## *Comptroller of the Treasury of Maryland v. Wynne* (2015)

575 U.S. 542

*Like many other States, Maryland taxes the income its residents earn both within and outside the state, as well as the income that nonresidents earn from sources within Maryland. But unlike most other states, Maryland does not offer its residents a full credit against the income taxes that they pay to other states, so some of the income earned by Maryland residents outside the state is taxed twice. In 2006, Brian and Karen Wynne claimed an income tax credit for all income taxes paid to other states, and when the Maryland State Comptroller of the Treasury denied their claim, they sued. The Maryland Tax Court upheld the Comptroller's decision, but the Circuit Court for Howard County reversed on the ground that Maryland's tax system violated the Commerce Clause. The Court of Appeals of Maryland affirmed that ruling, and the Supreme Court granted certiorari.*

Opinion of the Court: Alito, Roberts, Kennedy, Breyer, Sotomayor.

Dissenting opinions: Scalia, Thomas (as to Parts 1 and 2); Thomas, Scalia (except as to the first paragraph); Ginsburg, Scalia, Kagan.

**JUSTICE ALITO delivered the opinion of the Court.**

This case involves the constitutionality of an unusual feature of Maryland's personal income tax scheme [under which] some of the income earned by Maryland residents outside the State is taxed twice. Maryland's scheme creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity. We have long held that States cannot subject corporate income to tax schemes similar to Maryland's, and we see no reason why income earned by individuals should be treated less favorably. Maryland admits that its law has the same economic effect as a state tariff, the quint-essential evil targeted by the dormant Commerce Clause. We therefore affirm the decision of Maryland's highest court and hold that this feature of the State's tax scheme violates the Federal Constitution. . . .

II

A

The Commerce Clause grants Congress power to "regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. These "few simple words reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). Although the Clause is framed as a positive grant of power to Congress, "we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175 (1995).

This interpretation of the Commerce Clause has been disputed. But it has deep roots. By prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the

adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce. *The Federalist*, Nos. 7, 11, and 42.

Under our precedents, the dormant Commerce Clause precludes States from "discriminating between transactions on the basis of some interstate element." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). This means, among other things, that a State "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984). "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959).

B

Our existing dormant Commerce Clause cases all but dictate the result reached in this case. In *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), Indiana taxed the income of every Indiana resident (including individuals) and the income that every nonresident derived from sources within Indiana. The State levied the tax on income earned by the plaintiff Indiana corporation on sales made out of the State. Holding that this scheme violated the dormant Commerce Clause, we explained that the "vice of the statute" was that it taxed, "without apportionment, receipts derived from activities in interstate commerce." If these receipts were also taxed by the States in which the sales occurred, we warned, interstate commerce would be subjected "to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." The next year, in *Gwin, White & Prince, Inc.* v. *Henneford* (1939), we reached a similar result. [Finally,] in *Central Greyhound Lines, Inc.* v. *Mealey* (1948), New York sought to tax the portion of a domiciliary bus company's gross receipts that were derived from services provided in neighboring States. Noting that these other States might also attempt to tax this portion of the company's gross receipts, the Court held that the New York scheme violated the dormant Commerce Clause because it imposed an "unfair burden" on interstate commerce.

In all three cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity. Maryland's tax scheme is unconstitutional for similar reasons.

C

The principal dissent distinguishes these cases on the sole ground that they involved a tax on gross receipts rather than net income. We see no reason why the distinction should matter. The distinction between taxes on gross receipts and net income was based on the notion, endorsed in some early cases, that a tax on gross receipts is an impermissible "direct and immediate burden" on interstate commerce, whereas a tax on net income is merely an "indirect and incidental" burden. This arid distinction between direct and indirect burdens allowed "very little coherent, trustworthy guidance as to tax validity." And so, beginning with Justice Stone's seminal opinion in *Western Live Stock* v. *Bureau of Revenue* (1938), the direct-indirect burdens test was replaced with a more practical approach that looked to the economic impact of the tax.

For its part, petitioner distinguishes *J. D. Adams*, *Gwin, White*, and *Central Greyhound* on the ground that they concerned the taxation of corporations, not individuals. Attempting to explain why the dormant Commerce Clause should provide less protection for natural persons

than for corporations, petitioner and the Solicitor General argue that States should have a free hand to tax their residents' out-of-state income because States provide their residents with many services. This argument fails because corporations also benefit from state and local services.

The sole remaining attribute that, in the view of petitioner, distinguishes a corporation from an individual for present purposes is the right of the individual to vote to change Maryland's discriminatory tax law. But if a State's tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State. In addition, the notion that the victims of such discrimination have a complete remedy at the polls is fanciful. It is likely that only a distinct minority of a State's residents earns income out of State. Schemes that discriminate against income earned in other States may be attractive to legislators and a majority of their constituents for precisely this reason. It is even more farfetched to suggest that natural persons with out-of-state income are better able to influence state lawmakers than large corporations headquartered in the State. In short, petitioner's argument would leave no security where the majority of voters prefer protectionism at the expense of the few who earn income interstate.

D

In attempting to justify Maryland's unusual tax scheme, the principal dissent argues that Maryland has the sovereign power to tax all of the income of its residents, wherever earned, and it therefore reasons that the dormant Commerce Clause cannot constrain Maryland's ability to expose its residents (and nonresidents) to the threat of double taxation. The principal dissent, if accepted, would work a sea change in our Commerce Clause jurisprudence. Legion are the cases in which we have considered and even upheld dormant Commerce Clause challenges brought by residents to taxes that the State had the jurisdictional power to impose. If the principal dissent were to prevail, all of these cases would be thrown into doubt. After all, in those cases, as here, the State's decision to tax in a way that allegedly discriminates against interstate commerce could be justified by the argument that a State may tax its residents without any Commerce Clause constraints.

F

1

As previously noted, the tax schemes held to be unconstitutional in *J. D. Adams*, *Gwin, White*, and *Central Greyhound*, had the potential to result in the discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity. The Maryland scheme's discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States. Instead, Maryland's tax scheme is inherently discriminatory and operates as a tariff. This identity between Maryland's tax and a tariff is fatal because tariffs are "[t]he paradigmatic example of a law discriminating against interstate commerce."

The principal dissent is left with two arguments. First, the principal dissent claims that the analysis outlined above requires a State taxing based on residence to "recede" to a State taxing based on source. We establish no such rule of priority. To be sure, Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States. But we do not foreclose the possibility that it could comply with the Commerce Clause in some other way. Of course, we do not decide the constitutionality of a hypothetical tax

scheme that Maryland might adopt because such a scheme is not before us. That Maryland's existing tax unconstitutionally discriminates against interstate commerce is enough to decide this case.

Second, the principal dissent finds a "deep flaw" with the possibility that "Maryland could eliminate the inconsistency [with its tax scheme] by terminating the special nonresident tax—a measure that would not help the Wynnes at all." This second objection refutes the first. By 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.

G

Justice Scalia would uphold the constitutionality of the Maryland tax scheme because the dormant Commerce Clause, in his words, is "a judicial fraud." That was not the view of the Court in *Gibbons* v. *Ogden*, where Chief Justice Marshall wrote that there was "great force" in the argument that the Commerce Clause by itself limits the power of the States to enact laws regulating interstate commerce. Since that time, this supposedly fraudulent doctrine has been applied in dozens of our opinions, joined by dozens of Justices. Perhaps for this reason, petitioner in this case, while challenging the interpretation and application of that doctrine by the court below, did not ask us to reconsider the doctrine's validity.

Justice Scalia does not dispute the fact that State tariffs were among the principal problems that led to the adoption of the Constitution. Nor does he dispute the fact that the Maryland tax scheme is tantamount to a tariff on work done out of State. He argues, however, that the Constitution addresses the problem of state tariffs by prohibiting States from imposing "Imposts or Duties on Imports or Exports." Art. I, §10, cl. 2. But he does not explain why, under his interpretation of the Constitution, the Import-Export Clause would not lead to the same result that we reach under the dormant Commerce Clause.

Justice Thomas also refuses to accept the dormant Commerce Clause doctrine, and he suggests that the Constitution was ratified on the understanding that it would not prevent a State from doing what Maryland has done here. This argument is plainly unsound. First, because of the difficulty of interstate travel, the number of individuals who earned income out of State in 1787 was surely very small. Second, Justice Thomas has not shown that the small number of individuals who earned income out of State were taxed twice on that income. A number of Founding-era income tax schemes appear to have taxed only the income of residents, not nonresidents. Third, even if some persons were taxed twice, it is unlikely that this was a matter of such common knowledge that it must have been known by the delegates to the State ratifying conventions who voted to adopt the Constitution.

The judgment of the Court of Appeals of Maryland is affirmed.

**JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, dissenting.**

The Court holds unconstitutional Maryland's refusal to give its residents full credits against income taxes paid to other States. It does this by invoking the negative Commerce Clause, a judge-invented rule under which judges may set aside state laws that they think impose too much of a burden upon interstate commerce. The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains

only a Commerce Clause. Unlike the negative Commerce Clause adopted by the judges, the real Commerce Clause says nothing about prohibiting state laws that burden commerce. Much less does it say anything about authorizing judges to set aside state laws *they believe* burden commerce. The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce. See *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946). How could congressional consent lift a constitutional prohibition?

The Court's efforts to justify this judicial economic veto come to naught. The Court claims that the doctrine "has deep roots." So it does, like many weeds. But age alone does not make up for brazen invention. And the doctrine in any event is not quite as old as the Court makes it seem. The idea that the Commerce Clause of its own force limits state power "finds no expression" in discussions surrounding the Constitution's ratification. For years after the adoption of the Constitution, States continually made regulations that burdened interstate commerce (like pilotage laws and quarantine laws) without provoking any doubts about their constitutionality. Our first clear *holding* setting aside a state law under the negative Commerce Clause came after the Civil War, more than 80 years after the Constitution's adoption. *Case of the State Freight Tax* (1873).

The Court adds that "tariffs and other laws that burdened interstate commerce" were among "the chief evils that led to the adoption of the Constitution." This line of reasoning forgets that interpretation requires heeding more than the Constitution's purposes; it requires heeding the means the Constitution uses to achieve those purposes. The Constitution addresses the evils of local impediments to commerce by prohibiting States from imposing certain especially burdensome taxes—"Imposts or Duties on Imports or Exports" and "Dut[ies] of Tonnage"—without congressional consent. Art. I, §10, cls. 2–3. It also addresses these evils by giving Congress a commerce power under which *it* may prohibit other burdensome taxes and laws. As the Constitution's text shows, however, it does not address these evils by empowering the *judiciary* to set aside state taxes and laws that *it* deems too burdensome. By arrogating this power anyway, our negative Commerce Clause cases have disrupted the balance the Constitution strikes between the goal of protecting commerce and competing goals like preserving local autonomy and promoting democratic responsibility.

Maryland's refusal to give residents full tax credits against income taxes paid to other States has its disadvantages. It threatens double taxation and encourages residents to work in Maryland. But Maryland's law also has its advantages. It allows the State to collect equal revenue from taxpayers with equal incomes, avoids the administrative burdens of verifying tax payments to other States, and ensures that every resident pays the State at least some income tax. Nothing in the Constitution precludes Maryland from deciding that the benefits of its tax scheme are worth the costs.

**JUSTICE GINSBURG, with whom JUSTICE SCALIA and JUSTICE KAGAN join, dissenting.**

Today's decision veers from a principle of interstate and international taxation repeatedly acknowledged by this Court: A nation or State "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450 (1995). As I see it, nothing in the Constitution or in prior decisions of this Court dictates that one of two States, the domiciliary State or the source State, must recede simply

because both have lawful tax regimes reaching the same income. True, Maryland elected to deny a credit for income taxes paid to other States in computing a resident's county tax liability. It is equally true, however, that the other States that taxed the Wynnes' income elected not to offer them a credit for their Maryland county income taxes. In this situation, the Constitution does not prefer one lawful basis for state taxation of a person's income over the other. Nor does it require one State to limit its residence-based taxation, should the State also choose to exercise, to the full extent, its source-based authority. States often offer their residents credits for income taxes paid to other States, as Maryland does for state income tax purposes. States do so, however, as a matter of tax policy, not because the Constitution compels that course.

For at least a century, "domicile" has been recognized as a secure ground for taxation of residents' worldwide income. More is given to the residents of a State than to those who reside elsewhere, therefore more may be demanded of them. With this Court's approbation, States have long favored their residents over nonresidents in the provision of local services. A taxpayer's home State, then, can hardly be faulted for making support of local government activities an obligation of every resident, regardless of any obligations residents may have to *other* States. Residents, moreover, possess political means, not shared by outsiders, to ensure that the power to tax their income is not abused.

States deciding whether to tax residents' entire worldwide income must choose between legitimate but competing tax policy objectives. A State might prioritize obtaining equal contributions from those who benefit from the State's protection in roughly similar ways. Or a State might prioritize ensuring that its taxpayers are not subject to double taxation. For 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. Some States have chosen the same balance the Court embraces today. But since almost the dawn of the modern era of state income taxation, other States have taken the same approach as Maryland does now, taxing residents' entire income, wherever earned, while at the same time taxing nonresidents' entire in-state income. And recognizing that "protection, benefit, and power over [a taxpayer's income] are not confined to either" the State of residence or the State in which income is earned, this Court has long afforded States that flexibility. *Curry* v. *McCanless*, 307 U.S. 357 (1939). This history of States imposing and this Court upholding income tax schemes materially identical to the one the Court confronts here should be the beginning and end of this case.

The majority asserts that Maryland's tax scheme "operates as a tariff," making it "patently unconstitutional." This is a curious claim. The defining characteristic of a tariff is that it taxes interstate activity at a higher rate than it taxes the same activity conducted within the State. Maryland's resident income tax does the exact opposite: It taxes the income of its residents at precisely the same rate, whether the income is earned in-state or out-of-state.

This case is, at bottom, about policy choices: Should States prioritize ensuring that all who live or work within the State shoulder their fair share of the costs of government? Or must States prioritize avoidance of double taxation? As I have demonstrated, achieving even the latter goal is beyond this Court's competence. Resolving the competing tax policy considerations this case implicates is something the Court is even less well equipped to do. For a century, we have recognized that state legislatures and the Congress are constitutionally assigned and institutionally better equipped to balance such issues. I would reverse, so that we may leave that task where it belongs.