TAXES ON REMOTE WORK ARE NOT EVEN REMOTELY WORKING: *ZILKA V. TAX REVIEW BOARD* AND ITS IMPLICATIONS ON STATE AND LOCAL TAXATION*

I. INTRODUCTION

The befuddling interplay of state income taxation schemes has been eloquently characterized by legal scholarship as "a mess."[1] State taxes involve fifty jurisdictions applying distinct rules and differing tax rates.[2] To add more complexity to this tangled web, many states also permit cities, counties, and municipalities to levy separate income taxes.[3] With multiple governmental entities sinking their teeth into the same bundle of earnings, individual taxpayers are often left feeling as though they are paying too much in taxes.[4]

Though the presence of state and local taxation is nothing new, what has become more pervasive since the onset of the COVID-19 pandemic is the situation in which a taxpayer lives in one state but their workplace is in another state.[5] When a taxpayer is employed outside the state of residence, they may owe income tax to multiple states and political subdivisions, in addition to taxes owed to the federal government.[6]

Though the Due Process Clause of the U.S. Constitution does not necessarily forbid multiple taxation of personal income, aspects of the Commerce Clause require many states to combat duplicative taxation by providing credits for the amount of tax paid to other states.[7] This practice essentially allows for apportionment of the taxes

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1. Kathryn L. Moore, *State and Local Taxation of Interstate and Foreign Commerce: The Second Best Solution*, 42 WAYNE L. REV. 1425, 1426 (1996) [hereinafter Moore, *The Second Best Solution*].

2. Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 173 (1997) [hereinafter Moore, *When Will Congress Intervene?*].

3. *See* CHRISTIANA K. MCFARLAND & CHRISTOPHER W. HOENE, NAT'L LEAGUE OF CITIES, CITIES AND STATE FISCAL STRUCTURE, 16 tbl.1A (2015), https://www.nlc.org/wp-content/uploads/2015/01/NLC_CSFS_Report_WEB.pdf [https://perma.cc/Y6RN-KJWB].

4. *See* Fred Backus, *Nearly Half of Americans Feel They Pay Too Much in Taxes, Particularly Conservatives*, CBS NEWS (Apr. 18, 2022, 8:01 AM), https://www.cbsnews.com/news/tax-pay-too-much-opinion-poll-2022-04-18/ [https://perma.cc/FY8K-GF9X].

5. *See* Bryan Robinson, *Remote Work Is Here To Stay and Will Increase into 2023, Experts Say*, FORBES (Feb. 1, 2022, 6:24 AM), https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say [https://perma.cc/2CU5-HS7C].

6. *See, e.g.*, Zilka v. Tax Rev. Bd. (*Zilka II*), Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *1 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision); Comptroller of the Treasury v. Wynne, 575 U.S. 542, 545–47 (2015).

7. JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.10 (3d ed. 2022).

owed between the relevant states and localities, where an individual pays income tax first to the state where they earned the income (State A), and then, if the taxpayer's state of residence (State B) has a higher tax rate, they pay State B only the excess of State B's tax rate over that of State A.[8] Taxes owed to cities, counties, or municipalities in an interstate situation tend to operate similarly.[9]

In *Zilka v. Tax Review Board (Zilka II)*, the Commonwealth Court of Pennsylvania dealt with a complex, but likely commonplace, set of circumstances in which a taxpayer was a resident of Philadelphia but worked in Wilmington.[10] Though the taxpayer in the case—who owed income tax to four different taxing jurisdictions—had a tax bill greater than that of all her Philadelphia neighbors who worked in-state and greater than that of all her Wilmington coworkers who lived in Delaware, the court concluded that the tax scheme violated no constitutional principles.[11]

This Note begins by describing the facts and procedural history of *Zilka II* in Section II. Then, Section III examines the legal history of the dormant Commerce Clause and its intersection with state and local taxation. Section IV details the Commonwealth Court of Pennsylvania's decision and reasoning in the case.

Part V.A provides a critical analysis of the court's opinion, arguing that the court failed to sufficiently engage with the Commerce Clause issues presented in the case and misapplied the relevant Supreme Court precedent. Part V.B then argues that, even if the tax scheme at issue is constitutional, it has a number of defects from a tax policy perspective. Overall, this Note asserts that, despite the Supreme Court's silence on state income taxes and the fact that the ideal solution of uniformity is likely off the table, the *Zilka II* court failed to consider the constitutional and policy issues in the context of remote work.

II. FACTS & PROCEDURAL HISTORY

During the 2013–2016 tax years at issue, Diane Zilka (the "taxpayer") was a resident of Philadelphia, Pennsylvania, but worked in Wilmington, Delaware.[12] As a result, she owed taxes to four jurisdictions: (1) Pennsylvania, (2) Philadelphia, (3) Delaware, and (4) Wilmington.[13]

Pennsylvania permits residents who work out of state, and therefore owe taxes to another state, to claim the amount of tax paid to that other state as a credit to offset the taxpayer's Pennsylvania tax bill.[14] The taxpayer consequently claimed a credit for her Delaware tax (5%) to offset her Pennsylvania tax (3.07%).[15] Since Pennsylvania has a lower tax rate than Delaware, Pennsylvania only allowed the taxpayer to apply this

8. *Id.* at 22.
9. *Id.* at 22–23.
10. *Zilka II*, 2022 WL 67789, at *1.
11. *Id.* at *6–7.
12. *Id.* at *1.
13. *Id.*
14. *Id.*
15. *Id.*

credit to the extent of her Pennsylvania tax of 3.07%, creating 1.93% of taxes paid to Delaware but not permitted as a credit against the taxpayer's Pennsylvania taxes.[16]

In addition to claiming a credit for the amount of Wilmington tax paid (1.25%) to offset her Philadelphia tax (3.92%), the taxpayer attempted to claim a credit against her Philadelphia tax for the 1.93% unused credit that could not be applied at the state level.[17] The Philadelphia Department of Revenue allowed the taxpayer's credit for the 1.25% Wilmington tax to reduce her Philadelphia tax bill, but it prohibited the application of the 1.93% unused credit from her Delaware tax as a credit against her Philadelphia taxes.[18]

The taxpayer appealed the Philadelphia Department of Revenue's denial of the Delaware tax credit to the Tax Review Board of Philadelphia, claiming that she was entitled to this credit from Philadelphia, since she owed 1.93% more in taxes than other Philadelphia residents who work entirely in-state, solely by virtue of her interstate work.[19] She alleged that such a tax scheme resulted in an infringement on interstate commerce, in violation of the Commerce Clause of the U.S. Constitution.[20]

The Tax Review Board denied her appeal, and the Philadelphia County Court of Common Pleas affirmed.[21] On January 7, 2022, the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas, holding that Philadelphia's rejection of the taxpayer's credit did not amount to double taxation and, therefore, was not an unconstitutional hindrance on interstate commerce.[22] In July 2022, the taxpayer appealed the Commonwealth Court's decision to the Supreme Court of Pennsylvania, which held oral argument on March 7, 2023, and as of the writing of this Note, that is where the case is being adjudicated.[23]

III. PRIOR LAW

This Section covers the history of and developments in the law leading up to the decision in *Zilka II*.[24] Part III.A discusses the evolution of the dormant Commerce Clause in the Supreme Court's jurisprudence. Part III.B then outlines the intersection of dormant Commerce Clause principles and the multiple taxation doctrine. Part III.C walks through the development of the modern method for determining the constitutionality of state taxation schemes, as enunciated in the *Complete Auto Transit, Inc. v. Brady* test and expanded upon by subsequent case law. Finally, Part III.D

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Zilka v. Tax Rev. Bd. (*Zilka I*), Nos. 02438, 02439, 1063 CD 2019, 1064 CD 2019, 2019 WL 4396294, at *7 (Pa. Ct. C.P. Aug. 28, 2019).

22. *Zilka II*, 2022 WL 67789, at *6–7.

23. Zilka v. Tax Rev. Bd. (*Zilka III*), Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600, at *1 (Pa. July 5, 2022), 281 A.3d 1029 (unpublished table decision) (granting leave to appeal).

24. *Zilka II*, 2022 WL 67789, at *6.

describes the application of the *Complete Auto* test to a later Supreme Court case, which is of particular significance to the outcome in *Zilka II*.[25]

A. The Court's Regulation of the States' Power to Tax

To understand the interaction of state and local tax regimes, one must first understand where each governmental entity derives its power to tax.[26] Though the federal government needed the Sixteenth Amendment to levy an income tax on individual taxpayers,[27] states have always possessed the power to impose taxes on their citizens by virtue of the states' independent sovereignty.[28] Further, states can extend their power by permitting cities, counties, and municipalities to levy separate income taxes.[29]

For example, the City of Philadelphia derives its power to tax from the Commonwealth of Pennsylvania's Sterling Act.[30] More generally, cities and other political subdivisions are creatures of the state and derive their authority to tax from an explicit delegation by the state.[31]

However, when taxpayer challenges assert violations of the U.S. Constitution's Commerce Clause, courts have had to weigh in on the prerogative of states to determine whether a state or city tax passes constitutional muster.[32] The Commerce

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25. 430 U.S. 274, 279 (1977).

26. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 7, ¶ 20.10, at 1.

27. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

28. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 ("[T]he power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised [by the states] on the objects to which it is applicable, to the utmost extent to which the government may chuse to carry it."); RUSSELL J. DAVIS, MARY ELLEN WEST, ELIZABETH M. BOSEK, SALLY J.T. NECHELES, CARALYN M. ROSS, ERIC C. SURETTE, ELIZABETH WILLIAMS & LISA A. ZAKOLSKI, TEXAS JURISPRUDENCE TAXATION § 8 (3d ed. 2022) ("The power of the state to impose taxes is an inherent governmental power."); Douglas v. City of Jeannette, 130 F.2d 652, 658 (3d Cir. 1942) (stating that "the taxing power" is a "power inherent in sovereignty"). *But cf.* Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 10, 41 (2020) (arguing that the states and the Union "were simultaneously created and mutually constitutive" due to "both layers of government [having been] interrelated in their joint and codependent legal struggles for existence").

29. *See* MCFARLAND & HOENE, *supra* note 3, at 16.

30. *See generally* 53 PA. STAT. AND CONS. STAT. ANN. § 15971 (West 2023) (delegating taxing power to the City of Philadelphia); First Class City Home Rule Act, *id.* §§ 13101–13157 (granting Philadelphia with the authority of local self-government). *See* Philadelphia Home Rule Charter § 1-100 (1951) (outlining Philadelphia's broad "powers and authority of local self-government").

31. *See* Mastrangelo v. Buckley, 250 A.2d 447, 452–53 (Pa. 1969) ("The power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution. Absent a grant or a delegation of the power to tax from the General Assembly, no municipality, including Philadelphia, a city of the first class, has *any* power or authority to levy, assess or collect taxes." (footnote omitted)).

32. *See, e.g.*, J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 321 (1938) (striking down Indiana's gross receipts tax as a Commerce Clause violation); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 453–54 (1939) (striking down Washington's tax on business income conducted in state but shipped out of state as a Commerce Clause violation); Cent. Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663–64 (1948) (striking

Clause grants Congress the power "[t]o regulate Commerce . . . among the several States."[33] However, in contrast to the Constitution's affirmative grant of power to Congress, courts have interpreted the Commerce Clause to include a "negative aspect" that forbids state laws from unduly burdening "the interstate flow of articles of commerce."[34] This doctrine, known as the dormant Commerce Clause, "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[35] The effect is that while the Commerce Clause authorizes Congress to regulate interstate commerce,[36] the dormant Commerce Clause prohibits the states from enacting laws that inhibit interstate commerce.[37] Even outside of the state taxation context, the history and application of the Commerce Clause and dormant Commerce Clause doctrines have not been straightforward.[38] The early roots of the dormant Commerce Clause may trace back to Chief Justice John Marshall's decision in *Gibbons v. Ogden*.[39] There, the Court found "great force" in the argument that inherent in the Constitution's grant to Congress of the power to regulate interstate commerce is the implied exclusion of "the action of all others that would perform the same operation on the same thing."[40]

However, subsequent compositions of the Supreme Court diverged from Chief Justice Marshall's approach.[41] In one instance, the Court even went so far as to say that if Congress can meddle in interstate commercial affairs that are reserved for the states, as prescribed by the Tenth Amendment,[42] "the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."[43]

It was not until the New Deal Court that the pendulum swung back, once again expanding the role of the federal government relative to that of the states, by implementing a more pragmatic, fact-oriented approach to congressional authority.[44]

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down New York's tax on a bus company's out-of-state receipts); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995) (upholding Oklahoma's sales tax on bus tickets between Oklahoma and other states since the tax was on the transaction that occurred in state, not on the out-of-state services).

33. U.S. CONST. art. I, § 8, cl. 3.

34. Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 98 (1994) (internal quotation mark omitted) (citing Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)).

35. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).

36. U.S. CONST. art. I, § 8, cl. 3.

37. *Tenn. Wine*, 139 S. Ct. at 2459.

38. *Id.* ("This interpretation, generally known as 'the dormant Commerce Clause,' has a long and complicated history.").

39. 22 U.S. (9 Wheat.) 1 (1824).

40. *Id.* at 209.

41. *See, e.g.*, Thurlow v. Massachusetts (License Cases), 46 U.S. (5 How.) 504, 578–79 (1847) ("[T]he mere grant of power to the general government cannot . . . be construed to be an absolute prohibition to the exercise of any power over the same subject by the States."), *overruled by* Leisy v. Hardin, 135 U.S. 100 (1890).

42. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

43. Hammer v. Dagenhart, 247 U.S. 251, 276 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

44. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29–30 (1937); *Darby*, 312 U.S. at 124; Wickard v. Filburn, 317 U.S. 111, 118–19, 128–29 (1942).

The Tenth Amendment was declared "but a truism," not an independent check on federal power over the states.[45] From that point forward, the Court began striking down state laws that committed the sin of economic protectionism and thereby unduly infringed on interstate commerce.[46]

B. The Dormant Commerce Clause and the Rise of the Multiple Taxation Doctrine

The Court's exercise of the dormant Commerce Clause in the scope of state taxation has been at least as convoluted as its application outside the taxation context.[47] In 1872, the Supreme Court first invalidated a state tax on freight transported in interstate commerce, on the grounds that it violated the Commerce Clause.[48] This led to a period of confusion among the states and lower courts, as the Supreme Court began categorizing and differentiating between "direct taxes," which impermissibly burdened interstate commerce, and "indirect taxes," which were permissible taxes on local activities.[49] Scholars criticized this approach as perpetuating "a discordance between form and substance," where "[n]ames were made to matter more than mathematics or economics."[50]

Following this perplexing era, in 1938, the Court supplanted this formalistic distinction with the "multiple taxation doctrine," as established in *Western Live Stock v. Bureau of Revenue*.[51] Under this approach, state taxes were deemed constitutionally impermissible if they subjected a taxpayer engaged in interstate commerce to the risk

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45. *Darby*, 312 U.S. at 124.

46. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (striking down a state law that was facially discriminatory against milk pasteurized outside of Madison due to the presence of other nondiscriminatory alternatives); City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (striking down a facially discriminatory law prohibiting import of out-of-state waste absent legitimate local concerns incidental to treating out-of-staters differently than in-staters); W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 198–207 (1994) (striking down a facially neutral law imposing a tax on fluid milk, with the funds used to subsidize Massachusetts dairy farmers, since the purpose and effect of the scheme was protectionist); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459, 2474–76 (2019) (striking down a facially discriminatory state law creating a residency requirement to sell liquor since the law was not narrowly tailored to a legitimate state interest). *But see* Emma Horne, *Eating High on the Humanely Raised Hog: State Bans on Selling Food Produced Using Cruel Animal Farming Methods Do Not Violate the Dormant Commerce Clause*, 107 CORNELL L. REV. 1137, 1151–52 (2022) (noting that the Supreme Court granted certiorari in *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 1413 (Mar. 28, 2022), a challenge invoking the dormant Commerce Clause, which may provide an opportunity for the Supreme Court to reverse course in its dormant Commerce Clause jurisprudence in the animal agribusiness space).

47. *See* Moore, *The Second Best Solution*, *supra* note 1, at 1437.

48. *In re* State Freight Tax, 82 U.S. (15 Wall.) 232, 281–82 (1872) ("Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation."), *abrogated by* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

49. Moore, *The Second Best Solution*, *supra* note 1, at 1438.

50. Thomas Reed Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 502–03 (1947).

51. 303 U.S. 250, 275 (1938); *see also* Bradley W. Joondeph, *The States' Multiple Taxation of Personal Income*, 71 CASE W. RSRV. L. REV. 121, 126 (2020).

of a duplicative tax burden that was not borne by a taxpayer who was not engaged in interstate commerce.[52] The Court held that states could not levy taxes

> of such a nature as to be capable in point of substance, of being imposed, or added to, with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.[53]

The Court reasoned that multiple layers of tax on the same revenue "would spell the destruction of interstate commerce" and defeat the very purpose of the Commerce Clause.[54]

The Court first applied this principle in the 1938 case *J.D. Adams Manufacturing Co. v. Storen*.[55] The Court struck down an Indiana gross receipts tax on sales that constitute interstate commerce, on the grounds that the revenue could potentially be taxed both in the state of sale and in the state of manufacture.[56] The Court explained that "[i]nterstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."[57]

Next, in *Gwin, White & Prince, Inc. v. Henneford*, the Court encountered Washington's state tax on all income from business conducted within the state but shipped to out-of-state customers.[58] There, the Court held that such a tax scheme violated the Commerce Clause.[59] The Court reasoned that the tax discriminated against interstate commerce merely by virtue of being conducted across states.[60] Thus it was burdened with multiple taxation, while not exposing local commerce to the same risk.[61]

Then, in *Central Greyhound Lines, Inc., of New York v. Mealey*, a taxpayer challenged New York's tax on the portion of a bus company's receipts earned from services provided out of state.[62] The Court held that the tax scheme violated the dormant Commerce Clause by imposing an unfair burden on interstate commerce, since the receipts were also subject to taxation by other states.[63]

Through these cases, the Court molded its multiple taxation doctrine to effectuate its view that "the Commerce Clause forbids the *risk*—not just the fact—of multiple taxation" for multistate taxpayers.[64] The amorphous and uncertain nature of the

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52. Joondeph, *supra* note 51, at 126; Moore, *The Second Best Solution*, *supra* note 1, at 1439.
53. *W. Live Stock*, 303 U.S. at 255–56.
54. *Id.* at 256.
55. 304 U.S. 307, 314 (1938).
56. *Id.* at 311.
57. *Id.* (citing *W. Live Stock*, 303 U.S. at 255–56).
58. 305 U.S. 434, 436–37 (1939).
59. *Id.* at 439–40.
60. *Id.*
61. *Id.* at 439.
62. 334 U.S. 653, 654, 660 (1948).
63. *Id.* at 662.
64. WALTER HELLERSTEIN, STATE TAXATION ¶ 4.09[1][a] (3d ed. 2022) (emphasis added).

multiple taxation doctrine set the stage for the Court's later development of a more concrete, multifactor standard to promulgate its approach.[65]

C. The Court Develops the Modern Test for Determining the Constitutionality of State Taxes

Following the line of cases invoking the multiple taxation doctrine, the Court adopted a new standard, known as the *Complete Auto* test, to determine whether a state tax violates the dormant Commerce Clause.[66]

1. The *Complete Auto* Four-Prong Test

In *Complete Auto Transit, Inc. v. Brady*, a Mississippi motor carrier, which transported motor vehicles manufactured out of state to dealers within the state, sued for a refund of the sales tax charged by Mississippi.[67] The claim centered on whether a Mississippi sales tax on the privilege of conducting business in the state violated the Commerce Clause when applied to an interstate activity.[68]

In *Complete Auto*, the Court synthesized a number of its prior decisions to forge a path away from formalism and redirected toward pragmatism.[69] The Court also rejected some of its prior holdings, proclaiming that "a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce."[70] However, the *Complete Auto* Court's lasting impact was its articulation of a four-prong test to determine when a tax scheme should be sustained against a Commerce Clause challenge: (1) "the tax is applied to an activity with a substantial nexus with the taxing State," (2) the tax "is fairly apportioned," (3) the tax "does not discriminate against interstate commerce," and (4) the tax "is fairly related to the services provided by the State."[71]

On its face, the *Complete Auto* test was designed to address the dormant Commerce Clause's primary purpose of prohibiting discrimination against interstate

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65. *See* Taylor Payne, *Not Completely Useless:* Complete Auto Transit *and State Taxation*, 34 W. MICH. U. T.M. COOLEY L. REV. 261, 262–63 (2018).

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

67. *Id.* at 276–77.

68. *Id.* at 277.

69. *Id.* at 279 (finding that the Court's jurisprudence "considered not the formal language of the tax statute but rather its practical effect"); Payne, *supra* note 65, at 279.

70. *Complete Auto*, 430 U.S. at 288–89 (overruling its prior decision in Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 603 (1951), in its holding that a privilege of doing business tax is not a Commerce Clause violation merely because it applies to an activity in interstate commerce).

71. *Id.* at 279. The Supreme Court expanded the four-prong *Complete Auto* test into six prongs when evaluating challenges to taxing statutes affecting foreign commerce. *See* Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 451 (1979). The two additional prongs for foreign contexts are: (1) "whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation"; and (2) "whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Id.* (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

commerce.[72] Within the state taxation context, this burden most commonly appears in taxes that (1) are the product of economic protectionism or (2) cause duplicative taxation.[73] The *Complete Auto* test's third prong—nondiscrimination against interstate commerce—safeguards against economic protectionism, while its second prong—fair apportionment—protects against duplicative taxation.[74]

However, the *Complete Auto* Court—like the prior cases it sought to synthesize—did not provide much clarity regarding the application of the four factors.[75] Nonetheless, though *Complete Auto* lacked specificity, it served as a "catalyst for further tax litigation," providing subsequent courts with a springboard to refine each of the prongs and to shape the future of state taxation law.[76]

a. Substantial Nexus

The first prong of the *Complete Auto* test requires a substantial nexus between the levied tax and the taxing state.[77] In its initial application of the substantial nexus prong to subsequent cases, the Court broadly stated that there is a "fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'"[78] Over time, the nexus requirement for the Due Process Clause and Commerce Clause became "one and the same for purposes of assessing the validity of state taxes."[79]

In 1992, the Court announced a major shift, in *Quill Corp. v. North Dakota*, bifurcating the substantial nexus requirement between Due Process Clause and Commerce Clause analyses.[80] The Court stated that, within the Commerce Clause context, the nexus requirement is informed by "structural concerns about the effects of state regulation on the national economy."[81] Whereas the Due Process Clause possesses a "minimum contacts" requirement as a way to ensure notice, the Commerce Clause's substantial nexus requirement acts as "a means for limiting state burdens on interstate commerce."[82]

The Court also refused to reject the bright-line rule of a physical presence requirement that a prior tax case, *National Bellas Hess, Inc. v. Department of Revenue*

72. Michael Fader, Comment, *May States Double Tax Their Residents' Incomes? The Dormant Commerce Clause in* Maryland State Comptroller of the Treasury v. Wynne, 68 TAX LAW. 367, 371 (2015).

73. *Id.*

74. *Id.*

75. Payne, *supra* note 65, at 281.

76. *Id.*

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

78. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954)); Payne, *supra* note 65, at 282.

79. Payne, *supra* note 65, at 283 (quoting Pamela M. Krill, Note, Quill Corp. v. North Dakota*: Tax Nexus Under the Due Process and Commerce Clauses No Longer the Same*, 1993 WIS. L. REV. 1405, 1406).

80. 504 U.S. 298, 305–06 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

81. *Id.* at 312.

82. *Id.* at 313.

of Illinois, had articulated.[83] *Quill* imposed a more stringent requirement—now a state tax would have to fulfill the distinct nexus requirements of both the Due Process Clause and the Commerce Clause.[84]

However, after *Quill*, lower courts failed to consistently interpret the physical presence requirement for substantial nexus.[85] Some Justices on the Court had been critical of the decision in *Quill* for its failure "to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy."[86] As a result, the Court later overruled the physical presence requirement of *Quill* and *Bellas Hess*, particularly in light of the interconnectivity and virtual contacts afforded by modern e-commerce.[87]

b. Fair Apportionment

The second prong of the *Complete Auto* test requires that the tax be fairly apportioned.[88] The primary purpose for this analytical step is "to ensure that each State taxes only its fair share of an interstate transaction."[89] The fair apportionment prong draws its roots from the multiple taxation doctrine, since fair apportionment seeks to mitigate the possibility that one state will "exceed[] its fair share" of tax and then another state will tax that same share.[90]

In *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, the Court enunciated two subrequirements for the fair apportionment prong: (1) "internal consistency" and (2) "external consistency."[91] Under the internal consistency test, the Court must examine whether "the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear."[92] The goal is to verify that interstate commerce is not being disadvantaged relative to intrastate commerce.[93] Through this test, the Court can "isolate the effect of a defendant State's tax scheme."[94]

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83. 386 U.S. 753 (1967), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018); *Quill*, 504 U.S. at 317.

84. *Quill*, 504 U.S. at 313 ("[A] corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause.").

85. *See* Payne, *supra* note 65, at 285–86.

86. Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 16–17 (2015) (Kennedy, J., concurring).

87. *Wayfair*, 138 S. Ct. at 2095 ("Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. . . . A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.").

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

89. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995).

90. *Id.* at 184–85; *see also* W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 255–56 (1938).

91. 514 U.S. 175, 185 (1995).

92. *Id.*

93. *See id.*

94. Comptroller of the Treasury v. Wynne, 575 U.S. 542, 562 (2015).

By contrast, the external consistency test "looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[95] In other words, courts must "examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity."[96]

c. Nondiscrimination Against Interstate Commerce

The third prong of the *Complete Auto* test prohibits a state's tax from discriminating against interstate commerce.[97] This prong essentially collapses a Commerce Clause analysis into the *Complete Auto* framework.[98] A tax cannot "provid[e] a direct commercial advantage to local businesses."[99] Within the domestic context, states are barred from discriminating against "commercial activity occurring outside the taxing State" for the benefit of local business and interests.[100]

In *American Trucking Associations, Inc. v. Scheiner*, Pennsylvania imposed a flat tax on trucks for the privilege of using its highways.[101] Though in-state trucks traveled many more miles on Pennsylvania roads than out-of-state trucks, out-of-state trucks incurred a cost per mile nearly five times greater than that borne by local trucks.[102] The Court held that based on its "practical effect[s]," the tax was facially discriminatory.[103] "[A] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause."[104]

In *Jefferson Lines*, where Oklahoma imposed a sales tax on the full price of bus tickets for travel between Oklahoma and other states, the Court distinguished the tax from the one imposed in *Scheiner*,[105] highlighting the fact that Oklahoma facilitated the "purchases of the services equally for intrastate and interstate travelers" and that all purchasers incurred the same tax rate on these purchases.[106] The Court held that the tax did not discriminate against interstate commerce, because it imposed the same duty on purchases of equivalent value "regardless of whether the purchase prompts interstate or only intrastate movement."[107]

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95. *Jefferson Lines*, 514 U.S. at 185.

96. Goldberg v. Sweet, 488 U.S. 252, 262 (1989), *abrogated on other grounds by Wynne*, 575 U.S. 542.

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

98. Payne, *supra* note 65, at 288–89.

99. *Jefferson Lines*, 514 U.S. at 197 (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959), *superseded by statute*, 15 U.S.C. § 381).

100. *Id.*; Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329, 335 (1977).

101. 483 U.S. 266, 269–71 (1987).

102. *Id.* at 276.

103. *Id.* at 285–86.

104. *Id.* at 286.

105. Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 198 (1995) (citing *Scheiner*, 483 U.S. at 286).

106. *Id.*

107. *Id.* at 199.

d. Fairly Related to the Services Provided by the State

The final prong of the *Complete Auto* test requires a tax to be "fairly related to the services provided by the State."[108] In 1981, in *Commonwealth Edison Co. v. Montana*, the Court alluded to the overlap between this prong and the first prong of the *Complete Auto* test, which requires a substantial nexus between the levied tax and the state imposing the tax.[109] However, the Court then proclaimed that beyond this "threshold requirement," the fourth prong "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'"[110]

The dissent in *Edison* contended that the majority's interpretation rendered the fourth prong impotent, only requiring a state to levy a "proportional rather than a flat tax rate."[111] In 1989, in *Goldberg v. Sweet*, the Court reinforced the *Edison* majority precedent, declaring that the purpose of the fourth prong is "to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State."[112] This factor "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue."[113]

Since *Edison* and *Goldberg*, no Supreme Court case has addressed a challenge to the fourth prong of the *Complete Auto* test,[114] and most federal appellate courts have largely collapsed the analysis of the first and fourth prongs, wherein nexus is the dispositive element.[115] The *Edison* dissent's warning regarding the "emasculat[ion]" of the fourth *Complete Auto* prong has perhaps come to fruition, since the "blending of . . . [the two] prongs renders challenges to both prongs indistinguishable where one cannot be attacked without the other."[116]

D. Application of the Complete Auto *Test in* Comptroller of the Treasury v. Wynne

In 2015, the Court, for the first time, explicitly held that the dormant Commerce Clause applies to a state's tax on *personal* income.[117] In *Comptroller of the Treasury v. Wynne*, taxpayers challenged Maryland's personal income tax, which consisted of both a state and a county income tax.[118] Residents could take a credit against the state tax for the amount of income tax paid to another jurisdiction for income earned there, but they

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

109. 453 U.S. 609, 625–26 (1981).

110. *Id.* at 626 (quoting W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)).

111. *Id.* at 645 (Blackmun, J., dissenting).

112. 488 U.S. 252, 266–67 (1989) (citing *Commonwealth Edison*, 453 U.S. at 627), *abrogated on other grounds by* Comptroller of the Treasury v. Wynne, 575 U.S. 542, 555 (2015).

113. *Id.* at 267 (citing *Commonwealth Edison*, 453 U.S. at 627).

114. *See* Payne, *supra* note 65, at 291.

115. *See, e.g.*, Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1535–36 (3d Cir. 1993); CSX Transp., Inc. v. Ala. Dep't of Revenue, 888 F.3d 1163, 1183 (11th Cir. 2018).

116. *Commonwealth Edison*, 453 U.S. at 645 (Blackmun, J., dissenting); Payne, *supra* note 65, at 291.

117. *The Supreme Court, 2014 Term—Leading Cases*, 129 HARV. L. REV. 181, 181 (2015).

118. 575 U.S. 542, 545–46 (2015).

could not take a corresponding credit against the county tax.[119] Notably, both the state and county taxes were collected by the same entity—Maryland's Comptroller of the Treasury (i.e., the State).[120]

After articulating the history of the dormant Commerce Clause and the persistence of the multiple taxation doctrine,[121] the *Wynne* Court held that there should not be a distinction between taxes on gross receipts—like those taxes evaluated in *J.D. Adams*, *Gwin*, and *Central Greyhound*—and taxes on net income.[122] The Court also dismissed the petitioner's argument that dormant Commerce Clause principles should apply differently in cases involving corporations as compared to those involving individuals.[123] Further, the Court abrogated a portion of the dictum in *Goldberg* that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes," thus preserving a cause of action for in-state taxpayers.[124]

Additionally, in *Wynne*, the Court clarified the taxing power of a state with regard to the Due Process Clause as compared to the Commerce Clause.[125] The Due Process Clause, the Court explained, permits a state to tax "*all* the income of its residents, even income earned outside the taxing jurisdiction."[126] On the other hand, "while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."[127]

The *Wynne* opinion also elaborated on the *Complete Auto* test, as expanded on in *Jefferson Lines*, particularly in the fair apportionment prong.[128] Specifically, the Court explained the structural analysis process of the internal consistency test, when used to determine whether a tax's identical application in every state would hinder interstate commerce relative to that conducted intrastate.[129] The Court reasoned that the internal consistency test permits courts to "isolate the effect" of an individual state's tax by allowing courts to

> distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce

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119. *Id.* at 546.

120. *Id.*

121. *Id.* at 548–51.

122. *Id.* at 551–52; *see also* J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 308 (1938); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 435 (1939); Cent. Greyhound Lines, Inc., of N.Y. v. Mealey, 334 U.S. 653, 654 (1948).

123. *Wynne*, 575 U.S. at 553–54.

124. *Id.* at 555; Goldberg v. Sweet, 488 U.S. 252, 266 (1989), *abrogated on other grounds by Wynne*, 575 U.S. at 555 ("State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products they are unconstitutional." (quoting W. Lynne Creamery, Inc. v. Healy, 512 U.S. 186, 203 (1994))).

125. *Wynne*, 575 U.S. at 556.

126. *Id.* (quoting Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995)).

127. *Id.* (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992), *overruled by* South Dakota v. Wayfair, 138 S. Ct. 2080 (2018)).

128. *See id.* at 561–63.

129. *Id.* at 561–62.

> (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.[130]

The Court noted that the first category is largely an unconstitutional infringement on the dormant Commerce Clause, while the second likely passes constitutional muster.[131] Those cross-border tax schemes that fail the internal consistency test belong exclusively to the first category, since any interstate "tax disadvantage that remains after application of the [test] cannot be due to tax disparities but is instead attributable to the taxing State's discriminatory policies alone."[132]

The *Wynne* Court held that Maryland's tax scheme failed the internal consistency test, since the disparate treatment of interstate commerce was "not simply the result of its interaction with the taxing schemes of other States" but rather was "inherently discriminatory and operate[d] as a tariff."[133] Critically, the Court announced that, in applying the internal consistency test, Maryland's income tax scheme must be analyzed "*as a whole*."[134] Though Maryland labeled each tax distinctively—county tax and state tax—the Court noted that "[f]or Commerce Clause purposes, it is immaterial that Maryland assigns different labels . . . to these taxes" since they "must be considered as one."[135]

A state's labeling of its own taxes is not dispositive since granting weight to the labels would authorize the state to tax at discriminatory rates while hiding behind such designations.[136] Particularly in *Wynne*, where both the state and county taxes were collected by the same entity, the Court found that labels cannot be determinative, and that the scheme must be viewed in its entirety.[137] The Court concluded that Maryland could cure its system by permitting a credit, against both the state and county taxes, for taxes paid to other states and localities.[138]

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130. *Id.* at 562.

131. *Id.*

132. *Id.* at 563 (alteration in original) (internal quotation mark omitted) (footnote omitted) (quoting Ruth Mason, *Made in America for European Tax: The Internal Consistency Test*, 49 B.C. L. REV. 1277, 1310 (2008)).

133. *Id.* at 564–65. See HELLERSTEIN & HELLERSTEIN, *supra* note 7, for further explanation of why Maryland's tax scheme in *Wynne* failed the internal consistency test:

> If every state imposed a regime like Maryland's, a taxpayer who confined her activity to one state would pay a single tax on her income to the state where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across lines to earn her income would pay a double tax on such income, one to her state of residence and another to the state in which she earned the income.

Id. at 7.

134. *Wynne*, 575 U.S. at 564 n.8 (emphasis added).

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.* at 568.

IV. COURT'S ANALYSIS

In 2022, in *Zilka v. Tax Review Board*, the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas, holding that Philadelphia's tax scheme does not violate the Commerce Clause.[139] Part IV.A traces the *Zilka II* court's depiction of the double taxation doctrine and its impact on the dormant Commerce Clause. Part IV.B outlines the court's application of the *Complete Auto* test to the facts of *Zilka*, specifically focusing on the fair apportionment and nondiscrimination prongs. Part IV.C then summarizes the court's contrast of the facts in *Zilka* to those in *Wynne*. Lastly, Part IV.D describes the *Zilka II* court's conclusion that Philadelphia's tax regime did not violate the dormant Commerce Clause.

A. Double Taxation Under the Commerce Clause

Judge Wojcik began the discussion by outlining the implications of the Commerce Clause and dormant Commerce Clause when applied to a state's tax scheme.[140] The court highlighted that a state is forbidden from taxing an activity more heavily when it is interstate rather than intrastate, nor can a state discriminate against interstate commerce by benefiting local business at the expense of cross-state business.[141] The court stated that, "[i]n short, the Commerce Clause forbids double taxation."[142]

The court then attempted to apply the double taxation principle, concluding that the taxpayer was not subjected to duplicative taxation.[143] Judge Wojcik reasoned that Philadelphia's tax did not tax income crossing state lines more heavily than income generated entirely within Pennsylvania, since all residents, including the taxpayer, were paying the same 3.92% rate.[144] The court then advanced that while this taxpayer was paying 1.93% more in taxes than those who only worked intrastate, her increased tax burden resulted "because [she] chose to work in Delaware, *which charges a higher income tax than Pennsylvania*."[145] Philadelphia permitted Zilka to take a credit for taxes paid to Wilmington, and Pennsylvania did the same for taxes she had paid to the State of Delaware.[146] But the court determined that Philadelphia's refusal to apply the remaining unused credit of incremental Delaware tax that exceeded the Pennsylvania tax did not constitute double taxation in violation of the Commerce Clause.[147]

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139. *Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, *6–7 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

140. *Id.* at *2.

141. *Id.* (citing Comptroller of the Treasury v. Wynne, 575 U.S. 542, 549–50 (2015)).

142. *Id.* (citing *Wynne*, 575 U.S. at 550–51).

143. *Id.* at *3.

144. *Id.*

145. *Id.*

146. *Id.* at *6.

147. *Id.*

B. Application of the Complete Auto Test

The *Zilka II* court applied the *Complete Auto* test to determine whether Philadelphia's tax scheme infringed on the restrictions of the dormant Commerce Clause.[148] The court only focused on the second and third prongs—fair apportionment and discrimination—since the parties did not dispute the first and fourth prongs.[149]

1. Fair Apportionment Prong

In its analysis of the *Complete Auto* test second prong—fair apportionment[150]—the *Zilka II* court explained that it "ensures that each State taxes only its fair share of an interstate transaction."[151] To apply this fair apportionment requirement, the court sought to determine whether Philadelphia's tax was both internally and externally consistent.[152]

a. Internal Consistency Test

When applying the internal consistency test, the court "look[ed] to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."[153] Judge Wojcik established that the dormant Commerce Clause is not violated when different jurisdictions apply distinct tax formulas and rates, as long as "the alleged taxation disparities are 'the consequence of the combined effect' of two otherwise lawful income tax schemes."[154] Though employing uniformity in each jurisdiction's tax laws would certainly be sufficient to ensure the Commerce Clause's policy of having fairly apportioned and nondiscriminatory tax schemes, such a solution is not necessary.[155]

The *Zilka II* court concluded its internal consistency evaluation by finding that if every jurisdiction imposed a tax identical to that of Philadelphia, it would create the result that taxpayers living in Philadelphia but earning their income outside of Pennsylvania would be able to claim a credit for taxes paid to another jurisdiction and thus would pay the same amount as Philadelphians working entirely within the state.[156] The court held that Philadelphia's tax scheme was internally consistent, because Zilka's incremental tax owed was the natural consequence of her working in another state with a higher tax rate.[157] This determination rested on the court's view that the United States

148. *Id.* at *3–4.

149. *See id.* at *3; *Zilka I*, Nos. 02438, 02439, 1063 CD 2019, 1064 CD 2019, 2019 WL 4396294 (Pa. Ct. C.P. Aug. 28, 2019) ("Appellant appears to only be arguing that the Philadelphia wage tax system violates the 2nd and 3rd prong of the above referenced test.").

150. *Zilka II*, 2022 WL 67789, at *3–4.

151. *Id.* at *3 (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995)).

152. *Id.* (citing *Jefferson Lines*, 514 U.S. at 185).

153. *Id.* (quoting Comptroller of the Treasury v. Wynne, 575 U.S. 542, 562 (2015)).

154. *Id.* (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277 n.12 (1978)).

155. *Id.* (citing *Moorman Mfg.*, 437 U.S. at 279).

156. *Id.* at *4.

157. *Id.* at *3–4.

Supreme Court has often deemed a tax internally consistent when the taxing jurisdiction permits a credit to offset the amount a taxpayer has already paid to another jurisdiction.[158]

b. External Consistency Test

The court also applied the external consistency test, which looks at "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."[159]

The court determined that, since Philadelphia provided a credit for the tax Zilka had paid to Wilmington, the City was "not taxing all of Taxpayer's income regardless of source."[160] The court also found that Philadelphia's tax on the taxpayer's out-of-state income was justified by the administration of benefits and services to its residents.[161] The court held that Philadelphia's tax passed the external consistency test.[162]

2. Nondiscrimination Prong

The *Zilka II* court also examined the third prong of the *Complete Auto* test—that a state cannot levy a tax that discriminates against interstate commerce and favors intrastate activity.[163] Applying this standard, the court determined that Philadelphia's tax scheme did not discriminate against taxpayers with out-of-state income.[164] Judge Wojcik reasoned that the City taxed all residents at the rate of 3.92%, while permitting them to credit "any similar taxes paid to other jurisdictions."[165] In light of Zilka's ability to credit the full 1.25% paid to Wilmington against her Philadelphia tax liability, Judge Wojcik reasoned that the tax scheme merely apportioned Zilka's 3.92% tax rate between the two jurisdictions—2.67% paid to Philadelphia and 1.25% paid to Wilmington.[166] Therefore, it did not subject her income to double taxation.[167] The court did not mention Zilka's argument that her unused state-level tax credit should be allowed as a credit against her Philadelphia tax.[168]

158. *Id.* at *3.

159. *Id.* at *4 (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995)).

160. *Id.*

161. *Id.* (citing Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932)).

162. *Id.*

163. *Id.* (first citing Comptroller of the Treasury v. Wynne, 575 U.S. 542, 549–50 (2015); and then citing *Jefferson Lines*, 514 U.S. at 197).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *See id.*

C. *Comparison to* Wynne

Finally, the *Zilka II* court compared and contrasted the facts at issue with those of *Wynne*.[169] The court emphasized that both the state and county taxes in *Wynne* were collected by the same governing authority and that Maryland's county tax did not permit an offsetting credit for similar taxes paid to other jurisdictions.[170] The *Zilka II* court then underscored that the *Wynne* Court had explicitly stated that Maryland could have cured its discriminatory tax scheme by offering a credit against its county tax.[171]

The *Zilka II* court asserted that both Philadelphia's income tax, which provided a credit for taxes paid to Wilmington, and Pennsylvania's income tax, which provided a credit for taxes paid to Delaware, were in accordance with the remedy the Supreme Court had recommended in *Wynne*.[172] Judge Wojcik dismissed Zilka's assertion that the Court's holding in *Wynne* required Philadelphia to allow an additional credit for the unused excess credit from her Delaware tax that could not be fully credited against her Pennsylvania tax.

Judge Wojcik distinguished *Zilka II* from *Wynne* by asserting that, as a state tax, the Delaware tax was "dissimilar" to the Philadelphia tax, a city tax.[173] By contrast, in *Wynne*, Maryland's "'county' tax was actually a state tax because it was administered, adopted, mandated, and collected by the state."[174] The court determined that Philadelphia and Pennsylvania must apply an "apples to apples approach," only offsetting state taxes with other state taxes and local taxes with other local taxes.[175]

The court also held that, although this taxpayer paid more in taxes than her intrastate counterparts, "such is not the result of an unconstitutional tax scheme" and was instead the "result of the interaction of two different but nondiscriminatory and internally consistent schemes."[176] The court once again characterized Zilka's situation of living in one state but working in another state as her "cho[ice]."[177]

D. *Conclusion of* Zilka II

The *Zilka II* court concluded that the taxpayer was not subject to double taxation on her interstate income, as it found no support for the taxpayer's argument that "local and state taxes must be aggregated for Commerce Clause purposes."[178] Importantly, the court paid no regard to *Wynne*'s holding that courts must evaluate a state's tax scheme *as a whole* without necessarily giving credence to the state's own labeling of such

169. *Id.* at *5 (citing Comptroller of the Treasury v. Wynne, 575 U.S. 542, 545–47 (2015)).

170. *Id.* (citing *Wynne*, 575 U.S. at 546, 564–65).

171. *Id.* at *6 (citing *Wynne*, 575 U.S. at 568).

172. *Id.* (citing *Wynne*, 575 U.S. at 568).

173. *Id.*

174. *Id.*

175. *Id.* (internal quotation mark omitted) (quoting *Zilka I*, Nos. 02438, 02439, 1063 CD 2019, 1064 CD 2019, 2019 WL 4396294 (Pa. Ct. C.P. Aug. 28, 2019)).

176. *Id.* (quoting *Wynne*, 575 U.S. at 562).

177. *Id.*

178. *Id.*

taxes.[179] The *Zilka II* court held that Philadelphia's tax scheme did not violate the dormant Commerce Clause, affirming the trial court's disposition.[180]

V. PERSONAL ANALYSIS

The Commonwealth Court of Pennsylvania's decision in *Zilka II* missed the mark when addressing the Commerce Clause issues in the challenged state and local tax scheme.[181] The court misapplied the relevant Supreme Court precedent, failing to evaluate the state's tax system as a whole.[182] Additionally, the challenged tax regime includes several defects from a tax policy standpoint, making its perpetuation unsustainable, especially in light of the rise in remote work.[183]

This Section proceeds in four Parts. Part V.A criticizes the court's failure to accurately assess the constitutional problems present in the challenged tax scheme. Part V.B then asserts that although the *Zilka* tax system was deemed constitutional, it has fundamental tax policy flaws and cannot stand. Part V.C explores the Supreme Court's passiveness in helping taxpayers and the states clear up the prevailing uncertainty in interstate taxation. Finally, Part V.D focuses on the possible solutions available to address these state and local taxation issues.

A. The Zilka II *Court Did Not Correctly Address the Relevant Constitutional Issues*

In *Zilka II*, the Commonwealth Court of Pennsylvania failed to accurately apply dormant Commerce Clause principles, disregarding the fact that states grant authority to their political subdivisions.[184] The court also ignored the Supreme Court's decision in *Wynne*, by failing to evaluate Pennsylvania's tax scheme as a whole.[185]

1. Political Subdivisions Derive Their Power to Tax from the States

The *Zilka II* court improperly characterized the City of Philadelphia as an independent taxing authority.[186] The political subdivisions of a state (i.e., cities, counties, and municipalities) are "creatures of the state."[187] A locality's authority to act, specifically to tax, is derived from the state's explicit grant of such authority.[188]

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179. *See id.*; *Wynne*, 575 U.S. at 564 n.8.

180. *Zilka II*, 2022 WL 67789, at *6–7.

181. *See id.* at *5–6.

182. *See Wynne*, 575 U.S. at 564 n.8.

183. See *infra* Part V.B for a discussion of the system's tax policy flaws, namely lack of proportionality, promotion of uncertainty, and causing deadweight loss.

184. *See Zilka II*, 2022 WL 67789, at *5–6; *see also* HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 25.

185. *See Zilka II*, 2022 WL 67789, at *5–6; *see also Wynne*, 575 U.S. at 564 n.8.

186. *See Zilka II*, 2022 WL 67789, at *5–6 ("Philadelphia and Pennsylvania are two distinct taxing jurisdictions administering two distinct taxes to two different sets of citizenry.").

187. HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 16 (citing Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907)); *see also* McMillian v. Monroe Cnty., 520 U.S. 781, 790 (1997); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009).

188. *See, e.g.*, Mastrangelo v. Buckley, 250 A.2d 447, 452–53 (Pa. 1969) ("Absent a grant or a delegation of the power to tax from the General Assembly, no municipality, including Philadelphia, a city of

Specifically, the General Assembly of the Commonwealth of Pennsylvania granted the City of Philadelphia its broad self-governing authority, including the power to tax, by way of the First Class City Home Rule Act.[189] Absent this assignment of power, Philadelphia would not possess any taxing privilege.[190] In light of this dynamic between states and their political subdivisions, "the fact that the state tax power is exercised by a political subdivision of the state rather than by the state itself is of no constitutional moment."[191]

Based on these considerations, the *Zilka II* court's effort to distinguish the facts of *Wynne*—dealing with a state tax disguised as a county tax—from Philadelphia's city tax was immaterial.[192] Since the levying of local taxes was authorized by the Commonwealth of Pennsylvania, it must fundamentally be considered a state tax for Commerce Clause purposes.[193] As the Supreme Court dictated in *Wynne*,[194] when the *Zilka II* court examined the interaction of the Pennsylvania-Philadelphia tax scheme with the combined Delaware-Wilmington tax regime, it should have analyzed the entire Pennsylvania tax scheme as one whole, encompassing both the state-level tax and Philadelphia's city-level tax.[195]

Had the *Zilka II* court used this aggregate analysis approach, collapsing city taxes into the broader tax scheme of the state, it likely would have concluded differently.[196] Philadelphia's refusal to allow a credit against its city tax for the excess Delaware tax paid was not simply the application of an "apples to apples approach," maintaining city taxes and state taxes in their own separate lanes, but was rather a dormant Commerce Clause violation.[197] The taxpayer who engaged in out-of-state economic activity was subject to a higher tax rate than those only earned income within the state.[198]

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the first class, has any power or authority to levy, assess or collect taxes." (emphasis omitted)); HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 16 ("Because political subdivisions of a state are creatures of the state, their exercises of tax power are treated as the exercise of state tax power and adjudicated according to the standards restraining the exercise of state tax power." (footnote omitted)); *Ysursa*, 555 U.S. at 362 ("'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.' They are instead 'subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.'" (citation omitted) (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)).

189. 53 PA. STAT. AND CONS. STAT. ANN. §§ 13101–13157 (West 2023); *see also id.* § 15971; PHILADELPHIA HOME RULE CHARTER § 1-100 (1951).

190. § 13133(a)(8) ("[N]o city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly . . . [including] [l]imiting rates and fixing subjects of taxation . . . .").

191. HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 16.

192. See *infra* Part V.A.2 for further discussion regarding the immateriality of the differences between *Wynne*'s county tax and *Zilka*'s city tax.

193. *See* Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

194. *See id.*

195. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33.

196. *See Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision); HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33.

197. *See Zilka II*, 2022 WL 67789, at *5–6; HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33.

198. *See Zilka II*, 2022 WL 67789, at *5–6; HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33.

2. The Zilka II *Court Failed to Follow the Dormant Commerce Clause Principles Set Forth in* Wynne

When examining state taxation schemes through the lens of the dormant Commerce Clause in *Zilka II*, the Commonwealth Court of Pennsylvania disregarded key principles that the Supreme Court articulated in *Wynne*.[199] The Court in *Wynne* declared that when applying the internal consistency test, a court must evaluate a state's tax scheme "*as a whole*," aggregating all levels of tax across the relevant political subdivisions within the state.[200] The Court likely reasoned that because localities are creatures of the state and derive their power to tax solely by grant of such authority by the state, the taxes of such localities must be compiled at the state level.[201]

The *Wynne* Court also underscored that for dormant Commerce Clause purposes, a state's own labeling of different taxes (i.e., county tax, city tax, state tax) is immaterial to the analysis.[202] If the labels assigned by the state were dispositive, then the state could essentially tax any source of income at discriminatory rates simply by renaming the tax.[203] The *Wynne* Court's approach to dormant Commerce Clause analyses requires that all the taxes within the state and authorized by the state "must be considered as one."[204]

The City of Philadelphia and the Commonwealth Court noted apparent differences between the county tax in *Wynne* and the Philadelphia wage tax at issue in *Zilka II*.[205] Maryland's county tax was deemed a state tax, in *Wynne*, because it was collected by the State of Maryland's Comptroller,[206] whereas Philadelphia's tax is collected by the City of Philadelphia, not the Commonwealth of Pennsylvania.[207] Additionally, Maryland's county tax was enacted by Maryland's state legislature,[208] in contrast to Philadelphia's tax, which was enacted by a Philadelphia City Council ordinance.[209]

However, these differences are immaterial and wholly insufficient to prevent the application of *Wynne*'s legal reasoning to *Zilka*.[210] Though Maryland's county tax was collected by the State Comptroller, in *Wynne*, the Comptroller of Maryland

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199. *See Zilka II*, 2022 WL 67789, at *5–6; *Wynne*, 575 U.S. at 564 n.8.

200. *Wynne*, 575 U.S. at 564 n.8 (emphasis added) ("In order to apply the internal consistency test in this case, we must evaluate the Maryland income tax scheme as a whole.").

201. See *supra* Part V.A.1 for a discussion of the origin of political subdivisions' self-governing authority.

202. *Wynne*, 575 U.S. at 564 n.8.

203. *Id.*

204. *Id.*

205. Brief for Appellee at 19–21, *Zilka III*, Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600 (Pa. July 5, 2022), 281 A.3d 1029 (unpublished table decision); *Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

206. Brief for Appellee, *supra* note 205, at 21; *Wynne*, 575 U.S. at 546.

207. Brief for Appellee, *supra* note 205, at 21.

208. *See id.* at 20.

209. *See id.* at 13.

210. *See* Reply Brief for Appellant at 11–12, *Zilka III*, Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600 (Pa. July 5, 2022), 281 A.3d 1029 (unpublished table decision).

maintained[211] that the county tax was a *local* income tax which the state collected "*as a convenience for local governments*."[212] The accommodative nature of Maryland's county tax was central to the Court's conclusion that the labels assigned to taxes by a state and its political subdivisions are not determinative.[213]

Further, the fact that Maryland's tax was enacted by the state legislature while Philadelphia's was enacted by city ordinance cannot be dispositive.[214] Such a distinction is merely one of form, not substance.[215] If a tax's form were conclusive, then states could "circumvent the U.S. Constitution by merely changing how a tax is enacted, regardless of the fact that the taxes are imposed upon the same income, within the same state."[216] The differences between the taxes in *Wynne* and *Zilka II* are insignificant and should not be considered in the case's Commerce Clause analysis.[217]

The Commonwealth Court failed to examine Pennsylvania's tax scheme as a whole and failed to set aside the labels Pennsylvania had assigned to the taxes at issue.[218] The Commonwealth Court should have combined the Philadelphia city tax with the Pennsylvania state tax, in order to analyze the effect of the tax regime as required by the internal consistency test.[219] By doing so, the *Zilka II* court would have concluded that the overall Pennsylvania tax scheme inherently discriminates against interstate commerce, since identical application by every state would necessarily place interstate commerce at a disadvantage to intrastate commerce.[220]

Appellant's brief to the Supreme Court of Pennsylvania illustrates the lack of fair apportionment in the challenged tax scheme, thus undermining the Commonwealth Court's assertion that because all residents pay the same 3.92% tax rate, Philadelphia does not tax interstate income more heavily than intrastate income.[221] In 2014, one of the years at issue in *Zilka II*, a taxpayer working exclusively in Philadelphia would have incurred a 6.99% total tax rate.[222] By contrast, the taxpayer in *Zilka* was subject to

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211. *Maryland Income Tax Rates and Brackets*, COMPTROLLER OF MD., https://www.marylandtaxes.gov/individual/income/tax-info/tax-rates.php [https://perma.cc/K5ER-B9VK] (last visited Oct. 23, 2023) ("Maryland's 23 counties and Baltimore City levy a local income tax which we collect on the state income tax return as a convenience for local governments.").

212. Reply Brief for Appellant, *supra* note 210, at 12.

213. *See* Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

214. Reply Brief for Appellant, *supra* note 210, at 11.

215. *See id.*

216. *Id.*

217. *See id.* at 8–12.

218. *See Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

219. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995); Comptroller of the Treasury v. Wynne, 575 U.S. 542, 562 (2015).

220. *See Zilka II*, 2022 WL 67789, at *5–6; HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33 ("[I]f one views the Pennsylvania tax regime 'as a whole' at the state level taxpayers engaged in cross-border economic activity would often pay higher taxes than taxpayers that confined their activity to a single state in violation of the Commerce Clause.").

221. Brief for Appellant at 29 fig.2, *Zilka III*, Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600 (Pa. July 5, 2022), 281 A.3d 1029 (unpublished table decision); *Zilka II*, 2022 WL 67789, at *3.

222. Brief for Appellant, *supra* note 221, at 29 fig.2.

a total tax rate of 8.92%, since she was left with a 1.93% unused excess credit for taxes paid to Delaware but not allowed as a credit against her Philadelphia taxes.[223] Had the court correctly mandated that Philadelphia permit a credit for the remaining unused credit of incremental Delaware tax that exceeded her Pennsylvania tax, the taxpayer would have been taxed at 6.99%, like her counterparts working entirely in-state, thereby eliminating the discriminatory treatment of interstate commerce.[224]

As a whole, the challenged tax scheme in *Zilka* violates the dormant Commerce Clause.[225] The City of Philadelphia is a creature of the Commonwealth of Pennsylvania,[226] and its tax regime cannot withstand constitutional scrutiny in the face of the *Wynne* Supreme Court precedent requiring an examination of Pennsylvania's tax scheme as a whole and without regard for the state's assigned tax labels.[227]

B. The Challenged Tax Scheme in Zilka *Conflicts with Several Tenets of Sound Tax Policy*

Even if the challenged Pennsylvania-Philadelphia tax scheme were deemed constitutional, the scheme is still fundamentally flawed, as it violates several core principles of good tax policy.[228] In *The Wealth of Nations*, economist Adam Smith set forth four maxims of taxation: (1) proportionality, (2) certainty, (3) convenience of payment, and (4) minimization of deadweight loss.[229] For years, governments and economists have used these principles to guide tax policy decisions.[230] However, the tax scheme in *Zilka* fails at least three of these tenets and, therefore, is unsound from a tax policy perspective.[231]

1. The Lack of Proportionality in the *Zilka* Tax Scheme Promotes Inequity

Smith's first maxim of taxation is proportionality—the amount of tax owed by taxpayers should be proportionate to their relative ability to pay such taxes.[232] To achieve this aspirational level of fairness and ensure that similarly situated taxpayers

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223. *Id.*

224. *Id.*

225. *See Zilka II*, 2022 WL 67789, at *5–6; *see also* HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33.

226. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 21.

227. *See* HELLERSTEIN & HELLERSTEIN, *supra* note 7, at 33; Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

228. *See Zilka II*, 2022 WL 67789, at *5–6; *see also* Paul Mueller, *Adam Smith on Public Policy: Four Maxims of Taxation*, CATO INST. (Jan. 4, 2016), https://www.libertarianism.org/columns/adam-smith-public-policy-four-maxims-taxation [https://perma.cc/74LY-KU2U]; ASS'N OF INT'L CERTIFIED PRO. ACCTS., GUIDING PRINCIPLES OF GOOD TAX POLICY: A FRAMEWORK FOR EVALUATING TAX PROPOSALS, 3 (2017) [hereinafter AICPA, GOOD TAX POLICY], https://us.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/tax-policy-concept-statement-no-1-global.pdf [https://perma.cc/58HZ-LT7X].

229. Mueller, *supra* note 228.

230. AICPA, GOOD TAX POLICY, *supra* note 228, at 3.

231. *See Zilka II*, 2022 WL 67789, at *6.

232. Mueller, *supra* note 228 ("The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.").

are taxed similarly, a tax system must achieve two types of equity: horizontal equity and vertical equity.[233] Under horizontal equity, two taxpayers with an equivalent ability to pay ought to pay the same amount in taxes.[234] By contrast, for vertical equity, when two taxpayers have a different ability to pay, the one with the greater ability to pay should pay more.[235]

The principle of proportionality breaks down in the challenged tax scheme in *Zilka*.[236] There, a taxpayer who lives in Philadelphia and works in Wilmington incurs a tax rate of 8.92%.[237] Meanwhile, her Philadelphia counterparts who work entirely within city limits, who have the exact same level of income and utilize the same city resources and benefits, are subject to a 6.99% tax rate.[238] Such a tax regime destroys horizontal equity, since the taxpayer working outside the state pays disproportionately more in taxes than those who work inside the state, though both sets of taxpayers have an equal ability to pay.[239] Had the City of Philadelphia permitted a credit for the remaining unused credit of incremental Delaware tax that exceeded the taxpayer's Pennsylvania tax, her tax rate would have decreased to 6.99%, matching the tax rate of her counterparts working inside the state and restoring horizontal equity.[240]

2. The Tax Scheme in *Zilka* Provides Little Certainty in Tax Administration

Smith's next maxim for effective tax policy is certainty—a tax system should have clarity in the amount, timing, and method of tax payments.[241] Taxpayers should not only have reasonable certainty with regard to calculating the exact taxes they owe, but also certainty as who is owed these amounts.[242] Certainty is vital to a robust tax system, as it enhances taxpayer compliance and instills confidence in and respect for the system.[243] Such certainty is generally attained through clear statutes, regulations, and administrative guidelines, supplemented by coherent and consistent case law interpreting them.[244]

The challenged tax scheme in *Zilka* lacks certainty, and it is ambiguous regarding the political subdivision that is owed and in what amount.[245] The *Zilka II* court's disregard of one of the key Supreme Court assertions in *Wynne*, that a state's tax

233. AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

234. *Id.*

235. *Id.*

236. *Zilka II*, 2022 WL 67789, at *6.

237. *See id.* at *1; Brief for Appellant, *supra* note 221, at 28 fig.1.

238. *Zilka II*, 2022 WL 67789, at *1; Brief for Appellant, *supra* note 221, at 28 fig.1.

239. *See* AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

240. *See* Brief for Appellant, *supra* note 221, at 29 fig.2.

241. Mueller, *supra* note 228 ("[The] tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person."); AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

242. *See* AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

243. *Id.*

244. *Id.*

245. *Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

system must be analyzed as a whole, is a clear example of the inconsistent application of dormant Commerce Clause principles in interstate taxation regimes.[246] The taxpayer in *Zilka*, as well as those in similar out-of-state employment situations, had anything but certainty as to the amount of income tax she owed to each state and city, since in certain instances courts have paid no regard to a state's own labels of its taxes while in others such labels were determinative.[247]

This inconsistency has been exacerbated by the Supreme Court's failure to weigh in on cross-state tax issues, especially in light of the rise of remote work opportunities following the onset of the COVID-19 pandemic.[248] Until more clarity is provided, whether by the Supreme Court or Congress, many taxpayers across the country will continue to stumble through this uncertainty, as more and more people are working remotely for out-of-state employers and are facing interstate tax issues similar to those encountered by the taxpayer in *Zilka*.[249]

3. The *Zilka* Tax Scheme Disrupts Economic Efficiency by Causing Deadweight Loss

Smith's final maxim is limiting deadweight loss, which involves minimizing costs to taxpayers and the government that exceed those stemming from the direct payment and collection of taxes.[250] These deadweight losses may include the administrative costs of hiring tax collectors, the disincentives taxes create for production and industry, the incentives taxes have on tax evasion and black market activity, and the costs of hiring tax accountants and attorneys to assist with compliance.[251] As tax system complexity increases, government administration and taxpayer compliance generate greater deadweight losses, and this occurs to the detriment of economic efficiency.[252]

The tax regime in *Zilka* does not minimize deadweight loss, but rather, it causes taxpayers and the government to bear more costs.[253] As a result of the uncertainty and complexity surrounding the system, taxpayers must incur the costs of employing tax

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246. *See id.* at *6; Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

247. *See Zilka II*, 2022 WL 67789, at *5–6.

248. See *infra* Part V.C for a discussion of the Supreme Court's recent inaction in the field of interstate taxation, most notably in *New Hampshire v. Massachusetts*, despite many states submitting briefs requesting that the Court take up the issue. *See* Richard C. Auxier, *Supreme Court Punts on State Tax Question About Remote Work*, TAX POL'Y CTR.: TAX VOX (June 28, 2021), https://www.taxpolicycenter.org/taxvox/supreme-court-punts-state-tax-question-about-remote-work [https://perma.cc/6VWV-QUTJ]; New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (denying motion for leave to file a bill of complaint).

249. *See Pennsylvania Rules on Philly Wage Tax Credit Case*, GRANT THORNTON (Mar. 10, 2022), https://www.grantthornton.com/insights/alerts/tax/2022/salt/p-t/pa-rules-on-philly-wage-tax-credit-case-03-10 [https://perma.cc/A8HS-7UWC].

250. Mueller, *supra* note 228 ("Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the publick treasury of the state." (quoting 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS pt. II, ¶ 4 (1776))).

251. *Id.*

252. *See* AICPA, GOOD TAX POLICY, *supra* note 228, at 8.

253. *See Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

accountants and lawyers to ensure conformity with the tax rules of multiple jurisdictions.[254] This lack of definiteness also creates significant litigation costs for both taxpayers and the government, when challenges—like the one in *Zilka II*—naturally arise.[255]

Moreover, with the prospect of workers having to pay higher taxes on the same amount of income as their neighbors solely because they work remotely or have to commute a bit further to their office, workers may be discouraged from accepting jobs in cities outside of their state.[256] This is especially problematic in the new age of remote work positions and work-from-home accommodations, as additional taxes on out-of-state income could disrupt the flow of employment market activity and, thus, may diminish economic productivity.[257]

4. Upon Close Inspection, the Policy Arguments Supporting the City of Philadelphia's Position Are Unpersuasive

In *Zilka*, the City of Philadelphia raised an interesting question when it asked why the City should be the party responsible for absorbing the sought credit.[258] The City's perspective was that it should not be essentially "subsidiz[ing] Delaware's decision to impose a higher tax rate on Taxpayer than the Commonwealth of Pennsylvania."[259] There is certainly an issue of harmonization between the taxes levied by the State of Delaware and the Commonwealth of Pennsylvania.[260] Philadelphia's position was that the 1.93% unused credit was generated at the state level, so the City ought not to bear the burden—one it likely could not afford[261]—of accommodating a credit that resulted from the political choices made by the two states.[262]

However, following an inspection of the actual numbers, the prospect of providing the credit is not as drastic as it may initially seem.[263] Though Philadelphia contests having to take the hit for a lack of harmonization at the state level,[264] the reality is that the City is the most logical taxing jurisdiction to accommodate the credit and restore horizontal equity.[265] It makes little sense for the Commonwealth of Pennsylvania to provide the additional credit, since its 3.07% tax rate is completely wiped out by the credit it provides for taxes paid to Delaware; any incremental credit

254. *See* AICPA, GOOD TAX POLICY, *supra* note 228, at 8.

255. *See id.*; *see also Zilka II*, 2022 WL 67789, at *5–6.

256. *See Pennsylvania Rules on Philly Wage Tax Credit Case*, *supra* note 249.

257. *See id.*

258. *See* Brief for Appellee, *supra* note 205, at 17.

259. *Id.*

260. *See id.*

261. *See* Michael Butler, *Reminder: Philly Is Still the Poorest Big City in America*, TECHNICALLY MEDIA INC. (Oct. 14, 2020, 11:29 AM), https://technical.ly/civic-news/poorest-big-city-america-workforce-development/ [https://perma.cc/7J84-UNPS].

262. *See* Brief for Appellee, *supra* note 205, 205 at 17.

263. *See* Brief for Appellant, *supra* note 221, at 29 fig.2.

264. Brief for Appellee, *supra* note 205, at 17.

265. *See* Brief for Appellant, *supra* note 221, at 29 fig.2.

offered by Pennsylvania would put the Commonwealth at a negative effective tax rate with respect to taxpayers earning out-of-state income—an illogical result.[266]

By contrast, after providing a credit for taxes paid to Wilmington, the City of Philadelphia still imposes a remaining 2.67% rate of tax on the *Zilka* taxpayer.[267] As a result, even if the entire unused 1.93% credit were applied to the Philadelphia tax, the City would still be generating tax revenue from the *Zilka* taxpayer, for income earned outside the jurisdiction—realizing a net tax rate of 0.74%.[268] This scenario would equalize the effective tax rate incurred by the *Zilka* taxpayer with the rate on those working entirely intrastate, while still putting the City of Philadelphia in the black.[269]

Of course, for this tax scheme to be fair across taxing jurisdictions, in the inverse scenario—where a taxpayer resides in Wilmington but works in Philadelphia—the State of Delaware would have to be on the hook for the excess of Philadelphia's tax rate over that of Wilmington.[270] In that case, the taxpayer would be left with a 2.67% unused credit at the local level, after Wilmington credits the tax paid to Philadelphia of 3.92%, up to the Wilmington tax rate of 1.25%.[271] Delaware (tax rate of 5%) would provide a 3.07% credit for taxes paid to Pennsylvania, leaving a remaining 1.93% tax that would otherwise be due to the State of Delaware.[272]

By collapsing all local taxes with those at the state level, as asserted by *Wynne*,[273] Delaware would then be required to provide the taxpayer with an incremental credit reflecting the unused credit at the city level, but only up to Delaware's remaining tax rate of 1.93%.[274] This example would result in the taxpayer paying no income tax to either Delaware or Wilmington, though still with an unused credit of 0.742%.[275] Though this hypothetical Wilmington-residing taxpayer would owe 0.742% more in taxes than her neighbors who work exclusively within Wilmington, such would merely be the "result of the interaction of two different but nondiscriminatory and internally consistent schemes."[276] Thus, it would survive dormant Commerce Clause scrutiny.[277] This taxing dynamic would need to hold true in any interstate employment arrangement,[278] regardless of the size of the locality in which the taxpayer resides or works.[279]

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266. *See id.*

267. *See id.*

268. *See id.*

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

274. *See* Brief for Appellant, *supra* note 221, at 29 fig.2.

275. *See id.*

276. *See id.*

277. *See Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision) (quoting *Wynne*, 575 U.S. at 562).

278. In its amicus brief, the Pennsylvania Department of Revenue posited a situation in which a taxpayer lives in Sayre Borough, Pennsylvania but works in Binghamton, New York. Amicus Brief for Pa. Dep't of Revenue at 19, *Zilka III*, Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600 (Pa. July 5, 2022), 281

C. The Supreme Court Has Neglected to Opine on the Issue of Interstate Taxation, by Declining to Hear New Hampshire v. Massachusetts

In 2020, the State of New Hampshire filed a lawsuit against the Commonwealth of Massachusetts in the United States Supreme Court.[280] The complaint challenged Massachusetts's decision to continue collecting income taxes from residents of New Hampshire who worked for Massachusetts companies but were working from home in New Hampshire, due to the COVID-19 pandemic shutdown.[281]

Many people hoped that the Supreme Court would hear the case of *New Hampshire v. Massachusetts*, wanting the Court to halt the practice, by some states, of collecting taxes from remote workers who were employed by in-state companies but who performed the work outside of the state.[282] Fourteen states submitted briefs supporting New Hampshire's position, whereas no briefs were submitted on behalf of Massachusetts, which suggests that other states are grappling with similar issues.[283]

A.3d 1029 (unpublished table decision). Since Binghamton does not impose a local tax, under current law the taxpayer's local borough and school district would net a combined 1.5% rate of tax. *Id.* at 19–20. But, under an aggregated system, if Sayre Borough must provide a credit for unused state level credits, the locality would no longer receive any tax revenue from this taxpayer, since New York's state tax rate exceeds that of Pennsylvania by more than the total amount of the locality's rate of tax. *Id.* at 20. This result may seem extreme when impacting a significantly smaller political subdivision, especially should Sayre Borough be confronted with a multitude of residents who work out of state in localities with lower—or no—rates of tax. *See id.* at 19–20. However, if Sayre Borough feels as though it is not collecting enough tax revenue, its legislature can raise the locality's tax rate. *See id.* Though, in that case, Sayre residents who work within the borough would essentially be subsidizing those who work outside their home state. *See id.*

279. This result—a small political subdivision not receiving tax revenue from its residents due to credits provided for taxes paid to other jurisdictions—is relatively commonplace. *See Taxpayer Annual Local Earned Income Tax Return (F-1) FAQ*, BERKHEIMER TAX INNOVATIONS, https://www.hab-inc.com/local-earned-income-tax-return-faq/ [https://perma.cc/A9P7-H4X6] (last visited Oct. 23, 2023) ("If employed in Philadelphia [and residing in Allentown], you may use the Philadelphia Wage Tax as a credit against your liability to your resident jurisdiction, but the credit may not exceed your resident jurisdiction tax rate."). For instance, a taxpayer residing in Allentown, Pennsylvania owes the City and school district a combined 1.975% in income taxes. *Municipal Statistics*, PA. DEP'T OF CMTY. & ECON. DEV., https://munstats.pa.gov/Reports/ReportInformation2.aspx?report=EitWithCollector_Dyn_Excel&type=O [https://perma.cc/YRY4-8HMQ] (last visited Oct. 23, 2023) (The 1.975% can be obtained from the Total Resident Income Tax column). However, instead of commuting to work out of state, consider the consequences of that taxpayer working in Philadelphia. *See* Brief for Appellant, *supra* note 221, at 29 fig.2. In this circumstance, the taxpayer must pay Philadelphia's tax of 3.92%, and then Allentown credits her Philadelphia taxes, up to Allentown's charged rate of 1.975%. *See* BERKHEIMER TAX INNOVATIONS, *supra* note 279. The taxpayer's locality of residence would earn no tax revenue from this taxpayer based on its credit provided for income earned in the state but out of the taxing jurisdiction. *See id.* Since this tax scheme does not invoke interstate commerce, the dormant Commerce Clause would not be triggered, so the Commonwealth of Pennsylvania would not be on the hook for providing this taxpayer with her remaining unused credit derived at the local level. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

280. Press Release, New Hampshire Governor Chris Sununu, State of New Hampshire v. Commonwealth of Massachusetts (Oct. 19, 2020), https://www.governor.nh.gov/news-and-media/state-new-hampshire-v-commonwealth-massachusetts [https://perma.cc/7DFH-RXZ8].

281. Auxier, *supra* note 248; Press Release, *supra* note 278 (referring to Massachusetts's tax as an "unconstitutional tax grab").

282. 141 S. Ct. 2848, 2848 (2021); Auxier, *supra* note 248.

283. *Id.*

However, others, including the Biden administration, contended that the Supreme Court should not hear this case because the "pandemic-specific circumstances," which they presumed to be temporary, made the case "a poor vehicle in which to address the broader issues of interstate taxation."[284]

Ultimately, the Supreme Court did not grant a review of *New Hampshire v. Massachusetts*.[285] Though the Court did not explicitly articulate a reason for its denial, the Court and the Biden administration mischaracterized the brevity of the remote work situation.[286] Though several companies have been instituting return-to-work policies,[287] according to a 2023 WFH Research report, 12.7% of full-time employees continue to work from home and 28.2% work in a hybrid model.[288] This dynamic cuts against the *Zilka II* court's assertion that taxpayers necessarily have the *choice* to work in a different jurisdiction than that in which they reside—in many circumstances, the companies, not the employees, are the ones dictating where work is performed.[289] With states and companies struggling to navigate the uncertainty of interstate taxation, the onus is on the Supreme Court to take action and provide guidance.[290]

D. Does a Practical Solution for the Duplicative Interstate Taxation Issue Even Exist?

With each state imposing different standards for determining taxpayer income apportionment, which causes uncertainty and cripples interstate commerce, the natural question that arises is whether a pragmatic solution exists.[291] The obvious resolution is to mandate uniformity between state and local tax jurisdictions.[292] Otherwise, "[the]

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284. *Id.* (quoting Brief for the United States as Amicus Curiae at 21, 22, *Zilka III*, Nos. 31 EAL 2022, 32 EAL 2022, 2022 WL 2439600 (Pa. July 5, 2022), 281 A.3d 1029 (unpublished table decision)).

285. 141 S. Ct. at 2848; Auxier, *supra* note 248.

286. *See* Auxier, *supra* note 248; Eric House, *Supreme Court Considering Taking Up Remote Work Taxation Case*, WORLDWIDE ERC (Apr. 27, 2023), https://www.worldwideerc.org/news/public-policy/supreme-court-considering-taking-up-remote-work-taxation-case [https://perma.cc/U5TA-C3BD].

287. Lorie Konish, *Amid a Return-to-Office Push, It's Still Possible for Workers To Get Flexible Schedules. 'Think About It like a Salary Negotiation,' Expert Says*, CNBC (Aug. 25, 2023, 3:20 PM), https://www.cnbc.com/2023/08/25/how-to-get-a-flexible-work-schedule-amid-a-return-to-office-push.html [https://perma.cc/49VW-869J] (mentioning that Meta and Goldman Sachs are pushing mandatory return-to-office policies).

288. Kathy Haan, *Remote Work Statistics and Trends in 2023*, FORBES (June 12, 2023, 5:29 AM), https://www.forbes.com/advisor/business/remote-work-statistics [https://perma.cc/DG6R-3CSJ]; *see also* Brody Ford & Bloomberg, *Return to the Office? No Way, Say Some Tech Companies that Are Letting Workers Stay Remote Despite Rival Firms Imposing Mandates*, FORTUNE (Aug. 16, 2023, 2:09 PM), https://fortune.com/2023/08/16/atlassian-airbnb-remote-work-return-to-office/ [https://perma.cc/7TZD-PUGD] (discussing certain corporate backers of remote work, including Atlassian, Airbnb, and Dropbox).

289. *Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision) ("Taxpayer chose to work in a jurisdiction with a higher tax rate. Philadelphia is not responsible for the fact that Delaware charges 1.93% more than Pennsylvania.").

290. *See* Auxier, *supra* note 248.

291. *See* Moore, *When Will Congress Intervene?*, *supra* note 2, at 179–80; Brian L. Hazen, *Rethinking the Dormant Commerce Clause: The Supreme Court as Catalyst for Spurring Legislative Gridlock in State Income Tax Reform*, 2013 BYU L. REV. 1021, 1022–24.

292. Moore, *When Will Congress Intervene?*, *supra* note 2, at 179–80.

multitude of tax systems amounts to a drag on interstate trade almost as debilitating as the border restrictions our federal system was originally designed to prevent."[293]

Uniformity in state and local taxation would conform to the bounds of the dormant Commerce Clause.[294] With a tax scheme encompassing identical standards across taxing jurisdictions, the internal consistency test would become a nonissue, because the test for internal consistency is whether identical application of the challenged tax scheme across all taxing jurisdictions would infringe on interstate commerce.[295] Additionally, the issue in *Zilka* would never again occur, since each political subdivision would have a uniform rule for determining the out-of-state taxes that could be credited against a taxpayer's in-state tax bill, thereby eliminating the risk of multiple taxation.[296]

A uniform set of taxing rules would also follow the tenets of sound tax policy.[297] Proportionality and horizontal equity would be restored, since each taxpayer of the same ability to pay would owe the same amount of tax.[298] Moreover, individuals and states would have enhanced certainty under a uniform regime with regard to which jurisdiction is entitled to tax and in what amount.[299] Furthermore, deadweight loss would be diminished, because government administration and taxpayer compliance costs—including attorney fees, litigation costs, and collection costs—would be substantially reduced by the clarity and simplicity of a uniform tax system.[300]

Though uniformity in state and local taxation would be optimal, it may also be unattainable.[301] Congress is an unlikely candidate to enact legislation requiring uniformity, absent an agreement among states about how to structure such a system.[302] But, a multistate agreement and congressional action are improbable in light of the current congressional stalemate and the fact that "states and taxpayers usually take positions in hearings on state and local tax legislation that are driven in large part by narrow self-interest and rarely reflect the greater good."[303]

As a result of the congressional stalemate, the responsibility for instituting uniformity must rest with the Supreme Court.[304] However, the Court has repeatedly

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293. *Id.* at 179 (alteration in original) (quoting Gordon D. Henderson, *What We Can Do About What's Wrong with the Tax Law*, 49 TAX NOTES 1349, 1352 (1990)).

294. *See id.* at 179–81.

295. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995).

296. *See Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision); Moore, *When Will Congress Intervene?*, *supra* note 2, at 179–81.

297. *See* Mueller, *supra* note 228.

298. *See id.*; AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

299. *See* Mueller, *supra* note 228; AICPA, GOOD TAX POLICY, *supra* note 228, at 7.

300. *See* Mueller, *supra* note 228; AICPA, GOOD TAX POLICY, *supra* note 228, at 8.

301. *See* Moore, *When Will Congress Intervene?*, *supra* note 2, at 205; Moore, *The Second Best Solution*, *supra* note 1, at 1429–36.

302. Moore, *When Will Congress Intervene?*, *supra* note 2, at 205.

303. Hazen, *supra* note 291, at 1040; Moore, *When Will Congress Intervene?*, *supra* note 2, at 205.

304. Hazen, *supra* note 291, at 1023–24.

declined to impose its will in the field of interstate taxation,[305] instead deferring to Congress "out of ostensible respect for the separation of powers doctrine."[306] This circuitous loop of congressional stagnation and Supreme Court deference to Congress renders the idealistic vision for state and local taxation uniformity impractical and out of reach for the time being.[307]

With uniformity likely off the table, Professor Kathryn Moore, a prominent tax scholar at the University of Kentucky Rosenberg College of Law, has suggested an alternative idea, dubbed the "second best solution."[308] This approach modifies Justice Scalia's proposed two-prong test for challenges to state taxes under the dormant Commerce Clause, where "the Court should only strike down a state taxing statute if: (1) the statute facially discriminates against interstate commerce; or (2) the statute is indistinguishable from a statute the Court has previously stricken."[309] While Moore acknowledges the possible shortcomings in this solution's architecture, this approach has the potential to prevent state taxing statutes from causing "the most egregious drags on our national economy" and would also promote confidence and clarity in the tax system.[310]

Even so, this "second best solution" injects further uncertainty into an already uncertain system.[311] As Moore points out, reasonable minds can differ as to whether a taxing statute is facially discriminatory.[312] Perhaps the most practical solution is the one already before us: abiding by the Supreme Court's precedent in *Wynne*.[313] Though a far cry from the idealistic fantasy of uniformity, by having courts analyze a state's tax scheme as a whole, including taxes levied by its political subdivisions and without regard to the state's own labeling of such taxes, the fair apportionment and discrimination issues that plagued the *Zilka II* tax regime would suddenly disappear.[314]

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305. *See* Auxier, *supra* note 248.

306. Hazen, *supra* note 291, at 1023–24.

307. *See id.*; Moore, *The Second Best Solution*, *supra* note 1, at 1467–68 (attributing the Supreme Court's reluctance and improbability to weigh in on interstate commerce issues in state and local taxation due to a lack of institutional competence).

308. Moore, *The Second Best Solution*, *supra* note 1, at 1428.

309. *Id.* The author goes on to explain:

> In applying the first prong, the Court should only look beyond the face of the statute at issue to determine whether a facially discriminatory statute should be saved as a compensating tax. The court should narrowly define compensating taxes as functionally equivalent taxes. In applying the second prong, the Court should first ask whether the Court has ever stricken a functionally equivalent tax. If it has not, then it should uphold the statute. In determining whether the Court has stricken a functionally equivalent tax, the Court should take into account parties' expectations. When applying the prong, the Court should make every effort to announce clear and certain rules that further stability.

Id. at 1504.

310. *Id.* at 1428.

311. *See id.* at 1492–93.

312. *See id.*

313. *See* Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015).

314. *See id.*; *Zilka II*, Nos. 1063 C.D. 2019, 1064 C.D. 2019, 2022 WL 67789, at *5–6 (Pa. Commw. Ct. Jan. 7, 2022), 272 A.3d 991 (unpublished table decision).

Because remote work exposes more taxpayers to the problems evident in *Zilka II*, stricter obedience to *Wynne* by the courts may offer the only solution that can be implemented swiftly enough to avoid further litigation and incremental deadweight losses.[315]

VI. CONCLUSION

State and local taxation is anything but straightforward, especially in the interstate context.[316] Considering the long, windy legal history of the dormant Commerce Clause and its intersection with state taxation,[317] and particularly in light of the Supreme Court's silence on the matter,[318] it is no wonder that both taxpayers and courts are filled with uncertainty.[319]

Even so, the *Zilka II* court missed the mark.[320] The court failed to adequately address the case's constitutional issues, misapplying both the *Complete Auto* framework and the Supreme Court's precedent in *Wynne*.[321] And even if it is constitutional, the challenged tax scheme promotes unsound tax policy,[322] particularly with the rise of remote work in the aftermath of the COVID-19 pandemic.[323]

Potential solutions are few and far between.[324] Though uniformity would theoretically clear up many of the issues plaguing state and local taxation, in reality, it may just be a pipe dream.[325] Other proposed solutions may be even more complicated than the actual problem itself.[326] Until the Supreme Court or Congress intervenes, consistent application of the limited Supreme Court precedent by lower courts is likely the best we can hope for.[327]

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315. *See Wynne*, 575 U.S. at 564 n.8; *Zilka II*, 2022 WL 67789, at *5–6; *see also* Mueller, *supra* note 228; AICPA, GOOD TAX POLICY, *supra* note 228, at 3.

316. *See* Moore, *The Second Best Solution*, *supra* note 1, at 1426.

317. See *supra* Part III.A–B for a discussion of the evolution of the dormant Commerce Clause, both generally and related to state taxation.

318. See *supra* Part V.C for an analysis of the Supreme Court's decision to deny review of *New Hampshire v. Massachusetts*.

319. *See* Auxier, *supra* note 248.

320. *See Zilka II*, 2022 WL 67789, at *5–6.

321. See *supra* Part V.A for a discussion of the court's failure to sufficiently address the constitutional problems presented in the case.

322. See *supra* Part V.B for an analysis of the *Zilka II* tax scheme's policy defects.

323. *See* Robinson, *supra* note 5.

324. See *supra* Part V.D for a walkthrough of the potential solutions to resolving the foundational issues in state and local taxation.

325. *See* Moore, *When Will Congress Intervene?*, *supra* note 2, at 205; Moore, *The Second Best Solution*, *supra* note 1, at 1429–37.

326. *See* Moore, *The Second Best Solution*, *supra* note 1, at 1428–29.

327. *See* Comptroller of the Treasury v. Wynne, 575 U.S. 542, 564 n.8 (2015); Hazen, *supra* note 291, at 1023–24; Moore, *The Second Best Solution*, *supra* note 1, at 1467–68.