income earned by interstate enterprises.[95] The Court has never accepted that Delaware, for example, may tax 100% of the income of all Delaware-registered corporations no matter where such income is earned. Yet, that is precisely what Maryland and the United States argue when it comes to individuals.[96]

That last point raises a different (and conceptually distinct) reason for rejecting the position of the United States and Maryland—namely, that their approach would treat individuals differently from and worse than corporations, who are protected against multiple taxation of their income by different states. The Court has drawn considerable fire recently for holding that corporations may assert

95. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (requiring at least some form of apportionment to satisfy the requirement that "no tax may be imposed, unless there is some minimal connection between those activities and the taxing State").

96. Bizarrely, the United States goes even further and contends that Maryland's decision to tax 100% of a resident's income, no matter where earned, is a fairly apportioned tax. *See* Brief for the U.S., *supra* note 59, at *20–24. According to the United States, since a taxpayer can reside in only one state, only one state may tax an individual's income because of his residence. *Id.* at *24. In the view of the United States, the fact that other states may tax that same income because it is earned there (or for other reasons) is irrelevant to whether the tax is fairly apportioned. *Id*. Of course, on that view, no tax could ever fail the fair apportionment requirement of *Complete Auto* because every corporate income tax could be defended in the same tautological manner. On the United States' view, Delaware could tax 100% of Delaware corporations because Delaware is the state of their registration; New York could tax 100% of the income of Delaware corporation with their principal place of business in New York because New York is taxing only the right to do business in the state; and California could tax 100% of the income generated in California by Delaware corporations whose principal place of business is in New York because California is taxing only the right to earn income in the state. If multiple income taxes can be levied so long as each state claims some unique jurisdictional hook (as the United States urges), the prohibition on double taxation is illusory, and all of the Supreme Court's cases invalidating state taxes on that ground were wrongly decided.

First Amendment rights;[97] in the eyes of detractors, equating corporations with individuals for purposes of constitutional rights is unwarranted. What the United States and Maryland are pushing, however, goes a step further: they suggest that corporations are entitled to *greater* constitutional protection than individuals when it comes to the DCCD.[98] That cannot be right, and, unsurprisingly, neither the United States nor Maryland offer any support for why corporations should be constitutionally protected against double taxation but individuals shouldn't.

As to the practical problem of priorities, we think that the general rule followed by many states is a workable and sensible one: the domiciliary state should give a credit to taxes paid on income earned elsewhere. First, as the state has power to tax 100% of income, even income earned out of state, the domiciliary state will often be able to tax *some* of the taxpayer's income, if not the lion's share. While the state should be entitled to tax 100% of its residents' income if no other state chooses to lay claim to it, if another state taxes that income, we think the domiciliary state should honor that state's right to tax and not disadvantage interstate commerce by refusing to offer a tax credit against the tax paid. Second, by virtue of the taxpayer's domicile, he will be subject to numerous taxes that nondomiciliaries or nonresidents may avoid, such as property taxes, sales taxes, and ad valorem taxes of various kinds. These would seem to ensure some contribution to the state's coffers and provide recompense for the unique benefits residents derive from their state—even if the taxpayer managed to earn 100% of her income outside the state.

Maryland's argument that the Constitution prescribes no such rule of priority is something of a red herring. Constitutional principles are difficult to enforce directly. Judges of necessity must create mediating rules and doctrine to implement constitutional principles.

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97. Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342, 372 (2010) (invalidating restrictions on corporate spending in political campaigns and holding "political speech does not lose First Amendment protection simply because its source is a corporation" (internal quotation marks omitted)); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768–69 (2014) (holding that, under the Religious Freedom Restoration Act, corporations may assert statutory religious freedom claims).

98. *See* Brief for the U.S., *supra* note 59, at *30. The United States justifies this preference for corporations on the ground that corporations receive fewer benefits from states than individuals, pointing to the fact, for instance, that corporations do not have children to educate in schools. *Id*. Of course, corporations derive numerous benefits from states, often in ways that individuals do not, but, more importantly, the claim that individual income taxes need not be apportioned cannot rest on such an untested assertion that individuals (presumably as a class) receive more benefits from state governments than corporations (again, presumably as a class).

Only a constitution "partak[ing] of the prolixity of a legal code"[99] would contain priority rules for credits awarded in cases of multiple taxation. The doctrines employed by the Maryland court are no more novel than the content-based/content-neutral rules employed in First Amendment cases,[100] the anti-commandeering principle,[101] state sovereign immunity doctrine,[102] or the DCCD itself. There is a great deal of "constitutional law" that is rather tenuously connected to the document itself. Whether that is a fact to be celebrated[103] or mourned[104] is beyond the scope of our commentary here. But Maryland makes no good argument that the doctrine employed by the lower court was so egregiously divorced from time-honored constitutional principles that the decision rules it employed ought to be jettisoned in toto. To the contrary, unless the Supreme Court is prepared to abandon the DCCD in whole or in part—possibilities we consider in the next section—affirmance seems to be required by the logic of the Court's past decisions and the constitutional principles they endorsed.

V. SPECULATION ON THE COURT'S CERT. GRANT

For several reasons, the Court's decision to grant certiorari in the *Wynne* case was surprising. Perhaps even more surprising was the fact that the United States supported the grant of certiorari. The

99. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

100. *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech . . . ." (internal quotation marks omitted)).

101. *See, e.g.,* United States v. Printz, 521 U.S. 898, 932–33 (1997) (distinguishing analysis for laws of "general applicability" and those seeking to "direct the functioning of the state executive").

102. *See, e.g.,* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (inferring confirmation of state sovereign immunity from Eleventh Amendment's text).

103. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–79 (1996) (arguing that a common law method of constitutional interpretation is superior both as a descriptor of what the Supreme Court does in practice than originalism, and that it is normatively superior as well).

104. Akhil Reed Amar, *The Supreme Court, 1999 Term–Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000) ("What the American People have said and done in the Constitution is often more edifying, inspiring, and sensible than what the Justices have said and done in the case law."); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 211 (1985) ("The 'constitution' has become an ambitious political and social agenda; the courts have become a kind of elevated bureaucracy, busily crafting formulae that will bend the nation's affairs toward various visions dignified by constitutional status.").

United States' interest in the case is far from evident.[105] Nevertheless, the decision to hear the case has been made, and now the relevant question is what is the Court likely to do. In this part, we canvass several of the possibilities and evaluate their likelihood and merits. In doing so, we take as a given that the Court is inclined to reverse the Maryland Court of Appeals and hold that the DCCD does not require Maryland to provide a tax credit against its income tax for income taxes paid to other states.

A. Overturn the Dormant Commerce Clause

The broadest relief imaginable would be for the Court to repudiate its dormant Commerce Clause doctrine and hold that the Commerce Clause does not by itself impose any judicially enforceable limit on state authority. That seems unlikely, however. First, neither the State of Maryland nor the United States has advocated such a broad ground of relief.[106] Second, the fact that the DCCD has been part of the Supreme Court's constitutional jurisprudence since 1824 makes it inconceivable that the Court would issue such relief on its own.[107]

B. Restrict the Dormant Commerce Clause to State Regulatory Measures

A narrower variant of the foregoing argument would be to restrict the DCCD to state regulatory measures, thereby exempting state taxes from review under the dormant Commerce Clause. Again, neither the State of Maryland nor the United States has advocated such a position.[108] Moreover, the numerous cases in the past century and a half in which the Court has reviewed state and local taxes under the DCCD make such relief implausible.[109]

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105. In fairness, the United States weighed in on the grant of certiorari only after the Supreme Court invited the United States to do so. Of course, since the case involves only constitutional restrictions on state and local authority, the United States has no direct stake in the case. Neither in its brief in support of certiorari nor in its merits brief did the United States explain why it chose to side with Maryland rather than the taxpayers.

106. Brief for the U.S., *supra* note 59, at *14 (accepting long-standing pedigree of the DCCD).

107. *See* Norman R. Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1398–1401 (2004) (describing the origins of the DCCD).

108. Brief for the U.S., *supra* note 59, at *19–20 & n.3 (acknowledging that *Complete Auto* is good law and accepting that test applies to taxes on interstate commerce).

109. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1851) ("If . . . the nature of th[e] power . . . is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to Congress, as effectually and

Alternatively, but yet still in this vein, the Court could revisit its analytical framework for assessing state taxes under the DCCD. In particular, the Court could repudiate its four-part test from *Complete Auto v. Brady* and create a different, more lenient framework for reviewing the constitutional validity of state and local taxes. For instance, the Court could weaken the fair apportionment prong by jettisoning the internal consistency requirement. To be sure, the *Complete Auto* test has drawn considerable criticism over the past few decades; but again, no party in the *Wynne* case has asked the Court to undertake such a wide-reaching revision in its jurisprudence, let alone suggested what type of framework should replace *Complete Auto*. As such, it seems highly unlikely that the Court would use this case as the vehicle to overhaul its approach to reviewing state and local taxes under the DCCD.

And, even if the Court were inclined to revisit *Complete Auto*, *Wynne* provides a very poor vehicle for undertaking that revision. Both the state of Maryland and the United States accept that the Constitution forbids discriminatory taxes; they just dispute whether Maryland's county income tax is discriminatory. Similarly, both the State of Maryland and the United States acknowledge that corporate income taxes must be apportioned; they just contest the applicability of that principle to Maryland's county income tax.

C. Carve an Exception for the Taxation of Individuals

As just discussed, both the United States and State of Maryland have eschewed the broadest attacks on the dormant Commerce Clause, thereby accepting that the Commerce Clause does impose some judicially enforceable limits on state and local taxing authority. As noted above, however, the remedy the state seeks—freedom to tax all resident income, regardless of where the income is earned—would be difficult to square with existing case law. The Court would have to repudiate the line of cases protecting interstate income from double taxation or make a hard-to-defend distinction between corporate income and personal income. Neither of those options would be normatively justified or politically expedient.

perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them.").

D. Exempt Local Income Taxes

In light of the foregoing problems with Maryland and the United States' position, we hope that the Court rejects it. The Court could, for instance, carve an extremely narrow exception for local income taxes on residents, allowing localities to tax all the income of their residents on the theory that, because local income taxes are rare and, even where they do exist, their rates are so low, allowing double taxation of income by localities as a de minimis burden on interstate commerce.[110] Conceptually, double taxation is double taxation, and whether the additional tax burden is $1 or $1 million, the damage to the economic union among the states that the DCCD was designed to safeguard is the same.[111] Nevertheless, if the Court does not ultimately come to agree that the Maryland Court of Appeals reached the right result, such a narrow exception would do the least damage to interstate commerce and, just as importantly, to the dormant Commerce Clause doctrine that protects such commerce from discriminatory or unduly burdensome taxes and regulations.

E. Affirm

The last possibility is that the Court, upon reflection, decides that the Maryland Court of Appeals was correct and that the county income tax violates the DCCD. Although this would be the correct decision in our view, we are doubtful of its likelihood. With no circuit split on this issue to resolve, the Court must have been skeptical of the merits of the decision below.[112] At the same time, however, Justices can change their minds during the course of argument, and, unlike other areas of constitutional law, the DCCD generates an unusual grouping of Justices. Federalism, economic liberty, and judicial restraint themes point in different directions in DCCD cases, producing coalitions of Justices much different from the typical 5-4 conservative/liberal split in more "hot button" cases. Add to that the fact that it has been several years since the Court last considered a DCCD case, which in any event focused on a different element of the

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110. *But see* Fulton Corp. v. Faulkner, 516 U.S. 325, 334 n.3 (1996) ("[W]e have never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause.").

111. *See, e.g.*, Oregon Waste Systems, Inc. v. Dept. Environ. Quality, 511 U.S. 93, 108 (1994) (invalidating trivially small but still discriminatory waste tipping fee).

112. *Cf.* City of Bourne v. Flores, 521 U.S. 507 (1996) (granting certiorari and ultimately reversing court of appeals despite absence of circuit split).

DCCD,[113] and it is possible that, while there were initially four Justices interested in hearing the *Wynne* case, there may be five (or more) Justices prepared to affirm the decision below. Again, we do not think this is likely, but we do think it is correct.

VI. CONCLUSION

The decision of the U.S. Supreme Court to grant certiorari in *Wynne* is an ominous sign, given the propensity of the Court to reverse the vast majority of cases it hears. Reversal would be unfortunate because, as we have argued, the decision itself was a straightforward application of fairly long-settled constitutional principles limiting state taxation of interstate commerce. If reversal is the order of the day, we hope the Court will do so on a very narrow ground so as to minimize the wholesale destabilization of the DCCD. We would love to be proven wrong, however. It's possible that the Court chose to hear *Wynne* because its clean facts and its focus on the DCCD furnish an opportunity for a ringing endorsement of the principle that while states may make interstate commerce pay its way, individual states cannot tax more than their fair share of that commerce and can't expose it to the threat of double taxation in the name of state sovereignty. If the Wynnes cannot win, then we'll settle for a draw, and hope we don't completely lose the DCCD in the process.

113. Kentucky Dept. of Rev. v. Davis, 553 U.S. 328, 341 (2008); *see also* Norman R. Williams & Brannon P. Denning, *The "New Protectionism" and the American Common Market,* 85 NOTRE DAME L. REV. 247, 259–262 (2008) (describing and analyzing the *Davis* decision).