The Real Issue in *Wynne* Is Discrimination, Not Double Taxation

by Alan D. Viard

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Viard says the real issue in *Maryland Comptroller of the Treasury v. Wynne* is Maryland’s discriminatory taxation of interstate income, not its taxation of income that has also been taxed by other states. He urges the U.S. Supreme Court to strike down Maryland’s state income tax system under the dormant commerce clause.

On November 12 the U.S. Supreme Court heard oral argument in *Maryland Comptroller of the Treasury v. Wynne*, a case raising important questions about the treatment of state individual income taxes under the U.S. Constitution’s dormant commerce clause. Maryland generally imposes income tax on its residents’ income — including their out-of-state income — and on nonresidents’ in-state income. Residents may claim credit for income taxes paid to other states on out-of-state income against only a portion of their income tax.

Although the Wynnes correctly claim that the Maryland income tax system violates the dormant commerce clause, they have misidentified the nature of the violation. Contradicting that the dormant commerce clause forbids double taxation in which two states tax the same interstate income flow, they conclude that Maryland must prevent such taxation by allowing a full credit for income taxes paid to other states on out-of-state income against only a portion of their income tax.

The dormant commerce clause does not prohibit two states from taxing the same income; rather, it prohibits each state from discriminating against interstate income. If two states tax the same interstate income because of divergences between their nondiscriminatory tax systems, neither should be required to give way to the other. That type of double taxation, which does not harm interstate commerce in the aggregate, is not a dormant commerce clause concern. In contrast, a state whose tax system discriminates against interstate income should be required to mend its ways, even if other states choose not to tax and there is no double taxation.

A state income tax system discriminates against interstate income if the combined tax burden on nonresidents’ in-state income and residents’ out-of-state income exceeds the tax burden on residents’ in-state income. In that case, regardless of how before-tax incomes may adjust, the tax system impairs residents’ incentive to earn income out of state, nonresidents’ incentive to earn income within the state, or both. The incentive is impaired even if no other states impose any taxes.

Every state income tax system discriminates against interstate income, imposing tax at similar rates on nonresidents’ in-state income, residents’ out-of-state income, and residents’ in-state income. Thus, before credits, the combined tax burden on nonresidents’ in-state income and residents’ out-of-state income is approximately double the tax burden on residents’ in-state income.

The full tax credits granted by states other than Maryland greatly reduce, but do not eliminate, the discrimination. When nonresidents’ in-state income is taxed at the same rate as residents’ in-state income, neutrality does not permit any tax on residents’ out-of-state income. When nonresidents’ in-state income is taxed at a modestly lower rate than residents’ in-state income, as under Maryland’s system, neutrality allows only a small tax on residents’ out-of-state income. In either case, a full credit falls short of complete neutrality. It ameliorates the discrimination by eliminating tax on residents’ out-of-state income when the source state taxes it at a rate higher than the residence state. Nevertheless, the full credit leaves residents’ out-of-state income with a significant residual tax liability whenever the source state does not tax the income or taxes it at a much lower rate than the residence state. That residual tax liability is incompatible with neutrality.

Unfortunately, taxing each of the two interstate income flows at rates similar to the rate on intrastate income —
while providing a full credit — is a long-standing, widespread practice. It is highly unlikely that the Supreme Court will strike it down, particularly when the parties have not requested that it do so. As the Court has done in some other areas, it may choose to accept a long-standing practice that violates general constitutional principles.

Nevertheless, the Court should strike down Maryland’s partial-credit tax system. It is even more discriminatory than full-credit systems, and it cannot claim their historical provenance.

This article discusses the dormant commerce clause principles that should apply to state income taxation and reviews the November 12 oral argument in light of those principles.

I. Neutral Taxation

In its groundbreaking Complete Auto decision in 1977, the Supreme Court set forth a four-pronged test that a state tax must satisfy to be valid under the dormant commerce clause.\(^1\) One prong requires that the tax not discriminate against interstate commerce.

Mathematical analysis reveals that an income tax system does not discriminate against interstate income so long as the following tax rate condition holds:\(^2\)

\[
(tax \text{ rate on nonresidents' in-state income}) + (\text{tax rate on residents' out-of-state income}) - [(\text{tax rate on nonresidents' in-state income}) \times (\text{tax rate on residents' out-of-state income})] \leq (\text{tax rate on residents' in-state income})
\]

The sum of the tax rates on the two interstate income flows, minus an interaction term equal to the product of the two tax rates, can’t exceed the tax rate on residents’ in-state income. For simplicity, I refer to the sum of the two interstate tax rates, minus the interaction term, as the combined tax burden on interstate income. The condition then requires that the combined tax burden on interstate income not exceed the tax burden on residents’ in-state income. I clarify the role of the interaction term below.

A tax system that violates the tax rate condition unavoidably impairs one’s incentives to engage in interstate transactions no matter how before-tax incomes may change in response to the tax system. At every possible equilibrium, the tax system deters residents from earning income outside the state rather than within it, nonresidents from earning income within the state rather than outside it, or both.

If a tax system satisfies the tax rate condition, there is a potential set of changes in before-tax incomes inside and outside the state that preserve everyone’s incentive to engage in interstate transactions. When discussing various neutral tax systems later, I identify the changes in before-tax incomes that preserve those incentives. To be sure, there is no guarantee that before-tax incomes will respond to the tax system in exactly that way. But the state is not responsible for predicting how before-tax incomes will change, and courts can’t reliably determine how they have changed. A state that adopts a tax system satisfying the tax rate condition has met its nondiscrimination obligation because it has made it possible for interstate incentives to be preserved.

The logic of the tax rate condition applies in contexts other than income taxation. More generally, the combined tax burden on inbound and outbound interstate transactions cannot exceed the tax burden on intrastate transactions. For example, the combined tax burden on imports and exports cannot exceed the tax burden on intrastate sales.

Further, the tax rate condition also applies to subsidies on the same terms as taxes, with the subsidy rates entering the equation as negative tax rates. The long-standing search for a justification to treat subsidies and taxes differently under the dormant commerce clause is doomed because every subsidy can be rewritten as a negative tax and every tax can be rewritten as a negative subsidy. A coherent dormant commerce clause jurisprudence must treat taxes and subsidies equally, which is what the tax rate condition does. Regardless of whether a policy is labeled as a tax or a subsidy, it should be struck down as discriminatory only if its combined treatment of inbound and outbound interstate transactions is less favorable than its treatment of intrastate transactions.

Note also that the dormant commerce clause requires neutrality between interstate and intrastate commerce, not equality between residents and nonresidents. Any requirement that a state treat its residents — whom it has the authority to tax and whom it exists to serve — the same as the rest of the country would lead to absurd results. In the income tax context, the dormant commerce clause does not require that state income taxes apply equally to residents and nonresidents. Instead, it requires that state income taxes discourage neither residents from earning out-of-state income nor nonresidents from earning in-state income. That goal is achieved if the tax system satisfies the tax rate condition.

The tax rate condition is satisfied by a uniform residence-based tax, a uniform source-based tax, or a combination of the two. For simplicity, I assume that all before-tax incomes are initially $10,000. Because only the relative income changes matter, the incomes can have any starting values, which can differ from each other. For simplicity, I also talk about employers hiring workers, but the analysis applies without change to all transactions in which one party pays income to another.

First, consider a uniform residence-based tax, which applies to all income earned by residents, both within and outside the state, and exempts nonresidents’ incomes. The tax rate condition is satisfied because the tax rate on residents’ out-of-state income equals the tax rate on residents’


For a residence-based tax, everyone's incentives to engage in interstate transactions are preserved if before-tax incomes in both states simply remain unchanged at $10,000. If the tax rate is 5 percent, the following occurs:

- Out-of-state employers have no incentive to switch from hiring residents to hiring nonresidents, as they continue to pay $10,000 either way.
- In-state employers have no incentive to switch from hiring nonresidents to hiring residents, as they continue to pay $10,000 either way.
- Nonresidents, who are not subject to the tax, have no incentive to switch from in-state to out-of-state work, as they continue to earn $10,000 either way.
- Residents have no incentive to switch from out-of-state to in-state work, as they earn $10,000, pay $500 in tax, and clear $9,500 either way.

Next, consider a uniform source-based tax, which applies to all income earned within the state, both by residents and nonresidents, and exempts out-of-state incomes. The tax rate condition is satisfied because the tax rate on nonresidents' in-state income equals the tax rate on residents' in-state income and both the tax rate on residents' out-of-state income and the interaction term are zero.

With a 5 percent source-based tax, everybody's incentive to engage in interstate transactions is preserved if before-tax incomes for residents and nonresidents rise to $10,526 within the state and before-tax incomes for both groups remain unchanged at $10,000 outside the state. The following then occurs:

- Out-of-state employers have no incentive to switch from hiring residents to hiring nonresidents, as they continue to pay $10,000 either way.
- In-state employers have no incentive to switch from hiring nonresidents to hiring residents, as they pay $10,526 either way.
- Nonresidents have no incentive to switch from in-state to out-of-state work, as they continue to clear $10,000 either way. If they work within the state, they earn $10,526, pay $526 in tax (5 percent of $10,526), and clear $10,000. If they work outside the state, they earn $10,000, pay $500 in tax, and clear $9,500.
- Residents have no incentive to switch from out-of-state to in-state work, as they earn $10,526 either way.

Because a combination of neutral tax systems is still neutral, the tax rate condition is also satisfied by a mix of residence-based and source-based taxes. For example, a state may impose a 5 percent uniform tax on all income earned by its residents, whether within or outside the state, while also imposing a 5 percent uniform tax on all income earned within the state, whether by residents or nonresidents. Of course, for each of the two taxes to be uniform, residents' in-state income must be fully subject to both taxes. The residence-based tax is uniform only if it applies to residents' in-state income on the same terms as their out-of-state income, and the source tax is uniform only if it applies to residents' in-state income on the same terms as nonresidents' in-state income.

Residents' in-state income must therefore be subject to both 5 percent taxes. That policy requires a 9.75 percent tax rate on residents' in-state income, with one tax taking 5 percent of the income and the other tax taking 5 percent of the remaining 95 percent, or another 4.75 percent. The tax rate condition is then satisfied because $0.05 + 0.05 - 0.05 x 0.05 = 0.0975. The interaction term appears in the tax rate condition because the second tax applies only to the income remaining after the first tax is paid.

With a 5 percent tax on residents' out-of-state income, a 5 percent tax on nonresidents' in-state income, and a 9.75 percent tax on residents' in-state income, everyone's incentives to engage in interstate transactions are preserved if before-tax incomes — for both residents and nonresidents — rise to $10,526 within the state and before-tax incomes for both groups remain at $10,000 outside the state. The following then occurs:

- Out-of-state employers have no incentive to switch from hiring residents to hiring nonresidents, as they continue to pay $10,000 either way.
- In-state employers have no incentive to switch from hiring nonresidents to hiring residents, as they pay $10,526 either way.
- Nonresidents have no incentive to switch from in-state to out-of-state work, as they continue to clear $10,000 either way. If they work within the state, they earn $10,526, pay $526 in tax (9.75 percent of $10,526), and clear $9,500. If they work outside the state, they earn $10,000 tax-free.
- Residents have no incentive to switch from out-of-state to in-state work, as they clear $9,500 either way. If they work outside the state, they earn $10,526, pay $500 in tax, and clear $9,500. If they work inside the state, they earn $10,526, pay $1,026 in tax (9.75 percent of $10,526), and clear $9,500.

In contrast, it would be discriminatory to impose 5 percent tax on both nonresidents' in-state income and residents' out-of-state income while imposing 5 percent tax only on residents' in-state income. One can then view the state as having a neutral 5 percent residence-based tax plus a 5 percent discriminatory tariff on nonresidents' in-state income. Or one can view the state as having a neutral 5 percent source-based tax plus a 5 percent discriminatory tariff on residents' out-of-state income. The two interpretations are equally valid and both reveal the system's discriminatory nature.

The U.S. Supreme Court examined the conditions for neutral combinations of tax systems in

Armco Inc. v. Hardyesty and Tyler Pipe Industries Inc. v. Washington State Dept. of
Revenue. In each case, the Court struck down a tax system that included a manufacturing tax and a wholesaling tax but failed to impose the full combined burden of both taxes on transactions in which both manufacturing and wholesaling occurred within the state.

An important implication of the tax rate condition is that, holding constant the tax rate on residents’ in-state income, the permissible tax on residents’ out-of-state income is lower when the tax on nonresidents’ in-state income is higher, and vice versa. At first glance, it may seem surprising that the condition would link taxes on two different groups, nonresidents earning in-state income and residents earning out-of-state income. The two taxes are intertwined, though, because they interact to shape the before-income changes needed to maintain incentives to engage in interstate transactions. When the state taxes nonresidents’ in-state income, nonresidents’ in-state wages must rise to maintain their incentive for in-state work, which requires that residents’ in-state wage rise to maintain in-state employers’ incentive to hire nonresidents. To maintain residents’ incentive to work out of state in the face of the increase in their in-state wage, their out-of-state income cannot be taxed.

Discrimination against interstate income is quite different from double taxation, which occurs when two states tax the same interstate income. Double taxation, by itself, is not a dormant commerce clause violation.

II. Irrelevance of Double Taxation

Double taxation can arise when two states choose different nondiscriminatory tax systems. Suppose that State A imposes a uniform 5 percent tax on residents’ incomes and State B imposes a uniform 5 percent tax on income earned within the state. Then, income earned by a State A resident in State B is taxed by both states, while income earned by a State B resident in State A is taxed by neither state.

Because both states have nondiscriminatory tax systems, neither is required to alter its tax policy to accommodate the other’s independent policy decision. That is all to the good because there would be no logically compelling way to decide which state would have to accommodate the other. The Supreme Court has rightly rejected any view under which the validity of a state’s tax system would “depend on the shifting complexities of the tax codes of 49 other States” or in which “the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.”

It is easy to confirm that, despite the double taxation of State A residents working in State B, before-tax incomes can change in a way that preserves everyone’s incentives to engage in interstate transactions. Incentives are preserved if before-tax incomes remain at $10,000 for all workers in State A and rise to $10,526 for all workers in State B. The following then occurs:

- State A employers have no incentive to switch from hiring State A workers to hiring State B workers, as they continue to pay $10,000 either way.
- State B employers have no incentive to switch from hiring State B workers to hiring State A workers, as they pay $10,526 either way.
- State B workers have no incentive to switch from State A work to State B work, as they clear $10,000 either way. If they work in State A, they earn $10,000 tax-free. If they work in State B, they earn $10,526, pay $526 in tax to State B, and clear $10,000.
- State A workers have no incentive to switch from State B work to State A work, as they clear $9,400 either way. If they work in State B, they earn $10,526, pay $526 to State B under its 5 percent source tax, pay $600 to State A under its 5 percent residence tax (thereby suffering the dreaded double taxation), and clear $9,400.

The last transaction remains viable in the face of double taxation because the transactions against which it competes pay the same taxes. Although State A residents working in State B pay State B’s source tax, the State B residents working there also pay the tax, which allows the tax burden to be offset by a rise in before-tax incomes in State B. Although State A residents working in State B also pay State A’s residence tax, they would pay that tax no matter where they worked, so it creates no disincentive to work in State B.

Because there is no discrimination against interstate commerce, neither state has any obligation to accommodate the other state’s tax system. On the other hand, if one state had a discriminatory tax system, it would be obligated to change it, even if the other state imposed no tax and double taxation therefore did not occur.

If discrimination is the problem, how should it be remedied?

III. Remedies and Standing

The tax rate condition depends on all three tax rates. When a tax system violates the condition and thereby discriminates against interstate income, it is meaningless to ask which component of the tax system is to blame. The discrimination arises because the three components interact to place a combined tax on nonresidents’ in-state income and residents’ out-of-state income that exceeds the tax on residents’ in-state income, and it can be corrected by changing any of the components.

Consider again the discriminatory tax system in which all three tax rates are 5 percent. The discrimination could be corrected by eliminating the 5 percent tax on nonresidents’ in-state income, by eliminating the 5 percent tax on residents’ out-of-state income, or by raising the tax rate on residents’ in-state income from 5 percent to 9.75 percent. Many other options are also possible. For example, the tax

4Armco, 467 U.S. at 645.
rates on both interstate income flows could be reduced to 2.53 percent. Or the tax rate on nonresidents’ in-state income could be lowered to 2 percent, and the tax rate on residents’ in-state income could be raised to 6.9 percent.

The Supreme Court partially recognized the choice of remedies in dormant commerce clause cases in its 1990 *McKesson* decision. Explaining that a dormant commerce clause violation could be remedied by lowering taxes on interstate transactions, raising taxes on intrastate transactions, or a mixture of both, the Court remanded the choice of an appropriate remedy to the state courts, emphasizing that the remedy must apply retrospectively to all years for which the statute of limitations had not yet run.5

A choice of remedies also arises in other discrimination cases. When the equal protection clause is violated by a law granting benefits to one group and withholding them from another, the discrimination can be remedied either by extending the benefit to the disfavored group or withdrawing it from the favored group. As the Supreme Court stated in its 1984 *Mathews* decision:

> We have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program’s benefits to the excluded class...a court...faces two remedial alternatives; it may...order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.6 [Internal quotations omitted.]

In the dormant commerce clause context, the choice of remedy is more complicated than the *McKesson* Court recognized or than is shown in other discrimination cases. Even if a decision is made to lower taxes on interstate transactions rather than raise taxes on intrastate transactions, it is still necessary to decide whether the tax relief should be given to inbound or outbound transactions. In the above example, should the tax on nonresidents’ in-state income or the tax on residents’ out-of-state income be eliminated? Or should both taxes be reduced?

The proper remedy should normally be determined by state courts. Nearly all dormant commerce clause tax cases originate in state court because the Tax Injunction Act generally forbids the federal courts to “enjoin, suspend or restrain 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.”7 One reason for preserving state courts’ role in state tax litigation is surely to enable them to choose remedies for constitutional violation.

Because there are three ways to remedy a dormant commerce clause violation, no plaintiff can be sure that she will receive monetary relief even if her challenge to a tax system is successful. A nonresident plaintiff with in-state income may hope that the discrimination will be cured by eliminating her tax burden, and a resident plaintiff with out-of-state income may hope that the discrimination will be cured by eliminating her tax burden. But either plaintiff may be disappointed. Indeed, both plaintiffs may be disappointed, as the discrimination may be remedied by raising the tax on residents’ in-state income.

Nevertheless, both plaintiffs should have standing to file suit because the possibility of monetary relief provides each a personal stake in the case’s outcome. The Supreme Court said in *Mathews*, “We have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute’s benefits from both the favored and the excluded class.” In *Mathews*, the Court went further, finding that the plaintiff had standing even when the statute’s severability provision mandated withdrawal of benefits from the favored group in the event of invalidation, making monetary relief for the plaintiff impossible from the outset.8

Both residents with out-of-state income and nonresidents with in-state income should therefore have standing to challenge a state income tax system that discriminates against interstate income.

**IV. Residents and the Dormant Commerce Clause**

On a related note, some argue that a state’s residents cannot challenge the taxes that the state imposes on them under the dormant commerce clause because they have the ability to change the tax system through the political process.9 But the availability of the political process to change ill-conceived policy does not eliminate the judiciary’s powers to invalidate unconstitutional policies. Nobody would argue that a state tax system that discriminated among residents based on race or gender was immune to judicial challenge merely because residents could seek to change the tax system through political means. Similarly, a state tax system that discriminates among residents based on their involvement in interstate transactions should not be immune to judicial challenge.

Further, a rule barring challenges by residents would lead to absurd results in the dormant commerce clause context. Because every interstate transaction has one in-state participant, a discriminatory tax on interstate transactions can always be imposed on an in-state participant. And well-established economic principles demonstrate that it makes

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8 *Mathews*, 465 U.S. at 739.
9 In the context of *Wyne*, that argument was made by Edward Zelinsky, “*Wyne* and the Double Taxation of Dual Residents,” *State Tax Notes*, July 28, 2014, p. 259.
little or no difference which party to a transaction is named as the taxed party.¹⁰ Placing the legal incidence of a discriminatory tax on the in-state — rather than the out-of-state — party to an interstate transaction does nothing to mitigate the harm to interstate commerce.

Although an ill-considered dictum in the Supreme Court’s 1989 Goldberg decision said that “it is not a purpose of the Commerce Clause to protect state residents from their own state taxes,”¹¹ the entire course of the Court’s dormant commerce clause jurisprudence holds otherwise. Indeed, the dictum did not accurately describe even the Court’s analysis in Goldberg itself, in which the Court upheld the tax that Illinois imposed on its residents only after an extensive analysis of its treatment of interstate commerce.¹² Five years after Goldberg, the Court — without citing that case — emphatically repudiated the principle set forth in the dictum. Noting that the principle would “undermine almost every discriminatory tax case,” the Court said:

Is it possible to doubt that if Massachusetts imposed a higher sales tax on milk produced in Maine than milk produced in Massachusetts that the tax would be struck down, in spite of the fact that the sales tax was imposed on consumers? . . . State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional. . . . The cost of a tariff is also borne primarily by local consumers, yet a tariff is the paradigmatic Commerce Clause violation.¹³

A tax’s validity under the dormant commerce clause cannot depend on whether it is imposed on residents or nonresidents.

V. Similarity to Internal Consistency

The tax rate condition is a close cousin of the Supreme Court’s internal consistency test. The Court has phrased the test in the following terms: If, hypothetically, every state copied the challenged state tax system, would the nationwide tax on interstate transactions exceed the tax on intra-state transactions?

Unfortunately, the Court has not clearly explained the function of the internal consistency test. The Court has apologized for internal consistency as a poorly designed test for double taxation that functions by determining whether double taxation would occur under the completely unrealistic assumption that every state copied the challenged state’s tax system.¹⁴ Viewed in that light, the test makes little sense, particularly because double taxation is constitutionally irrelevant.

The test’s actual justification is quite different. As can easily be seen, the test is generally identical to the tax rate condition. If every state copied the challenged tax system, someone earning income across state lines would pay the nonresident in-state income tax in one state and the resident out-of-state income tax in another state. Someone earning income within her own state would pay only the resident in-state income tax. Internal consistency therefore requires that the combination of the nonresident in-state income tax and the resident out-of-state income tax not exceed the tax on resident in-state income, which is exactly what the tax rate condition requires. The internal consistency test therefore provides an accurate measurement of whether the state tax system discriminates against interstate income, regardless of what other states are doing.

The Court’s rhetoric suggests that the imposition of an internally consistent tax by any state should be deemed nondiscriminatory because no discrimination would occur in the hypothetical situation in which every state imposed the tax. But the causality actually runs in the opposite direction. No discrimination would occur if every state imposed the internally consistent tax because the tax is inherently nondiscriminatory, however many or few states adopt it.

As discussed later, the internal consistency test diverges from the tax rate condition when a state makes its tax system depend on other states’ tax systems. That divergence is relevant to the analysis of the typical state income tax system.

VI. Principle Versus Practice

The universal state income tax practice, which also follows the practice of most national income tax systems, is to tax income on both a source and residence basis, with residents’ in-state income taxed only once. In other words, the typical state income tax system resembles the discriminatory tax system discussed earlier, in which all three income tax rates are 5 percent.

A key feature of the typical state tax system alleviates the discrimination to some extent. The state normally allows “full” credit for taxes that residents pay to other states on their out-of-state income. Although a full credit does not allow unlimited credit for all taxes paid to other states, it allows credit up to the amount of tax paid to the residence state on the out-of-state income.

A full credit would not eliminate the discrimination of the tax system discussed previously. So long as nonresidents’ in-state income and residents’ in-state income are both

¹²Id. at 260-266.
taxed at 5 percent, for example, the tax rate condition does not permit any taxation of residents’ out-of-state income. The credit achieves that result only when the source state taxes the income at 5 percent or higher. If the source state does not tax the income or taxes it at a rate below 5 percent, the residence state still imposes a residual tax on the out-of-state income and the tax rate condition is violated.

Nevertheless, the credit does alleviate the discrimination. If the source state imposes any tax at all, the credit reduces the tax on residents’ out-of-state income to some extent, thereby moving the tax system closer to compliance with the tax rate condition.

Although a full credit does not satisfy the tax rate condition, it satisfies the internal consistency test. If every state copied the tax system, including its 5 percent tax rate, the full credit would always eliminate the tax on residents’ out-of-state income. The nationwide tax on interstate income would then equal the nationwide tax on intrastate income. The internal consistency test diverges from the tax rate condition because, under a tax credit system, the state makes the taxes it imposes dependent on the taxes imposed by other states. The assumption that the source states copy the residence state’s tax rates automatically assumes away the case in which the credit fails to provide full relief, namely the case in which the source state imposes a lower tax rate.

Motivated by its phrasing of the internal consistency test, the Supreme Court has suggested that a full credit for taxes paid to other states would be sufficient to validate taxes that discriminate against interstate commerce. For example, when it struck down Washington’s internally inconsistent taxation of manufacturing and wholesaling in *Tyler Pipe*, the Court stated that a full credit “would presumably cure the discrimination.” The Court has also suggested in other cases that credits for taxes paid to other states can cure dormant commerce clause violations.

The Supreme Court is unlikely to strike down a state tax system that taxes all three incomes at similar rates while providing a full credit for taxes paid to other states, despite its discrimination against interstate commerce. The Court is likely to give such systems a pass, because they are so long-standing and so widespread. The Court has sometimes upheld a practice against constitutional challenges that might otherwise have been fatal based on its historical provenance, notably in cases involving prayers at legislative sessions and the assertion of personal jurisdiction over nonresidents based on in-state service of process.

Nevertheless, there is no basis for upholding tax systems that tax all three income flows at similar rates and do not provide a full credit for taxes paid to other states. Those systems are even more discriminatory than those with full credits, and they do not have the same historical provenance. That is the situation posed by Maryland’s tax system.

VII. Maryland’s Income Tax System

The Maryland income tax on residents has two components. In addition to the state income tax, there is a county tax — also collected by the state — with rates that vary across counties within statutory bounds. In 2006, the year at issue in *Wynne*, Maryland’s top income tax rate, which applied to all income above a modest level, was 4.75 percent, and the county income tax rates ranged from 1.25 to 3.2 percent. Maryland residents are taxed on their income, wherever earned. They may generally claim credit for taxes paid to other states on income earned outside Maryland, but the credit is limited to the increase in state income tax liability arising from the inclusion of the income taxed by other states. Under a 1975 legislative amendment, the credit cannot be claimed against the state-collected county income tax.

State income tax generally applies to income earned within Maryland by nonresidents, including income derived from real or tangible personal property located in the state and income derived from carrying on a business, occupation, profession, or trade within the state. Nonresidents are generally not subject to county income tax because they do not live in a Maryland county, but they are instead subject to the special nonresident tax (SNRT), which has a 1.25 percent rate, equal to the lowest county tax rate. The Maryland Court of Appeals has upheld the SNRT against dormant commerce clause and other challenges.

In this analysis, I assume that the state income tax rate is 4.75 percent. I focus on the case in which the county tax rate is 3.2 percent, but also mention the generally similar results that apply at lower county tax rates. All tax rates are rounded to the nearest one-hundredth of 1 percent.

15 *Tyler Pipe*, 483 U.S. at 245 n.13, 249.
16 See *Goldberg*, 488 U.S. at 264, and *Jefferson Lines*, 514 U.S. at 185.
19 Md. Statutes Ann., Tax-General (T-G) sections 10-102 (state income tax), 10-103 (county income tax), 10-106(a)(1) (bounds on county income tax rates), 10-105(a) (state income tax rate schedule), and 10-703 (credit for taxes paid to other states). The 1975 amendment is discussed and interpreted in *Comptroller v. Blanton*, 890 A.2d 279 (Md. 2006).
20 T-G sections 10-210 (state income tax on nonresidents) and 10-106.1 (SNRT). Under section 10-210(e), state income tax does not apply to wages earned in Maryland by nonresidents living in states with reciprocity agreements that exempt Maryland residents’ wages from tax. Under sections 10-103(a)(4) and 10-806(c), county income tax applies to wages earned by nonresidents living in localities that impose local taxes on Maryland residents’ wages.
A. With No Credit

First, consider the effects of the Maryland tax system if there were no credit at all for taxes paid to other states. Then, residents’ income — both in-state and out-of-state — would be taxed at 7.95 percent: 4.75 percent state tax plus 3.2 percent county tax. Nonresidents’ in-state income would be taxed at 6 percent: 4.75 percent state income tax plus 1.25 percent SNRT.

The combined tax burden on interstate income flows would be 13.47 percent (0.06 + 0.0795 - 0.06 x 0.0795 = 0.1395 - 0.0048 = 0.1347), which would exceed the 7.95 percent tax on residents’ in-state income by 5.52 percentage points. The excess taxation of interstate income would be slightly greater at lower values of the county income tax rate.22

Many measures could be taken to address the discrimination, under the continued assumption that no credit is provided for taxes paid to other states. I briefly discuss three of them.

A simple option would exempt nonresidents’ in-state income from state income tax and eliminate the SNRT. With no tax on nonresidents’ in-state income and uniform taxation of residents’ in-state and out-of-state income, the tax system would be neutral at any value of the county tax rate.

Another option would keep the tax on residents’ and nonresidents’ in-state income unchanged and lower the tax on residents’ out-of-state income to 2.07 percent. The combined tax burden on interstate income would then be 7.95 percent (0.06 + 0.0207 - 0.06 x 0.0207 = 0.0807 - 0.0012 = 0.0795), matching the tax rate on residents’ in-state income. Neutrality permits some taxation of residents’ out-of-state income because nonresidents’ in-state income is taxed at a lower rate than residents’ in-state income, as the 1.25 percent SNRT rate is lower than the 3.2 percent county income tax rate. The permissible tax rate on residents’ out-of-state income falls slightly more than one-for-one as the county tax rate falls below 3.2 percent and reaches zero when the county tax rate reaches 1.25 percent.

A third option would leave the tax rates on both interstate income flows unchanged and increase the tax on nonresidents’ in-state income. The tax rate on residents’ in-state income would need to rise to 13.47 percent to match the combined tax burden on interstate income computed previously. The required tax rate would be lower at lower values of the county tax rate.23

B. Maryland’s Partial Credit

Next, consider Maryland’s actual tax system, which allows credit to be claimed against the state income tax. If the source state’s tax rate is 4.75 percent or higher, residents’ out-of-state income faces only the 3.2 percent county tax. With a 6 percent tax on nonresidents’ in-state income, the combined tax burden on interstate income is 9.01 percent (0.06 + 0.032 - 0.06 x 0.032 = 0.092 - 0.0012 = 0.0901), which exceeds the 7.95 percent on residents’ in-state income by 1.06 percentage points. The excess taxation is slightly larger at lower values of the county tax rate, reaching a peak value of 1.17 percentage points when the county tax rate is at its minimum value of 1.25 percent. If the source state’s tax rate is below 4.75 percent, residents’ out-of-state income faces an even higher tax rate. For example, if the source state does not impose any tax, the results are the same as those with no credit.

Maryland’s credit does not satisfy the internal consistency test. If every state copied Maryland’s tax system, including its state and county tax rates, interstate income would bear 6 percent tax in the source state and 3.01 percent tax (3.2 percent of the remaining 94 percent) in the resident state while intrastate income would pay 7.95 percent, leaving interstate income overtaxed by 1.06 percentage points. The internal consistency test understates the actual discrimination because it assumes away the case in which the source state has a lower tax rate. Yet, even that test reveals discrimination.

C. With a Full Credit

Finally, consider Maryland’s tax system with a full credit. Although a full credit would not achieve complete neutrality, it would significantly reduce the discrimination against interstate income.

If the source state’s income tax rate was greater than or equal to 7.95 percent, the full credit would exempt residents’ out-of-state income from Maryland tax. The tax system would then favor interstate income by 1.95 percentage points, because the 7.95 percent tax on residents’ in-state income would exceed the 6 percent tax on nonresidents’ in-state income. As noted, neutrality does not require complete exemption of residents’ out-of-state income when nonresidents’ in-state income is taxed at a lower rate than residents’ in-state income. The maximum potential favoritism toward interstate income, which would occur when the source state’s income tax rate was greater than or equal to 4.75 percent plus the county tax rate, would fall one-for-one

22At the minimum 1.25 percent rate, residents’ income, both in-state and out of state, would be taxed at 6 percent, the same rate as nonresidents’ in-state income. The combined tax burden on interstate income would be 11.64 percent (0.06 + 0.06 - 0.06 x 0.06 = 0.12 - 0.0036 = 0.1164), which would exceed the 6 percent tax on residents’ in-state income by 5.64 percentage points.

23The required tax rate on residents’ in-state income falls slightly less than one-for-one as the county tax rate falls, reaching 11.64 percent when the county tax rate reaches 1.25 percent.
as the county tax rate fell below 3.2 percent, reaching zero when the county tax rate fell to its minimum 1.25 percent value.

If the source tax rate was lower than 7.95 percent, a full credit would leave a residual tax on residents’ out-of-state income equal to 7.95 percent minus the source rate. With a source rate of T percent, the excess tax burden on interstate income would be 5.52 - 0.94 x T percentage points. Neutrality would occur when the source state’s tax rate was 5.88 percent, which would leave a residual tax on residents’ out-of-state income of 2.07 percent, the neutral tax rate computed above. Interstate income would be favored if the source-state-tax rate was below 5.88 percent, which would leave a residual tax on residents’ out-of-state income by 0.0552 - 0.94 x t.

The validity of the Maryland tax system is the issue now before the Supreme Court.

VIII. The Path to the Supreme Court

The comptroller disallowed the credit for taxes paid to other states that Brian and Karen Wynne claimed against their county income tax on their 2006 resident tax return. The Maryland Tax Court affirmed the assessment, rejecting the Wynnes’ dormant commerce clause challenge. In June 2011, the circuit court for Howard County reversed the tax court, ruling that the Maryland tax system violates the dormant commerce clause. In January 2013, the Maryland Court of Appeals affirmed the circuit court’s decision. On May 17, 2013, the Court of Appeals denied the comptroller’s motion for reconsideration, but modified its opinion in two respects, and stayed its decision.

The comptroller petitioned the U.S. Supreme Court for certiorari in October 2013. In January 2014, the Court invited the solicitor general to file a brief stating the views of the United States. On April 4, the solicitor general recommended that the Court grant certiorari and reverse. The Court granted certiorari on May 27.

On September 26 the author and seven other scholars — Alan J. Auerbach, Alex Brill, Christopher DeMuth, Brian Galle, Kevin A. Hassett, R. Glenn Hubbard, and Robert J. Shapiro — filed an amicus brief supporting the Wynnes, dubbed “the tax economists’ brief.” In our brief, we outlined nondiscrimination analysis presented in this article. An amicus brief filed by Michael S. Knoll and Ruth Mason also outlined the nondiscrimination analysis. Other briefs on both sides generally focused on double taxation.


The high stakes became clear during the argument. In response to a question from Justice Stephen G. Breyer, Brockman asserted that states need not offer any credit at all. When Justice Ruth Bader Ginsburg pointed out that Maryland offers a credit for much of its tax, Perella correctly said, “But the rule Maryland suggests is not a compromise. The rule they suggest to you is you can impose complete double taxation.”

IX. The Oral Argument

Unfortunately, much of the argument was misdirected, as the parties focused on double taxation rather than discrimination. Perella, in accord with the argument raised in the Wynnes’ briefs and in the state courts, contended that Maryland had a duty to avoid double taxation and was therefore obligated to accommodate the source state’s tax. He noted that the comptroller’s argument would allow “100 percent double taxation” of small businesses operating across state lines. Perella later said that states have the power to tax worldwide income, but must structure their tax systems to avoid double taxation. He also noted that the Court has said that double taxation “is forbidden” and that “you can’t create the substantial nationwide risk of double taxation. So that has to be the first principle. . . . the line is drawn on the idea that you can’t double tax.”

Brockman challenged the view that a state with a nondiscriminatory tax system must accommodate sister states’ tax policies, saying, “There is no reason that a state should have to subordinate . . . this taxing power, just because another state, exercising an equally legitimate taxing power, but on a very distinct ground, is taxing a portion of that income merely because it was earned within that state’s borders.” He correctly cited the Court’s 1995 Jefferson Lines decision for the proposition that multiple states could

24Letting t equal T/100, the combined tax burden on interstate income would be (0.0795 - t) + 0.06 - 0.06 x (0.0795-t) = 0.1347 - 0.94 x t, which exceeds the 0.0795 tax rate on residents’ in-state income by 0.0552 - 0.94 x t.

25More generally, if the source state’s tax rate was lower than 0.0475 + c, in which c is the county tax rate, the combined tax burden on interstate commerce would be 0.06 plus 0.94 x (0.0475 + c). The excess tax would be 0.06 - 0.94 x t - 0.06 x (0.0475 + c). Neutrality would occur when t was equal to (0.06/0.94)*(1-0.0475-c), or 0.0638*(1-0.0475-c). At the 0.0125 minimum value of c, the neutral source-state-tax rate t would be 0.06.

26Maryland State Comptroller v. Wynne, 64 A.3d 453 (Md. 2013).

27We thank David Daniels and Margaret Meyers of Richards Kibbe & Orbe LLP for excellent pro bono representation.

28Transcript of Wynne oral arguments, at 6.

29Id. at 34-35.

30Id. at 28.

31Id. at 38.

32Id. at 41.

33Id. at 49.

34Id. at 3.
tax the same transaction on different bases.\textsuperscript{35} He also observed that double taxation could permissibly result if one state imposed a manufacturing tax and another state imposed a gross receipts tax on sales, which is correct if each tax is internally consistent. Surprisingly, Brockman cited \textit{Armco} — which struck down West Virginia’s internally inconsistent tax — to make that point.\textsuperscript{36}

Perella’s double taxation argument ran headlong into two intertwined obstacles, neither of which arises under the correct nondiscrimination analysis. First, if double taxation arises from the overlap of two states’ nondiscriminatory tax systems, a priority rule must be formulated to specify which state must yield to the other. Second, if the residence state is required to yield, then states are foreclosed from making the legitimate policy decision that residents with only out-of-state income should pay income tax.

Justice Elena Kagan asked Perella, “You’re not saying that we . . . should establish a priority rule as to different taxing schemes, are you? You’re not saying it has to be source-based or residence-based, or vice versa?”

As required by his argument’s logic, however, Perella replied that the Court needed to set a priority rule. Citing prior Court decisions about corporate taxes, he said that the Court has held “where one state is taxing on the basis of residency and the other on the basis of source, it is the state of residency that yields.”\textsuperscript{37}

Earlier in the argument, Justice Antonin Scalia said that he did not see why fairness would require the residence state to yield to the source state rather than vice versa, although he said he did not know what the “imaginary negative commerce clause” might require.\textsuperscript{38}

Under the correct nondiscrimination analysis, no priority rule is needed. Each state can impose a uniform residence tax, a uniform source tax, or a combination of the two (with residents’ in-state income subject to both taxes) — and neither state need accommodate the other.

If the residence state must yield to the source state, a state cannot tax any resident, all of whose income was earned outside the state and taxed at higher rates than the state’s rate. Some justices were understandably troubled by the prospect of imposing that restriction on a state’s taxing power.

Ginsburg raised that concern early in Perella’s argument, adding the further assumption that the resident sends five children to the state’s public schools. Justice Anthony M. Kennedy was also concerned that the resident would receive a “free ride” in those circumstances.

Perella gave six replies. First, he said that the situation would not occur often. Perhaps not, but the frequency with which the situation arises does not address the question of what should be done when it does arise. Second, he noted that states could enter into reciprocal agreements under which only the residence state would tax — and observed that Maryland had reached such agreements with a few other states. Unfortunately, that approach still leaves the residence state’s options at the mercy of other states’ decisions. Third, he replied that the resident would pay taxes to other states, which wouldn’t help the residence state. Fourth, he replied that the residence state would collect income taxes from residents of other states, which might be in the converse situation. Kennedy noted, however, that there was no guarantee that things would balance out. Fifth, Perella said that the resident would still pay property and other taxes. Nevertheless, it seems clear that the state should have the ability to impose an income tax on the resident if it wishes to do so. Sixth, Perella said that other states had not found that to be a problem, because they allowed a full credit.\textsuperscript{39}

Kennedy asked whether the state could impose a minimum tax on the resident. Perella said that the state could not impose a minimum income tax, but that an unspecified “school support tax” might be permissible.\textsuperscript{40} Later, Justice Sonia Sotomayor asked whether the state could impose a fixed tax of $1,000 per person, which she confusingly described as an income tax. Perella appeared to say that the tax would fail the internal consistency test, which is clearly incorrect.\textsuperscript{41}

Brockman argued against imposing that limitation on states, pointing out that someone who gets 82 percent of income from out of state does not receive only 18 percent of services.\textsuperscript{42}

The concerns expressed by Brockman and by Ginsburg, Kennedy, and Sotomayor do not arise under the correct nondiscrimination analysis. Each state may impose residence-based taxation, either in place of or alongside source-based taxation, without providing any credit for taxes paid to other states. The only requirement is that the tax system be nondiscriminatory, meaning that residents’ in-state income is fully subject to the residence-based tax and is also fully subject to any source-based tax imposed alongside it. If that requirement is met, the state can tax all of its residents, including those whose income was earned exclusively in higher-tax states.

Despite the emphasis on double taxation, there was significant attention to the properties of the Maryland tax system. Much of the discussion was phrased in terms of internal consistency.

Early in the argument, Justice Samuel A. Alito asked Brockman about the nondiscrimination argument made in the tax economists’ brief: “Can you tax all income earned

\textsuperscript{35}Id. at 7 (citing \textit{Jefferson Lines}, supra note 14).
\textsuperscript{36}Id. at 25.
\textsuperscript{37}Id. at 35 (citing \textit{Standard Oil Co. v. Peek}, 342 U.S. 382 (1952) and \textit{Mobil Oil Corp. v. Commissioner of Taxes}, 445 U.S. 425 (1980)).
\textsuperscript{38}Id. at 9-10.
\textsuperscript{39}Id. at 29-31.
\textsuperscript{40}Id. at 31.
\textsuperscript{41}Id. at 46-47.
\textsuperscript{42}Id. at 52-53.
within your borders, whether by resident or nonresident, and also tax income earned by your residents in other States?"

Brockman’s answer was breathtakingly false. He asserted that the tax economists’ brief “talked about two states’ taxes by using what they call a heuristic device of hypothesizing that the other state has the exact same taxes. Fine. We can do that, too.” In reality, the brief followed the same analysis as that set forth above, analyzing the impact of each state’s tax with absolutely no assumption about the effects of other states’ taxes.

Brockman continued in the same line, “But the point is that it’s the combined effect. That means that Maryland’s taxes, the validity of Maryland’s tax, will turn on how another state exercises its taxing powers.” In reality, the brief’s entire point was that the discriminatory nature of Maryland’s tax system arose solely from its own features and was completely independent of what other states did. It made clear that the combined effect of multiple states’ taxes is not the issue.

Kagan asked about double taxation that might result if two states had internally consistent systems. Perella said that he was inclined to think that the residence state would still have to yield to avoid “massive double taxation,” but emphasized that Wynne was easier because Maryland’s system was internally inconsistent.

Brockman had a difficult time addressing the undeniable fact that the Maryland tax system violated the internal consistency test. At the beginning of the argument, Chief Justice John Roberts pointed out that the special nonresident tax (SNRT) resulted in a violation of internal consistency. Brockman replied that the SNRT was a valid compensatory tax.

However, a valid compensatory tax must offset another tax provision that favors interstate commerce. For example, a tax on imports is a compensatory tax regarding a retail sales tax that applies only to intrastate sales, because the sales tax in isolation favors interstate commerce over intrastate commerce. A use tax on imports would not be a valid compensatory tax if both intrastate sales and exports were already taxed because the tax system would then already impose equal burdens on interstate and intrastate commerce. Similarly, a tax on nonresidents’ in-state income (or a tax on residents’ out-of-state income) would be a valid compensatory tax if the rest of the tax system applied only to residents’ in-state income. But if residents’ out-of-state income is already taxed at the same rate as residents’ in-state income, then there is no favoritism toward intrastate income to be offset. A tax on nonresidents’ in-state income then introduces discrimination against interstate income.

When Roberts pressed him, Brockman replied that the internal consistency test does not apply when two taxes are imposed on different bases, such as source and residence. In reality, the internal consistency test applies in precisely that context, requiring that both taxes be fully imposed on intrastate transactions that fall under each tax.

Brockman also continued to observe that the county income tax, without the SNRT, was internally consistent. He asserted that “it’s undisputed that Maryland’s tax does not facially discriminate. It’s even-handed in its application. Only after the tax liability is determined does it take into account the source, and there it gives an advantage to the people who have earned some of it out of state.” Similarly, when Sotomayor asked about internal consistency, Brockman said that the relevant question was the internal consistency of the residency rationale. For the tax system to be internally consistent, though, the residence tax and the source tax must each be internally consistent, which requires that residents’ in-state income be subject to both taxes.

In his opening remarks, Feigin rightly objected to any constitutional rule that would require states to impose only a residence tax or a source tax, but not both. Of course, neither internal consistency nor the tax rate condition imposes any such requirement. States may impose both taxes, if both fully apply to residents’ in-state income.

When questioned by Kennedy, Feigin echoed Brockman by stating that the county income tax, excluding the SNRT, satisfied internal consistency. In response to an immediate follow-up by Roberts, however, Feigin admitted that the SNRT violates internal consistency.

An irrelevant digression focused on whether the SNRT and the county income tax should be considered together or separately. Feigin argued that the two taxes had different jurisdictional rationales and should not be mixed and matched. He said that the “completely nondiscriminatory” county income tax should not be found unconstitutional by yoking it to some other tax like the SNRT, “which is going to look discriminatory no matter what other scheme of taxes you throw into it.” But there is nothing inherently discriminatory about a tax on nonresidents’ in-state income; that kind of tax would be neutral if it was combined with an equal tax on residents’ in-state income. Roberts responded that the county income tax and the SNRT were linked and should not be artificially separated.

The debate is meaningless. Because the combination is internally inconsistent, the internal inconsistency always appears in some component of the tax system, no matter
how the components are divided and recombined. If the SNRT is considered in combination with the county income tax, as was done in this analysis, the combined system is internally inconsistent. If the two are considered separately, the county income tax is internally consistent, but the SNRT is internally inconsistent. If the portion of the county tax that applies to residents’ in-state income is combined with the SNRT, that combination is internally consistent, but the remainder of the county income tax — the portion that applies to residents’ out-of-state income — is internally inconsistent. All of those analyses are equally valid.

When Roberts said that the internal inconsistency arose only because of the SNRT, Perella correctly replied that one has to look at both interstate income flows, citing the tax economists’ brief, and that looking at only one interstate income flow “makes nonsense of the test.”

Ignoring the indeterminacy of which component of the Maryland tax system was to blame for its internal inconsistency, Feigin gave three invalid reasons for placing the blame on the SNRT.

First, Feigin said that the SNRT is the only component of the tax system triggered by crossing state lines. But that is true only if the county income taxes on residents’ in-state and out-of-state income are viewed as a single component. If the two county income taxes are separated, the county income tax on residents’ out-of-state income is also triggered by crossing state lines.

Second, Feigin said that only the SNRT would create different incentives for earning income in different states — which is true, but irrelevant. Source-based taxes, unlike residence-based taxes, create incentives to earn income in low-tax rather than high-tax states. The potential inefficiencies from those incentives provide a plausible policy argument for residence-based taxation. The dormant commerce clause, however, is not concerned with whether a tax is efficient or whether it favors one state over another. It is concerned with whether intrastate transactions are favored over interstate transactions. Because residence-based and source-based taxation both satisfy that requirement, each of them is constitutionally permissible.

Third, Feigin said that the county income tax is permissible because it falls on residents, who can try to change it through the political process. Brockman made a similar point. As discussed, however, that the tax is imposed on residents has no relevance for whether it is discriminatory.

When Ginsburg asked Perella whether residents could challenge state taxes, Perella correctly replied that they could, pointing to Boston Stock Exchange and Goldberg (in which, as noted above, the Court considered the residents’ challenge at length before setting forth the puzzling dictum).

One might wonder why Feigin was so eager to place the blame on the SNRT. After all, in response to a question by Alito, he refused to say that the SNRT should necessarily be struck down. However, his motive was his claim that residents — such as the Wynnes — do not have standing to challenge the SNRT. That argument is invalid for the reasons discussed above.

X. Conclusion

The Supreme Court should strike down Maryland’s state income tax system under the dormant commerce clause. Maryland follows the historically sanctioned, but discriminatory, practice of taxing residents’ in-state income, residents’ out-of-state income, and nonresidents’ in-state income at similar rates. But it fails to follow the historically sanctioned practice of alleviating the discrimination by allowing its residents a full credit for taxes paid to other states. It can therefore claim no historical support for its unusually discriminatory system.

To increase the clarity of its dormant commerce clause jurisprudence, the Court must emphasize that the problem is discrimination, not double taxation. Even if the Court strikes down only those discriminatory tax systems that permit double taxation and upholds discriminatory tax systems that avoid double taxation, it should emphasize that both systems would fall if dormant commerce clause principles were applied across the board, without regard to historical practice. And the Court should explain that a state with a nondiscriminatory tax system is not required to accommodate other states’ tax systems. A state may therefore tax residents’ out-of-state income with no credit for other states’ taxes, so long as the state tax system’s combined burden on residents’ out-of-state income and nonresidents’ in-state income does not exceed its burden on residents’ in-state income.

Double taxation under nondiscriminatory tax systems is not a constitutional problem. But the Court cannot let that fact mislead it into upholding discriminatory tax systems that result in double taxation.

53 Id. at 37.
54 Id. at 20-21.
55 Id. at 52.
56 Id. at 39-40 (citing Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977)).
57 Id. at 23.
58 Id. at 17.