

# The Dormant Coordination Clause

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## I. WHY THIS CASE?

The Supreme Court’s odd cert. grant in *Comptroller v. Wynne*<sup>1</sup> provides occasion to rehearse the key perplexity of the so-called “dormant” or “negative” Commerce Clause: the paradox between the doctrine’s uncertain constitutional foundations and its broad application over the past 140 or so years.<sup>2</sup>

Like virtually all tax cases implicating the dormant Commerce Clause, this one comes from a state court (the Maryland Court of Appeals). Over the past two decades, the Supreme Court has grown increasingly stingy in taking cases that originate from state courts,<sup>3</sup>

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1. 64 A.3d 453 (Md. 2013), *cert. granted*, 134 S. Ct. 2660 (2014).

2. I have explored the theme elsewhere at greater (and in fact excruciating) length. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 91–111, 214–20, 287–307, 356–65 (2012).

3. A search in the National Science Foundation’s Supreme Court Database website clearly shows a declining trend in state grants. In 1967, the Supreme Court reviewed seventy-one state cases; by the early 2010s, it averaged some ten state cases. See also *The Statistics*, 127 HARV. L. REV 408, 418, 422 (2013) (explaining that in the 2012-2013 Term, the Supreme Court heard only

including state tax cases.<sup>4</sup> All of the ordinary indicia of certworthiness—lower court splits, exceptional importance, and unsettled law—are missing here.<sup>5</sup> Thus, the suspicion arises that at least some of the Justices voted to call for the views of the Solicitor General (“CVSG”) and then to grant cert. because, well, the *Wynnes* won below. Put more directly: one must apprehend, as one must in well-nigh every dormant Commerce Clause case, that the Justices who have long viewed the dormant Commerce Clause as constitutionally baseless have seized on *Wynne* to make that point one more time (and perhaps to pick up additional allies). If that’s the idea, the Justices may have chosen the right case.

In addition to its allegedly lacking constitutional foundations, the dormant Commerce Clause has been assailed on two grounds: (1) it is a horrid mess in application; and (2) most of the concerns that the doctrine aims to address can also be handled, perhaps more effectively, under textual clauses, in particular the Privileges and Immunities Clause and the Import-Export Clause.<sup>6</sup> Neither of these

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six civil cases originating in state court). Roughly, the percentage of state cases declined from 36% to 13% of a shrunken Supreme Court docket. However, the portion of interstate tax cases decided by the Supreme Court appears to have been insignificant for decades. A quick search in the National Science Foundation’s Supreme Court Database website revealed only nine “federalism” state tax cases from 1959 to 1998. In all but a handful of cases, state courts have the final word in state tax cases raising federal questions.

4. Since the decision in *Camps Newfound/Owatonna v. Town of Harrison, Me.*, 520 U.S. 564 (1997), the Court has decided only five additional state tax cases implicating the dormant Commerce Clause: *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16 (2008); *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000); *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). The Court has denied certiorari in numerous cases, some of (arguably) greater interest than *Wynne*. See, e.g., *Overstock.com, Inc. v. N.Y. State Dep’t of Taxation and Fin.*, 987 N.E.2d 621 (N.Y. 2013), *cert. denied*, 134 S. Ct. 682 (2013); *Lamtec Corp. v. Dep’t of Revenue*, 246 P.3d 788 (Wash. 2011), *cert. denied*, 132 S. Ct. 95 (2011); *KFC Corp. v. Iowa Dep’t of Revenue*, 792 N.W.2d 308, 310 (Iowa 2010), *cert. denied*, 132 S. Ct. 97 (2011); *Peoples Gas, Light & Coke Co. v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. Ct. App. 2008), *cert. denied*, 131 S. Ct. 2097 (2011); *Midland Central Appraisal Dist. v. BP Am. Prod. Co.*, 282 S.W.3d 215 (Tex. Ct. App. 2009), *cert. denied*, U.S. Tax Appeals Tribunal, 131 S. Ct. 2097 (2011) (mem.); *Comm’r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 235–36 (W. Va. 2006), *cert. denied*, 551 U.S. 1141 (2007); *Thomas Truck Lease, Inc. v. Lee Cnty.*, 768 So.2d 870 (Miss. 1999), *cert. denied*, 531 U.S. 812 (2000); *Chase Manhattan Bank v. Gavin*, 733 A.2d 782 (Ct. 1999), *cert. denied*, 528 U.S. 965 (1999); *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125 (N.Y. 1998).

5. The only consideration arguing in favor of a grant is the U.S. Solicitor General’s cert. recommendation, which does not strike me as terribly persuasive. See Supplemental Brief for Respondents at \*2, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (Apr. 21, 2014), 2014 WL 1571927.

6. U.S. CONST. art. IV, § 2, cl. 1 (Privileges and Immunities Clause); U.S. CONST. art. I, § 10, cl. 2 (Export-Import Clause). See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,

complications is present here. Notwithstanding the attempt by certain amici (notably, the Multistate Tax Commission) to complicate the matter,<sup>7</sup> the respondents—plaintiffs below—ask for an easily applied, binary rule.<sup>8</sup> At the same time, all parties agree that no other clause applies here. One cannot easily imagine a cleaner engagement with the dormant Commerce Clause doctrine and its foundations.

The case hardly compels that engagement. The Wynnes have a dozen or so cases—as well as the Hellersteins’ state tax bible<sup>9</sup>—to support their position, and the Justices could treat the case as a mere housekeeping exercise to keep a few wayward states in line. But a cert. grant in the rare case where a state court has already done that housekeeping suggests that at least some of the Justices have something more in mind. Here’s to hoping that they forget that “something” in this and, ideally, any future case.

The dormant Commerce Clause is an inference from the constitutional structure, and it is a constitutional common law rule: it operates presumptively, until and unless Congress says otherwise.<sup>10</sup> One can insist, wrongly in my mind, that any and all such constitutional common law rules are illegitimate. However, it is implausible to single out the dormant Commerce Clause. As constitutional common law goes, the doctrine (warts and all) is about as good as one can reasonably hope for.

## II. CONSTITUTIONAL FUNCTION AND FORM

Justice Scalia and Justice Thomas have criticized the dormant Commerce Clause as an “adverse intellectual possession,”<sup>11</sup> an

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Me., 520 U.S. 564, 609 (1997) (Thomas, J., dissenting); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring); *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring and dissenting in part); see also GREVE, *supra* note 2, at 359–61.

7. See Brief of Multistate Tax Comm’n in Support of Petitioner State of Maryland, Md. State Comptroller of the Treasury v. Wynne, No. 13-485 (Sep. 26, 2014), 2014 WL 3943824.

8. See Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 463–71 (Md. 2013) (applying the *Complete Auto* test, described *infra* notes 39–41).

9. See 1 JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN SWAIN, STATE TAXATION ¶ 20.04 (3d ed. 2014), 1999 WL 1399043 [available as Westlaw database ST TAXN WGL].

10. See Henry Paul Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

11. *Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting) (“[T]he Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing

illegitimate arrogation of judicial power,<sup>12</sup> and an interstate-commerce version of *Lochner*.<sup>13</sup> The Justices' position is intimately tied to their textualist-originalist jurisprudence, and both Justices have stated their views with characteristic force and clarity. However, substantially identical arguments have accompanied the dormant Commerce Clause since at least the 1870s. Attacks on the doctrine as hopelessly confused and as constitutionally baseless had great traction especially during the five decades spanning the turn of the twentieth century, and it is fair to say that the defenses of the doctrine—as a corollary of an exclusive Commerce Clause, or as a reflection of an undeclared will of Congress—were not fully persuasive.<sup>14</sup> Nonetheless, the dormant Commerce Clause thrived; as Justice Thomas has pithily observed, “[t]here is, quite frankly, nothing ‘dormant’ about [the Court’s] jurisprudence in this area.”<sup>15</sup> Moreover, even ardent opponents of laissez faire jurisprudence embraced the dormant Commerce Clause. Oliver Wendell Holmes, no huge fan of *Lochner*, thought the Union would be in peril without the dormant Commerce Clause.<sup>16</sup> Professor Felix Frankfurter, like his teacher James B. Thayer, was a very harsh critic of the doctrine. Later, Justice Frankfurter applied the doctrine in his very first written opinion—apparently, on a claim that the petitioner had failed to plead.<sup>17</sup> Evidently, those jurists thought they needed the doctrine: why?

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that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.”).

12. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting).

13. *Lochner v. New York*, 198 U.S. 45 (1905). *E.g.*, *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 355 (2007) (Thomas, J., concurring). *Cf.* *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 34 (2008) (Thomas, J., concurring) (“[D]ivining from the Fourteenth Amendment a right against disproportionate taxation bears a striking resemblance to our long-rejected *Lochner*-era precedents.”).

14. *See Camps Newfound*, 520 U.S. at 610–21.

15. *Id.* at 609 n.1 (Thomas, J., dissenting) (citing Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 425, n.1 (1982)).

16. “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often action is taken that embodies what the Commerce Clause was meant to end.” OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 295–96 (1921).

17. *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939). For discussion, see Ernest J. Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 *YALE L. J.* 219 (1957).

One explanation, prominent in opinions of the post-World War II era, is that the Founders sought to establish an “economic union.”<sup>18</sup> That form of constitutional argument by grandiloquence, though, has largely fallen out of favor (except on such matters as abortion or gay rights). A second explanation is that the dormant Commerce Clause doctrine prevents “discrimination” against interstate commerce and those engaged in it. That proposition is much closer to a constitutional argument, and it has a great deal of plausibility. Without more, however, this “discrimination” theory faces two objections. First, “discrimination” is not the Supreme Court’s true test. Instead, in each case the Court stacks up the state’s police power justifications against the burdens on interstate commerce. The “discrimination” label serves to describe instances when the state loses.<sup>19</sup> Second, the Constitution contains textual prohibitions against “discrimination”: the Privileges and Immunities Clause<sup>20</sup> and the Import-Export Clause (in conjunction with the Tonnage Clause).<sup>21</sup> Why do these textual clauses, properly read, fail to do the job of the dormant Commerce Clause? To the extent that these other constitutional provisions fall short, should *exclusio alterius* apply—on the general presumption, buttressed by the Tenth Amendment, that the states are permitted to do what is not prohibited to them by the Constitution (or by Congress, pursuant to its enumerated powers)?

These are the right questions. The answer is that the textual clauses *cannot* take the place of the dormant Commerce Clause—not in their present form,<sup>22</sup> and not in any plausible reconfiguration. To bury the dormant Commerce Clause is to leave its distinctive work undone, or else, to leave it to the states or to Congress; and that, too, amounts to leaving it undone.

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18. See Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 43 (1988).

19. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1409 & n.19 (1994) (citing *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 95–96 (1987) (Scalia, J., concurring)). I take this to be one of Justice Scalia’s objections to the doctrine, and I think it has considerable force.

20. U.S. CONST. art. IV § 2, cl. 1; see *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265 (1987).

21. U.S. CONST. art. I § 10, cl. 2; see *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 7–8 (2009) (explaining that the Tonnage Clause serves as an anti-circumvention clause for the Import-Export Clause).

22. For discussion, see Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003); Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 COLO. L. REV. 155 (1999).

## III. WHAT THE DORMANT COMMERCE CLAUSE DOES

Federal systems have many advantages, but they also pose political risks to interstate commerce.<sup>23</sup> Those risks can be grouped under three headings: exclusion (i.e. barriers to trade); exploitation; and coordination problems, or what the Supreme Court calls “balkanization.”

*A. Exclusion*

Barriers to trade, wholesale or partial, in the form of tariff barriers or regulatory substitutes, is what the Supreme Court often calls “protectionism.” The Privileges and Immunities Clause and the Import-Export Clause guard against it. Those clauses have fallen into desuetude, however, since the Supreme Court, for various reasons and in various ways, put them there a long time ago. It held that corporations, while “citizens” for purposes of diversity jurisdiction, were *not* citizens for purposes of the Privileges and Immunities Clause.<sup>24</sup> When more and more commerce came to be conducted in corporate form, the Court needed an instrument to protect corporations and their transactions against protectionist legislation. The Import-Export Clause could not do that work because the Court had also held, probably incorrectly, that this Clause applied only to commerce with foreign nations, not to interstate transactions.<sup>25</sup> The dormant Commerce Clause solved the Court’s problem.

While the Supreme Court might be able to reformulate the doctrine under the textual clauses, it is hard to see the point of a maneuver that would likely create more practical problems than it would solve.<sup>26</sup> In any event, to the extent that the dormant Commerce

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23. By “political” risks I mean dangers arising from state law and legislation, as distinct from natural impediments or externalities. To be clear, I do not mean to imply that the Constitution *must* be read as a seamless web to fend off those risks. It may have left them unaddressed, either inadvertently or deliberately. It still helps to work through the basic federalism dynamic.

24. See *Bank of Augusta v. Earle*, 38 U.S. 519 (1839); *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

25. *Woodruff v. Parham*, 75 U.S. 123, 136–37 (1868) (“[W]e are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one State to tax articles brought into it from another.”).

26. See Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, *supra* note 22 (describing the collateral consequences of repealing the doctrine).

Clause covers this core domain of “discrimination,” it should not be terribly controversial; and in truth, it isn’t.<sup>27</sup>

### B. Exploitation

Exploitation, or the deliberate infliction of harm by one state on other states and their citizens, for domestic gain, is a more vexing problem. There is no problem in saying that the Due Process Clause prohibits states from taxing or regulating conduct wholly beyond their jurisdiction. Alas, the Constitution does not say what that jurisdiction is.<sup>28</sup> Territorial categories quickly fail; and in any event, the Due Process Clause cannot fully cover this ground.

The federalism problems here are acute. Ever since *Parker v. Brown*,<sup>29</sup> however, the Supreme Court has been depressingly indifferent to the exploitation risk.<sup>30</sup> While the dormant Commerce Clause prohibits the direct regulation of wholly extraterritorial conduct,<sup>31</sup> even that minimal safeguard against mutual state exploitation is enforced only sporadically. For example, even as *Comptroller v. Wynne* was re-listed, CVSG’d, and eventually granted, the Justices quickly denied cert. in an exceptionally important and well-briefed case that squarely presented the question of whether a single state (California) may regulate transactions in Ohio and in Brazil for purposes of global climate protection.<sup>32</sup> Perhaps the Justices

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27. See, e.g., *Tyler Pipe Indus.*, 483 U.S. at 265 (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 636 (1997) (Thomas, J., dissenting).

28. *State Tax Comm’n of Utah v. Aldrich*, 316 U.S. 174, 201 (Jackson, J., dissenting) (“I find little difficulty in concluding that exaction of a tax by a state which has no jurisdiction or lawful authority to impose it is a taking of property without due process of law. The difficulty is that the concept of jurisdiction is not defined by the Constitution. Any decision which accepts or rejects any one of the many grounds advanced as jurisdictional for state taxing purposes will read into the Constitution an inclusion or an exclusion that is not found in its text.” (footnotes omitted)).

29. 317 U.S. 341 (1943). For the federalism and dormant Commerce Clause implications of the case, see Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983). See also Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983).

30. The exceptions are “exploitation” cases that can also be analyzed as “discrimination” cases, such as cases arising over discriminatory highway tolls. See, e.g., *Am. Trucking Ass’ns, Inc. v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429 (2005); *Am. Trucking Ass’ns, Inc. v. Smith*, 496 U.S. 167 (1990); *Am. Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266 (1987).

31. *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

32. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), cert. denied, 134 S. Ct. 2884 (2014); see also *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Harris*, 729

deemed the case to fall under the greenhouse-gas exception that seems to trump every other constitutional or administrative doctrine previously thought to have been settled.<sup>33</sup> It is equally likely, however, that interstate exploitation is simply not in their lexicon.

Mercifully, none of this is implicated in *Comptroller v. Wynne*. Due process problems are entirely of the Comptroller's imagination.<sup>34</sup> And Maryland is not contesting any other state's right to tax its citizen-residents; it merely wants to tax them again.

### C. Balkanization

States may have different rules for many reasons having nothing to do with protectionism or exploitation. In such situations, the Supreme Court has sometimes mobilized the dormant Commerce Clause to force coordination on a single rule. One can analogize these sorts of state regulations to the production of appropriable rents (and so to either discrimination or exploitation).<sup>35</sup> At bottom, though, the cases present coordination problems with multiple equilibria. Typically, the cases arise when most states have already agreed on a common rule; the Court's usual solution is to mow down the dissident jurisdiction. Leading cases have involved the shape of mudguards on trucks<sup>36</sup> and differing requirements for railroads.<sup>37</sup>

More than occasionally, the analytical categories overlap. For example, cases over state highway tolls and fees can be described as "exploitation" or "discrimination" (in the sense of "exclusion").<sup>38</sup> The key is that the Due Process Clause, the Privileges and Immunities

F.3d 937 (9th Cir. 2013), *cert. denied*, 134 S. Ct. \_\_\_ (Oct. 14, 2014) (holding that the dormant Commerce Clause allows California to impose a complete ban on the sale of foie gras based solely on the agricultural methods used by out-of-state farmers entirely beyond California's borders).

33. *Massachusetts v. EPA*, 549 U.S. 497 (2007), cannot reasonably be read to stand for any other proposition. Cf. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007) (discussing the Supreme Court's departure from standard constitutional and administrative law doctrine as an attempt to force global warming "expertise" on the administration); Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions 2* (Harvard Pub. L. Working Paper No. 14-08, 2013), available at <http://papers.ssrn.com/abstract=2355493> (arguing that on plausible readings, *Massachusetts v. EPA* runs up hard against established administrative law precepts).

34. See Brief for Respondents at \*27–45, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (Sept. 19, 2014), 2014 WL 4681795.

35. Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 13 (2003).

36. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981).

37. *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

38. See, e.g., *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005); *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987).

Clause, and the Import-Export Clause can do some *but not all* of the work of the dormant Commerce Clause, especially not its coordinating function. *Wynne* provides an excellent illustration.

#### IV. WHAT OF WYNNE?

The Maryland Court of Appeals correctly held *Wynne* to be governed by the Supreme Court's "internal consistency" test, first formulated explicitly in *Complete Auto Transit, Inc. v. Brady*.<sup>39</sup> It asks: if every state adopted this rule, would that produce double taxation and disproportionate burdens on interstate commerce? The test is readily understood as an (imperfect) tax coordination rule.<sup>40</sup> It operationalizes the baseline proposition, long predating the test, that interstate income should be taxed no more severely than in-state income—ideally, by a single state and, if that fails, under some apportionment formula.<sup>41</sup>

Alternatively, one can view "internal consistency" as a discrimination test. As explained in the tax economists' amicus brief, the problem here arises because Maryland insists on taxing "inbound" income earned by Maryland residents on one basis (residence) and "outbound" income earned within the state by nonresidents on another basis (source), as revenue-optimizing strategies may dictate.<sup>42</sup> It is this conjunction of two superficially neutral taxes that produces excess burdens on interstate commerce. Importantly, though, this type of "discrimination" is not easily analogized to the "discrimination" that is barred by the Privileges and Immunities Clause or the Import-Export Clause,<sup>43</sup> because Maryland is not discriminating against anyone in a

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39. 430 U.S. 274 (1977).

40. The test is imperfect because two internally consistent rules may yet produce double taxation. See *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

41. See *HELLERSTEIN ET AL.*, *supra* note 9, at ¶ 4.09[1]; *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The Court's crucial and wholly salutary move in that case, principally engineered by then-Justice Harlan Fiske Stone, was to abandon territorial and category-based Commerce Clause distinctions and instead to ensure that interstate commerce pay its way without suffering special burdens.

42. See Brief of Tax Economists as Amicus Curiae in Support of Respondents, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (Sep. 26, 2014), 2014 WL 4895266 (disclosure: several of the signatories are former colleagues at the American Enterprise Institute). An additional, equally compelling amicus brief by tax experts makes substantially the same point. See Brief of Michael S. Knoll & Ruth Mason as Amicus Curiae in Support of Respondents, *Maryland State Comptroller of the Treasury v. Wynne*, No. 13-485 (Sep. 26, 2014), 2014 WL 4895269.

43. As the Supreme Court has put it in slightly varying formulations, the dormant Commerce Clause prohibits discrimination against interstate *commerce*, as distinct from

protectionist fashion. Thus, regardless of whether one views “internal consistency” as a coordination or an anti-discrimination rule, the dormant Commerce Clause is supposed to do here what no other clause can do.

The Wynnes must concede that Maryland can tax residents’ income wherever earned and that other states can tax that same income. Moreover, they cannot say that Maryland *must* provide a tax credit for other states’ taxes. Why should Maryland’s right to tax its own citizens hinge on what other states have done or may want to do? In determining how to order rival, legitimate claims on the same tax base, why should nonresident states get to go first? And isn’t the states’ autonomy to configure their own tax base the embodiment of a “retained” power that should be beyond federal control and preemption, including the Supreme Court’s control?

The answer is that the “internal consistency” test deliberately abstracts from the states’ rights or jurisdictional concerns that Maryland advances here. It simply looks to the aggregate effect on interstate commerce. Crucially, it does not say a state *must* configure its tax system to grant a credit to another state. But Maryland has alternatives, such as apportioning the tax base.<sup>44</sup> Any “internally consistent” regime will satisfy the Constitution.

For the Wynnes, that position is not entirely congenial. The optimal, internally consistent rule may be to tax *all* income on the basis of residence only.<sup>45</sup> For obvious reasons, the Wynnes’ lawyers do not mention that solution, since their clients would still be taxed twice. If confronted with it, however, the lawyers can truthfully say that credits for income earned and taxed elsewhere are a close second-best. And in any event, what Maryland may or must do in the event of an adverse ruling is not really on review here. The question is whether the judgment below should stand, and the answer has to be “yes.”

Short of a major revamp of dormant Commerce Clause jurisprudence or a decision that for some reason declares extant rules inapplicable to individuals or S-corporations,<sup>46</sup> it is difficult to see how

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participants *in* that commerce. *E.g.*, *Exxon v. Maryland*, 437 U.S. 117, 127–28 (1978) (“[T]he [dormant Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”).

44. See HELLERSTEIN ET AL., *supra* note 9, at ¶ 8.02 (detailing methods used by the States).

45. Relative to source-based taxes, residence-based taxes minimize enforcement and compliance costs.

46. S-Corporations are pass-through entities, meaning that corporate income, losses, credits and deductions pass directly to the shareholders for federal tax purposes. See 26 U.S.C. § 1362(1) (2012).

the Wynnes can lose. But it all hangs (does it not?) on the proposition that the dormant Commerce Clause *should* serve as a judicially enforced coordination rule, or a rule against forms of discrimination that escape the purview of the other aforementioned textual clauses. That proposition strikes me as eminently plausible. The contrary position requires a far more robust defense than it has received to date.

#### V. POLITICAL DEFECTS AND JUDICIAL DEFAULTS

It bears emphasis how deferential and circumspect the dormant Commerce Clause—especially in the deployment here at issue—actually is. It asks at the front end whether the state tax (or regulation) has a substantial effect on interstate commerce. If the answer is “no,” the courts will let it pass because the costs of coordination would vastly exceed the benefits of local choice and variety. If and only if the answer is “yes” will the “internal consistency” test apply.<sup>47</sup>

That test, in turn, does not demand any particular state regime. It merely asks for *some* state rule of conduct on which coordination would in principle be possible, on terms that prevent excess burdens on interstate commerce. No conventional economist would care to defend that test as efficient. But then, it is futile to look for a rule that produces technically efficient results in every case. What is needed is a set of plausible rules that produce acceptable results over the general run of cases, with minimum friction or interference.

The dormant Commerce Clause *is* that rule. The overwhelming majority of states with an income tax have accommodated themselves to the injunction by crediting taxes paid elsewhere. *Comptroller v. Wynne* is not about states chafing under an arbitrary Supreme Court rule; it is about cutting down an opportunistic outlier.<sup>48</sup> A Court that is unwilling to do even that much is effectively saying that there should be *no* judicially supplied rule to begin with—not even a judicial default rule.

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47. One can call that a “balancing” test, but it makes perfect sense, and it is hard to see the alternative. Deciding such cases under the Import-Export Clause would produce precisely the same difficulty. GREVE, *supra* note 2, at 364 (explaining the point and discussing *Brown v. Maryland*, 25 U.S. 419 (1827)).

48. By all appearances, only a handful of state or local jurisdictions fail to provide credits for income taxes paid elsewhere. See HELLERSTEIN ET AL., *supra* note 9.

That position must rest on one of two propositions.<sup>49</sup> Either no rule is needed because states will coordinate *sua sponte*; or, “the Court’s involvement in this area is wholly unnecessary given Congress’ undisputed authority to resolve income apportionment issues by virtue of its power to regulate commerce ‘among the several States.’”<sup>50</sup> Neither proposition is tenable.

### A. Defects

The states’ best effort to agree on coordination rules is the Multistate Tax Compact and the Multistate State Commission (“MTC”), originally formed to fend off feared congressional legislation on state business income apportionment. Ostensibly, the MTC is committed to coordinate state taxation and to reduce double taxation, among other objectives. However, a group of *tax collectors* is more likely to go to Heaven than to act on those particular commitments; and indeed, the MTC has not and does not. In *Comptroller v. Wynne*, the MTC *defends* the state’s position, which is all one needs to know about the prospect of voluntary state tax coordination on nondiscriminatory terms. In truth, the MTC can protect its own existence only by allowing uninhibited free-riding. Even among its dwindling number of full members, the MTC has averred in litigation pending elsewhere, its resolutions and model laws operate as mere suggestions.<sup>51</sup>

Congress for its part has never exercised its awesome authority over state taxation except to freeze a legal status quo or to address the particular concerns of potent constituencies, such as railroads and pensioners.<sup>52</sup> An endless stream of federal preemption cases illustrate that Congress is inept even at determining what belongs to the feds and what belongs to the states collectively—in part because Congress cannot foresee every contingency, and in much larger part because states can be every bit as ornery as the Constitution expects them to be. When it comes to the much harder task of providing a coordination

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49. A third possible position is that the Founders were sufficiently stupid to write a federal Constitution that sows the seeds of its own destruction. To my knowledge, no judicial critic of the dormant Commerce Clause has taken that position.

50. *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 34 (2008).

51. Brief Amicus Curiae of the Multistate Tax Comm’n in Support of Defendant-Respondent California Franchise-Tax Board at \*7–16, *Gillette Co. v. Cal. Franchise Tax Bd.*, No. S206587 (Cal., Nov. 7 2013), 2013 WL 7089595.

52. For examples and discussion, see Kathryn Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. OF LEGIS. 171–213 (1997).

rule to govern *what* belongs to *which* state, Congress has been virtually silent for some 225 years.<sup>53</sup> While state tax coordination has multiple equilibria, there is no *legislative* equilibrium at all: any proposed solution quickly founders on holdout problems<sup>54</sup> and distributional disagreements.<sup>55</sup> For these reasons, no general state tax coordination rule has come or will ever come from anywhere except the Supreme Court.<sup>56</sup>

### B. Defaults

The Constitution contains an array of “hard” constitutional coordination rules, such as the Privileges and Immunities Clause. While overlapping with those clauses, the dormant Commerce Clause differs in operation: as a default rule, it governs unless Congress says otherwise. It is a rather hard default—not so much because Congress is not the House of Commons or because it must clearly express its intent to trump the clause,<sup>57</sup> but mostly because Congress does not want to sort out disputes among states in the first place. Still, Congress has on occasion exercised its power, albeit almost invariably to our collective misfortune.<sup>58</sup>

To modern-day, positivist ears, such a presumptive constitutional rule is not easily explained. Surely, it has been said with a snarl, there is no other area where Congress can render an otherwise unconstitutional rule constitutional by simple legislation.<sup>59</sup> However, one can in fact find old cases like that. They include a state tax case involving this same state: *McCulloch v. Maryland* held that

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53. For example, the Full Faith and Credit Clause, U.S. CONST. art. IV § 1, envisions a prominent role for Congress in ordering horizontal state relations. Statutes to enforce the Clause can be counted on the fingers of one hand. *E.g.*, Full Faith and Credit Act, 28 U.S.C. § 1738 (2012) (enacted as Act of May 26, 1790, ch. 11, 1 Stat. 122); Federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (2012); Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013); *see also infra* note 56.

54. *See* Jonathan Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990).

55. *See* Robert Cooter, *The Costs of Coase*, 11 J. LEGAL STUDIES 1 (1982).

56. Walter Hellerstein, *Tax Coordination Among the U.S. States—The Role of the Courts*, in M. LANG, ET AL., HORIZONTAL TAX COORDINATION 317 (2013).

57. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

58. *See* McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011–15 (2012).

59. *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 263 n.4 (1987) (Scalia, J., dissenting).

states may not tax or otherwise encumber the Bank of the United States *unless Congress provides otherwise*.<sup>60</sup>

## VI. THE CHOICE

There is, to repeat, no need whatsoever to confront these cosmic issues in *Comptroller v. Wynne*. However, should the modern-day opponents of the dormant Commerce Clause choose to make this case their vehicle, it is past time for them to confront the jurisprudential and practical difficulties of their position.

If *McCulloch* was wrong on the issue of exclusive and “dormant” powers of the federal government, and if *Gibbons v. Ogden*<sup>61</sup> was likewise wrong on the closely related question of “implied” federal preemption, then let’s hear it. And if the answer to the grim choice between the dormant Commerce Clause and no coordination whatsoever is “tough luck,” let’s hear that, too. Like the Constitution at large, the dormant Commerce Clause would benefit from less abstract theorizing and a clear recognition of the Constitution’s ingenious political economy.

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60. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435–36 n.2 (1819); *see also* *Van Allen v. The Assessors*, 70 U.S. 573 (1865).

61. 22 U.S. 1 (1824).