LEADING CASES

CONSTITUTIONAL LAW

Article I — Dormant Commerce Clause — Personal Income Taxation — Comptroller of the Treasury of Maryland v. Wynne

The states' power to tax, the Supreme Court has long held, is restricted by the dormant commerce clause.[1] As a part of the Commerce Clause's silent command that the states abstain from discriminating against interstate commerce, state taxes on interstate activity must be "fairly apportioned"[2] — that is, when more than one state could plausibly tax the same income, each state may tax only its fair share of that income. A long line of cases has imposed this fair apportionment requirement on states' taxes on multistate businesses.[3] Last Term, in *Comptroller of the Treasury of Maryland v. Wynne*,[4] the Court for the first time held that a state's tax on *personal* income was subject to the restrictions of the dormant commerce clause[5]: the Court invalidated Maryland's personal income tax scheme after determining that it inherently burdened the earnings of individuals who resided in one state but worked in another.[6] In deciding the case on the ground that Maryland's income tax was inherently discriminatory, the Court avoided directly addressing an additional part of the fair apportionment inquiry. The Court thus left open the following question: when a resident earns income out of state, how much of that income can her state of residence tax (and how much must it apportion to the state where she earned the income)? The Court's dicta indicated that the answer to that question might be very different in the personal income tax realm than it is with regard to corporate income taxes, creating uncertainty about what states must do to "fairly apportion" personal income.

The Maryland personal income tax scheme invalidated in *Wynne* consisted of three parts, all of which were collected by the state of Maryland: a standard graduated "state" tax, a "county" tax, and a

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[1] *See, e.g.*, Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 279–80 (1873).

[2] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

[3] *See* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 153–54, 153 n.21 (2002).

[4] 135 S. Ct. 1787 (2015).

[5] *See id.* at 1796–98.

[6] *See id.* at 1803–04.

"special nonresident" tax.[7] This scheme created three categories of taxpayers. (1) Maryland residents who earned all their income in-state paid the state and county taxes. (2) Maryland residents who earned some income out of state paid the state tax and the county tax on all their income, but then got a credit from Maryland — *for the state tax only* — for income taxes paid to other states. (3) Nonresidents who earned some income in Maryland paid the state tax and the special nonresident tax on that income.[8]

The dispute in *Wynne* arose when Maryland, in accordance with its tax code, refused to give a resident couple a credit against their county tax for income taxes they had paid to other states.[9] Brian and Karen Wynne had earned income in thirty-nine states as a result of Brian's partial ownership of an S corporation, a structure in which income passes through the corporate entity, untaxed, directly to its owners.[10] The Maryland Comptroller's Office determined that the Wynnes could not take a credit on the county tax for the taxes they paid to other states, and so ordered the Wynnes to pay additional taxes.[11] The Wynnes argued that Maryland's failure to provide a credit for income earned out of state violated the dormant commerce clause.[12] The Maryland Tax Court rejected their argument, but the Maryland Circuit Court agreed with the Wynnes.[13]

The Maryland Court of Appeals (the state's high court) affirmed the circuit court's decision, holding in favor of the Wynnes.[14] After explaining that Maryland's failure to provide a credit on the county income tax implicated the dormant commerce clause,[15] the court applied the Supreme Court's four-part test for ensuring state taxes pass dormant commerce clause muster.[16] A tax satisfies this test if it "(1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) is not discriminatory towards interstate or foreign commerce; and (4) is fairly related to the services provided by the State."[17] The court first determined that the tax scheme

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[7] Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 457–58 (Md. 2013). The confusingly named "county" tax went to the state too; it was so called because its rate depended on which county the taxpayer lived in. *Id.* at 458.

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

[9] *Id.* at 1793.

[10] *See Wynne*, 64 A.3d at 459–60.

[11] *See Wynne*, 135 S. Ct. at 1793.

[12] *Wynne*, 64 A.3d at 460.

[13] *Id.*

[14] *Id.* at 471.

[15] The court determined that the tax disincentivized Maryland residents from generating income in other states, potentially "affect[ing] the interstate market for capital and business investment." *Id.* at 463.

[16] *Id.*

[17] *Id.* (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

was not "fairly apportioned" because it failed both of the Supreme Court's fair apportionment requirements[18]: it was neither "internally consistent" (if every state imposed an identical tax scheme, interstate commerce "would . . . be disadvantaged compared to intrastate commerce")[19] nor "externally consistent" (individuals' tax liabilities did not "reasonably reflect" whether income was derived from out-of-state sources).[20] The tax scheme also, the court held, discriminated against interstate commerce.[21] Thus the tax violated the dormant commerce clause.[22]

The Supreme Court affirmed the judgment of the Maryland Court of Appeals.[23] Justice Alito, writing on behalf of a five-Justice majority,[24] began by defending the "deep roots" of dormant commerce clause doctrine,[25] explaining that its prohibition on state laws that discriminate against interstate commerce prevents "economic Balkanization."[26] The Court's dormant commerce clause jurisprudence, Justice Alito wrote, stops states from "subjecting interstate commerce to the burden of 'multiple taxation.'"[27]

Turning to the case at hand, the Court explained that its precedents "all but dictate[d]" the conclusion that Maryland's income tax scheme violated the dormant commerce clause.[28] Justice Alito highlighted three cases in which the Court held that state taxes levied against domiciliary corporations violated the dormant commerce clause.[29] In each of these cases, the Court invalidated taxes that risked doubly taxing out-of-state earnings and that discriminated against interstate activity.[30] Justice Alito swatted away the attempts of the principal dissent and Maryland to distinguish those cases. He rebutted their contention that those cases were distinguishable because they involved

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[18] *See id.* at 463–68.

[19] *Id.* at 464. Although this "internally inconsistent" inquiry sounds a lot like part three of the four-part test — which asks whether the tax scheme discriminates against interstate commerce — courts treat them as distinct analyses.

[20] *Id.* at 467.

[21] *Id.* at 468–70. The court determined that the Maryland county tax, plus the tax levied by the state where income is earned, plus Maryland's failure to credit the out-of-state taxes, "create[d] the discrimination." *Id.* at 469.

[22] *Id.* at 470.

[23] *Wynne*, 135 S. Ct. at 1807.

[24] Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor.

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

[26] *Id.* (quoting Hughes v. Oklahoma, 441 U.S. 322, 325 (1979)).

[27] *Id.* (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

[28] *Id.*

[29] *Id.* at 1795. The cases were *J.D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

[30] *Wynne*, 135 S. Ct. at 1795.

taxes of gross receipts rather than net income, noting that recent cases reject any formalistic difference between the two.[31] He then attacked the claim that a meaningful distinction exists between taxes on corporations and taxes on natural persons[32]: he argued that states provide costly benefits to *both* individuals *and* corporations[33] and rejected the idea that the power of individuals to vote can justify differential treatment.[34] Thus, the Court established that the dormant commerce clause places limits on a state's ability to tax its residents' income.[35]

The Court then applied the "internal consistency" test to Maryland's income tax scheme. Justice Alito explained that the internal consistency test works as follows: The Court imagines that every state has the same tax structure as the one at issue. If in that hypothetical scenario interstate commerce would be disadvantaged relative to intrastate commerce, the tax fails the internal consistency test and contravenes the dormant commerce clause.[36] The Court used a simplified example to show that Maryland's income tax scheme failed the test.[37] The Court imagined that every state imposed taxes equivalent to Maryland's county and special nonresident taxes. If April lived in State A and earned her income in State A, she would pay the county tax to State A. If Bob lived in State A but earned his income in State B he would pay *both* the county tax to State A *and* the special nonresident tax to State B. Because the internal logic of Maryland's tax scheme thus "inherently" subjected interstate income to higher taxes than it did intrastate income, it flunked the internal consistency test.[38]

The tax scheme's failure to pass the internal consistency test, the Court held, was sufficient to resolve the dormant commerce clause inquiry: Maryland's income tax scheme was unconstitutional.[39] The

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[31] *Id.* at 1795–96.

[32] *Id.* at 1796–97.

[33] *Id.* at 1797.

[34] In particular, Justice Alito dismissed the dissent's claim that the ability to vote obviated the need to enforce the dormant commerce clause, remarking that "the notion that the victims of such discrimination have a complete remedy at the polls is fanciful" given that the doubly taxed individuals are likely to be a political minority. *Id.* at 1798. Justice Alito further opined that it was "even more farfetched" to believe residents have more power to influence lawmakers than large corporations do. *Id.*

[35] The dissent's contention that Maryland was free "to tax all of the income of its residents, wherever earned," Justice Alito wrote, "confuses what a State may do without violating the Due Process Clause . . . with what it may do without violating the Commerce Clause." *Id.* While he acknowledged that states have the "raw power" to reach their residents' out-of-state income, Justice Alito explained that the jurisdictional power to tax has no bearing on the dormant commerce clause analysis. *Id.* at 1799.

[36] *See id.* at 1802.

[37] *See id.* at 1803–04.

[38] *Id.* at 1804.

[39] *Id.* at 1805. Accordingly, the Court (unlike the Maryland high court) did not address whether the tax failed the external consistency test or *Complete Auto*'s discrimination prong.

Court defended this holding against the dissents' criticisms. It didn't matter, the Court explained, that internally consistent tax schemes could (in interaction with one another) produce the same sort of double taxation at issue in *Wynne*; the Constitution forbids not double taxation per se, but rather discrimination against interstate commerce.[40] The Court also contested the dissent's claim that its analysis "requires a State taxing based on residence to 'recede' to a State taxing based on source."[41] While Maryland *could* come into constitutional compliance by so "receding" (that is, by offering credits for taxes paid to other states), the Court left open the possibility that Maryland could find another remedy for the unconstitutionality of its tax scheme.[42]

Justice Ginsburg authored the principal dissent.[43] She began by invoking the often-acknowledged power of each state to "tax *all* the income of its residents, even income earned outside the taxing jurisdiction."[44] The rationales underpinning that power, she argued, are strong: not only do residents get lots of government services, but they also have political power that enables them to protect themselves against burdensome taxation.[45] She also explained that each state has an "independent interest" in taxing nonresidents who work in-state and thereby benefit from the state's protection.[46] And when it comes to establishing a tax regime, each state must prioritize between "competing tax policy objectives" — namely, each state must choose between (a) ensuring that those who receive similar government benefits pay similar taxes and (b) ensuring individuals are free from double taxation.[47] Justice Ginsburg argued that states "cannot achieve both objectives," and contended that "[f]or at least a century, responsibility for striking the right balance between these two policy objectives has belonged to the States (and Congress), not this Court."[48] After citing historical state income tax policies,[49] a number of due process cases,

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[40] *See id.* at 1804.

[41] *Id.* at 1805 (quoting *id.* at 1813 (Ginsburg, J., dissenting)).

[42] *Id.* at 1805–06. While refusing to comment on the constitutionality of alternative modes of compliance, the Court did state that "[b]y positing that Maryland could remedy the unconstitutionality of its tax scheme by eliminating the special nonresident tax, the principal dissent accepts that Maryland's desire to tax based on residence need not 'recede' to another State's desire to tax based on source." *Id.* at 1806. The Court concluded by defending the dormant commerce clause against existential attacks waged in Justices Scalia's and Thomas's dissents. *See id.* at 1806–07.

[43] Justice Ginsburg was joined by Justices Scalia and Kagan.

[44] *Wynne*, 135 S. Ct. at 1813 (Ginsburg, J., dissenting) (quoting Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995)).

[45] *Id.* at 1814–15.

[46] *Id.* at 1816.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1816–17 (describing the early-twentieth-century personal income tax schemes in Wisconsin, Oklahoma, and Missouri).

and two dormant commerce clause cases in support of the notion that a state's right to tax the income of its residents is limitless,[50] Justice Ginsburg quoted Justice Holmes's admonition that the long existence of systems of taxation is "a strong reason . . . for leaving any improvement that may be desired to the legislature."[51]

Justice Ginsburg next claimed that failing the internal consistency test didn't spell certain death for Maryland's income tax scheme. The Court, she argued, had previously allowed internally inconsistent taxes to stand.[52] What's more, she contended, the internal consistency test is no "cure" for tax schemes that burden interstate commerce, since the interaction of divergent, internally consistent tax schemes can similarly burden interstate commerce.[53] Justice Ginsburg concluded by arguing that the "competing tax policy considerations this case implicates" are better left to state legislatures and Congress, bodies that "are constitutionally assigned and institutionally better equipped to balance such issues."[54]

Justices Scalia and Thomas also wrote dissenting opinions. Justice Scalia assailed the dormant commerce clause as a "judicial fraud" and a "brazen invention" without textual basis in the Constitution,[55] and critiqued the doctrine as ad hoc, unstable, and incompatible with the judicial role.[56] Justice Thomas (who would not apply the dormant commerce clause against any state law[57]) claimed that founding-era states imposed income taxes that would have failed the Court's test, and argued that "[i]t seems highly implausible that those who ratified the Commerce Clause understood it to conflict with the income tax laws of their States and nonetheless adopted it without a word of concern."[58]

Although the Court invalidated Maryland's income tax scheme after applying only the internal consistency test, *Wynne* could have important implications for the part of the "fair apportionment" test it didn't reach: the external consistency test, which requires states to apportion income so as to "reflect a reasonable sense of how income is *generated*."[59] In its dicta disputing Justice Ginsburg's claim that

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[50] *Id.* at 1817–19.

[51] *Id.* at 1819 (omission in original) (quoting Paddell v. City of New York, 211 U.S. 446, 448 (1908)).

[52] *Id.* at 1820–21 (first citing Shaffer v. Carter, 252 U.S. 37, 57 (1920); and then citing Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 438 (2005)).

[53] *Id.* at 1822 (quoting *id.* at 1806 (majority opinion)).

[54] *Id.* at 1823.

[55] *Id.* at 1808 (Scalia, J., dissenting).

[56] *See id.* at 1809–10.

[57] *See id.* at 1811 (Thomas, J., dissenting).

[58] *Id.* at 1812.

[59] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983) (emphasis added). To put it another way, when Acme's activities in multiple states all play a part in generating its

Wynne prioritizes a state taxing based on source over a state taxing based on residence, the majority seemed to accept that Maryland could fix its tax scheme by eliminating the special nonresident tax.[60] But because that arrangement would still let Maryland levy its county tax on *all* of its residents' income generated out of state — apportioning *no income whatsoever* to those other states — it would seem to squarely violate the external consistency test. The majority's dicta thus suggest that the Court is not prepared to apply the external consistency test to states' personal income taxes, because the Court isn't equipped to decide what "fair apportionment" among states of earning and residence looks like in the personal income context.

When future courts hear dormant commerce clause challenges to personal income taxes, they may wonder how the *Wynne* Court's internal consistency–centric opinion bears upon the external consistency test.[61] In previous cases scrutinizing state taxes under the dormant commerce clause, the Court has explained that taxes must pass *both* the internal consistency test *and* the external consistency test: failure of *either* test renders a tax unconstitutional.[62] And so, the Court followed its precedent in disposing with *Wynne* on internal consistency grounds. The Court's dicta, however, address issues relevant to the external consistency test, and seem to indicate that the Court could be inclined to treat the external consistency test differently when it comes to personal income taxes than it does when it comes to corporate income taxes.

The external consistency test, as applied in the corporate income context, mandates that a state reach no more of a taxpayer's income than "that portion of value that is fairly attributable to economic activity within the taxing State."[63] The test is most vividly illustrated by cases involving interstate transportation. For example, the Court invalidated a New York tax on 100% of a resident bus company's receipts from routes on which 43% of the mileage took place in other

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income, each state must apportion Acme's income so it taxes only the income actually generated by Acme's activities in that state.

[60] *See Wynne*, 135 S. Ct. at 1805–06.

[61] Professor Walter Hellerstein has noted that "external consistency" encompasses all of the content of the Court's historical fair apportionment jurisprudence. *See* WALTER HELLERSTEIN, STATE TAXATION ¶ 4.16[2] (3d ed. 2015), Westlaw WGL-STATE. To maintain clarity, this comment refers to all fair apportionment requirements that *don't* fall within the internal consistency test as "external consistency" requirements.

[62] *See, e.g.*, *Container Corp.*, 463 U.S. at 169.

[63] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995); *see also* Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 917 (1992).

states (and was thus earned under the "protection" of other states).[64] The external consistency test doesn't apply only to such easily apportioned activity; it applies generally to states' taxes on multistate businesses.[65] When a corporation generates income in multiple states, each state may tax that corporation by multiplying the corporation's total income by an "apportionment formula" in order to approximate the share of the total income generated by activity in the taxing state.[66] While this apportionment requirement doesn't eliminate a state's theoretical power to tax its corporate residents' income wherever earned, it does (at least in the corporate income context) establish a rule of priority in which a state of source gets preference over a state of residence when taxing income.[67] This rule of priority largely limits the power of the state of residence to reach income it can't assert was generated under its protection.

If personal income taxes were to receive the exact same dormant commerce clause scrutiny as corporate income taxes, they would also have to pass the external consistency test. Indeed, the Maryland Court of Appeals, after determining that the personal income tax was subject to dormant commerce clause strictures, didn't hesitate before applying this test. The Maryland high court concluded that "[b]ecause no credit is given with respect to the county tax for income earned out-of-state," Maryland impermissibly taxed residents' income "derived entirely from out-of-state sources" and so failed the external consistency test.[68]

But, in contrast to the Maryland court's willingness to reach the external consistency test, *Wynne*'s dicta indicate the Court would be hesitant to apply the test to taxes on natural persons' income. Most critically, the logic of the Court's claim that *Wynne* doesn't force states taxing based on residence to "recede" to states taxing based on source seems to contradict the external consistency test's requirements. The Court cast doubt on its allegiance to the external consistency test when it touted the dissent's argument that "Maryland could remedy the unconstitutionality of its tax scheme by eliminating the special nonresident tax" as evidence that *Wynne* establishes no rule of priority.[69] That's because if Maryland eliminated the special nonresident tax, it would still be imposing a county tax on 100% of its residents' income, with no credit offered for income earned (and taxed) out of state. And

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[64] Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 662 (1948). The tax would have passed constitutional muster, the Court explained, had New York taxed only the portion of the travel that took place on New York roads. *Id.* at 663.

[65] *See, e.g.*, *Container Corp.*, 463 U.S. at 169–70.

[66] *Id.* at 169.

[67] Walter Hellerstein, *State Taxation of Corporate Income from Intangibles:* Allied-Signal *and Beyond*, 48 TAX L. REV. 739, 812 n.398 (1993).

[68] Md. State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 467 (Md. 2013).

[69] *Wynne*, 135 S. Ct. at 1806.

while the Court was careful not to prematurely endorse the constitutionality of such an unapportioned tax, the Court did highlight the "flexibility" that states have in responding to the invalidation of their tax schemes.[70]

A tax scheme like the one that *Wynne*'s dicta suggested, however, would fail the external consistency test because it would make no attempt whatsoever to "slic[e] a taxable pie among several States in which the taxpayer's activities contributed to taxable value."[71] While the simplest resolution of this conflict between precedent and dicta is to reject the dicta, the Court's language could indicate its willingness to abstain from imposing the external consistency test on personal income tax schemes. Such an abstention, if followed through with, would likely arise from the Court's sense that Congress is better situated to determine which basis of taxation — residence or source — deserves primacy.

Indeed, as a general matter, the Court's dormant commerce clause cases evince an understanding that prudence limits the application of the external consistency requirement to invalidate state taxes — an understanding premised largely on Congress's power to remedy impermissibly discriminatory state taxation through legislation.[72] For example, the Court relied upon a prudential rationale when it refused to mandate a nationally uniform corporate-income apportionment formula: while the Court conceded that a nationally uniform formula might be constitutionally necessary to avoid discriminatory interstate effects,[73] it nonetheless refused to dictate what that formula looked like because "the Constitution has committed such policy decisions" to Congress.[74] And although the Court didn't concede that it lacked the

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[70] *Id.* at 1806 (quoting McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 39 (1990)). The Court also suggested that the mere risk of multiple taxation of interstate activities was of little constitutional significance, *id.* at 1804, a claim that does not directly conflict with external consistency precedent, but is in some tension with the Court's previous pronouncement that "the threat of real multiple taxation . . . may indicate a State's impermissible overreaching," Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

[71] *Jefferson Lines*, 514 U.S. at 186; *see also* HELLERSTEIN, *supra* note 61, ¶ 20.10[2][b] ("[T]he Commerce Clause would limit the ability of a resident state to refuse to grant personal income tax credits for source based taxes imposed on income from . . . employment carried on in other states . . . ."). The only way a state of residence could comply with this requirement while simultaneously taxing income its residents earn out of state would be if the taxpayers' activities in their states of residence contributed to *all* of their income (and their activities in the state of earning contributed *nothing*), a logically untenable position.

[72] *See* HELLERSTEIN, *supra* note 61, ¶ 4.24[1]; *see also id.* ¶ 4.24[2].

[73] *See* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978) ("[T]he freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity . . . .").

[74] *Id.* The Court reaffirmed the political nature of the question of apportionment in a later case, explaining that *Moorman* stands for the proposition that "that task [is] . . . essentially legislative" and so the Court "declined to undertake it." Container Corp. of Am. v. Franchise Tax Bd.,

competence to set *any* limits on the reasonableness of apportionment of corporate earnings,[75] the Court did recognize that determining exactly how much of a corporation's earnings was fairly attributable to the state where a corporation makes sales (as opposed to the state of corporate headquarters) was beyond the judicial ken.

When it comes to personal income taxes, the Court might believe it's incompetent to establish a meaningful external consistency standard — and that any standard would be so toothless that either the state of residence or the state of source could validly apportion 100% of an individual's income to itself. There are meaningful differences between the ways a taxpaying corporation's state of residence and a taxpaying individual's state of residence contribute to each taxpayer's income: whereas a corporation can "reside" in a state in which it has a minimal presence, an individual invariably receives a huge number of benefits from her state of residence.[76] As a result, a state can more persuasively claim that its protections contribute to the income that its human residents earn out of state than it can with regard to income that its corporate residents earn via out-of-state sales.

In the face of this difference between individual and corporate income, the Court might not feel compelled to impose the external consistency requirement on individual income taxes.[77] As Justice Ginsburg noted, any attempt by the Court to say which state gets priority claim to individuals' income would have major implications for state tax policy, and Congress can fashion rules to resolve conflicts among state tax policies.[78] The Court might thus see fit to follow its dicta in recognition of the difficult questions that it would have to answer in order to impose a meaningful external consistency test on state income tax schemes — and the political ramifications that such imposition would entail.

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463 U.S. 159, 171 (1983). Justice White also wrote in one case that he voted to sustain a state tax because Congress's power to resolve potential issues "counsel[ed] withholding [the Court's] hand." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 637 (1981) (White, J., concurring). Justices Frankfurter and Black also made competence pleas in state tax cases. *See* HELLERSTEIN, *supra* note 61, ¶ 4.24[2].

75 *See Container Corp.*, 463 U.S. at 169–70 (implying just such competence).

76 *See* Brief of the International Municipal Lawyers Ass'n & Other State & Local Government Groups as *Amici Curiae* in Support of Petitioner at 6–10, *Wynne*, 135 S. Ct. 1787 (No. 13-485); *see also Wynne*, 135 S. Ct. at 1816 (Ginsburg, J., dissenting).

77 Such an approach would not be inconsistent with the Court's rejection of the argument that the different benefits flowing to individuals exempt individual income taxes from dormant commerce clause scrutiny; that rejection merely affirmed that individual income taxes cannot be discriminatory, not that they must be apportioned identically to corporate income taxes. *See Wynne*, 135 S. Ct. at 1797 (majority opinion).

78 *See id.* at 1816, 1823 (Ginsburg, J., dissenting).