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The States' Multiple Taxation of Personal Income

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Introduction

The multiple state taxation of income—the taxing of the same increment of a particular taxpayer's income by more than one state—has long been considered constitutionally taboo.[1] The reason is plain enough. Such an overlap can only occur when a taxpayer is engaged in income-producing activity in multiple states; taxpayers confining their activity to a single state are necessarily immune. It logically follows that such duplicative taxation, when it occurs, operates to the disadvantage of taxpayers engaged in interstate commerce. And the disadvantaging of interstate commerce, relative to purely intrastate

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1. By "taboo," I do not mean necessarily *unconstitutional*. Indeed, elucidating this distinction—between multiple taxation in general and multiple taxation that presents a constitutional problem—is one of this article's principal objectives.

commerce, is typically the *sine qua non* of a dormant Commerce Clause violation.[2]

Unsurprisingly, then, many Supreme Court decisions have seemed to proclaim that multiple taxation—or even just the *risk* of multiple taxation—is constitutionally verboten. Consider the Court's 1939 decision in *Gwin, White & Prince, Inc. v. Henneford*,[3] where the Court invalidated a state tax on the ground that it created, "merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."[4] Or consider the Court's opinion in *Northwestern States Portland Cement Co. v. Minnesota*,[5] where it declared that a state may not "impose a tax which discriminates against interstate commerce . . . by subjecting interstate commerce to the burden of 'multiple taxation.'"[6] As the foremost expert in the field has written, "[f]or more than 75 years, the Supreme Court has steadfastly adhered to the doctrine that the dormant Commerce Clause forbids state taxes that expose interstate commerce to a risk of multiple taxation to which intrastate commerce is not exposed."[7]

But matters are not quite so simple. Despite these broad pronouncements, the taxation of the same person's income by multiple states is often perfectly constitutional. And the Supreme Court has so held, for reasons that are central to the states' power to raise revenue—an authority that is essential to their independent sovereignty.

First, it is firmly established that states have the power to tax any income that is earned within their borders. If a taxpayer avails herself

2. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574–75 (1997) (alteration in original) ("A State's 'power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against [interstate] commerce.'" (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 596 (1923))).

3. 305 U.S. 434 (1939).

4. *Id.* at 439.

5. 358 U.S. 450 (1959).

6. *Id.* at 458 (quoting Mich.-Wis. Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954)); *see also* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 182 (1995) (referring to the dormant Commerce Clause's "prohibition against multiple taxation").

7. Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 123 J. Taxation 1, 6 (2015) [hereinafter *Deciphering* Wynne]. *See also* Walter Hellerstein, State Taxation ¶ 4.09[1][a] (3d ed. 2020) [hereinafter State Taxation] ("[A] tax that exposes a multistate taxpayer to the risk of multiple taxation is invalid under the Commerce Clause."). To be fair, Professor Hellerstein has also written that "[t]his is not to suggest, however, that the Constitution always forbids double taxation of income. In fact, it does not." *Id.* ¶ 6.04. *See infra* notes 41–44 and accompanying text.

of the opportunity to engage in income-earning activity within a given state, that state has jurisdiction to tax her income earned there.[8] (This is often called "source-based" tax jurisdiction.) But as the Supreme Court squarely held in *Moorman Manufacturing Co. v. Bair*,[9] the Constitution does not prescribe any uniform method for states to determine what income has been earned within their borders; it merely requires that such determinations not be "arbitrary."[10] As a result, the states' income-attribution rules differ substantially from one another, making overlap in the taxation of multistate taxpayers' incomes commonplace.[11] And this multiple taxation, as the Court recognized in *Moorman*, is entirely constitutional.[12]

Second, in addition to their source-based jurisdiction, states have the power to tax *all* of the income of their residents, no matter where the individual earns that income.[13] This authority reflects a state's unique relationship with its citizens: the public services it provides, the rights of citizenship it confers, and the protections it affords for the enjoyment of that income.[14] The existence of these two, independent fonts of a state's power to tax an individual's income—on the basis of source *and* residence—means that often two states will have the authority to tax the same increment of income. And those taxing powers are of equal constitutional status; the Constitution prescribes no rule of priority between the state of source and the state of residence.[15] Hence, the foundations of the states' constitutional powers to impose personal income taxes inherently contemplate—even invite—the existence of multiple taxation.[16]

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8. *See* Int'l Harvester Co. v. Wis. Dep't of Tax'n, 322 U.S. 435, 441–42 (1944).
9. 437 U.S. 267 (1978).
10. *Id.* at 275 ("The Iowa statute afforded appellant an opportunity to demonstrate that the single-factor formula produced an arbitrary result in its case. But this record contains no such showing and therefore the Director's assessment is not subject to challenge under the Due Process Clause.").
11. *See id.* at 278–80 (discussing the fact that this sort of multiple taxation is inevitable without mandatory, uniform rules for the division of income).
12. *See id.* at 278.
13. *See, e.g.*, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995); New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937); Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 279 (1932).
14. *See Cohn*, 300 U.S. at 313.
15. *See infra* notes 62–66 and accompanying text.
16. A point of clarification: for purposes of this article, I am setting aside the question of whether states possess the authority to tax the entire income of resident corporations, rather than the income reasonably attributable to the taxpayer's activity within the state. As others have noted, this remains an open (and important) question. *See* Brief for the United States as Amicus

Thus, the proposition that a state personal income tax that exposes taxpayers to multiple taxation is unconstitutional *for that reason* is untenable. No doubt, multiple taxation may point to an underlying constitutional problem. An exaction is unquestionably impermissible when it projects the state's taxing authority beyond its lawful jurisdiction, or when it discriminates against interstate commerce.[17] And a tax that violates one of these foundational prohibitions will often result in duplicative tax burdens. But it is a conceptual mistake to confuse a symptom for the underlying disease. Properly understood, multiple taxation only indicates that a constitutional violation *may* be afoot, not that one necessarily exists.

This clarification concerning the role of multiple taxation in assessing the constitutionality of a state personal income tax is significant, for it resolves an important question left unanswered by the Supreme Court's recent decision in *Comptroller of the Treasury of Maryland v. Wynne*.[18] There, the Court invalidated a provision of Maryland's personal income tax that taxed Maryland residents on the entirety of their incomes, wherever earned, without offering a credit for income taxes paid to other states.[19] (Maryland also imposed this same tax on nonresidents, on the income they earned within the state.[20]) Maryland's scheme necessarily exposed its residents who earned income outside the state—when other states taxed that same income on a source basis—to double state-level taxation.[21]

The first part of the Court's analysis in *Wynne* invoked three decisions invalidating state taxes that had subjected taxpayers to the

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Curiae at 31, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13–485), 2014 WL 3811118 (noting that "[i]t is an open question whether States are constitutionally *required* to apportion the income of a domestic corporation"); State Taxation, *supra* note 7, ¶ 8.02[3]. There are strong arguments that states have this power. But there are also decent arguments that the relationship between a state and its individual (human) residents is fundamentally different from what it has with business entities domiciled in the state. And that difference might dictate a narrower jurisdiction to tax a corporation's income earned outside the taxing state. In all events, the analysis presented in this essay is limited to *personal* income taxes.

17. Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1805 (2015).

18. 135 S. Ct. 1787 (2015).

19. *Id.* at 1792.

20. *Id.*

21. *See* Bradley W. Joondeph, *Opinion Analysis: Maryland's Personal Income Tax Violates the Commerce Clause*, SCOTUSblog (May 19, 2015, 10:20 AM), https://www.scotusblog.com/2015/05/opinion-analysis-marylands-personal-income-tax-violates-the-commerce-clause/ [https://perma.cc/88QC-2YHC].

risk of multiple taxation.[22] Remarking that these cases were "particularly instructive," the Court seemed to intimate that tax schemes producing this sort of "double taxation of income earned out of the State" are necessarily unconstitutional.[23] But the Court ultimately grounded its holding in the conclusion that—viewing Maryland's scheme as a whole, as applied to both residents and nonresidents—it discriminated against interstate commerce.[24] And in doing so, the Court reserved the question of whether the Constitution permits states to impose nondiscriminatory personal income taxes on the entirety of their residents' incomes without protecting those taxpayers from the risk of multiple taxation, disclaiming that it was establishing any "rule of priority" for the state of source.[25] The Court thus left undecided whether such a scheme—which would necessarily expose taxpayers engaged in interstate commerce to duplicative burdens not borne by taxpayers confining their activities to one state—would violate the dormant Commerce Clause.[26]

This article explains why it would not—why a state personal income tax that exposes taxpayers to multiple taxation is entirely constitutional so long as it neither projects the state's taxing powers beyond the state's lawful jurisdiction nor discriminates against interstate commerce.

Part I demonstrates that, contrary to the broad-brush generality that the Constitution prohibits state income tax schemes that produce multiple taxation, such schemes can be perfectly constitutional, giving lie to the generality. Part II then explains that, though income taxes that result in multiple taxation are frequently unconstitutional, the reason is not the multiple taxation itself, but those schemes' violation of one of the two deeply embedded, foundational limits on states' taxing authority: (1) that states may only tax income over which they have lawful jurisdiction; and (2) that states may not impose taxes that discriminate against interstate commerce. Finally, Part III illustrates how this understanding of multiple taxation—disentangled from the deeper principles that determine a state income tax's constitutionality—answers the question left open by *Wynne*. Specifically, a state's nondiscriminatory personal income tax on the entirety of its residents' income—absent any provision protecting taxpayers from duplicative burdens stemming from other states' taxing that same

22. *Wynne*, 135 S. Ct. at 1795 (discussing J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939), and Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948)).

23. *Id.*

24. *Id.* at 1805.

25. *Id.*

26. *See Deciphering* Wynne, *supra* note 7, at 4 (explaining that the Court's holding left this question open).

income—is constitutionally permissible, despite the resulting multiple taxation for taxpayers engaged in interstate commerce.

I. The Constitutionality of Multiple Taxation

A. The "multiple taxation doctrine"

It is a well-worn general principle of state and local tax law that the Constitution forbids state income tax schemes that expose taxpayers engaged in interstate commerce to multiple taxation. Indeed, though the Supreme Court has been somewhat inconsistent on this point,[27] many of the Court's decisions have articulated the principle that a state tax that subjects taxpayers to the *risk* of multiple taxation (and not just *actual* multiple taxation) violates the dormant Commerce Clause.[28]

This "multiple taxation doctrine" is often traced to the Supreme Court's 1938 landmark decision in *Western Live Stock v. Bureau of Revenue*.[29] There, the Court upheld a New Mexico gross receipts tax imposed on a newspaper's revenue from out-of-state advertisers (dis– pensing with the formalistic rule that states may not impose taxes "directly" on interstate commerce).[30] But in so holding, the Court explained that a state tax would violate the Commerce Clause if it subjected taxpayers engaged in interstate commerce to duplicative tax burdens. States are forbidden from imposing taxes

> of such a nature as to be capable, in point of substance, of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being

27. *Compare Gwin, White & Prince*, 305 U.S. at 439 (invalidating a state tax because "it imposes upon [interstate commerce], merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed"), *with* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276 (1978) (rejecting the taxpayer's dormant Commerce Clause challenge in part because the "record does not establish the essential factual predicate for a claim of duplicative taxation" where the existence of "duplicative taxation of the net income" was "speculative").

28. *See, e.g.*, *Gwin, White & Prince*, 305 U.S. at 439; J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938).

29. 303 U.S. 250 (1938); *see* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 181–82 (1995) (noting that Justice Stone's opinion in *Western Live Stock v. Bureau of Revenue* has "since become our aspiration in this quarter of the law"); State Taxation, *supra* note 7, ¶ 4.09[1][a] (noting that Justice Stone was the "chief architect of the multiple taxation doctrine" in *Western Live Stock v. Bureau of Revenue*).

30. *Western Live Stock*, 303 U.S. at 254 ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

> done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.[31]

Less than three months later, the Court invoked this principle in *J.D. Adams Manufacturing Co. v. Storen* to invalidate an Indiana gross receipts tax.[32] The Court reasoned that, "as applied to receipts from interstate sales," Indiana's tax "includes in its measure, without apportionment, receipts derived from activities in interstate com–merce."[33] As such, the tax was imposed on revenue that could be taxed "by States in which the goods are sold as well as those in which they are manufactured."[34] The tax therefore subjected interstate commerce "to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."[35]

Likewise, in both *Gwin, White & Prince, Inc. v. Henneford*[36] and *Central Greyhound Lines, Inc. v. Mealy*,[37] the Court invalidated state taxes on the ground that, in taxing 100% of revenue also taxable by other states, they impermissibly subjected taxpayers to the risk of multiple taxation. In *Greyhound Lines*, the Court struck down a New York gross receipts tax imposed on the full value of bus tickets sold to passengers traveling between two points in New York, even though nearly half of the mileage of the trips occurred in New Jersey and Pennsylvania, making the taxpayers' receipts from these trips also taxable by other states.[38] And in *Gwin*, *White & Prince*, the Court invalidated a gross receipts tax that Washington had imposed on a fruit distributor on the full value of its sales to out-of-state customers, revenue that "other states to which the commerce extends may, with equal right, lay a tax."[39] It therefore exposed multistate taxpayers to "the risk of a multiple burden to which local commerce is not ex–posed."[40]

True enough, the measure of each of these taxes was the taxpayer's gross receipts—that is, the taxpayer's revenue without any allowance for the expenses incurred in earning that revenue. But nothing in the rationales of the decisions suggested that this "multiple taxation

31. *Id.* at 255–56 (citations omitted).
32. 304 U.S. 307, 314 (1938).
33. *Id.* at 311.
34. *Id.*
35. *Id.*
36. 305 U.S. 434 (1939).
37. 334 U.S. 653 (1948).
38. *Id.* at 660.
39. *Gwin, White & Prince*, 305 U.S. at 439.
40. *Id.*

doctrine" depended on the type of tax imposed. And the Court has subsequently applied the doctrine to state taxes more generally, without regard to the species of tax at issue. For example, in *Mobil Oil Corp. v. Commissioner of Taxes*,[41] the Court evaluated whether Vermont's corporate income tax impermissibly subjected the taxpayer's dividend income to multiple taxation in violation of the Commerce Clause.[42] In *Oklahoma Tax Commission v. Jefferson Lines*,[43] the Court assessed whether Oklahoma's imposition of its retail sales tax on bus tickets for travel from a point inside Oklahoma to a destination outside the state "violated the prohibition against multiple taxation."[44] And just five years ago, in *Comptroller of the Treasury of Maryland v. Wynne*, the Court repeatedly invoked "the threat of double taxation" in invalidating a provision of Maryland's personal income tax.[45]

This "prohibition on multiple taxation" is well enough instantiated in state and local tax law that the leading treatise in the field, Professor Hellerstein's *State Taxation* (which some people call the "state tax bible"[46]) contains a section entitled "The Multiple Taxation Doctrine."[47] And though in another section of the treatise Professor Hellerstein concedes that the Constitution "does not" always forbid the "double taxation of income,"[48] in this section he proclaims that the Supreme Court's "recent decisions have put the matter to rest," firmly establishing "that the risk, and not just the actuality, of multiple taxation suffices to establish a constitutional violation."[49]

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41. 445 U.S. 425 (1980).

42. *Id.* at 436.

43. 514 U.S. 175 (1995).

44. *Id.* at 182.

45. 135 S. Ct. 1787, 1798 (2015).

46. Michael S. Greve, *The Dormant Coordination Clause*, 67 Vand. L. Rev. En Banc 269, 271 (2014).

47. State Taxation, *supra* note 7, ¶ 4.09[1].

48. *Id.* ¶ 6.04. ("This is not to suggest, however, that the Constitution always forbids double taxation of income. In fact, it does not."). Professor Hellerstein draws a distinction between tax schemes that create a "risk of multiple taxation" that is "adventitious"—such as through the happenstance of inconsistent division-of-income rules—and those "where the risk of multiple taxation [is] *inexorable*," such as when there is a "conflict between one state's residence-based rules and another state's source-based rules." *Deciphering* Wynne, *supra* note 7, at 11. In his view, the former is constitutional, while the latter is not. In my view, for reasons addressed *infra*, this concession that *some* multiple taxation is constitutional reveals that multiple taxation *itself* cannot be the constitutional problem. *See infra* note 130 and accompanying text.

49. State Taxation, *supra* note 7, ¶ 4.09[1][a]; *see also* Dan T. Coenen, *Why* Wynne *Should Win*, 67 Vand. L. Rev. En Banc 217, 217 (2014) (quoting

B. The permissibility of multiple taxation

Given the weight of this authority, the matter would appear cut and dried: state income taxes subjecting multistate taxpayers to the risk of multiple taxation would seem to violate the dormant Commerce Clause, full stop. But the reality is more complicated. As it turns out, state income tax schemes that expose taxpayers engaged in interstate commerce to multiple taxation are often perfectly constitutional.

1. Multiple taxation through the application of inconsistent division-of-income rules

To understand why tax schemes that produce multiple taxation are often constitutionally permissible, it is important to start with the foundations of states' authority to tax income. Though the Constitution greatly strengthened the national government relative to that which existed under the Articles of Confederation, it preserved state governments as "independent sovereigns."[50] And an indispensable aspect of that sovereignty is the power to raise revenue through the imposition of taxes. The Constitution places constraints on that power, but states could hardly exist as independent governments without the authority to tax. As Chief Justice Marshall explained in the great case of *McCulloch v. Maryland*,[51] "the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised [by the states] on the objects to which it is applicable, to the utmost extent to which the government may choose

J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938)) (asserting that a state tax that "exposes interstate income earners to overlapping income taxation . . . violates a cardinal principle of dormant Commerce Clause law, 'forbidding' state laws that expose interstate commerce 'to the risk of a double tax burden to which intrastate commerce is not exposed.'"); Brannon P. Denning, *The Dormant Commerce Clause Wins One: Five Takes on* Wynne *and* Direct Marketing Association, 100 Minn. L. Rev. Headnotes 103, 109–10 (2016) (asserting that the dormant Commerce Clause "has long protected the income earned in interstate commerce from double taxation"); Brief of the Maryland Chamber of Commerce as Amicus Curiae at 3, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13–485), 2014 WL 4895274 (co-authored by Professor Hellerstein) ("[T]he dormant Commerce Clause prohibits a state taxing scheme that exposes taxpayers to multiple state taxation on income earned in interstate commerce, thereby placing an undue burden on interstate commerce."); *id.* ("[T]his Court's jurisprudence clearly demonstrates that the risk of multiple taxation—regardless of on what individual or what entity the risk falls—is forbidden by the dormant Commerce Clause.").

50. *See* Nathaniel Chipman, Principles of Government: A Treatise on Free Institutions including the Constitution of the United States 266 (2000).

51. 17 U.S. (4 Wheat.) 316 (1819).

to carry it."[52] Moreover, as Marshall continued, this "power of taxation is not confined to the people and property [domiciled in] a state," but "may be exercised upon every object brought within its jurisdiction."[53]

In the early 1900s, as states began adopting the first modern state income taxes, the Supreme Court cited these passages from *McCulloch* in recognizing states' authority to require "contributions from those who realize current pecuniary benefits under the protection of the government."[54] By this, the Court meant that states could tax income "where it is earned," regardless of where the earner of that income resides.[55] As the Court explained in *Shaffer v. Carter*:

> [J]ust as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may . . . levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein . . . .[56]

The justification for this "source-based" jurisdiction is plain enough. If the state provides a market, of which the taxpayer avails itself to earn income, then the state is entitled to ask for a contribution to the public fisc in return.[57] Or, from a more territorial perspective, income generated within a given state's boundaries lies within that state's geographic jurisdiction, wholly independent of *who* earned that income. In this way, a state's source-based jurisdiction to tax income is analogous to specific (or case-linked) adjudicative jurisdiction. When a defendant has "minimum contacts" with a state—when it "purpose–fully avails itself of the privilege of conducting activities within" that

52. *Id.* at 428.

53. *Id.* at 429.

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

55. Curry v. McCanless, 307 U.S. 357, 368 (1939).

56. *Shaffer*, 252 U.S. at 52.

57. *See* Int'l Harvester Co. v. Wisc. Dep't of Tax'n, 322 U.S. 435 (1944). There the Court wrote that

> [a] state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers.

Id. at 441–42. As the Supreme Court explained in *Wisconsin v. J.C. Penney Co.*, the relevant "test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state." 311 U.S. 435, 444 (1940).

state[58]—that state's courts may assert *in personam* jurisdiction over the defendant.[59] Specific adjudicative jurisdiction does not extend to all possible claims against that defendant, however, but only to those claims "arising out of or related to the defendant's contacts" in the forum state.[60] Similarly, a state's source-based jurisdiction to tax the income of nonresidents only extends to the income derived from the taxpayer's activities in the taxing state (i.e., the income reasonably determined to have been earned within that state).

In exercising this source-based jurisdiction, a state must have some rational basis for determining that the income it seeks to tax is indeed attributable to activities that occurred within its borders.[61] As the Supreme Court has phrased it, "the income attributed to the State for tax purposes must be rationally related to 'values connected to the taxing State.'"[62] But within this lenient boundary, states are free to exercise their own, policy-informed discretion in determining where the income of multistate taxpayers has been earned. The Constitution does not mandate that these rules be uniform across states, or that they be particularly precise. Rather, states "have wide latitude in the selection of" division-of-income rules, and their determinations "will only be disturbed when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' or has 'led to a grossly distorted result.'"[63]

Thus, one state might determine that, with respect to individual taxpayers, their entire salary is earned in the state where their principal place of employment is located, unless her performance of services

58. Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

59. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 283–86 (2014); Daimler AG v. Bauman, 571 U.S. 117, 128 (2014).

60. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.15 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (2014).

61. *See* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978).

62. *Id.* (quoting Norfolk & W. Ry. Co. v. State Tax Comm'n, 390 U.S. 317, 325). *See also Norfolk & W. Ry. Co.*, 390 U.S. at 325 (stating that, in the context of a property tax, "[a]ny formula" for the attribution of values among states "must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State").

63. *Moorman*, 437 U.S. at 274 (citations omitted) (quoting Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 135 (1931) and *Norfolk & W. Ry. Co.*, 390 U.S. at 330 (Black, J., dissenting)).

elsewhere is for the convenience of her employer.[64] But another state might conclude that income is earned where the taxpayer is physically located at the time of the income-earning activity, including those days that she works from home purely for personal convenience.[65] Likewise, with respect to business enterprises, one state might use a formula for apportioning a taxpayer's income among the states in which it operates, taking account of where its sales, property, and employees are located. By contrast, another state might divide the income of multistate taxpayers purely on the basis of its proportion of sales revenue in the states in which it operates. Or one state might deem a taxpayer's investment income to be earned entirely in her state of domicile, while another might define it to have been earned where those investments are actively managed. These are just a few examples; the possibilities for inconsistency are nearly limitless.

Importantly, this divergence in income-attribution rules, as a practical matter, *guarantees* that some taxpayers engaged in interstate commerce will be subjected to multiple taxation. Consider the facts of *Moorman Manufacturing v. Bair*.[66] Moorman was an agricultural feed manufacturer whose manufacturing operations were located in Illinois.[67] During the tax years in question, it made between 18 and 22% of its sales to customers in Iowa.[68] Moorman was required to pay income taxes in both Illinois and Iowa.[69] Illinois computed the amount of income that a multistate taxpayer earned in the state by multiplying its total income (wherever earned) by a three-factor formula that weighted equally the proportion of the taxpayer's property, payroll, and sales in Illinois.[70] Iowa, in contrast, multiplied a taxpayer's total income by a single-factor formula, taking into account only the proportion of the taxpayer's sales in the state.[71]

64. *See* STATE TAXATION, *supra* note 7, ¶ 20.05[4][e] (discussing the "convenience of the employer" test for the attribution of nonresident individuals' income, and its use by New York).

65. *See* Edward A. Zelinsky, *New York's Ill-Advised Taxation of Nonresidents During COVID-19*, TAX NOTES STATE (May 25, 2020), at 1001, 1003 (quoting *Telecommuter COVID-19 Employer and Employee FAQ*, N.J. TREASURY DIV. TAX'N (May 26, 2020), https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml [https://perma.cc/W9FG-BMWN]) (discussing New Jersey's rule that "income is sourced based on where the service or employment is performed on a day's method of allocation").

66. 437 U.S. 267 (1978).

67. *Id.* at 269.

68. *Id.* at 271 n.4.

69. *Id.* at 268, 278.

70. *Id.* at 270.

71. *Id.* at 269.

Due to the confluence of these inconsistent division-of-income rules, Moorman—to a mathematical certainty—was subjected to multiple taxation on the income it earned on the products it sold to Iowa customers. Iowa taxed 100% of that income, while Illinois necessarily taxed a substantial portion of it as well (due to the property and employees located in Illinois who played a role in manufacturing those products).[72] As the Supreme Court had observed in a prior decision interpreting the District of Columbia's statute attributing corporate income for tax purposes, "[t]he use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income."[73]

The multiple-taxation problem created by Iowa's scheme was even plainer if one imagined a taxpayer whose workforce and manufacturing operations were located entirely in Illinois, but which made all of its sales in Iowa. Under those circumstances, Illinois would have taxed 66.7% of the taxpayer's income (using its equally weighted, three-factor formula). Meanwhile, Iowa would have taxed 100% of the taxpayer's income. Two-thirds of this hypothetical taxpayer's income would have been taxed twice due to the taxpayer's doing business in both states. By contrast, competitors who confined all of their activities to one state (whether Illinois or Iowa) would have been taxed only once, on exactly 100% of their income. The disadvantage to interstate commerce seems blatant.

Moorman thus argued that Iowa's scheme violated the dormant Commerce Clause.[74] But the Supreme Court emphatically rejected the claim: "Even assuming some overlap, we could not accept [Moorman's] argument that Iowa, rather than Illinois, was necessarily at fault in a constitutional sense."[75] Though Moorman may well have been subjected to duplicative taxation—a burden not borne by firms engaged in purely intrastate commerce—that "disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter."[76] Contrary to the taxpayer's contention, the Commerce Clause does not "prohibit[] any overlap in the computation of taxable income by the States."[77] Rather, "some risk of duplicative taxation exists whenever the States in which a corporation does

72. *Id.* at 266–67.

73. Gen. Motors Corp. v. District of Columbia, 380 U.S. 553, 559 (1965).

74. *Moorman*, 437 U.S. at 276.

75. *Id.* at 277.

76. *Id.* at 277 n.12.

77. *Id.* at 278.

business do not follow identical rules for the division of income."[78] And the Constitution "is neutral with respect to the content of any uniform rule."[79]

Moorman thus stands for the important proposition that the duplicative taxation of a multistate taxpayer's income—at least when it stems from the interplay of states' inconsistent income-attribution rules—does not violate the Commerce Clause. The double taxation of income, at least under some circumstances, can be fully consistent with the Constitution, even when it only affects those taxpayers who earn income across state lines.

2. Multiple taxation through the overlap of states' different jurisdictional bases for imposing income taxes

In addition to having the jurisdiction to tax income earned within their borders, states are separately entitled to tax the *entire* incomes of their residents, no matter where the income is earned. "Enjoyment of the privileges of residence . . . and the attendant right to invoke the protection of its laws," the Supreme Court has explained, "are inseparable from the responsibility for sharing the costs of government."[80] Thus, it has been "universally recognized" for more than eighty years that "the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event."[81] "Domicil itself" grants states "a basis for such taxation."[82]

The justification for this residence-based jurisdiction stems from the special relationship a state shares with its residents.[83] States provide residents with a wide variety of public services, the staples of the modern welfare state: public schools and universities, health insurance, anti-poverty programs, unemployment insurance, state parks, vehicle licensing, and the like. These benefits are quite expensive (at least in the aggregate), and most are available exclusively to a state's residents. Moreover, though U.S. citizens can choose their state of residence, states confer on their residents the privileges of state citizenship, which include, most notably, rights of political participation (such as to vote and hold public office). Finally, and perhaps most importantly, states provide their residents with the basic elements of civil society—a functioning judicial system, police and fire protection, and the enforce–

78. *Id.*

79. *Id.* at 279.

80. New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937).

81. *Id.* at 312–13.

82. *Id.* at 313.

83. *Id.* ("A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.").

ment of the state's criminal and civil laws—that enable inhabitants to enjoy the fruits of their labor. As the Court explained in *Lawrence v. State Tax Commission*,[84] residence-based income taxation is "founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received," which "are rights and privileges incident to his domicile in the state."[85]

No matter the precise justification, the principle that states' sovereign powers include this jurisdiction to tax the entirety of a resident's income is well established and deeply rooted in the reserved powers of the states.[86] And it necessarily overlaps with other states' jurisdiction to tax any income earned within their borders. If a resident of State A earns income in State B, both states possess the authority to tax that same increment of income: State A on the basis of residence, and State B on the basis of source. Absent one state extending a credit to the taxpayer for taxes paid to the other state (or exempting the income at issue from taxation), the risk of multiple taxation is unavoidable.[87]

Presently, the near-universal practice among states imposing per–sonal income taxes is to protect their residents from this risk of multiple taxation by affording them a credit for taxes paid to other states on income earned in those states.[88] But many observers—including the field's leading lights—have gone further and asserted that, when this overlap of source- and residence-based taxation subjects a taxpayer to duplicative burdens, the Constitution *requires* the state of residence to cede its authority to the state of source, so as to prevent the consequent burden on interstate commerce. Professor Hellerstein has written that "[w]hen both the state of residence and the state of source have a legitimate claim to tax income, there are widespread understandings

84. 286 U.S. 276 (1932).

85. *Id.* at 281.

86. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995) ("[A state] may tax *all* the income of its residents, even income earned outside the taxing jurisdiction."); *Deciphering* Wynne, *supra* note 7, at 7.

87. *See* Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1310 (1974).

88. *See* Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1801 (2015); State Taxation, *supra* note 7, ¶ 20.10. Many states have also entered into reciprocal exemption agreements, under which the state of source abstains from taxing nonresidents' income (so long as the taxpayer is a resident of a state that provides an identical exemption for residents of the taxing state). *See id.* ¶ 20.10[6]. Just like credits, these reciprocal exemptions protect taxpayers earning income in states other than where they reside from duplicative tax burdens, with the difference being that the tax collected on income earned out-of-state flows to the state of residence rather than the state of source. *Id.*

that the state of residence ordinarily yields to the state of source to avoid double taxation."[89] In his view, the Supreme Court has, "in accord with the widespread understanding that the state of source has the stronger tax claim, consistently interpreted the dormant Commerce Clause as requiring the state of residence to yield to the state of source whenever allowing both claims to prevail would result in multiple taxation of interstate commerce."[90] Likewise, Professor Denning has asserted that permitting "domiciliary states [to] tax 100% of their residents' income with no credit for taxes paid in other jurisdictions" would remove an "important constitutional safeguard . . . clearly advantag[ing] intrastate income over that earned elsewhere."[91] And Professor Coenen has argued that "when the state in which income has its source exercises its taxing power, the state of residence must in some way yield, thus ensuring that double taxation of income earned outside its borders does not occur."[92]

There is support for this position in a handful of Supreme Court decisions.[93] Consider *Standard Oil Co. v. Peck*,[94] which involved an *ad valorem* property tax that Ohio had imposed on the full value of boats and barges used to transport oil on the Mississippi and Ohio rivers.[95]

89. *Deciphering* Wynne, *supra* note 7, at 7; *see also* John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Income*, 33 VA. TAX REV. 209, 223 (2013) ("Under the Commerce Clause, a state's power to tax income from interstate commerce on a residence basis is limited by other states' power to tax the same income on a source basis insofar as is necessary to avoid the risk of multiple taxation that the Commerce Clause generally prohibits.").

90. *Deciphering* Wynne, *supra* note 7, at 8. As Professor Hellerstein explains, "the logic underlying this rule is irrefutable: if a taxpayer is taxable in more than one state, a state's insistence on the right to tax 100 percent of the taxpayer's income would expose the taxpayer to an unconstitutional risk of multiple taxation." STATE TAXATION, *supra* note 7, ¶ 20.04[1][a]; *see also* Brief of the Maryland Chamber of Commerce as Amicus Curiae in Support of Respondents at 3, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13–485), 2014 WL 4895274 ("When the risk of multiple taxation of the same income arises because of conflicting taxation claims made by the state where the taxpayer resides and the state where the income is earned, the dormant Commerce Clause requires that the former must yield to the latter.").

91. Denning, *supra* note 49, at 110; *see also* Brannon P. Denning & Norman R. Williams, Wynne*: Lose or Draw?*, 67 VAND. L. REV. EN BANC 245, 263 (2014) ("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.").

92. Coenen, *supra* note 49, at 220.

93. *See Deciphering* Wynne, *supra* note 7, at 7–9.

94. 342 U.S. 382 (1952).

95. *Id.* at 382–83.

Because Ohio was the taxpayer's state of domicile (and thus where the vessels were registered), Ohio asserted the authority to tax 100% of their value.[96] But because the boats and barges spent most of their time traveling in the waters of other states, those other states had the constitutional authority to impose fairly apportioned property taxes on them as well (based on the proportion of their use within those other states).[97] The Court thus invalidated Ohio's attempt to tax the vessels' full value, reasoning that "[t]he rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile."[98] "Otherwise," said the Court, "there would be multiple taxation of interstate operations."[99]

Or consider *Mobil Oil Corp. v. Department of Taxation*,[100] in which the Court addressed Vermont's tax on a nonresident corporation's dividend income. Mobil challenged the tax on several grounds, one of which was that, because its state of residence (New York) could tax 100% of its dividend income, Vermont's tax subjected its "dividend income to a substantial risk of multiple taxation."[101] The Court rejected the taxpayer's claim, holding that "there is no reason in theory why" the state of residence's power to tax the taxpayer's dividend income "should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States."[102] And in so holding, the Court reasoned that "[t]axation by apportionment and taxation by allocation to a single situs are theoretically incommen–surate," such that if one is "constitutionally preferred," the other would be impermissible.[103]

On reflection, though, the notion that the Constitution contains a "rule of priority"—a rule requiring the state of residence to yield to the state of source when both seek to tax the same income of an

96. *Id.* at 383.

97. *Id.* at 383–84.

98. *Id.* at 384.

99. *Id.* at 385.

100. 445 U.S. 425 (1980).

101. *Id.* at 442.

102. *Id.* at 445–46.

103. *Id.* at 444–45; *see also* Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 447 (1979) ("The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. . . . Otherwise there would be multiple taxation of interstate operations." (quoting *Standard Oil*, 342 U.S. at 384–85)); Central R.R. Co. v. Pennsylvania, 370 U.S. 607, 612 (1962) ("[M]ultiple taxation is possible . . . if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax."); *id.* ("'multiple taxation of interstate operations' . . . offends the Commerce Clause." (quoting *Standard Oil*, 342 U.S. at 385)).

individual—does not bear scrutiny. Though a handful of Supreme Court opinions seem to support its viability, and though it reflects present practice, such a requirement *as a rule of constitutional law* conflicts with basic principles that are deeply embedded in our constitutional fabric.

First, interpreting the dormant Commerce Clause as mandating that the state of residence cede its authority to tax its residents' incomes when other states tax the same income would render states' reserved, sovereign power to tax their residents on all of their income a hollow shell (if not entirely a dead letter). Again, states independently possess the source-based jurisdiction to tax the income that their residents earn inside the state. For example, California need not rely on residence-based jurisdiction to tax the income that Californians earn in California; it can already tax that income on the ground of being the state of its source. As a result, a state's power to tax individuals' income on the basis of residence only *matters* when taxing the income that its residents earn outside the state.

Forcing the state of residence to yield to the state of source would make this power largely inconsequential. It would mean that the state of residence could only tax the out-of-state income of its residents when that income was not taxed by the state in which it was earned (or taxed by those states at a lower rate, in which case the state of residence could capture the difference). Given that the forty-one states with broad-based personal income taxes[104] generally reach the income earned by nonresidents within their borders, states would be forbidden from exercising their residence-based jurisdiction except to collect a vanishingly small sliver of their personal income tax revenue.

Second, a rule requiring residence-based taxation to yield to source-based taxation would create an odd disconnect between how the Constitution treats the *provision* of state benefits, on the one hand, and the *financing* of those benefits, on the other. Again, states provide a wide variety of expensive public goods and services, from education to emergency supplemental income to testing for COVID-19. The Supreme Court has long understood the Constitution—despite its many prohibitions on state discrimination against out-of-staters—as permitt–ing states to provide these benefits exclusively to their own residents. For instance, in *Martinez v. Bynum*[105] the Court upheld a Texas statute limiting the provision of free primary and secondary education to *bona fide* state residents:

104. *Individual Income Taxes*, Urb. Inst.: State and Loc. Fin. Initiative, https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/individual-income-taxes [https://perma.cc/RGS4-P7VY] (last visited Sept. 20, 2020).

105. 461 U.S. 321 (1983).

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents.[106]

Likewise, in *Vlandis v. Kline*[107] the Court "fully recognize[d] that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis."[108]

The essential justification for sustaining the constitutionality of this sort of state favoritism for residents is that, in the words of the Court, it permits states to limit the "benefits generated by a state program to *those who fund the state treasury* and whom the State was created to serve," whether those benefits are "the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, [or] agricultural improvement and business development programs."[109] The Constitution allows states to discriminate in favor of their own residents in the provision of these benefits precisely because they are the ones who pay for them.

But if the state of residence were required to yield to the state of source in the collection of personal income taxes, states would be, to a significant degree, *constitutionally forbidden* from making this justifi–

106. *Id.* at 328–29 (footnotes omitted).

107. 412 U.S. 441 (1973).

108. *Id.* at 452–53; *see also* Starns v. Malkerson, 401 U.S. 985 (1971) (affirming summarily a lower court judgment permitting Minnesota to require students at the University of Minnesota to reside in the state for at least a year before qualifying for the lower in-state tuition rate).

109. Reeves, Inc. v. Stake, 447 U.S. 429, 442 (1980) (emphasis added). This constitutional permission for states to limit the provision of these benefits to its own residents makes a good deal of practical sense. Without the capacity to capture the value of these public goods, it would be financially impracticable for states to offer the benefits its residents desired—and were willing to finance with their taxes—if they were required to offer them on equal terms to residents and nonresidents alike. Nonresidents would be able to free ride on the generosity of other states, making states' investment in these goods and services cost-ineffective. Thus, even in states where the population were willing to support the provision of such goods and services with higher taxes, the inability to reap the fruit of such investments would deter states from providing them. The ultimate result would be a substantial underproduction of state-provided goods and services.

cation a reality. States that depend on personal income taxes to finance a substantial portion of their budgets (all but nine) would be prohibited from requiring a sizeable percentage of their residents from contributing equally to the cost of these public services.

As an example, consider an Oregon taxpayer with an adjusted gross income of $2 million who earns all of that income in another state (say, as an employee performing her services at an office in San Francisco). California would tax the entirety of her income, at a rate higher than Oregon would impose. Thus, were Oregon constitutionally required to afford this resident a credit for the tax she paid California, Oregon would be constitutionally prohibited from collecting any personal income taxes from her. And this would be so no matter how many children the taxpayer enrolled in Oregon public schools, or how valuable Oregon fire and police protection were to the protection of her real and personal property located in Oregon. Meanwhile, an Oregon resident who earned her entire $75,000 income within Oregon would pay a substantial sum in Oregon income taxes, even if she had no school-age children.

In other words, the very rationale for the states' constitutional permission to discriminate against nonresidents in the provision of most public benefits—namely, because their residents are the ones "who fund the state treasury"[110]—would be largely nullified, at least with respect to those residents earning income outside the state.

To be sure, states already accept this asymmetry as a matter of policy choice; the near-universal practice among states is to offer a credit to resident taxpayers for taxes paid to other states on the same income.[111] But it is one thing for states to exercise their policy discretion to shield their residents from duplicative state-level tax burdens. It is quite another for the Constitution to *mandate* this course. As a matter of constitutional doctrine, it would be quite strange to read the Commerce Clause as largely forbidding a practice that is presupposed by (and forms the basis for) another significant, related constitutional principle.

Third, and perhaps most importantly, a "rule of priority"—which would make the constitutionality of one state's tax dependent on the laws of other states—would run contrary to how the Constitution's federalism-based limitations on the states are conceptualized and enforced. The Constitution contains a number of structural, union-preserving provisions that constrain the centrifugal tendencies of the states so as to protect the interests of the Nation as a whole. One is the dormant Commerce Clause; others include the intergovernmental immunity doctrine, the Privileges and Immunities Clause of Article IV,

110. *Id.*

111. *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1792 (2015) (stating that "most other states," unlike Maryland, offer a "full credit against the income taxes that [residents] pay to other States").

the Full Faith and Credit Clause, and the doctrine of preemption. With respect to each of these important aspects of our constitutional architecture, the constitutionality of a challenged state law generally does not depend on the content of any other state's laws. Instead, the provisions are assessed in isolation, measured by themselves against the demands of the Constitution.

Consider some recent examples. Whether Alabama violated the Full Faith and Credit Clause when its Supreme Court refused to credit a Georgia trial court's judgment recognizing an adoption did not depend on the content of any other state's laws (other than as necessary to determine the validity of the Georgia judgment).[112] Whether Virginia's law restricting the availability of state Freedom of Information Act requests to Virginia to "citizens of the Commonwealth" violated the Privileges and Immunities Clause of Article IV did not depend on any other state's rules regarding such requests.[113] And no other state's law mattered in deciding whether California's rule forbidding class arbitration waivers in consumer contracts was preempted by the Federal Arbitration Act (as dictated by the Supremacy Clause).[114]

To be sure, there are a handful of (relatively old) dormant Commerce Clause cases involving state *regulations* in which the Court has examined the challenged state law's interaction with other states' laws in determining whether they imposed an impermissible burden on interstate commerce. For example, in the 1945 decision of *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[115] the Court invalidated an Arizona law limiting the length of trains moving through the state, in part on the ground that its inconsistency with surrounding states' laws impeded the flow of train traffic.[116] And in the 1959 decision of *Bibb v. Navajo Freight Lines, Inc.*,[117] the Court struck down an idiosyncratic Illinois law requiring all commercial trucks operating in the state to be fitted with a particular type of contoured mudguard, in part due to the requirement's incompatibility with the laws of other states.[118]

Assuming these cases (and their interpretive methodology) remain good law—and that they extend beyond the particular context of state regulations governing the physical instrumentalities of interstate commerce—the Supreme Court has specifically and repeatedly rejected

112. *See generally* V.L. v. E.L., 136 S. Ct. 1017 (2016).

113. *See generally* McBurney v. Young, 569 U.S. 221 (2013).

114. *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

115. 325 U.S. 761 (1945).

116. *Id.* at 774–75.

117. 359 U.S. 520 (1959).

118. *Id.* at 529–30.

the consideration of other states' laws when assessing whether a state *tax* violates the dormant Commerce Clause. As discussed earlier, the Court in *Moorman* only asked whether Iowa's method of apportioning the income of multistate taxpayers was reasonable, refusing to consider how Iowa's method interacted with that of Illinois (or that Iowa's method was, at the time, decidedly unusual).[119] More pointedly, the Court declared in *Mobil Oil* that "the constitutionality of a [state's] tax should not depend on the vagaries of [another state's] tax policy."[120] As the Court explained much longer ago in *Freeman v. Hewit*,[121] "[t]he immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."[122]

But an understanding of the Commerce Clause that required the state of residence to yield to the state of source in instances of overlapping taxation would create precisely that sort of dependence. Suppose Minnesota imposed an income tax on the entirety of its residents' incomes and offered no credit for taxes paid on that same income to other states. The constitutionality of Minnesota's tax, at least as applied to Minnesotans with out-of-state income, would depend on whether other states also taxed the income of Minnesotans; it would turn on the "shifting complexities of the tax codes of 49 other States."[123]

Fourth and finally, to the extent it matters, neither *Standard Oil* nor *Mobil Oil* really stand for the principle that the state of residence must yield to the state of source in instances of duplicative personal income taxes. First, the Court's statement in *Mobil Oil* was purely contingent: the Court stated that *if* the Constitution preferred either the division of income among multiple states or the allocation of that income to one state, *then* one would need to yield, as the two methods of taxing income are "theoretically incommensurate."[124] But the Court

119. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276–81 (1978).

120. Mobil Oil Corp. v. Comm'r of Taxes of Vt., 445 U.S. 425, 444 (1980).

121. 329 U.S. 249 (1946).

122. *Id.* at 256; *see also* Armco Inc. v. Hardesty, 467 U.S. 638, 644–45 (1984) (justifying the Court's holding on the ground that "[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated"); Adam B. Thimmesch, Comptroller v. Wynne *and the Futile Search for Non-Discriminatory State Taxation*, 67 Vand. L. Rev. En Banc 283, 294 (2014) (explaining that "the Court has historically evaluated taxes' impacts on interstate commerce in isolation").

123. *Armco*, 467 U.S. at 645.

124. *Mobil Oil*, 445 U.S. at 444–45.

did not address, let alone resolve, whether one of these methods is, in fact, constitutionally preferred. Second, *Standard Oil* concerned the constitutionality of a *property* tax, not an income tax.[125] And it may well be that the states' authority to tax their residents on all of their income due to their residency does not translate to the context of property taxes. (Certainly, a taxpayer cannot enjoy *all* of her property, wherever that property is physically located, in her state of residence, the same way she can her income.) "Domicil alone" may not justify a state's taxation of all of a resident's property.[126]

In all events, the idea that the dormant Commerce Clause precludes the state of residence from taxing income over which it plainly possesses jurisdiction—on the ground that another state has chosen to tax the same income—runs counter to how federalism works in our constitutional system. The Constitution does not rank one species of a state's jurisdiction as stronger than another. Source and residence are simply alternative bases on which states are constitutionally empowered to tax income, in the exercise of their authority as independent sovereigns.[127]

Again, we can analogize to a state's jurisdiction to adjudicate a lawsuit. Often, multiple states will have the constitutional authority (through their courts) to exercise personal jurisdiction over the litigants in a given lawsuit. State A might have specific jurisdiction because the events giving rise to the plaintiff's claim occurred there, while State B might have general jurisdiction on the ground of being the defendant's state of domicile. But neither State A nor State B would have any sort of jurisdictional "priority" to try the case. In a constitutional sense, both states would be equally authorized to adjudicate the dispute.

Of course, the fact that a state has jurisdiction to impose an income tax hardly guarantees that the tax is constitutional. State income taxes must still consist with the dormant Commerce Clause, just as they must abide other constitutional constraints, such as those contained in the First Amendment and the Equal Protection Clause. But the dormant

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125. Standard Oil Co. v. Peck, 342 U.S. 382, 383 (1952).

126. *See, e.g.*, *id.* at 384 ("The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile.").

127. As Professor Greve has explained:

> Why should [a state's] right to tax its own citizens hinge on what other states have done or may want to do? In determining how to order rival, legitimate claims on the same tax base, why should nonresident states get to go first? And isn't the states' autonomy to configure their own tax base the embodiment of a "retained" power that should be beyond federal control and preemption, including the Supreme Court's control?

Greve, *supra* note 46, at 278.

Commerce Clause forbids state laws that discriminate against or unduly burden interstate commerce.[128] And whether a state tax transgresses these limitations is determined by examining the law itself, without regard to its interaction with any other state's laws.

Thus, the Constitution's architecture of federalism—in endowing the states with the authority to tax income on the basis of both source and residence and granting neither precedence in such taxation—fully contemplates the existence of multiple taxation. This is true even when the taxpayers who are exposed to multiple taxation are engaged in interstate commerce, and those engaged in purely intrastate commerce are immune.

In short, the proposition that "the dormant Commerce Clause forbids state taxes that expose interstate commerce to a risk of multiple taxation" just does not hold true.[129]

II. The Role of Multiple Taxation in Constitutional Analysis

Stated simply, the Constitution does not prohibit state income taxes *because* they expose taxpayers engaged in interstate commerce to duplicative tax burdens. But that does not mean that the existence of multiple taxation tells us nothing. The Constitution imposes two basic structural constraints on states in their taxation of income: (1) they cannot tax income that lies beyond their lawful jurisdiction, and (2) they cannot discriminate against interstate commerce.[130] When a state

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128. As explained in more detail below, *see infra* note 133, the Supreme Court generally has not applied the "undue burden" portion of this test to state taxes, at least in the last fifty years (though it has, on two occasions, applied it to tax collection obligations—though those are better understood as regulations than as taxes). Thus, it is probably fair to say that, under present law, the dormant Commerce Clause only demands that state taxes not discriminate against interstate commerce.

129. *Cf.* Michael S. Knoll & Ruth Mason, *Dual Residents: A Sur-Reply to Zelinsky*, State Tax Notes, Jan. 15, 2018, at 269, 271 (noting that "the dormant commerce clause does not per se forbid double taxation").

130. Since 1977, the Supreme Court has often (though not always) applied a four-part test—first articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)—to determine whether a state or local tax violates the dormant Commerce Clause. *See* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial Taxation*, 71 Fordham L. Rev. 149, 153–54, 153 n.21 (2002) (listing the decisions). The "*Complete Auto* test" asks whether (1) "the tax is applied to an activity with a substantial nexus with the taxing state," (2) "is fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided." *Complete Auto*, 430 U.S. at 279. As I have attempted to explain elsewhere, the four parts of this test effectively amount to a more detailed operationalizing of the fundamental limits on a state's taxing authority: that the state have jurisdiction over whatever it seeks to

income tax runs afoul one of these prohibitions, it will often result in duplicative taxation. But it is a tax's transgression of one of these foundational structural principles—and not the multiple taxation itself—that creates the constitutional problem.

A. The jurisdictional limits on a state's power to tax income

Again, a state has the jurisdiction to tax income on two distinct bases: that the income was earned by one of its residents, and that the income was earned within its borders. When a state seeks to tax income falling outside either of these parameters, it violates the Constitution. The constitutional problem is no different than when a state court attempts to adjudicate a lawsuit against a defendant over which it lacks *in personam* jurisdiction, or when a state seeks to regulate activity occurring elsewhere, and thus legislates extraterritorially.

Courts and commentators have tended to locate these jurisdictional limits on state taxing authority within the Due Process Clause, which the Supreme Court has described as containing protections pertaining to both fundamental fairness and the territorial limits of a state's rightful authority.[131] These jurisdictional boundaries might also reflect structural principles inherent in the federal system created by the Constitution, independent of any specific textual provisions.[132] In either event, these constraints on a state's taxing power are well established and uncontroversial.

When a state exceeds its lawful jurisdiction in taxing income, multiple taxation will often result. For example, suppose California imposed an income tax on a Nevada resident. California's only jurisdic–tional basis for imposing the exaction would be that the taxpayer had earned that income in California. But suppose California's income-attribution rules were unreasonable, and the taxpayer had clearly earned the income in Oregon. If Oregon also imposed a tax on non-

tax, and that its tax not discriminate against interstate commerce. *See* Joondeph, *supra,* at 154–61.

131. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (explaining that the Due Process Clause of the Fourteenth Amendment "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

132. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819) ("All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."); Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 Va. Tax Rev. 109, 122–32 (2004) (arguing that state laws projecting their legislative powers to tax or regulate beyond their borders are simply *ultra vires*, inconsistent with the basic premises of the constitutional design, even when they do not deprive any person of the fundamental fairness guaranteed by the Due Process Clause).

residents for income earned within the state, it, too, would tax this increment of income. The taxpayer would thus be taxed twice on the income she earned in Oregon—once by California and once by Oregon. (And this duplicative taxation would occur regardless of whether Nevada additionally asserted its authority to tax that income on the basis of residence.)

The taxpayer would be subject to multiple state-level taxation, and California's tax would be unconstitutional. But the multiple taxation would not be what renders the California tax impermissible. Rather, the constitutional problem would be that California has sought to tax income over which it lacks jurisdiction: the income of a nonresident that was not plausibly attributable to California.

Or suppose the same facts, but assume that Oregon did not tax the income of nonresidents earned in Oregon. In that scenario, the taxpayer would *not* be subject to multiple taxation; the income she earned in Oregon would be taxed only once, by California. Yet California's tax would still be unconstitutional. It would still reach income over which California lacked jurisdiction.

Thus, multiple taxation is really beside the point in identifying the constitutional transgression, neither sufficient nor necessary. Multiple taxation might be present, but the actual constitutional problem concerns the jurisdictional boundaries that define the breadth of a state's taxing authority within our federal system.

B. The prohibition on state taxes that discriminate against interstate commerce

The other basic structural principle governing state income taxes is that they may not discriminate against interstate commerce. This is the essence of the proscription imposed by the dormant Commerce Clause.[133] Over and again, in literally hundreds of decisions, the

133. To be clear, black-letter law presently dictates that a state law will generally violate the dormant Commerce Clause if it either discriminates against interstate commerce *or* imposes an "undue burden" on interstate commerce. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018). And a burden on interstate commerce is considered "undue" when it is "clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

For a variety of reasons, I believe the distinct "undue burden" inquiry can be disregarded in this context. First, as explained earlier, *see supra* note 130, since 1977 the Supreme Court has generally applied the four-part *Complete Auto* test for determining whether a state tax violates the dormant Commerce Clause. That test, in different ways, examines the taxing state's connection to the value it seeks to tax (i.e., its jurisdiction) and whether the tax discriminates against interstate commerce. The *Complete Auto* test has never asked whether the burden that the state tax imposes on interstate commerce is "undue."

Supreme Court has identified this anti-discrimination rule as the core of the Commerce Clause's constraint on state and local taxes and regulations.[134]

As with taxes exceeding a state's jurisdiction, taxes discriminating against interstate commerce will often result in multiple taxation. For example, suppose Illinois imposed a tax on income earned in Illinois, but exempted its own residents from the tax, such that the only taxpayers subject to the tax were those engaged in interstate commerce (residing in another state and earning income in Illinois).[135] And suppose Indiana adopted a purely residence-based income tax, by which it taxed

Second, the Supreme Court has never actually applied the *Pike* "undue burden" test—at least as a distinct requirement—in assessing the constitutionality of a state or local tax. Indeed, the only state tax cases where the burden on interstate commerce (independent of any discrimination) seemed relevant to the Court's analysis were those involving enforcement obligations, where the state had required out-of-state vendors to collect taxes on sales to the state's consumers. *See* Quill Corp. v. North Dakota, 504 U.S. 298 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). Thus, the relevant issue in these cases did not actually concern whether the *tax* imposed an undue burden, but instead whether the regulatory burden imposed on vendors did so. In all events, the Supreme Court recently overruled both *Quill* and *Bellas Hess* and held that such collection obligations, when imposed on vendors that lack a physical presence in the taxing state, do not create an undue burden on interstate commerce. *See Wayfair*, 138 S. Ct. 2080.

Third, and more generally, the Supreme Court has largely allowed *Pike*'s "undue burden" test to fall into desuetude. *See* Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 Temp. L. Rev. 331, 379 (2020) (acknowledging "the reality that the Court has shown little interest in engaging in *Pike* balancing or even shown faith in its ability to do so"). The justices have not invalidated *any* state law on this basis since at least 1992, and perhaps since 1988. *See Quill*, 504 U.S. 298 (1992); Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988). Moreover, to the extent the Court has used the undue burden test in the past fifty years to invalidate laws under the dormant Commerce Clause, it has done so to strike down provisions that regulated extraterritorially—a matter that really concerns a state's legislative jurisdiction. *See Quill*, 504 U.S. at 298; *Bendix*, 486 U.S. at 888; Brown-Forman Distilleries Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); Edgar v. MITE Corp., 457 U.S. 624 (1982).

Realistically, then, the present doctrinal test for assessing the constitutionality of a state tax is that it must (1) fall within the state's lawful taxing jurisdiction, and (2) not discriminate against interstate commerce.

134. *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1794 (2015) (listing cases that establish the Supreme Court's dormant Commerce clause anti-discrimination precedent).

135. For purposes of this example, I am assuming Illinois has *not* imposed a similar tax exclusively on its residents, such that, when viewing its taxation of residents and nonresidents as a whole, the scheme is nondiscriminatory.

its residents on the entirety of their incomes, affording no credit for taxes paid to other states on the same income.

An Indiana resident who commuted into Chicago for her job would be taxed twice on her salary—once by Indiana (as the state of residence) and once by Illinois (as the state of source). And Illinois's tax would be unconstitutional. But again, the constitutional problem would not be the multiple taxation itself; it would be that the Illinois tax discriminated against interstate commerce. By imposing its tax exclus–ively on nonresidents, Illinois would be expressly favoring intrastate over interstate commerce.

The insignificance of multiple taxation to the constitutional question is even clearer if we suppose Indiana imposed no income tax. On those facts, the taxpayer would not be subject to multiple taxation, but the Illinois tax would still impermissibly discriminate against interstate commerce. Or suppose Indiana adopted an income tax scheme similar to what most states have today, whereby it imposed a tax on the entirety of its residents' incomes but offered them credits for income taxes paid to other states. Again, our hypothetical taxpayer would not be subject to multiple taxation, as she would be taxed on her salary only by Illinois. But the Illinois tax would still be unconstitutional.

In short, there are two basic structural constraints on the states' taxation of income: they can only tax income within either their source-based or residence-based jurisdiction, and they cannot discriminate against interstate commerce. A state income tax that violates one of these principles will frequently subject taxpayers engaged in interstate commerce to duplicative burdens. But the constitutional violation lies in the transgression of one of these structural principles, not the fact that the taxpayer has been exposed to multiple taxation.

III. Revisiting *Wynne*

Disentangling multiple taxation from the Constitution's structural constraints on a state's power to tax income clarifies the analysis for determining whether a state income tax is constitutionally permissible. And in doing so, it answers an important question left unresolved by the Supreme Court's recent decision in *Comptroller of the Treasury of Maryland v. Wynne.*

At issue in *Wynne* was a discrete component of Maryland's personal income tax. Somewhat confusingly, Maryland's state-level personal income tax comprised two separate components: a state component (retained entirely by the state) and a county component, which was assessed and collected by the state (and thus was part of the state's income tax) but the revenue from which ultimately flowed to the taxpayer's county of residence.[136] Maryland imposed its personal income tax on the entirety of a resident's income, regardless of where that income was earned.[137] With respect to the state component, Maryland granted its residents a credit for income taxes paid to other states on the same income.[138] But Maryland did not offer such a credit against the county component, even if the taxpayer earned most of her income in other states.[139] Importantly, Maryland also imposed the county component of the tax on *nonresidents* for the income they earned within Maryland.[140]

Consequently, the county component of Maryland's tax exposed some Maryland residents—those earning out-of-state income taxed by other states—to duplicative taxation: once by Maryland, and then again by the state where the income was earned.[141] The Wynnes were Maryland residents who had earned much of their income in other states.[142] They argued that by exposing their income to multiple taxation, the county component of Maryland's scheme violated the dormant Commerce Clause.[143]

In an opinion authored by Justice Alito, the Court held that the county component of Maryland's tax was unconstitutional.[144] The ma–jority began its analysis by discussing three decisions—*J.D. Adams Manufacturing Co. v. Storen*,[145] *Gwin, White & Prince, Inc. v. Henneford*,[146] and *Central Greyhound Lines, Inc. v. Mealey*[147]—that seem to stand for the proposition that *any* state tax that exposes a taxpayer to the risk of multiple taxation violates the dormant

136. *Id.* at 1792.

137. *Id.*; *see also* Bradley W. Joondeph, *Argument Preview: The Scope of the States' Constitutional Authority to Tax the Personal Income of Their Residents*, SCOTUSblog (Oct. 28, 2014, 8:00 AM), https://www.scotusblog.com/2014/10/argument-preview-the-scope-of-the-states-constitutional-authority-to-tax-the-personal-income-of-their-residents/ [https://perma.cc/QDR7-A2GZ].

138. *Wynne*, 135 S. Ct. at 1792.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1793.

143. *Id.* at 1793–94.

144. *Id.* at 1803–06.

145. 304 U.S. 307 (1938).

146. 305 U.S. 434 (1939).

147. 334 U.S. 653 (1948).

Commerce Clause.[148] The Court noted, for instance, that in *J.D. Adams* "the 'vice of the statute' was that it taxed, 'without apportionment, receipts derived from activities in interstate commerce,'" and thus exposed multistate taxpayers "to the risk of a double tax burden to which intrastate commerce is not exposed."[149] Likewise, the Court cited *Gwin, White & Prince* as holding that a state tax violates the dormant Commerce Clause when "it imposes upon [interstate commerce], merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."[150] These decisions, said the Court, "all but dictate[d] the result" in *Wynne*[151]—insinuating that the county component of Maryland's tax was unconstitutional simply because, without offering a credit for taxes paid to other states, it taxed the entirety of its residents' income—income that, for many taxpayers, was also taxable by other states.[152]

But instead of ultimately relying on this risk-of-multiple-taxation rationale, the Court's opinion pivoted, homing in instead on how Maryland's scheme discriminated against interstate commerce.[153] To assess whether Maryland's tax so discriminated, the Court deployed the so-called "internal consistency test," by which it asked whether, if every state adopted the challenged tax scheme, interstate commerce would be disadvantaged relative to intrastate commerce.[154] Internal consistency is valuable as a constitutional metric, said the Court, because it distinguishes those tax schemes that are "inherently discriminatory" from those where the disadvantage to interstate commerce is "simply the result of its interaction with the taxing schemes of other States."[155] And in applying this test, the Court found it necessary to consider

148. *See J.D. Adams Mfg. Co.*, 304 U.S. at 311; *Gwin, White & Prince*, 305 U.S. at 439; *Central Greyhound Lines*, 334 U.S. at 662.

149. *Wynne*, 135 S. Ct. at 1795 (quoting *J.D. Adams Mfg. Co.*, 304 U.S. at 311).

150. *Id.* (quoting *Gwin, White & Prince*, 305 U.S. at 439).

151. *Id.* at 1794.

152. *See Deciphering* Wynne, *supra* note 7, at 12 (remarking that *J.D. Adams Mfg. Co*, *Gwin, White & Prince*, and *Greyhound Lines* "can be fairly read as standing for the proposition that states that seek to tax 100% of a tax base on an unapportioned basis must yield to states that can tax the same receipts on some other plausible basis, whether or not the unapportioned taxes are internally consistent."); *cf.* Edward A. Zelinsky, *Comparing* Wayfair *and* Wynne*: Lessons for the Future of the Dormant Commerce Clause*, 22 CHAP. L. REV. 55, 66 (2019) ("*Wynne* indeed reflects a strong aversion to double taxation.").

153. *See Wynne*, 135 S. Ct. at 1803–06; *see also* Darien Shanske, *States Can and Should Respond Strategically to Federal Tax Law*, 45 OHIO N.U. L. REV. 543, 558 (2019).

154. *Wynne*, 135 S. Ct. at 1802–06; *see also* Joondeph, *supra* note 21.

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

Maryland's income tax scheme "as a whole."[156] This meant examining the tax as imposed on both residents and nonresidents.[157]

Framed this way, the county component of Maryland's tax was internally inconsistent, and hence discriminatory.[158] Had every state adopted the same scheme, taxpayers who confined their income-earning activities to a single state would be taxed only once, on precisely 100% of their incomes.[159] By contrast, any taxpayer who lived in one state but earned income in another would be taxed on 100% of their income by their state of residence, and then again by the state of source on the income they earned outside the state.[160] In this way, those taxpayers engaged in economic activities crossing state lines would be systematically disadvantaged relative to those confining their activities to their state of residence. To the Court, this meant that "Maryland's tax scheme [was] inherently discriminatory," and thus forbidden by the dormant Commerce Clause.[161]

Justice Ginsburg authored the principal dissent, arguing vociferously that the Court had "veer[ed] from a principle of interstate and international taxation repeatedly acknowledged by this Court: A nation or State 'may tax all the income of its residents, even income earned outside the taxing jurisdiction.'"[162] To her, the Court was really holding that, "[i]n taxing personal income, . . . source-based authority, i.e., authority to tax commerce conducted within a State's territory, boxes in the taxing authority of a taxpayer's domicile."[163] But the Constitution entitles a state to tax the entirety of a resident's income, argued the dissent, regardless of what any other state might do.[164] True enough, most states afford their residents credits for taxes they pay to other states when taxed on the same income. But they do so "as a matter of tax 'policy,' . . . not because the Constitution compels that course."[165] In the dissenters' view, "nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary

156. *Id.* at 1803 n.8.

157. *See id.* at 1803–04.

158. *Id.*

159. *Id.* at 1804.

160. *Id.*

161. *Id.*

162. *Id.* at 1813 (Ginsburg, J., dissenting) (emphasis omitted) (quoting Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995)).

163. *Id.*

164. *Id.*

165. *Id.* at 1814 (quoting *Chickasaw Nation*, 515 U.S. at 463 n.12).

State or the source State, must recede simply because both have lawful tax regimes reaching the same income."[166]

In response, the majority asserted that the dissenters had over–looked the critical distinction "between discriminatory tax schemes and double taxation that results only from the interaction of two different but nondiscriminatory tax schemes."[167] The Court's holding rested not on the fact that Maryland's scheme produced double taxation per se, but that the duplicative taxation at issue "discriminated in favor of intrastate over interstate economic activity."[168]

Critically, then, *Wynne* did not answer whether a nondiscrim–inatory tax imposed by a state on all of the income of its residents, without affording any credit for taxes paid to other states on the same income, would violate the dormant Commerce Clause. Specifically, the Court clarified that its opinion did not require Maryland to cure the constitutional problem "by granting a credit for taxes paid to other States;" its rationale did not "foreclose the possibility that it could comply with the Commerce Clause in some other way."[169] Presumably, as explained by the dissent, that "some other way" would have been by repealing the application of the county component of the tax to nonresidents.[170] The Court therefore stopped short of establishing a "rule of priority" that would require "a State taxing based on residence to 'recede' to a State taxing based on source."[171]

But a clear understanding of the constitutional significance (or insignificance) of multiple taxation—as discussed at length in Parts I and II—fully answers this question: A state can impose a nondiscrim–inatory personal income tax on the entirety of its residents' income, even if it would subject taxpayers engaged in interstate commerce to duplicative tax burdens from which taxpayers earning their incomes in only one state would be shielded.

Despite the Court's repeated references to Maryland's scheme resulting in the "double taxation of income earned out of state,"[172] the constitutional problem in *Wynne* was not that Maryland's scheme produced multiple taxation. One can see this by conceptualizing Maryland's tax, in alternate turns, according to the two possible

166. *Id.* at 1813; *see also id.* at 1813–14 ("[T]he Constitution does not prefer one lawful basis for state taxation of a person's income over the other. Nor does it require one State, in this case Maryland, to limit its residence-based taxation, should the State also choose to exercise, to the full extent, its source-based authority.").

167. *Id.* at 1804 (majority opinion).

168. *Id.* at 1795.

169. *Id.* at 1806.

170. *Id.* at 1822 (Ginsburg, J., dissenting).

171. *Id.* at 1805 (majority opinion).

172. *Id.* at 1801.

jurisdictional bases for its application of the county component of the tax to its own residents. First, Maryland could have justified imposing the tax on its own residents as an exercise of its residence-based jurisdiction. Given the scope of this jurisdiction, this would have authorized applying the tax to *all* of its residents' income, wherever earned. But if this explained the tax's application to Maryland residents, there was a constitutional problem in applying the tax to *nonresidents*. Residence-based jurisdiction could not justify this part of the tax; a tax on nonresidents could only be permissible as an exercise of the state's *source*-based jurisdiction. But if only nonresidents were taxed on the basis of source—that is, if only nonresidents (and no Marylanders) were taxed on the privilege of earning income in the state—then this aspect of the tax was blatantly discriminatory: it applied exclusively to nonresidents.

Alternatively, Maryland could have justified the application of the county component of its tax to its residents as an exercise of its source-based jurisdiction. This would have solved the discrimination issue described above, for on this understanding, *all* taxpayers (residents and nonresidents alike) would have been taxed equally on the income they earned within Maryland. But this conceptualization would have created a different problem: Maryland would have needed to invoke its *residence*-based jurisdiction to justify reaching the income that its residents earned in other states. And this, too, would have been blatantly discriminatory, for it would have meant that this residence-based tax (on the privilege of enjoying one's income in Maryland) was imposed exclusively on the income earned by Marylanders *outside the state*; income earned within Maryland would have been exempt from this residence-based tax on the receipt or enjoyment of income in the state. Again, an aspect of the scheme would have plainly discriminated against interstate commerce.

In other words, however one conceptualized Maryland's deployment of its taxing powers to justify the county component of the tax, the scheme hit a constitutional snag. Considered as a whole, as applied to both residents and nonresidents, its discrimination against interstate commerce was inescapable.[173]

But the constitutional problem really had nothing to do with a state's authority to tax the entirety of its residents' incomes without protecting them from duplicative state-level taxation. Had Maryland applied the county component of its income tax exclusively to its own residents—based on its jurisdiction to tax the entirety of their

173. The Court's "internal consistency" analysis captured the essence of this problem, and thus led to the same result. *Id.* at 1803–06. The explanation provided here draws out, perhaps in plainer terms, how Maryland's scheme necessarily discriminated against taxpayers whose income-earning activities crossed state lines.

incomes—the tax would have been perfectly constitutional.[174] And this would have been so even though Maryland taxpayers who engaged in interstate commerce (like the Wynnes) would have been subjected to substantial multiple taxation, while taxpayers who engaged in purely intrastate commerce (earning their income entirely within Maryland) would have been immune. The disadvantage to interstate commerce under such a scheme would not have stemmed from any impermissible discrimination against interstate commerce, but instead (in the Court's words in *Wynne*) from "the interaction of two different but non-discriminatory and internally consistent schemes."[175]

Conclusion

For the time being, the question of whether the Constitution permits a state to tax all the income of its residents without protecting them from multiple taxation (through credits or exemptions) is not especially pressing. As discussed at oral argument in *Wynne*, Mary–land's personal income tax was the only such state-level scheme in the country.[176] Moreover, there does not seem to be much of a desire among states to adopt such taxes in the near future. To make such schemes non-discriminatory, states would need to forego taxing the income of nonresidents earned within their borders or impose an evenhanded source-based tax that stacked on top of the residence-based tax already imposed on their residents (thus substantially increasing their marginal rates).[177] At the moment, neither option seems palatable.[178]

174. *See Wynne*, 135 S. Ct. at 1823 (Ginsburg, J., dissenting) (explaining that the Court's holding—finding that Maryland's tax scheme violated the dormant Commerce Clause because of its internal inconsistency—left Maryland free to cure the constitutional problem by declining to impose the county component of the income tax on nonresidents earning income in Maryland).

175. *Id.* at 1802 (majority opinion).

176. Transcript of Oral Argument at 32, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13–485), 2014 WL 7661629 at *32; *see* State Taxation, *supra* note 7, ¶ 20.10 ("[E]very state with a broad-based personal income tax provides a credit for taxes that their residents pay to other states . . . .").

177. For example, a state could impose a 6% tax on all the income of its residents, wherever earned, and then an additional 3% tax on all income earned within the state, which would be imposed on residents and nonresidents alike. The state would then still collect personal income taxes from nonresidents, but the aggregate rate imposed on its residents (9%) would be substantially higher.

178. *See Deciphering* Wynne, *supra* note 7, at 16 (noting that this eventuality "seems highly improbable in light of the reaction of voting residents to the adoption of such a regime").

But several cities—including New York, Philadelphia, Detroit, Kansas City, and St. Louis—presently impose these sorts of residence-based income taxes without offering full credits for taxes paid to other states on the same income.[179] And at the state level, the policy calculations and political winds might shift. At some point, states could find it important to distribute more equally the burdens of financing the state-funded goods and services to which their residents are entitled (and which they enjoy to the exclusion of nonresidents). States might wish to allocate these costs based simply on their residents' respective incomes, independent of where those incomes were earned. Equity in contributions to the public fisc might become a higher priority than protecting residents from duplicative state-level income taxes, or than taxing income earned in the state on the basis of source.[180]

The Constitution empowers states to make that choice. Though strands of the Supreme Court's Commerce Clause jurisprudence can be pieced together to contend otherwise—and though the Court reserved the question in *Wynne*—there should not be any doubt. Structural principles deeply embedded in Constitution's architecture of federalism grant states the authority to tax the entirety of their residents' income, even when it exposes them to duplicative tax burdens. It is a "constitutional power of taxation reserved to the state,"[181] regardless of what policies other states might pursue.

179. *See* Brief of the International Municipal Lawyers Ass'n et al. as Amici Curiae at 17–18, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787 (2015) (No. 13–485), 2013 WL 6115820, at *17–18; *see also Deciphering* Wynne, *supra* note 7, at 16 (noting that, "[a]t the local level, . . . *Wynne* is likely to have more of a practical impact" given the existence of these city income tax schemes).

180. *See Wynne*, 135 S. Ct. at 1816 (Ginsburg, J., dissenting).

181. Lawrence v. State Tax Comm'n, 286 U.S. 276, 281 (1932).