NOTE

REIMAGINING DUE PROCESS: A NEW APPROACH TO REGULATING STATE TAXING AUTHORITY

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Introduction

In 2015, the Supreme Court decided *Comptroller of the Treasury of Maryland v. Wynne*,[1] which some commentators then called "the most important state tax decision in decades."[2] In *Wynne*, a five-justice major-

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[1] 135 S. Ct. 1787 (2015).

[2] Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. 309, 310 (2017).

ity held that Maryland's personal income tax scheme constituted impermissible discrimination of interstate commerce under the dormant Commerce Clause. Although the Court correctly applied the existing Commerce Clause jurisprudence to reach this result, the opinion illustrates the absurd means by which the dormant Commerce Clause can operate to restrict state taxing authority. In particular, the opinion shows that the internal consistency test, which supposedly protects against discriminatory double taxation of interstate commerce, does not actually do so. Indeed, the internal consistency test fosters uncertainty because it cannot predict which tax schemes will actually result in discriminatory double taxation. In addition, there are powerful reasons why we should allow at least some amount of double taxation, even if it is discriminatory. Our existing Commerce Clause jurisprudence is therefore flawed and should be either modified or replaced in order to regulate state taxing authority more fairly.

This Note proposes a new approach that would more predictably regulate discriminatory taxing of interstate commerce while nevertheless allowing for a reasonable amount of double taxation. Instead of proposing a rework of the internal consistency test, I argue that a modified due process standard can provide an effective and simpler means of regulating state taxing authority, at least in the context of personal income taxes. My basic contention is that the due process standard of minimum contacts for specific personal jurisdiction should be adopted as the standard for state authority to tax personal income. Under this proposed modified due process standard, there would be no need for the Commerce Clause to regulate state taxing authority at all.

This Note will proceed as follows: Part I provides a brief overview of the existing Due Process and Commerce Clause restrictions on state taxing authority; Part II provides an in-depth discussion of *Maryland v. Wynne* and the ineffectiveness of the internal consistency test; Part III discusses existing criticisms of the internal consistency test; and Part IV outlines the proposed modified due process standard.

I. CONSTITUTIONAL RESTRICTIONS ON STATE TAXING AUTHORITY

State taxing authority is limited by both the Due Process and Commerce Clauses.[3] More precisely, the dormant Commerce Clause restricts state taxing authority.[4] And while the due process standard is the familiar test of minimum contacts, the Commerce Clause standard is a convoluted amalgam of several tests.

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[3] JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION, ¶ Intro Pt III (3d ed. 2001). The Import-Export Clause also restricts state taxing authority by preventing states from imposing tariffs on interstate commerce. *Id.*

[4] *Id.*

A. *Due Process Restrictions*

Under the Due Process Clause, a state may tax only those over whom it has authority.[5] This authority "requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax."[6] Of course, this language closely resembles the minimum contacts standard for territorial authority to adjudicate (e.g., personal jurisdiction), which the Court has recently described as requiring "a connection between the forum and the specific claims at issue."[7] Although it is conceivable that the due process minimum contacts test for taxation could be different from the minimum contacts test for personal jurisdiction, the Court in *Quill Corp. v. North Dakota* essentially incorporated the due process jurisprudence on personal jurisdiction into the due process standard for taxation.[8] And, to continue with the analogy, just as a person's domicile establishes a basis for general jurisdiction,[9] a taxpayer's domicile establishes a basis to tax all of the taxpayer's income, regardless of where the taxpayer earns his income.[10]

Due process also requires that "the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State."[11] While this requirement is not clearly defined, one could analogize this to the requirement that a state's exercise of personal jurisdiction must be reasonable.[12]

B. *Dormant Commerce Clause Restrictions*

The dormant Commerce Clause imposes "closely-related . . . [but] distinct limits [from due process limitations] on the taxing powers of the States."[13] The seminal case is *Complete Auto Transit, Inc. v. Brady*,[14]

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5 *Id.*

6 Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

7 Bristol-Myers Squibb Co. v. Superior Court of California, 173 S. Ct. 1773, 1781 (2017).

8 *See* Quill Corp. v. North Dakota, 504 U.S. 306, 307–08 (1992). In applying due process principles to state taxing authority, the Court in *Quill* cited the seminal personal jurisdiction cases including International Shoe Co. v. Washington, 326 U.S. 310 (1945); Shaffer v. Heitner, 433 U.S. 186 (1977); and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

9 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011).

10 HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 20.03, 20.04[1]; *see also* Lawrence v. State Tax Comm'n of Mississippi, 286 U.S. 276, 279–80 (1932). Although the concepts of domicile and residency are legally distinct, this Note uses the terms interchangeably. *See* Aaishah Hashmi, *Is Home Really Where the Heart Is?: State Taxation of Domiciliaries, Statutory Residents, and Nonresidents in the District of Columbia*, 65 TAX LAW. 797, 798–99 (2012) (discussing the distinction between residency and domicile).

11 *Quill*, 504 U.S. 298, 306 (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273 (1978) (internal quotation mark omitted).

12 *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 276 (1945).

13 *Quill,* 504 U.S. at 306.

14 430 U.S. 274 (1977).

which articulated a four-part test to determine whether a tax violates the dormant Commerce Clause. Under *Complete Auto*, a tax is constitutional if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[15]

The substantial nexus test is similar to the due process concept of minimum contacts.[16] Indeed, the two concepts became arguably indistinguishable when the Court recently held that substantial nexus does not require that the taxpayer maintain a physical presence in the taxing state.[17] As Hellerstein and Hellerstein explain, substantial nexus requires both a connection between the taxing state and the taxpayer, and a connection between the taxing state and "the activity the state seeks to tax."[18]

Fair apportionment asks whether a tax is attributable to the taxpayer's activities within the state seeking to impose the tax.[19] Prior to *Wynne*, the Court had measured fair apportionment under the complementary tests of internal and external consistency.[20] The details of the internal consistency test will be discussed later, but briefly, internal consistency can be explained as a *hypothetical* inquiry into whether a tax discriminates against interstate commerce.[21] On the contrary, external consistency is a *practical* inquiry into whether "a State's tax reaches beyond that portion of value that is fairly attributable to the economic activity within the taxing State."[22]

The fair relation inquiry appears to be nearly identical to the fair apportionment inquiry. Fair relation asks whether a tax is "fairly related to the services provided by the State."[23] Whether a tax is fairly related does not turn on the value of the benefits that the taxpayer actually receives from the state; fair relation requires that "the measure of the tax

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15 *Id.* at 279.

16 *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (noting that the concept of substantial nexus has "significant parallels" to the concept of minimum contacts).

17 *Id. Wayfair* is the most recent Supreme Court case interpreting the substantial nexus requirement. *Wayfair* overruled *Quill*, which held that substantial nexus required physical presence. *Id.*

18 HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 6.02.

19 *See* Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 FORDHAM L. REV. 149, 150 (2002).

20 *See* Edward A. Zelinsky, *The Enigma of Wynne*, 7 WM. & MARY BUS. L. REV. 797, 810–11 (2016).

21 If this statement seems confusing because I frame what is ostensibly an apportionment test in terms of nondiscrimination, which is a separate prong of the *Complete Auto* test, then see *infra* note 40.

22 Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 4.16[2] (describing the external consistency test as "nothing more than another label for the fair apportionment requirement.").

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

must be reasonably related to the extent of the [taxpayer's] contact [that forms a substantial nexus] . . . ."[24] Given this extremely close resemblance to the fair apportionment inquiry, the fair relation prong appears redundant.[25]

The nondiscrimination inquiry asks whether a state's tax scheme treats interstate commerce more favorably than it treats intrastate commerce.[26] While this definition is straightforward, the nondiscrimination test appears to be merely conclusory: a tax that fails either of the three other tests will by definition be discriminatory. Indeed, one struggles to conceive a scenario where a tax would fail only the nondiscrimination prong of the *Complete Auto* test. Nevertheless, it was the nondiscrimination inquiry which was at issue in *Maryland v. Wynne*. The next Part examines how the *Wynne* Court used the internal consistency test to measure nondiscrimination.

II. *MARYLAND V. WYNNE* AND THE PECULIAR TEST OF INTERNAL CONSISTENCY

Maryland v. Wynne challenged the constitutionality of Maryland's personal income tax scheme. To determine whether Maryland's tax scheme discriminated against interstate commerce, the Court applied the internal consistency test. Although the Court applied the internal consistency test correctly, the Court's opinion reveals that the internal consistency test cannot actually protect against states' discriminatory taxation of interstate commerce.

A. Factual Background

In 2015, Maryland's personal income tax scheme consisted of three separate taxes. First, Maryland imposed a "state" tax which applied to (1) the income of all residents, regardless of whether the resident earned his income in-state or out-of-state, and (2) any income that nonresidents earned in Maryland.[27]

Second, Maryland subjected its residents—but only its residents—to a "county" tax.[28] If a resident earned income in another state and also paid income taxes to that other state, then Maryland allowed that resident taxpayer a credit against the Maryland state tax.[29] However, Maryland

[24] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625–26 (1981).

[25] *See* Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 S. CT. REV. 193, 245 (1998) (describing the fair relation prong as "functionally irrelevant").

[26] HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 4.14.

[27] Maryland State Comptroller of the Treasury v. Wynne, 64 A.3d 453, 458 (Md. 2013).

[28] Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1792 (2015).

[29] *Id.*

did not provide for any credit against the Maryland county tax.[30] In this way, a Maryland resident who earned income outside of Maryland could be subject to double taxation on a portion of his out-of-state income. Specifically, his out-of-state income would be subject to both the Maryland county tax and the non-Maryland state's income tax.

Third, nonresidents who were already subject to the state tax were also obligated to pay a special nonresident tax.[31] As the Maryland Court of Appeals summarized: "Thus, all individual taxpayers [were] subject to the State tax and either the county tax or the [special nonresident tax]."[32]

The respondents in the case were married couple Bryan and Karen Wynne, Maryland residents who were shareholders in a Subchapter S corporation called Maxim Healthcare Services, Inc.[33] Maxim earned income in 39 states, and the Wynnes claimed credits against both Maryland's state and county taxes for the income taxes paid to those other states.[34] Of course, claiming a credit against the county tax was improper under Maryland's tax scheme, so Maryland assessed a tax deficiency, which the Maryland Tax Court affirmed.[35] On appeal, the Maryland Circuit Court sided with the Wynnes and reversed, holding Maryland's tax scheme unconstitutional under the dormant Commerce Clause.[36] The Court of Appeals of Maryland affirmed, and the Supreme Court of the United States granted certiorari.[37] By a vote of five to four, the Supreme Court also affirmed.[38]

B. The Internal Consistency Test

The Supreme Court applied the internal consistency test to determine whether Maryland's tax scheme impermissibly discriminated against interstate commerce.[39] The Court first articulated the internal consistency test in *Container Corp. of America v. Franchise Tax Bd.*[40] The internal consistency test operates as follows: a court hypothetically

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30 *Id.*

31 *Wynne*, 64 A.3d at 458.

32 *Id.*

33 *Wynne*, 135 S. Ct. at 1793. A Subchapter S Corporation is a pass-through entity that is taxed similar to a partnership: the corporate entity itself does not pay any taxes; income and losses are passed through to the corporate shareholders, who pay tax at the individual level. *See generally* BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS, ¶ 6.05 (7th ed. 2015).

34 Wynne, 135 S. Ct. at 1793.

35 *Id.*

36 *Id.*

37 *Id.* at 1793–94.

38 *Wynne*, 135 S. Ct. 1787

39 *Id.* at 1802–05.

40 463 U.S. 159, 169 (1983). When *Container Corp.* introduced the internal consistency test it was as a means to test for fair apportionment. *Container Corp.* also introduced the external consistency test as a complementary test for fair apportionment. *Wynne* represented a

assumes that every state has adopted a tax scheme identical to the scheme at issue and then looks to see whether the scheme interacts with itself to place a higher burden on interstate commerce.[41] For example, a state tax scheme that imposes a 3% tax on only its residents is internally consistent: if every state adopted such a scheme, all taxpayers would be taxed only once and at the same rate—by their home state at 3%— regardless of whether the taxpayer earned income out-of-state (interstate commerce) or in-state (intrastate commerce).[42] In this way, the internal consistency test supposedly distinguishes between tax schemes that are "inherently" discriminatory and schemes that merely "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."[43] Schemes that fail the test are inherently discriminatory and are "*typically* unconstitutional."[44]

Before proceeding, it is worth commenting on a few things. First, the only issue with Maryland's tax scheme was that it threatened double taxation of Maryland residents' out-of-state income. If the Maryland scheme was unconstitutional, it could therefore be unconstitutional only on that basis. However, in the language quoted above, the Court explicitly states that double taxation of interstate commerce is permissible in some instances, namely if it results from the interaction of two internally consistent tax schemes. As Justice Scalia illustrates in his dissent, this permissible sort of discrimination could result "if Maryland imposes its income tax on people who live in Maryland regardless of where they work . . . while Virginia imposes its income tax on people who work in Virginia regardless of where they live."[45] Both schemes are internally consistent, but they interact to create double taxation of interstate commerce. Specifically, a Maryland resident who works in Virginia will pay tax to both states, whereas a Maryland resident who works in Maryland will pay tax to Maryland only. Thus, under the internal consistency test, double taxation of interstate commerce is not always unconstitutional, even if the double taxation is in fact discriminatory.[46]

Second, even tax schemes that fail the internal consistency test—the so-called inherently discriminatory schemes—are only "typically" un-

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break from precedent in that the Court used the internal consistency test to measure nondiscrimination rather than apportionment. *See* Zelinksy, *supra* note 20, at 810–11.

41 *Wynne*, 135 S. Ct. at 1802.

42 *See id.* at 1811 (Scalia, J., dissenting).

43 *Id.* at 1802 (emphasis added).

44 *Id.* (emphasis added).

45 *Id.* at 1811 (Scalia, J., dissenting).

46 Double taxation is not always discriminatory. For example, both intrastate and interstate income could be subject to an identical double tax.

constitutional.[47] This equivocal language confirms that the internal consistency test, and by extension double taxation of interstate commerce, is not dispositive to the constitutionality determination.[48]

In any case, Maryland's scheme clearly failed the internal consistency test. The Court illustrates this by way of an example:[49] suppose April and Bob are both Maryland residents. Furthermore, suppose that each of Maryland's three taxes—the state, county, and special nonresident tax—each have a rate of 1%. April earns all of her income in Maryland, but Bob commutes to Virginia and earns all of his income there. Remember, the internal consistency test assumes that Virginia has adopted a tax scheme identical to Maryland's.[50] April and Bob's tax obligations will be as follows:

TABLE 1: MARYLAND'S UNCONSTITUTIONAL SCHEME

	April	**Bob**
State Tax Owed	1% to MD	1% to MD and 1% to VA
County Tax Owed	1% to MD	1 % to MD
Special Nonresident Tax ("SNR") Owed	none	1% to VA
Eligible Tax Credit	none	(1%) from Md.
Total Tax Obligation	**2% to MD**	**1% to MD and 2% to VA**

Bob's total tax burden will be 3%—a higher burden than April's 2%. Crucially, Bob's burden is higher only because he earns interstate income. Maryland's scheme was thus inherently discriminatory, and therefore (typically) unconstitutional.

C. *Implications of Internal Consistency*

The internal consistency test's ineffectiveness becomes even more apparent when one considers how Maryland could become compliant with the test. To become compliant, Maryland would have to alter its tax scheme such that interstate income is not taxed more than intrastate income. As the Court in *Wynne* explains, Maryland could accomplish this

47 In so qualifying its language, the Court was likely acknowledging *American Trucking Assns., Inc. v. Michigan Pub. Ser. Comm'n,* 545 U.S. 429 (2005), where the Court upheld a flat trucking tax despite the tax apparently failing the internal consistency test. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 4.16[1][a][vi].

48 *See* Knoll & Mason, *supra* note 2, at 336–37 (explaining that the dormant Commerce Clause does not prohibit double taxation).

49 *Wynne*, 135 S. Ct. at 1803.

50 Maryland's tax scheme is explained above in Part II A.

either by raising its tax rate of intrastate income ("leveling up," in the Court's parlance) or lowering its tax rate of interstate income ("leveling down").[51] Maryland could level down by (1) eliminating the special non-resident tax, or (2) providing a full tax credit to its residents who pay income taxes to other states.[52] Table 2 below illustrates some of these scenarios using the earlier example of April and Bob.

TABLE 2: CURING MARYLAND'S TAX SCHEME

	"Leveling up" Raise the State Rate for April		**"Leveling down" 1** Eliminate the SNR		**"Leveling down" 2** Provide a Full Credit to Bob	
	April	Bob	April	Bob	April	Bob
State	2% to MD	1% to MD 1% to VA	1% to MD	1% to MD 1% to VA	1% to MD	1% to MD 1% to VA
County	1% to MD	1% to MD	1% to MD	1% to MD	1% to MD	1% to MD
SNR	none	1% to VA	-	-	none	1% to VA
Credit	none	(1%) from MD	none	(1%) from MD	none	(2%) from Md.
Total	**3% to MD**	**1% to MD 2% to VA**	**2% to MD**	**1% to MD 1% to VA**	**2% to MD**	**2% to VA**

April and Bob pay the same aggregate tax rate in all of the above scenarios. However, there are some peculiar implications with these possible cures. First, the leveling up scenario— whereby Maryland raises its tax rate on residents who earn income in-state (i.e., April)—does not in any way change Bob's position; Bob's income (all of which is earned out-of-state) is still subject to the same double taxation burden as before. However, this double taxation is permissible because the end result is that April and Bob are burdened equally. Thus, an internally consistent scheme may incorporate double taxation of interstate commerce. This confirms that the dormant Commerce Clause is not per se against double taxation; the dormant Commerce Clause prohibits double taxation of interstate commerce only when it entails preferential treatment of interstate commerce.[53]

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51 *Wynne*, 135 S. Ct. at 1806. Maryland could also have become compliant by both leveling up and leveling down. *Id.*

52 *Id.*

53 *See* Walter Hellerstein, *Deciphering the Supreme Court's Opinion in Wynne*, 123 J. TAX'N 4, 6–8 (2015); *see also* Ryan Lirette & Alan D. Viard, *Putting the Commerce Bank in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 J. L. & POL'Y 467, 491 (2016) (explaining that double taxation is not necessarily discriminatory, despite the Supreme Court sometimes articulating that one of the dormant Commerce Clause's purposes is to prevent double taxation).

Second, if Maryland wants to exercise the full extent of both its residence-based taxing authority (taxing the income of its residents regardless of where its residents earn income) and its source-based taxing authority (taxing the income of anyone who earns income in Maryland regardless of where they reside), then the former is apparently limited by the latter.[54] As Table 2 shows, the extent to which Maryland may tax Bob will always be qualified by the extent to which Virginia also taxes Bob. Maryland's ability to tax Bob (a Maryland resident) thus depends on how another state would hypothetically exercise its source-based authority to tax Bob. Indeed, if Maryland cures its scheme by providing Bob with a full credit, then Maryland receives no tax from Bob at all.[55] It is unclear whether this is desirable, but intuitively it seems that a state has a claim to at least some portion of a resident taxpayer's income, even if that claim results in double taxation, and even if the taxpayer earns no income in-state.

Because internal consistency assumes that Virginia has adopted Maryland's own tax scheme, it is not really Virginia's scheme that is limiting Maryland's ability to tax Bob. It is more accurate to say that Maryland itself limits the extent to which Maryland may tax Bob. In other words, Maryland has a choice: Maryland can either tax Bob and April equally, but only if Maryland's tax scheme does not impose *any* tax on nonresidents (i.e., Maryland declines to exercise its source-based authority); or, Maryland can decide to tax nonresidents, but only by foregoing its ability to tax Bob to the same extent that it taxes April.[56]

Third, and accordingly, Bob will always pay less tax to Maryland than April will pay to Maryland, even though both are Maryland residents.[57] This will always be the case so long as Bob pays any tax to

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54 *See* Mackenzie Catherine Schott, *Inconsistency with the Internal Consistency Test*, 77 LA. L. REV. 947, 962–63, 970–71 (2017); *see also* 135 S. Ct. at 1813 (Ginsburg, J., dissenting) (arguing that a state should be able to exercise the full extent of both its residence and source-based taxing authority). *But see* Hellerstein, *supra* note 53, at 9 (arguing that *Wynne* rejects a rule of priority where source-based authority trumps residence-based authority). The *Wynne* Court unconvincingly states: "We establish no such rule of priority." 135 S. Ct. at 1805. According to the Court, there is no rule of priority because Maryland could cure its tax scheme by offering a full credit, thereby allowing Maryland to exercise its full residence-based authority. *Id.* However, Maryland could only exercise its full residence-based authority if it abandons its source-based authority.

55 The Court hints that providing a full credit is the most desirable cure. *Wynne*, 135 S. Ct. at 1801 ("Today, the near universal state practice is to provide credits against personal income taxes for such taxes paid to other States."); *see also* Hellerstein, *supra* note 53, at 7–8 ("When both the state of residence and the state of source have a legitimate claim to tax income, there are widespread understandings that the state of residence ordinarily yields to the state of source to avoid double taxation.").

56 The Court calls this argument a "red herring." 135 S. Ct. at 1805. "The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer." *Id.*

57 Unless Maryland abandons its taxes on nonresidents entirely.

Virginia (i.e., if Maryland's tax scheme taxes nonresidents to *any* extent). The only way in which Maryland could extract more tax from Bob would be if Maryland "leveled up" more than was necessary. For example, Maryland could tax April at 5% in the aggregate. This would obviate the need for Maryland to give Bob any tax credit while enabling Maryland to tax Bob at an additional 1%. But again, Bob would still pay less tax than April to Maryland. Of course, this may not be an unfair result. As someone who both lives and works in Maryland, April presumably enjoys more of Maryland's protections and benefits than Bob does. However, Bob would still be entitled to many of the same benefits that April would be entitled to. For example, Bob could attend a Maryland public college for the same reduced in-state rate as April, even though he contributes a smaller proportion of his income to Maryland.[58]

Fourth, the internal consistency test is not concerned with the extent of the taxpayer's tax burden. In other words, Maryland could tax April and Bob exorbitantly, so long as both taxpayers are subjected to the same aggregate tax burden. On the contrary, even a trivially higher tax on interstate income will fail the internal consistency test. Internal consistency therefore seeks equity between individual taxpayers, regardless of the state or states to which the taxpayer pays taxes.

Another alarming possibility is that the internal consistency test might actually upset an otherwise nondiscriminatory interaction between two state tax schemes. In other words, it is possible for Maryland's scheme to be nondiscriminatory despite being internally inconsistent. For example, if Virginia's *actual* tax scheme does not include a special nonresident tax (but otherwise mirrors Maryland's tax scheme), then there would be no discrimination between April and Bob under Maryland's original tax scheme (both taxpayers would owe 2% in taxes). It is only because the internal consistency test hypothetically assumes a uniform tax scheme among all of the states that Maryland's scheme is deemed inherently discriminatory. In actuality, however, whether a tax scheme discriminates against interstate commerce depends on how that scheme interacts with the actual schemes of other states.

To summarize, the internal consistency test supposedly protects against discrimination of interstate commerce. Although this discrimination can occur through double taxation of interstate commerce, internal consistency does not prevent all discriminatory double taxation. In addition, internal consistency enforces a de facto rule of priority whereby a state's residence-based taxing authority must give way to another state's

[58] Ginsburg makes this argument in dissent. 135 S. Ct. at 1816 (Ginsburg, J., dissenting) ("The Wynnes enjoyed equal access to the State's services but will have paid . . . less to cover the costs of those services than similarly situated neighbors who earned their income entirely within the State.").

source-based taxing authority. This rule of priority means that a state can never exercise its full source-based and residence-based authority simultaneously, and any exercise of source-based authority will limit the extent to which a state may tax its residents who earn income out-of-state.[59] Finally, forcing an internally inconsistent tax scheme to become internally consistent may upset an otherwise nondiscriminatory interaction of state tax schemes.

Internal consistency's greatest problem, however, is that it is a hypothetical test. As such, it can never be a true measure of whether a state's tax scheme actually discriminates against interstate commerce. Indeed, the *Wynne* case itself never addressed whether Maryland's scheme was discriminatory in fact. The Court determined that Maryland's scheme failed the internal consistency test, which ended the Court's inquiry.[60]

III. ALTERNATIVES TO INTERNAL CONSISTENCY

As one would imagine, the internal consistency test is not without its critics, many of whom have called for its modification or replacement. Daniel Bosworth argues in favor of replacing the four-part *Complete Auto* test with a "Bridge Test."[61] Under Bosworth's Bridge Test, a tax scheme that failed the internal consistency test is not automatically deemed unconstitutional; rather, failure of the internal consistency test establishes a rebuttable presumption that can be overcome if the tax scheme passes a three-part factor test.[62] Bosworth's factors are as follows: "(1) the tax is not facially discriminatory towards out-of-state interests; (2) the interests most directly burdened by the tax have a remedy in the political process; and (3) the tax is externally consistent."[63] Bosworth's Bridge Test is appealing in that it waters down the internal consistency test, but the Bridge Test does not seem to simplify the Court's task; it appears to replace one set of tests with another.[64] Furthermore, Bosworth's test apparently has no nexus requirement, which (at least prior to *Wayfair*) was arguably the most important prong of the *Complete*

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59 The rule of priority whereby source-based authority trumps residence-based authority has actually long been accepted. *See, e.g.*, Standard Oil Co. v. Peck, 342 U.S. 382, 384–85 (1952) ("The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile.").

60 Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1805 (2015).

61 Daniel Bosworth, *Comptroller of the Treasury v. Wynne: Bridging the Gap Between Strands of Jurisprudence on State Income Taxation*, 75 MD. L. REV. 1092, 1111 (2016).

62 *Id.*

63 *Id.*

64 Justice Scalia took issue with the various and cumbersome Commerce Clause tests. *Wynne*, 135 S. Ct. at 1809 (Scalia, J., dissenting) (describing the dormant Commerce Claus as a "bestiary of ad hoc tests and ad hoc exceptions . . . including the substantial nexus test, the fair apportionment test, and the fair relation test.").

Auto inquiry.[65] The Bridge Test also retains the highly ineffective internal consistency test, albeit with less potency.

Mark L. Mosely similarly argues for abandoning the four-part *Complete Auto* test, but goes further by proposing that the internal consistency test should be abandoned as well.[66] According to Mosely, the only question that a court should ask is whether a tax actually causes "substantial interference with competition in the specified market," where the taxpayer has the burden to prove this sort of interference.[67] Mosley contends that this approach would confine the inquiry to a tax's practical effects, which "should be determined by evidentiary findings."[68] Although Mosley's approach is commendable for its focus on practical effects (rather than internal consistency's focus on hypothetical effects), his proposition would remove certainty from the equation. In other words, there are no guidelines as to what constitutes substantial interference. For all of its faults, the internal consistency is at least predictable and easy to apply; with Mosley's approach, we lose that predictability.[69]

Jesse H. Choper and Tung Yin also propose an alternative to the entire *Complete Auto* test. Their alternative is a two-part test called the "object-measure" approach.[70] The object-measure approach looks to the "object," or subject of a tax (for example, a tax on particular property or a particular activity), and seeks to tax that activity at an appropriate measure.[71] The object-measure approach first asks whether "the object of the tax is something that only one state has the ability to tax."[72] If that is the case, then the tax is "usually" valid and does not need to be apportioned.[73] If more than one state can appropriately tax the object, however, then the tax must be fairly apportioned.[74] Choper and Yin's approach thus greatly simplifies the cumbersome *Complete Auto* test by essentially reducing the test to a single apportionment inquiry. In addition, the object-measure approach ensures that there is no double taxation of interstate commerce. Although eliminating any threat of double taxation might appear to be attractive, double taxation is not necessarily a

65 Although not so explained in his article, Bosworth may have omitted a nexus requirement because due process already requires that the taxing state have minimum contacts with taxpayer.

66 Mark L. Mosely, *The Path Out of the Quagmire: A Better Standard for Assessing State and Local Taxes Under the Negative Commerce Clause*, 58 TAX LAW. 729, 764 (2005).

67 *Id.*

68 *Id.*

69 *See* Schott, *supra* note 54, at 974 (describing the internal consistency test as "straightforward").

70 Choper & Yin, *supra* note 25, at 205.

71 *Id.* at 205–06.

72 *Id.* at 206.

73 *Id.*

74 *Id.*

concern of the dormant Commerce Clause. In some instances, double taxation does not result in discrimination of interstate commerce; in others, double taxation might actually be desirable, even if it is discriminatory.[75]

The dissenting justices in *Wynne* offered their own alternatives to the internal consistency test. Indeed, Justice Scalia attacks the dormant Commerce Clause itself, arguing that the dormant Commerce Clause is a "judicial fraud" because it has no express basis in the Constitution.[76] Scalia argues that the Constitution's Article I prohibition against states laying "'[i]mposts or [d]uties on [i]mports or [e]xports'" protects against tariffs, and thus provides sufficient protection against tax schemes that are analogous to tariffs.[77] In other words, the Import-Export clause would strike down any facially discriminatory tax scheme. The implication, of course, is that tax schemes that are not facially discriminatory yet nevertheless indirectly discriminate against interstate commerce—such as Maryland's challenged tax scheme in *Wynne*—would be constitutional. Put somewhat differently, states would be able to exercise their full source-based and residence-based taxing authority at the same time, even if such exercise resulted in discriminatory double taxation of interstate commerce.

In *Wynne*'s principal dissent, Justice Ginsburg likewise argues that a state should be able to exercise the full extent of both its source-based and residence-based taxing authority, even though doing so might result in discriminatory double taxation of interstate commerce.[78] In other words, a state's ability to tax its residents should not be limited by the extent to which that State also chooses to tax the income that nonresidents earn in-state. Ginsburg grounds her argument supporting residence-based authority in the Due Process Clause, which gives states the power to tax the "worldwide" income of their residents.[79] Taxing a resident's

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75 *See* Part V, *infra.*

76 *Wynne*, 135 S. Ct. at 1808 (Scalia, J., dissenting). Scalia emphasizes his disdain for the dormant Commerce Clause by referring to it as the "Synthetic Commerce Clause," *id.* at 1810 (Scalia, J., dissenting), and the "Imaginary Commerce Clause," *id.* at 1811 (Scalia, J., dissenting). In his dissenting opinion, Justice Thomas also argues that the dormant Commerce Clause has no basis in the Constitution. *Id.* at 1811 (Thomas, J., dissenting). For other criticisms of the dormant Commerce Clause doctrine, *see* Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 453 (1992) (arguing that the dormant Commerce Clause doctrine encourages "judicial activism," thereby upsetting the separation of powers); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–48 (1982) (arguing that judicial intervention grounded in the dormant Commerce Clause should instead be grounded in the Privileges and Immunities Clause).

77 *Wynne*, 135 S. Ct. at 1809–10 (Scalia, J., dissenting).

78 *Id.* at 1813–14 (Ginsburg, J., dissenting).

79 *Id.* at 1814 (Ginsburg, J., dissenting). *See supra* Part I.A, for a discussion of the due process restrictions on state taxing authority.

interstate income is fair, Ginsburg continues, because the state confers protections and benefits to its residents, who in turn have the power to check abusive taxation via the state's "political process" (i.e., via elections).[80] Taxing a nonresident's in-state income is likewise fair, Ginsburg claims, because that nonresident similarly derives protections and benefits from the state in which he earns income, and should be expected to contribute to that state's maintenance.[81] Although a nonresident cannot participate in the taxing state's political process in the same way that a resident can, Ginsburg claims that "the existence of major interstate interests"—in other words, comity between states—is a sufficient check against abusive taxes.[82] Ginsburg therefore claims that it is possible for two states to have "lawful tax regimes reaching the same income."[83] Whether a state offers credits for taxes that their residents pay to other states, Ginsburg concludes, is "a matter of tax policy."[84]

Although Ginsburg thus argues for a repeal of the internal consistency test, she does not share Scalia's position that we should abandon the dormant Commerce Clause entirely. Ginsburg acknowledges that the dormant Commerce Clause places some restriction on state taxing authority, but she does not put forth a clear alternative to the internal consistency test. Rather, she provides some examples of when the dormant Commerce Claus would strike down a tax scheme. According to Ginsburg, the dormant Commerce Clause would not tolerate a scheme that "tax[ed] residents at a higher *rate* for out-of-state activities than for in-state activities (or to exempt from taxation only in-state activities)."[85] "By contrast," Ginsburg continues, "the Court has generally upheld 'evenhanded tax[es] . . . in spite of any adverse effects on interstate commerce . . . ."[86] Ginsburg defines evenhanded taxes as taxes "which [tax] residents' income at the same *rate* whether earned in-state or out-of-state."[87] Put more simply, Ginsburg is saying that the dormant Commerce Clause prohibits only facially discriminatory taxes.

Ginsburg thus ends up in the same place as Scalia—both would adopt a rule whereby only facially discriminatory taxes are unconstitutional; the justices just house their rules under different clauses of the Constitution. And though the approach advocated by the dissenting justices certainly has its appeal—it would greatly simplify the admittedly

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80 *Id.* at 1814–15 (Ginsburg, J., dissenting).

81 *Id.* at 1816 (Ginsburg, J., dissenting).

82 *Id.* at 1815 (Ginsburg, J., dissenting).

83 *Id.* at 1813 (Ginsburg, J., dissenting).

84 *Id.* at 1814 (Ginsburg, J., dissenting).

85 *Id.* at 1815 (Ginsburg, J., dissenting) (emphasis added).

86 *Id.* at 1815 (Ginsburg, J., dissenting) (internal quotation mark omitted) (citation omitted).

87 *Id.* at 1815 (Ginsburg, J., dissenting) (emphasis added).

cumbersome dormant Commerce Clause jurisprudence—Scalia and Ginsburg's total relaxation on discriminatory double taxation may go too far.

IV. A NEW APPROACH—MODIFY DUE PROCESS AND ABANDON THE DORMANT COMMERCE CLAUSE RESTRICTIONS ON STATE TAXING AUTHORITY

Given the above considerations, can we develop a more effective test than internal consistency? In this Part, I propose a modified due process standard that would replace not only the internal consistency test, but the entire four-part *Complete Auto* test as well.[88] The modified due process standard seeks to (1) provide a straightforward approach that limits the risk of discriminatory double taxation while (2) nevertheless permitting some reasonable amount of double taxation, even if that double taxation is discriminatory. In this way, the modified due process standard reflects a compromise between the competing justices in *Wynne.* As will be illustrated below, the proposed approach effects this compromise by enforcing a *limited* rule of priority whereby source-based taxing authority prevails over some, but not all, residence-based taxing authority.

A. *The Mechanics of the Modified Due Process Standard*

The modified due process standard would operate as follows: under the Due Process Clause, states would have the authority to tax all income that taxpayers earn in-state, whether or not the taxpayer is a resident of the taxing state (i.e., states would be able to exercise their full source-based taxing authority). If a state's exercise of its source-based authority would reach less than 20% of a resident taxpayer's income, however, then the state would also be entitled to exercise its residence-based authority until it is able to reach up to (but no more than) 20% of the resident taxpayer's income. The home state would be able to so use its residence-based authority regardless of whether discriminatory double taxation of interstate commerce resulted. In this way, every resident taxpayer will contribute at least some portion of his taxes to the maintenance of his home state.[89] Table 3 below illustrates how a taxpayer's income would be apportioned under the modified due process standard.

[88] Under the modified due process standard, the dormant Commerce Clause thus plays no part in restricting state taxing authority. I do not advocate, however, for the wholesale rejection of the dormant Commerce Clause doctrine in other contexts (e.g., in non-tax Commerce Clause cases).

[89] This Note assumes that all taxpayers are residents of a single state only (i.e., there are no dual-residents, which are taxpayers who qualify as residents of more than one state). For a discussion of the double taxation challenges facing dual-residents, see Hashmi, *supra* note 10, at 798–800. For an interesting proposal for the taxation of dual-residents, see Edward A. Zelin-

TABLE 3: APPORTIONMENT UNDER THE MODIFIED DUE PROCESS STANDARD

Taxpayer	% of Income Earned Out-of-state	% of Income Reachable by the Home State's Residence-based Authority	% of Income Reachable by the Home State's Source-based Authority	% of Income Reachable by Other States' Source-based Authority	% of Income Exposed to Taxation
A	100%	20%	0%	100%	**120%**
B	90%	10%	10%	90%	**110%**
C	80%	0%	20%	80%	**100%**
D	50%	0%	50%	50%	**100%**
E	0%	0%	100%	0%	**100%**

Table 3 makes clear that a state can exercise its residence-based authority *only* if it cannot reach at least 20% of a resident taxpayer's income through its source-based authority. In the case of a resident taxpayer who earns some, but less than 20% of his income in-state (taxpayer B in the table above), then the home state must first determine how much of the taxpayer's income it can reach under its source-based authority before it is entitled to exercise its residence-based authority. In other words, every state is entitled to reach at least 20% of its residents' income. If a state cannot reach 20% by using its source-based authority, then, and only then, may it use its residence-based authority to make up the shortfall.

Table 4 below provides an example of the modified due process standard. For simplicity, assume that the prevailing tax rate is 5% in all states and that every taxpayer has taxable income of $1,000.

sky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLA. TAX. REV. 533, 581 (2014) (arguing that states should apportion the personal income taxes of dual residents based on the dual resident's "relative presence" in each state).

TABLE 4: SIMPLE EXAMPLE OF THE MODIFIED DUE PROCESS STANDARD

Taxpayer	**% of Income Earned Out-of-state**	**Tax Owed to Home State**	**Tax Owed to Other States**	**Total Tax Owed**
A	100%	$10	$50	**$60**
B	90%	$10	$45	**$55**
C	80%	$10	$40	**$50**
D	50%	$25	$25	**$50**
E	0%	$50	$0	**$50**

As Table 3 shows, a taxpayer's home state is guaranteed to receive at least $10 in taxes from all of its residents, regardless of where the residents earn their income. Although the modified due process standard permits discriminatory double taxation, only resident taxpayers who earn greater than 80% of their income out-of-state will be exposed to double taxation. For all other taxpayers, each dollar of their income will be subject to only one state's tax.[90] In addition, individual states would still be free, as a matter of policy, to extend tax credits to their residents for any taxes paid to other states (or extend credits to nonresidents for taxes paid to the nonresident's home state).[91] Similarly, a state could decide in its discretion not to exercise its full taxing authority in order to avoid double taxation.

The modified due process standard is thus a sensible alternative to the internal consistency test: whereas an uncertain amount of double taxation is permissible under internal consistency, the modified due process standard provides for a predictable and reasonable amount of double taxation; whereas internal consistency can work to deprive a resident's home state from receiving any tax from a resident,[92] the modified due process standard guarantees that a home state will receive at least some

[90] In other words, although a taxpayer may pay taxes to more than one state, no two states will be able to tax the *same* income at the same time.

[91] *But see* Hashmi, *supra* note 10, at 833–35 (arguing that the mere availability of tax credits does not necessarily mean that the taxpayer will be able to claim them).

[92] *See* Table 2, *supra* Pt. II. If the home state provides a full credit to residents who earn 100% of their income out-of-state, then the home state may end up receiving no tax from the resident taxpayer.

tax contribution from all of its residents; whereas the internal consistency test constitutes only one prong of a cumbersome four-part dormant Commerce Clause test, the modified due process standard is straightforward, easy to apply, and does not require that the Commerce Clause impose any restrictions on state taxing authority.

B. Theory Behind the Modified Due Process Standard

The modified due process standard goes against the long-standing tax principle that due process entitles a state to tax the worldwide income of its residents.[93] As mentioned earlier in this Note, this principle is analogous to the concept of general jurisdiction with respect to authority to adjudicate. However, domicile as a basis for taxation and domicile as a basis for jurisdiction speak to different concerns, so it makes sense to treat the two situations differently. On the one hand, general jurisdiction ensures that there is at least one forum where a defendant may be sued.[94] On the other hand, domicile as a basis for taxation is a quid pro quo: in exchange for enjoying the protections and benefits of his home state, a resident is expected to contribute to his home state's maintenance.[95] Unlike ensuring the availability of a forum for suit, due process in the context of taxation is not concerned with ensuring that there is at least one state that can tax a person's income.

Rather than asking whether the taxing state has power, or minimum contacts, over the person (i.e., the taxpayer), the modified due process standard asks whether the state has power over the *income* that it seeks to tax. In this way, the modified due process standard aligns with the concept of specific personal jurisdiction, though a comparison to in rem jurisdiction may also be appropriate.[96] The Supreme Court's most recent personal jurisdiction case, *Bristol-Myers Squibb v. Superior Court of California*, articulated that minimum contacts requires "a connection between the forum and the *specific claims* at issue."[97] With the modified due process standard, the analogous requirement would be that a taxing state must have a connection to the *specific income* at issue. Under the

[93] *See, e.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995).

[94] Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 667 (1988).

[95] New York ex rel. Cohn v. Graves, 300 U.S. 308, 312–13 (1937) ("Domicile itself affords a basis for . . . taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.").

[96] *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (holding that the same minimum contacts test for personal jurisdiction also applies to *in rem* jurisdiction).

[97] Bristol-Myers Squibb Co. v. Superior Court of California, 137. S. Ct. 1773, 1781 (2017) (emphasis added). For an argument that *Bristol-Myers Squibb* narrowed the scope of personal jurisdiction, see Daniel Ritter, *Limiting Personal Jurisdiction: The Impact of Tyrrell, Bristol-Myers Squibb, and Aspen American*, 106 ILL. B. J. 32 (2018).

modified due process standard, domicile or residency standing alone is not a strong enough connection to warrant taxation (i.e., residency alone does not pass the minimum contacts test). At its core, due process is concerned with fundamental fairness,[98] and that fairness should not mean that a state is entitled to reach 100% of the income of every resident taxpayer. For example, take the case where a resident earns all of his income out of state—is it fair for the resident's home state to lay a claim to tax every dollar of that resident's income?

Drawing an analogy between personal jurisdiction jurisprudence and the due process standard for taxation is reasonable. Although conceptually distinct, the Supreme Court already incorporated personal jurisdiction jurisprudence into the due process standard for taxation in *Quill Corp. v. North Dakota*.[99] In *Quill*, the Court was asked to determine whether North Dakota could compel an out-of-state business (Quill Corp.) to collect and remit sales tax to North Dakota, even though the business did not maintain a physical presence in North Dakota.[100] The Court held that a state's exercise of its taxing authority under due process did not require that the taxpayer maintain a physical presence in-state.[101] In so holding, the Court acknowledged that "[o]ur due process jurisprudence has evolved substantially . . . particularly in the realm of personal jurisdiction." The Court then cited the seminal personal jurisdiction cases of *International Shoe Co. v. Washington*,[102] *Shaffer v. Heitner*,[103] and *Burger King Corp. v. Rudzewicz*[104] to conclude that Quill Corp. had "purposefully directed its activities at North Dakota residents," which justified taxation under due process despite Quill not having a physical presence in-state.[105]

As stated above, the modified due process standard views residency as an insufficient connection to warrant a state's exercise of its taxing authority. Although not perfectly analogous, support for this proposition is growing in the realm of taxation of trusts. Just earlier this year in *Kimberly Rice Kaestner 1992 Family Trust v. North Carolina Dep't of Revenue*,[106] the Supreme Court of North Carolina was asked to determine whether North Carolina had authority under due process to tax the undistributed income of an out-of-state trust, where the trust's sole con-

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98 *See, e.g.*, Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 826–27 (2004).

99 504 U.S. 298, 301 (1992).

100 *Id.* at 301.

101 *Id.* at 307.

102 326 U.S. 310 (1945).

103 433 U.S. 186 (1977).

104 471 U.S. 462 (1985).

105 *Quill*, 504 U.S. at 308.

106 814 S.E.2d 43 (N.C. 2018), *cert. granted*, (U.S. Jan. 11, 2019) (No. 18-457).

nection to North Carolina was that the trust beneficiaries were North Carolina residents. The court ruled that a beneficiary's residency with the taxing state was, standing alone, insufficient to pass the minimum contacts test.[107] In making this determination, the court drew on the personal jurisdiction due process jurisprudence, citing the leading cases as well as *Quill*.[108] Admittedly, *Kimberly Rice* is not entirely comparable to the modified due process standard, primarily because an irrevocable trust is treated as a separate entity for tax purposes.[109] The inquiry in *Kimberly Rice* was thus whether the nonresident trust had minimum contacts with North Carolina, not whether the trust income itself had minimum contacts with North Carolina (although the *Kimberly Rice* court did acknowledge that a trust is really nothing more than an "abstraction").[110] Nevertheless, *Kimberly Rice* illustrates that some states do not view residency as enough of a connection with a state to justify taxation.

In summary, the modified due process standard is supported by a solid theoretical basis grounded in personal jurisdiction jurisprudence. The modified due process standard does, however, upset the well-established tax principle that a taxpayer's residence is a basis for the taxpayer's home state imposing a tax on the resident's worldwide income. But for the reasons stated above, this principle may cut against due process's core concern of fundamental fairness.

In addition, the modified due process essentially prescribes a forced apportionment—while this forced apportionment has the benefits of predictability, it also exposes certain taxpayers to double taxation.

C. The Modified Due Process Standard Can Accomplish the Same Goals of the Entire Four-Part Complete Auto Test

At first blush, it may appear that the modified due process standard is a substitute for only the nondiscrimination prong of the *Complete Auto* test (and some might say a questionable substitute, given the modified

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107 *Id.* at 51. *But see* Chase Manhattan Bank v. Gavin, 733 A.2d 782, 802 (Conn. 1999) (holding that the domicile of a trust beneficiary or trustee is sufficient to establish due process minimum contacts empowering the domiciliary's home state to tax the undistributed trust income); McCulloch v. Franchise Tax Bd., 390 P.2d 412, 419 (Cal. 1964) ("[T]he beneficiary's state of residence may property tax the trust on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income."). It is interesting to point out that if a state determines that a beneficiary's residence alone *is* a sufficient contact justifying taxation of a nonresident trust, then the trust income will be subject to double taxation. *See* The American College of Trust and Estate Council, *Study 6: State Taxation on Income of Trusts with Multi-State Contacts*, 6–7 (2001), https://www.actec.org/assets/1/6/Study6.pdf.

108 *See Kimberly Rice*, 814 S.E. 2d at 48.

109 HOWARD M. ZARITSKY ET AL., FEDERAL INCOME TAXATION OF ESTATES AND TRUSTS, ¶ 1.01[1] (3d ed. 2001).

110 *See Kimberly Rice*, 814 S.E. 2d at 48.

due process's allowance for discriminatory double taxation). However, the modified due process standard also addresses the other *Complete Auto* inquiries: substantial nexus, fair apportionment, and fair relation.

Until 2018, the substantial nexus inquiry was distinguishable from the due process minimum contacts test in that substantial nexus required that the taxpayer maintain a physical presence in the taxing state as a prerequisite for the state imposing its taxing authority.[111] However, the Court removed that distinction in *South Dakota v. Wayfair, Inc.*, which was decided earlier this year.[112] In *Wayfair*, the Court revisited its decision in *Quill* and ruled that—just like the due process test of minimum contacts—substantial nexus did not require physical presence.[113] With minimum contacts and substantial nexus thus now fully aligned, the substantial nexus test is superfluous. The proposed modified due process standard therefore does not alter the taxation analysis by abandoning the substantial nexus inquiry.

The fair apportionment inquiry asks whether a tax is attributable to the taxpayer's activities within the state seeking to impose the tax.[114] Under *Complete Auto*, fair apportionment is measured by the external consistency test, which seeks to determine whether "a State's tax reaches beyond that portion of value that is fairly attributable to the economic activity within the taxing State."[115] Of course, this definition merely restates the concept of fair apportionment, rendering the external consistency test unnecessary.[116] In any case, the modified due process standard guarantees that there will be fair apportionment, because the modified due process standard ties a state's taxing authority to the income that it seeks to tax rather than the person that it seeks to tax. By ensuring that the taxing state has minimum contacts with the income at issue, any tax will necessarily be fairly attributable to the taxing state. Furthermore, by giving priority to source-based taxation authority, the modified due process ensures that any tax is fairly attributable to *economic activity* within the taxing state. In cases where a resident taxpayer earns over 80% of his income out of state, however, the modified due process standard will admittedly result in double taxation in order to ensure that the resident's home state receives at least some tax contribution from its residents.

Even so, this does not necessarily mean that such a double tax is unfairly apportioned—as Justice Ginsburg noted in her dissent to *Wynne*, it is possible for an individual to enjoy the protection and benefits of

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[111] *See* Part I B, *supra*; *see also* Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[112] *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2080 (2018).

[113] *See id.* at 2093.

[114] *See* Part I B, *supra.*

[115] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

[116] HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 4.16[2] have described the external consistency test as "nothing more than another label for the fair apportionment requirement."

more than one state.[117] This is true even when a resident earns all of his income out of state—such a resident is still protected by the police of his home state, uses his home state's infrastructure, and can attend a public college for a reduced in-state rate. In other words, the concept of fair apportionment should not necessarily be inconsistent with double taxation.

As discussed earlier, the fair relation inquiry does not seem to add anything to the *Complete Auto* test. Indeed, Jesse H. Choper and Tung Yin have argued that the fair relation test is "virtually meaningless."[118] Choper and Yin go on to point out that the Court has never invalidated a state tax under the fair relation test.[119] The modified due process standard thus does not do any harm by abandoning the fair relation inquiry.

D. Criticisms and Limitations of the Modified Due Process Standard

The most obvious criticism of the proposed modified due process standard is that it strictly limits the extent to which a state may tax its residents. Above, I discussed why limiting this power is not inconsistent with due process's core concern of fundamental fairness. And although imposing such a limitation would certainly upset a long-standing principle of tax law, it would likely not have a significant practical effect. For one, it has long been understood that residence-based taxing authority must yield to source-based authority in order to prevent double taxation.[120] To that end, every state offers its residents tax credits for income taxes paid to other states.[121] In practice, therefore, most states do not actually exercise the full extent of their residence-based taxing authority. That a state has a constitutional right to reach all of a resident taxpayer's income is therefore strictly theoretical. If anything, the modified due process standard might permit states to exercise *more* of their residence-based authority by guaranteeing that states are able to reach up to 20% of all resident taxpayers' income.

In addition, the modified due process standard does not itself protect against facially discriminatory taxes, which the *Complete Auto* test certainly prevented via the internal consistency test. For example, a state could tax the income that its residents earned out-of-state at a higher *rate* than income that its residents earned in-state. Such a tax is plainly discriminatory, but permissible under the modified due process standard. However, the modified due process standard does not need to protect against facially discriminatory taxes—as Justice Scalia argued in his dis-

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117 Maryland v. Wynne, 135 S. Ct. 1787, 1813 (2015) (Ginsburg, J., dissenting).

118 *See* Choper & Yin, *supra* note 25, at 204.

119 *Id.*

120 HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 6.04.

121 *Id.* ¶ 20.10.

sent to *Wynne*, the Import-Export Clause can function as a sufficient check on such taxes.[122] The modified due process standard also does not address so-called "nowhere" activity, which has been defined as "activities that occur in locations where they may escape taxation because they occur outside of *any* taxing jurisdiction."[123] For example, a commercial ship that spends most of its time at sea is, strictly speaking, outside of any state tax jurisdiction.[124] Although one could therefore argue that this activity should not be taxed, non-taxation would create a competitive advantage for actors engaged in nowhere activity.[125] The issue of nowhere activity is beyond the scope of this Note, but a pair of scholars have argued for a "full accountability apportionment approach" whereby source states may tax nowhere income on a proportionate basis (e.g., states whose ports a ship uses may split a tax on nowhere activity between them).[126]

The taxation of dual-residents is also outside the scope of this Note. Dual-residents are individuals who qualify for residency in more than one state.[127] But how should dual-residents be taxed under the modified due process standard? Consider the scenario where a taxpayer is a dual resident of States A and B, but earns all of his income in State C. Would both States A and B be able to reach 20% of the taxpayer's income by using their residence-based authority? I would think not, because then 40% of the taxpayer's income would be exposed to double taxation, and the modified due process standard contemplates exposing only 20% of some taxpayers' income to double taxation. Edward A. Zelinksy proposes a straightforward solution: apportion the taxpayer's income based on the taxpayer's "relative presence" in each state of which he is a resident.[128] Applying Zelinsky's approach would result in the following: States A and B would be allowed to, *in the aggregate*, reach 20% of the taxpayer's income, with each state's share determined by the taxpayer's relative presence in the given state. For example, if the taxpayer spent 50% of his time in State A, then State A would be allowed to tax 10% of the taxpayer's income.[129] Finally, this Note has explored how the modified due process standard would apply to only one class of taxes, personal income taxes. Whether the standard would be effective in the

122 *Wynne*, 135 S. Ct. at 1809–10 (Scalia, J., dissenting).

123 John A. Swain & Walter Hellerstein, *State Jurisdiction to Tax "Nowhere" Activity,* 33 VA. TAX REV. 209, 209 (2013) (emphasis added).

124 *Id.* at 212.

125 *Id.* at 209.

126 *Id.* at 236–38, 266.

127 Zelinsky, *supra* note 89, at 533.

128 *Id.* at 581.

129 10% of the taxpayer's income comes from 20% of the aggregate income multiplied by 50%, the relative amount of time the taxpayer spends in State A.

context of corporate taxes, taxes on trusts, property taxes, etc., is beyond the scope of this Note.

CONCLUSION

Our existing Commerce Clause restrictions on state taxing authority are indeed, as Justice Scalia has described, "a bestiary of ad hoc tests and ad hoc exceptions . . . ."[130] At least two parts of the four-part *Complete Auto* test are redundant: substantial nexus is indistinguishable from due process minimum contacts, and the fair apportionment inquiry completely engulfs the fair relation inquiry. Furthermore, the external consistency test, which supposedly tests for fair apportionment, is "nothing more than another label for the fair apportionment requirement."[131] And finally, the internal consistency test, which supposedly protects against discriminatory taxing of interstate commerce, does not actually prevent such discrimination.

The modified due process standard presents a straightforward alternative to the cumbersome Commerce Clause jurisprudence described above. By enforcing a limited rule of priority whereby source-based authority overcomes most of a state's residence-based authority, the modified due process standard permits a reasonable amount of double taxation in order to ensure that each state receives some tax contribution from its residents. In addition, the theory underlying the modified due process standard is well-grounded in specific personal jurisdiction jurisprudence, the thrust of which is to measure a state's minimum contacts with the income it seeks to tax rather than with the individual that the state seeks to tax. Although the modified due process standard upsets the long-standing tax principle that residency entitles a state to tax a taxpayer's worldwide income, in practice, states do not exercise their full residence-based authority anyway.

130 Maryland v. Wynne, 135 S. Ct. at 1809 (Scalia, J., dissenting).

131 HELLERSTEIN & HELLERSTEIN, *supra* note 3, ¶ 4.16[2].