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Maryland's Response to *Comptroller v. Wynne*: Answering Double Taxation with a Double Standard

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In *Comptroller of the Treasury v. Wynne*,[1] the Supreme Court of the United States found that Maryland's failure to provide a full tax credit for taxes on out-of-state income was a violation of the Interstate Commerce Clause ("Commerce Clause").[2] The Court held that this failure subjected the out-of-state income to a tax from both the foreign state as well as the native state, creating an "incentive for taxpayers to opt for intrastate rather than interstate economic activity."[3] The *Wynne* decision is noteworthy because it demonstrated the Court's preference for Commerce Clause precedent, and for a practical effect analysis of the State tax, over the more formal standards of sovereign tax authority favored by the dissenting Justices.[4] Maryland's unorthodox response to the *Wynne* decision should garner even more attention as it will create new constitutional challenges to the State's tax policy, leaving the full scope of *Wynne*'s impact largely unsettled.

In response to the *Wynne* ruling, Maryland's General Assembly lowered interest rates for any *Wynne*-based refund payments that the State would owe taxpayers as a result of the ruling.[5] Although justified as a cost-saving solution,[6] the legislation fails

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

2. *See id.* at 1792 (describing the economic effect of Maryland's tax structure as synonymous with the "evil" targeted by the Dormant Commerce Clause and thus a violation of the Federal Constitution); *see also* U.S. CONST. art. I, § 8, cl. 3.

3. *Comptroller v. Wynne*, 135 S. Ct. at 1792.

4. *See id. passim* (referring to the "effect" of the tax as the dispositive consideration).

5. 2014 Md. Laws 2960, 2962, 3002.

6. Letter from Douglas Gansler, Att'y Gen. of Maryland, to Martin O'Malley, Governor of Maryland, at 9 (May 14, 2014) [hereinafter *Letter from Att'y Gen. to Governor*] (justifying the "determin[ation] that the provision

to even solve the revenue loss the State claims it will suffer.[7] The legislation also opens the State to further constitutional challenges of its tax code by adding new life to old constitutional debates.[8] This untenable response, to such a significant decision, leaves the tax community collectively bracing for an unknown ripple effect. The impact is fully realized when viewed beyond Maryland's tax policy and considered in light of subsequent jurisdictions that will seek to remedy their own tax systems to fall in line with *Wynne*.[9]

The Maryland tax system is already feeling the effects of the *Wynne* decision.[10] Other states whose tax codes share characteristics with the components at issue in *Wynne* will likely see similar effects.[11] Maryland's preemptive estimate placed the cost

is appropriate . . . because it will result in savings in the State budget"); *id.* at 10 ("Lessening the interest payments on those claims . . . reduces the State's need to sacrifice its own investments").

7. *Compare id.* at 10 (estimating the State's refund costs at $190 million, prior to interest), *with* Bill Turque, *Maryland Prepares for $200 Million Hit From Supreme Court Tax Case*, WASHINGTON POST, Apr. 10, 2014 (calculating the State to owe $200 million in refund payments, inclusive of interest, but also noting an additional $42 million in future, annual revenue losses), *and* Jennifer DePaul, *Maryland Counties Will Owe Millions in Tax Refunds Under* Wynne Decision, 76 STATE TAX NOTES 567, May 25, 2015 (tallying the total cost to Maryland at $202 million, with the substantial burden falling to the local counties). Neither of these calculations include any litigation costs, whether stemming from the inevitable rise in claims that will be filed for owed refunds, or for claims related to litigation over this provision of the BFRA itself.

8. For an understanding of the first constitutional debate triggered by Maryland's legislative response see United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (invalidating a congressional attempt to prevent the Federal Court of Claims from considering pardons as evidence, despite the pardon having already been considered as evidence in a judgment adverse to the Government, and where the lack of such evidence would relieve the U.S. government from owing compensation to pardoned citizens for property seized during the Civil War); Lawrence G. Sager, Klein's *First Principle: A Proposed Solution*, GEO. L.J., 2525, 2525 (July 1998) ("The case is 1[46] years old, and still seems to command the active attention of the Supreme Court."). For an overview of the second constitutional debate triggered by Maryland's legislative response see Robert Meltz, CONG. RESEARCH SERV., 97–122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1, 1–2 (2015) (marking the Supreme Court's takings clause doctrine as spanning as far back as 1870, and extending to cases as recent as the last four years, with some hundred more cases in between). *See generally* DePaul, *supra* note 7 (forecasting "litigation that will challenge Maryland's retroactive reduction in interest rates as . . . the new local Maryland controversy").

9. *See infra* Section IV.a.

10. David Sawyer, *Processing of* Wynne *Refunds Backlogged, Maryland Officials Say*, 77 STATE TAX NOTES 975, Sep. 21, 2015 ("As of the date of the Supreme Court decision, the comptroller had received 9,240 protective claims . . . and since then has received another 2,824 amended returns."). As Sawyer reports, Maryland's Comptroller recognizes this as a growing problem, "The 'claims are coming in faster than we are getting them processed . . . . Last week, for instance our beginning balance was 9,896 returns, we received 441 new ones, and we processed 221 . . . [i]t grows each week.'" *Id.*; *see also id.* (listing a 249-day estimate for processing regular amended returns compared to a 125-day estimate for processing new *Wynne* returns). This growing problem comes with a significant cost as a deputy director at the Maryland Comptroller stated, "processed claims have resulted in payments of $19.43 million in tax refunds and another $16.89 million in interest . . . [and those are] just on the ones we've processed so far." *Id.*

11. *See* Brief for Int'l Mun. Lawyers Assoc. et al. as Amici Curiae in Support of Petitioner, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485) at 17 (listing Wisconsin, North Carolina and Tennessee as examples of states with partial tax credits similar to the Maryland tax scheme found to be

of the *Wynne* decision, in refund payments alone, at $190 million.[12] That figure does not include an estimated $42 million in losses to annual state tax revenue.[13] When extrapolated to other states and localities expected to be implicated by this ruling, the financial impact across the nation is significant.[14]

Courts tasked with hearing challenges to Maryland's *Wynne* response will need to decide, among other things, whether the State may retroactively adjust its tax code to accommodate State revenue interests threatened by an unfavorable judicial ruling. Concern over this question is amplified by the fact that this "accommodation" for the State comes at the cost of its taxpayers. Although this question of propriety may seem obvious at first, a full answer is certainly more complicated. That answer can be found in century old constitutional doctrines,[15] though their modern applications remain in dispute.[16] This new context warrants a revisiting of those debates.

This comment seeks to illustrate: (1) the underlying legal support for the *Wynne* Court's finding that Maryland's tax code was unconstitutional;[17] (2) the implications of this decision for Maryland as well as other states who must adjust their tax codes in response to *Wynne*;[18] and (3) how Maryland's response is flawed and will subject the State to new constitutional challenges.[19]

Part I of this comment explains the relevant portions of Maryland's tax code that gave rise to the *Wynne* dispute and illustrates how the code was applied to the Wynnes' taxes. Part II provides an overview of Supreme Court doctrines related to Commerce Clause authority and sovereign tax authority, which the Justices grappled with in deciding the *Wynne* case. Part III then walks through the Commerce Clause precedent applied by the Court in *Wynne*, the Court's response to challenges from the opposition, and ultimately the legitimacy of the *Wynne* Court's holding. With all

unconstitutional by the Court in *Wynne*); *id.* at 17–18 (adding examples of local governments implicated by this rule such as, New York City, Philadelphia, Cleveland, Detroit, Kansas City, St. Louis, Wilmington, as well as certain counties in Indiana). The examples offered by this brief do not appear to be exhaustive as more recently, other jurisdictions not mentioned by the brief have faced the question of how to adapt to the *Wynne* ruling. *Cf, e.g.*, Michael S. Knoll & Ruth Mason, *How the Massachusetts Supreme Judicial Court Should Apply* Wynne, 78 STATE TAX NOTES 921 Dec. 21, 2015 (demonstrating the litigation effect that will be faced by states whose taxes similarly implicate Commerce Clause protections).

12. *See Letter from Att'y Gen. to Governor*, *supra* note 6, at 10.

13. Turque, *supra* note 7.

14. *But see* Radha Mohan & Rishi Agrawal, *High Court's* 'Wynne' *Decision Could Have Major Impact, State Tax Experts Say*, BLOOMBERG BNA, 1, 13 May 22, 2015 (qualifying that because most states already offer credits against taxes to other states, "few believe that this decision will create great waves in the seas of tax law").

15. *Supra* note 8.

16. *See* Sager, *supra* note 8, at 2525 (noting the Supreme Court's continued debate over the precedent deriving from *Klein*); *Meltz*, *supra* note 8, at 16, 20 (listing the 1870 cases of *Knox. v. Lee*, and *Hepburn v. Griswold*, as the spark to a seemingly endless debate over takings clause claims that continues today).

17. *See infra* Parts II–III.

18. *See infra* Part IV.

19. *See infra* Sections IV.c–d.

of this as a necessary backdrop, Part IV of this comment highlights the future implications this decision will have on Maryland, as well as other states. Most importantly, this section addresses Maryland's preemptive response to the *Wynne* decision and how that response exposes Maryland to new constitutional challenges to its tax code – challenges the State will be hard-pressed to withstand.

I. THE MAKINGS OF A CONSTITUTIONAL TAX CHALLENGE IN MARYLAND

a. The Wynnes and Their Dispute with the Comptroller

Brian and Karen Wynne owned stock in a Subchapter S corporation named Maxim Healthcare Services, Inc. ("Maxim").[20] Maxim earned income through medical staffing services, which it offered across several states.[21] Like countless other taxpayers nationwide who invest in corporations, the Wynnes received income from their proportionate share of the multi-state income that Maxim earned.[22] However, unlike shareholding taxpayers from other states – whose income enjoys protections from double taxation[23] – the Wynnes were not afforded an analogous protection by Maryland.[24] Upon receiving the Wynnes' tax return, wherein the Wynnes sought a full credit for their out-of-state income, the Comptroller instead assessed a tax deficiency against the Wynnes on the basis of the "unique Maryland income-tax system."[25]

The Maryland Tax Court affirmed the Comptroller's deficiency assessment,[26] but the Circuit Court for Howard County reversed this decision on the ground that the tax system violated the Commerce Clause.[27] The Maryland Court of Appeals later affirmed the Circuit Court's decision.[28] The Maryland Court of Appeals applied the

20. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1793 (2015).

21. MAXIM HEALTH SERVICES INC., http://www.maximhealthcare.com/about-us/ (last visited Oct. 23, 2016).

22. *Comptroller v. Wynne*, 135 S. Ct. at 1793.

23. *Cf.* Turque, *supra* note 7 (indicating over forty state tax systems which offer full credit); Edward A. Zelinsky, Wynne *and the Double Taxation of Dual Residents*, 73 STATE TAX NOTES 259, Jul. 28, 2014 ("Those credits are common to avoid double taxation of state income. *Wynne* raise[d] the question whether that widespread practice is constitutionally mandated or is just a matter of generally accepted tax policy.") (emphasis added).

24. Comptroller of the Treasury v. Wynne, 64 A.3d 453, 460 (Md. 2013), *aff'd* 135 S. Ct. 1787 (2015).

25. Adam Thimmesch, Comptroller v. Wynne *and the Futile Search for Non-Discriminatory State Taxation*, 67 VAND. L. REV. EN BANC 283, 283 (2014) (explaining that Maryland's tax system is "unique" because it "bifurcates the state income-tax assessment into two components – a 'state' income tax and a 'county' income tax") (emphasis added).

26. *Comptroller v. Wynne*, 135 S. Ct. at 1793. *But see Comptroller v. Wynne*, 64 A.3d at 460 (acknowledging that the Comptroller did revise the Wynnes' credit, slightly, but only to account for taxes paid on an unrelated Form 502 submission).

27. *Comptroller v. Wynne*, 135 S. Ct. at 1793.

28. *Id.*

four-part Commerce Clause test established by *Complete Auto Transit, Inc. v. Brady*,[29] to conclude that the Maryland tax scheme was unconstitutional.[30] Maryland's highest court found that by denying a credit for a portion of the tax on out-of-state income, the State fell short on two parts of this test: fair apportionment and non-discrimination.[31] The Court applied the "internal consistency test" to reach this finding.[32] As discussed in detail below, this test instructs that a statute is unconstitutional when, if adopted by every state, its application would disproportionately burden interstate commerce.[33]

b. Tax Code

To best interpret the *Wynne* ruling, it is important to first understand relevant portions of the State's tax scheme and how those components fit into prior Supreme Court precedent on tax code constitutionality. Despite the widespread application of tax credits across federal and state tax schemes, Maryland's use of a tax credit, in the *Wynne* case, was unique. Along with this unique tax credit, two common tax distinctions drew considerable attention from opponents to the *Wynne* decision and consequently require attention here as well. The two following sections will explain these elements and in turn serve to better inform the subsequent analysis throughout the course of this comment.

i. Tax Credits and Maryland's Unique Application

Tax credits are a common apparatus in both federal and state tax schemes. By claiming a credit, a taxpayer is excused from a portion of taxes otherwise owed to the government.[34] These credits are tools to mitigate burdens from a tax scheme, to

29. 430 U.S. 274, 279 (1977).

30. *Comptroller v. Wynne*, 64 A.3d at 463. The *Complete Auto* test, relied on by the Maryland Court, determined the validity of the tax by asking whether it "applied to an activity with a substantial nexus [to] the taxing State, [whether it was] fairly apportioned, [whether it] discriminate[d] against interstate commerce, and [whether it was] fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). In *Complete Auto*, the Court emphasized that by using this test it was appropriately considering the practical effect of the tax rather than making its determination merely on the basis of the statute's formal language. *Id.* at 279.

31. *See generally Comptroller v. Wynne*, 64 A.3d. at 463–69 (finding, first, that the tax failed the internal and external tests of apportionment, and second, that because the tax scheme encouraged intrastate investment versus interstate investments it created a discriminatory effect).

32. *See infra* Section II.a.i.

33. *Id.*

34. *See generally* SEAN LOWRY, CONG. RESEARCH SERV., R42872, TAX DEDUCTIONS FOR INDIVIDUALS: A SUMMARY (2015); TAX POLICY CENTER, BRIEFING BOOK, ch. 3, http://www.taxpolicycenter.org/briefing-book/whats-difference-between-tax-deductions-and-tax-credits (explaining that tax credits differ from tax deductions in that credits reduce the taxpayer's liability directly, irrespective of their marginal tax rate, whereas deductions only reduce a taxpayer's taxable income which is dependent on their marginal tax rate).

encourage certain behavior through tax benefits,[35] or to eliminate an untenable implication of a tax code.[36]

Although Maryland's tax scheme allowed for a partial credit, it did not permit a "full credit" for the taxation of income earned outside of the State.[37] This distinction between a partial and full credit derives from Maryland's two-tiered income tax structure: applied first on a state level and second on a county level.[38] What makes Maryland's system problematic is that a credit is allowed for the state level tax, but not for the county tax – thereby creating the potential for out-of-state income to be taxed twice without the post hoc credit relief.[39] The resulting disadvantage to a Maryland taxpayer can be illustrated as follows:

> *[A]ssume that Maryland imposes a 5% state tax and a 2% county tax on a particular taxpayer's income. If that taxpayer earns $1000 of wages in the state, she would owe $50 of state tax and $20 of county tax. Her total Maryland income tax liability would thus be $70. Assume, in the alternative, that she earned her $1000 of wages while working in a state with a 7% tax rate. That state would impose a $70 tax on that income on a source basis. Maryland would also impose its tax on that income on the basis of her residency in the state. Her tentative Maryland tax liability would thus still be $70, but she would get a credit against the state portion of that tax, which would amount to a $50 credit. Her aggregate tax liability in this situation would thus be $90—the $70 paid to the state where she worked and the $20 of Maryland county tax. That aggregate liability is, of course, greater than the liability that she would have faced if she had provided her services within Maryland.*[40]

35. *See, e.g.*, GRANT THORNTON LLP, GREEN TAX INCENTIVES AND CREDIT FOR BUSINESS AND INDIVIDUALS: FEDERAL AND STATE PLANNING IDEAS 1, 3 (2010) (discussing tax credits designed to incentivize environmentally conscience business decisions as more viable investments via a desirable tax treatment).

36. These credits can also serve as a less painful alternative to the political burden of reforming tax codes. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1805 (2015) (offering the tax credit as an instrument to "remedy the infirmity" of the State's existing tax scheme); Zelinsky, *supra* note 23 (describing the credits as "common to avoid double taxation of state income"). In *Wynne*, the question was decided on the side of the "untenable" implication, that is double taxation, being constitutionally impermissible. Thus, because reform is necessitated by the ruling, a post hoc tax credit may be easier to apply than restructuring the tax code. In a less "severe" example, a government may choose to provide a tax credit to encourage business activity related to alternative energies over more traditional energy industries. *See generally* GRANT THORTON LLP, *supra* note 35.

37. *Comptroller v. Wynne*, 135 S. Ct. at 1792.

38. The "state" tax provision is provided in MD. CODE ANN. TAX-GEN. § 10-105(a) (2014) and the "county" provision is found under MD. CODE ANN. TAX-GEN. §§ 10-103, 10-106 (2010). While the county rate may vary from county to county, the rate is capped at a maximum of 3.2%. *Id*. at § 10-106.

39. *Comptroller v. Wynne*, 135 S. Ct. at 1792.

40. Thimmesch, *supra* note 25, at 286.

As exemplified above, an individual residing in Maryland could be incentivized to avoid doing business outside the state. It is precisely this chilling effect on interstate commerce that has driven courts to take up countless Commerce Clause challenges.[41]

ii. Notable Tax Assessment Distinctions

Opponents to the *Wynne* decision raised two common tax distinctions as evidence that the Maryland scheme was permissible. First is the distinction between the taxation of corporations versus the taxation of individual residents.[42] Amidst various reasons why corporations are taxed differently than individuals, opposition to the *Wynne* decision argued that corporations deserve more tax protections because they less readily avail themselves of the benefits to tax revenue spending than a resident would (e.g., residents benefiting from state spending on infrastructure like roads and emergency services).[43]

Second is the distinction between the taxation of net income versus the taxation of "gross receipts" or gross business revenues; this distinction is two-fold.[44] This argument asserts that when applying a tax to gross receipts of multi-state income, the tax may escape Commerce Clause scrutiny if the respective state only taxes their proportionate share of the income.[45] It also suggests that a court's analysis of a tax on gross receipts should be different than a court's analysis of a tax on net income because the implicated authority for each of these state actions are different.[46] The underlying logic to this argument is that as states adjust tax rates when substituting gross income for net income, so must courts adjust their analysis of a tax scheme's permissibility when considering taxes on gross receipts versus taxes on net income.

As will be discussed in further sections below, each of these distinctions are dismissed as illusory and ultimately irrelevant to the question at issue in *Wynne*.[47]

41. M. Redish & S. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 4 DUKE L. J. 569, 570 (2014).

42. *See infra* Section III.b.ii.2 (discussing the majority's response to Maryland's attempt to distinguish the cases relied on by the majority, from the application of their tax system).

43. *See infra* Section III.b.ii.2.

44. *See infra* Section III.b.ii.2.

45. *See* Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 656 (1948) (discussing a lineage of lower court cases related to the proportional taxing of activity wholly within a state, to survive interstate commerce clause scrutiny). *But see id.* at 662–63 (qualifying that even though a tax on gross receipts would unconstitutionally subject the income to a threat of multiple taxation, that threat does not exist on a proportional basis and thus a fairly apportioned tax would be constitutionally permissible).

46. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1820 (2015) (Ginsburg, J., dissenting). *But see infra* text accompanying note 118 (comparing Justice Ginsburg's cited authority for this assertion with the authority employed by the majority in refuting Justice Ginsburg's claim).

47. *See infra* Sections III.b.i.2, III.b.ii.2 (speaking to the Court's dismissal of the distinction between taxation of a corporation versus taxation of a resident, raised by the State, and the distinction between taxation of net income versus taxation of gross income, raised by the dissent).

II. THE DEVELOPMENT OF SUPREME COURT DOCTRINE ON COMMERCE CLAUSE TAX RESTRICTIONS

The Interstate Commerce Clause of the Constitution, empowering Congress to "regulate Commerce . . . among the several States,"[48] is complimented by a "negative aspect" or Dormant Commerce Clause which restricts states from "discriminat[ing] against or burden[ing] the interstate flow of articles of commerce."[49] The *Wynne* Court applied the Dormant Commerce Clause to Maryland's sovereign tax power.[50] This section will first provide a foundational overview of Dormant Commerce Clause doctrine, particularly as it relates to tax challenges. This understanding will help illustrate the constitutional lens through which the Court examined the Comptroller's actions in *Wynne*. This understanding will also help unveil the constitutional precedent implicated by Maryland's legislative response to *Wynne*.

a. Foundations of a Commerce Clause Ruling on Tax Code

There is a litany of Commerce Clause precedent, as well as jurisdictional tax authority precedent, for the Supreme Court to rely on when considering questions on either of these issues in isolation. In the unique circumstance of *Wynne*, where these two issues intersect, the Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*[51] is a logical starting point. In *Portland Cement*, the Court applied the Dormant Commerce Clause restriction to taxes, stressing that local businesses could not receive *direct* commercial advantages through a discriminatory tax.[52] If the *Wynne* dispute had mirrored a more typical Interstate Commerce Clause claim, brought by an out-of-state party alleging a disproportionate burden, the reasoning in *Portland Cement* may have sufficed and the Court may have stopped there. However, the unusual nature of the Wynnes' claim – wherein Maryland residents claimed discrimination by their *own* state[53] – prompted a closer look from the Court.

i. Complete Auto Transit, Inc. v. Brady*: the Four-Part Commerce Test*

The Court in *Complete Auto* evaluated the challenged tax with a four-part test. The test measures whether the tax (1) "applied to an activity with a substantial nexus [to]

48. U.S. CONST. art. I, § 8, cl. 3.

49. Comptroller of the Treasury v. Wynne, 64 A.3d 453, 461 (Md. 2013), *aff'd* 135 S. Ct. 1787 (2015) (internal quotations omitted). The "Dormant Commerce Clause" is not an actual clause expressed in the Constitution but rather is a term used to characterize the established Supreme Court precedent of reading this limitation into the purpose of the express Commerce Clause. *Id.*

50. *Comptroller v. Wynne*, 135 S. Ct. at 1799 (qualifying Maryland's "raw power to tax" as still limited by Dormant Commerce Clause scrutiny).

51. 358 U.S. 450 (1959).

52. *See Northwestern States Portland Cement*, 358 U.S. at 458 (citing Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952)).

53. *Comptroller v. Wynne*, 135 S. Ct. at 1792.

the taxing State;" (2) was "fairly apportioned;" (3) "discriminate[d] against interstate commerce;" and (4) was "fairly related to the services provided by the State."[54] This four-part test has consistently been applied by courts to decide Commerce Clause questions involving state tax schemes.[55] The questions of nexus and fairly relating to state services are obvious in a case like *Wynne* where a party is a resident of the state. Thus, this comment will focus on the remaining questions of fair apportionment and discrimination.

Whether a tax is discriminatory can naturally be answered by looking at whether out-of-state income would be taxed at a higher rate than a source within the state.[56] In an effort to "prevent [the] multiple taxation of interstate commerce," courts have included the fair apportionment question to ensure that "no instrumentality of commerce is subjected to more than one tax on its full value."[57] Courts have answered this apportionment question by employing what has become known as the "internal consistency test."[58] This test asks whether, if every state were to adopt the tax scheme in question, interstate commerce would be taxed at a higher rate than the intrastate commerce.[59] If the answer to this is yes, then the tax is not fairly apportioned.[60]

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

55. *See* Comptroller of the Treasury v. Wynne, 64 A.3d 453, 463–64 (Md. 2013), *aff'd* 135 S. Ct. 1787 (2015) (citing multiple cases relying on *Complete Auto* as the applicable doctrine).

56. Thimmesch, *supra* note 25, at 285–86.

57. *Comptroller v. Wynne*, 64 A.3d at 463–64 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)).

58. *Comptroller v. Wynne*, 135 S. Ct. at 1802 (legitimizing the internal consistency test as widely accepted and applied).

59. *Id.* at 1802.

60. The Court offers a helpful comparison:

> Maryland's income tax scheme fails the internal consistency test. A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Id. at 1803–04 (citation omitted). The Court adds an important footnote emphasizing that "to apply the internal consistency test in this case, [the Court] must evaluate the Maryland income tax scheme as a whole." *Id.* at 1803 n.8 (pointing out that a State's label for the taxes must be "immaterial" for Commerce Clause purposes because otherwise, "[i]f state labels [were to] control[,] a State would always be free to tax . . . at discriminatory rates simply by attaching different labels.").

b. The Development of Supreme Court Commerce Clause Precedent in Tax Challenges

Three cases formed the precedential basis for the Court's decision in *Wynne*.[61] These cases, decided over the span of just a decade, all pertained to a state's taxation of income with interstate sources of origin.[62] These cases are particularly on point because the *Wynne* case called for the Court to apply Dormant Commerce Clause precedent to a tax scheme.

i. The Risk of Double Taxation is a Violation of the Dormant Commerce Clause

Two Supreme Court cases, *J.D. Adams Mfg. Co. v. Storen*[63] and *Gwin, White & Prince, Inc. v. Henneford*,[64] decided within just a year of each other, firmly entrenched the Court's stance that even the mere risk of double taxation was enough to render a tax statute unconstitutional.

In *J.D. Adams Mfg. Co. v. Storen*, the Supreme Court considered an Indiana state tax on income derived from sources within Indiana.[65] The taxpayer in *Storen* was an Indiana corporation that manufactured road machinery equipment, which it subsequently shipped from its factory in Indiana to other states and countries.[66] While the corporation was headquartered in Indiana, it sold eighty percent of its product to out-of-state customers.[67] Indiana taxed the corporation's income from these out-of-state sales, giving rise to the corporation's claim that the State's tax scheme was unconstitutional.[68] The Court in *Storen* agreed with the corporation, finding the tax violated the Dormant Commerce Clause by creating a risk of double taxation.[69]

Just one year later, *Storen* was reinforced by the Court's decision in *Henneford*.[70] Gwin, White & Prince, Inc., a Washington State corporation, challenged Washington's tax of corporate income earned through shipping fruit to other states

61. J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948); *see Comptroller v. Wynne*, 135 S. Ct. 1794–95, (appointing the cases of *Storen*, *Henneford*, and *Mealey* as "particularly instructive" within the precedent deemed to "all but dictate the result reached in this case").

62. *See infra* Section II.b (explaining the circumstances, holdings, and relevant precedent of the decisions in *Storen*, *Henneford*, and *Mealey*).

63. 304 U.S. 307 (1938).

64. 305 U.S. 434 (1939).

65. *Comptroller v. Wynne*, 135 S. Ct. at 1795 (citing *Storen*, 304 U.S. at 307–09).

66. *Storen*, 304 U.S. at 308–09.

67. *Id.* Some of these "out-of-state" customers were actually foreign customers. *Id.*

68. *Comptroller v. Wynne*, 135 S. Ct. at 1795 (citing *Storen*, 304 U.S. at 309).

69. *Id.* (citing *Storen*, 304 U.S. at 311) (finding that the statute taxed income without fair apportionment).

70. *See generally* Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939) (deciding that a Washington state tax assessed on a Washington Corporation's income earned through shipping fruit to out-of-state and international customers, created a threat of double taxation and was thus unconstitutional).

and countries.[71] The Washington State Court upheld the tax as applying to all income earned by any persons doing business in the State and thereby remaining within the State's sovereign authority.[72] However, following their *Storen* decision of just a year earlier, the Supreme Court again found the State tax unconstitutional.[73] The Court was careful to note that its decision did not hinge just on "the risk of a multiple burden," but also that the risk existed for interstate commerce and not for local commerce.[74]

ii. Mealey*: Interstate Commerce Necessitates a Practical Definition*

In *Central Greyhound Lines, Inc. v. Mealey*,[75] a New York corporation challenged the State's tax on a portion of gross receipts for transportation services that the corporation provided between New York and neighboring states.[76] In *Mealey* the Court crystallized its *Storen* and *Henneford* decisions by simplifying the definition of interstate commerce in the tax context.[77] The *Mealey* Court resisted hypertechnical methods for defining interstate commerce,[78] as being an exercise in "pure fiction,"[79] and instead set "practical lines" as the proper guidepost for such definitions.[80] Ultimately, the Court again found the threat that other states might also try to tax this income was enough to disqualify the tax as unconstitutional.[81]

As will be explained in Part III below, these cases and their underlying doctrines were relied on heavily by the *Wynne* Court.

71. *Id.*

72. *Id.* at 437.

73. *Id.* at 439.

74. *Id.*

75. 334 U.S. 653 (1948).

76. *See generally id.*

77. *See id.* at 659 ("To call commerce [that is] in fact interstate[,] 'local commerce[,]' because under a given set of circumstances . . . a particular exertion of State power [would remain] []valid . . . is to indulge in a fiction."). In effect, the Court ignored these technical "circumstances," and refused to entertain maneuvering "to label transportation across an interstate stream [as being] 'local commerce.'" *Id.*; *see also infra* notes 78–79.

78. *See generally Mealey*, 334 U.S. at 664, 666–68 (Murphy, J., dissenting) (asserting that the business activity is both interstate and intrastate, and thus a more technical consideration is most appropriate for the application of interstate commerce definitions).

79. *Id.* at 660 ("To say that this commerce is confined to New York is to indulge in pure fiction."). The Majority opinion was unabashed in characterizing its disdain for this strained definition of interstate commerce. *See, e.g.*, *id.* at 659 ("us[ing] loosely[,] terms having . . . constitutional significance"); *id.* ("a needless fiction,"); *id.* at 660 ("[a] verbal device").

80. *Id.* at 659 ("[C]ommerce among the [s]tates both are practical rather than technical conceptions, and, naturally, their limits must be fixed by *practical lines*.") (internal citations omitted) (emphasis added).

81. *Id.* at 662.

III. THE SUPREME COURT OFFERED A SOUND DECISION IN *WYNNE*

The Court in *Wynne* divided its reasoning into two parts. First, the Court laid out its foundation for applying Commerce Clause precedent to the specific tax issue in *Wynne*, relying heavily on the three precedential decisions discussed in Section II.b above. Second, the Court responded to opposing arguments by focusing on the practical implications of those contentions as well as viable alternatives to address the concerns raised. Section III.a of this comment outlines the *Wynne* Court's foundational precedent while Section III.b addresses the Court's preemptive responses to opposing opinions. Section III.c then discusses why this format will insulate the decision from future negative treatment.

a. Use of Commerce Clause Tax Precedent

The *Wynne* Court's heavy reliance on *Storen*, *Henneford*, and *Mealey* demonstrated the Court's preference for evaluating tax statutes, "not [by its] formal language . . . but rather [by] its practical effect."[82] The *Wynne* Court struck down Maryland's tax for the same reasons stressed in these cases, namely that the tax schemes risked double taxation and disadvantaged interstate commerce.[83]

Describing the implications of the Indiana tax scheme from *Storen*, the *Wynne* opinion emphasized that even the mere "risk of a double tax burden," was forbidden by the Dormant Commerce Clause.[84] This established that to find a state tax unconstitutional, the Court need only to find a *potential* for double taxation rather than actual examples. The *Wynne* Court used the *Henneford* decision, which largely echoed the ruling of its predecessor in *Storen*, to reiterate that a double taxation risk is unconstitutional specifically because it imposes on interstate commerce but not local commerce.[85]

In *Mealey*, the Court looked past technical constructions of interstate commerce in favor of a practical interpretation of the activity in question.[86] This distilled the evaluation for the *Wynne* Court, relieving it of an unnecessarily difficult analysis of interstate commerce itself, and instead allowed the Court to focus exclusively on the practical effect the tax had on the business transaction.[87]

82. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1795 (2015) (citing Complete Auto Transit, Inc. v. Brady 430 U.S. 274, 279 (1977)).

83. *Id.*; *State & Local Tax Alert, U.S. Supreme Court Holds Lack of County Personal Income Tax Credit for Taxes Paid to Other States Violates Commerce Clause*, GRANT THORTON LLP, May 26, 2015, at 3.

84. *Comptroller v. Wynne*, 135 S. Ct. at 1795 (quoting J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 439 (1938)).

85. *See id.* (discussing *Henneford*).

86. *See supra* notes 76–81.

87. *See Comptroller v. Wynne*, 135 S. Ct. at 1795 (using *Mealey* as a basis for its reliance on a practical analysis).

b. Preemptive Responses to Protect the Decision from Criticism

After outlining the foundations of its decision, the *Wynne* Court methodically responded to the opposing arguments raised by the dissenting Justices and the State of Maryland.[88] The opposing arguments attempted to distinguish the cases of *Storen*, *Henneford*, and *Mealey* on the basis of: (1) the superficial application of the tax rather than the result of the tax;[89] (2) the distinction between applying taxes to corporations versus individuals;[90] and (3) the different implications for assessing income tax based on net incomes versus gross receipts.[91] Relying on these alleged distinctions, the opposition tried to shift focus to precedent where a state's sovereign tax authority is controlling.[92] The majority opinion stayed true to its practical effect focus in dispensing with each of these arguments.

i. Maryland's Defense

1. The "Tax Neutral" Argument

Maryland tried to defend its tax policy in a vacuum by focusing exclusively on the application of the tax itself and thereby ignoring the coinciding application of tax credits (or need thereof). The State argued its tax was neutral, not discriminatory, because the tax was applied to both out-of-state as well as instate income.[93] This defense is a red herring because it was not the tax itself that was unconstitutional. Instead, it was the practical effect resulting from the tax's denial of a subsequent credit for out-of-state income that was unconstitutional.[94] The Court avoided this fallacy by recognizing that the Dormant Commerce Clause bans activity even where it is not "facially discriminatory,"[95] so long as it is discriminatory in "practical effect."[96]

88. *See generally Comptroller v. Wynne*, 135 S. Ct. at 1795–801 (identifying, and then systematically responding to, the various arguments of both the Dissent and the State of Maryland).

89. *See infra* Section III.b.i.1.

90. *See infra* Section III.b.i.2.

91. *See infra* Section III.b.ii.1.

92. *See infra* Section III.b.ii.2.

93. *Comptroller v. Wynne*, 135 S. Ct. at 1804. The State specifically delineates three categories of income: "(1) residents who earn income in State, (2) residents who earn income out of State, and (3) nonresidents who earn income in State." *Id.* For the purposes of the *Wynne* Court's analysis, the two-part distinction between out-of-state versus instate, suffices. *Id.* at 1804–05 (persisting that these aesthetic categorizations, do nothing to "save [the tax] from invalidation.").

94. *See supra* text accompanying notes 82–83.

95. *Comptroller v. Wynne*, 135 S. Ct. at 1805 (quoting American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266, 281 (1987)).

96. *See id.* (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)) (giving example to different ways in which a law may *be* discriminatory, and not offering ways in which a law is permitted to be discriminatory).

2. The Corporation Versus Resident Distinction

The taxpayers in *Storen*,[97] *Henneford*,[98] and *Mealey*[99] were all corporations whereas the Wynnes are individual residents.[100] The State attempted to paint the Wynnes' claim as unwarranted because income earned by an individual deserves fewer protections under the Commerce Clause, than does income earned by a corporation.[101] The basis for this argument is two-fold: (1) that a tax on the individual is more justified due to individuals "reap[ing] the benefits of local roads, local police and fire protection . . . ;"[102] and (2) that an individual's right to vote is a sufficient protection from unfair taxing – a protection not afforded to corporations.[103]

The Court in *Wynne* rejected the State's first premise, pointing out that state infrastructure like roads are the same driven by corporate trucks; and state services like police and fire departments are the same services corporations call on to protect their facilities.[104] The Court also dismissed the State's second premise related to a corporation's lack of voting power by noting prior decisions where a challenge to legislation was sustained notwithstanding the party having had the right to cast a vote on the challenged legislation.[105] Again relying on practical considerations, the Court reinforced its position by questioning the result if the State's argument were to prevail in a case where the victim of the discriminatory tax held a minority view in the voting population.[106]

97. *See* J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 308 (1938) (naming the appellant taxpayer as a manufacturing business incorporated in Indiana).

98. *See* Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 435 (1939) (identifying the appellant taxpayer as a fruit distribution business incorporated in Washington state).

99. *See* Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 665 (1948) (Murphy, J., dissenting) (classifying the appellant taxpayer as a New York corporation). The dissent is referenced here simply because it offered the most explicit reference to the appellant taxpayer, as indeed a New York corporation, but this was not a disputed issue – so much so that the majority seemingly did not find it necessary to designate the appellant taxpayer as such in its opinion.

100. *Comptroller v. Wynne*, 135 S. Ct. at 1793.

101. *Id.* at 1797.

102. *See id.* (quoting Brief for Petitioner at 30, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485)).

103. *Comptroller v. Wynne*, 135 S. Ct. at 1797; *cf.* Zelinksy, *supra* note 23 (asserting that the inequity of taxing non-residents or statutory residents who do not have a political voice in the state from which they're being taxed, does not apply to the Wynnes because they're able to vote in Maryland).

104. *Id*. The Court also gave examples of ways in which corporations benefit from state services that may more exclusively be thought of as an individual resource. *See id.* (suggesting that schools or any other government service, is relied on by the corporation to serve and better their employees, while also attracting employees to their place of business).

105. *Id.* at 1793.

106. *Id.* at 1798.

ii. The Dissents

1. Net Income vs. Gross Receipts Income

In *Storen*, *Henneford*, and *Mealey* the challenged tax was assessed on the taxpayers' "gross receipts," as opposed to net income.[107] The dissent in *Wynne* sought to capitalize on this nuance, relying on a 2003 tax treatise to conclude that, historically, there's been a distinction in taxing the two forms of earnings.[108] However, the majority quickly dismissed this distinction as irrelevant, pointing to the dissent's own acknowledgment that more recent precedent has rejected this distinction.[109] Utilizing the same treatise offered by the dissent, the majority stressed that this distinction would, "allow[] very little . . . trustworthy guidance as to tax validity."[110] As the majority described, "the gross receipts judicial pendulum has swung in wide arc, . . . now squarely reject[ing] the argument that the Commerce Clause distinguishes between taxes on net and gross income."[111]

2. Sovereign Tax Authority Trumps Commerce Clause Limitations

After attempting to distinguish the cases of *Storen*, *Henneford*, and *Mealey* from the facts in *Wynne*, the dissent then argued that the State's sovereign tax authority was the appropriate precedent to apply.[112] The dissent relied on the premise that the states' tax authority is absolute, and that it applied to "*all* the income of its residents, even income earned outside the taxing jurisdiction."[113]

Although the sovereign tax authority may be constitutional standing on its own, it is preempted like much of state authority when the exercise of that authority unjustly infringes on an individual's constitutional rights.[114] The dissent looked past this preemption limitation. As the *Wynne* Court stated, despite states' clear authority

107. *See Storen*, 304 U.S. at 309 (acknowledging that the State tax was applied to income from appellant's gross income from sales); *Henneford*, 305 U.S. at 435 (specifying the Washington statute called for the tax of the "gross income of the business"); *Mealey*, 334 U.S. at 664 (framing the issue of the case as a State tax law that imposed on gross receipts).

108. *Comptroller v. Wynne*, 135 S. Ct. at 1820 (Ginsburg, J., dissenting) (citing CHARLES A. TROST & PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 251 (Thomson Reuters ed., 2d ed. 2003) [hereinafter TROST & HARTMAN]).

109. *Comptroller v. Wynne*, 135 S. Ct. at 1795–96.

110. *See id.* at 1796 (quoting TROST & HARTMAN at 212) (discussing the use of direct and indirect burden tests in considering commerce clause violations as they apply to tax schemes). The Court goes on to explain that because this formal distinction does not create valuable guidance, controlling cases like *Storen* or *Henneford*, rely instead on an economic impact analysis – in this scenario, a threat of multiple taxation. *Id.*

111. *Id.* at 1796 (citing Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331, 1335 (1995)).

112. *Comptroller v. Wynne*, 135 S. Ct. at 1798.

113. *Id.* (citation omitted) (emphasis in original).

114. *See, e.g.*, U.S. CONST. amend. IV (protecting citizens from unreasonable search and seizure); U.S. CONST. amend. VII (ensuring a defendant's right to a speedy and public trial).

to tax, "[the] imposition of th[at] tax may nonetheless violate the Commerce Clause."[115]

To further illustrate this preemption limit, the majority in *Wynne* looked to *Camps Newfound/Owatonna v. Town of Harrison,*[116] where the Court sustained a challenge from a Maine corporation to a Maine tax law.[117] In describing *Camps Newfound*, the *Wynne* Court conceded that there was "no question" of Maine's jurisdictional authority to tax the plaintiff.[118] The Court qualified, however, simply *that* "a state has the jurisdictional power to impose a tax says nothing about whether that tax violates the Commerce Clause."[119] Like in *Camps Newfound*, where Maine's tax failed the scrutiny of Commerce Clause precedent, Maryland's tax scheme similarly failed.[120] Thus, the Court referenced *Camps Newfound* to further accentuate that, "Maryland's raw power to tax its residents . . . does not insulate its tax scheme from scrutiny under the [D]ormant Commerce Clause."[121] The dissent failed to reconcile this point.

c. Wynne *is a Sound, Defensible Opinion*

The *Wynne* decision recasts the constitutional markers for applying the Dormant Commerce Clause to tax codes. Subsequently, the decision places a burden on states to alter course as they navigate the limitations on State tax authority, while also seeking to keep State tax revenue afloat. The Court in *Wynne* was considerate of this burden.[122]

Justice Alito carefully weaved the Court's practical effect emphasis into the majority opinion of *Wynne*.[123] The opinion methodically answered the pertinent arguments raised by the opposition and went as far as acknowledging an alternative solution to address the alleged friction between the Commerce Clause and the sovereign jurisdictional tax power.[124] This consideration protected the opinion from the oppositions' cries of an unreasonable burden placed on the states left to adapt

115. *Comptroller v. Wynne*, 135 S. Ct. at 1798 (citing Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992) (rejecting a due process challenge before sustaining a commerce clause challenge to the same tax)).

116. Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 (1997).

117. *Id.* at 569.

118. *Comptroller v. Wynne*, 135 S. Ct. at 1799 (deeming the plaintiff's incorporation in Maine as an obvious qualifier for the State's tax authority). Maryland's authority to tax the Wynnes would be just as clear as Maine's, given the Wynnes' residency in Maryland.

119. *Id.*

120. *Id.* (citing *Camps Newfound*, 520 U.S. at 580–83).

121. *Id.* at 1799.

122. *See infra* notes 123–26 and accompanying text.

123. *See supra* Part III.

124. *Comptroller v. Wynne*, 135 S. Ct. at 1806 (offering contemporary tax code examples that would cure the constitutional defects of the Maryland code, without requiring a major overhaul of the code at whole); *see supra* Section III.b.

their tax code to the ruling.[125] This decision will necessitate substantial reform of some states' current tax policies and, in some cases, may prompt states to make other budgetary adjustments to account for lost revenue. However, by paying attention to the opposing arguments and recognizing existing policy for compliance, Justice Alito's opinion in *Wynne* is sound.[126]

IV. FUTURE IMPLICATIONS

In the wake of this decision, states with noncompliant tax codes will be left to find a balance between sustaining necessary tax revenues and complying with this ruling.[127] Maryland, albeit without any meaningful guidepost, stumbled out of the gate in its effort to find that balance. Although Maryland's failure will subject it to further Constitutional challenges, it should also serve as a guide for other states seeking to avoid similarly self-inflicted wounds.[128] The following sections will offer insight into the impact of *Wynne* both in Maryland and nationwide. These sections will look at how Maryland's legislative history, along with relevant constitutional precedent, will both influence future litigation aimed at exploiting Maryland's flawed response to this matter.

a. Wynne*'s Impact on Maryland and Beyond*

A universally relatable measurement for "impact" is, of course, monetary cost. Consequently, cost is a logical framework to illustrate this ruling's tangible effect on Maryland, as well as across the nation. Maryland preemptively estimated the ruling's cost to the State, in refund payments alone, to be $190 million before interest.[129] In addition, the State's annual revenue loss has been estimated at $42 million.[130] Even more alarming is the cost to counties who will ultimately have to reimburse the state

125. *See generally id.* at 1813–20 (Ginsburg, J., dissenting).

126. Although the Justice's opinion is sound, this does not preclude it from substantial debate and disagreement. As is the case with most 5-4 opinions of the Supreme Court, many have and will continue to disagree with this opinion.

127. *See infra* notes 133–134 and accompanying text (naming other jurisdictions who are likely to face similar challenges to their own tax law, which is reflective of Maryland's unconstitutional scheme).

128. Maryland may have learned from its own failures. A Senate bill was introduced in Maryland in early 2016, aimed at repealing the 2014 reduction of interest rates on *Wynne* refunds. S.B. 1024, 2016 Leg., (Md. 2016). However, despite the bill being introduced on February 17, 2016, it did not make it beyond a first reading. *Id.*

129. *Letter from Att'y Gen. to Governor*, *supra* note 6, at 10; *see* Turque, *supra* note 7 (estimating Maryland's cost to top $200 million).

130. Brent Kendall, *Supreme Court Strikes Down Maryland's Double Taxation of Residents*, WALL STREET JOURNAL, May 18, 2015.

for any tax refunds.[131] Certain counties in Maryland have estimated revenue losses as high as $55 million annually.[132]

The national scope of this ruling comes into focus when considering other states and localities that employ tax provisions like the ones invalidated by the *Wynne* decision. An amicus brief submitted to the *Wynne* Court listed, by way of example, Wisconsin, North Carolina, and Tennessee all as states implicated by the *Wynne* ruling.[133] The brief went on to list the cities of Philadelphia, Cleveland, Detroit, Kansas City, St. Louis, and New York as similarly implicated.[134] Maybe the most startling inclusion on this list is New York City, considering the sheer volume of its resident's income and the proportionate ratio of that income which involves interstate sources.

Finally, a cost that is more difficult to conceptualize is the looming legal and administrative costs that will follow this decision. The extent of refunds to be filed as a result of *Wynne* is not yet known, but simply claiming and processing these refunds will carry a substantial cost.[135] Costs surrounding the inevitable litigation that will arise are even more difficult to calculate.[136] Even in the infancy of the *Wynne* doctrine, claims have started to appear in Maryland[137] and elsewhere.[138] The success of these suits may give way to a new feeding ground for tax attorneys across the nation, leaving Maryland and other similarly implicated states with an ultimate cost that is currently immeasurable.

131. DePaul, *supra* note 7.

132. Aaron Kraut, *U.S. Supreme Court Decision in Tax Case Could Cost Montgomery County Millions*, BETHESDA MAGAZINE, May 18, 2015.

133. *See* Brief for Int'l Mun. Lawyers Assoc. et al. as Amici Curiae in Support of Petitioner, Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) (No. 13-485) at 17–18 (analogizing these states to Maryland on the basis that they too do not provide a credit to account for the resident tax on out-of-state income).

134. *Id.*

135. *See generally* Sawyer, *supra* note 10 (discussing a backlog of thousands of claims, increasing in number and cost, daily).

136. *See* DePaul, supra note 7 (raising various prospective litigation claims related to the refunds).

137. Amended Class Action Complaint, Holzheid v. Comptroller of the Treasury of Maryland, Case No. 24-C-15-005700, 1, 13–16 (Balt. City Cir. Ct. Dec. 10, 2015), (No.5/0) (asserting a class action suit against Maryland for, among other things, Commerce Clause violations and takings clause violations). The plaintiffs also seek an injunction preventing the State from applying its 2014 legislation which reduced interest rates for *Wynne* refunds, and asks for declaratory relief finding the legislation unconstitutional. *Id.* at 17. Defendant's Motion to Dismiss was denied on February 18, 2016 and trial is scheduled for December 16, 2016. *See generally* Amy Hamilton, Maryland Acknowledges Class Action Related to *Wynne* Refunds, 79 STATE TAX NOTES 8, Jan. 4, 2016 (giving a general background on Maryland's retroactive adjustment as it relates to potential class participants).

138. *See generally* Knoll & Mason, *supra* note 11 (reporting on the Massachusetts highest Court's consideration of a remand case to apply the Supreme Court's *Wynne* ruling in determining whether a State tax is discriminatory). As of the publication of this comment, the *Wynne* case has been cited in nine federal court cases, including cases from the First, Second, Ninth and Tenth Circuits, as well as in six state court cases, including Connecticut, Florida, Massachusetts, New York, Ohio, and Utah. *See, e.g.*, Direct Mktg. Ass'n v. Brohl, 814 F.3d 1129 (2016); Merscorp Holdings, Inc. v. Malloy, 13 A.3d 220 (Conn. 2016).

The following sections will demonstrate why Maryland will likely lose the fight over the constitutionality of its *Wynne* response. To give context to this new litigation, this section will first identify the key components of Maryland's legislative response to the *Wynne* ruling as well as useful background to that legislation. This section will then provide an overview of the constitutional precedent that forms the basis for these new constitutional challenges to Maryland's response.

b. The History of Maryland's Tax Refund and Deficiency Interest Rates

Maryland's response to *Wynne* must be viewed not only in the perspective of the existing legislation it amended, but also with an eye to the State's reasoning for making the change. In Maryland, prior to 2007, interest rates were different for returns paid by the State and deficiency assessments paid by the taxpayer.[139] When the taxpayer owed the State, the taxpayer would be charged thirteen percent interest.[140] However, when the State owed the taxpayer, the State only charged itself four percent interest.[141] This inconsistency was corrected in 2007, when the rate was equalized to at least thirteen percent interest for both refund payments to the taxpayer and deficiency payments to the State.[142] This rate remained consistent for deficiencies and refunds until 2014.[143] In expectation of an adverse ruling from the Supreme Court in *Wynne*,[144] the State again amended legislation in May of 2014 reducing the interest rate the State would owe on any refund resulting from *Wynne*. The rate was reduced to roughly four percent, while the rate taxpayers owed the stated remained at thirteen percent, nearly resetting the discrepancy the State had corrected in 2007.[145] The reduced rate applied exclusively to any refunds the State would owe

139. Office of the Comptroller, *Interest and Penalty Charges Announcement – Interest Rates*, http://taxes.marylandtaxes.com/Individual_Taxes/Individual_Tax_Types/Estate_and_Inheritance_Tax/Payment_Information/Interest_and_Penalty_Charges.shtml [hereinafter *Maryland Comptroller's Interest Rate Announcement*].

140. *Id.* The discrepancy between rates charged against taxpayers and those charged against the State, favored the State by as much as 9% in 2005, equating to more than a three times higher interest cost for taxpayers than the State. *Id.*

141. *See id.* (showing the interest rate the State charges itself had decreased to 4% in 2006 from as high as 8% in 2001).

142. *See* H.B. 1345, 107th Cong., §1 (Md. 2007) (applying the same interest rate calculation to both tax deficiencies and refunds).

143. *See Maryland Comptroller's Interest Rate Announcement*.

144. *Letter from Att'y Gen. to Governor*, *supra* note 6, at 10 (taking note of the "strength" of the Court of Appeals decision).

145. *See* S.B. 172, 114th Cong., §§ 16, 20 (Md. 2014) (amending the thirteen percent rate set by the 2007 legislation, to a "percent that equals the average prime rate of interest quotes by commercial banks"). Often generalized, the term "prime interest rate," represents an average of the rates at which large institution banks lend money to each other. *See Wall Street Journal Prime Rate*, BANKRATE.COM (last visited Nov. 8, 2016). The Wall Street Journal prime rate, currently at 3.5%, is calculated by averaging a daily survey of the prime rates offered by

specifically from the *Wynne* decision.[146] The *Wynne* decision was not rendered until May 18, 2015.[147]

c. Constitutional Background for New Challenges to Maryland Tax Law

While arguably a new frontier of tax litigation, challenges to Maryland's legislative response will reinvigorate Constitutional doctrine whose debates initiated centuries ago. First is the narrow and rarely applied doctrine prohibiting prescriptive legislation from limiting a judicial decision. Second is the embattled doctrine of the Constitution's takings clause. This section offers useful background to the cases that make up these areas of law, and will serve as an important framework for analyzing litigation over Maryland's *Wynne* response.[148]

i. Klein's *Guidance on "Rules of Decision" Creating Prescriptive legislation*

United States v. Klein,[149] in its most basic form, was a dispute over property rights in cotton seized by the United States during the civil war pursuant to a congressional enactment which made property in the insurrectionary territory subject to confiscation without compensation.[150] Seemingly just a property dispute in origin, the ultimate decision in *Klein* established significant markers for the separation of powers between the legislative and judicial branches.

Beginning on July 13, 1861, Congress passed various acts which subjected persons (and more directly their property) to seizure and forfeiture for even loose association with insurrectionist territory or motives.[151] However, the last installment of this three-part legislative initiative, enacted on July 17, 1862, included authorization for the President to pardon, and in turn restore property rights to, persons having been associated with, or having had property seized in the insurrectionist territories.[152] Through a subsequent proclamation on December 8, 1863, the President offered a full pardon, with full restoration of property, contingent upon the person taking an

the thirty largest banks. *Id.* The Wall Street Journal's prime rate average "is the most widely quoted measure of the prime rate." *Id.*

146. S.B. 172, 114th Cong., § 16 (Md. 2014); *see also Letter from Att'y Gen. to Governor*, *supra* note 6, at 9 (specifying that the provision applies to other taxpayers who may file refund claims as a result of the *Wynne* ruling and are "successful on their claims").

147. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

148. *See infra* Sections IV.d.ii–iii.

149. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

150. *Id.* at 128.

151. *Id.* at 130. This legislative span consisted of three separate acts, passed on July 13, 1861, August 6, 1861, and July 17, 1862, respectively. *Id.*

152. *Id.* at 131.

oath of allegiance to the Union.[153] The claimant in *Klein*[154] sought to be compensated for seized property pursuant to such a pardon and was granted his request by the Federal Court of Claims.[155] The Federal Government appealed the Court of Claims judgment, but the Supreme Court affirmed the decision.[156]

The *Klein* case returned to the Supreme Court by way of a motion from the United States Attorney General, requesting that the Court dismiss its prior decision.[157] The motion cited a congressional proviso passed in the same year, which in relevant part enumerated, "no pardon . . . shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States."[158] The proviso went further to mandate that should any such pardon be offered into evidence, it should not be "used or considered by said court, or by [an] appellate court."[159]

In considering the Federal Government's appeal, the *Klein* Court looked to *United States v. Padelford*,[160] a case decided prior to the congressional proviso.[161] In *Padelford* the Supreme Court affirmed a decision that granted an award in favor of a pardoned person.[162] The *Klein* Court recognized that its decision in *Padelford* was an acknowledgement of its duty to indeed consider these pardons as evidence.[163] This new proviso, the Court decided, "den[ied] pardons . . . the effect which th[e] [C]ourt" in *Padelford* "had adjudged them to have."[164] Additionally, the Court found that the prospective nature of the proviso sought to manipulate the absolute rights and obligations due to citizens from their government.[165] The proviso transformed those

153. *Id.* at 131–32.

154. *See id.* at 132 (clarifying that Klein had standing as an administrator to the affairs of V. F. Wilson, who died in 1865). Wilson's property had been seized for his aiding rebellion soldiers during the Civil War. *Id.* Wilson was pardoned prior to his death, pursuant to an oath of allegiance he took on February 15, 1864. *Id.*

155. *Klein*, 80 U.S. (13 Wall.) at 132–33. This grant was decided on May 26, 1869 despite it being filed by Klein in December of 1865. *Id.* The award was significant, totaling $125,300. Today that figure would translate to roughly $2.1 million.

156. *Id.*

157. *Id.* at 134.

158. *Id.* at 133.

159. *Id.* The proviso, as written, based its invalidation of the pardon on the fact that such a pardon would offer conclusive evidence of a prior infidelity to the Union and thereby should "summarily" cease the Court's jurisdiction over the claim. *Id.* In effect, the proviso renders the pardon moot, for the very issue the pardon was enacted to address, i.e., prior association with the rebellion. *Supra* notes 153–56. This comment fully explores the legal short-comings of this enactment, but the question is begged of how a piece of legislation as circular, and as ill-constructed as this proviso, survived all the way to a court of decision before meeting a fatal judgment.

160. United States v. Padelford, 76 U.S. 531 (1869).

161. United States v. Klein, 80 U.S. (13 Wall.) 128, *passim* (1871) (referencing *Padelford*, 76 U.S. at 531).

162. *Id.*

163. *Klein*, 80 U.S. (13 Wall.) at 145.

164. *Id.* at 145.

165. *Id.* at 146.

rights and obligations from absolute to selective, permitting the government to recognize its duty only when certain circumstances were triggered.[166] The Court soundly rejected this notion of selective legislation, claiming "it is as much the duty of the government as of individuals to fulfil[l] its obligations,"[167] and that in passing such a proviso, "Congress ha[d] . . . passed the limit which separates the legislative from the judicial power."[168]

The *Klein* decision offers two key takeaways for the constitutional boundaries of the separate branch powers. First, that it is unconstitutional for the legislature to prescribe a "rule of decision" for a judicial ruling;[169] and second, that new legislation cannot be created to retroactively absolve the State of existing obligations.[170] As will be discussed in further detail below, Maryland's legislative response to the *Wynne* decision is impermissibly congruent with the congressional proviso forbidden in *Klein*.[171]

ii. Takings Clause Doctrine: Confounding Precedent

For nearly 150 years the Supreme Court has consistently ushered takings clause cases into its crowded docket. Yet as this precedent grows, each new opinion seems to only further confound efforts to predict a court's application of the resulting doctrine.[172] While some literature has made inroads to organizing the courts' consideration of these matters, as this section will discuss further below,[173] even today a compensable takings claim is inherently uncertain legal footing.[174] Nonetheless, exploring this

166. In this context that transformation, from absolute to selective, was triggered when the pardon in question was being considered by a Court of Claims. *Id.* at 134 (including the proviso language that explicitly lays out criteria for when the absolute rights are ignored).

167. *Id.* at 144.

168. *Id.* at 147.

169. *Klein*, 80 U.S. (13 Wall.) at 146 (invoking a court's duty to "ascertain [for itself] certain facts and thereupon to declare that its jurisdiction on appeal has ceased"). The Court then concluded that relying on the Congressional proviso, as an instruction for where the court's jurisdiction starts and stops, would be nothing more than the Court acquiescing to an order from Congress to rule "in a particular way"). *Id.*

170. *Id.* at 142.

171. *See Infra* Section IV.d.ii.

172. *See generally* Meltz, *supra* note 8 (offering a chronology of the continual development of taking clause precedent from Supreme Court decisions covering the infamous 1870 case of *Hepburn v. Griswold*, one of the first hallmark cases to takings clause doctrine, to contentious Supreme Court decisions in 2005 which left the constitutional debate very much alive). The continued uncertainty over how courts decide takings cases, is further evidenced by the fact that since 1978 "more than 50 takings cases have been decided by the Supreme Court." *Id.*

173. *See infra* note 176.

174. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles – Part I – A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1316 (1989) ("It is difficult to discern from the Court's takings decision which test the Court would apply in any given case. Moreover, whichever test is used, there is considerable uncertainty as to what each test means."). *But see id.* at 1342 (reconciling this inconsistency and lack of guidance with a "underlying pattern" based in the Justices' reliance on a sense of "when fairness requires the

argument is a useful exercise in the *Wynne* context given the likelihood that plaintiffs to subsequent *Wynne* refund litigation will claim the value of lost interest from refund payments as compensable property.

The Supreme Court's takings doctrine can generally be divided into three "eras" of precedent, each set apart by a marked shift in courts' general approach to the issue.[175] The most recent of these shifts, prompted by the Supreme Court's 1978 decision in *Penn Cent. Transp. Co. v. City of New York*,[176] has seen courts focus predominantly on three key factors in a takings determination: (1) the "character" of the government action, (2) the extent to which it interferes with distinct investment-backed expectations, and (3) the economic impact of the action.[177] In keeping with the tradition for confusion surrounding this doctrine, the Supreme Court has not given a definitive answer as to whether any of these factors are independently dispositive.[178] Even worse, the courts' interpretation of each factor itself has been marred with inconsistencies.[179]

Under the first analysis prong, "character of the governmental action," courts have looked at whether the government physically takes or invades property, focusing particularly on the "serious" or "permanent" nature of the action.[180] As a result, courts have been more likely to find a taking where it is of an "unusually serious

payment of compensation"). Despite Peterson's efforts, the reconciliation of a "sense of fairness" presumably does little to assuage the confusion of lower court judges, and practitioners alike, left to navigate the murky waters of this Supreme Court precedent. As will be articulated further in the text of this comment, these "murky waters" are decidedly less so in the context of "per se" takings.

175. *See* Meltz, *supra* note 8, at 16 (deeming the period from 1870 to 1922 as the era of "appropriations and physical takings only," where the Supreme Court's precedent on the constitutional takings clause took form through the Court's recognition that the clause went beyond just limiting the government's formal exercise of its eminent domain power and extended to more indirect government conduct); *see also id.* at 11 (categorizing the period from 1922 to 1978 as the "dawn of regulatory takings law" where the Court recognized that a government taking extends even to mere government regulation of property use); *id.* (discussing the most expansive era of constitutional takings clause doctrine which is still developing today and was, initiated by a Supreme Court decision in 1978).

176. 438 U.S. 104 (1978); *see* Peterson, *supra* note 174, at 1317 (describing the three-factor test from *Penn Central*, as the "primary test" used to determine whether a taking has occurred). As Peterson points out, the Court had grown wary of its "ad hoc, factual inquiries" in prior decisions and through *Penn Central* sought to provide more "structure for future inquiries by identifying three factors it considered particularly significant in determining whether governmental action constituted a taking." *Id.*

177. Meltz, *supra* note 8, at 3. *But see* Peterson, *supra* note 174, at 1316 (hinting at the unpredictability of courts, Peterson acknowledged that aside from the *Penn Central* test, courts have applied three other modern tests, albeit on a more limited basis).

178. Peterson, *supra* note 174, at 1317, 1320, 1326.

179. *Id.* at 1316 ("It is difficult to discern . . . which test the Court would apply in any given case. Moreover, whichever test is used, there is considerable uncertainty as to what each tests means."); *see, e.g.*, *id.* at Section IV.c.ii (laying out the various applications of each prong of the *Penn Central* test).

180. *Id.* at 1317–18.

nature."[181] Where the matter at hand has not involved a physical taking, courts' analysis of this prong has shifted to focus on the government's justification.[182]

In the second prong of analysis, "interfere[nce] with the claimant's reasonable, investment-backed expectations," courts have usually asked whether the claimant "reasonably relied to [their] economic detriment on an expectation that the government would not act as it did."[183] This expectation has mostly failed where courts have deemed the government action to be foreseeable.[184] Courts have found foreseeability in a variety of circumstances, for example, where the claimant was effectively "on notice" that the action may occur,[185] where changes in the law were "foreseeable given the history of regulation in [an] industry,"[186] or where the government reserved the power to change the law.[187] However, courts have been "likely to find that reasonable expectations were disappointed [] when the government has broken a promise . . . for example . . . [where] the law had 'explicitly guaranteed[,]'" something.[188] Under similar "broken promise" reasoning, courts have "equate[d] reasonable, investment-backed expectations with 'property,'" referring to the expectation as a "vested right."[189]

Courts have differed in their consideration of the third analysis prong, "economic impact of the governmental action."[190] Some have required a showing of "greatly diminished [] value of the claimant's tangible thing," whereas other courts have considered the "economically viable use" that remains.[191] In instances where only the diminution of value is required, courts have generally not focused on the static loss in dollars, but rather on the proportion of the original value.[192]

d. Maryland's Flawed Response to the Wynne *Decision*

Maryland's legislative response to *Wynne* will fail because it ignores constitutional doctrine and oversteps State authority. The legislative amendment subjects

181. *Id.* at 1318.

182. *Id.* at 1319 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).

183. *Id.* at 1320; *see also id.* at 1321 (defining "investment backed" as a scenario where the claimant "parted with something of economic value in reliance on an expectation that the government would not act in a particular manner").

184. Peterson, *supra* note 174, at 1320.

185. *Id.* (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

186. *Id.* (citing Connolly v. Pension Ben. Guar. Corp., 475 U.S. 211 (1986)).

187. *See id.* at 1321 (indicating that the reservation could be either implied or explicit).

188. *Id.*

189. *Id*. at 1323.

190. Peterson, *supra* note 174, at 1325.

191. *Id.*

192. *Id.* at 1325–26.

Maryland taxpayers to the mercy of the State's self-proclaimed "grace"[193] in determining interest rates for *Wynne* refunds. However, because this "grace" was not exercised uniformly, it creates an unfair burden on interstate commerce, not to mention on Maryland taxpayers. Even putting aside this unfair burden, the provision limits a judicial ruling in a way that exceeds the State's authority. For these reasons the State's exercised "grace" is constitutionally impermissible.

i. Legislative Impropriety

Maryland's legislative amendment in 2007 simplified the calculation of tax interest rates to eliminate a complex formula that over time had lost its utility.[194] Generally, deference should be given to the State's discretion in tax policy decisions – so long as the application of that discretion is uniform.[195] The 2014 legislation, expressly purposed as a move to shrink payments the State would owe for prior unconstitutional tax calculations,[196] does not apply that discretion uniformly.[197] Instead, it selects a specific class of State residents particularly wronged by the State's tax code, and particularly positioned to seek repayments from the State, and it retroactively reduces the State's obligation to these residents.[198]

This action on its face questions the good faith in which the State administered its taxing authority, but more directly it is an affront to the State's obligations to its residents – obligations that have been shown to be constitutionally protected.[199]

ii. Klein *Prohibits Maryland's Retroactive Adjustment of* Wynne *Refunds*

Maryland's adjustment of the refund rate, specifically for refunds expected from the *Wynne* decision, mirrors the prohibited conduct in *Klein* and thus should be similarly banned.[200] The legislative proviso in *Klein* adjusted the effect of pardons specific to

193. *Letter from Att'y Gen. to Governor*, *supra* note 6, at 9 (citation omitted) (characterizing the determination of interest paid on tax refunds, as "a matter of grace which can only be authorized by legislative enactment").

194. *See supra* Section IV.b; H.B. 1345, 107TH Cong., §1 (Md. 2007); *see also* FISCAL AND POLICY NOTE, H.B. 1345, MARYLAND GENERAL ASSEMBLY (2007) at 2 (explaining existing calculations choose the greater of 13% or a 3% markup of the average prime banking rate). While the 3% markup may have been appropriate at the time of the original legislative enactment, as rates began to change, the calculated average even *with* the markup became more and more disproportionate. *Id.*

195. *Supra* notes 114–15 and accompanying text.

196. *Letter from Att'y Gen. to Governor*, *supra* note 6, at 9–10.

197. *Supra* notes 139–46 and accompanying text.

198. *Supra* notes 139–46 and accompanying text.

199. *See supra* Part II; *infra* Section IV.d.ii.

200. *Compare* 2014 Md. Laws 2962, 3002 (applying exclusively to *Wynne* refunds and limiting any prospective judicial ruling that finds a refund to be due by eliminating the taxpayer's entitlement to a portion of the interest due on the refund), *with* United States v. Klein, 80 U.S. (13 Wall.) 128, 134, 142 (1871) (applying exclusively to claims related to the pardon declaration and denying pardoned claimants a vested right to restored property).

Federal Court of Claims cases. Maryland's legislative amendment in response to *Wynne* adjusts the applicable rate specific to refunds stemming from the *Wynne* case.[201] In *Wynne*, like in *Klein*, this adjustment creates an unfair benefit for the government. What is worse is that the benefit comes at the cost of taxpayers, to an extent that is constitutionally impermissible.

As the Court stated in *Klein*, a government, just like an individual, has a "duty . . . to fulfil[l] its obligations."[202] Addressing the context of presidential pardons, the Court emphasized that where "conditions [have] been satisfied, the pardon and its connected promises took full effect."[203] Though a different context, this same trigger applies to Maryland's legislative enactment. Once the "condition is satisfied," which in *Wynne* was the Government's over-taxation, then the "promises [take] full effect." For the Wynnes, that promise was a refund payment with interest at the rate legislatively required – not a new rate conveniently chosen to please the State.

The State's action in 2014 was designed to soften any ruling adverse to the State, that the Supreme Court would make in its 2015 decision, through the caveat that the State would choose the interest rate to charge itself for any payments it owes. The Court made no such condition in its ruling.[204] Effectively, Maryland's response would require any court hearing disputes over *Wynne* refunds to read in a caveat to the *Wynne* ruling that simply does not exist. This is no different than when the Government sought to render the *Padelford* decision moot to the *Klein* Court.[205] Maryland's legislative amendment limits the amount of any prospective refund that any court may find to be due pursuant to *Wynne*. Thus, like in *Klein*, through this enactment the State "den[ied] . . . the effect which this [C]ourt had adjudged" its *Wynne* opinion to have.[206]

Had the State chosen to alter interest rates uniformly, the State likely would have been within its taxing authority (though such an enactment would undoubtedly have faced more resistance in political arenas).[207] Maryland's amendment is not simply a change in the law, which would be more likely to survive the *Klein* standard. Instead

201. *See supra* Section IV.d.

202. *Klein*, 80 U.S. (13 Wall.) at 144.

203. *Id.* at 142.

204. *See generally* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015).

205. *See supra* Section IV.c.i (presenting *Klein's* conclusion that Congress's proactive proviso forced the Court to ignore its precedent of finding presidential pardons to be admissible evidence). This reality would be the same for a Court reviewing a *Wynne* tax refund claim, as the legislature has effectively said that where specific *Wynne* claims are raised, the Court may *only* grant a reduced refund, rather than the full refund found to be warranted by *Wynne*. *See generally Comptroller v. Wynne*, 135 S. Ct. 1787 (offering no qualification for a reduced interest rate on the owed refund).

206. *Klein*, 80 U.S. (13 Wall.) at 145.

207. *Cf.* Sager, *supra* note 8, at 2527 (pointing out the Supreme Court case of *Robertson v. Seattle Audobon Society*, which found a challenged legislative act not to be in conflict with *Klein* because the enactment was *a change* of applicable law, and not simply a directive altering the application of an existing law).

it is a directive on how to apply the *Wynne* refunds specifically.[208] It is clear that the purpose of the legislation was to curtail only the results of the *Wynne* decision in hopes of softening the blow of any ruling adverse to the State.[209] This is no different than the congressional proviso of 1870, where the enactment was drafted "largely in reaction to the *Padelford* decision," as "Congress sought a means by which to defeat such claims."[210] Thus, Maryland's decision to focus the legislation specifically on tax refunds stemming from a prospective judicial ruling went beyond its taxing authority and infringed on the judicial power.

iii. Wynne *Refunds Constitute Compensable Takings If They Don't Include the Originally Enumerated Interest Rate*

Judicial decisions on takings clause challenges, while prolific, have been anything but consistent.[211] Notwithstanding this uncertainty, citizens who are eligible for *Wynne* refunds can make a compelling argument that the denial of owed interest by Maryland's legislation constitutes a compensable taking. Thus, even without finding Maryland's response unconstitutional under *Klein*, courts may still hold the State liable for a compensable taking.

Prior to applying each prong of the *Penn Central* test to *Wynne* refunds, there are two preliminary matters that must be addressed. First, as a point of clarification, it is not a refund itself that would be the subject of a takings claim here, but rather the portion of the owed interest not paid because of the interest rate reduction.[212] Second, the State may argue that the interest paid on a refund does not constitute property and instead is only a prospective benefit. In turn, the State could then argue that it did not take away that benefit, but rather only revoked the privilege to receive it. This line of reasoning is favorable for the State as courts have been less likely to find a taking where the government action merely "adjust[s] the benefits [or burdens of economic life."[213] However, an equally compelling argument is that a *Wynne* claimant need not have physical possession of the owed interest payment for a compensable taking to have occurred.[214] Courts have accepted this argument because

208. *Id.*

209. *Letter from Att'y Gen. to Governor*, *supra* note 6, at 9–10.

210. AMANDA L. TYLER, THE STORY OF KLEIN: THE SCOPE OF CONGRESS'S AUTHORITY TO SHAPE THE JURISDICTION OF THE FEDERAL COURTS 94 (Foundation Press ed., 2d ed. 2009).

211. *See* discussion *supra* Section IV.c.ii.

212. This portion is the difference between the originally enumerated 13% value of the refund, and the retroactively reduced 3.5% value of the refund, *see supra* Section IV.b, that constitutes the State's taking of a property interest that the citizen was entitled to receive. This is particularly important in the context of the third prong of the *Penn Central* test, which considers the economic impact of the action.

213. Peterson, *supra* note 174, at 1357.

214. *Id.* at 1323.

the claimants' right to that payment is already vested and thus, whether the claimant ever physically possessed the property or took action on the right is immaterial.[215]

Under the first prong of the *Penn Central* test, considering the "character of government action," courts are most likely to find a compensable taking to exist when the government physically takes or invades property.[216] In the context of a *Wynne* refund, the Government is arguably withholding a portion of the refund owed to the taxpayer, or put another way, the taxpayer is losing out on a refund they are entitled to. However, even if a court were unwilling to find this "physical taking," that would not preclude a successful takings claim. Because a "physical taking" is only *more likely* to satisfy the "character of government action" prong, this necessarily leaves open the possibility for less direct actions to satisfy this portion of the test.[217]

The Supreme Court has even clarified that a "physical invasion" is most persuasive simply because it constitutes a "property restriction of an unusually serious character" and not because of any exclusive preference for the physical nature itself.[218] Further, where a physical taking has not occurred, courts have shifted their focus to the government justification.[219] A court would be hard-pressed to justify Maryland's retroactive denial of a tax credit to a particular class of citizens, whom the Supreme Court had already deemed to be victims of an unconstitutional tax.[220]

The second prong of the *Penn Central* test, which considers the "extent to which [the action] interfered with a reasonable-investment backed expectation," may be the most difficult prong for a *Wynne* refund claim to satisfy. A determinant for this test is whether the action was foreseeable.[221] The State would likely argue that the change in the law was foreseeable because, (1) legislative adjustments to tax codes are

215. *See id.* (citing Williamson Cty. Reg'l Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)) (tying the "expectation interests" to a vested right, where the destruction of one destroys the other). While this distinction is pertinent to each prong of the *Penn Central* test, it is particularly so in the context of the second prong's "reasonable expectation" consideration.

216. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by [the] government.").

217. *Id.* The Court's use of "readily" rather than language like "is required" or "must," suggests that the Court entertained the possibility of a taking being found, even where this physical element did not exist.

218. Peterson, *supra* note 174, at 1318 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

219. *Id.* at 1319 (quoting Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987); *see id.* (connecting the *Keystone* Court's shift to "asking whether the government's actions were justified," with the Court's emphasis "that the case did not involve a physical invasion").

220. While cost can be a valid reason for government action, that reasoning does not go far enough here to justify the State's failure to apply its action uniformly.

221. Peterson, *supra* note 174, at 1320. Although this prong also requires the reliance to result in an economic detriment, and while the State may argue whether the denial of a tax credit constitutes such a detriment, the nature of this argument at its core best fits under the last prong where courts considers the value lost. *See infra* text accompanying notes 220–23.

historically commonplace, and (2) Maryland had reserved authority to revoke the benefit of the credit. Courts have recognized the history of similar government action,[222] as well as a reserved power to revoke benefits, to be indicia of foreseeability.[223]

The foreseeability argument, however, is dramatically weakened when the change was applied retroactively. Maryland may also be hesitant to argue that it has made similarly retroactive changes on a *regular* basis.[224] A *Wynne* refund claimant could argue that their "reasonable expectation [was] disappointed [by] the government br[eaking] a promise" explicit in the original legislative mandate for a thirteen percent rate.[225]

Finally, the third prong of the *Penn Central* test, which weighs the "economic impact" of the action, may be the easiest for a *Wynne* refund claimant to satisfy. In this portion of the test courts have not looked at the static dollar amount of the value lost, but instead at the proportional value lost.[226] Courts have found this portion of the test to be satisfied where only a diminished value is demonstrated.[227] Thus, recognizing that the interest rate was originally set at thirteen percent and was retroactively reduced to roughly four percent, the value is obviously diminished. While the reduction in the static dollar amount owed may seem insignificant, in effect the state receives a seventy percent discount on the total interest it originally owed to the taxpayer.

Moreover, even under the limited instances where courts have required the government action to deny the *entire* economic value of the property, a *Wynne* refund claim wouldn't be any less likely to succeed. As pointed out initially, it is the difference between the original interest rate and the reduced rate that constitutes the entire economic value taken.[228] Thus, by reducing the interest rate from thirteen percent to four percent a *Wynne* claimant is denied the entire economic value of the nine percent that was originally owed. Where a regulation reduces, but does not entirely eliminate the value of property, the argument that some value remains may

222. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (finding that prior legislative acts had given "more than sufficient notice").

223. Peterson, *supra* note 174, at 1321 (citing Bowen v. Gilliard, 483 U.S. 587 (1987)).

224. This suggested hesitation is based purely on the undesirable imagery that could be expected to result from a State subscribing to this stance on how to treat residents.

225. Peterson, *supra* note 174, at 1321.

226. Hodel v. Irving, 481 U.S. 704, 727 (1987) (Stevens, J., concurring in the judgment) ("The Fifth Amendment draws no distinction between grand larceny and petty larceny."); *see also* Peterson, *supra* note 174, at 1325 (pointing to several cases where a taking was found, notwithstanding "the loss, measured in dollars, [being] quite small").

227. Peterson, *supra* note 174, at 1325.

228. *See supra* note 212 and accompanying text.

be more persuasive.[229] However, as would be the case in a *Wynne* claim, where an entire portion of the interest is denied, an argument that some of that portion's value is still available would be precluded by nature.

V. CONCLUSION

Throughout the *Wynne* opinion the Court stayed true to its focus on the practical effect of interstate commerce violations, as they relate to state tax schemes. In doing so, the Court crystallized a tax protection for the individual – a protection that formerly had only been defined for corporations.[230] The Court's decision may necessitate substantial reform of current state tax policy and may prompt states to make other adjustments to account for the ensuing lost tax revenue.[231] However, by being cognizant of these implications and recognizing existing policies to allow for compliance, the *Wynne* decision is sound.[232]

Other jurisdictions seeking to balance constitutional compliance with protecting their state's own revenue streams should not look to Maryland for a solution. In trying to fix one constitutional defect in its tax code, Maryland only further violated constitutional protections afforded to the taxpayer – all in pursuit of softening its financial blow from the *Wynne* decision. Unfortunately for Maryland this hasty response will likely fail in Court, leaving the State again in need of a remedy to an unconstitutional tax provision.

229. Peterson, *supra* note 174, at 1330–33 (discussing a "no economically viable use" analysis as a part of a separate, *Agins* test, not discussed in this comment). For the purposes of understanding the reasoning behind this test, the two applications are identical. *Id.*

230. Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1792 (2015) (suggesting that because corporate tax receives protection from "double taxation," and because there is no reason for corporations to be treated more favorably than taxpayers, it is only logical for individuals to receive commensurate protections).

231. *See* Turque, *supra* notes 7.

232. *See supra* Section III.c.