Wynne and the Double Taxation of Dual Residents

by Edward A. Zelinsky

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Zelinsky discusses Maryland State Comptroller of the Treasury v. Wynne. He writes that the U.S. Supreme Court should decide the case narrowly and in a way that does not prevent it from ruling later that the dormant commerce clause requires tax credits to abate the double taxation of individuals who are residents of two or more states but lack the ability to vote in a state that taxes them as residents on their worldwide income.

I. Introduction

Maryland State Comptroller of the Treasury v. Wynne

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requires the U.S. Supreme Court to decide whether the U.S. Constitution compels a state to grant an income tax credit to its residents for income taxes residents pay to the other states from which residents derive out-of-state income. Those credits are common to avoid double taxation of state income. Wynne raises the question whether that widespread practice is constitutionally mandated or is just a matter of generally accepted tax policy.

In Wynne, the Maryland Court of Appeals held that the credits are required by the dormant commerce clause of the U.S. Constitution.2 The U.S. Supreme Court should reverse the lower court’s decision for two reasons. First, Wynne highlights the fundamental incoherence of the dormant commerce clause test of tax nondiscrimination: Any tax provision can be transformed into an economically equivalent direct expenditure. No principled line can be drawn between those tax provisions that are deemed to discriminate against interstate commerce and those that do not. Thus, an ill-defined subset of tax laws is stricken as discriminating against interstate commerce even though those tax laws are substantively equivalent to other tax laws and to direct government outlays that pass dormant commerce clause muster.

While Wynne may not be the appropriate occasion for the Court to revisit the dormant commerce clause’s concept of tax nondiscrimination, that incoherent concept should be extended no further. Wynne should therefore be reversed because it presses the dormant commerce clause into new territory by constitutionalizing the obligation of states of residence to grant income tax credits to their residents for income taxes residents pay to other states on income earned in those states.

Second, the political process concerns advanced both by the Wynne dissents in the Maryland Court of Appeals and by the U.S. solicitor general are persuasive. Mr. and Mrs. Wynne are Maryland residents who, as voters, have a voice in Maryland’s political process. That contrasts with nonresidents and statutory residents, individuals who are not domiciled in a particular state but are nevertheless taxed by that state on their worldwide incomes because they are deemed for income tax purposes to be residents. As nonvoters, nonresidents and statutory residents — individuals who are not domiciled in a particular state but are taxed by that state on their incomes because they are deemed for income tax purposes to be residents3 — lack political voice in those

2 Article I, section 8, cl. 3 of the U.S. Constitution authorizes Congress to “regulate Commerce . . . among the several states.” That provision has been interpreted as including a “dormant” or “negative” aspect that precludes the states from interfering with interstate commerce. For a discussion of the dormant commerce clause, see Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992).
states in which they cannot vote. Nonresidents and statutory residents require protection under the dormant commerce clause because politicians find it irresistible to export tax obligations onto nonvoters.

By reversing Wynn, the Court would establish that the Constitution does not require credits for the income taxes residents of one state pay to other states in which they earn income. The Court should decide the case narrowly; that decision should not foreclose the Court from ruling down the road that credits are required to prevent the double taxation of dual residents who lack the ability to vote in one or more of the states taxing them.

II. The Case

Brian and Karen Wynn live in Howard County, Maryland, and, as Maryland residents, pay state income taxes on their worldwide income. Mr. Wynn is a shareholder of an S corporation that earns income throughout the United States. In 2006, the year at issue in Wynn, Wynn's S corporation filed income tax returns in 39 states. For tax purposes, the corporation's income, deductions, and credits are passed through to him. On their Maryland state income tax return for 2006, the Wynnes reported the pass-through county-level income tax. The county income tax piggybacked on the state tax and is collected by the state for each Maryland county at a rate that, within limits, each county determines for itself.

The Maryland tax statute provides that Maryland residents who pay income taxes to states in which they do not live may credit against their Maryland state income tax liability the taxes paid to those states of nonresidence. However, the Maryland tax law grants no equivalent credit under the county income tax for out-of-state taxes owed by Maryland residents on income earned outside Maryland.

Thus, the Maryland state income tax follows the common pattern in which residents report to their home state their worldwide income but avoid double taxation by crediting against the home state's income tax the income taxes paid to any state of nonresidence on income earned in that state. However, the Maryland county income tax deviates from that pattern by not providing a credit to avoid double taxation.

Maryland’s income tax statute imposes two related taxes on Maryland residents, a state-level income tax and a county-level income tax. The county income tax piggybacks on the state tax and is collected by the state for each Maryland county at a rate that, within limits, each county determines for itself.

III. The Opinion of the Maryland Court of Appeals

The Wynnes challenged the constitutionality of the Maryland county income tax insofar as that tax fails to provide residents with a credit for out-of-state income taxes to abate double taxation. A divided Maryland Court of Appeals, Maryland’s highest court, agreed.

At the outset, the court of appeals held that the Maryland county income tax is subject to dormant commerce clause scrutiny. It relied principally on Owatonna v. Town of Harrison. In Owatonna v. Town of Harrison, the U.S. Supreme Court invalidated a Maine property tax under the dormant commerce clause because it was imposed at a higher rate on a nonprofit summer camp that served mostly individuals who were not residents of Maine.


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4Wynn, 431 Md. at 158-159.
5Id.
6IRC section 1366.
7Wynn, 431 Md. at 159.
8Id. See also Md. Tax-General Code Ann. section 10-703 (Maryland residents may claim credit “against the State income tax . . . for State tax on income paid to another state”).
9If a nonresident of Maryland owes Maryland state income tax on income earned in Maryland, he also pays a supplementary tax in lieu of the county income tax levied only against residents. Md. Tax-General Code Ann. section 10-106.1. See Wynn, 431 Md. at 156 (discussing the special nonresident tax).
10Id. Tax-General Code Ann. section 10-102.
11Id. Tax-General Code Ann. section 10-103.
Corp. v. Faulkner\textsuperscript{23} to support its conclusion that the Maryland county income tax triggered review under the dormant commerce clause. In \textit{Edwards} the U.S. Supreme Court invalidated under the dormant commerce clause a California statute that “prohibit[ed] the transportation of indigent persons across the California border” because the statute’s “burden upon interstate commerce is intended and immediate.”\textsuperscript{24} In \textit{Boston Stock Exchange}, the Court struck down a New York state securities transfer tax because New York “impose[d] a greater tax liability on out-of-state sales than on in-state sales” and thus fell “short of the substantially even-handed treatment demanded by the Commerce Clause.”\textsuperscript{25}

In \textit{Fulton Corp.}, the Supreme Court held that “North Carolina’s intangibles tax facially discriminate[d] against interstate commerce” because a stockholding North Carolina resident paid less intangible tax on his corporate stock if the corporation did more of its business in the Tar Heel State.\textsuperscript{26}

The court said that as with the laws at issue in those cases, the failure of the Maryland county income tax law to provide residents with a credit for out-of-state taxes triggers dormant commerce clause scrutiny because that failure can result in significantly different treatment for a Maryland resident taxpayer who earns a substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities. This creates a disincentive for the taxpayer to conduct income-generating activities in other states with income taxes, the court said. “Thus, the operation of the credit regarding the county tax may affect the interstate market for capital and business investment and, accordingly, implicate the dormant commerce clause.”\textsuperscript{27}

Having decided that the Maryland county income tax should be reviewed under the dormant commerce clause because it does not credit out-of-state income taxes, the court of appeals then concluded that the county income tax violates two of the tests under the well-known formula for dormant commerce clause compliance articulated in \textit{Complete Auto Transit Inc. v. Brady}.

In particular, the appeals court held, the failure to offer residents a credit for out-of-state taxes means that for dormant commerce clause purposes as explicated by \textit{Complete Auto}, the Maryland county income tax is not properly apportioned and also impermissibly discriminates against interstate commerce.

Regarding \textit{Complete Auto’s} apportionment standard under the dormant commerce clause, the Maryland Court of Appeals first looked to the formal inquiry the U.S. Supreme Court has called “internal consistency,”\textsuperscript{29} namely, whether the challenged tax would cause multiple taxation if it were imposed universally by all states. According to the Maryland court, the answer is yes, because if every state emulated Maryland’s tax statute, “taxpayers who earn income from activities undertaken outside of their home states would be systematically taxed at higher rates relative to taxpayers who earn income entirely within their home state.”\textsuperscript{30}

In that vein, the appeals court contrasted a Maryland resident who earns $100,000 in Maryland with a Maryland resident who earns $50,000 in Maryland and $50,000 in Pennsylvania.\textsuperscript{31} Assuming for internal consistency purposes that Pennsylvania has adopted an income tax law identical to Maryland’s tax statute, the second resident pays more income tax on the same income than does the first resident since the second resident pays the Maryland county tax on his entire income of $100,000 without receiving against that tax a credit for the Pennsylvania tax he also pays on $50,000 of that income.\textsuperscript{32}

According to the court of appeals, Maryland’s failure to grant a credit against the county income tax acts as an extra tax on interstate income-earning activities and thus fails the internal consistency test.\textsuperscript{33}

Further, the court of appeals continued, under \textit{Complete Auto’s} dormant commerce clause standard of proper apportionment, the Maryland tax statute also flunks the practical test of “external consistency”\textsuperscript{34} because in fact that statute creates double taxation:

Because no credit is given with respect to the county tax for income earned out of state, the Maryland tax code does not apportion income subject to that tax even when that income is derived entirely from out-of-state sources. Thus, when income sourced to out-of-state activities is subject to the county tax, there is a potential for multiple taxation of the same income. In those circumstances, the operation of the county tax appears to create external inconsistency.\textsuperscript{35}

The court of appeals also held that the county income tax flunks \textit{Complete Auto’s} test of nondiscrimination since it does not provide residents with a credit for out-of-state taxes.\textsuperscript{36} The Maryland Court analogized the county income tax to the North Carolina intangibles tax stricken in \textit{Fulton Corp.}\textsuperscript{37} Because that North Carolina intangibles tax “was

\textsuperscript{23}16 U.S. 325 (1996).
\textsuperscript{24}Edwards, 314 U.S. at 174.
\textsuperscript{25}Boston Stock Exchange, 429 U.S. at 332.
\textsuperscript{26}Fulton Corp., 516 U.S. at 346.
\textsuperscript{27}Wynne, 431 Md. at 164.
\textsuperscript{30}Wynne, 431 Md. at 167.
\textsuperscript{31}Id. at 167-168.
\textsuperscript{32}Id.
\textsuperscript{33}Id. at 169.
\textsuperscript{34}Oklahoma Tax Commission, 514 U.S. at 185; Zelinsky, supra note 29.
\textsuperscript{35}Wynne, 431 Md. at 172.
\textsuperscript{36}Id. at 173.
\textsuperscript{37}Id. at 174.
reduced to the extent that the corporation’s income was subject to tax in” the Tar Heel State, the tax discriminated against interstate commerce by encouraging North Carolina residents to hold the stock of in-state rather than out-of-state corporations. 43

Similarly, the court added, the Maryland county income tax encourages Maryland residents to earn income in Maryland rather than earn out-of-state income, which is subject to double taxation — that is, out-of-state income tax plus the county tax unreduced for out-of-state income tax:

The failure to provide a credit against the county tax in that case penalizes investment in a Maryland entity that earns income out-of-state: an investment in that venture incurs both out-of-state taxes and the Maryland county tax on the same income; a similar venture that does all its business in Maryland incurs only the county tax. 39

IV. The Dissent in the Maryland Court of Appeals

Dissenting for himself and Judge Lynne A. Battaglia, Judge Clayton Greene Jr. cited the U.S. Supreme Court’s observation in Goldberg v. Sweet 40 that “it is not a purpose of the commerce clause to protect state residents from their own state taxes” since those residents have a political voice in the state government imposing those taxes. 41

Quoting General Motors Corp. v. Tracy, 42 the dissent said a tax violates the dormant commerce clause only if it “expressly discriminates against or places an undue burden on interstate commerce.” 43 The dissent maintained that the Maryland county income tax does neither: “The Howard County tax is directed at income earned by residents of Maryland county income does neither: ‘The Howard County tax is directed at income earned by residents of Maryland county tax on the same income; a similar venture that does all its business in Maryland incurs only the county tax.” 39

V. The Amicus Brief of the Solicitor General

In response to Maryland’s petition for certiorari, the U.S. Supreme Court requested the U.S. solicitor general’s analysis of Wynne. 48 In his amicus brief, the solicitor general supported the state’s petition and called for the Supreme Court to reverse the opinion of the court of appeals.

The solicitor general’s Wynne brief starts with the “well-established principle of interstate and international taxation” that “a jurisdiction . . . may tax all the income of its residents, even income earned outside the taxing jurisdiction.” 49 Thus, Maryland and Howard County are entitled to tax all of the Wynnes’ income wherever that income is earned.

“It is far from clear that the Complete Auto test should apply to a State’s taxation of its own residents’ income,” the solicitor general said. 50 Assuming that it should, the Maryland county tax is properly apportioned and nondiscriminatory for dormant commerce clause purposes, even without granting residents a credit for out-of-state taxes, the solicitor general continued. 51

The Maryland county income tax does not discriminate against interstate commerce since “it treats all residents of a particular county — whether they earn income in-state or out-of-state — exactly the same,” assessing a tax on each of them at an identical fixed rate.” 52 It is true that because the county income tax does not credit out-of-state income taxes, a Maryland resident with out-of-state income will pay more tax than a Maryland resident with the same amount of income earned in Maryland. However, the solicitor general contended, the possibility that a state resident’s multistate tax bill will be higher because he earns income out of state and thus is subject to taxation by multiple states is not in itself a cognizable discriminatory effect under the commerce clause. The higher tax bill is no more attributable to Maryland than it is to the other state or states that are taxing the resident’s income. 53

As to Complete Auto’s apportionment test under the dormant commerce clause, the solicitor general argued that that test does not apply given that residents’ incomes “may be taxed in full by Maryland and its counties.” 54 Echoing the dissent in the court of appeals, 55 the solicitor general emphasized that a resident who believes that his taxes are unfair can complain to the elected officials who assess those taxes.

38 Id.
39 Id. at 175-176.
41 Wynne, 431 Md. at 179 (quoting Goldberg v. Sweet).
42 491 U.S. 278 (1997).
43 Wynne, 431 Md. at 181 (quoting General Motors Corp. v. Tracy).
44 Id. at 182.
45 Id.
46 Id. at 184.
47 Id. at 185.
49 Id. at 77 (quoting Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)).
50 Id. at 12.
51 Id. at *12-13.
52 Id. at *13 (quoting United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007)).
53 Id. at *14.
54 Id. at *17.
VI. Discussion

The U.S. Supreme Court should reverse Wynne for two reasons. First, the case highlights the fundamental incoherence of the dormant commerce clause test of tax nondiscrimination: Any tax incentive can be transformed into an economically equivalent direct expenditure. No principled line can be drawn between those tax provisions that are deemed to discriminate against interstate commerce and those that are not. Thus, an ill-defined subset of tax laws is stricken as discriminatory for dormant commerce clause purposes even though they are substantively equivalent to other tax laws and to direct government outlays that pass dormant commerce clause muster.

Any tax incentive can be transformed into an economically equivalent direct expenditure.

While Wynne may not be the appropriate occasion for the Court to revisit Complete Auto’s concept of tax nondiscrimination, that incoherent concept should not be extended further. Hence, Wynne should be reversed because it presses the dormant commerce clause into new territory by constitutionalizing the obligation of a state of residence to grant income tax credits to its residents for income taxes they pay to other states.

Second, the political process concerns advanced by both the Wynne dissenters and the solicitor general are compelling. Unlike nonresidents and statutory residents who lack political voice, the Wynnes are residents of Maryland with a voice in Maryland’s political process. Nonresidents and statutory residents require protection under the dormant commerce clause since politicians find it irresistible to export tax obligations onto nonvoters.

The Supreme Court should decide Wynne narrowly by holding that the Constitution does not require credits for the income taxes residents of a single state pay to other states in which they earn out-of-state income. That decision should not preclude the Court from ruling in the future that credits are required to prevent the double taxation of individuals who lack the ability to vote in a state taxing them.

A. The Incoherence of Dormant Commerce Clause Nondiscrimination

Legal scholars have endeavored to justify Complete Auto’s test of nondiscrimination to implement the dormant commerce clause. Those efforts have failed because the concept of dormant commerce clause tax nondiscrimination is, at its core, incoherent. Any tax incentive can be transformed into an economically equivalent direct expenditure. No convincing line can be drawn between those tax provisions deemed to discriminate against interstate commerce and those that do not. Thus, a subset of tax laws are stricken as discriminatory under the dormant commerce clause as expounded by Complete Auto even though there is no principled basis for distinguishing those stricken tax laws from other tax provisions or from equivalent direct governmental outlays.

Suppose, for example, that Howard County seeks to improve its public schools, police services, or roads. No court or commentator suggests that that kind of routine public improvement violates the dormant commerce clause principle of nondiscrimination. However, direct public expenditures, if successful, have precisely the effect on residents and interstate commerce for which the court of appeals condemned the Maryland county income tax as discriminating against interstate commerce: Better public services “may affect the interstate market for capital and business investment” by inducing residents and businesses to stay and by attracting new residents and businesses to come. Better public services encourage residents to deploy investments and undertake business activity locally, rather than in another state.

Unless the courts are prepared to condemn those kinds of routine government programs as discriminating against interstate commerce, there is no principled basis for labeling as


59Wynne, 431 Md. at 164.
discriminatory under the dormant commerce clause equivalent tax policies because they affect “the interstate market” of households and businesses. Direct government outlays have the same effects as taxes on the choice between in-state and out-of-state activity. If taxes discriminate against interstate commerce because they encourage in-state enterprise, so do those direct government expenditures that make the state more attractive and thereby stimulate in-state activity.

Consider again Camps Newfound/Owatonna, a decision on which the Wynne court relied for the proposition that the Maryland county tax is subject to dormant commerce clause scrutiny. Insofar as Camps Newfound/Owatonna held that the movement of individuals across state lines constitutes interstate commerce, that decision rests on firm historic and doctrinal footing. However, Camps Newfound/Owatonna is unconvincing insofar as it invalidated the Maine property tax as discriminating against interstate commerce because that tax was reduced for Maine summer camps serving Maine residents rather than out-of-state campers.

Suppose Maine provided a voucher to each Maine resident who attends a Maine summer camp. That voucher would be presented to the in-state camp each resident attends and then redeemed by the camp through a cash payment from the Maine treasury. The economic impact on Maine camps would be identical regardless of whether they are subsidized financially by that voucher program for Maine residents or by the now-stricken property tax, which would be reduced if the camp serves Maine, rather than out-of-state, residents. Under either program, the camp is subvented financially for serving a Maine (rather than an out-of-state) camper. Or suppose that Maine disburses money directly from the Maine treasury under a formula that allocates a flat-dollar grant to each Maine camp for every Maine camper served by that particular camp.

Unless the Court is prepared to extend the dormant commerce clause into the routine operations of the states and localities, those kinds of direct expenditure programs achieve the same results as did the Maine property tax, which was abated if a summer camp served only Maine residents. There is no principled basis for labeling the property tax version of that pro-resident policy as discriminating against interstate commerce unless we are prepared to make the same judgment about economically equivalent direct spending programs that similarly reward in-state institutions for serving in-state residents rather than nonresidents.

The problem is fundamental to Complete Auto’s nondiscrimination test under the dormant commerce clause: The core mission of states and localities is to provide public services to their residents. By making the state more attractive, those services may cause individuals or firms to either move to the state or stay in order to receive those services. Those services may lead individuals or businesses to invest in-state rather than look for out-of-state opportunities. The economic impact of state and local services can be identical to the economic impact of tax subsidies — both benefit residents and encourage in-state activity to the exclusion of nonresidents and out-of-state activity. If tax provisions are deemed to discriminate against interstate commerce because they favor residents and promote in-state enterprise and investment, the same must be said of direct public expenditures that similarly benefit residents and encourage in-state activity.

By the same token, Maine improves and polices its state highways for the benefit of Maine’s residents and in-state business activity, including tourists who can be lured into the Pine Tree State by better transportation. Good roads may lead a Maine resident to pursue in-state activity rather than undertake an enterprise out of state. Similarly, better public schools might cause a Maine resident to invest in-state because Maine is, by virtue of better education opportunities, an improved place to work and live.

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61 Wynne, 431 Md. at 163.
However, a general rate reduction has the same economic effect as the denial of a credit for out-of-state income taxes. A general rate reduction encourages residents to remain and invest in-state and creates a corresponding “incentive for the taxpayer . . . to conduct income generating activities in other states with income taxes.” Even supporters of the dormant commerce clause test of tax nondiscrimination are unwilling to declare that states’ and municipalities’ general tax rates should be supervised by the courts under that test. For dormant commerce clause purposes, however, there is no principled distinction between general tax rate reductions and the other, narrower tax provisions that are held to discriminate against interstate commerce. Both general tax rates and targeted tax provisions can affect the decision to live, work, and invest in one state or locality as opposed to another. If one unconstitutionally favors local residents and in-state activity over out-of-state enterprise, so does the other.

In short, all taxes potentially affect a resident’s decision to live, work, and invest in-state rather than out of state. It is arbitrary to single out as discriminating against interstate commerce some tax policies that encourage residents to stay and invest at home (such as the failure of the Maryland county income tax to grant residents a credit for out-of-state taxes) while approving other equivalent tax policies (such as general rate reductions) that similarly encourage residents to stay and invest in-state.

Wynne may not be a good vehicle for the Supreme Court to consider whether it should jettison the dormant commerce clause concept of tax nondiscrimination. Because the Court has not signaled that that possibility is on the table, the lower courts that heard Wynne did not consider it. By the same token, the briefs submitted to the Supreme Court in Wynne will undoubtedly assume the continued existence of Complete Auto’s dormant commerce clause test of tax nondiscrimination and will argue whether that test has or has not been appropriately implemented in Wynne.

On the other hand, the incoherence of Complete Auto’s nondiscrimination inquiry cautions against applying that inquiry to areas previously untouched by it. The U.S. Supreme Court should thus reverse Wynne rather than confirm the Maryland Court of Appeal’s expansion of the dormant commerce clause by requiring states of residence to provide income tax credits to avoid double taxation. The tax policy argument for those credits is strong. The constitutional argument for mandating those credits under the dormant commerce clause is not.

B. As Maryland Residents, the Wynnes Vote for the Public Officials Imposing County Taxes

While the concept of dormant commerce clause tax nondiscrimination is irredeemably incoherent, Complete Auto’s tests of nexus and apportionment play useful roles under the dormant commerce clause. Among other functions, those tests help to identify when taxpayers have a voice in the political process that is taxing them and they encourage tax-sensitive actors to use that voice rather than exiting for friendlier tax environments.

In that context, the political process concerns advanced by both the Wynne dissenters and the U.S. solicitor general are compelling. Mr. and Mrs. Wynne are residents of Maryland with a voice in Maryland’s political process. The Wynnes vote for those who impose Maryland’s state and local taxes on them. In contrast to the Wynnes’ status as Maryland voters, nonvoting statutory residents and nonvoting nonresidents are subject to classic taxation without representation. Statutory residents and nonresidents need judicial succor, which the Wynnes, as Maryland voters, do not.

Consider first statutory residents. Maryland taxes an individual domiciled elsewhere as a resident if he maintains a place of abode in Maryland for more than six months of the tax year. Thus, an individual who lives in Manhattan but keeps a permanent second home on the Maryland shore may be taxed on his worldwide income both by New York, where he is domiciled, and by Maryland, because he maintains a place of abode there for more than six months in the year. That individual is for income tax purposes a dual resident, subject to taxation of his worldwide income by his state of domicile (New York) and his state of statutory residence (Maryland). However, he votes in only one of those states, his state of domicile. That dual resident has no right to vote in his state of statutory residence.

In Wynne, the Maryland Court of Appeals noted one of the best known cases of dual residence, Tamagni v. Tax Appeals Tribunal. The Tamagnis were domiciled in New Jersey and presumably voted there. They also maintained a small apartment in Manhattan. Mr. Tamagni worked at his office in Manhattan. The combination of the Manhattan apartment plus Tamagni’s workdays in Manhattan made the Tamagnis statutory residents of the Empire State for income tax purposes. In addition to being taxed on their worldwide income in their home state of New Jersey, the Tamagnis were taxed by New York as statutory residents.

The Wynnes’ situation differs from the Tamagnis’ in terms of their political voice. The only state taxing the Wynnes as residents is the one in which they are eligible to vote: Maryland. In contrast, the Tamagnis were subjected to a second income tax by a state that taxed them as residents.

66 Zelinsky, supra note 29.
67 Id.
68 Wynne, 431 Md. at 179.
69 As Maryland residents, the Wynnes are entitled to vote in Maryland elections. Md. Election Law Code Ann. section 3-102(a)(1)(iii).
on their worldwide income without allowing them to vote since their domicile was in New Jersey.⁷²

For Wynne, it is important to recognize the difference between those two situations. Wynne involves taxpayers who are residents of a single state who are challenging taxes levied on them by the state in which they vote. Tamagni involved dual residents and the taxes imposed on them by a second state that classified them as statutory residents without allowing them to vote. The Wynne dissenters and the solicitor general correctly argue that the Wynnes, as Maryland voters, have a political voice in the state government taxing them as residents. However, the Tamagnis did not have the same political voice since New York taxed the Tamagnis as statutory residents even though they were domiciled and presumably voted in New Jersey.

Consider also the Wynnes' status as voting residents in contrast to nonvoting nonresidents. A state can properly tax a nonresident on income earned within its jurisdiction.⁷³ However, a state may overreach in taxing a nonresident.⁷⁴

Nonresidents and statutory residents both require protection under the dormant commerce clause because politicians find it irresistible to export tax obligations onto nonvoters.⁷⁵ To those who find that assessment too harsh, I would argue that in my 14 years as a municipal legislator, I (and my colleagues) invested considerable energy trying to finance the public services our constituents sought by foisting the costs onto others. To borrow from Abraham Lincoln, I can characterize politicians “with the greater freedom, because [having been] a politician myself, none can regard it as personal.”⁷⁶ Politicians like to tax nonvoters who, whether taxed as statutory residents or as nonresidents on income earned in the taxing state, require dormant commerce clause protection, which the Wynnes do not.

In sum, the Wynnes, unlike nonresidents and statutory residents, vote in Maryland, the state that imposes on them the taxes to which they object. “It is not a purpose of the commerce clause to protect state residents from their own state taxes”⁷⁷ when state residents vote for the officials imposing those taxes.

C. The Need to Decide Wynne Narrowly: The Problem of Dual Resident Double Taxation

The U.S. Supreme Court should decide Wynne narrowly. Reversing Wynne would establish that the U.S. Constitution does not require credits for the income taxes the residents of a single state pay to any other states in which they earn out-of-state income. However, that decision should not foreclose the Court from later ruling that because dual residents lack the vote in one of the states taxing them, credits are required to prevent the double income taxation of those individuals who are residents of two or more states.

The double taxation of dual residents is a growing problem as Baby Boomers establish second homes for retirement and as dual-career couples balance the demands of work and family by maintaining two homes in different states.⁷⁸ The U.S. Supreme Court need not address that problem when it decides Wynne because the Wynnes are not dual residents but, rather, are only residents of Maryland. However, the Court should decide Wynne narrowly and should not foreclose itself from later considering the proper treatment under the dormant commerce clause of dual residents who do not vote in the second state taxing them on their global incomes.

VII. Conclusion

The U.S. Supreme Court should reverse Wynne, a case that highlights the fundamental incoherence of the dormant commerce clause test of tax nondiscrimination. While Wynne may not be the appropriate occasion for the Court to revisit Complete Auto’s concept of tax nondiscrimination under the dormant commerce clause, that concept should be extended no further.

The political process concerns advanced by both the Wynne dissenters in the court of appeals and by the U.S. solicitor general are persuasive. The Wynnes are Maryland residents who, as voters, have a voice in Maryland’s political process. That contrasts with nonvoting statutory residents and nonresidents who do not vote in the state taxing them. Wynne should be decided narrowly. The Supreme Court should reverse Wynne in such a manner it will not be foreclosed from ruling in an appropriate case in the future that the dormant commerce clause requires credits to prevent the double income taxation of individuals who are residents of two or more states but who lack the vote in the second state taxing them as residents on their worldwide income.

⁷²NY Elec. Law sections 1-104(22) (defining residence as “that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return”) and 5-102(1) (requiring that a New York voter be “a resident of this state”).

⁷³Chickasaw Nation, 515 U.S. at 463, n.11; Hellerstein et al., supra note 17, at 355-362.


⁷⁷Goldberg, 488 U.S. at 266.