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The Dormant Foreign Commerce Clause After *Wynne*

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THE DORMANT FOREIGN COMMERCE CLAUSE AFTER *WYNNE*

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This Essay surveys dormant foreign Commerce Clause doctrine to determine what limits it places on state taxation of international income, both income earned by foreigners in a U.S. state, and income earned by U.S. residents abroad. Among our conclusions is that, just as the dormant interstate Commerce Clause forbids states from discriminating against interstate commerce, the dormant foreign Commerce Clause forbids states from discriminating against international commerce. We also consider differences between the interstate and foreign commerce contexts, including differences in the nationality of affected taxpayers and differences in the impact of state taxes on federal international tax policy goals. Assuming we are correct that the dormant foreign Commerce Clause places similar limits on states to the dormant interstate Commerce Clause, we provide states guidance as to how to conform their regimes for taxing international income to constitutional requirements.

INTRODUCTION

The Supreme Court long has interpreted the dormant interstate Commerce Clause to limit state tax powers, including by interpreting it to forbid states from using their tax systems to discriminate against interstate commerce. This Essay considers the limits imposed by the dormant *foreign* Commerce Clause on state tax powers. We use a

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recent Utah Supreme Court case that we believe to be wrongly decided, *Steiner v. Utah State Tax Commission*, to illustrate our inquiry. Although the Supreme Court denied *certiorari* in *Steiner*,[1] the case raised questions that will be important as other state courts, and ultimately perhaps the Supreme Court, consider the impact of the dormant foreign Commerce Clause on state taxes.

We argue that the conception of the dormant foreign Commerce Clause propounded in *Steiner* was too narrow. In particular, the Utah Supreme Court failed to acknowledge that, just as the Supreme Court has ruled that the interstate dormant Commerce Clause prevents states from favoring in-state commerce over interstate commerce, the Court has also ruled that the dormant foreign Commerce Clause prevents states from favoring in-state commerce over foreign commerce.

In our analysis, we pay special attention to the implications of the Supreme Court's 2015 decision in *Wynne v. Maryland Controller* for foreign commerce. In *Wynne*, an interstate commerce case, the Supreme Court confirmed that the value pursued by the nondiscrimination requirement of the dormant Commerce Clause was prevention of protectionism, and it furthermore confirmed that the internal consistency test was a reliable way for courts to identify unconstitutionally protectionist taxes. Under the internal consistency test, the reviewing court imagines that all states apply the challenged state's rule. It then asks, under these conditions of hypothetical harmonization, whether interstate commerce suffers more tax than in-state commerce. If so, the challenged regime is unconstitutional unless justified.

Although the Supreme Court has applied the internal consistency test by name for more than three decades,[2] *Wynne* was the first case to acknowledge its "economic bona fides" as a test for protectionism.[3] The great virtue of *Wynne* is that by providing a principled approach firmly grounded in economics to resolve tax discrimination cases, it promised to lead dormant Commerce Clause doctrine out of what the Supreme Court itself has described as a "quagmire." But *Wynne* can only lead courts out of the doctrinal quagmire if lower courts apply it, which the Utah Supreme Court refused to do.[4]

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[1] *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (2019).

[2] *See Wynne*, at 1802 (also tracing the test back to the 1930s, "[a]lthough we did not use the term in those cases").

[3] *Wynne*, at 1802.

[4] *See* discussion *infra* Part II.

Although the Utah Supreme Court acknowledged its obligation to follow controlling U.S. Supreme Court precedent, it concluded that — given the "lack [of] any clear overarching theory"[5] for the dormant Commerce Clause — the Utah court itself would "decline to extend [the U.S. Supreme Court's] precedent into new territory — even in ways that might seem logical in other jurisprudential realms."[6]

This Essay argues that the best reading of Supreme Court doctrine is that *Wynne* and its internal consistency test applies broadly as a rule for identifying state tax discrimination in both the interstate and foreign Commerce Clause contexts. Indeed, the Supreme Court has repeatedly acknowledged the applicability of the internal consistency test to dormant foreign Commerce Clause cases, and it has never suggested that the test does not apply in such cases.[7] The court's refusal to follow *Wynne* essentially sets up a two-tiered system under which some states — those that adhere to Supreme Court precedent[8] — are constrained from enacting protectionist taxes. But other states, including Utah, remain freer to engage in protectionism.[9]

Part I of this Essay provides background on both the interstate and foreign dormant Commerce Clause doctrines, including in-depth doctrinal analysis of the dormant foreign Commerce Clause. Although there are some differences between the doctrines, the Supreme Court interprets both clauses to forbid discrimination, and in both contexts, the Court has recognized that protectionist taxes discriminate. Thus, the Court considers internal consistency relevant to both contexts. In light of substantial criticism of the dormant Commerce Clause both on and off the bench for being atextual, we conclude Part I by showing that dormant Commerce Clause doctrine has the support of a large majority of the current justices of the Supreme Court.

Part II criticizes the Utah Supreme Court's decision in *Steiner*. We show that the Utah tax regime upheld in *Steiner* was structurally nearly identical to the Maryland tax regime struck down by the U.S. Supreme Court in *Wynne.* The main difference was that

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[5] *Steiner*, at para. 18.

[6] *Steiner*, at para. 20.

[7] See discussion *infra* Part I.B.

[8] Kathleen K. Wright, *The Decision in Wynne and the Impact on the States*, State Tax Notes, Apr. 10, 2017, p. 187 (detailing state implementation of *Wynne*).

the Maryland regime discriminated against interstate commerce, whereas the Utah regime discriminated against international commerce. To be specific, Utah taxed its residents' worldwide income at 5 percent. It likewise taxed nonresident aliens on their Utah-source income at 5 percent.[10] Although Utah allowed its residents credits for taxes imposed by other U.S. states, it allowed no credits for foreign taxes. Such a regime is internally inconsistent because it overtaxes international income relative to in-state income, and hence underdormant Commerce Clause doctrine it is unconstitutional unless justified. Although the Utah Supreme Court refused to apply relevant Supreme Court precedent in *Steiner*, other states courts may face questions about the constitutionality of their state tax regimes. Many state tax regimes, like Utah's, do not fully credit foreign taxes,[11] and relying on the Supreme Court's decision in *Wynne*, residents of those states and aliens taxed by those states may challenge those regimes. Part II thus provides insight as to how *Wynne* and other aspects of dormant Commerce Clause doctrine limit state taxation of foreign commerce.

Acknowledging that the dormant Commerce Clause prohibits states from discriminating against international income, however, does not imply that states must always credit foreign taxes. Thus, in Part III, we consider a variety of options available to states to make their international tax regimes internally consistent.

I. DORMANT COMMERCE CLAUSE DOCTRINE

This Part gives background on the dormant Commerce Clause. Subpart A describes the values pursued by the dormant Commerce Clause, and it briefly reviews the development of the doctrine from its historical roots to the present. Because *Steiner* involves a discrimination challenge, we pay special attention to the Supreme Court's discrimination jurisprudence, including the Court's most important recent case, *Wynne v. Maryland Controller*. Decided in 2015, *Wynne* reaffirmed that the nondiscrimination

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[10] The current Utah statutory tax rate is 4.95 percent. From 2008 through 2017, which includes the years at issue in *Steiner*, the rate was 5 percent. Utah State Tax Commission, Official Utah Tax Information, available at https://incometax.utah.gov/paying/tax-rates. Throughout this Essay, we use a 5 percent rate for simplicity.

[11] Of the 43 states that tax personal income, most offer no credits for foreign income; a handful restrict the availability of the credits (mostly to Canada); and 10 states (Arizona, Hawaii, Indiana, Iowa, Kansas, Maryland, Montana, New Jersey, North Carolina, and West Virginia) appear to generally offer tax credits on foreign income. Accordingly, at least half of the states are potentially at risk for violating the dormant foreign Commerce Clause. *See* Bloomberg, Law Chart Builder Individual Income Tax Cite

principle in the dormant Commerce Clause prevents states from enacting protectionist taxes, and in *Wynne* the Supreme Court acknowledged internal consistency as an appropriate test for determining whether a state tax is protectionist.[12]

Subpart B extensively reviews the Supreme Court's few dormant foreign Commerce Clause cases, which reveal that, like the dormant interstate Commerce Clause, the dormant foreign Commerce Clause also forbids protectionism. For completeness, although they are not directly relevant for *Steiner*, Subpart B also critically reviews some additional doctrinal restrictions on states that apply under the foreign, but not interstate dormant Commerce Clause. These include the requirement that state taxes not create a substantial risk of multiple international taxation and that state taxes not prevent the federal government from speaking with one voice in international commerce issues.

Subpart C argues that despite criticism—including from Justices Gorsuch and Thomas and the late Justice Scalia—a majority of the current justices of the Supreme Court continue to interpret the Commerce Clause to impliedly limit state tax powers, in particular by prohibiting discrimination, that is, protectionist taxation.

A. The Dormant Commerce Clause After *Wynne*

The Commerce Clause of the U.S. Constitution grants to Congress the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes."[13] Although an affirmative grant of power to Congress, the Supreme Court has long held that the Commerce Clause contains a "dormant" or negative implication that limits the ability of state and local governments to also regulate commerce. The dormant Commerce Clause has "deep roots" that extend back to the debates surrounding the drafting of the Constitution and its ratification.[14] For nearly 200 years, the Court has recognized the principle that the Commerce Clause, by its own force and effect and without the need for any congressional action, limits the ability of states to regulate cross-border commerce.[15] The animating principle advanced by the

[12] *Wynne*, at 1802.

[13] U.S. Const., Art. I, section 8, clause 3.

[14] *Wynne*, 135 S. Ct. at 1794.

[15] The seminal case is *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

dormant Commerce Clause was perhaps most clearly and cogently articulated by Justice Robert H. Jackson, who in 1949 wrote:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home-embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.[16]

Under the dormant Commerce Clause, states may not discriminate against or unduly burden interstate commerce.[17] Discriminatory taxes are almost always fatal. According to the Supreme Court, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose"[18] or that it has explicit congressional approval.[19] Only if state laws or regulations do not discriminate against

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[16] *J.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949).

[17] *Wynne*, 135 S. Ct. at 1794 ("By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce.").

[18] T*ennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449, 2462 (2019) (citations and quotation marks omitted); *Oregon Waste* v. *Department of Environmental Quality*, 511 U.S. 93 (1994) ("Because the Oregon surcharge is discriminatory, the virtually per se rule of invalidity provides the proper legal standard here, not the *Pike* balancing test. As a result, the surcharge must be invalidated unless the respondents can show that it advances a legitimate local purpose that cannot be adequately served by legal nondiscriminatory alternatives. Our cases require that justifications for discriminatory restrictions on commerce pass the strictest scrutiny. The State's burden of justification is so heavy that facial discrimination by itself may be fatal defect.") (citations and quotation marks omitted)

[19] *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 652-53 (1981) ("if Congress ordains that the states may freely regulate an aspect of interstate commerce, any action taken by the state within the scope of congressional authorization is rendered invulnerable to a Commerce Clause challenge"); *Lewis v. BT Investment Managers Inc.*, 447 U.S. 27, 44 (1980) ("Congress, of course, has power to regulate the flow of interstate commerce in ways that the states, acting independently, may not. And congress, if it chooses, may exercise this power indirectly by conferring

interstate commerce does the Court go on to evaluate them under the undue-burden standard, but we do not consider undue burdens here in this essay.[20]

Since 1977, the Supreme Court has used the four-part *Complete Auto* test to evaluate whether state taxes are consistent with the dormant Commerce Clause.[21] To be compatible with the dormant Commerce Clause under the *Complete Auto* test, a state tax must (1) apply only to taxpayers with a substantial nexus to the state; (2) be fairly apportioned; (2) not discriminate against cross-border commerce; and (4) be fairly related to services provided by the state.[22] A tax that fails the *Complete Auto* test would be struck down absent a compelling justification.[23] The Court's announcement of the *Complete Auto* test marked an important turning point in dormant Commerce Clause doctrine away from legal formalism and toward substantive inquiry into the economic consequences of a state's laws.[24] Notwithstanding this advance, *Complete Auto* failed to provide clear guidance to states, taxpayers, and lower courts.[25]

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upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.").

[20] *Wynne*, 135 S. Ct. at 1794. For more on undue burdens, see Adam Thimmesch, *The Unified Dormant Commerce Clause*, at 2 (forthcoming *Temple Law Review* 2020); Thomas B. Nachbar, *The Peculiar Case of State Network Neutrality Regulation*, 37 CARDOZO ARTS & ENT. L.J. 659 (2019).

[21] *Complete Auto*, 430 U.S. 274.

[22] *Id*. at 279.

[23] *See, e.g., Wynne*, 135 S. Ct. at 1793 (reiterating the *Complete Auto* test).

[24] *Wynne*, 135 S. Ct. at 1795-6 (reviewing doctrine under the dormant Commerce Clause, describing *Complete Auto* as a return to substantive inquiry after "earlier formalism").

[25] The leading state tax treatise on the dormant Commerce Clause details the problems with the text, including criticism of it by Supreme Court justices. See 1 WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶ 4.12 (Westlaw (database updated Dec. 2019); *See also* Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause*, 1998 SUP. CT. REV. 193; Edward A. Zelinksy, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N. U. L. REV. 29 (2002); Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction*, 24 VA. TAX REV. 109 (2004); Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment*, 28 VA. TAX. REV. 1 (2008); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause*, 73 LA. L. REV. 979 (2013); Richard D. Pomp, *Revisiting Miller Brothers, Bellas Hess, and Quill*, 65 Am. U. L. Rev. 1115 (2016); Hayes Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1 (2019); Thimmesch, *supra*.

Recent cases, however, have improved the clarity and workability of the *Complete Auto* test.[26] Because *Steiner* involved a question of tax discrimination, we focus on the Supreme Court's 2015 decision in *Comptroller of the Treasury of Maryland v. Wynne*, which cleared out much of the controversy surrounding the dormant Commerce Clause by confirming that nondiscrimination has a specific meaning: It prevents the states from enacting protectionist regulations and taxes, or, equivalently, it requires states to maintain a level tax and regulatory playing field between in-state and out-of-state commerce.[27] Although this anti-protectionist principle underlying the dormant Commerce Clause had long been acknowledged, before *Wynne*, translating that principle into clear judicial guidance was neither smooth nor consistent.[28] The Court in *Wynne* clarified the importance of economic analysis to dormant Commerce Clause review, and the Court expressly connected the definition of discrimination to a doctrinal test for discrimination, the internal consistency test.

Developed by the Court in the early 1980s to resolve tax apportionment cases,[29] the continued relevance of the internal consistency test was uncertain at the time the

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[26] *See, e.g., South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). This Essay does not focus on the nexus prong of *Complete Auto*, nor does it consider undue burdens. For more on *Wayfair*, see *Implications of Wayfair*, 46 INT'L TAX REV. 810 (2018). *See also* Adam Thimmesch, *supra*; Holderness, *supra*.

[27] 135 S. Ct. 1787 (2015), aff'g sub nom. Maryland State Comptroller of the Treasury v. Wynne, 64 A.3d 453 (Md. 2013).

[28] For the argument that the nondiscrimination principle in the dormant Commerce Clause forbids protectionism, see generally Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause* , 103 VA. L. REV. 309 (2017); Ryan Lirette & Alan D. Viard, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J. L. & POL'Y (2016). For the argument that the dormant Commerce Clause more generally, including undue-burden doctrine, principally forbids intentional protectionism, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause* , 84 MICH. L. REV. 1091 (1986).

[29] *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 169 (1983) ("the first and again obvious, component of fairness in an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed."). The origins of the test can be traced back further. *See Wynne*, at 1802 (referring to cases decided as early as 1938 and noting that "[a]lthough we did not use the term in those cases, we held that those schemes could be cured by taxes that satisfy what we have subsequently labeled the 'internal consistency' test").

Court granted *certiorari* in *Wynne*.[30] Under internal consistency, a reviewing court assumes that all other states adopt the challenged state's tax system.[31] The court then asks whether, under those conditions of hypothetical harmonization, cross-border commerce would be taxed more heavily than in-state commerce.[32] If so, then the court nearly always strikes down the tax as discriminatory.[33] Conversely, the Court typically upholds internally consistent taxes.[34]

Wynne involved discrimination that was obscured within Maryland's facially neutral tax regime.[35] The Maryland income tax consisted of both a state and a county component. Only the county tax was at issue. The county tax applied to residents' in-state and out-of-state income at a flat rate between 1.25 percent to 3.2 percent, depending upon the county of residence.[36] Nonresidents paid county tax on the Maryland-source income at the lowest rate, 1.25 percent.[37] Residents were not entitled

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[30] *See Wynne*, 135 S. Ct. at 1820-21 (Ginsburg, J., dissenting) ("This Court has not rigidly required States to maintain internally consistent tax regimes. Before today, [the Court] . . . has not struck down a state tax for failing the test in nearly 30 years . . . . Moreover, the Court has rejected challenges to taxes that flunk the test.") (internal citations omitted). For discussion of the case in which the Court upheld an internally consistent tax, see *infra* note 33. *See also* Knoll & Mason (2017), *supra note* ___, at 312 (noting that before *Wynne*, doubts abbout the "continued relevance" of the test).

[31] *See, e.g., Container*, at 169. *See also Wynne* at 1802 (citing "numerous cases in which we have applied the internal consistency test in the past")

[32] *See, e.g., Wynne* at 1802. *See also Oklahoma Tax Comm 'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (test looks to " whether [a tax's] identical application by every State would place interstate commerce at a disadvantage as compared with commerce intrastate").

[33] *See Wynne*, at 1821 (Ginsburg, J., dissenting) (noting that the Court previously upheld a "concededly" internally inconsistent tax) (citing *American Trucking,* 545 U.S. 429 (2005)). *But see Wynne*, at ___, n. 7 (disputing that the Court had conceded that the tax in *American Trucking* was internally consistent). In our view, the tax challenged in *American Trucking*, which was an unapportioned flat tax on trucks that made deliveries in Michigan, was indeed internally inconsistent, and therefore functioned equivalently to a tariff and should have been struck down.

[34] The Court will uphold such taxes unless they impose an undue burden on interstate commerce. Discrimination and undue burden are the two ways that taxes and regulations can be found in violation of the dormant Commerce Clause.

[35] For analysis of *Wynne*, see generally Knoll & Mason (2017), *supra* note ___.

[36] Md. Code Ann., Tax. Gen. § 10-103(a)(1) (2010).

[37] Md. Code Ann., Tax. Gen. §§ 10-103(a)(1), 10-703(a) (2010).

to a credit against the country tax for taxes paid to other jurisdictions.[38] This regime is facially neutral: nonresidents do not pay a higher tax rate on Maryland-source income than do Maryland residents, and Maryland residents do not pay a higher tax rate on out-of-state income than on in-state income. Nonetheless, Maryland's highest court struck down the tax regime for violating the dormant Commerce Clause.[39]

The Wynnes were Maryland residents whose county taxed their worldwide income at 3.2 percent.[40] The Wynnes challenge the tax regime under the dormant Commerce Clause, arguing that because Maryland did not credit the taxes they paid to other states up to the full amount of the county tax due on the same income, Maryland discouraged them from earning income from other states in violation of the dormant Commerce Clause.[41] Among the defenses raised by Maryland were that the dormant Commerce Clause did not apply to individual taxpayers, that residence states may tax all their residents' income (wherever derived), and that states are under no obligation to relieve double tax.[42]

After holding that the dormant Commerce Clause applies to individuals as well as corporations,[43] and confirming that the dormant Commerce Clause neither forbids states from taxing all their residents' worldwide income nor forbids all double taxation,[44] a 5-4 majority of the Supreme Court nevertheless held that the Maryland tax regime violated the dormant Commerce Clause because it discriminated against

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[38] Md. Code Ann., Tax. Gen. §, 10-703(a), (c) (2010).

[39] Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453 (Md. 2013), aff'd sub nom. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

[40] *Wynne,* 135 S.Ct. at 1792.

[41] *Id*. *See also* Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 460 (Md. 2013).

[42] *See Wynne*, at 1797 (Maryland's argument that the dormant Commerce Clause does not apply to individuals. *Id.* at 1800 (principal dissenters' argument that Maryland was entitled to tax all its residents' worldwide income); *id*. at 1801-2 (principal dissenter's argument that the dormant Commerce Clause does not require states to relieve double taxation).

[43] *Wynne*, at 1797.

[44] *Wynne*, at 1805. For more on the distinction between double taxation and tax discrimination, see Knoll & Mason (2017), *supra* note ___, at 336-342. *See id*. at 333 (noting that "eight of nine justices [in *Wynne*] agreed that the Constitution does not categorically forbid double taxation).

interstate commerce.[45] The Maryland regime involved no facial discrimination—it did not overtly tax interstate commerce at a higher rate than domestic commerce. Applying the internal consistency test, however, revealed the discriminatory impact inherent in the regime. The insight of *Wynne*, and the reason the Court reaffirmed the internal consistency test, was that taxes that fail the internal consistency test are protectionist as an economic matter, but taxes that pass the test are not.[46] Thus, rather than sideline or abandon internal consistency, in *Wynne*, the Supreme Court elevated it to the principal test for tax discrimination.[47]

With its "economic bona fides"[48] thus uncovered, the internal consistency test now provides a principled way to resolve tax discrimination cases under the dormant Commerce Clause. By providing courts a method to affirmatively identify taxes that

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[45] *Wynne*, at 1804.

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> By hypothetically assuming every state has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant state's tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other states, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes. The first category of taxes is typically unconstitutional; the second is not.

Wynne, 135 S. Ct. at 1802 (internal citations omitted). *Id.* at 1805 ("The internal consistency test and economic analysis . . . confirm that the tax scheme operates as a tariff and discriminates against interstate commerce, and so the scheme is invalid."). In arriving at this conclusion, the Court relied on economic analysis provided by us and by a group of tax economists in separate briefs. *See id.* at 1802, 1804, 1806 (citing Knoll and Mason Brief as *amici curiae* and citing Brief for Tax Economists as *amici curiae*). We first presented this mode of economic analysis in an academic article. Ruth Mason & Michael S. Knoll, *What is Tax Discrimination?* 121 YALE L.J. 1014 (2012). For more on how internal consistency identifies protectionist taxes, see Knoll and Mason (2017), *supra note* ___ at 318-329; Lirette & Viard, *supra* note ___, at 495 to 500. For a thorough discussion of how the internal consistency test would apply to past Supreme Court cases and difficult open doctrinal questions, *see generally* Lirette & Viard, *supra* note ___.

[47] *Wynne*, 135 S. Ct. at 1802.

[48] *Id*.

have effects economically equivalent to tariffs,[49] the internal consistency test operationalizes the anti-protectionist goals underlying the dormant Commerce Clause. Because the test is limited and behaves in a rule-like fashion, it identifies protectionism without unnecessarily encroaching on state autonomy.[50] Plus, although economic analysis supports using the internal consistency test as a tool for identifying protectionist taxes, it is easy to apply; one need not be an economist to apply it.

Committed to the internal consistency test as a means of verifying whether state taxes function economically equivalently to tariffs,[51] the Supreme Court assumed that all other states would adopt Maryland's regime, and then it asked whether cross-border commerce would face more tax than domestic commerce.[52] To simplify the application of the internal consistency test, in our example we will let Delaware stand as a proxy for all other states.[53] Assuming that Delaware adopted Maryland's tax system, then Maryland residents, including the Wynnes, would pay tax at 3.2 percent on their in-state income, but at 4.45 percent on their out-of-state income. This is so because when they earned income in Maryland, they would pay only the 3.2 percent tax to their county. But when they earned income in Delaware, they would pay not only the 3.2 percent tax to their Maryland county, but also the 1.25 percent nonresident tax to Delaware. Because the Maryland tax regime did not allow a credit against the Maryland county tax for any taxes paid to other states, the Maryland regime taxed cross-border income more heavily than purely in-state income. As a result, the

[49] *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 193 (1994) ("the paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other states, but does not tax similar products produced in state").

[50] Knoll & Mason (2017), *supra note* ___, at 337 ("The internal consistency test preserves . . . tax sovereignty to enact a variety of nondiscriminatory taxes"). *Id*. at 351 ("A virtue of the internal consistency test is that it goes no further than necessary to achieve [the goal of identifying discriminatory taxes] . . . . Thus, the . . . internal consistency test provide[s] states with wide, but not unfettered, discretion.").

[51] The Wynne majority repeatedly analogized Maryland's income-tax regime to a tariff. *See Wynne*, at 1804, 1805, 1806-7.

[52] *Wynne*, at 1803.

[53] The Supreme Court also allowed a single other state (State B) stand in for all other states when it conducted internal consistency analysis in *Wynne*. *Wynne*, at 1803-4.

Supreme Court held that the Maryland tax was internally inconsistent and struck it down. Table 1 illustrates the internal consistency test applied to Maryland law:

TABLE 1: MARYLAND TAX UNDER INTERNAL CONSISTENCY

	Delaware Resident	Maryland Resident
Maryland Source	4.45%	3.2%
Delaware Source	3.2%	4.45%

In Table 1, the shaded cells represent interstate commerce, while the unshaded cells represent in-state commerce. In *Wynne*, the Supreme Court applied the internal consistency test to reveal that if every state adopted Maryland's regime, interstate commerce would bear more tax than in-state commerce.[54] The *Wynne* Court held that this excess burden on interstate commerce violated the dormant Commerce Clause.[55]

Besides confirming that internal consistency as a test for protectionism, a second important point emerges from *Wynne*. The familiar paradigm of dormant Commerce Clause cases involves a nonresident who challenges the protectionist practices of a state. But *Wynne* involved a claim brought by residents against their own state. In *Wynne*, the Supreme Court confirmed prior doctrine holding that residents could challenge their own states' rules. In prior academic work, we have emphasized that this outcome is logical, given the Court's views on discrimination.[56] Every discriminatory tax results in two distortions to where people earn income, and these distortions run in opposite directions.[57] A state's regime is protectionist whenever it undermines the comparative

[54] *Wynne*, at 1803. The internal consistency test identifies the fact and amount of the excess burden; Maryland taxes interstate commerce at 1.25 percent more than domestic commerce. To alleviate that excess burden, Maryland could increase its credit of other states' taxes, decrease its own tax of residents out-of-state income, or decrease its tax of nonresidents' Maryland income. On possible remedies for Maryland's tax regimes, see Knoll & Mason Brief, *supra* note ___, at 28-32. The *Wynne* majority agreed with our analysis of the remedy issue. *Wynne*, at 1806 (citing the Knoll & Mason Brief). On remedies for internally inconsistent taxes more generally, see Knoll & Mason (2017), *supra* note ___, at 342-5.

[55] *Wynne*, at 1804.

[56] Knoll & Mason (2017), *supra* note ___, at 318-29

[57] For more on the two-directional effect of discriminatory taxes, see Mason & Knoll (2012), *supra* note ___, at 1056–60 (referring to a "two-directional distortion").

advantage of nonresidents who earn income within the state relative to residents who earn income within the state. But protectionist taxes do more than discourage nonresidents from engaging in commerce within the state. Because they also undermine the comparative advantage that residents have over nonresidents on income earned *outside* the state, protectionist taxes also discourage residents from engaging in commerce outside the state.[58] We refer to the second type of distortion as retentionist.[59] Protectionist taxes keep outsiders out; retentionist taxes keep insiders in. Both protectionist and retentionist taxes by their nature have bi-directional effects; protectionist taxes create retentionist effects and vice versa.[60] Thus the dormant Commerce Clause could not effectively prohibit protectionist taxation if it did not apply to both inbound *and outbound* commerce. Thus, it makes sense for a legal rule that prohibits protectionism also to prohibit retentionism, and it makes sense for courts to allow residents like the Wynnes to challenge their own state's tax rules when those rules discriminate against foreign income in favor of in-state income.[61]

Thus, *Wynne* establishes several important points.[62] First, the Court confirmed that the dormant Commerce Clause applies to taxes imposed on individuals by their own states.[63] Second, although states have authority to tax their residents' worldwide income, the dormant Commerce Clause limits the exercise of that authority in

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[58] Protectionist taxes do this by making it more attractive for residents to earn income at home; only when they earn income at home can they secure the protectionist advantages the state provides them when it discriminates against outsiders.

[59] Knoll & Mason (2017), *supra* note ___, at 320.

[60] Knoll & Mason (2017), *supra* note at 320 ("all discriminatory taxes have both protectionist and retentionist impacts").

[61] Knoll & Mason (2017), *supra* note at 320 ("Although the protectionist effect of the Maryland tax regime was not at issue in *Wynne*, we can describe it. Because the Maryland tax regime discouraged Marylanders from earning out-of-state income, it upset the comparative advantage nonresidents may otherwise have had over Marylanders when competing for work and investments in Maryland.").

[62] Much has been written about *Wynne* and why a failure of internal consistency reveals as an economic matter that a state tax functions equivalently to a tariff. *See* references in *supra* note 46.

[63] *Wynne*, 135 S. Ct. at 1797

particular, states may not impose retentionist taxes on their residents.[64] Third, economic analysis is essential to judicial review of state tax rules for discrimination under the dormant Commerce Clause.[65] The Court stated clearly that the nondiscrimination principle under the dormant Commerce Clause prevents protectionism; states may not use their tax and regulatory systems to impose the functional equivalent of tariffs on interstate commerce.[66] Fourth, and most important, the Court affirmed the internal consistency test as a convenient and reliable test for protectionism and, consequently, discrimination.[67] Internally inconsistent taxes are protectionist and therefore discriminatory; they violate the dormant Commerce Clause except where stringently justified.[68] Fifth, although we will not analyze the issue until Part III of this essay, states have a variety of options for curing (or avoiding) internally inconsistent tax regimes, including through their choices of source and residence tax rates and via credit mechanisms.[69]

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[64] The *Wynne* court did not use the term retentionist; that the dormant Commerce Clause forbids retentionism is an implication of the Court's holdings that the dormant Commerce Clause forbids protectionism and applies to challenges brought by residents against their own states. *Wynne*, 135 S. Ct. at 1805 (refuting claim by dissenters that the majority's ruling "requires a State taxing on residence to 'recede' to a State taxing on source . . . We establish no such rule of priority. To besure, Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other states") (internal citations omitted). *See also* Knoll & Mason (2017), *supra* note at 351 (noting that under *Wynne*, "Maryland's choices about its source taxes constrain *its own* residence taxes and vice versa. But *other* states' tax rate choices constrain neither Maryland's source nor its residence taxes. Under a competitive neutrality conception of nondiscrimination, each state sets its taxes independently of every other state, but no state may set its source taxes independently of its own residence taxes, or vice versa.").

[65] *Wynne*, 135 S. Ct. at 1803-03.

[66] *Id*. at 1804.

[67] *Id.* ("The internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff.").

[68] *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding a Maine law prohibiting the importation of baitfish because Maine authorities could not be certain that the imported fish would be noninvasive species that were free of parasites).

[69] *Wynne*, 135 S. Ct. at 1806. We address this issue at length *infra* Part III.

B. The Dormant Foreign Commerce Clause

The Commerce Clause of the U.S. Constitution, which grants to Congress the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes,"[70] can be broken into three separate but related clauses: the foreign Commerce Clause, the interstate Commerce Clause, and the Indian Commerce Clause.[71] Each area describes an affirmative grant of power to Congress. And each contains a corresponding negative or dormant aspect.[72] Among the three areas, the dormant interstate Commerce Clause has received the most attention.

The Supreme Court has only considered a few cases implicating the dormant foreign Commerce Clause.[73] The Supreme Court (and lower courts) analyze interstate and foreign dormant Commerce Clause cases similarly,[74] and the Supreme Court has

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[70] U.S. Const., Art. I, section 8, clause 3.

[71] For comprehensive discussion of the dormant Indian Commerce Clause, Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010).

[72] *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) ("Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1160 (2003) (advocating a presumption of intrasentence uniformity on the grounds that although the "phrase 'regulate commerce' clearly is capable of conveying multiple meanings in the Commerce Clause, the presumption of intrasentence uniformity wins out… because nothing in the Commerce Clause's text or original understanding actually suggests that the Founders understood 'regulate commerce' as having multiple meanings" but also noting that "the dormant aspect of the Commerce Clause applies differently to each subpart," with the dormant foreign Commerce Clause constraining states more than the other subparts); Edward S. Corwin, The Commerce Power Versus State Rights 50 (1936) (advocating lock-step interpretation).

[73] The most important of these cases is *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979). *See also Barclays Bank PLC v. Franchise Tax Bd*., 512 US 298, 114 S. Ct. 2268 (1994); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Kraft General Foods Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992); *Wardair Can., Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 US 159 (1983); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980).

[74] Michael A. Zuckerman, *The Offshoring of American Government*, 94 CORNELL L. REV. 165, 180 (2008) ("Lower courts borrow the dormant Interstate Commerce Clause standard to adjudicate challenges to state regulation of foreign commerce because the Supreme Court's dormant Foreign Commerce Clause jurisprudence is relatively undeveloped."). *See id*. (citing *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41,

long made clear that the Constitution's prohibition against discriminatory taxes applies to both interstate and foreign commerce.[75] The Supreme Court interprets the dormant foreign Commerce Clause to place more, not fewer, restrictions on state taxation than does the dormant interstate Commerce Clause.[76] Specifically, state laws must pass two additional hurdles under the dormant foreign Commerce Clause that do not apply under the dormant interstate Commerce Clause.[77] The first additional consideration is whether the challenged state tax creates" a substantial risk of international multiple taxation."[78] This requirement arises because — as compared with interstate commerce cases — dormant foreign commerce cases involve at least one more additional taxing jurisdiction: the foreign country.[79] Second, state taxation must not impair federal uniformity in an area where it is essential that the federal government "speak with one voice."[80]

1. Complete Auto Factors

In tax cases—and all of the cases in which the dormant foreign Commerce Clause has played an important role are tax cases—the Supreme Court applies the four-part

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46 (1st Cir. 2005) ("Although the language of dormant Commerce Clause jurisprudence most often concerns interstate commerce, essentially the same doctrine applies to international commerce.").

[75] *See* discussion *infra* Part II.B.1.

[76] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."). *Id*. at 451 ("we believe that an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce"); *South–Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) ("It is a well-accepted rule that State restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny."); *Kraft General Foods Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992) ("the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded interstate commerce, in part because matters of concern to the entire Nation are implicated").

[77] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 447(1979).

[78] *Id*., at 451.

[79] *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 317 (1994).

[80] *Japan Line*, 441 U.S. at 448

Complete Auto test that it devised for interstate commerce cases.[81] None of these cases squarely addresses the issue of whether the dormant interstate and foreign Commerce Clauses uphold the same values. Instead, the Supreme Court simply has assumed or very briefly concluded that the *Complete Auto* factors apply the same way to interstate and foreign dormant Commerce Clause cases as a first step before going on to add additional prongs to the *Complete Auto* test that apply exclusively in foreign commerce cases.[82]

Although the Supreme Court has applied the *Complete Auto* test in both interstate and foreign dormant Commerce Clause cases, there could be reasons for distinguishing them.[83] For example, the risks of economic balkanization within the United States, a frequently cited concern in dormant interstate Commerce Clause cases, are presumably

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[81] *See, e.g., Japan Line*, at 445; *Container Corporation*, 463 U.S. at 169 to 171.

[82] *See, e.g., Japan Line*, at 445 (not specifically applying the internal consistency test, but assuming the challenged tax satisfied the *Complete Auto* factors before holding that it nevertheless created a substantial risk of multiple international tax and prevented the federal government from speaking with one voice in international commerce); *Container*, at 169 (noting that state taxes that impact foreign commerce must satisfy internally consistency, and, although it did not perform internal-consistency analysis on the challenged California rule, it noted that the Court had previously upheld such apportionment rules as internally consistent) (citing *Butler Bros. v. McColgan*, 315 U.S. 501, (1942); *id.*, at 170 ("Besides being fair, an apportionment formula must, under the Commerce Clause, also not result in discrimination against interstate or foreign commerce."); *Barclays*, at 312 (applying internal consistency test to California's apportionment formula that affected foreign commerce; concluding that "'if applied by every jurisdiction,' California's method 'would result in no more than all of the unitary business' income being taxed'") (*citing Container*, 463 U.S. at 169); *Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60, 73-4 (1990) (noting that because the taxpayer accepted the lower court's conclusion that the challenged tax satisfied the *Complete Auto* factors, it only had to consider the two additional *Japan Line* factors, multiple tax and one voice); *Kraft General Foods*, 508 U.S. at 79-82 (not applying the internal consistency test, but holding that a state's inclusion income of foreign, but not domestic, dividends facially discriminated in violation of the dormant foreign Commerce Clause).

[83] When faced with his first "occasion to consider an asserted application of the negative Commerce Clause to commerce 'with foreign Nations'—as opposed to commerce 'among several states'" Justice Scalia concluded that "for reasons of *stare decisis*, I must apply the same categorical prohibition against law that facially discriminate against foreign commerce as I do against laws that facially discriminate against interstate commerce—thought it may be that the rule is not as deeply rooted in our precedents for the former field." *Itel*, 507 U.S. at 81 (Scalia, J. concurring). But Justice Scalia further concluded that '[a]s with the Interstate Commerce Clause, however, stare decisis cannot bind me to a completely indeterminate test such as the 'four-factored test plus two" that combines the *Complete Auto* test with two additional factors from *Japan Line*.

less significant when states tax (or regulate) foreign commerce.[84] Likewise, any concerns that the nondiscrimination principle may help provide proxy representation for nonresident Americans that lack voting entitlements in states where they do business presumably do not carry as much weight when the disenfranchised parties are not U.S. residents.[85] Still, the Supreme Court has not distinguished the two contexts, so the best reading of current doctrine is that the nondiscrimination principle is the same across both contexts. Thus, in both cases, the nondiscrimination principle prevents protectionism. And because internal consistency test as a method for identifying protectionism can perform that function as well for interstate as foreign commerce, it makes sense for the Court to apply it in both foreign and domestic commerce cases. The Court's repeated application of the *Complete Auto* factors—including the internal consistency test—in dormant foreign Commerce Clause cases confirms this view.[86]

[84] *But see Itel*, at 86 (Blackmun, J., dissenting) (expressing fear that allowing "states that are constantly in need of new revenue to impose new taxes on [shipping] containers" would result in "a patchwork of state taxes that will burden international commerce").

[85] Justice O'Connor regarded lack of political protections for foreign economic actors to be an important element in interpreting the scope of the dormant foreign Commerce Clause. In *Barclays Bank*, she argued that the dormant foreign Commerce Clause only bars "double taxation that (1) burdens a foreign corporation in need of protection for lack of access to the political process, and (2) occurs 'because [the State] does not conform to international practice.'"). *Barclays Bank*, at 320. The majority in *Barclays* however, regarded the "battalion of foreign governments that has marched to Barclays' aid, deploring worldwide combined reporting in diplomatic notes, *amicus* briefs, and even retaliatory legislation" as proof that foreign corporations did not need political protection from the dormant Commerce Clause. *Id*., at 320. Since *Barclays*, the Supreme Court has moved away from the political-safeguards theory of the dormant Commerce Clause, including by moving away from the dictum announced in *Goldberg v. Sweet* that the dormant Commerce Clause should not apply to residents complaining about restriction or discrimination imposed by their own states because those residents have recourse to political solutions. *See, e.g., Wynne* at 1798 (noting that the Court has "repudiated" the notion that the dormant Commerce Clause does not apply to residents).

[86] *See* references in *supra* note 82. Other questions, including for example, whether the market participation exception to the dormant Commerce Clause applies to regulation of foreign commerce, remain open. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 66 (1st Cir. 1999) ("we believe that the risks inherent in state regulation of foreign commerce—including the risk of retaliation against the nation as a whole and the weakening of the federal government's ability to speak with one voice in foreign affairs,… weigh against extending the market participation exception to the Foreign Commerce Clause") (citations omitted).

2. Multiple Taxation

This Subpart discusses the first additional consideration—beyond the *Complete Auto* factors—that applies in dormant foreign Commerce Clause tax cases, namely, whether the challenged rule creates a substantial risk of multiple international taxation. As we explain, the Supreme Court's position on double international taxation under the dormant foreign Commerce Clause context is unclear, reflecting the age of its dormant foreign Commerce Clause decisions, the most recent of which dates to the mid-1990s.[87]

a) Japan Line

In 1979, a unanimous Supreme Court decided *Japan Line*, a case challenging a California tax on the value of shipping containers.[88] California imposed property tax on assets present in California on the "lien date," a particular day of each year.[89] As applied to containers used in interstate commerce, California argued that the tax was well apportioned because the value of containers present in California on the lien date was representative.[90] Six Japanese companies challenged the rule, arguing that although the presence of their shipping containers on the lien date was "fairly representative of the containers 'average presence' [in California] during each year,"[91] the imposition by California of any property tax *at all* on containers owned by foreign companies and used in international commerce violated the dormant foreign Commerce Clause. The Supreme Court accepted the lower court's factual conclusions that (1) under accepted international practice, Japan did not tax the shipping containers of U.S. companies,[92] and (2) the Japanese companies in fact suffered unrelieved double tax because Japan taxed the full value of all containers owned by its corporate residents in addition to California taxing some of those containers.[93]

After assuming that the California tax passed the *Complete Auto* test, the Supreme Court concluded that "[w]hen construing Congress' power 'to regulate commerce with

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[87] *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

[88] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

[89] *Japan Line*, at 437.

[90] *Japan Line* , at 437.

[91] *Id*.

[92] *Id*.

[93] *Id.* at 436, 452, n. 17.

foreign Nations,' a more extensive constitutional inquiry is required."[94] Specifically, when a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in *Complete Auto*, come into play. The first is whether the state tax creates an "enhanced risk of multiple taxation."[95] In the dormant interstate Commerce Clause context, the nondiscrimination and fair apportionment prongs of the *Complete Auto* test handle risks of double state taxation, and courts use the internal consistency test to determine whether or not a state's substantive tax rule or its apportionment rule operate as functional tariffs on interstate commerce.[96] Specifically, state taxes that are internally consistent with respect to the taxation of interstate commerce are nondiscriminatory and fairly apportioned.[97]

Although the *Japan Line* Court did not expressly apply the internal consistency test, if it had, the Court would have found the California tax regime to be internally consistent with respect to foreign commerce. If other jurisdictions adopted California's rule, each container would be taxed by only one tax jurisdiction, the one in which the container was physically present on the lien date, and owners of shipping containers would never be subject to double tax. Nevertheless, the Supreme Court held that the California tax as applied to instrumentalities of interstate commerce such as shipping containers owned by Japanese companies and used in "oceangoing traffic," violated the dormant foreign Commerce Clause due to the risk of double taxation that arose from the possibility that Japan would seek to tax the containers' full value.[98] When California responded that it was Japan, not California, that created the risk of multiple tax by assessing the whole value of the containers to tax without apportionment, the Court responded that "California's tax… must be evaluated in the realistic framework of the custom of

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[94] *Japan Line*, at 446 (quoting the Constitution). *Cf. Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57 (1933) ("It is an essential attribute of the [foreign commerce] power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action.").

[95] *Japan Line*, at 446.

[96] Knoll & Mason (2017), *supra* note ___ (using the example of tax rates); Knoll & Mason, *How the Massachusetts Supreme Judicial Court Should Apply Wynne*, 78 STATE TAX NOTES 921 (2015) (using the example of apportionment formulas) [hereinafter Knoll & Mason, *Massachusetts*].

[97] *See, e.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978) (holding that a state was free to adopt an apportionment formula that differed from the formula used by forty-four of the forty-six states imposing an income tax).

[98] *Japan Line* at 447, 449, 451.

nations,"[99] under which "Japan has the right and the power to tax appellants' containers at their full value; nothing could prevent it from doing so."[100]

Thus, according to the *Japan Line* Court, even "fairly apportioned" taxes may violate the dormant foreign Commerce Clause.[101] The Court distinguished interstate commerce by noting that when double taxation arises from overlapping taxes by two or more U.S. states, the Supreme Court has "the ability to enforce full apportionment by all potential taxing bodies."[102] In contrast, "[i]f an instrumentality of commerce is domiciled abroad, the country of domicile [Japan] may have the right, consistently with the custom of nations, to impose a tax on… full value."[103] Indeed, the Court concluded that "California's tax… creates more than the *risk* of multiple taxation; it produces multiple taxation in fact."[104] The Court distinguished *Moorman*,[105] a case in which it upheld an unusual (by other states' standards) state apportionment formula notwithstanding that it created a risk of double state taxation.[106] According to the *Japan Line* Court, "[e]ven a slight overlapping of tax—a problem that might be deemed *di minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."[107]

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[99] *Id*. at 454.

[100] *Id*. at 454.

[101] *Id*. The *Japan Line* Court went to some effort to distinguish *Moorman*, reasoning that the risk of multiple state taxation in *Moorman* was speculative, whereas the risk of multiple international taxation in *Japan Lines* was certain. *Id*. at 455.

[102] *Id*. at 447.

[103] *Japan Line*, at 447.

[104] *Id*. at 452.

[105] *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978).

[106] *Japan Line*, at 456. In *Moorman*, the challenged state used single-factor-sales apportionment, whereas all other states at that time used three-factor (sales, properly, payroll) apportionment.

[107] *Id*., at 456. As in *Japan Line*, in *Mobil Oil*, the Supreme Court again emphasized its ability to "correct" multiple taxation that arises from overlapping exercises of tax powers by states. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). *Mobil Oil* involved Vermont's ability to tax a nondomiciliary parent company on dividends comprised of foreign income. Vermont included an apportionable share of those dividends in the parent's income taxable in Vermont. *Mobil Oil*, at 429. Mobil Oil argued that such dividends should be allocated exclusively to the parent's domicile state, New York. *Mobil Oil*, at 435, 444. Refusing to find a constitutional preference for allocation over apportionment, the Court noted that even

The *Japan Line* Court reasoned that because neither the Supreme Court nor any other "authoritative tribunal" could mandate that foreign jurisdictions use fractional apportionment rather than source-and-residence rules, states faced additional restrictions on their ability to tax foreign commerce that did not apply to restrict states' ability to tax interstate commerce.[108] The Court regarded it as essential to its holding that the case involved instrumentalities of interstate commerce.[109]

b) *Container Corporation* and *Barclay's Bank*

The Supreme Court took a large step back from the far-reaching implications of *Japan Line* in *Container Corporation*, a 5-3 decision that brought dormant foreign Commerce Clause doctrine into much closer alignment with modern dormant interstate Commerce Clause doctrine on the issue of double taxation.[110] *Container* involved a challenge by a domestic company with foreign operations to California's worldwide unitary tax with formula apportionment. Under its apportionment rule, California taxed a portion of the company's global unitary business income, as measured by its California sales, payroll, and property compared to its global sales, payroll, and property.[111] Among other claims, the taxpayer argued that the California rule violated the fair apportionment prong of *Complete Auto* and that the dormant foreign Commerce Clause obliged California to use separate accounting and the arm's-length method to

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though apportionment created a risk of multiple state taxation, the Court had the "power to correct any gross overreaching" *Id*. at 446. Although Mobil Oil alleged a "discriminatory effect on foreign commerce as a result of multiple state taxation," the Court found that effect "just as detectible and corrigible as a similar effect on commerce among the states. Accordingly, we see no reason why the standard for identifying impermissible discrimination should differ in the two instances." *Id*. at 447.

[108] *Japan Line*, at 447. *See id*. at 455 (in this case "true apportionment does not exist and cannot be policed by this Court at all").

[109] *Japan Line*, at 444 (describing the question presented as "whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State"). *Id.* at 446-7 ("In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value").

[110] *Container Corp. of Am. v. Franchise Tax Bd*., 463 U.S. 159 (1983). (Justice Stevens did not participate in the decision).

[111] *Container*, at 163.

allocate income instead of formula apportionment because separate accounting was both the federal rule and the internationally accepted standard.

Following precedent in which it had already accepted formula apportionment, and citing the internal consistency test, the Supreme Court rejected the fair-apportionment claim.[112] It noted that California's "the three-factor [apportionment] formula is necessarily imperfect. But we have seen no evidence demonstrating that the margin of error… is greater than [that]… inherent in the sort of separate accounting urged upon us."[113] Noting that "in the interstate commerce context, however, the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment," the Court confirmed that "a more searching inquiry is necessary when we are confronted with the possibility of international double taxation."[114] The Court acknowledged that *Container* was similar to *Japan Line*. Both involved actual double taxation that stemmed from a divergence in the allocation rules adopted by a U.S. state and a foreign government. And in both cases, the foreign government's allocation rule represented the accepted international practice.[115] Notwithstanding these similarities, the Supreme Court distinguished *Container* from *Japan Line*, ultimately holding that the California apportionment regime did not offend the Constitution. First, the Court drew a distinction between property taxes on instrumentalities of interstate commerce and income taxes, noting that "'the reasons for allocation to a single situs that often apply in the case of property taxation carry little force' in the case of income taxation."[116] The Court has since abandoned sharp distinctions between types of taxes under the nondiscrimination prong of dormant Commerce Clause analysis so this basis of distinction is not relevant to modern cases.[117]

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[112] *Container*, at 170 (citing *Butler Bros. v. McColgan*, 315 U.S. 501 (1942)). *See id.* at 181 to (reasoning that separate accounting with arm's-length was not the benchmark by which unfair apportionment could be established).

[113] *Container*, at 183-4.

[114] *Container*, at 171. *See id.* at 185 (concluding that "we must subject this case to the additional scrutiny required by the Foreign Commerce Clause").

[115] *Container*, at 187.

[116] *Container*, at 188 (quoting Exxon Corp., 447 U.S., at 445).

[117] *Cf. Wynne*, at 1796-7 (tracing the Court's move away from formalism and towards economic substance in evaluating state taxes).

Second, the Court reasoned that whereas the California property tax struck down in *Japan Line* led inevitably to double international taxation, the apportionment rule challenged in *Container* did not. In *Japan Line,* collection by California of any property tax on the shipping containers led to double taxation because Japan, as the domicile state, already taxed the containers in full. And, since the Court could not do anything about Japan's taxation, the only way to avoid double taxation was to require California to forgo tax entirely. Moreover, such forbearance would be effective: "the taxing State could entirely eliminate one important source of double taxation simply by adhering to one bright-line rule: do not tax, to any extent whatsoever," foreign-owned cargo containers used in international commerce.[118] The Court thought it was "by no means unfair" to require California in *Japan Line* to forgo property taxation on shipping containers owned by foreign companies, because such forbearance "did no more than reflect consistent international practice and express federal policy."[119]

In contrast, the *Container* Court held that, unlike the overlap between the California and Japanese property tax regimes, the overlap between the California apportionment regime and other countries' separate accounting regimes was not inevitable.[120] And even if use by California and other countries of "two distinct methods of allocating the income of a multi-national enterprise"[121] led to some overlap, the Court noted that forcing California to switch to separate accounting might not cure the double tax, since different states enforce separate accounting differently.[122] Citing *Moorman*, the *Container* Court concluded that it would be "perverse, simply for the sake of avoiding double taxation, to require California to give up one allocation method that sometimes results in double taxation in favor of another allocation method that also sometimes

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[118] *Container*, at 189

[119] *Container*, at 191.

[120] *Container*, at 188 ("Whether the combination of the two methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case." *Container*, at 188-9 (multiple tax was not the "inevitable result" of the California apportionment rule).

[121] *Container*, at 188.

[122] *See id*. at 191 ("if California were to adopt some version of the arm's-length approach, it could not eliminate the risk of double taxation of corporations subject to its franchise tax, and might in some cases end up subjecting those corporations to more serious double taxation than would occur under formula apportionment").

results in double taxation."[123] Finally, the Court held that the solution imposed in *Japan Line*—complete forbearance of property tax on foreign companies' shipping containers—was not appropriate in *Container.* According to the Court, preventing California from assessing income taxation on a domestic company with foreign operations involved "obvious unfairness [that] requires no elaboration."[124]

The Court also distinguished the cases two by observing that *Container* involved the taxation of a domestic company, whereas *Japan Line* involved the taxation of instrumentalities of foreign commerce owned by foreign companies.[125] The Court did not elaborate on this point, and partially abandoned it eleven years later in *Barclays Bank*, a case in which the Court upheld application of California's worldwide apportionment rule to a foreign-parented multinational.[126]

In a dissent in *Container* joined by Chief Justice Burger and Justice O'Connor, Justice Powell concluded that the California apportionment rule violated both of the additional dormant foreign Commerce Clause factors announced under *Japan Line*. Among other reasons for his dissent, Justice Powell cited that the California regime not only created a risk of multiple international taxation, it "resulted in actual double taxation."[127] When other countries used separate accounting, the California regime would lead to double tax whenever California had a larger share of the unitary business's factors than did other countries.[128] Moreover, despite the majority's claims to the contrary, Justice Powell noted that there did indeed exist a method by which California could prevent the risk of multiple international taxation. Specifically, instead of adopting separate accounting, California could apportion only the company's federal income,

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[123] *Container*, at 192 (citing Moorman Mfg. Co., 437 U.S., at 278–280). *See also* Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 319 (1994) (forcing California to switch to the world standard would not "dispositively lessen the risk of multiple taxation")

[124] *Container*, at 190

[125] *Container*, at 189. *See also id*. at n. 24 ("we deliberately emphasized in *Japan Lines* the narrowness of the question presented: 'whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State'").

[126] *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994).

[127] *Container*, at 198 (Powell, J., dissenting).

[128] *Container*, at 200 (Powell, J., dissenting).

rather than its worldwide income.[129]

c) Other Cases

Other taxes survived judicial review, notwithstanding that they involved actual or at least potential double tax. For example, decided in 1980, *Mobil Oil* involved Vermont's inclusion in its tax base via formulary apportionment of a portion of dividends Mobil received from its foreign subsidiaries on the theory that they were part of the company's unitary business.[130] Mobil argued that the dormant foreign Commerce Clause should completely preclude Vermont from taxing such dividends because they should be allocated exclusively to New York, the company's state of domicile.[131] Thus, although *Mobil Oil* involved foreign-source income, it was really a case about the risk of double U.S.-state taxation, not double international taxation. Although Mobil Oil claimed that all the foreign dividends were apportionable only to New York, New York did not include them, so the case also did not involve actual double taxation.[132] Unwilling to "establish a theoretical constitutional preference" for taxation by a "single situs " over "[t]axation by apportionment,"[133] the Supreme Court, by a 6-1 majority, upheld Vermont's tax on the apportioned dividends. The *Mobil Oil* Court distinguished *Japan Line* on grounds that in this case, the Court possessed the "power… to correct excessive taxation" that might arise from overlaps between the apportionment rules of New York and Vermont.[134]

In 1993 in *Itel Containers International*, the taxpayer complained that Tennessee's imposition of sales tax on leases of shipping containers that traveled in international

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[129] *Container*, at ___, n. 1. (Powell, J., dissenting). Shortly thereafter, California succumbed to political pressure and provided an election to limit unitary reporting to "the United States' 'water's edge,'" meaning companies could limit the unitary income calculation only to companies whose presence in the United States "surpasses a certain threshold." *Barclays*, at 306.

[130] The cases also implicated the taxation of dividends paid by U.S. companies domiciled outside Vermont. We do not address this part of the claim, except to note that the Court held that the dormant Commerce Clause did not preclude Vermont from taxing an apportionable share of these dividends.

[131] The taxpayer argued that "dividends from a 'foreign source' by their very nature are not apportionable income." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 435 (1980).

[132] *Mobil Oil*, at 444 (1980).

[133] *Mobil Oil*, at 444. *Id*. at 445 ("we find no adequate justification for such a preference.").

[134] *Mobil Oil*, at 447. *Id*. at 448 (also noting that *Japan Line* involved tax on instrumentalities of interstate commerce).

commerce and were delivered to Tennessee violated the dormant foreign Commerce Clause.[135] Itel argued that although no other countries actually imposed duplicative sales taxes on the leases, Tennessee "invites multiple taxation of container leases because numerous foreign nations have a sufficient taxing nexus with the leases to impose equivalent taxes."[136] The Court rejected this argument because "the foreign commerce clause cannot be interpreted to demand that a State refrain from taxing any business transaction that is also potentially subject to taxation by a foreign sovereign."[137] The Court also noted that the relevant transactions took place in Tennessee, and that Tennessee "reduces, if not eliminates, the risk of multiple international taxation" by crediting other jurisdictions' sales taxes on the leases, including foreign taxes.[138]

d) Conclusion

The Supreme Court has only once, in *Japan Line*, applied the "risk of multiple international tax" doctrine to strike down a state tax under the dormant foreign Commerce Clause. Although the Court did not expressly consider the internal consistency of the California tax at issue in *Japan Line*, as we explained above, the tax was internally consistent. That said, since *Japan Line*, the Supreme Court has never struck down under the dormant foreign Commerce Clause a tax rule that was internally consistent, even when the challenged rule led to multiple international tax, as it did in *Container Corporation* and *Barclays*.

Moreover, although not a dormant foreign Commerce Clause case, in 2015 *Wynne* raised new doubts about whether *Japan Line's* substantial-risk-of-multiple-international-tax doctrine survives. The *Wynne* Court made it clear that although the dormant Commerce Clause forbids *discriminatory* double taxation, it does not forbid *nondiscriminatory* double taxation.[139] Double tax discriminates when it is internally

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[135] *Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60 (1990).

[136] *Itel*, at 74.

[137] *Itel*, at 74.

[138] *Id*.

[139] *Wynne*, at 1804 (observing the "critical distinction… between discriminatory tax schemes and double taxation that results only from the interaction of two different but nondiscriminatory tax schemes"). For more on the differences between discriminatory and nondiscriminatory double taxation, see Knoll & Mason (2017), *supra* note ___.

inconsistent, otherwise it doesn't.[140] This holding makes sense because double taxation that arises from the mismatched, but internally consistent tax rules of different states does not have protectionists effects, whereas double taxation that arises from an internally inconsistent rule imposed by a single state does have protectionist effects.[141] Although the Court has not expressly endorsed the *Wynne* view in the dormant *foreign* Commerce Clause context, its approval in *Container Corporation* and *Barclays* both decided before *Wynne* but after the Court's adoption of the internal consistency test, despite the fact that the internally consistent taxes in those cases led to multiple international double taxation, strongly suggests that if it faced the issue again, the Court would adopt the *Wynne* view of double taxation in the dormant foreign Commerce Clause context. Moreover if the dormant Commerce Clause prevents protectionism, the Court's decisions upholding the California worldwide apportionment regime in *Container* and *Barclay* were correct. Because that regime was internally consistent, any double international taxation resulting from it arose from a *mismatch* between the California apportionment rule and other countries' different allocation rules (e.g., separate accounting with arm's-length), not from discrimination by California. Because the California rule was internally consistent, it was not protectionist.[142] The same analysis applies to the sales tax on container leases upheld in *Itel.*

While subsequent cases including *Container*, *Barclays*, *Itel*, and *Wynne* suggest that internally consistent tax do not violate the dormant Commerce Clause, the Court has never overruled *Japan Line*, and it has cited it since *Container*.[143] Also unclear is the impact of a consistent international tax practice on the obligations of the states under the dormant foreign Commerce Clause. The *Japan Line* Court based its decision that California created an impermissible risk of multiple international taxation at least in part on the fact that Japan followed international practice in taxing the full value of containers owned by its residents, whereas California deviated from that practice. On the other hand, California's deviation from the dominant international practice of taxing income

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[140] *Wynne*, at 1802.

[141] *See also* Knoll & Mason (2017), *supra* note ___, at 326-9 (explaining that internally consistent taxes are not protectionist).

[142] For more on the relationship between apportionment rules, discrimination, and internal consistency, see Knoll & Mason, *Massachusetts*, supra note ___.

[143] *See Barclays*, at 318-22 (citing the *Japan Line* factors, but holding that the state satisfied both of them). *See also Wardair*, at 8-9 ("there is no threat of multiple international taxation in this case").

via separate accounting and arm's-length did not create an unacceptable risk of multiple tax in *Container* or *Barclays*, where a majority of the Court observed that "we cannot agree that 'international practice' has such force as to dictate this Court's Commerce Clause jurisprudence."[144]

3. Undermining Federal Ability to "Speak with One Voice"

The other additional dormant foreign Commerce Clause requirement, which the Court also announced in *Japan Line*, is that states must not "impair federal uniformity in an area where federal uniformity is essential."[145] States thus must not "prevent this Nation from 'speaking with one voice' in regulating foreign commerce."[146] The cases do not present a clear picture of when states violate the "one voice" requirement.

a) Deviation from International Practice

One relevant, but not dispositive factor in whether a state violates the one-voice requirement is whether the state tax practice matches international tax practice. In *Japan Line*, the Court pointed to the Customs Convention on Containers, a treaty signed by the United States and Japan among others, that required that shipping containers "temporarily imported are admitted free of 'all duties and taxes whatsoever chargeable by reason of importation.'"[147] Although the treaty did not appear to expressly bar the California tax because it was not an import tax,[148] the Court concluded that treaty "reflect[ed] a national policy to remove impediments to the use of containers as 'instruments of international traffic.'"[149]

In *Japan Line*, the Court had accepted that it was international practice for states to assess property taxes on the full value of shipping containers owned by their residents.

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[144] *Barclays*, at 320.

[145] *Japan Line*, at 448. *See also id*. at 448 ("'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'") (*quoting Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59, (1933)). As the Tenth Circuit put it, the dormant foreign Commerce Clause "is a restriction on the States. It silences them so that only the voice of the national government is heard on international matters." *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018).

[146] *Id*. at 451.

[147] *Japan Line*, at 452-3.

[148] The Court did not make a finding on this issue.

[149] *Japan Line*, at 452-3.

Thus, California's variant policy of taxing shipping containers of all companies on an apportioned basis—whether resident or not—deviated from international practice, which risked triggering "international disputes over reconciling apportionment formulae."[150] The California property-tax rule therefore violated the federal uniformity requirement of the dormant foreign Commerce Clause.[151]

But, as discussed above, in *Container and Barclays*, the Court declined to impose the international practice[152] of apportioning income via separate accounting and arm's-length transfer pricing on California because doing so would not necessarily eliminate (or even lessen) double taxation.[153]

b) Risk of Retaliation

In *Japan Line*, the Court expressed a concern that the risk of retaliation by Japan to California's deviant (by world standards) property tax rule was "acute" and that such retaliation "would be felt by the Nation as a whole," not just California.[154] But in *Container*, the Court emphasized its lack of institutional competence in determining "precisely when foreign nations will be offended by particular act"[155] or when they might retaliate.[156] Moreover, even when presented with clear evidence of international opposition and threatened retaliation in *Barclays Bank*, the Supreme Court still held that California's apportionment rule did not violate the dormant Commerce Clause because "Congress, not 'international practice' holds the reins" when it comes to the Commerce

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[150] *Id*., at 450

[151] *Id*. at 453.

[152] *See Barclays Bank*, at 305 ("The corporate income tax imposed by the United States employs a 'separate accounting' method, a means of apportioning income among taxing sovereigns used by all major developed nations.").

[153] *Container*, at 192 In contrast, Justice O'Connor would hold that state taxes violate the dormant foreign Commerce Clause when they create a risk of multiple tax that arises from the state's use of a standard or rule that differs from "accepted international practice." *Barclays*, at 335 (O'Connor, J., dissenting in part and concurring in part).

[154] *Id.* at 453 (the "risk of retaliation by Japan … would be felt by the Nation as a whole)."

[155] *Container*, at 194.

[156] *Id*. The *Container* Court also gave reasons why it thought retaliation was not likely in the case of the California apportionment regime, including that it did not inevitably result in double taxation. *Id.* at 195.

Clause.[157] The Supreme Court furthermore concluded that "Barclays' and its amici's argument that California's worldwide combined reporting requirement is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum. The judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'"[158]

c) Deviation from Federal Practice

Another issue in these cases is whether to avoid violating the one-voice requirement states must adopt the same substantive tax policies as the federal government when those policies touch on foreign commerce. For example, one question in *Container* was whether the dormant foreign Commerce Clause required California to adopt the same apportionment rule as the federal government, namely separate accounting with arm's-length transfer pricing. The Supreme Court held that federal-state tax base conformity was not required,[159] noting that "if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, '[a]bsent some explicit directive from Congress, ... that treatment of foreign income at the federal level mandates identical treatment by the States.'"[160]

d) Discerning Federal Policy

Under *Japan Line*, a state may not "impair federal uniformity in an area where federal uniformity is essential"[161] nor "prevent this Nation from 'speaking with one voice' in regulating foreign commerce."[162] In *Container*, the Court limited the *Japan Line*

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[157] *See, e.g.*, *Barclays* at 320 (describing a "battalion of foreign governments that has marched to Barclays aid deploring worldwide combined reporting in diplomatic notes, *amicus* briefs, and even retaliatory legislation"). *See id*. (O'Connor, J., concurring in part and dissenting in part) (citing diplomatic notices to the effect that "[m]ost of the United States' trading partners have objected to California's use of worldwide combined reporting").

[158] *Barclays*, at 327-8 (quoting *Container* at 194).

[159] For more on tax-base conformity, see Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013).

[160] *Container*, at 194 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 448 (1980)). *Cf. Mobil Oil*, at 448 ("Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the states. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but has not exacted, legislation designed to regulate state taxation of income."

[161] *Japan Line*, at 448

[162] *Id*. at 451

doctrine, stating that it would not overturn a state tax that "merely has foreign resonances, but does not implicate foreign affairs." This requirement leads to significant open questions. For example, when is federal uniformity essential? When does a state interfere with the federal government's ability to speak with one voice? How can courts distinguish taxes with mere foreign resonances, from those that implicate foreign affairs?[163] And to the extent that any of these questions turn on a court's ability to discern federal policy (as something other than federal law), how should it do so?[164]

In *Japan Line*, the Court rested its conclusion that by imposing property taxes on shipping containers owned by foreign companies and used in international commerce on several grounds. First, it understood the United States' participation in the Customs Convention on Containers, a treaty that prohibited import taxes on shipping containers. "to reflect[] a national policy to remove impediments to the use of containers as 'instruments of international traffic."[165] Although the Court did not find that the Convention by its terms barred the challenged California property tax,[166] the Court nevertheless held that by taxing shipping containers at all California "frustrate[d] attainment of federal uniformity"[167] and thereby violated the dormant foreign Commerce Clause's one-voice requirement.

But on the basis of similar types evidence, the Supreme Court in later cases found that a state did not interfere with federal policy. For example, in 1986 in *Wardair Canada, Inc. v. Florida Dept. of Revenue*,[168] the Supreme Court considered whether a sales tax on

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[163] Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 64 (2016) (noting that dichotomy between laws that have foreign resonances and those that implicate foreign affairs is elusive).

[164] See Caleb Nelson, Judicial Review of Legislative Purpose, (2008) (tracing historical approaches to whether prohibitions of certain legislative purposes were judicially enforceable and evolving methods adopted by the judiciary to discern legislative purpose, including in the dormant Commerce Clause context). *See also* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 *Fordham L. Rev*. 1955, 1989 (2015) (advocating against finding state action barred under the dormant foreign Commerce Clause in the absence of a clear federal statement).

[165] *Japan Line*, at 453. In favor of the proposition that there was a noational policy to remove impediments to such use of containers, the Court also cited 19 U.S.C. § 1322(a), a federal law that grants the Treasury Secretary authority to exempt instruments of international traffic from customs laws. Japan Line *at 453.*

[166] Property taxes are not, without more, import duties, and so presumably would not be barred by the Customs Convention on Containers.

[167] *Id*.

[168] 477 U.S. 1 (1986).

aviation fuel violated the dormant foreign Commerce Clause when Florida imposed it on all fuel purchased in the state, including fuel used exclusively for international flights. The taxpayer conceded that the tax satisfied *Complete Auto* and that it created no risk of multiple international taxation.[169] The only remaining dormant foreign Commerce Clause question was whether the tax prevented the federal government from speaking with one voice.

The *Wardair* Court confirmed that the national uniformity requirement announced in *Japan Line* was concerned "not with an actual conflict between state and federal law, but rather with the policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when the Federal Government remains silent."[170] The taxpayer argued that the state sales tax threatened "a federal policy" of reciprocal tax exemptions on aviation fuel and similar goods and services related to international air traffic.[171] But the Supreme Court disagreed, arguing that not only was there no evidence for such a policy, but that by entering into various agreements that limited the federal, but not state, entitlement to tax aviation fuel, the federal government had essentially announced a policy not to restrict such state taxes.

The taxpayer, supported by the United States as *amicus curiae*, argued that a federal policy opposing any taxation of aviation fuel could be derived from a combination of several sources, namely a multilateral treaty under which the United States and 156 partners agreed not to impose certain national fuel taxes; a resolution adopted by the International Civil Aviation Organization, of which the United States was a member, that endorsed fuel tax exemptions; and 70 bilateral aviation agreements under which the United States agreed not to impose national fuel taxes.

In a decision joined by seven justices,[172] the Court held that these sources did not amount to evidence of a coherent federal policy to forbid state air fuel taxes. On the contrary, federal law and several of the cited sources expressly permitted the type of subnational fuel tax at issue in the case, even as they forbade certain national and

[169] *Wardair*, at 8-9.

[170] *Wardair*, at 8.

[171] *Wardair*, at 9.

[172] Chief Justice Burger joined in the judgment, but he concluded that federal law expressly permitting the tax was sufficient to dispose of the dormant foreign Commerce Clause inquiry; the Court need not have consulted international agreements. *See Wardair*, at 17 (Burger, C.J, concurring) ("Just as we need not look beyond the plain language 'when a federal statute unambiguously *forbids* the States to impose a particular kind of tax on an industry affecting interstate commerce,' we need not look beyond the plain language of a federal statute which unambiguously *authorizes* the States to impose a particular kind of tax.") (quoting *Aloha Airlines*, 464 U.S., at 12). (emphasis in original).

subnational fuel taxes.[173] Moreover, regarding the resolution, the Court noted that it was not "signed, entered into, agreed upon, approved, or passed by either the Executive or Legislative branch of the Federal government."[174] As such, it represented not a policy of the United States, but merely the policy of an organization of which the United States was a member.[175] Thus, the Court concluded that the federal government came closer to *consenting* to the challenged tax than it did to forbidding it; in the Court's view "the Federal Government has affirmatively decided to permit the States to impose these sales taxes."[176]

Justice Blackmun dissented in *Wardair*, concluding that if the regulated area was one that necessitates a uniform national rule, then the dormant foreign Commerce Clause applies to prevent state action unless the "intent of the Federal Government to permit state activity [is] 'unmistakably clear'"[177] Not only was a federal intention to allow state taxation of airline fuel not unmistakably clear, but "[t]he Government's efforts in the international sphere reveal an overarching and coherent policy directed at the creation of reciprocal tax exemptions in the area of foreign aviation."[178] Although the federal government "stopped short of explicitly banning state levies on aircraft fuel used in foreign travel, the indisputable pattern that emerges is one of a policy of reciprocal tax exemptions for instrumentalities of international commerce, like the containers in *Japan Line* or the fuel at issue here."[179] Justice Blackmun argued that Florida's tax could inspire retaliation by other countries and hamper U.S. negotiations with them.[180]

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[173] *Wardair*, at 11-12.

[174] *Id.* at 11.

[175] *Wardair*, at 11.

[176] *Id*., at 12 ("It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow.").

[177] *Wardair*, at 18-19 (Blackmun, J., dissenting) (quoting South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91 (1984)).

[178] *Wardair*, at 19 (Blackmun, J., dissenting).

[179] *Id*.

[180] *Id*., at 20.

Adding further doubts about the scope of the one-voice requirement, the Supreme Court found no violation when it twice considered the constitutionality of California's worldwide formula apportionment regime. In *Container* in 1983, Court noted that the solicitor general had not filed an amicus brief in the case,[181] nor had the federal government taken the opportunity to bind states to the arm's-length method its tax treaties.[182] Although the Court expressly acknowledged that an amicus brief from the United States could not be dispositive, the Court concluded that the California apportionment rule was not "preempted by federal law or fatally inconsistent with federal policy."[183] When the same California regime was challenged again eleven years later in *Barclays Bank*, the Court noted that in cases involving "otherwise constitutional" taxes, "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential'; it need not convey its intent with the unmistakable clarity required to permit state regulation that *discriminates* against interstate commerce or otherwise falls short under *Complete Auto* inspection."[184] Thus, although Congress must *expressly* consent to taxes that violate *Complete Auto* (for example because they are discriminatory), the Supreme Court will uphold "otherwise constitutional" taxes under the one-voice doctrine provided that Congress has at least "passively" indicated that such practices do not impair federal uniformity.[185]

Because the California apportionment rule challenged in *Barclays Bank* was otherwise constitutional, the Supreme Court sought "'specific indication of congressional intent' to bar the state action."[186] It noted that although eleven years had passed since the Supreme Court had approved California's regime in *Container*, Congress had not preempted the rule, even though Congress had considered bills to require states to use arm's-length allocation rules.[187] Nor had the federal government

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[181] *Container*, at 196-7. *See also Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60, 75 (1990) (noting, but declaring not dispositive, that the United States had filed an amicus brief defending the challenged state's law as "not interfer[ing] with our ability to 'speak with one voice'").

[182] *Container*, at 197.

[183] *Container*, at 197.

[184] *Barclays Bank*, at 323 (emphasis added and citations omitted). *See id.* (citing *Maine v. Taylor*, 477 U.S. 131, 139, (1986) (requiring an "unambiguous indication of congressional intent" to insulate "otherwise invalid state legislation" from judicial dormant Commerce Clause scrutiny.

[185] *Barclays*, at 323

[186] *Barclays*, at 324.

[187] *Barclays*, at 325.

bound states to the arm's-length method in its tax treaties; indeed, when the executive negotiated a tax treaty with the United Kingdom that would have prevented California from applying its worldwide apportionment regime to companies resident in the United Kingdom, the Senate only ratified it subject to a reservation reading the relevant provision out of the treaty.[188] The Supreme Court took such evidence as "indicia of Congress's willingness to tolerate worldwide combined reporting mandates, even when those mandates are applied to foreign corporations."[189] Moreover, the Court concluded that executive branch statements, including an amicus brief in *Barclays* filed by the U.S. Solicitor General arguing that California interfered with the federal government's ability to speak with one voice, were not dispositive. The Court gave two reasons for upholding the California apportionment rule despite executive branch communications that opposed it. First, the commerce power belongs to Congress, not the executive; second, there was ample evidence from Congress's failure to explicitly preempt the California practice that it did not intend to preempt it.[190]

Other than in *Japan Lines*, the Supreme Court has not struck down any other state taxes for violating the one-voice requirement under the dormant foreign Commerce Clause. Indeed, when the Supreme Court considered another case that involved taxes on shipping containers in 1993, *Itel Containers*, it rejected the notion that Tennessee's sales tax, as applied to leases of shipping containers used in both foreign and domestic commerce, impeded federal objectives. In reaching this conclusion, the Supreme Court relied on the exact same Customs Convention on Containers from *Japan Line*, but this time, the Court used it to draw the opposite inference. Because the federal government in the Convention and in other statutes had expressly restricted states' ability to tax only in certain "defined circumstances"[191] that did not include the type of sales tax on

[188] *Barclays*, at 326.

[189] *Barclays*, at 327.

[190] *Barclays*, at 328. *Id*., at 329-30 ("The Executive Branch actions press releases, letters, and *amicus* briefs on which [the taxpayer] here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting").

[191] *Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60, 75 (1990).

shipping containers challenged in *Itel*, the Court concluded that the federal government implicitly intended to permit such taxation.[192]

e) Conclusion

Unlike the "risk of multiple international tax" requirement in *Japan Line,* which we find to be redundant with the discrimination and fair apportionment prongs of *Complete Auto*, the "one-voice" requirement seems to add a genuinely different (and at first glance sensible) requirement in foreign commerce cases that does not apply in interstate cases. But the Supreme Court has only invoked it once, in *Japan Line*, to strike down a state tax. Moreover, as narrowed by the Supreme Court in *Barclays*, it would appear to apply to only a small set of cases. First, if a state law overtly conflicted with federal policy regarding foreign commerce, it presumably would be preempted.[193] In contrast, where state laws do not overtly conflict with federal law, *Barclays* and *Itel* suggest that they will not violate the dormant foreign Commerce Clause, at least in cases where the state tax is "otherwise constitutional," meaning that it passes the *Complete Auto* test (and whatever may remain of *Japan Line's* multiple international tax test). In such cases, the Court will find taxes to be "passively" approved by Congress.[194] But where state taxes fail to comply with *Complete Auto*, they are unconstitutional for that reason, and the Court would presumably not reach the one-voice question.

So what is left of the "one-voice" test? And if it is to be resuscitated, how are the Courts to ascertain the need for federal uniformity in the absence of an enacted law, treaty or other legislative action involving both the legislative and executive branches?

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[192] *Itel*, at 76 (citing "strong indications from Congress that Tennessee's method of taxation is allowable"). In a part of its decision considering whether the Tennessee tax was federally preempted, the Court noted that "federal regulatory scheme for containers used in foreign commerce discloses no congressional intent to exempt those containers from all or most domestic taxation"). *Id*. at 70.

The *Itel* Court also noted that the United States solicitor general filed an amicus brief in support of the Tennesee tax, although that brief was "by no means dispositive." *Itel*, at 75. *Itel* was decided before the Court's criticism in *Barclays* of using executive branch briefs to establish federal commerce policy.

[193] See Leanne M. Wilson, *The Fate of Dormant Foreign Commerce Clause after Garamendi and Crosby*, 107 COLUM. L. REV. 746 (2007) (arguing that cases resolved under the dormant foreign Commerce Clause would be better handled under preemption analysis). The problem with Wilson's approach is that it would leave a gap in cases where Congress has not spoken. In such cases, the dormant foreign Commerce Clause remains relevant. *See generally* Caleb Nelson, Preemption, 86 Va. L. Rev. 225 (2000).

[194] *Barclays*, at 323.

The court has not provided any answers to these and other questions raised by the requirement of a need for federal uniformity and none are readily apparent to us.

We are not alone in wondering about the scope of the one-voice requirement. Justice Scalia argued that "no state can ever actually '*prevent* this Nation from 'speaking with one voice' in regulating foreign commerce"[195] because the "National Government can always explicitly pre-empt the offending state law."[196] He also noted that the one-voice doctrine was indeterminate—it resulted in striking down the property tax on shipping containers in *Japan Line*, but it did not disturb an income tax on the proceeds of shipping container leases in *Itel*.[197] In *Barclays Bank*, Justice Scalia noted that the majority's decision "requires no more than legislative *inaction* to establish that 'Congress implicitly has permitted' the States to impose a particular restriction on foreign commerce."[198] Justices O'Connor dissenting in part from the judgment in *Barclays Bank* similarly complained that "the Legislature has neither approved nor disapproved the California tax."[199]

4. Discrimination Under the Two Clauses

State taxes must comport with the dormant aspects of both the interstate and foreign Commerce Clauses. That means, at a minimum, that state taxes that affect interstate and international commerce must comply with the *Complete Auto* test.[200] The gravamen of tax cases under *Complete Auto* is typically discrimination. Thus, it is important to understand whether the conceptions of discrimination differ under the interstate and foreign versions of the clause. The nondiscrimination requirement

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[195] *Itel*, at 80 (Scalia, J., concurring) (quoting *Japan Line*)

[196] *Id.* at 80-81.

[197] *Id*. at 81 (Scalia, J. concurring). *See id.* at 85 (Blackmun, J., dissenting) (concluding that the income tax on shipping container leases was unconstitutional because it interfered with the federal government's ability to speak with one voice). *Id*., (noting that although Congress may authorize state regulation that otherwise would violate the Commerce Clause, "the president many not authorize such regulation by the filing of an *amicus* brief").

[198] *Barclays Bank*, at 332 (Scalia, J., concurring) (quoting the majority opinion)

[199] *Id.* at 334.

[200] *See, e.g.*, *Japan Line*, at 445 (using the *Complete Auto* test to evaluate a state tax under the dormant foreign Commerce Clause).

prevents states from preferring in-state[201] or U.S. commerce[202] to international commerce.

Although the Supreme Court has not considered the question at any length, if the main value underlying the dormant Commerce Clause's nondiscrimination principle is anti-protectionism, as we and others have argued,[203] then it would make sense to apply the same nondiscrimination standard to cases implicating interstate and foreign commerce.[204] For example, because of the bi-directional impact of protectionist taxes, taxes that protect a state's economy from foreign competition are also retentionist; a state that discriminates against foreigners' in-state economic activity necessarily also discourages resident from earning foreign income. Thus, whereas the case for preventing states from discriminating against *foreigners* may seem less compelling than the case for preventing states from discriminating against residents of *other states*, both kinds of discrimination are retentionist. That is, both kinds of discrimination harm state residents, not only as consumers, but also as producers.

An implication of interpreting the dormant Commerce Clause to prohibit protectionism in the foreign commerce context is that states may not restrict their *own*

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[201] *Id*.

[202] *Kraft General Foods Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992) (holding that Iowa could not favor commerce conducted in *other U.S. states* to foreign commerce). *Id*. ("a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination."). *Id*. at 83 (Rehnquist, J., dissenting) ("Iowa… does not favor subsidiaries incorporated in Iowa over foreign subsidiaries, but… does favor subsidiaries incorporated in other States over foreign subsidiaries.").

[203] *See generally* references cited in *supra* note 28. *See e.g., Itel Containers Int'l Corp. v Huddleston*, 507 U.S. 60, 73-4 (1990) (noting in a dormant foreign Commerce Clause case "that the *Complete Auto* Test confirms both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce, be it foreign or domestic").

[204] *See Wardair*, at 7 ("In cases involving the so-called dormant Commerce Clause, both interstate and foreign… [, the] 'words of the Commerce Clause ... reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation'") (*citing Hughes v. Oklahoma*, 441 U.S. 322, 325–326, (1979)). *See also Barclays*, at 310 (the Commerce Clause "has long been understood… to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted....'" (*quoting Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).

residents' opportunities to engage in foreign commerce, just as they may not restrict their residents' opportunities to engage in interstate commerce.[205] Consistently with this idea, the Supreme Court struck down in *Kraft General Foods* a facially discriminatory rule under which Iowa allowed deductions to residents for dividends received from domestic, but not foreign, subsidiaries.[206] The notion that the dormant foreign Commerce Clause, like the dormant interstate Commerce Clause, applies against taxpayers' own residence states is important for cases like *Steiner*, which involve challenges by residents of their own state's discrimination against foreign commerce. Notwithstanding that discrimination against foreign commerce affects not only foreigners, but also Americans, the case for prohibiting discrimination against foreign commerce still seems less compelling than that for prohibiting discrimination against interstate commerce because on the in-bound side, foreigners rather that residents of fellow U.S. states, benefit.

Interpreting both the interstate and foreign Commerce Clauses to prevent protectionism means that, as the Supreme Court has done, lower courts also would use the internal consistency test in both types of cases.[207] As with interstate commerce, discrimination against foreign commerce can be justified by a "compelling justification,"[208] such as a "serious health and safety concern"[209] that cannot be addressed by less discriminatory measures.[210] The Court has not considered many justifications for tax discrimination, but it has ruled that the administrative convenience to states of conforming with the federal corporate tax base cannot justify facial

[205] Knoll & Mason (2017), *supra* note ___ (arguing that protectionism and retentionism are two sides of the same coin; protectionist taxes are necessarily retentionist, and vice versa). *See also* Mason & Knoll (2012), *supra* note ___, at 1057-71 (making the bi-directional argument).

[206] *Kraft General Foods Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992)

[207] For cases in which the Supreme Court stated that the Complete *Auto factors*, including internal consistency as a test of nondiscrimination and fair apportionment, are relevant under the dormant foreign Commerce Clause, see *supra* note 82.

[208] *Kraft General Foods*, at 81.

[209] *Kraft General Foods*, at 82.

[210] *Maine v. Taylor*, 477 U.S. 131 (1986) (holding that a U.S. state did not violate the dormant Commerce Clause when it banned importation of baitfish from other states, since the ban protecting native fisheries from parasitic infection and adulteration by non-native species, goals that could not be accomplished by less discriminatory means).

discrimination against foreign commerce.[211] As with the dormant interstate Commerce Clause, Congress can expressly consent to violations of the dormant foreign Commerce Clause.

C. Continued Relevance of the Dormant Commerce Clause

Before moving on to consider the facts of *Steiner*, we briefly address a controversy surrounding dormant Commerce Clause doctrine. The dormant Commerce Clause has many fans with widely divergent political views, but it also has many critics,[212] including Justice Clarence Thomas, who has clearly and consistently announced that he will not apply the doctrine.[213] Despite criticism, however, the dormant Commerce Clause not only remains good law, but has the solid support of a large majority of the current Court.

1. Atextualism

A mere seven weeks before the Utah Supreme Court decided *Steiner*, the U.S. Supreme Court issued its most recent dormant Commerce Clause opinion. The case, *Tennessee Wine & Spirit Retailers Association v. Thomas*,[214] involved a Tennessee law that imposed strict period-of-residence requirements for liquor licenses.[215] For example, for a corporation to obtain a license to operate a liquor store, all of its officers, directors, and capital stock owners had to satisfy Tennessee residence requirements, which effectively

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[211] *Kraft General Foods*, at 82.

[212] *See Wynne*, 135 S. Ct. at 1794 (recounting criticism by Thomas and Justice Antonin Scalia). *Id*. at 1806 (J. Scalia, dissenting) (referring to the dormant Commerce Clause as "a judicial fraud"). *See generally* Regan, *supra* note 28 (arguing that the dormant Commerce Clause should be limited to preventing intentional discrimination). Many prominent academics and jurists (with widely divergent political views) are proponents of a robust dormant Commerce Clause doctrine. *See Wynne*, 135 S. Ct. at 1794 (discussing the doctrine's "deep roots"). *See also* Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, 50 WM. & MARY L. REV. 417 (2008); and Knoll & Mason (2017), *supra* note 28.

[213] *See, e.g., Wynne*, 135 S. Ct. at 1811 (Thomas, J. dissenting) ("the negative Commerce Clause … cannot serve as a basis for striking down a statute.")

[214] *Tennessee Wine*, 139 S. Ct. 2449.

[215] To obtain an initial license to own or operate a liquor store, an individual had to reside in Tennessee for the two previous years. To renew the license — which Tennessee required after only one year of operation — an individual had to show continuous residency in Tennessee for 10 years. *Tennessee Wine*, 139 S. Ct. at 2457 (citing Tenn. Code Ann. section 57-3-204(b)(2)(A)).

precluded publicly traded corporations from operating liquor stores in Tennessee.[216] When a local trade group brought suit to demand that the Tennessee Alcohol and Beverage Commission enforce part of the residence requirement, the dispute ultimately reached the Supreme Court.[217]

The *Tennessee Wine* Court, by a vote of 7 to 2, struck down the Tennessee residency requirement under the dormant Commerce Clause, and the seven justices in the majority reiterated in clear and unambiguous terms their support for a robust dormant Commerce Clause.[218] In confirming that the 21st Amendment was not a license to vitiate other constitutional protections, the Court made clear that the dormant Commerce Clause is entitled to no less adherence than any other constitutional

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[216] *Tennessee Wine*, 139 S. Ct. at 2457 (citing Tenn. Code Ann. section 57-3-204(b)(3)). The Tennessee law required anyone seeking a liquor license to have lived in state for at least one year; for renewal, the applicant had to have lived in state for ten years. And for a corporation to receive a liquor license all of its officers, directors and shareholders had to satisfy the residence requirement. All three provisions were struck down by the lower court. The Tennessee Retailers Association sought and were granted *certiorari* only on the initial one-year residence requirement.

[217] The trade association argued that residence requirement was permissible under the 21st Amendment to the U.S. Constitution, which repealed the 18th Amendment (prohibition). Specifically, the trade association argued that section 2 of the 21st Amendment, which provides that "the transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited," insulated the provision from a dormant Commerce Clause challenge.

[218] *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S.Ct. 2449 (2019). Justices Thomas and Gorsuch dissented in *Tennessee Wine*. *See id*. Justice Thomas's negative view of the dormant Commerce Clause is well known. *See, e.g.*, Wynne at 1811-12 (Thomas, J., dissenting) ("I continue to adhere to my view that the negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and consequently, cannot serve as a basis for striking down a statute." (quoting McBurney v. Young, 569 U.S. ___ (2013) (Thomas, J., dissenting)). In his dissent in *Tennessee Wine*, Justice Gorsuch called the dormant Commerce Clause "peculiar," noting that it "cannot be found in the text of any constitutional provision but is (at best) an implication from one." *See Tennessee Wine*, at 2478 (dissenting from the majority's holding that the challenge regulation discriminated against interstate commerce in violation of the dormant Commerce Clause on the grounds that Congress had consented to the challenged regulation). In *Wayfair*, Justice Gorsuch noted that "[w]hether and how much of [dormant Commerce Clause doctrine] can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day." *Wayfair*, at 2100-1.

doctrine.[219] In describing the important role played by the dormant Commerce Clause, Justice Alito wrote for the majority:

> The Commerce Clause . . . provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Although the Clause is framed as a positive grant of power to Congress, we have long held that this Clause also prohibits state laws that unduly restrict interstate commerce. This negative aspect of the Commerce Clause prevents states from adopting protectionist measures and thus preserves a national market for goods and services."[220]

Before *Tennessee Wine*, the Court's two most recent dormant Commerce Clause decisions–both tax cases—also garnered large majorities in favor of the continued validity of the dormant Commerce Clause.[221] Thus, while commentators and jurists — including Supreme Court justices — have questioned the textual basis and even the wisdom of the dormant Commerce Clause,[222] not only do the origins of the judicial doctrine reach back as far as Chief Justice John Marshall in *Gibbons v. Ogden*,[223] but a large majority of the current justices continue to support it. Even efforts to cabin dormant Commerce Clause doctrine typically do not propose allowing the states to discriminate between in-state and cross-border commerce. Nor do commenters

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[219] 139 S. Ct. at 2472-73.

[220] *Id.* at 2459.

[221] Although the ultimate questions in *Wynne* and *Wayfair* were both resolved on a 5-4 vote, support on the Court for the dormant commerce clause more generally was stronger in both cases. In *Wynne*, seven justices indicated their support for the doctrine, with Scalia and Thomas repeating their long-standing disagreement, and in *Wayfair* only Justice Thomas expressed his rejection of the doctrine whereas Justice Gorsuch raised questions but ultimately reserved making an explicit judgment on the validity of the doctrine itself.

[222] In recent years, some justices have authored vigorous and thoughtful critiques of this interpretation. *See, e.g., Wynne*, 135 S. Ct. at 1808-09 (Scalia, J., dissenting).

[223] *See Wynne*, 135 S. Ct. at 1794 (the Commerce Clause "'reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–326 (1979)).

propose allowing states to obstruct cross-border commerce. Instead, most would limit the scope of the dormant Commerce Clause to preventing protectionism and retentionism[224] or, like Justice Thomas, they would ground similar outcomes in different constitutional text.[225]

Given that removing state trade barriers was a principal reason for the adoption of the Constitution,[226] interpreting the Constitution to permit states to use their income tax and regulatory regimes to impose the functional equivalent of trade barriers would be hard to justify. It is not surprising, then, that in cases interpreting the dormant Commerce Clause, the Supreme Court has long emphasized the connection between trade barriers that existed under the Articles of Confederation and the call for a new constitution that could eliminate those barriers. Nearly 140 years ago, for example, the Court wrote that

> state protectionist measures, if maintained by this Court would ultimately bring our commerce to that oppressed and degraded state, existing at the adoption of the present Constitution, when the hapless, inadequate Confederation was abandoned and the national government instituted. More recently, we observed that our dormant Commerce Clause cases reflect a central concern of the framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid

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[224] *See* Regan, *supra note* 28 (arguing that the Court strikes down state laws only when they involve intentional protectionism, even though the Court has not acknowledged that that is what it does).

[225] *See, e.g.*, *Wynne*, 135 S. Ct. at 1808-09 (Thomas, J., dissenting) (arguing that the import/export clause would provide a better textual basis for a constitutional prohibition of protectionism); *Camps* Newfoundland/Owatonna Inc. v. Town of Harrison, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting) (making the same argument). *But see* Brannon P. Denning, *Justice Thomas, the Import Export Clause, and* Camps Newfoundland/Owatonna v. Harrison," 70 COLO. L. REV. 155 (1999) (arguing Thomas is correct about the framers' intent but rejecting a wholesale substitution). *Cf.* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. (1982) (arguing that the values pursued under the dormant Commerce Clause should be narrowed and protected under the privileges and immunities clause) *with* 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) (arguing that the privileges and immunities clause is not sufficient to vindicate the values protected under the dormant Commerce Clause).

[226] *Wynne*, 135 S. Ct. at 1794 (the Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce").

> the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation.[227]

Considering this history and our established case law, the conclusion that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our law and constitutional tradition.[228]

2. The Current Status of the Dormant Foreign Commerce Clause

While it is clear that a majority of the current Supreme Court regards the dormant interstate Commerce Clause as either not objectionable or required as a matter of *stare decisis*, that does not necessarily mean that those views carry over to the dormant foreign Commerce Clause. The Supreme Court has invalidated only two taxes under the dormant foreign Commerce Clause, the property tax in *Japan Line* and the facially discriminatory inclusion of foreign (but not domestic) dividends in *Kraft General Foods.*[229] The Supreme Court has not considered a dormant foreign Commerce Clause case since the mid-2000s in *Barclays Bank.*[230] In the absence of other indications, however, we assume that the Court will continue to apply the dormant foreign Commerce Clause as a matter of *stare decisis*, and so must lower courts. Moreover, as we explained above, the state tax discrimination against foreign commerce impacts state residents in their capacities not only as consumers, but also as producers engaged in outbound commerce. This suggests that there is a similar role to be played by the dormant Commerce Clause in both foreign and interstate commerce.[231]

II. *STEINER* AND STATE TAXATION OF INTERNATIONAL INCOME

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[227] *Guy v. Baltimore*, 100 U.S. 434, 440 (1880).

[228] *Tennessee Wine*, 139 S. Ct. at 2459-62 (citations, footnotes, and quotation marks omitted).

[229] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Kraft General Foods Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992)

[230] The Supreme Court has avoided dormant foreign Commerce Clause questions. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue. . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause.").

[231] *See* discussion *supra* Part I.B.4. One can also imagine an argument that obstructing foreign commerce also indirectly obstructs interstate commerce.

Having introduced both internal consistency and the dormant foreign Commerce Clause, we now turn to *Steiner*. In *Steiner*, the Utah Supreme Court upheld a tax regime that was structurally nearly identical to the tax struck down by the Supreme Court in 2015 in *Wynne*. We argue that the Utah Supreme Court erred by refusing to apply *Wynne*, which was clearly relevant to *Steiner*. Although the Supreme Court denied *certiorari* in *Steiner*, we analyze the Utah Supreme Court's decision in some detail because other states' income tax systems may contain the same constitutional infirmity as Utah's, namely that their taxes on foreign commerce are internally inconsistent. This Part therefore provides guidance to other state courts that confront post-*Wynne* dormant foreign Commerce Clause challenges to their regimes for taxing foreign income. For this reason, although it was not dispositive in *Steiner*, we also review the application of the external consistency test to the Utah regime, and we briefly consider the application of the additional *Japan Line* factors to that case.

A. Facts and Procedural History of *Steiner*

Robert Steiner was a resident of Utah and a shareholder in Steiner LLC, which was taxed as an S corporation.[232] Steiner LLC was the sole shareholder of Alsco Inc., a linen and uniform rental business that services restaurants, hospitals, and numerous other industries in the United States and in 13 other countries.[233] In foreign markets, Alsco operated through subsidiaries, most of which had elected to be taxed under U.S. law as partnerships. As a result, the income earned through Alsco's foreign business operations passed through the foreign subsidiaries to Alsco, then to Steiner LLC, and finally to Steiner himself. Steiner reported that income on his personal tax return, which he filed jointly with his wife. On their federal tax returns, for 2011, 2012, and 2013 (the tax years in question), the Steiners reported their income from Steiner LLC and claimed a foreign tax credit for the taxes paid to foreign jurisdictions on their behalf by their Alsco subsidiaries.

[232] Steiner is also a beneficiary of the trust that is the majority owner of Steiner LLC.

[233] Alsco, which stands for the American Linen Supply Co., is run by the fourth generation of the Steiner family. The business was started by George A. Steiner in 1889, but it took off when his son, George Steiner, patented the continuous cloth roll towel dispenser in 1918. Mike Gorrell, *This Linen-Delivery Company Worth $50 in 1889 Has Quietly Become an International, 4th-Generation Utah Success Story*, THE SALT LAKE TRIBUNE, Nov. 27, 2017.

Like many states, Utah taxes its residents on their worldwide income.[234] Utah also allowed its residents a credit for income taxes paid to other U.S. states, but not for taxes paid to foreign countries.[235] In an effort to avoid double foreign and Utah taxation, the Steiners sought a statutory "equitable adjustment" to exclude their foreign income from Utah tax.[236] Under Utah law, the state tax commission "shall allow an adjustment to adjusted gross income of a resident or nonresident individual [who] would otherwise . . . suffer a double tax detriment under this part."[237] The Utah State Tax Commission disallowed the Steiners' "equitable adjustment" to exclude the foreign income.[238]

After further procedural wrangling, the Steiners paid their assessed Utah deficiency and appealed to a Utah district court. The Utah district court ruled that the Steiners were entitled to an "equitable adjustment" and allowed the exclusion.[239] The lower Utah court's ruling was based not only on its interpretation of the Utah statute, but also its view that the dormant foreign Commerce Clause required Utah to provide the Steiners with relief because its regime for taxing international income was internally inconsistent.[240] Utah appealed, and the Utah Supreme Court reversed, granting summary judgment for the state, rejecting the taxpayers' constitutional and statutory arguments.[241] The principal question on appeal concerned the limits imposed by the dormant foreign Commerce Clause on states' ability to tax their residents' income from outside the United States.

B. Utah Supreme Court's Resolution of *Steiner*

The Utah tax regime upheld in *Steiner* was similar to the Maryland regime struck down in *Wynne.* Both regimes involved a single rate of tax on residents' in-state and out-of- state income combined with a positive rate of tax on the income of nonresidents.

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[234] Utah Code section 59-10-103(1)(a)(i) (stating that adjusted gross income is calculated in accordance with the federal tax system).

[235] Utah Code section 59-10-1003.

[236] Utah Code section 59-10-115 (allowing such equitable adjustments).

[237] *Steiner*, at para. 8.

[238] *Steiner*, at para. 10.

[239] *Steiner*, at para. 12.

[240] *Steiner*, at para. 12.

[241] *Steiner*, at para. 12.

Both regimes also shared the feature that they offered no credit for taxes paid outside the jurisdiction. The only difference between the two cases was that *Wynne* concerned taxes paid by state residents to other U.S. states while *Steiner* concerned taxes paid by state residents to other countries.

The Utah Supreme Court offered three reasons why the Utah tax regime, despite its structural similarity to the unconstitutional *Wynne* regime, did not violate the dormant foreign Commerce Clause: (1) the dormant foreign Commerce Clause does not apply to individual, as opposed to corporate, income taxes; (2) if the dormant foreign Commerce Clause did apply, Utah's failure to credit foreign taxes did not violate it, in part because the federal credit for foreign taxes was adequate to avoid discrimination, and (3) even if Utah's tax system discriminated against foreign commerce, Congress passively approved it.[242] We refute each of these arguments in turn.

1. Applicability to Individuals

The Utah Supreme Court's first holding was that the foreign, as opposed to the interstate, dormant Commerce Clause doctrine does not apply to individual taxpayers such as the Steiners, who resided in Utah. The *Steiner* court acknowledged that the dormant foreign Commerce Clause applies to corporate taxpayers, and that the dormant interstate Commerce Clause applies to both corporate and individual taxpayers, but it asserted that the dormant foreign Commerce Clause does not apply to individual taxpayers.[243] The court offered no support for this proposition, other than an absence of cases in which the U.S. Supreme Court has affirmatively applied the dormant foreign Commerce Clause to individuals.[244]

The Utah court's reasoning is untenable after *Wynne*. *Wynne* expressly raised the question of whether the dormant Commerce Clause applies to individual taxpayers, and the Supreme Court's answer was unequivocal: It does.[245] The *Wynne* Court flatly rejected the argument that the dormant Commerce Clause does not apply to

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[242] *Steiner*, at paras. 55-56 (citing *Barclays*, 512 U.S. 298).

[243] *Id.* at para. 45.

[244] *Id.* at para. 45-46.

[245] *Wynne*, 135 S. Ct. at 1797.

individuals, reasoning that it is "hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations."[246]

The Utah Supreme Court was aware of this holding from *Wynne*, but the Court criticized it for being thinly reasoned.[247] The Utah Supreme Court also attempted to distinguish *Wynne* by asserting that the dormant Commerce Clause applied to individuals only for cases involving the interstate commerce aspect of that clause, not the foreign commerce aspect.[248] The Utah Supreme Court provided no substantive rationale for limiting the dormant foreign Commerce Clause to corporations. Rather, it based its decision on its unfavorable view of the dormant Commerce Clause itself, which it saw as confused and inconsistent.[249]

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[246] *Id.*

[247] *Steiner*, at para. 32 (the Supreme Court "concluded, with little analysis, that individuals are also protected by the dormant Commerce Clause — even though the Court had previously never explicitly held as much."). Despite the Utah Court's protestations, the *Wynne* majority spent seven paragraphs and nearly 900 words explaining why the dormant Commerce Clause applied to companies and resident individuals alike. Among the reasons were that: (1) notwithstanding that prior cases had not raised the question, there was no affirmative argument for treating resident individuals and corporations differently under the dormant Commerce Clause, (2) some of the taxes previously invalidated under the dormant Commerce Clause applied to both individuals and corporations, even if the particular challenge was brought by a corporate taxpayer, and (3) resident individuals and corporations could not be meaningfully distinguished for dormant Commerce Clause purposes because both resident individuals and corporations received benefits from the state, and (4) although only resident individuals could vote against discriminatory taxes, such a remedy was insufficient to respond to the antidiscrimination value vindicated by the dormant Commerce Clause. Finally, (5) *Wynne* involved the taxation of a resident individual for income earned by a subchapter S corporation. Thus, the *Wynne* Court reasoned that refusing to apply the dormant Commerce Clause to the Wynnes would "provide greater protection for income earned by larger Subchapter C corporations than small businesses incorporated under Subchapter S." *Wynne,* 135 S. Ct. at 1798. Like *Wynne*, *Steiner* also involved tax on income that individuals earned through an S-corporation. *Steiner*, at para. 40. The principal dissenters in *Wynne* did not expressly join or refute the majority's reasoning that the dormant Commerce Clause applied to individuals as well as corporations. *See id*. 1813-23 (Ginsburg, J., joined by Kagan, J. and Scalia, J., dissenting). Although Justice Scalia also did not address the question in his separate dissent, he held narrow views of the dormant Commerce Clause and opposed its extension.

[248] *Steiner*, at paras. 45-50.

[249] *Steiner*, paras. 18, 62.

Moreover, nothing in *Wynne* suggests that limitation. In *Wynne*, the Supreme Court referred to the dormant Commerce Clause, not the dormant *interstate* Commerce Clause, and it cited a variety of dormant Commerce Clause cases, including dormant interstate and foreign Commerce Clause cases.[250] If the purposes of the dormant interstate and foreign Commerce Clauses are to safeguard commerce against protectionism by the states, the dormant Commerce Clause must apply to all commercial actors, regardless of their form.

The Utah Supreme Court's second argument for upholding the Utah law was that Utah's tax treatment of residents' foreign income did not discriminate and was fairly apportioned. In our view, the discrimination and fair apportionment prongs of the *Complete Auto* test ask the same question, and fair apportionment typically can be folded into discrimination.[251] State tax regimes and apportionment rules must not tax international or interstate commerce more heavily than domestic commerce.[252] Put equivalently, state tax laws and regulations violate the dormant Commerce Clause whenever they have protectionist impacts that cannot be justified on public policy grounds.[253]

2. Internal Consistency

In *Wynne*, the Supreme Court explicitly addressed both the importance of proper economic analysis in making discrimination determinations and the relevance of the internal consistency test in determining whether state taxes function equivalently to

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[250] *See, e.g.*, *Wynne*, 135 S. Ct. at 1802 (emphasizing "the numerous cases in which we have applied the internal consistency test in the past"). *Id*. at 1803 (citing various other internal consistency test cases). *See also id*. at 1803 (citing statement in *Container* that the internal consistency test was part of dormant Commerce Clause analysis) (citing *Container* at 463 U.S. 159 (1983)). *Id*. at 1799 (citing *Barclays* Court's assumption, in a dormant foreign Commerce Clause case, that the internal consistency test was satisfied) (citing *Barclays* 512 U.S. 298).

[251] Knoll & Mason, *Massachusetts*, *supra* note ___.

[252] *Wynne*, 135 S. Ct. at 1795 (states violate the dormant Commerce Clause when they "discriminate[] in favor of intrastate over interstate economic activity"). *See generally* Mason & Knoll, *supra note* ___ , at 1023-85 (defining tax discrimination as violations of competitive neutrality, which results from taxing cross-border commerce or out-of-state residents more heavily than in-state commerce or state residents). *See also* Lirette & Viard, *supra note* ___.

[253] *Wynne*, 135 S. Ct. at 1795 . *See also* Knoll & Mason (2017), *supra* note ___.

tariffs.[254] There is nothing in *Wynne* to suggest that this approach applies narrowly. On the contrary, the *Wynne* Court took pains to establish the breadth of the internal consistency test, noting that it applied to both incoming and outgoing commerce, to residents and nonresidents, and to corporations and individuals. Thus, there is no support in *Wynne* or any other cases, for the notion that the internal consistency test applies only to interstate, but not foreign, commerce cases. Indeed the court has repeatedly emphasized that *Complete Auto*, including its internal consistency test, applies in dormant foreign Commerce Clause cases.[255] In fact, the *Wynne* Court took pains to document the history of the test in a broad range of cases.[256] Although the *Wynne* Court cited dormant foreign Commerce Clause cases as part of its analysis, it did not emphasize the international aspect of any of the cases. But the court's clear goal in reviewing prior cases was to show the breadth, not the narrowness, of the test.[257]

In finding the Utah law nondiscriminatory, the Utah Supreme Court applied the internal consistency test to Utah's tax regime for taxing *interstate* income,[258] but it declined to apply the internal consistency test to Utah's regime for taxing *international* income, even though Utah's tax on international income was the only issue at state in the case. In the court's view, "it would make no sense to universalize Utah's tax system to conduct a *Wynne* analysis — Utah is a single, subnational taxing jurisdiction. There is no proper basis to compare the effect of its tax system with the effect of those foreign jurisdictions encompassing multiple levels of taxation."[259] As with the rest of it opinion, the Utah Supreme Court's analysis of internal consistency was conclusory; it involved little reasoning other than an insistence that since the Supreme Court has never applied the dormant foreign Commerce Clause to an individual, the Utah court has no guidance as to how to do so itself.[260] The Utah court cited no authorities other

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[254] *Wynne*, 135 S. Ct. at 1804.

[255] *See, e.g., Japan Line*, 441 U.S. at 445; *Container*, 463 U.S. at 169 to 171.

[256] *Wynne*. at 1802-04.

[257] *Id*.

[258] *Steiner*, at para 43 (Utah's regime for taxing interstate income was internally consistent because it credited taxes imposed on Utah residents by other U.S. states).

[259] *Steiner*, para. 55.

[260] *Steiner*, at para. 48 (noting, without citing any authorities or reasons for the proposition, that "crucial [doctrinal] distinctions" exist between corporations and individuals). *Id.* (relying on these crucial doctrinal distinctions to observe that "logically, then, individuals and corporations may also be subjected

than one of its own pre-*Wynne* opinions and the *Wynne* dissent's position that Maryland could tax all of the Wynnes' out-of-state income, an issue that was not in dispute in *Steiner*. Moreover, the Utah court's claim that there was no way to evaluate the impact of the Utah tax system on foreign commerce is tantamount to concluding that the dormant foreign Commerce Clause does not apply at all to state taxes, a claim refuted by many Supreme Court cases.[261] Indeed, the Supreme Court's most often quoted statement of the internal consistency test comes from *Container*, a dormant foreign Commerce Clause case.[262]

Notwithstanding that the Supreme Court stated in *Container*, *Barclays*, and other cases that state taxes on foreign commerce must pass the internal consistency test,[263] the Utah Supreme Court claimed that the internal consistency test was "quite impossible to apply in an international setting."[264] We now explain how the internal consistency test would apply in *Steiner*. We emphasize that the analysis we present here is the same as that of the lower Utah court, which apparently had no trouble applying the test.[265]

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to differing analytical frameworks under the Dormant Foreign Commerce Clause. But the Supreme Court has provided no guidance whatsoever to lower courts regarding how to treat individuals in the context of *foreign* commerce. So even if we were inclined to conclude that state taxes of individual residents are subject to Dormant Foreign Commerce Clause scrutiny, we would be completely at sea. We would have no idea what test to apply or how to apply it."). As discussed in Part I.A., *supra*, due to the bi-directional effects of both protectionist and retentionist taxes, the dormant Commerce Clause could not effectively prohibit protectionist taxes if it did not apply to both inbound and outbound commerce.

[261] *See* cases cited in *supra* note 73.

[262] *Container*, 463 U.S. at 169 ("The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed.")

[263] *See* discussion, *supra* note 82.

[264] *Steiner*, at para. 49.

[265] *Steiner v. Utah State Tax Commission*, No. 170901774, at 6-7 (Utah Dist. Ct. Jan. 30, 2018). The lower court's internal consistency test analysis consisted of three simple paragraphs in which it straightforwardly applied the test as described in *Wynne* and other cases. To reflect that the challenged tax involves a tax on international, rather than interstate, income, the district court logically applied the test to international, rather than interstate, income.

Recall that Utah taxed the Steiners on all their income, which comprised in-state income, out-of-state income, and foreign income.[266] There is nothing unusual about such a regime. Against the out-of-state income, Utah granted credits for taxes paid to other U.S. states, but Utah allowed no credits for foreign income taxes and provided no other nondiscretionary method to avoid double state and foreign tax.[267] Utah taxed nonresidents, including taxpayers who reside outside the United States,[268] on their income earned in Utah. This is nearly the same structure as the tax regime found unconstitutional in *Wynne*.

The first step in the internal consistency test is hypothetical harmonization. When courts evaluate state tax regimes under the dormant *interstate* Commerce Clause using the internal consistency test, they assume that all other U.S. states apply the challenged regime. To evaluate Utah's tax regime under the dormant *foreign* Commerce Clause using the internal consistency test requires only one small change. Instead of assuming that all other U.S. states adopt the challenged state's regime, the court could assume that subdivisions of all other countries do so.[269] Thus, to evaluate the Utah regime under the dormant foreign Commerce Clause, we must consider how a globally universalized Utah regime would tax international income.

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[266] Utah Code section 59-10-103.

[267] Utah law gives the Utah tax commissioner discretion to exclude foreign income if including it would lead to double tax, but the commissioner denied discretionary relief to the Steiners.

[268] *See* Utah Code section 59-10-103(1) (a), (w) (defining Utah adjusted gross income for nonresident individuals as federal adjusted gross income as defined in IRC section 62 after adjustments). *See* Utah Code section 59-10-103(1) (q) (defining nonresident individual to mean "an individual who is not a resident of this state"). Utah Code section 59-10- 103(1)(j) (defining individual to include aliens). The adjustments to federal AGI required for nonresidents under the Utah Code result in the inclusion of Utah-source income by nonresident aliens. *See* Utah Code sections 59-10-114 and 59-10-115. Such Utah-source income includes income from real property, from a Utah trade or business, and wages earned in Utah. *See* Utah Code section 59-10-117.

[269] Citing *Container* and *Jefferson Lines*, the Utah district court stated that "[a]ssuming that every jurisdiction, including all other states and foreign jurisdictions, has a tax structure identical to Utah's current structure, the question is whether this tax structure discriminates against interstate or foreign commerce." *Steiner v. Utah State Tax Commission*, No. 170901774, at 6-7 (Utah Dist. Ct. Jan. 30, 2018).

To make our example simple but concrete, assume that the Utah tax rate is 5 percent on residents' in-state and foreign income and 5 percent on nonresidents' income from Utah, and that Utah does not credit taxes assessed on foreign income.[270]

Assume that, in addition to Utah, there is only one other taxing jurisdiction, Ontario. Under internal consistency, the reviewing court would assume that Ontario adopts the same tax rules as Utah. Under this assumption, Ontario would tax its residents at 5 percent on their income from Ontario and at 5 percent on their income from Utah (that is, their foreign income). Ontario would also tax Utahns at 5 percent on their income from Ontario. Ontario would not grant its residents credit for taxes levied by Utah. Under this harmonized regime, Utahns would be taxed at 5 percent on their income earned in Utah, but they would be taxed at 10 percent on their income earned in Ontario. The 10 percent tax would arise from a combination of three effects: Ontario's tax on Utahns' Ontario income, Utah's tax on Utahns' foreign-source income, and Utah's failure to credit foreign taxes. Similarly, Ontarians would be taxed at 5 percent on their income earned in Ontario, but at 10 percent on their Utah income. This result — heavier taxation of international than in-state income — means that the tested Utah tax regime is internally inconsistent.[271] Table 2 demonstrates this effect:

TABLE 2. UTAH FOREIGN INCOME TAX REGIME UNDER INTERNAL CONSISTENCY

	Ontario Resident	Utah Resident
Utah Source	10%	5%
Ontario Source	5%	10%

[270] The income tax rate in Utah for the tax years in question in *Steiner* was 5 percent; the rate is now 4.95 percent. *See* Utah State Tax Commission, Tax Rates.

[271] The Utah regime challenged in *Steiner* may have defined in-state income more narrowly for foreigners than for Utah residents. *See* Utah Code section 59-10-117 (defining Utah source income for nonresidents, which includes foreigners). Even if this is so, it would not change the analysis; given the features of Utah's tax on residents, in the absence of Utah credits for foreign taxes, the regime will be internally inconsistent if Utah assesses any positive rate of tax on any Utah-source income, however defined, earned by foreigners.

The only difference between *Wynne* and *Steiner* is that in *Wynne* Maryland overburdened interstate income relative to in-state income, whereas in *Steiner* Utah overburdened international income relative to in-state income.[272] It is also worth reiterating that our application of the internal consistency test is the same as the lower Utah court's, which found the Utah tax regime to be internally inconsistent and held that the Steiners ought to have therefore been granted an "equitable adjustment" under Utah law to exclude their foreign-source income.[273]

3. Federal Foreign Tax Credit

In addition to refusing to apply *Wynne* and its internal consistency test, the Utah Supreme Court in *Steiner* asserted that the federal credit for foreign taxes was adequate to resolve any potential discrimination against international income by Utah, such that requiring state-level relief of double taxation would provide a double benefit.[274] But that assertion is incorrect. Applying the internal consistency test to the aggregate of the Utah tax regime and the federal tax regime with its limited foreign tax credit does not change the result.

To see why, assume that the Steiners are taxed at 40 percent at the federal level and at 5 percent on the state level. Further assume, consistently with U.S. law, that the U.S. federal income tax offers individual taxpayers a limited credit for foreign taxes, up to the amount of U.S. federal tax due on the same income.[275] Under the internal consistency test, we would assume all relevant jurisdictions adopt the same tax structure. Thus, under the hypothetical harmonization step of the internal consistency test, the reviewing court would assume that Canada had a 40 percent federal income tax

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[272] *See* analysis of *Wynne*, *supra* Part I.A. The structures are similar because both Maryland and Utah impose a single rate of tax on residents' in-state and out-of-state income, a positive rate of tax on nonresidents' in-state income, and neither state provides a tax credit for out-of-state income from certain sources. The difference is that Utah denied a credit for foreign income, whereas Maryland denied a credit for interstate income.

[273] *Steiner v. Utah State Tax Commission*, No. 170901774, at 6-7 (Utah Dist. Ct. Jan. 30, 2018). *See also* Utah Code section 59-10-115 (allowing such equitable adjustments).

[274] *Steiner*, paras. 52-54. There is some question about whether states can defend their discrimination by pointing to compensating provisions in federal law. *Cf. Kraft General Foods*, 505 U.S. 71, 81 ("We find no authority, however, for the principle that discrimination against foreign commerce can be justified if the benefit to domestic subsidiaries might happen to be offset by other taxes imposed not by Iowa, but by other States and by the Federal Government").

[275] I.R.C. § 904 (providing limited foreign tax credit).

with a limited credit for foreign taxes and that each province had a 5 percent income tax without a credit. The Steiners would be taxed at a total rate of 45 percent on their Utah income, comprised of the 40 percent U.S. federal tax plus the 5 percent Utah tax. On their Ontario income, they would pay a 40 percent Canadian federal tax, for which they would receive a credit against their U.S. federal tax liability, eliminating their U.S. federal liability. The Steiners would also pay a 5 percent tax to Ontario, but because they exhausted their U.S. federal credit by using it to relieve double federal taxation by the United States and Canada, there would be no relief from the U.S. federal government for the Ontario tax. Thus, in addition to the 5 percent tax imposed by Ontario, they Steiners would pay a 5 percent tax to Utah for the income they earned in Canada. Thus, the Steiners' total tax liability on their Ontario income would 50 percent. In contrast, had the Steiners earned their income solely within the United States, they would have paid tax at only 45 percent. Table 3 illustrates this result.

TABLE 3. FEDERAL AND UTAH REGIME UNDER INTERNAL CONSISTENCY

	Ontario Resident	U.S. Resident
Utah Source	50%	45%
Ontario Source	45%	50%

The difference in tax between domestic and international income shows the internal consistency of the Utah regime, notwithstanding the availability of a U.S. federal credit. The situation would be similar for residents of Ontario. They would pay 45 percent tax on their income earned in Canada and 50 percent on their income earned in the United States, as illustrated in the table above. The Utah tax thus violates internal consistency: it discourages Utahns from earning income abroad, and it discourages foreigners from earning income in Utah. Thus, whether examined as a stand-alone tax or in combination with the federal income tax, the Utah tax violates internal consistency and hence discriminates against foreign commerce.

The Utah Supreme Court was correct that in reality, as opposed to the formality of the internal consistency test, some federal credits may be available to offset other countries' subnational taxes.[276] But the Utah Supreme Court was wrong that such federal credits will always be sufficient. The Utah Court also did not base its conclusion on a particularized inquiry into the Steiners' situation to determine whether, in this particular case, excess foreign credits were available to compensate the Steiners for Utah's discrimination. Later, in Part III, we consider how states might take the federal credit for foreign taxes into account as part of a regime that is internally consistent in its treatment of international income.

4. Passive Congressional Approval

The Utah Supreme Court's third reason for upholding the Utah regime was that even if it did discriminate against foreign commerce in violation of the Commerce Clause, it was nevertheless valid under the doctrine of "passive congressional approval" as announced by the U.S. Supreme Court in *Barclays Bank*.[277] This conclusion misreads *Barclays Bank*.

Recall that *Barclays Bank* involved a dormant foreign Commerce Clause challenge brought by a foreign firm with U.S. subsidiaries against California's worldwide apportionment regime. Having determined that the challenged California regime did not violate the *Complete Auto* test, including that it was not discriminatory,[278] the *Barclays* Court went on to consider the two additional *Japan Line* restrictions on state taxation that apply to dormant *foreign* Commerce Clause cases that do not apply to dormant *interstate* Commerce Clause cases.[279]

As part of its consideration of whether the California tax inhibited the federal government's prerogative to speak with one voice on foreign affairs, the *Barclays* Court considered the possibility that the federal government may have passively indicated that "certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential.'"[280] Passive indicators might include Congress declining to pass

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[276] This would be so if, for example, if the foreign federal tax rate is lower than the U.S. federal tax rate.

[277] *Barclays*, 512 U.S. 298.

[278] *Barclays*, 512 U.S. at 322.

[279] *Id*.

[280] *Barclays*, 512 U.S. at 323 (citing *Japan Line*, 441 U.S. at 448) (emphasis in original).

legislation prohibiting the challenged tax.[281] For example, in *Barclays*, the Court ascertained implicit congressional approval of the challenged California apportionment regime from years of congressional consideration and rejection of federal tax bills to bring the California regime into alignment with what other states do.[282] It also considered the long history of federal tax treaties that did not cover state taxes and therefore did nothing to prevent the challenged California tax regime.

The *Barclays* Court , however, never suggested that Congress might passively (as opposed to actively) sanction a *discriminatory* tax.[283] Congressional consent to a *discriminatory* law must be explicit.[284] Because the Utah tax regime discriminates, explicit congressional consent would be required to uphold it. Such consent is not present in the Utah tax regime considered in *Steiner*.[285]

C. External Consistency and the *Japan Line* Factors

Although not crucial for the outcome in *Steiner*, we want to address some additional errors and omissions by the Utah Supreme Court because they may be relevant to challenges in other courts. The first involves the application of the external

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[281] *Barclays*, 512 U.S. at 323.

[282] *Barclays*, 512 U.S. at 324.

[283] *Id.* ("requiring an 'unambiguous indication of congressional intent' to insulate 'otherwise invalid state legislation' from judicial dormant Commerce Clause scrutiny") (quoting *Maine v. Taylor*, 477 U.S. 131 (1986)).

[284] Thus, in *Barclays*, the Court considered the central question whether California's worldwide combined reporting requirement "impair[ed] federal uniformity . . . in an area where such uniformity is central." *Barclays*, at 320.

> In both *Wardair* and *Container Corp.*, the Court considered the "one voice" argument only after determining that the challenged state action was otherwise constitutional. An important premise underlying both decisions is this: Congress may more passively indicate that certain state practices do *not* impair federal uniformity in an area where federal uniformity is essential; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce or otherwise falls short under *Complete Auto* inspection.

Barclays, 152 U.S. at 323-24 (citations and quotation marks omitted).

[285] Under our analysis, the Utah Supreme Court would not reach these additional questions because the Utah tax regime is internally inconsistent and therefore discriminatory under the *Complete Auto* test.

consistency test, which is one of the considerations under the fair-apportionment prong of *Complete Auto*. The second involves the application of the *Japan Line* factors, which the Utah Supreme Court simply did not consider.

1. External Consistency

In *Container*, the Supreme Court recognized two aspects of fair apportionment: internal consistency and external consistency.[286] The external consistency test, like the nexus prong of *Complete Auto*, overlaps with due process; it concerns the connection between income-generating activities in the state and the income the state seeks to tax.[287] The Utah Supreme Court concluded that after *Wynne*, the external consistency test no longer applies as part of dormant Commerce Clause analysis, so the Utah court provided no analysis or substantive discussion of external consistency. Although we think the conclusion that the external consistency test no longer applies is wrong, because the external consistency test is irrelevant to *Steiner* (and was irrelevant in *Wynne* itself), the Utah court's error was harmless.

The Utah Supreme Court's conclusion that the external consistency doctrine was a dead letter rested on two arguments. First, because the U.S. Supreme Court recommended as a potential solution in *Wynne* a tax regime that the Utah court regarded as externally inconsistent, the Utah court assumed that the U.S. Supreme Court must have intended to overrule the external consistency test. Second, because the *Wynne* court never expressly considered external consistency, it must be a dead letter.[288] Both arguments are faulty.

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[286] *Container Corp. of Am. v. Franchise Tax Bd*., 463 U.S. 159, 169 (1983) (the state tax must "reflect a reasonable sense of how income is generated").

[287] "External consistency" is the idea that "the factor or factors used must actually reflect a reasonable sense of how income is generated . . . . We will strike down the application of an apportionment formula if the taxpayer can prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportion to the business transacted in that State." *Container Corp.*, 463 U.S. at 169-170. The external consistency test, which reflects fairness concerns, might alternatively be dealt with under the due process clause.

[288] *See Steiner*, at para. 44 ("Utah's tax code thus satisfies the internal consistency test. In *Wynne*, the Supreme Court declined to require anything else of Maryland's tax . . . . It would be an extension of *Wynne* to require that these taxes also satisfy external consistency.").

First, consider the supposedly externally inconsistent suggestion the U.S. Supreme Court offered to Maryland.[289] In *Wynne*, the Supreme Court noted that Maryland could have avoided discrimination by taxing its residents on all their income wherever earned, with no credit for other states' taxes, provided that Maryland also did not tax nonresidents' Maryland income at all.[290] The Utah Supreme Court declared that because such a regime would not involve an apportionment formula, it must be externally inconsistent.[291] But there is nothing externally inconsistent about the regime the U.S. Supreme Court suggested to Maryland. Residence-based taxation is widely acknowledged to be a reasonable and fair basis upon which to levy unapportioned worldwide taxes.[292] Although such unapportioned worldwide taxation raises a risk of double taxation, if Maryland paired it with either credits for source taxes or nontaxation of nonresidents on income sourced in Maryland (that is, exemption by Maryland of nonresidents' Maryland-source income, as suggested by the Supreme Court), the Maryland regime would not raise an undue risk of double taxation. Nor would it tax more than Maryland's fair share of interstate or international income.[293] It thus would be both internally and externally consistent.

The Utah Supreme Court seems to hold the view that to be fairly apportioned state taxes must involve apportionment formulas,[294] but that is incorrect. Fair apportionment is about the division of income among the states and the degree of connection between the taxing state and the income it seeks to tax. Like apportionment

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[289] *Steiner*, at para. 37 ("The *Wynne* Court thus went out of its way to endorse a tax regime violative of the external consistency test.").

[290] *Steiner*, at para. 33.

[291] *Steiner*, at para. 36.

[292] *See, e.g.*, Restatement (Third) of Foreign Relations Law, Am. Law Inst. 1987, section 411 (acknowledging residence-based tax of worldwide income).

[293] There are infinite ways to split cross-border income among the states, and the Supreme Court long has held that it will not foist on a state any one particular splitting rule. See discussion of *Container* and *Barclays,* supra Part I.B.2.b. *See also Barclays*, 512 U.S. at 312 (indicating the need for a "rational relationship between the income attributed. . . and the intrastate values of the enterprise").

[294] *See Steiner*, at para. 36 (quoting a law review student note that argued that the worldwide tax rule imposed at residence and paired with no credits for foreign tax and no source tax of any kind "'would seem to squarely violate the external consistency test,' which requires states to apportion income such that it 'reflect[s] a reasonable sense of how income is generated'").

formulas, source and residence rules can also fairly apportion income among states. Indeed, as far as we know, not only do all U.S. states that tax the income of natural persons use source and residence rules to divide income up among the taxing states, so do all nations. Source and residence rules are fairly apportioned — they will pass the external consistency test — provided that they reflect real connections to the state and do not overtax cross-border income.[295] Few would argue that residents are insufficiently connected to their states to support taxation of their worldwide income. Indeed, as recently as *Wynne* in 2015, the Supreme Court has affirmed that states may tax their residents on all their income.[296] Likewise, few would argue that inclusion of residents' worldwide income overtaxes it. Although the Utah Supreme Court was correct when it wrote that "slicing the pie is the quintessential point of external consistency,"[297] it was wrong that slicing the pie fairly requires formula apportionment. Source and residence rules—with or without double taxation relief—can also slice the pie fairly.

The Utah Supreme Court's second argument for the death of external consistency was that the Supreme Court did not consider it in *Wynne*. But no conclusion about the continued relevance of the test can be drawn from this omission because the external consistency test was so clearly satisfied in *Wynne*, a case that involved taxation by Maryland of its own residents' income. However, for the same reasons, the Utah tax regime likewise satisfies the external consistency test; there is nothing wrong with Utah taxing on both source and residence bases, provided that its source and residence rules are sensibly defined and internally consistent. Nor was there any indication in *Steiner* that Utah had unusual source or residence rules that taxed income that had no relation to the state or its residents.

We agree with the Utah Supreme Court that the current status of the external consistency test is unclear, especially after cases like *Quill* and *Wayfair* that suggest that nexus issues will be resolved under the due process clause rather than the dormant

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[295] *See Jefferson Lines Inc.*, 514 U.S. at 185 (external consistency is about "whether a state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state") (citation omitted).

[296] *Wynne*, 135 S. Ct. at 1818. *See also Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 462-463 (1995).

[297] *Steiner*, at para 36.

commerce clause.[298] Nonetheless, we believe that the external consistency test — or a principle like it — is needed to serve as a check on states that might seek to impose tax rules that, while internally consistent, do not reasonably reflect contacts between the taxpayer and the taxing state.[299] But courts need not consider external consistency in cases, like *Wynne* and *Steiner*, that involve taxation by residence states that have a clear and well established entitlement to tax their residents' worldwide income.[300]

2. *Japan Line* Factors

The Utah Supreme Court also considered the *Japan Line* factors, namely whether the Utah regime creates a substantial risk of multiple international taxation and whether it prevents the federal government from speaking with one voice, to be satisfied in *Steiner*. If a court regards a state's regime for taxing international income to be internally inconsistent or otherwise to violate the *Complete Auto* factors, then the tax regime is unconstitutional, and the court need not consider the additional *Japan Line* factors. However, if a state court determines that a challenged state's taxes meet the *Complete Auto* factors, as the Utah Supreme Court did, then it should go on to consider the *Japan Line* factors.

a) Substantial Risk of Multiple International Tax

We argued above that the Supreme Court has failed to provide lower courts with clear guidance with respect to either of the *Japan Line* factors. Like the California property tax regime struck down in *Japan Line*, Utah's failure to credit foreign taxes is

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[298] *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-08 (1992); *South Dakota v. Wayfair Inc*., 138 S. Ct. 2080 (2018) *Cf*. Mason, *Implications of* Wayfair, 46 INT'L TAX REV. 810, 814-5 (2018) (arguing that "while the *Wayfair* Court did not give up on the idea that due process nexus and dormant Commerce Clause nexus could be different, it held that 'there are significant parallels' between them and 'physical presence is not necessary to create a substantial nexus' for either") (quoting *Wayfair*, at 10).

[299] Internal and external consistency do not completely collapse into each other. For example, a rule taxing only based on residence, but defining tax residence to be the taxpayer's state of birth , would be internally consistent but not externally consistent. It would be internally consistent because if all states adopted it, exactly all (no more and no less) of a taxpayer's income would be taxed once, on a residence basis. But because the connections between the taxpayer and her state of birth are so much weaker than her connections with her state of domicile, such a rule likely would fail external consistency. The birth state would be regarded as taxing income that more properly belonged to another state.

[300] The issue of external consistency could come up in a subsequent case if a state were to amend its law to be internally consistent. The courts would then consider whether the internally consistent revised Utah law was also externally consistent.

unusual by world standards, and it differs from federal practice both in federal law and in its tax treaties. As to the "inevitability" of international double tax, it is hard to know what the Supreme Court means by this. One thing it apparently does not mean is that the U.S. state tax leads to actual double tax—such double tax is not by itself sufficient to violate *Japan Lines*. The double tax caused by the combination of other countries assertion of jurisdiction to tax nonresidents on their Utah-source income and its failure to credit its own residents foreign tax is more analogous to the source-residence overlap struck down in *Japan Line* than to the coincidental overlap upheld in *Container* of the California apportionment rule and other countries' separate accounting rules. Moreover, as we discuss in Part III, there are multiple ways that the Utah tax regime could be brought into conformity with the internal consistency test, some of which would definitely eliminate any risk of multiple international tax. That such double tax could not be eliminated in *Container* by imposing separate accounting on California was one of the reasons the Supreme Court gave for upholding the challenged California apportionment rule. Nevertheless, as discussed above, it is unclear what, if anything, survives of the *Japan Line* "multiple tax" doctrine after *Wynne.*

b) One Voice

The other requirement under *Japan Line* is that the state must not interfere with the federal government's ability to speak with one voice. Because we conclude that the *Steiner* court should have held the Utah regime to violate *Complete Auto*, under *Barclays*, an explicit statement of congressional consent would be required to uphold the Utah rule under this factor.[301] Nevertheless, because other courts may need to analyze other regimes that comply with the *Complete Auto* factors, we note that tax treaties between the United States and other countries do not apply to state taxes, and so despite the fact that the federal government has had ample opportunity to require states to credit foreign taxes, it has never done so. Thus, a state court considering "otherwise constitutional"[302] taxes under the "one voice" doctrine can cite such treaties as evidence that Congress has at least "passively" indicated that such practices do not impair federal uniformity.

D. Why *Steiner* Matters

Steiner represents an example of the hostility of some lower courts to the dormant Commerce Clause generally, but more importantly, it is the second example of

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[301] *See* discussion *supra* Part II.B.3.

[302] Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 323 (1994).

a state supreme court refusing to apply the main lesson of *Wynne*—namely that state taxes that function as tariffs are unconstitutional. *Wynne* represents the best chance to lead courts out of the quagmire of dormant Commerce Clause doctrine, but it can only serve that role if courts apply it.

In its unanimous decision in *Steiner*, the Utah Supreme Court did little to conceal its antipathy to the dormant Commerce Clause. For example, after discussing *Steiner's* facts and procedural history, the court criticized the U.S. Supreme Court's dormant Commerce Clause doctrine, citing a 60-year-old Supreme Court case in which the Court called its own doctrine a "quagmire."[303] The Utah Supreme Court observed that "not much has changed . . . except perhaps to add more room for controversy and confusion and little in the way of precise guides to the states in the exercise of their indispensable power of taxation."[304] The Utah court distained what it described as "judicially jury-rigged multipart tests"[305] and lamented that "lower courts are operating largely in the dark in this important field of constitutional law."[306] Although the Utah Supreme Court acknowledged its obligation to follow controlling U.S. Supreme Court precedent, it concluded that — given the "lack [of] any clear overarching theory"[307] and the difficulty a lower court will have "in attempting to anticipate expansion of the law into new territory"[308] — the Utah court itself would "decline to extend [the U.S. Supreme Court's] precedent into new territory — even in ways that might seem logical in other jurisprudential realms."[309] In taking such an unusual step, the court claimed that it was doing so "not out of any disrespect for the U.S. Supreme Court, but in our best attempt

[303] *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (2019), at para. 16 (citing *Northwest Portland Cement*, 358 U.S. at 458).

[304] *Steiner*, at para. 17 (citing *DIRECTV v. Utah State Tax Commission*, 364 P.3d 1036 (Utah 2015)).

[305] *Steiner*, at para. 56. *See also* id. at para. 48, n. 17 ("we see no basis for stumbling through these nesting layers of unknowns until the Supreme Court lights the way").

[306] *Steiner*, at para. 17.

[307] *Steiner*, at para. 18.

[308] *Id*.

[309] *Steiner*, at para. 20.

at judicial humility in a constitutional field marked more by haphazard policy judgments than any unifying legal theory."[310]

In applying Supreme Court precedent, an inferior court or a state court "must follow its best understanding of governing precedent."[311] It is not the court's "job to re-litigate or trim or expand Supreme Court decisions, [but] to follow them as closely and carefully and dispassionately as [they] can."[312] Courts are not to take a "too-narrow view of holdings . . . as a means . . . to evade precedents that cannot be distinguished."[313] Although there is room for legitimate disagreement over what is the most reasonable reading of a case and whether a rule articulated in one case should apply in a different situation, state courts and inferior federal courts are obliged to faithfully adhere to relevant precedent. To do otherwise threatens to overturn the structure of constitutional law and lead to a proliferation of inconsistent interpretations and applications of the Constitution across the United States.

Although state court judges are rarely willing to confront the Supreme Court directly by explicitly declining to follow precedent, state courts have made ever more strained arguments to avoid applying dormant Commerce Clause precedents.[314] In

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[310] *Id*.

[311] Massachusetts v. U.S. Department of Health and Human Services, 682 F.3d 1, 15-16 (1st Cir. 2012).

[312] *Priests for Life v. U.S. Department of Health and Human Services*, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[313] Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994).

[314] State courts have drawn fine distinctions to avoid applying *Wynne* to invalidate internally consistent taxes, notwithstanding the Supreme Court's emphasize in *Wynne* on the deep historical roots of the test and its broad application across a wide range of taxes and tax rules. *See, e.g., Edelman v. New York State Department of Taxation and Finance* 162 A.d.3d 574, 575 (N.Y. App. Div. 2018) *cert. denied* 140 S. Ct. 134 (2019) (holding "W*ynne* is distinguishable from … the instant case, in two critical respects. First, it did not involve individuals who faced double taxation on intangible investment income by virtue of being domiciliaries of one state and statutory residents of another. Second, the income subject to tax in *Wynne* was not intangible investment income, but business income, traceable to an out-of-state source." *See also id*. at 575-6 ("Nor does *Wynne*, by establishing that the 'internal consistency' test must be applied wherever there is Commerce Clause scrutiny, abrogate [our prior holding that when] Commerce Clause scrutiny reveals that the statute at issue does not affect interstate commerce, there is no need for a test determining whether the statute unduly burdens interstate commerce.") For the argument that the New York residence rule challenged in *Edelman* was internally inconsistent and unconstitutional, see Michael

Steiner, the Utah court struggled mightily to avoid applying the precedent established by the Supreme Court in *Wynne* to a tax regime with a nearly identical structure. But members of the Utah Supreme Court do not have the prerogative to sharply cabin existing Supreme Court precedent. They are obliged to faithfully adhere to U.S. Supreme Court precedent: "State courts, as much as federal courts, have a solemn obligation to follow federal law."[315] Dormant Commerce Clause doctrine cannot be ignored, but that is effectively what the Utah high court did.

Other state courts considering similar questions, however, may wish to apply *Wynne*, so this Part provided guidance on how to do that. The next Part considers remedies for cases in which a court finds a state tax regime to violate the dormant foreign Commerce Clause because it is internally inconsistent.

III. DESIGNING AN INTERNALLY CONSISTENT TAX ON FOREIGN INCOME

In this Part, we briefly consider how states might formulate their tax treatment of foreign income to make it internally consistent, and therefore compliant with the dormant foreign Commerce Clause. A state has available to it a wide variety of options for curing the constitutional infirmity in its tax regime, but they fall into three major patterns: apportionment, rate recalibration, and credits. There are examples of all three groups that would satisfy the internal consistency test:

Option 1. Domestic apportionment. A state could apportion domestic income and only domestic income across the states.

Option 2. Worldwide apportionment. A state could apportion worldwide income across the globe.

Option 3. Eliminate the Outbound Tax. A state could lower the outbound tax to zero. In other words, it could exclude residents' foreign-source income.

Option 4. Eliminate the Inbound Tax. A state could also eliminate the inbound tax on foreign residents who earn income in the state. That is to say, a state could continue to tax the foreign income of residents, along with the domestic income of residents, but forgo taxing the in-state income of foreign residents.

S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, STATE TAX NOTES, Aug. 14, 2017, p. 707.

[315] *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).

Option 5. Increase the Domestic Tax Rate. A state could alternatively increase its tax rate on the in-state income of residents to eliminate any excess burden on cross-border commerce that applying the internal consistency test reveals.

Option 6. Mirror image credit. A state (a subnational political divisions) could credit all taxes paid to foreign subnational political entities; states would not have to credit taxes paid to foreign national governments.

Option 7. Residual credit. A state could credit foreign taxes paid (whether paid to national governments or political subdivisions thereof) to the extent such taxes are not credited by the U.S. federal government.

This Part briefly examines the foregoing options.

A. Apportionment

One way a state could satisfy the internal consistency test would be by substituting formulary apportionment for separate accounting and arm's-length pricing to assign income to jurisdictions. There are two apportionment methods that a state could adopt that would satisfy the internal consistency test without having to change tax rates.

Option 1: Domestic apportionment. A tax system that apportioned domestic income among the fifty states according to a formula and exempted foreign income from state taxation would be internally consistent. If universalized, such a system would apply state taxes only to a portion of income earned within the United States. Although such a system would be constitutional, it is politically undesirable because all foreign income earned by a state's residents would be excluded from that state's tax base.[316]

Option 2: Worldwide apportionment. A second option would be to use California's worldwide apportionment regime upheld in *Container* and *Barclays*.[317] Although California uses apportionment for corporate taxation, it could be extended to individuals. Under such a regime, the state would calculate the taxpayer's worldwide

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[316] Such a system would substitute for source-and-residence based taxation.

[317] Under international pressure, California dropped its system of worldwide apportionment for corporations in favor of a water's edge approach that used separate accounting to allocate income to the United States and outside and then applied domestic apportionment to apportion U.S. income among the states.

income; and then apportion it using according to the presence of productive factors in the state versus worldwide factors. The California regime upheld in *Container* and *Barclays* equally weighted property, payroll and sales. Although it would be strange by international practice to use such a complicated system to tax the earned income of individuals, using it to apportion the income of a complex S-Corporation operating in many jurisdictions (like the Steiners' company) would be more reasonable. The state would have to use an internally consistent formula—one that compared factor presence in the state to world factor presence. Under this approach, a state would be able to tax its proportional share of the foreign income of its residents, but to be internally consistent, it would also have to exempt the share of in-state income of residents that was allocable elsewhere under the formula.[318]

B. Rate Recalibration

Because switching to apportionment would constitute a fundamental change in its tax system for individuals, we next describe the two approaches available to Utah that maintain separate accounting. A state could reconfigure the rates of its current tax system so that under internal consistency, the tax on in-state income earned by residents (i.e., domestic tax) was no higher than the combination of the tax on residents' economic activities abroad (outbound tax) plus the tax on foreign residents' economic activities in the state (inbound tax). Its goal, in amending its rate structure to comply with the dormant foreign Commerce Clause would be to satisfy the following tax rate condition:

$$T_d \geq T_o + T_i - (T_o \times T_i),$$

where T_d, or the domestic tax, is the tax on residents' in-state income; T_o, or the outbound tax is the tax on residents' foreign-source income, and T_i, or the inbound tax, is the tax rate on nonresident aliens' in-state income.[319]

Although there are infinitely many combinations of these three rates that would satisfy internal consistency, we note the following three options as edge cases.

Option 3: Eliminate the Outbound Tax. The simplest approach towards foreign income and the most straightforward is an exclusion by a state of its residents' foreign

[318] Again, such a system would substitute for source-and-residence based taxation.

[319] See Knoll & Mason (2017), *supra* note ___, at 323; Lirette & Viard, *supra* note ___, at 483.

source income. Such a cross-border tax system is sometimes called territorial taxation or exemption, and, as can be readily seen, it is internally consistent.

Recall Utah's tax regime upheld in *Steiner* despite its internal inconsistency. Suppose that Utah wanted to make the regime internally consistent. If Utah were to exclude residents' foreign income, and if Ontario were assumed adopt the same tax system as Utah (as the internal consistency test calls for), then residents of Utah and residents of Ontario would both be taxed at 5 percent wherever they earn income. No one, would be taxed at home on income earned in the other country. Because the total tax rate would be 5 percent regardless of where one earned income, such a tax would be internally consistent. Moreover, although Utah's tax treatment of income earned by Utah residents in other U.S. states under such a system would differ from its tax treatment of income earned by Utah residents in foreign countries, there should be no tension between them because they both work with Utah having a tax rate of 5 percent on Utahns' in-state income.[320]

Option 4: Eliminate the Inbound Tax. Alternatively, a state could tax residents' domestic and foreign income at the same rate if it completely eliminated its tax on foreign residents' in-state income. Such a tax regime would be internally consistent because under hypothetical harmonization, other subnational jurisdictions (like Ontario) would not tax a U.S.-state resident's income (that is, Ontario would exempt Utahns' Ontario-source income) and hence taxation of foreign income would only occur in the state of residence, and at the same rate as for in-state income. Moreover, such a tax system, although different from the treatment of income earned in other U.S. states, can exist alongside a full credit for taxes paid to other U.S. states without creating tension because both systems are internally consistent with the same tax rate on residents' in-state income.

Option 5: Increase the Domestic Tax Rate. Every taxpayer bringing a dormant Commerce Clause challenge against a state tax hopes that the remedy will be a refund of tax. But discrimination can be cured not only by refunding taxes to the group that experienced discrimination, but also by increasing the taxes of the favored group. As the Supreme Court observed in *Wynne*, "[w]henever government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.' Whenever a State impermissibly taxes interstate commerce at a higher rate than

[320] This would be so provided that Utah retained the tax credit available under current law for source taxes assessed by other U.S. states.

intrastate commerce, that infirmity could be cured by lowering the higher rate, raising the lower rate, or a combination of the two."[321]

A state can make its tax system internally consistent not only by lowering taxes, but also by raising taxes that residents pay on in-state income. For example, to make its regime internally consistent, Utah could increase the tax rate on the in-state income of Utahns up to the sum of the tax rate on nonresidents' Utah income and residents' out-of-state income.[322] If, for example, Utah were to increase the tax rate on residents' domestic income from 5 percent to roughly 10 percent,[323] Utah could retain its 5 percent tax rate on Utahns' foreign income and its 5 percent tax rate on the Utah income of nonresidents. If such a tax were universalized, then both foreign and in-state income would be taxed at 10 percent. Accordingly, such a tax system is internally consistent in its treatment of foreign and in-state income.

Such an approach, however, would impose a higher tax on state residents' in-state income than is necessary to achieve internal consistency as regards *interstate* commerce if the state credits taxes imposed by other U.S. states, as Utah does. As a result, such a tax would discourage state residents from earning in-state income as compared to income from other U.S. states, because only income earned in other U.S. states would be eligible for credits.[324] Such "reverse discrimination" is not unconstitutional, but it is not common either as it is considered to be politically unpalatable. One solution would be for a state that selects this option to repeal its credit for taxes paid to other U.S. states.

C. Tax Credits

The last class of tax systems that satisfies internal consistency is worldwide taxation with a limited (or more generous) tax credit—a limited tax credit is a tax credit

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[321] *Wynne*, at 1806.

[322] Knoll & Mason (2017), *supra* note ___, at 341.

[323] If the Utah tax rate on residents' out-of-state and on nonresidents' in-state income was 5 percent and Utah taxed its residents on their worldwide income without allowing a deduction for taxes paid to other states, then the tax rate on residents' in-state income would have to rise to 10 percent to achieve internal consistency. If, however, Utah allowed residents a deduction for the taxes paid on foreign income, then the in-state rate would have to rise to only 9.75 percent.

[324] Such a tax would also provide Utahns with a tax-induced advantage over nonresidents in earning income in other U.S. states.

offered by a residence state for taxes paid to other jurisdictions on income earned in other jurisdictions up to, but not beyond, the taxpayer's tentative tax liability to the residence state on the same income.[325] Income tax systems with a limited tax credit (but no more) are fairly common. There are at least two ways that a state could grant tax credits to residents with foreign income that would arguably be consistent with the internal consistency test.

Option 6: Mirror image credit. A state could follow the lead of some states and municipalities after *Wynne* and adopt a mirror image tax system for the credit. Under this approach, the state would credit taxes paid abroad if, but only if, those taxes are assessed at a subnational level similar to the level of the U.S. states. Such a system, which is how most states eliminate double *U.S.-state* taxation, would be internally consistent. Such a credit, however, would overcompensate residents whenever a resident's federal credit had already effectively compensated them for subnational foreign taxes.[326]

This possibility of a double credit might lead the state to restrict access to the credit while maintaining internal consistency, for example by prohibiting double crediting of subnational taxes. Such techniques implicate the external consistency strand of tax discrimination, which requires a reasonable connection between the income the state seeks to tax and the income-generating activities conducted in state.[327]

Option 7: Residual credit. An alternative approach to the foreign tax credit would start with the recognition that a dollar of tax is a dollar of tax whether it is imposed at the national or subnational level. Thus, it makes sense to allow a state credit for taxes paid to foreign *national and subnational* governments so long as those taxes have not already been credited by the U.S. federal government. Such an approach is a holistic approach to internal consistency, but it could be complicated to implement and comply with for some taxpayers.

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[325] No state offers an unlimited tax credit. Because such a system has the potential to lead to massive refunds, at most states offer a limited credit, a credit that would zero out the taxpayer's liability to the residence state.

[326] Utah residents would be overcompensated whenever foreign taxes were less than federal taxes on the same income.

[327] *Container Corp.*, 463 U.S. at 169.

IV. CONCLUSION

Although the Supreme Court declined *certiorari* in *Steiner*, the fundamental question it raises, what limits does the dormant foreign Commerce Clause impose on state tax powers, is unlikely to go away. Many states tax foreign commerce in a manner that violates the internal consistency test, which the Court in *Wynne* made clear is the principal test for determining whether a state tax regime discriminates. For example, roughly half of the states tax both residents' worldwide income and nonresident aliens' in-state income, but do not offer residents a credit for taxes paid outside the United States. Such tax systems are very likely to fail the internal consistency test.[328] And even tax systems that provide foreign tax credits can fail the internal consistency test if the credit is not sufficiently broad. Accordingly, other taxpayers, both domestic and foreign, will likely bring *Wynne* challenges to their state's international tax regimes. And not every state court will defy the Supreme Court by refusing to apply the latter's dormant Commerce Clause precedents. Thus, sooner or later, the Supreme Court may hear a request to resolve conflicting interpretations by state courts of the dormant foreign Commerce Clause. Until that time, uncertainty and inconsistency are likely to remain.

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[328] Only if the domestic tax rate is as high as the inbound and outbound tax rates together would the state's tax system be internally consistent. We are not aware of any such state tax system.