

# Why Wynne Worries Me

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## I. INTRODUCTION

*Maryland State Comptroller of the Treasury v. Brian Wynne* requires the U.S. Supreme Court to decide if the U.S. Constitution mandates that states grant to their respective residents income tax credits for the income taxes such residents pay to other states.<sup>1</sup> As a matter of tax policy, credits for out-of-state taxes are desirable to abate double income taxation when residents earn income and pay tax outside their states of residence. Going beyond considerations of policy, Maryland’s Court of Appeals, that state’s highest court, held that such credits are constitutionally mandated when residents pay tax on income earned in states in which they do not live.

There are strong reasons for the U.S. Supreme Court to reverse *Wynne* and hold that the states are not constitutionally compelled to offer credits to their residents for the out-of-state income taxes such residents pay. It is, however, important that the Supreme Court reverse *Wynne* narrowly. Mr. and Mrs. Wynne are apparently domiciled in Maryland and vote there. As Maryland voters, the Wynnes do not require Commerce Clause protection from the elected officials who tax them.

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1. *Md. State Comptroller of the Treasury v. Wynne*, 64 A.3d 453 (2013), *cert. granted*, No. 13-485, 134 S. Ct. 2660 (2014).

*Wynne* worries me because of the possibility that, in overturning *Wynne*, the U.S. Supreme Court could make it unnecessarily difficult for the Court to decide a future case addressing the double state taxation of dual residents. An unqualified declaration in *Wynne* that residents never need Commerce Clause protection would go too far. Nonvoting statutory residents present a different constitutional issue than do voting residents like the Wynnes.

In contrast to the Wynnes' situation, most states today also impose resident income taxes on nonvoters who are not domiciled in the taxing state. Such statutory residents do require Commerce Clause protection as they are taxed as residents on their worldwide incomes without possessing the right to vote in the states taxing them. The upshot of the states' statutory residence laws is often double income taxation as dual residents are taxed on their worldwide incomes both by the state in which they are domiciled and vote and by a second state which taxes them as statutory residents but does not let them vote since they are not domiciled there.

The Supreme Court in *Wynne* need not decide the constitutional protections nonvoting statutory residents should receive from double state income taxation. The Wynnes are domiciliary, not statutory, residents of Maryland. However, the Court should not complicate its future course by making the sweeping statements urged by Maryland and its *Wynne* amici. Maryland and its amici contend that residents never need Commerce Clause protection from the states taxing them on their global incomes.

For residents such as the Wynnes, who are domiciled in Maryland, the statements of Maryland and its *Wynne* amici are correct—the Wynnes need no Commerce Clause protection from the Maryland officials chosen through elections in which the Wynnes vote. However, the same is not true for nonvoting statutory residents who do not pick the officials in the second state taxing them as residents on their worldwide incomes. The Court should decide *Wynne* in a fashion which permits the Court in the future to consider Commerce Clause protections to shield a nonvoting statutory resident from double state income taxation by both the state in which he is domiciled and votes and the second state which also deems him to be a resident for income tax purposes based on statutory criteria.

To date, the Court has been unwilling to protect dual residents from double taxation. The Court should reverse the decision of the Maryland Court of Appeals in *Wynne*, but in a fashion which does not impair the Court's ability to revisit its choices when it confronts a Commerce Clause challenge by a nonvoting statutory resident to

income taxes imposed on him by a state in which he is not domiciled and in which he does not vote.

## II. BACKGROUND<sup>2</sup>

Maryland, like other states, taxes its residents on their worldwide incomes. Maryland, also like other states, grants its residents a tax credit against their Maryland state income taxes for the income taxes such Maryland residents pay to other states for income earned in those other states. Besides the state income tax, Maryland law imposes for each Maryland county a tax on the county's residents' global incomes. Unlike the state income tax, the county income tax Maryland residents pay to the counties in which they live does not grant a credit for out-of-state income taxes paid on income earned outside of Maryland.

Mr. and Mrs. Wynne claim that, under the U.S. Constitution, Maryland must grant to its residents credits against Maryland income taxes for the income taxes such residents pay to other states. Maryland fails this standard since Maryland law, while it provides such credits against the state income tax, does not provide residents with credits against the county income tax for out-of-state taxes.

The Wynnes are apparently domiciled in Maryland and presumably vote there. *Wynne* raises no issue of double taxation since no state besides Maryland claims to tax Mr. and Mrs. Wynne as residents taxable on their worldwide income.

Many states (including Maryland) tax individuals who are not domiciled within the state as residents because such individuals trigger specified statutory criteria.<sup>3</sup> Typically, an individual can be deemed to be a statutory resident of a second state for income tax purposes because he maintains a home (such as a vacation place) in the state and/or spends some specified number of days in-state. Maryland, for example, taxes an individual domiciled elsewhere as a Maryland resident if he “maintain[s] a place of abode” in Maryland “for more than 6 months of the taxable year.”<sup>4</sup> Thus, an individual who lives in Manhattan but keeps a permanent second home at the Maryland shore may be taxed on his worldwide income both by New

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2. For more detailed background on *Wynne*, see Edward A. Zelinsky, *Wynne and the Double Taxation of Dual Residents*, 73 ST. TAX NOTES 259, 260–62 (2014).

3. See Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX REV. 533, 542–46 (2014) (discussing different states' statutory residence requirements).

4. MD. CODE ANN., TAX-GEN. § 10-101(k)(1)(i)(2) (2009).

York, where he is domiciled, and by Maryland, because he “maintain[s] a place of abode” there for over 6 months in the year. For income tax purposes, this dual resident is subject to double taxation of his worldwide income by two states—his state of domicile (New York) and his state of statutory residence (Maryland). However, he only votes in one of these states, the state of domicile.<sup>5</sup> This dual resident has no right to vote in the second state, the state of statutory residence, since he is not domiciled there.

As an example of double taxation caused by statutory residence laws, consider the case of Lucio and Joan Noto,<sup>6</sup> who maintain homes in Greenwich, Connecticut and in East Hampton, New York. For state income tax purposes, the Notos are residents of both Connecticut, where they are domiciled (and presumably vote), and of New York, where they spend at least 183 days annually. Both New York and Connecticut taxed the Notos on their global income without providing a credit for the income tax levied by the other. Consequently, the Notos, as dual residents of both the Empire State and the Nutmeg State, paid double state income taxes. *Wynne* does not present such a situation of dual residents being double taxed. However, as I discuss *infra*, there is a danger that the U.S. Supreme Court could decide *Wynne* in a fashion which makes it unnecessarily difficult for the Court to decide a future case addressing the double taxation of dual residents like the Notos.

In *Cory v. White*, the Supreme Court held that the double taxation of dual residents did not violate the U.S. Constitution.<sup>7</sup> Dissenting in that case,<sup>8</sup> Justice Powell (joined by Justices Marshall and Stevens) argued “that multiple taxation on the basis of domicile” is unconstitutional as such multiple taxation is “incompatible with the structure of our federal system.” To give relief from double taxation to dual residents like Mr. and Mrs. Noto, the U.S. Supreme Court would need to turn this dissenting view into constitutional law.

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5. Reeder v. Bd. of Supervisors, 269 Md. 261, 266 (1973) (“For election law purposes ‘resident’ means a domiciliary.” (internal citations and quotation marks omitted)). In restricting the right to vote to individuals domiciled in the state, Maryland’s law follows that of the other states. See, e.g., *In re* November 2, 2010 Gen. Election for Office of Mayor, 423 N.J. Super. 190, 207 (N.J. Super. Ct. App. Div. 2011) (“The permanent home of a person is considered his domicile and the place of his domicile determines his right to vote.”). Statutory residents are not entitled to vote since they are domiciled elsewhere—even though they pay tax as statutory residents on their worldwide incomes.

6. Noto v. N.Y. State Dept. of Taxation & Fin., No. 03392/2010, 2014 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. Mar. 3, 2014).

7. 457 U.S. 85, 89 (1982).

8. *Id.* at 97 (Powell, J., dissenting).

In deciding *Wynne*, Maryland's Court of Appeals held that Maryland's failure to provide a credit against the county income tax violates the strictures of the dormant Commerce Clause, including the requirement that state taxes not discriminate against interstate commerce:

[T]he failure to provide a credit against the county tax in this case penalizes investment in a Maryland entity that earns income out-of-state: an investment in such a venture incurs both out-of-state taxes and the Maryland county tax on the same income; a similar venture that does all its business in Maryland incurs only the county tax.<sup>9</sup>

### III. RESIDENTS AS VOTERS

In contrast to the opinion of Maryland's Court of Appeals, the U.S. Supreme Court is being advised by Maryland and Maryland's amici, including the U.S. Solicitor General, that the Wynnes do not require Commerce Clause protection from the residence-based income taxation Maryland imposes upon them because the Wynnes are Maryland voters. On the facts of *Wynne*, this is correct. But Maryland and most other states also tax, as residents, nonvoters like the Notos who trigger statutory tests short of domicile. As nonvoters, these statutory residents do require constitutional protection against double state income taxation.

Maryland's *Wynne* brief<sup>10</sup> vigorously and unreservedly defends the state's ability to tax residents' worldwide incomes since such residents vote for the state officials who levy such residence-based taxes:

If Maryland residents think that the State is taxing them too onerously, they can give direct effect to their views by voting for various forms of lower taxes, including more generous credits for out-of-state tax payments.<sup>11</sup>

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9. Md. State Comptroller of the Treasury v. *Wynne*, 64 A.3d 453, 470 (Md. 2013). For a contrary view, see Zelinsky, *supra* note 2, at 263–65. I argue that the dormant Commerce Clause doctrine of tax nondiscrimination is incoherent and should not be extended in *Wynne*. This differs from the argument that the dormant Commerce Clause should be abandoned altogether. Unlike those who would jettison the dormant Commerce Clause in its entirety, I conclude that there is continuing validity to the dormant Commerce Clause tax notions of nexus and apportionment. Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit and the Dormant Commerce Clause*, 28 VA. TAX REV. 1, 2–6 (2008) [hereinafter Zelinsky, *Rethinking*]. It is only the dormant Commerce Clause test of tax nondiscrimination that I would eliminate. For an overview of the dormant Commerce Clause as it pertains to state taxation, see WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 115–202 (10th ed. 2014).

10. Brief for the Petitioner, Md. State Comptroller of the Treasury v. *Wynne*, No. 13-485 (July 29, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2671.

11. *Id.* at \*24–25.

Maryland resident taxpayers are fully entitled to participate in the give-and-take of Maryland's political process, and Maryland residents who are dissatisfied with the State's tax policies can vote for different ones.<sup>12</sup>

In his brief,<sup>13</sup> the U.S. Solicitor General similarly argues that residents like the Wynnes do not need constitutional protection from residence-based state income taxes because they vote for the Governor and legislators who impose those taxes:

A State's taxation of its own residents' income is structurally limited by the political will of those residents . . . .<sup>14</sup>

. . . .

[B]ecause States are politically accountable to their own residents, the constitutional limitation that respondents advocate is unnecessary to prevent state overreaching in the sphere of individual income taxation.<sup>15</sup>

So too the other amici in *Wynne* emphasize the right of residents to vote for the officials who impose taxes upon them. In support of the State of Maryland, the *Wynne* brief of the Multistate Tax Commission<sup>16</sup> highlights "the right of residents to participate in the democratic process as citizens in determining how much tax they will pay and how those tax dollars will be spent."<sup>17</sup>

Similarly, the amicus brief filed by eight organizations, including the International Municipal Lawyers Association, the National League of Cities, the U.S. Conference of Mayors and the National Conference of State Legislatures argues that residents, as voters, do not require constitutional protection from states' residence-based tax policies.<sup>18</sup>

12. *Id.* at \*42; *see also id.* at \*12 (noting "the ability of Maryland residents to exercise their political power to change unpopular tax policies."); *id.* at \*16 ("[I]f Maryland residents are displeased with their taxes, they . . . have the political capacity, as eligible Maryland voters, to press for changes to the State's tax laws."); *id.* at \*17 ("[R]esidents have the political capacity to redress unwanted taxation at the ballot box.").

13. Brief for the United States as Amicus Curiae Supporting Petitioner, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (August 1, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2685.

14. *Id.* at \*7.

15. *Id.* at \*15; *see also id.* at \*19 ("The residents of a State may democratically decide—as States since the founding era have decided—that the fairest way to distribute all or some of their joint financial burden is through a tax proportioned to income.").

16. Brief of Multistate Tax Comm'n as Amicus Curiae in Support of Petitioner, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (August 5, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2758.

17. *Id.* at \*12.

18. Brief for the Int'l Mun. Lawyers Ass'n et al. as Amici Curiae Supporting Petitioner, *Md. State Comptroller of the Treasury v. Wynne*, No. 13-485 (August 5, 2014), 2014 U.S. S. Ct. Briefs LEXIS 2759.

Residents also exclusively enjoy one other unique privilege that directly informs the constitutional issues at stake here: Only residents enjoy the right to vote. It is beyond cavil that voting is of the most fundamental significance under our constitutional structure. Unlike non-residents who have no direct say in setting another State's tax policies, residents can vote to change them. Thus, whereas there are structural reasons to be wary of taxes on non-residents, there is no comparable concern regarding policies directed at residents and instead every reason to defer to the political process.<sup>19</sup>

The *Wynne* dissenters in Maryland's Court of Appeals embraced this approach as well. The Wynnes, these dissenters argued, should address their concerns about Maryland taxes to "the elected officials of Howard County and the State"<sup>20</sup> of Maryland. "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes."<sup>21</sup> A state resident is an "insider who presumably is able to complain about and change the tax through the [state] political process."<sup>22</sup>

#### IV. STATUTORY RESIDENCE: THE DOUBLE TAXATION OF NONVOTING DUAL RESIDENTS

As applied to Mr. and Mrs. Wynne, the analysis advanced by Maryland, its amici and the *Wynne* dissenters in Maryland's Court of Appeals is compelling: the Wynnes, who are domiciled in Maryland and presumably vote there, do not need Commerce Clause protection from the taxation Maryland's elected officials impose upon the Wynnes. As voters, the Wynnes have voice in the political process taxing them.<sup>23</sup> There is no second state taxing the Wynnes as statutory residents. This may lead the Supreme Court to declare, as Maryland and its amici suggest, that the dormant Commerce Clause never protects residents from residence-based state income taxation.

However, such an overly broad statement would be unfortunate because it would preclude Commerce Clause protection from double taxation for nonvoting statutory residents. Statutory residents are typically double taxed by two states, their state of domicile and their

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19. *Id.* at \*8–9 (internal citations and quotation marks omitted); *see also id.* at \*4 ("[T]he political process provides residents an ample check against erroneous and oppressive taxation[.]" (internal citations and quotation marks omitted)).

20. *Md. State Comptroller of the Treasury v. Wynne*, 64 A.3d 453, 472 (Md. 2013) (Greene, J., dissenting).

21. *Id.* (quoting *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989)) (internal quotation marks omitted).

22. *Id.* (alteration in original) (internal quotation marks omitted).

23. *See Zelinsky, Rethinking*, *supra* note 9, at 49–50 ("A person subjected to state taxation to which he objects has . . . resort to . . . voice, i.e., recourse to the political process[.]").

state of statutory residence.<sup>24</sup> Statutory residents, unlike domiciliary residents, do not vote and thus do not have voice in the political system of the second state taxing them as residents on their global incomes.<sup>25</sup>

Consider in this context the *Wynne* brief of the State of Maryland.<sup>26</sup> “[B]y definition,” Maryland assures the Court, “only one state can impose a valid tax based on residency within its borders.”<sup>27</sup> Cases like *Noto*<sup>28</sup> belie these assurances. As discussed *supra*, the Notos were domiciled in Connecticut and paid state income taxes on their global income to the Nutmeg State. New York imposed a second state income tax on the Notos as nonvoting statutory residents of the Empire State. While the Wynnes do not need Commerce Clause protection from double taxation, the Notos do.

Consider as well the *Wynne* brief of the Multistate Tax Commission,<sup>29</sup> which states that “the Wynnes can be legal residents of only one state.”<sup>30</sup> Not so. Were the Wynnes to change their lifestyle, for example by buying a second residence in another state, they could, for income tax purposes, be deemed to be residents of two states—as were the Notos, the Tamagnis,<sup>31</sup> and Mrs. Luther.<sup>32</sup>

When it decides *Wynne*, the Court need not revisit *Cory v. White* and address the problem of double taxed dual residents. But the Court should also not create unnecessary barriers to the possible reversal of *Cory* in the future by making the sweeping statements urged by Maryland and its amici. Maryland and its amici suggest that residents never need Commerce Clause protection from the states taxing them on their worldwide incomes. This is not correct. The Wynnes, domiciled in Maryland, need no Commerce Clause protection

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24. Zelinsky, *supra* note 3, at 545–46 (“If an individual triggers [a state’s statutory residence test], he will be subject to personal income tax . . . in that state . . . as well as in the state in which he is domiciled . . .”).

25. *Reeder v. Bd. of Supervisors*, 269 Md. 261, 266 (1973) (“For election law purposes ‘resident’ means a domiciliary.”).

26. Brief for the Petitioner, *supra* note 10.

27. *Id.* at \*15.

28. *Noto v. N.Y. State Dept. of Taxation & Fin.*, No. 03392/2010, 2014 N.Y. Misc. LEXIS 1008 (N.Y. Sup. Ct. Mar. 3, 2014).

29. Brief of Multistate Tax Comm’n as Amicus Curiae in Support of Petitioner, *supra* note 16.

30. *Id.* at \*11.

31. See *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1127–28 (N.Y. 1998) (upholding as constitutional a determination that the Tamagnis, New Jersey domiciliaries, were also residents of New York for purposes of taxation).

32. See *Luther v. Commissioner*, 588 N.W.2d 502, 504 (Minn. 1999) (affirming a tax adjustment from \$23,309 to \$238,101.36 for a Florida domiciliary, based on Minnesotan statutory residence status, against a constitutional challenge).



from the Maryland officials for whom the Wynnes vote. However, such protection should be extended to nonvoting statutory residents who do not pick the officials in the second state taxing them as residents on their global incomes.

The U.S. Supreme Court last considered the double taxation of dual residents over a generation ago in *Cory v. White*.<sup>33</sup> At that time, six justices concluded that the U.S. Constitution does not preclude the double taxation of dual residents.<sup>34</sup>

The world has changed greatly since then:<sup>35</sup> The double taxation of dual residents, once merely the problem of the ultra-rich,<sup>36</sup> is moving down the income scale as Baby Boomers purchase second homes for retirement and as dual career families balance the demands of work and family by maintaining two homes in different states. States' statutory residence laws tax as residents individuals who are not domiciled in the taxing states and do not vote there. Statutory residence laws typically result in double residence-based taxation by both the taxpayer's state of domicile and the second state of statutory residence.

The Court need not now revisit *Cory v. White* and the issue of double taxed dual residents. By the same token, in reversing the Maryland Court of Appeals in *Wynne*, the Supreme Court need not foreclose the possibility of reconsidering the constitutional status of double taxed dual residents. The Wynnes are domiciled and vote in Maryland. They do not need Commerce Clause protection. However, the same is not true of the Maryland statutory resident who is taxed by officials for whom he does not vote.

## V. CONCLUSION

*Wynne* worries me because of the possibility that the U.S. Supreme Court could make it unnecessarily difficult for the Court to decide a future case addressing the double state taxation of dual residents. The Court should avoid the sweeping statements urged by Maryland and its amici. There are strong arguments for reversing in *Wynne*: Mr. and Mrs. Wynne are domiciled in and vote in Maryland. The Wynnes do not require Commerce Clause protection from the taxes imposed upon them by Maryland's elected officials. While tax

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33. 457 U.S. 85 (1982).

34. *See id.* at 89 (“[I]nconsistent determinations by the courts of two States as to the domicile of a taxpayer do not raise a substantial federal constitutional question.”).

35. Zelinsky, *supra* note 3, at 556–62.

36. The taxpayer in *Cory v. White* was the estate of Howard Hughes. 457 U.S. at 86.

credits to avoid double state income taxation are a sound tax policy, the *Wynnes*, as Maryland voters, do not need a constitutional mandate for such credits.

However, the status of dual state residents is different. When a state imposes a second income tax upon the global income of a statutory resident, that statutory resident does not have recourse to the ballot box since he is not domiciled in this second state and does not vote there. The Court in *Wynne* should thus avoid a sweeping declaration that residents never require Commerce Clause protection from the states taxing them on their worldwide incomes.

To date, the Supreme Court has been unwilling to extend constitutional succor to double taxed dual residents. But the Court, in overturning the Maryland Court of Appeals decision in *Wynne*, should not preclude a future revisiting of this important issue.

An unqualified declaration in *Wynne* that residents never need Commerce Clause protection would go too far. Nonvoting statutory residents present a different constitutional issue than do voting residents like the *Wynnes*.