
**THE DORMANT COMMERCE CLAUSE
WYNNE WON WINS ONE:
FIVE TAKES ON *WYNNE* AND *DIRECT
MARKETING ASSOCIATION***

Brannon P. Denning[†]

INTRODUCTION

October Term 2014 featured what is to date the most important state and local tax case since 1992's *Quill Corp. v. North Dakota*.¹ In *Comptroller v. Wynne*,² the U.S. Supreme Court affirmed a state court decision holding unconstitutional Maryland's refusal to grant a credit for taxes paid by a resident taxpayer to other states on income earned by the taxpayer in those states. The scope of the decision remains something of a mystery, as does the Court's decision to grant certiorari in the first place. After a brief summary of the case, I will offer five takes on *Wynne* and another state and local tax case from the 2014-2015 term, *Direct Marketing Association v. Brohl*.³

First, it is somewhat remarkable that, having agreed to hear the case, the Court affirmed the Maryland Court of Appeals instead of reversing it. For the first time in many years, then, the Supreme Court found a state tax to violate the dormant Commerce Clause doctrine (DCCD). Second, in striking down the Maryland tax, the Court relied in part on the "internal consistency" doctrine, an aspect of fair apportionment whose continued viability one prominent state and local tax

[†] Associate Dean and Professor, Cumberland School of Law, Samford University. This is a revised and extended version of remarks made at The University of Minnesota Law School Corporate Institute Forum on Taxation and Regulation's Perspectives on Taxation Lecture Series on November 17, 2015. Thanks to Kristin Hickman for the kind invitation and to Joel Michael for moderating. Sarah F. Bothma provided excellent research assistance. Thanks to Bruce Ely, Mike Kent, and Norman Williams for comments on an earlier version of this Essay. Copyright © 2016 by Brannon P. Denning.

1. 504 U.S. 298 (1992).
2. 135 S. Ct. 1787 (2015).
3. 135 S. Ct. 1124 (2015).

scholar questioned just a few years ago. Third, the Court's invocation of internal consistency and the linkage of it with the DCCD's anti-discrimination principle—a linkage at odds with the generally-understood framework the Court laid down nearly forty years ago in *Complete Auto Transit, Inc. v. Brady*⁴—raises the possibility that the Court's DCCD jurisprudence in tax cases might be undergoing a transformation. Fourth, additional evidence that doctrinal change is afoot is furnished by Justice Kennedy's concurring opinion in *Direct Marketing Association*. In it, Kennedy signaled a willingness to reconsider *Quill*'s holding that the Commerce Clause requires the taxpayer's physical presence in a state to trigger an obligation to collect and remit sales and use taxes.⁵ Kennedy was part of the *Quill* majority,⁶ so his concurrence increases the likelihood the Court may reconsider *Quill* in the near future. Fifth, and finally, a recent decision by the U.S. Supreme Court to grant certiorari to, vacate, and remand the decision of the Massachusetts Supreme Judicial Court in *First Marblehead Corporation v. Commissioner*,⁷ offers some hints at the potential scope of *Wynne*. A brief conclusion follows.

COMPTROLLER V. WYNNE: A SUMMARY⁸

Maryland imposed both a state and a county income tax on the personal income of its residents.⁹ While the state provided a credit for taxes paid in other jurisdictions against the *state* tax, it did not provide a similar credit against the county tax.¹⁰ The Wynnes argued that the lack of credit meant that their income would be subject to double taxation.¹¹ When the plaintiffs challenged the deficiency, the Maryland Tax Court affirmed the

4. 430 U.S. 274 (1977).

5. See *infra* notes 99–105 and accompanying text.

6. Justice Kennedy joined the concurring opinion written by Justice Scalia. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992) (Scalia, J., concurring).

7. *First Marblehead Corp. v. Comm'r*, 23 N.E.3d 892 (Mass. 2015), *cert. granted, vacated, and remanded*, 136 S. Ct. 317 (2015).

8. This summary draws on BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (2d ed. 2013 & 2016 Supp.).

9. *Comptroller v. Wynne*, 135 S. Ct. 1787, 1792 (2015).

10. *Id.* at 1793.

11. *Id.* The Wynnes owned stock in a Subchapter S corporation that filed tax returns in thirty-nine states. The income of the corporation passed through to the taxpayers, who were likewise allocated a pro rata share of taxes paid to the various states. See *id.*

Comptroller's assessment. The circuit court, however, reversed, concluding that Maryland's tax scheme violated the DCCD.¹² The state appealed, and the Maryland Court of Appeals affirmed the circuit court's decision.¹³ The Supreme Court granted certiorari and—to the surprise of many—affirmed.¹⁴

Justice Alito's opinion for the Court stated that the "existing dormant Commerce Clause cases all but dictate the result reached in th[e] case by Maryland's highest court."¹⁵ In three separate cases, he noted, "the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity."¹⁶

In addition to the cases cited, the Court concluded that the lack of a credit violated the Court's "internal consistency" test.¹⁷ In order to pass constitutional muster under the Commerce Clause, (1) a state or local government seeking to tax interstate commerce must have a substantial nexus with the taxpayer; (2) the tax must be fairly apportioned; (3) nondiscriminatory; and (4) the amount of the tax must be fairly related to the services provided by the state.¹⁸ A part of the fair apportionment inquiry, the internal consistency test requires a reviewing court to perform the following thought experiment: imagine that every other state has the same taxing regime as the one under review. If identical application of the tax could result in double taxation, then the tax fails internal consistency.

12. *Id.*

13. *Id.* (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). The *Complete Auto* test "asks whether a tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* The Court of Appeals held that the tax failed the apportionment and discrimination prongs of the test. *Id.*

14. *Id.* at 1794, 1807. For a pessimistic assessment of the Wynnes' chances prior to the decision, see Brannon P. Denning & Norman R. Williams, Wynne: *Lose or Draw?*, 64 VAND. L. REV. EN BANC 245 (2014).

15. *Wynne*, 135 S. Ct. at 1794. The cases, which are rather elderly, were *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (striking down unapportioned gross receipts tax imposed on domestic corporation that exposed "interstate commerce ... to the risk of double taxation"); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939) (invalidating unapportioned "business activities" tax laid on gross receipts of domestic corporation); and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (invalidating unapportioned gross receipts tax laid on interstate bus company).

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

17. *Id.* at 1803.

18. See *Complete Auto Transit*, 430 U.S. at 277–79.

cy.¹⁹ Guarding against double taxation ensures that interstate commerce is not placed at a disadvantage relative to intrastate commerce. Justice Alito agreed with the Court of Appeals of Maryland that

Maryland's income tax scheme fails the internal consistency test. A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.²⁰

The Court noted that a credit against the county tax would have cured the double-taxation problem, but it declined to "establish [a] rule of priority" requiring "a State taxing based on residence to 'recede' to a State taxing based on source."²¹ The majority further noted that its decision was not intended to "foreclose the possibility that [Maryland] could comply with the Commerce Clause in some other way."²²

The Court rejected a number of arguments put forward to save the tax: that the earlier cases involved gross receipts taxes as opposed to income taxes,²³ for example, or that they involved

19. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); see also Walter Hellerstein, *Is "Internal Consistency" Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1 (2007) [hereinafter Hellerstein, *Dead*]; Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138 (1988) [hereinafter Hellerstein, *Foolish*].

20. *Wynne*, 135 S. Ct. at 1803–04 (citations omitted).

21. *Id.* at 1805.

22. *Id.* at 1806. Justice Alito noted that

[w]henver government impermissibly treats like cases differently, it can cure the violation by either "leveling up" or "leveling down." Whenever a State impermissibly taxes interstate commerce at a higher rate than intrastate commerce, that infirmity could be cured by lowering the higher rate, raising the lower rate, or a combination of the two.

Id. As Edward Zelinsky notes, another remedy would be to exempt nondomiciliary income from taxation. Edward A. Zelinsky, *The Enigma of Wynne*, 7 WM. & MARY BUS. L. REV. 797, 811–14 (2016).

23. *Wynne*, 135 S. Ct. at 1796 ("The discarded distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible 'direct and imme-

corporations, not individuals.²⁴ As to the first, Justice Alito wrote that “[w]e see no reason why the distinction between gross receipts and net income should matter, particularly in light of the admonition that we must consider ‘not the formal language of the tax statute but rather its practical effect.’”²⁵ Moreover, the Court continued, “it is hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations.”²⁶ Though individuals enjoy benefits and services the state provides, corporations do too, he observed.²⁷

The Court also rejected as “fanciful” the argument that the political safeguards provided through the franchise warranted the Court’s acquiescence to Maryland’s tax scheme because a majority of residents might find it expedient to tax their fellow residents’ out of state income.²⁸ *Wynne* reemphasized that the Due Process and Commerce Clauses protect different interests and that simply because the taxing scheme might pass muster under the former does not automatically mean it survives review under the latter.²⁹

Justice Ginsburg wrote the main dissent,³⁰ which emphasized the principle—articulated in numerous Due Process Clause cases—that a state may tax the entire income of its residents.³¹ She noted that “[r]esidents . . . possess political means, not shared by outsiders, to ensure that the power to tax their

diate burden’ on interstate commerce, whereas a tax on net income is merely an ‘indirect and incidental’ burden. . . . [T]he direct-indirect burdens test was replaced with a more practical approach that looked to the economic impact of the tax. These cases worked ‘a substantial judicial reinterpretation of the power of the States to levy taxes on gross income from interstate commerce.’”) (quoting *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328–29 (1918); 2 TROST & HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10:1, p.251 (2d ed. 2003)) (citations omitted).

24. *Id.* at 1797.

25. *Id.* at 1795.

26. *Id.* at 1797.

27. *Id.* (noting that “corporations also benefit heavily from state and local services”).

28. *Id.* at 1798 (“[T]he notion that the victims of . . . discrimination have a complete remedy at the polls is fanciful. It is likely that only a distinct minority of a State’s residents earns income out of the State.”).

29. *Id.* at 1799.

30. Justices Scalia and Thomas dissented, each reiterating his own opposition to the totality of the DCCD. *See Id.* at 1807 (Scalia, J., dissenting); *id.* at 1811 (Thomas, J., dissenting).

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

income is not abused.”³² Moreover, she argued, “nothing in the Constitution or in prior decisions of this Court dictates that one of two States . . . must recede simply because both have lawful tax regimes reaching the same income.”³³ She asserted that, “at bottom,” *Wynne* was about policy choices: “Should States prioritize ensuring that all who live and work within the State should pay their fair share of the costs of government? Or must States prioritize avoidance of double taxation?”³⁴ Resolving those concerns was beyond the competence of the Court and should, she argued, be left to state legislatures or to Congress.³⁵

TAKE ONE: A RARE WIN FOR THE DORMANT COMMERCE CLAUSE

My first point may seem obvious, but it nevertheless bears mentioning: *Wynne* saw the Court, for the first time in a decade, hold that a state law violated the DCCD. The doctrine has not had a good run of late in the Supreme Court. The last time a non-tax regulation was invalidated was in the 2005 *Granholm* case, which involved the direct shipment of wine.³⁶ The last DCCD victory in a tax case—nearly twenty years ago—was *Hunt-Wesson, Inc. v. Franchise Tax Board*,³⁷ in which the Court held unconstitutional California’s refusal to allow interest expense to be claimed by a nondomiciliary corporate taxpayer.³⁸ The appellees’ victory alone, after such a losing streak for the DCCD, makes *Wynne* an important decision.

The DCCD has had a particularly rough go of it in the Roberts Court era. Before Justice Scalia’s death, any DCCD claim automatically began with a 0-2 count, because of Justice Thomas’s announced refusal to enforce it³⁹ and Justice Scalia’s

32. *Id.* at 1814.

33. *Id.* at 1813.

34. *Id.* at 1823.

35. *Id.*

36. *See* *Granholm v. Heald*, 544 U.S. 460 (2005) (striking down Michigan law permitting in-state but not out-of-state wineries to ship directly to consumers).

37. 528 U.S. 458 (2000).

38. *See id.* at 468.

39. *Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 609–20 (1997) (Thomas, J., dissenting) (“That the expansion effected by today’s decision finds some support in the morass of our negative Commerce Clause case law only serves to highlight the need to abandon that failed jurisprudence and to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role.”).

substantially equivalent position.⁴⁰ Chief Justice Roberts, though joining the *Wynne* majority, created an additional exception to the DCCD in 2007.⁴¹ Justice Ginsburg is often skeptical, as her dissent indicates; she was joined by Justice Kagan as well as by Justice Scalia.⁴² Only Justices Kennedy and Alito are consistent supporters of the DCCD.⁴³ Therefore, the news that the Court had granted certiorari in *Wynne* was greeted with trepidation among supporters of the DCCD;⁴⁴ the Court does not often grant certiorari simply to affirm lower court holdings.⁴⁵

It seems likely that there were four votes to hear *Wynne* and then one of the Justices whose mind was not made up was persuaded to be the fifth in a majority to uphold. One clue is the somewhat peculiar structure of the opinion. While Justice Alito held that Maryland's failure to offer the tax credit to the Wynnes failed the internal consistency test, the majority opinion also held that the result followed *a fortiori* from the three rather old cases invalidating unapportioned corporate gross receipts taxes. Reliance on those cases might have been one member of the Court's price for making (or keeping) a majority. That member may have preferred to rest the holding on narrow *stare decisis* grounds, rather than on the more sweeping internal consistency rationale. (On the other hand, no member of the majority concurred separately to disclaim reliance on the internal consistency portion of the opinion.)

It is nevertheless worrisome that Justice Ginsburg was a single vote away from essentially gutting the fair apportionment prong of *Complete Auto*. The DCCD has long protected

40. Technically, Justice Scalia's position was not so uncompromising; he maintained that he would adhere to prior cases as a matter of *stare decisis*, but only if the factual situations were identical. *See id.* at 635.

41. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 340–41 (2007) (holding that an ordinance that favors public entities does not discriminate against interstate commerce for purposes of the DCCD).

42. *See Comptroller v. Wynne*, 135 S. Ct. 1787, 1813 (2015) (Ginsburg, J., dissenting).

43. *See, e.g., Dep't of Rev. v. Davis*, 553 U.S. 328, 362 (2008) (Kennedy, J., dissenting); *United Haulers*, 550 U.S. at 356 (Alito, J., dissenting).

44. *See, e.g., Denning & Williams*, *supra* note 14, at 264–65.

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

the income earned in interstate commerce from double taxation. To hold, as Justice Ginsburg urged, that the domiciliary states could tax 100% of their residents' income with no credit for taxes paid in other jurisdictions would have removed that important constitutional safeguard and left out-of-state income vulnerable. Disabling that safeguard would likewise endanger the anti-discrimination principle because it would clearly advantage intrastate income over that earned elsewhere.⁴⁶

TAKE TWO: INTERNAL CONSISTENCY LIVES!

While the Court had long considered unapportioned state and local taxes of businesses that earned income in many different jurisdictions to be a constitutional problem,⁴⁷ in the 1980s it subdivided *Complete Auto's* fair apportionment prong into requirements that taxes be "internally" and "externally" consistent.⁴⁸ The latter looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing State."⁴⁹ In other words, external consistency "is nothing more than another label for the fair apportionment requirement."⁵⁰

Internal consistency, however, provides additional protection against the possibility of double taxation by requiring courts to perform a thought experiment. For each tax, a court must assume that every other state imposes an identical tax to see "whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."⁵¹

In 1988, Professor Walter Hellerstein undertook a critical

46. I argue below that fair apportionment and anti-discrimination requirements of *Complete Auto* seem to be converging. See *infra* notes 67–85 and accompanying text.

47. DENNING, *supra* note 8, at § 8.11, 8-43 ("The danger of multiple tax burdens has been recognized for well over a century; indeed, the courts have employed it more persistently, with fewer detours, dead ends, and qualifications than any other principle in determining whether a state tax violates the dormant Commerce Clause.").

48. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

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

50. 1 JEROME HELLERSTEIN ET AL., *STATE TAXATION* ¶ 4.16[2], at 4-244 (3d ed. 1998).

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

analysis of this new doctrine.⁵² He concluded that while there was nothing novel about the Court ensuring that “interstate business should not be subject to additional tax burdens merely because it engages in commercial activity across state lines,”⁵³ he argued that the results achieved by applying the internal consistency test could have been achieved “under a straightforward application of the venerable fair apportionment requirement.”⁵⁴ He worried that the introduction of the concept simply “introduce[d] confusion and uncertainty in an area of the law that has had more than its fair share of both.”⁵⁵

Nearly two decades later, however, the Court decided *American Trucking Associations, Inc. v. Michigan Public Service Commission (American Trucking II)*,⁵⁶ in which the Court upheld an unapportioned tax on intrastate commercial haulers.⁵⁷ The Court distinguished *American Trucking Associations, Inc. v. Scheiner (American Trucking I)*,⁵⁸ in which the Court held that an unapportioned flat fee on commercial haulers failed the internal consistency test, because unlike the flat fee in *American Trucking I*, the Michigan tax applied solely to *intrastate* commerce.⁵⁹

Following *American Trucking II*, Professor Hellerstein wrote a sequel of sorts to his earlier article asking whether internal consistency was now dead.⁶⁰ “In effect,” he wrote, “the Court looked the implications of the internal consistency doctrine squarely in the eye and blinked.”⁶¹ Reconsidering pre-*American Trucking II* case law in light of the decision and then looking at post-*American Trucking II* decisions in state courts, Professor Hellerstein concluded:

We now know from *American Trucking II* that the most expansive interpretations of the internal consistency doctrine cannot be sustained,

52. See Hellerstein, *Foolish*, *supra* note 19.

53. *Id.* at 188.

54. *Id.*

55. *Id.*

56. 545 U.S. 429 (2005).

57. *Id.* at 438.

58. 483 U.S. 266 (1987).

59. *American Trucking II*, 545 U.S. at 436–37 (contrasting the Pennsylvania axle tax “levied upon all trucks (interstate and intrastate) that used its roads, including trucks that merely crossed Pennsylvania’s borders to transport, say, Ohio goods to New Jersey customers” with the Michigan fee, which “taxe[d] purely local activity” and “does not tax an interstate truck’s entry into the State nor . . . transactions spanning multiple States”).

60. See Hellerstein, *Dead*, *supra* note 19.

61. *Id.* at 26.

at least when the exactions at issue can fairly be characterized as “local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike.” Thus the Court’s opinion in *American Trucking II* may well insulate from successful constitutional challenge a number of fees and taxes that once appeared vulnerable to attack under the internal consistency principle. Among these are (1) the initial fees and taxes that states impose on domestic corporations when first organizing or qualifying to do business in the state, (2) the annual business license taxes imposed by states and localities for carrying on particular trades or occupations, many of which are unapportioned, (3) professional and similar licensing fees, and, of course, (4) flat taxes on trucks. Although the hypothetical replication of these fees and taxes by every state or locality imposes a cumulative tax burden on the multistate enterprise not borne by its intrastate competitor solely because the multistate business has chosen to do business in more than one state, they also appear to fall under the umbrella of *American Trucking II*’s exception. In fact, the Court explicitly identified as presumptively unobjectionable the “numerous flat fees upon local businesses and service providers, including, for example, upon insurers, auctioneers, ambulance operators, and hosts of others.”⁶²

Not only did *Wynne* not kill off internal consistency, the case might conceivably be read to make it the focus of the Court’s efforts to combat unconstitutional double taxation and tax discrimination. In his commentary on *Wynne*, Professor Hellerstein observed that the case could be read to hold “that internal consistency is the *only* principle (apart from extraterritorial taxation or ‘external consistency’) for determining whether a tax imposes an unconstitutional risk of cumulative tax burdens in violation of the Commerce Clause.”⁶³ For him, however, that reading would be an unfortunate one.

Previously, he argued, when faced with a conflict between a state’s claim on an apportioned slice and a second state’s claim on the entire pie, “the Court generally resolved those conflicts, without resort to the internal consistency principle,” by requiring the latter to yield to the former’s claim.⁶⁴ If *Wynne* makes internal inconsistency the “*sine qua non* of a [multiple taxation] claim,” he concluded, then the case “made a noteworthy modification in dormant Commerce Clause law.”⁶⁵ For Professor Hellerstein, however, internal consistency should be a sufficient, but not a necessary condition for invalidating a state or local tax under the fair apportionment prong of *Complete Au-*

62. *Id.* at 50–51 (footnotes omitted).

63. Walter Hellerstein, *Deciphering the Supreme Court’s Opinion in Wynne*, 123 J. TAX’N 4, 10 (2015).

64. *Id.* at 12.

65. *Id.* at 10, 12.

to. Even so, he argued that any possible weakening of scrutiny for “internally consistent taxes that create the risk of multiple taxation” might have been offset by *Wynne*’s “reject[ion of] distinctions . . . between gross receipts taxes and net income taxes and between corporations and individuals.”⁶⁶

TAKE THREE: IS *WYNNE* A HARBINGER OF DOCTRINAL CHANGE IN STATE AND LOCAL TAX CASES?

One interesting—if curious—aspect of the *Wynne* opinion is its treatment of internal consistency as an aspect of the rule against anti-discrimination and not as one half of the inquiry into fair apportionment. Another is the absence of the *Complete Auto* test. Both, along with Justice Kennedy’s expression of second thoughts about his vote in *Quill* equating “substantial nexus” with physical presence,⁶⁷ suggest that the Court’s application of the DCCD to state and local taxes is evolving.

Introducing the section discussing internal consistency, Justice Alito writes that the test functions to help “courts identify tax schemes that discriminate against interstate commerce.”⁶⁸ Applying the internal consistency test to the Maryland tax, Justice Alito concludes that “Maryland’s tax scheme is inherently discriminatory and operates as a tariff.”⁶⁹ Commenting on this portion of Alito’s opinion, Professor Edward Zelinsky asked:

[i]s *Wynne* now suggesting that discrimination and apportionment are the same dormant Commerce Clause inquiries? If so, that would be a radical transformation of the *Complete Auto* formula that treats apportionment and discrimination as independent, separate hurdles, both of which must be surmounted for a tax to survive dormant Commerce Clause scrutiny. If not, it is perplexing that the *Wynne* Court, by deploying the internal consistency test, struck the creditless Maryland county income tax as malapportioned without explicitly saying so.⁷⁰

In addition to its collapse of at least part of the fair apportionment test into the anti-discrimination principle, the Court did not test the tax for external consistency. Like Professor Hel-

66. *Id.* at 21.

67. *See infra* notes 86–91 and accompanying text.

68. *Comptroller v. Wynne*, 135 S. Ct. 1787, 1802 (2015).

69. *Id.* at 1804. The Court was influenced by a brief written by academics Michael Knoll and Ruth Mason, who had previously outlined their thinking in a series of law review articles. *See, e.g.*, Michael S. Knoll and Ruth Mason, *How the Massachusetts Supreme Judicial Court Should Apply Wynne*, 78 ST. TAX NOTES 921 (2015).

70. Zelinsky, *supra* note 22, at 812.

lerstein, Professor Zelinsky noted the Court's "enigmatic silence"⁷¹ on external consistency, and wondered whether internal consistency would not henceforth be the alpha and omega of fair apportionment. If so, he thought that would represent "a dramatic reduction of scrutiny under the dormant Commerce Clause as internal consistency is to be the end of the inquiry, which previously continued to the practical test of external consistency."⁷²

Equally curious is *Wynne's* failure to mention *Complete Auto*, much less analyze the case using *Complete Auto's* four-factor framework.⁷³ These oddities, plus Justice Kennedy's abjuration of his vote in *Quill*,⁷⁴ strongly suggest instability in the doctrine.⁷⁵ Is it possible that the Court is on the verge of replacing *Complete Auto's* four-factor test? If so, what would the new doctrine look like?

The majority rejected one option, urged by the dissent, the State of Maryland, and the U.S. Government: invalidate only facially discriminatory state and local taxes, trusting that the political process and the Due Process Clause will function to prevent egregious abuses.⁷⁶ And yet, the Court no longer seems satisfied with the *Complete Auto* framework either.

The collapse of internal consistency and the anti-

71. *See id.* at 808.

72. *Id.* at 810.

73. *Wynne*, 135 S. Ct. at 1793–94 (discussing *Complete Auto* only when describing the Maryland Court of Appeals's application of its factors). There is one other absence in the opinion, though it is a welcomed one. When the Court upheld Kentucky's practice of exempting from its income tax the income generated from state-issued bonds, it applied the *Pike* balancing test, something that had never been a part of the Court's DCCD tax jurisprudence. *See Dept. Rev. v. Davis*, 553 U.S. 328, 353–56 (2008) (applying *Pike* balancing). For a discussion of the appearance of balancing in *Davis*, see Norman R. Williams & Brannon P. Denning, *The "New Protectionism" and the American Common Market*, 85 NOTRE DAME L. REV. 247, 304–09 (2009). Thanks to Norman Williams for noting *Pike's* absence in *Wynne*.

74. *See infra* notes 97–101 and accompanying text.

75. For some speculation why constitutional doctrine undergoes these periodic changes, see, for example, Brannon P. Denning & Michael B. Kent, Jr., *Judicial Doctrine as Risk Regulation*, 82 TENN. L. REV. 405, 428–38 (2015) (suggesting that doctrine undergoes change in response to judicial perceptions of risk to constitutional principles implemented by the doctrine); *see also* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (identifying pathologies in constitutional decisions that suggest doctrine is no longer functioning well to implement the principles it was designed to implement).

76. For Maryland and the U.S. Government's arguments, see Denning & Williams, *supra* note 14, at 252–64.

discrimination principle, as well as the abandonment of both the “fairly related” factor⁷⁷ and the physical presence requirement for substantial nexus, would roughly approximate the Court’s doctrinal journey in non-tax cases. The black-letter law of the DCCD in non-tax cases states that laws discriminating against interstate commerce on their face, in their purposes, or in their effects, garner a kind of strict scrutiny, requiring the state to demonstrate (1) a legitimate (i.e., non-protectionist) end and (2) no less discriminatory means to effectuate that end.⁷⁸ *Truly* nondiscriminatory laws that nevertheless burden interstate commerce are subject to the eponymous *Pike* balancing test, which requires challenges to demonstrate that the burden on interstate commerce clearly exceeds the putative local benefits.⁷⁹ In practice, it has been over thirty years since the Supreme Court has invalidated a nondiscriminatory state or local law because it was unduly burdensome on interstate commerce.⁸⁰ Moreover, the Court has likewise greatly limited—perhaps to the point of abandoning—a branch of the DCCD that invalidated state laws having extraterritorial regulatory effects.⁸¹ These developments mean that—in the Supreme Court, at least—only a discriminatory state or local law will be deemed to run afoul of the DCCD.⁸²

In light of the Court’s non-tax DCCD cases, the fair apportionment requirement makes eminent sense as one iteration of the anti-discrimination principle. In much the same way that discrimination can lurk in the purposes or effects of a facially neutral statute in non-tax DCCD cases, internal consistency allows a court, through a thought experiment, to see if the *effect* of a tax regime is such that, if duplicated, it would disadvantage interstate commerce relative to purely intrastate

77. The fairly related prong has never done much appreciable work. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625–26 (1981) (refusing to invalidate severance tax on the grounds that taxpayers did not receive sufficient benefits from the state to justify imposition of the tax).

78. *See, e.g., DENNING, supra* note 8, § 6.06[A](3), at 6-56.

79. *See Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970).

80. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

81. For the origins and evolution of DCCD extraterritoriality, and an argument that the Court has largely abandoned it, see Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979 (2013).

82. Discrimination is a necessary, but not always a sufficient condition for invalidation. Witness the Roberts Court’s creation of the “public entity” exception to the anti-discrimination principle. *See supra* note 41 and accompanying text.

commerce.⁸³ If, as a *Commerce Clause* matter, fair apportionment is *not* meant to safeguard against interstate commerce being treated worse than intrastate commerce, it is difficult to see why it is even a Commerce Clause concern. The Due Process Clause, with its dual concerns of notice and fairness, can adequately safeguard against the extraterritorial exercise of taxing jurisdiction.⁸⁴

If placing anti-discrimination front and center in tax cases is indeed the Court's aim, it represents a fascinating convergence of doctrinal lines governing tax and non-tax cases that diverged long ago. To make discrimination against interstate and foreign commerce the focus of the DCCD makes a good deal of sense and is likely more true to the reasons for restraining state taxing and regulatory power in that area in the first place.⁸⁵

83. Knoll & Mason, *supra* note 69, at 923. Knoll and Mason, for example, explain that the Maryland statute in *Wynne* was internally inconsistent and, therefore, violated the DCCD. “[A]s interpreted by the Supreme Court, the dormant commerce clause does not prevent *double taxation* as such, but rather it prevents *discrimination against interstate commerce*,” and “avoiding discrimination requires that state taxes be uniform.” *Id.* Internal consistency, they state, “is an easy way to check for uniformity in a state’s tax rates.” *Id.*

84. See, e.g., *Tyler Pipe Indus., Inc. v. Washington*, 483 U.S. 232 (1987) (discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980) (discussing that the fair apportionment factor requires a rational relationship between the income attributed to the State and the intrastate values of the enterprise); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) (discussing that a single-factor formula that does not result in extraterritorial taxation does not constitute a tax on income derived from sales also taxed by another state).

85. Professor Zelinsky argues that to make anti-discrimination the centerpiece of the DCCD would be to move in precisely the wrong direction. According to Zelinsky, anti-discrimination is “incoherent” because it is “arbitrar[y]” and that things like lowering tax rates to encourage companies to relocate from State A to State B could be at risk. Zelinsky, *supra* note 22, at 805, 808. “[I]f some tax provisions that encourage in-state investment are deemed to be unconstitutionally discriminatory because of their tariff-like effects,” he argues, “so too all economically equivalent direct expenditure programs must also run afoul of the dormant Commerce Clause because of their identical, tariff-like effects.” *Id.* at 807. He claims that the Court’s analogy of Maryland’s tax to a tariff “has no convincing limiting principle.” *Id.* Professor Zelinsky has long held the opinion that the Court should jettison the anti-discrimination principle in DCCD cases. See Edward A. Zelinsky, *The Incoherence of Dormant Commerce Clause Nondiscrimination: A Rejoinder to Professor Denning*, 77 MISS. L.J. 653 (2007); Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29 (2002). For a response, see Brannon P. Denning, *Is the Dormant Commerce*

TAKE FOUR: ARE *QUILL*'S DAYS NUMBERED?

Supporting the speculation above that the Court may be contemplating replacing *Complete Auto*'s four-factor framework with something else is Justice Kennedy's concurring opinion in the 2014 October Term's other important state and local taxation case, *Direct Marketing Association v. Brohl*.⁸⁶ In his separate opinion, Justice Kennedy recanted his vote in *Quill* to require the physical presence of a retailer in a state in order to obligate the retailer to collect and remit sales and use taxes.⁸⁷

Since the Court announced it, *Quill*'s holding has been controversial.⁸⁸ The advent of the Internet and the rise of electronic commerce intensified the criticism.⁸⁹ The *Quill* Court was ra-

Clause Expendable? A Response to Edward Zelinsky, 77 MISS. L.J. 623 (2007); see also Edward A. Zelinsky & Brannon P. Denning, Debate, *The Future of the Dormant Commerce Clause: Abolishing the Prohibition on Discriminatory Taxation*, 155 U. PA. L. REV. PENNUMBRA 196 (2007).

86. 135 S. Ct. 1124 (2015).

87. See *id.* at 1134 (Kennedy, J., concurring).

88. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 327–28 (1992) (White, J., dissenting) (criticizing the Court's retention of the physical-presence rule under the commerce clause, because "in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax"); see also Christina R. Edson, *Quill's Constitutional Jurisprudence and Tax Nexus Standards in an Age of Electronic Commerce*, 49 TAX LAW. 893, 893 (1996) (state revenue agencies have been "forced to apply outdated statutes and court decisions relating to archaic business methods when analyzing the taxation of companies that conduct business within a state but do not have the traditional 'physical presence' within the state via property, employees, inventory, and the like"); Jerome R. Hellerstein, *The Quill Case: What the States Can Do to Undo the Effects of the Decision*, 58 ST. TAX NOTES 791 (1993); Charles Rothfield, *Quill: Confusing the Commerce Clause*, 3 ST. TAX NOTES 111 (1992); David F. Shores, *State Taxation of Interstate Commerce: Quill, Allied Signal and a Proposal*, 72 NEB. L. REV. 682 (1993).

89. See, e.g., Jephtha Nafziger, *Taxing Business-to-Consumer Interstate Remote Retail Sales: Economics v. Jurisprudence in the Battle Over Tax Jurisdiction*, 16 J. PUB. AND INT'L AFF. 122, 122 (2005) ("The continued and increasing significance of nontaxed remote retail sales . . . has put the long-term solvency of these tax bases and the public programs they fund in jeopardy."); John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 355 (2003) (arguing that, contrary to the Supreme Court's decision in *Quill*, "[c]ommon sense tells us that the volume of sales, or the percentage of total sales that a seller makes to customers within a state, or both, are the proper measures of the threshold"); John A. Swain, *Cybertaxation and the Commerce Clause: Entity Isolation or Affiliate Nexus?*, 75 S. CAL. L. REV. 419, 473 (2002) ("[S]ales tax equity can be fully achieved only if *Quill*'s anachronistic physical presence test is either judicially or legislatively overruled."); *Academic Specialists Reject Advisory Commission Sales Tax Proposals*, 2000 ST. TAX TODAY 80-30, at Doc. 2000-11538 (Apr. 25, 2000) (arguing that the physical presence test from *Quill* should be overruled).

ther sanguine about the effects of its decision; it noted that Congress could, if it wished, prescribe a different rule.⁹⁰ While various proposals have been floated in Congress,⁹¹ none has become law. In the meantime, state courts have largely limited *Quill* to its facts with several holding that economic presence suffices for a state to tax the income of multistate businesses doing business in a state but lacking a physical presence there.⁹² Justice Kennedy's concurring opinion suggests that members of the Court, too, are beginning to weary of waiting for a legislative fix.

Direct Marketing Association was the latest in a series of legal disputes over laws aimed at forcing Amazon to collect and remit sales and use taxes to states.⁹³ In contrast to other states, Colorado's law simply required retailers whose Colorado gross sales exceeded \$100,000 to notify Colorado purchasers of their obligation to pay sales and use taxes and send a report to Colorado purchasers who bought more than \$500 worth of goods from the retailer.⁹⁴ The retailer then had to provide the state with a list of Colorado purchasers, including names and addresses, as well as how much they purchased.⁹⁵

The Direct Marketing Association sought to enjoin the law, claiming it violated the DCCD. A district court agreed;⁹⁶ on ap-

90. *Quill*, 504 U.S. at 318 ("Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").

91. See, e.g., Marketplace Fairness Act of 2013, S. 743, 113th Cong. (2013). The Marketplace Fairness Act of 2013 would have authorized states under the Streamlined Sales and Use Tax Agreement to require remote sellers with annual gross receipts exceeding \$1 million to collect and remit sales and use taxes if the state complies with the minimum simplification requirements relating to the administration of the tax. See also Marketplace Fairness Act, S. 1832, 112th Cong. (2011). This 2011 bill would have authorized states to require remote sellers to collect and remit sales and use taxes if the state was a member of the Streamlined Sales and Use Tax Agreement or had simplified their sales and use tax administration requirements.

92. See, e.g., *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), cert. denied, 114 S. Ct. 550 (1993) (upholding the imposition of a franchise tax on a non-resident taxpayer and concluding that *Quill*'s physical presence requirement did not apply to other taxes).

93. Neal A. Koskella, Comment, *The Enigma of Sales Taxation Through the Use of State or Federal "Amazon" Laws: Are We Getting Anywhere?*, 49 IDAHO L. REV. 121, 124 (2012) (examining the debate between supporters and critics of the constitutionality of "Amazon laws").

94. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1128 (2015).

95. *Id.*

96. *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo. Jan. 26, 2011), 2011 WL 250556 (granting preliminary injunction; finding likeli-

peal, the Tenth Circuit held that the law violated the Tax Injunction Act (TIA), which prohibits courts from “enjoin[ing], suspend[ing], or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”⁹⁷ A unanimous Court held that the Colorado law did none of those things and was not barred by the TIA.⁹⁸

In his concurring opinion, Justice Kennedy signaled an openness to reconsidering *Quill*.⁹⁹ Kennedy had joined Justice Scalia’s concurring opinion in *Quill*, which justified the retention of the physical presence requirement on *stare decisis* grounds.¹⁰⁰ Not only had times (and technology) changed, Kennedy argued, he even suggested that *Quill* might have been wrong the day it was decided. He wrote that the *Quill* Court “should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy.”¹⁰¹ He continued:

The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper’s favorite store is a click away—regardless of how close or far the nearest storefront. Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.¹⁰²

“Given these changes in technology and consumer sophistication,” he concluded,

hood of success on the merits of DCCD claim).

97. 28 U.S.C. § 1341 (2012).

98. *Direct Mktg. Ass’n*, 135 S. Ct. at 1124. The Court did make clear that it took no position on whether the “comity doctrine” barred the district court’s injunction. *Id.* at 1133; *see, e.g.*, *Levin v. Commerce Energy, Inc.* 560 U.S. 413, 421 (2010) (describing the “comity doctrine,” a discretionary judicial practice, which defers to the jurisdiction of another state and which centers on the belief that other states’ and the federal government should respect the sovereignty of the separate state governments in the interest of cooperation and uniformity). On remand, the Tenth Circuit concluded that Colorado’s notice and reporting requirements did not violate the DCCD. *Direct Mktg. Ass’n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016).

99. *See Direct Mktg. Ass’n*, 135 S. Ct. at 1135 (Kennedy, J., concurring).

100. *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (Scalia, J., concurring). Justice Thomas also joined Justice Scalia’s opinion. *See id.*

101. *Direct Mktg. Ass’n*, 135 S. Ct. at 1134–35 (Kennedy, J., concurring).

102. *Id.* at 1135 (citations omitted).

it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier. It should be left in place only if a powerful showing can be made that its rationale is still correct.¹⁰³

The Court would not lack for possible cases to take up, should three other justices share Justice Kennedy's skepticism about the continued desirability of retaining the physical presence standard. Some states, like Alabama and South Dakota, have recently issued regulations or passed "economic nexus/factor presence" laws¹⁰⁴ that all but beg online retailers lacking a physical presence but doing substantial business in the state to sue them.¹⁰⁵

TAKE FIVE: *FIRST MARBLEHEAD CORP. V.*
COMMISSIONER OF REVENUE AND THE SCOPE OF
WYNNE

Though it didn't require that domiciliary states give credits for individual income taxes paid to source states as a matter of constitutional law, *Wynne* did hold that credits cured the lack of internal consistency. While long a feature of tax cases involving interstate corporations, *Wynne's* application of the principle to a case involving an individual income tax represented something of an extension of existing law. Most early commentators on *Wynne*, however, noted that its holding could create effects that ripple through other areas of state and local taxation.¹⁰⁶

Clues to *Wynne's* scope can perhaps be found in the Court's decision to grant *certiorari* in *First Marblehead Corp. v. Commissioner*,¹⁰⁷ then immediately vacate and remand it to the Supreme Judicial Court of Massachusetts for reconsideration in light of *Wynne*. While both cases involved the application of in-

103. *Id.* (citations omitted).

104. The economic presence nexus standard issued by the Alabama Department of Revenue, based on a pre-*Quill* nexus statute, ALA. CODE § 40-23-68 (2016), provides that nonresident business entities doing business in Alabama are deemed to have a substantial nexus with Alabama, and thus subject to income tax and business privilege tax filing obligations, if the entity's sales in the State exceed \$250,000 annually.

105. Alan Collins, *Governor Bentley Feeling Confident About Tax Plan Going into Special Session*, WBRC FOX 6 NEWS, <http://www.wbrc.com/story/29682672/governor-bentley-feeling-confident-about-tax-plan-going-into-special-session> (last updated Aug. 7, 2015).

106. *See, e.g.*, Hellerstein, *supra* note 63, at 10; Zelinsky, *supra* note 22, at 812–13.

107. 23 N.E.3d 892 (Mass. 2015), *cert. granted, vacated, and remanded* 136 S. Ct. 317 (2015).

ternal consistency, *First Marblehead* involved not state rates of taxation but rather a state's statutory sourcing rules.

First Marblehead Corporation was involved in issuing and securitizing student loans.¹⁰⁸ One of its subsidiaries, Gate Holdings, held interests in a series of trusts that, in turn, held the securitized loans.¹⁰⁹ The income from the trusts constituted "substantially all of Gate's gross income" during the tax years in question.¹¹⁰ Otherwise, "Gate was essentially a holding company with no employees, payroll, tangible assets, or office space—either owned or leased."¹¹¹ Its commercial domicile, however, was Massachusetts.¹¹²

When computing Gate's income taxes for the 2004-2006 tax years, the state employed its three-factor apportionment formula, which allocated to the state a percentage of Gate's income based on receipts, property, and payroll in Massachusetts, divided by receipts, property, and payroll nationwide.¹¹³ For each taxable year, the state found that Gate's property factor was 100% "with the result that for each taxable year, fifty-one percent of Gate's income was taxable in Massachusetts."¹¹⁴ Gate had no payroll either in Massachusetts or elsewhere. As a result, Gate owed an additional \$4 million in taxes to the state.¹¹⁵

On appeal, the issue was the state's allocation of 100% of the loans held by Gate to Massachusetts. Gate and First Marblehead argued that Gate's Massachusetts property factor ought to be zero because *none* of the loans were held in the state.¹¹⁶ Under the state's source allocation statute, loans assigned other than to the taxpayer's "regular place of business" would be assumed to have had the preponderance of substantive contacts regarding the loan occur in Massachusetts.¹¹⁷ Because Gate had no regular place of business—it had no offices or employees—all substantive contacts regarding the loans were assumed to have taken place in Massachusetts, subject to

108. *Id.* at 896.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 897.

114. *Id.* Gate was found to derive 2% of its receipts from activities in Massachusetts. *Id.* at 897 n.14.

115. *Id.* at 897.

116. *Id.* at 900.

117. *Id.*

rebuttal.¹¹⁸

Gate argued that because the loans were administered outside the state, that fact should serve to rebut the presumption that the loans should be allocated to Massachusetts. The appellate tax board, however, ruled that Gate “had not proved the servicers were agents of the trusts . . . and that Gate had not offered any other legal basis for attributing the activities of the servicers to Gate.”¹¹⁹ On appeal from that decision, however, the Massachusetts Supreme Judicial Court ruled that agents or not, “[the servicers’] actions were not appropriately included within the concept of administration,” as defined by the statute.¹²⁰

Having disposed of Gate’s remaining statutory arguments, the court then turned to its constitutional objections. In a confusing and rather cursory analysis, the court concluded that the allocation of loans to Massachusetts was not internally inconsistent:

[W]e have no reason to conclude that application of the apportionment statute as we have interpreted it produces duplicative taxation of Gate’s income, given that Gate’s Massachusetts apportionment percentage for the tax year at issue was approximately fifty-one per cent, and the record reflects that Gate filed tax returns only in Massachusetts and Florida for the relevant years.¹²¹

As commentators pointed out, though, that is *not* how internal consistency is determined. Note that the court did not assume that all fifty states had similar allocation statutes and then determine whether the risk of double taxation existed.¹²²

In a recent commentary on *First Marblehead*, Michael Knoll and Ruth Mason, proponents of the internal-consistency-as-anti-discrimination-test view¹²³ and authors of an amicus brief in *Wynne* that was apparently highly persuasive to the

118. *Id.*

119. *Id.* at 903.

120. *Id.*

121. *Id.* at 906.

122. *See, e.g.,* Knoll & Mason, *supra* note 69, at 924 (“Rather than hypothetically assuming that all states used Massachusetts’s apportionment rules, the Massachusetts court instead looked to see whether Gate experienced *actual* double taxation. We assume that was why the Supreme Court granted certiorari, vacated the court’s opinion, and remanded the case for further consideration.”).

123. For a nice summary of their position, see Michael S. Knoll & Ruth Mason, *Comptroller v. Wynne: Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax*, 163 U. PA. L. REV. ONLINE 267 (2015).

majority,¹²⁴ discussed how *Wynne* should apply when the Massachusetts high court reconsiders *First Marblehead*. They concede that comparing sourcing rules is more difficult than comparing states' rate structures, but nevertheless argue that internal consistency "provides a simple and powerful technique that courts can use to ascertain whether a state's tax laws are unconstitutional."¹²⁵

The court, they argue, "should add (1) the portion of Gate's income Massachusetts would allocate to Massachusetts under the state's property allocation rule and (2) the portion of Gate's income other states would allocate to themselves *using the challenged Massachusetts property allocation rules*."¹²⁶ If more than 100% of Gate's income is allocated, then the sourcing rules fail internal consistency. While they concede that they are "unsure which way *First Marblehead* should come out on remand," they conclude that "*Wynne* and the internal consistency test provide the lower courts with clear direction."¹²⁷

What is more significant about *First Marblehead*, however, is that the Supreme Court did not treat *Wynne* as a one-off. Even though the subject was sourcing rules as opposed to tax rates, the Court's remand to the Massachusetts high court signals that it understands the rule in *Wynne* should be applied beyond *Wynne*'s particular facts. As one state and local tax expert commented, *First Marblehead* was likely a shot across the bow of states and cities whose apportionment and tax base measurement structures have internal consistency problems; he predicted some quiet settlements in the wake of *First Marblehead* and thought that the Court's treatment of the case might have a future deterrent effect as well.¹²⁸

124. *Wynne*, 135 S. Ct. at 1802–04 (discussing and applying the analysis from the Knoll & Mason brief).

125. Knoll & Mason, *supra* note 69, at 925.

126. *Id.* at 926.

127. *Id.* at 926. "What a court would need to know to apply the internal consistency test and ascertain whether the Massachusetts sourcing rules are constitutional as applied to Gate," they explain, "is how Massachusetts treats the nondomiciliary situation when Massachusetts *non-domiciliaries* hold loans that have connections with Massachusetts." *Id.* at 927.

128. 'First Marblehead' *Reflects Broad Implications of 'Wynne'*, BLOOMBERG BNA (Oct. 23, 2015) http://news.bna.com/dtln/display/batch_print_display.adp (quoting Bruce P. Ely, chair of the state and local tax section at Bradley, Arant, Boult, Cummings, in Birmingham, Alabama).

CONCLUSION

That the *Wynnes* prevailed on their DCCD claim is reason enough to take note of their case. Add to that, however, the Court's strong endorsement of internal consistency, the majority's characterization of internal consistency as a means for smoking out discrimination, the *absence* of both external consistency and the *Complete Auto* framework, as well as Justice Kennedy's call for a reconsideration of *Quill*, and *Wynne* seems more like an inflection point in the Court's DCCD jurisprudence. While such points are often clear only in retrospect, the Court's actions in *First Marblehead* strongly suggest that *Wynne* was not to be confined to its facts.

Wynne is also useful to illustrate a broader point: Constitutional doctrine is not static.¹²⁹ The process of creation, application, and modification of rules to implement constitutional principles is just that—a process.¹³⁰ Courts over time create and discard rules for any number of reasons: because old rules no longer fit the facts on the ground,¹³¹ because of changes in perceptions of risk,¹³² or because changes in other areas exert a kind of gravitational pull or exert hydraulic pressure on existing doctrines.

Despite its now-canonical status, the *Complete Auto* “test” became so only *nunc pro tunc*. In the case itself, Justice Blackmun merely mentioned a few things, the presence or absence of which might have called a state or local tax into question.¹³³ As Boris Bittker observed, “[t]his list of the four claims that the taxpayer did *not* make in *Complete Auto Transit* was

129. See, e.g., Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991).

130. Denning & Kent, *supra* note 75, at 456–28.

131. See Roosevelt, *supra* note 75 (describing symptoms that suggest doctrinal rules no longer adequately serve to implement constitutional principles); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145 (arguing that changes in perceptions of facts impact justices' choice of decision rules and affect shape of constitutional doctrine generally).

132. See Denning & Kent, *supra* note 75 (arguing that constitutional doctrine reflects justices' perception of risk to constitutional principles and adequacy of existing political safeguards to address those risks).

133. See *Complete Auto Transit v. Brady*, 430 U.S. 274, 287 (1977). Justice Blackmun wrote:

We note . . . that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.

Id.

promptly transformed into a ‘test,’ although it was not given this title at birth.”¹³⁴ Nor were those factors new ones; most could be found in earlier opinions.¹³⁵ Moreover, one of the four factors—whether the tax is fairly related to the benefits provided by the taxing jurisdiction—has subsequently never done any appreciable work. Well before *Wynne*, commentators had suggested that “several of [*Complete Auto*’s] parts are functionally redundant.”¹³⁶ It should therefore be no surprise—and no occasion for distress—if the Court has decided, nearly forty years on, that a different, perhaps better set of tools is required to implement the principles served by the DCCD.

134. DENNING, *supra* note 8, at § 8.10, 8-41.

135. See, e.g., *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48 (1940) (articulating the anti-discrimination principle); *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (striking down unapportioned gross receipts tax imposed on domestic corporation that exposed “interstate commerce . . . to the risk of a double taxation”); *W. Live Stock v. Bureau of Rev.*, 303 U.S. 250, 260 (1938) (observing that the Commerce Clause prohibits the imposition of multiple tax burdens on interstate commerce).

136. Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 193.