

## DEBATE

### THE FUTURE OF THE DORMANT COMMERCE CLAUSE: ABOLISHING THE PROHIBITION ON DISCRIMINATORY TAXATION

Professor Edward A. Zelinsky, of the Cardozo School of Law, argues that “[i]t is time to abolish the dormant Commerce Clause prohibition on discriminatory taxation.” This is so, he writes, because “the prohibition is today doctrinally incoherent and politically unnecessary.” The incoherence, Zelinsky maintains, stems from the disparate treatment by the United States Supreme Court of economically identical activities: “discriminatory taxation favoring local industries,” which the doctrine prohibits, and “direct expenditures subsidizing those same industries,” which it permits. It is unnecessary, Zelinsky argues, because Congress is able, and better suited, to police any state abuses. In short, “[l]ike a once-great champion who refuses to leave the ring, the dormant Commerce Clause prohibition on discriminatory taxation stumbles along well past its prime.” Professor Brannon P. Denning, of the Cumberland School of Law, finds in Zelinsky’s proposal a slippery slope. As Denning argues, taking Zelinsky’s argument on its own terms, “there is no reason to restrict his proposal to tax cases.” And yet, writes Denning, “if the antidiscrimination principle is to be jettisoned in nontax cases as well, then we might as well do away with the [dormant Commerce Clause doctrine (DCCD)] altogether, since the antidiscrimination principle is the DCCD’s most robust branch.” Pretty quickly, writes Denning, it appears that “Professor Zelinsky is really proposing nothing less than the abandonment of the DCCD *in toto*.”

## OPENING STATEMENT

*The Time Has Come to Abolish the Dormant Commerce Clause Prohibition on Discriminatory Taxation*Edward A. Zelinsky<sup>†</sup>

It is time to abolish the dormant Commerce Clause prohibition on discriminatory taxation. Indeed, such abolition is overdue. This prohibition has played a historically important role in implementing the Framers' vision of the United States as an economically integrated free-trade zone, unimpeded by state barriers to national commerce. However, the prohibition is today doctrinally incoherent and politically unnecessary.

As it exists today, the dormant Commerce Clause case law proscribes discriminatory taxation favoring local industries but condones economically and procedurally comparable direct expenditures subsidizing those same industries. Within the universe of state taxation, the dormant Commerce Clause case law does not convincingly identify which state tax provisions discriminate and which do not. The resulting indeterminacy subjects equivalent government policies to diametrically opposed treatment under the dormant Commerce Clause.

Abolishing the dormant Commerce Clause prohibition on discriminatory taxation would leave intact the Clause's other requirements for state taxes—i.e., that such taxes (1) be properly apportioned, (2) be levied against taxpayers with adequate nexus to the taxing state, and (3) bear a reasonable relationship to the services received by the taxpayer from the taxing state. Moreover, abolishing the dormant Commerce Clause prohibition on discriminatory taxation would not alter the case law relative to states' nontax policies, nor would such abolition modify the constitutional constraints imposed on state taxation by other provisions of the Constitution, such as the Equal Protection Clause and the Privileges and Immunities Clause.

Abolishing the dormant Commerce Clause prohibition on discriminatory taxation would send many controversies which are now litigated in the courts, to the political branches of government—which is where they belong. In the final analysis, the Commerce Clause is Congress's to enforce.

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Typical of the contemporary dormant Commerce Clause cases prohibiting discriminatory taxation is *New Energy Company of Indiana v. Limbach*. In *New Energy*, Ohio granted a sales tax credit for Ohio-produced ethanol. New Energy, an Indiana-based producer of ethanol, complained that Ohio's tax credit discriminated against out-of-state producers like itself. The U.S. Supreme Court agreed with New Energy that the Ohio tax credit, limited to ethanol produced in-state, constituted "economic protectionism" by Ohio and thus discriminated against out-of-state ethanol producers like Indiana-based New Energy. Ohio's tax-based discrimination, the Court held, therefore violated the dormant Commerce Clause.

A fundamental problem with this conclusion is that Indiana comparably bolsters its domestic ethanol industry by means of cash subsidies with economic effects resembling those of the Ohio tax credit. However, this form of "economic protectionism," the Court indicated, is permitted under the dormant Commerce Clause, despite its similar economic effect to the Ohio tax credit. Thus, it turns out, *New Energy* is not about "economic protectionism" after all. Rather, it is about the form such protectionism may take. As long as states subsidize their own industries through direct cash outlays, rather than tax breaks, there is no constitutional constraint.

*New Energy* is not an isolated or unusual case; rather, it is typical of the Court's contemporary dormant Commerce Clause jurisprudence, which prohibits certain state tax policies while condoning economically and procedurally comparable direct expenditure programs. For example, this doctrinal inconsistency also emerges in *Bacchus Imports, Ltd. v. Dias*. In *Bacchus*, Hawaii exempted from its wholesale liquor sales tax certain locally produced beverages. The Court struck this exemption as violating the dormant Commerce Clause prohibition on discriminatory taxation, since beverages produced out-of-state did not receive Hawaii's tax exemption.

Like the Court's holding in *New Energy*, the Court's holding in *Bacchus* is plausible at first blush. A second look, however, is more troubling. Just as Indiana is free to provide cash subsidies to its local ethanol industry, Hawaii is free to subvent its in-state beverage producers via cash grants and other nontax subsidies—even though these permitted subsidies can have the same economic effects as the tax-based programs the Court forbids under the dormant Commerce Clause.

What, I respectfully ask, is the point of all of this? Why are state subsidies constitutionally acceptable in the form of direct cash grants,

but become discriminatory protectionism when undertaken by means of economically equivalent tax breaks?

The problem, moreover, is not just that the dormant Commerce Clause is today understood as outlawing tax benefits for in-state industries while condoning comparable cash subsidies for those industries. The case law, which purports to strike tax benefits which are discriminatory, does not reliably or persuasively tell us which state taxes are (and are not) discriminatory. It is, consequently, impossible to know in advance which state tax provisions run afoul of the dormant Commerce Clause prohibition on discriminatory taxation and which do not.

Consider, for example, the Sixth Circuit's decision in *Cuno v. DaimlerChrysler*. In *Cuno*, Ohio law gave DaimlerChrysler state income tax credits and local property tax exemptions for replacing DaimlerChrysler's existing auto manufacturing plant in Ohio with a new facility in Ohio. The appeals court held that Ohio's income tax credit granted to DaimlerChrysler discriminated under the dormant Commerce Clause but that the property tax exemption to DaimlerChrysler did not. Moreover, the court indicated that, had DaimlerChrysler not already owned a plant in Ohio, the Ohio income tax credit would not have discriminated for Commerce Clause purposes if that credit had lured DaimlerChrysler into Ohio *de novo*.

The confusion in *Cuno* is not the Sixth Circuit's fault, but rather reflects the current unfortunate status of the dormant Commerce Clause prohibition on discriminatory taxation. The dormant Commerce Clause is today understood as proscribing some state taxes but not others without reliably or persuasively indicating which state taxes unconstitutionally discriminate and which do not. The dormant Commerce Clause also is understood today as forbidding discriminatory tax policies (however defined) while permitting economically and procedurally comparable nontax programs. Like a once-great champion who refuses to leave the ring, the dormant Commerce Clause prohibition on discriminatory taxation stumbles along well past its prime.

What will happen if the U.S. Supreme Court, confronting the doctrinal incoherence of the dormant Commerce Clause prohibition on discriminatory taxation, abolishes that prohibition? The controversies giving rise to cases like *New Energy*, *Bacchus*, and *Cuno* will not go away. Rather, these controversies will be channeled toward political resolution. Consider, for example, the Ohio taxpayers who brought the *Cuno* litigation to protest the tax-based subsidization of DaimlerChrysler. If these taxpayers can no longer attack tax provisions as discrimi-

natory under the Commerce Clause, they will still be free to take their opposition to such tax breaks to the localities which granted the property tax exemptions to DaimlerChrysler; to the Ohio legislature that authorized the corporate income tax credits DaimlerChrysler received for building its new Ohio plant; and, ultimately, to the Congress that, using its affirmative legislative powers under the Commerce Clause, can regulate states' ability to subsidize interstate actors. In sum, closing the courthouse to the *Cuno* taxpayers will not leave them without potential remedies. Rather, it will require them to pursue political, rather than judicial, remedies to repeal the state tax policies they oppose.

*Bacchus* is particularly instructive in this regard, for the Hawaii state tax subsidies declared unconstitutional in *Bacchus* had already been allowed to expire by the Hawaii legislature. Tax policies adopted by the states can be undone by the states.

In the context of the overriding controversy about the dormant Commerce Clause, the call to abolish the prohibition on discriminatory taxation is actually quite modest—prominent voices call for repudiating the dormant Commerce Clause altogether. In contrast, I propose only that the once-useful prohibition on discriminatory taxation now be laid to rest. This would leave intact the Court's dormant Commerce Clause case law relative to nontax state policies and would leave in place, as to state taxes, the requirements that such taxes be properly apportioned, be assessed only as to taxpayers with sufficient nexus to the taxing state to justify taxation, and be levied in reasonable relationship to the services received by the taxpayer from the taxing state.

I call for such abolition as one who, on the merits, shares the skepticism of the state subsidies which prompt much of the contemporary dormant Commerce Clause litigation. As a matter of policy, the tax breaks challenged in *New Energy*, *Bacchus*, and *Cuno* strike me as problematic. There is, however, a difference between state tax policy being unwise and being unconstitutional.

Supporters of the status quo mount a variety of defenses for the dormant Commerce Clause prohibition on discriminatory taxation, despite the prohibition's doctrinal incoherence. The most common one is this: if the Court abandons this prohibition, some states will (literally or figuratively) erect tariff booths at their borders, requiring nonresidents to pay for entry. I doubt that any states would institute such tariffs if the Court abandoned the dormant Commerce Clause prohibition on discriminatory taxation. Even if they did, it is doubtful that Congress would permit this. And even if I am wrong about the

states and about Congress, the Privileges and Immunities Clause of the Constitution would preclude states from imposing entry fees on nonresidents alone.

The proverbial bottom line is that, to address this and similar hypotheticals, we need not retain the incoherent body of law which is today the dormant Commerce Clause prohibition on discriminatory taxation.

Another theme of those defending the doctrinal status quo is that taxes are different procedurally from direct expenditures. The seemingly untenable distinction between discriminatory state tax policies (prohibited under the dormant Commerce Clause) and economically equivalent direct subsidies (permitted under the Clause) is viable, they claim, because tax breaks are less well understood and less carefully scrutinized than are cash grants and other forms of nontax subsidization. Hence, it is appropriate for the judiciary, under the aegis of the dormant Commerce Clause, to provide additional oversight of states' tax policies.

Like the prohibition itself, this argument was once more compelling than it is today. Today, most states produce tax expenditure budgets which highlight and quantify tax subsidies. We also have fewer illusions today than we once did about the level of political scrutiny actually given to direct budgetary outlays. Budgetary oversight, whether of tax expenditures or of direct outlays, is typically incremental, focusing on the margins of tax and expenditure programs. In 2007, it is not as credible as it once was to suggest that direct expenditures are reviewed with considerably greater efficacy than are comparable tax subsidies. It is thus unpersuasive for the dormant Commerce Clause to prohibit certain (hard to identify) state tax breaks while permitting equivalent direct expenditures.

Finally, defenders of the dormant Commerce Clause prohibition on discriminatory taxation can point to the weaknesses and limitations of legislative and executive decision making as reasons to retain the status quo, i.e., judicial supervision of state tax breaks under the aegis of the nondiscrimination principle. However, legislators and administrators have superior resources and opportunities for tax policy decision making. Unlike generalist judges, legislatures have specialized committees with professional staffs, and tax administrators similarly have greater specialized expertise. Legislators and executive branch tax policymakers can draw upon outside expertise from many sources, something difficult for judges to do. Legislators and executive branch officials also can give continuous attention to the tax law, unlike judges, whose intervention in the tax law is episodic at best. And judi-

cial decision making has its own weaknesses. If those who love laws and sausages should see neither being made, the same is often true of judicial opinions.

At the end of the day, the dormant Commerce Clause prohibition on discriminatory taxation is an anachronism which was useful in an earlier age but does not work today. It makes no sense to proscribe on constitutional grounds certain tax breaks while simultaneously condoning economically and procedurally comparable direct expenditures. It is particularly troubling that today we cannot even identify which state tax breaks will be deemed discriminatory (and thus forbidden by the dormant Commerce Clause) and which will not. The dormant Commerce Clause prohibition on discriminatory taxation has performed an honorable service to the nation, but it is now time to put this prohibition to rest.

#### REBUTTAL

#### *The Dormant Commerce Clause Doctrine: Mend It, Don't End It*

Brannon P. Denning<sup>†</sup>

Under the dormant Commerce Clause doctrine (DCCD), a state or local law's validity often depends exclusively on whether or not it discriminates against interstate commerce. Even ardent critics of the DCCD, like Justice Scalia, concede that discriminatory laws violate the restraints on states implicit in the constitutional grant of power over commerce to Congress. This makes Professor Zelinsky's proposal to discard what I will term the DCCD's "antidiscrimination principle" for tax cases particularly iconoclastic, if not downright revolutionary. For if the arguments Professor Zelinsky makes are valid, then there is no reason to restrict his proposal to tax cases. And if the antidiscrimination principle is to be jettisoned in nontax cases as well, then we might as well do away with the DCCD altogether, since the antidiscrimination principle is the DCCD's most robust branch. For all the claims made about the modesty of his proposal, Professor Zelinsky is really proposing nothing less than the abandonment of the DCCD *in toto*.

Fortunately, as I shall argue here, Professor Zelinsky has, at most, made an argument that the DCCD needs reform *in its application*. The

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bill of particulars in his indictment, however, does not support abandoning the antidiscrimination principle or the DCCD—in tax or non-tax cases.

Professor Zelinsky's argument for abolishing the antidiscrimination principle rests on three points. First, he argues that the doctrine is inconsistent and incoherent because economically identical actions are treated differently, and because courts have not offered a useful definition for "discrimination." Second, he claims that courts would still possess adequate doctrinal remedies to combat state abuses even if the antidiscrimination principle were discarded. If those remaining judicial safeguards should fail, he concludes, Congress could exercise its affirmative power under the Commerce Clause to limit state power. I will address each of his arguments in turn. But before I begin, let me explain my contention that his proposal is not modest as compared with calls to abandon the DCCD altogether and that, taken to its logical conclusion, his proposal means the end of the DCCD for all practical purposes.

It is misleading for Professor Zelinsky to advertise his proposal as modest doctrinal pruning. It is true that Justices Scalia and Thomas have urged the Court to give up the DCCD. But neither Justice has ever endorsed abandoning the *antidiscrimination principle*—each just thinks it is not to be found in the Commerce Clause. For Justice Scalia, the Privileges and Immunities Clause of Article IV, Section 2 bars discrimination against out-of-state citizens; for Justice Thomas, the Import-Export Clause of Article I, Section 10 is the proper source. (Justice Thomas, in fact, would apply the antidiscrimination principle to state tax laws *only*, since the Import-Export Clause bars the levying of "imposts" and "duties" without congressional consent.)

Further, given that Professor Zelinsky's core argument against the antidiscrimination principle concerns the alleged incoherence of its differential treatment of economically equivalent activities (discriminatory taxes versus discriminatory subsidies), his call for abandonment *only* in tax cases seems arbitrary. If the compliance cost for regulation  $R$  is \$100, that seems economically identical to a tax in that amount on the regulated activity. If that's true, and if, as he maintains, the DCCD lacks a meaningful definition of "discrimination" to sort permissible from impermissible laws, then the antidiscrimination principle ought to be abandoned in its entirety. That would mean, in essence, scraping the DCCD itself, since the overwhelming majority of nontax laws the Court has invalidated in the past several years have been those that it has deemed discriminatory. Professor Zelinsky's claim that political safeguards would remedy abuses suggests he is aware that his



argument might overflow its banks and swamp the doctrine in its entirety, and that he would not regard such a result as catastrophic.

I am not so phlegmatic. But before discussing whether or not the demise of the DCCD would mean the end of economic union, let's examine closely the claims Professor Zelinsky makes for discarding the antidiscrimination principle.

Professor Zelinsky invokes the different judicial treatment of taxes and subsidies as evidence of the principle's irrationality and incoherence. If the Constitution and the Commerce Clause reflect, as he writes, "the Framers' vision of the United States as an economically integrated free-trade zone, unimpeded by state barriers to national commerce," differentiating between economically identical activities makes no sense. *Any* barrier to that vision, whatever *form* it takes, offends the substance of that constitutional value and ought to be invalidated. Yet the DCCD distinguishes between discriminatory uses of the tax code and discriminatory uses of tax revenue in the form of cash subsidies—permitting the latter, but not the former. While Professor Zelinsky's logic is sound, I think he is reasoning from an erroneous premise.

I would argue that the Framers did *not* draft the Commerce Clause out of any ideological attachment to free trade. Their desire to centralize trade regulation in Congress, thus fettering the states, stemmed more from a belief that doing so was the only way to break the cycle of commercial discrimination and retaliation that threatened national union during the Confederation Era. Put another way, the Framers regarded the elimination of provocative state taxation and regulation of interstate trade as the key to removing a primary source of friction among the states—friction that undermined national unity.

On this account, then, form matters. Discriminatory taxes might provoke retaliation where subsidies would not. Subsidies were common during the Confederation Era, yet no one complained of them as they did taxes and other regulations aimed at incoming commerce from neighboring states. In a recent article, Professor Zelinsky has himself demonstrated the powerful framing effects exerted by choosing to subsidize activities with cash rather than through the tax code.

Professor Zelinsky also assures us that doctrinal and political safeguards will be sufficient to prevent state abuse, even if the antidiscrimination principle is cast aside. I remain unpersuaded.

Doctrinally, Professor Zelinsky points out that his proposal would not abandon the other requirements that state and local taxes must satisfy under the test set forth in *Complete Auto Transit, Inc. v. Brady*: (1) that there be a sufficient nexus between the taxing jurisdiction

and the activity taxed; (2) that any tax on interstate commerce be fairly apportioned; and (3) that the tax be fairly related to the benefits received by the taxpayer. It is ironic that Professor Zelinsky would advocate abandoning the antidiscrimination prong of *Complete Auto Transit*, while retaining the others, on the ground that there is no real way to distinguish between discriminatory and nondiscriminatory taxes, since the other aspects of the *Complete Auto* test are at least as opaque as “discrimination.”

Does Professor Zelinsky really want courts to get into the business of deciding whether or not a taxpayer is receiving fair value for the taxes paid? Courts have heretofore been so reluctant to do so that the “fairly related” prong of *Complete Auto* has become a dead letter. And while determining whether a tax is apportioned correctly can be a simple matter of calculating the amount of activity that can be attributed to the taxing jurisdiction and taxing that portion, this prong has spawned the Court’s notoriously confusing “internal” and “external consistency” tests, each accompanied by layers of judicial exegesis. Even the nexus inquiry in the DCCD is complicated by the Court’s insisting on the taxpayer’s physical presence in the taxing jurisdiction in some cases but not others, rather than relying on the “minimum contacts” test used in due process cases. Compared to these vexing determinations, whether a tax discriminates against interstate commerce or not can be the easiest inquiry a court conducts.

Other constitutional provisions Professor Zelinsky mentions as effective substitutes for the antidiscrimination principle are the Equal Protection Clause and the Privileges and Immunities Clause of Article IV, Section 2. Those provisions definitely complement the DCCD, but they complement it at precisely the point that Professor Zelinsky argues is unworkable—at the DCCD’s antidiscrimination prong! Nondiscriminatory taxes will never be reviewed under either the Privileges and Immunities Clause or the Equal Protection Clause. Further, to apply them to “discriminatory” taxes, one requires a way to distinguish discriminatory from nondiscriminatory taxes—a distinction that Professor Zelinsky says cannot be made. If that is true for the DCCD, then it is hard to see how the concept can be salvaged for use by those related constitutional provisions.

Finally, Professor Zelinsky seems confident that, in the absence of an antidiscrimination principle, state and local governments would not rush to prey on neighboring states’ commerce with parochial taxes; if they did, Congress could step in, as it has occasionally (most recently to prevent state taxation of Internet sales), and check abuses. Again, I do not share his confidence on either point.

The DCCD has been enforced, in some form, since 1824 and the antidiscrimination principle enforced since at least the 1870s. Given this history, state decision making has long occurred in the shadow of the DCCD. Nevertheless, state and local governments have frequently passed taxes and other regulations that discriminate against interstate commerce. If such legislative responses occur when courts enforce the doctrine, it seems puzzling to conclude that such legislation would cease, as opposed to increase, in the absence of such a restraint on state power. One can hardly pick up the *Wall Street Journal* or *The Economist* without reading a story about protectionism (euphemistically termed “economic nationalism” by proponents) on the rise in Europe and Asia. I don’t see why state and local politicians in the United States would be immune to similar temptations in the absence of any threat of judicial sanction, especially given the apparent widespread insecurity about the economy and the increased demands of competition in a globalized economy.

Were the antidiscrimination principle (or the DCCD itself) cast aside, it is true that Congress could step in to stay the hand of states by exercising its affirmative Commerce Clause power. But would it? Professor Zelinsky cites some examples in his writings; but he does not discuss the fact that, if it acts at all, Congress is as likely to *authorize* state discrimination (as is its constitutional prerogative) as it is to end it. In one recent example, the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, contained a provision (not obviously related to the ostensible subject of legislation) entitled the Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005, which permitted states to discriminate against nonresidents in the “regulation of hunting or fishing by a State or Indian tribe.” This is surely a political solution to DCCD challenges made by out-of-state residents to discriminatory state license fees, bag limits, and the like. The question is whether such legislation is the sort of politics that ought to be encouraged, or whether it represents any real safeguard against the problems the Framers sought to ameliorate when they centralized control over interstate commerce.

Still, congressional action of any sort would likely remain the exception rather than the rule, whether out of indifference, the press of other business, or simple political pressure. That will mean that discrimination against interstate commerce will go unremedied unless it affects powerful interests that can command congressional attention, or the abuse is of such a magnitude that Congress dare not ignore it. Meanwhile, retail-level discrimination of the sort currently policed by

the courts will exist—it may even increase as states retaliate against one another—and will go unremedied, and interstate commerce will suffer for it.

I do not deny that the concept of discrimination in DCCD cases is undertheorized. The Court has never done a particularly good job explaining what it means, precisely, when it labels a tax or nontax regulation “discriminatory.” But this is a problem of *application*. It can be remedied. To conclude, as Professor Zelinsky does, that this problem requires us to discard the antidiscrimination principle (or, indeed, the entire DCCD) seems to me to burn down the proverbial house to roast the pig.

#### CLOSING ARGUMENT

Edward A. Zelinsky

Professor Denning’s reply is as revealing for what it does not say as for what it does. I criticize the dormant Commerce Clause prohibition on discriminatory taxation for its doctrinal incoherence. Whatever its past utility might have been, the nondiscrimination principle today proscribes certain state tax incentives while condoning economically and procedurally comparable direct expenditures. Within the universe of state tax policies, the dormant Commerce Clause case law does not inform us reliably or persuasively as to which state tax policies discriminate (and are thus constitutionally forbidden) and which state tax policies do not discriminate (and are thus constitutionally permitted).

In his reply, Professor Denning does not deny this doctrinal incoherence. Instead, he acknowledges this incoherence when he characterizes dormant Commerce Clause theory as “undertheorized.” If we all just think harder, Professor Denning suggests, these problems will eventually be solved.

I disagree. Over the years, there has been much good thinking about the dormant Commerce Clause, including Professor Denning’s. However, more theorizing cannot eliminate the reality that, in the modern world, states’ tax-based subsidies of local industries can, and frequently are, paralleled or replaced by economically and procedurally comparable direct expenditures. It is unconvincing to proscribe the former to guard against states’ protectionist impulses while permitting the latter manifestations of those impulses. Similarly, the

efforts by many fine scholars (again, including Professor Denning) have failed to give a convincing account of which state tax policies discriminate for Commerce Clause purposes and which do not.

In the face of this doctrinal incoherence, I ask: What is the point? In his reply, Professor Denning offers four basic answers, none of which proves availing.

Professor Denning first asserts the existence of a very slippery slope: Abolishing the prohibition on discriminatory taxation “taken to its logical conclusion” implies “the end” of the entire dormant Commerce Clause “for all practical purposes.” Second, Professor Denning suggests that I am too sanguine about political processes as opposed to judicial decision making. Third, Professor Denning indicates that it is paradoxical for me to propose abandoning the Commerce Clause principle of tax nondiscrimination while calling for continuing scrutiny of state taxes under the Equal Protection Clause and the Privileges and Immunities Clause. The courts, he indicates, will simply recreate under these constitutional provisions the same body of nondiscrimination case law which has emerged under the dormant Commerce Clause. Finally, to sustain the Commerce Clause distinction between tax subsidies and equivalent direct outlays, Professor Denning appeals to two sources of authority, one venerable (the intent of the Framers), the other considerably less so (my own research on framing effects). Let us consider each argument in turn.

*Abolishing the dormant Commerce Clause prohibition on discriminatory taxation will lead to the abandonment of the dormant Commerce Clause in its entirety.* Professor Denning occupies his strongest ground when he asserts that abolishing the dormant Commerce Clause prohibition on tax discrimination might lead to the abandonment of the nondiscrimination norm in nontax Commerce Clause cases as well. Perhaps, over the years, the dormant Commerce Clause case law in nontax contexts will become as chaotic as the Court’s tax decisions, prohibiting some state policies while condoning other economically and procedurally equivalent policies. If so, it will then indeed be time to retire the Commerce Clause nondiscrimination norm in nontax contexts.

Professor Denning also stands on strong ground when he observes that there is little content today to the dormant Commerce Clause test requiring a reasonable relationship between the services provided by a taxing state and the taxes imposed for those services. This reasonable relationship standard has proved elusive and, consequently, of little practical import.

There remain, however, two other mainstays of dormant Commerce Clause tax doctrine, namely, the requirements of nexus and of

fair apportionment. Under the nexus test, the relevant inquiry is whether the taxpayer and the taxing state have sufficient contact to justify taxation. Under the fair apportionment test, the inquiry is whether the state is taxing only what is properly assigned to its jurisdiction.

Like all such constitutional standards, nexus and fair apportionment have their problems and limitations, though I think Professor Denning overstates these. For purposes of this debate, however, the shortcomings of the nexus and fair apportionment tests are not the relevant issue. Rather, the relevant issue is whether Professor Denning is right that abolishing the dormant Commerce Clause concept of tax nondiscrimination will lead to the abandonment of the nexus and fair apportionment inquiries as well.

I think not. At its core, Professor Denning's claim is empirical: "[T]he overwhelming majority of nontax laws the Court has invalidated in the past several years have been ones it has deemed discriminatory." Perhaps so. Nevertheless, nexus and fair apportionment are analytically separate and distinct inquiries, which can and do take place independently of any nondiscrimination test. Under the heading of nexus, the courts ask whether a potential taxpayer has sufficient contact to justify a state's assertion of tax authority over that taxpayer. Under the rubric of fair apportionment, the courts ask whether a taxing state is overreaching, projecting its tax authority beyond its borders. Under the discrimination test, the courts ask—well, whether the tax discriminates. We can abolish this last Commerce Clause inquiry without abandoning the first two.

*Political processes are imperfect.* Indeed, they are. If the relevant comparison is between the messy realities of legislative politics and a pristine, idealized notion of judicial decision making, it is easy to pick the winner. If, however, we compare legislatures (and executive departments) with the courts as they actually are, a different picture emerges.

Congress, Professor Denning correctly tells us, will typically exercise its affirmative Commerce Clause authority at the behest of "powerful interests that can command congressional attention." But these are the same interests that bring most dormant Commerce Clause litigation into the courts. And after litigating, these interests can, under present law, still go to Congress for succor.

Professor Denning's other reservation about Congress is that, in contrast to the courts' policing of "retail-level discrimination," Congress will act under the Commerce Clause only in the face of a state

committing “abuse . . . of such a magnitude that Congress dare not ignore it.”

These criticisms of Congress prove much too much. Congress does indeed respond to organized interests and to politically compelling situations. That is true when it comes to the Internal Revenue Code, to patent law, to federal budgeting, to farm policy—in short, to the universe of issues within Congress’s domain. Should we shift all of these issues to the courts? If not, what qualifies Commerce Clause nondiscrimination issues to be unique wards of the judiciary?

As a matter of policy, Professor Denning, like many dormant Commerce Clause experts, does not like the subsidy programs often adopted by state legislators, viewing these programs as inappropriately parochial subventions of in-state interests. However, current dormant Commerce Clause doctrine condones this parochialism, as long as it is implemented through states’ direct expenditure programs rather than certain (unspecified) tax breaks.

Professor Denning also dislikes when Congress, acting affirmatively under the Commerce Clause, permits the states to favor their respective in-state interests. I confess that I am not troubled by Professor Denning’s prime example of this: Congress’s decision to permit states to distinguish between residents and nonresidents when regulating hunting and fishing. Even if I were, it is ultimately Congress’s constitutional role under the Commerce Clause to strike the appropriate balance between state regulation and interstate trade.

In the final analysis, taxation is an inherently political matter and the Commerce Clause is Congress’s to enforce.

*It is paradoxical for me to propose abandoning the Commerce Clause principle of tax nondiscrimination while calling for continuing scrutiny of state taxes under the Equal Protection Clause and the Privileges and Immunities Clause.* Not so: It is not inevitable that the Supreme Court will recreate under these constitutional provisions the morass which is today the Court’s nondiscrimination case law under the dormant Commerce Clause. In *Lunding v. New York Tax Appeals Tribunal*, for example, the Court decided that New York offered no convincing justification for denying to nonresidents the income tax deduction for alimony New York afforded its residents. Hence, the Court concluded, this denial violated the Privileges and Immunities Clause. Whether one thinks *Lunding* was right or not, nothing in that decision compels the Court to recreate under the Privileges and Immunities Clause the incoherence of *Bacchus* and *New Energy*.

*The Framers and framing effects justify the dormant Commerce Clause prohibition on discriminatory taxation.* By his appeal to the Framers’ in-

tent, Professor Denning thrusts himself into one of the hottest of contemporary legal controversies, to wit, whether the original understandings of those who drafted and adopted the Constitution can be determined and, if so, whether those original understandings should control today. Mushy moderate that I am, I think that the Framers' intentions sometimes help resolve today's constitutional disputes and sometimes do not. In the context of the dormant Commerce Clause nondiscrimination principle, I think the Framers' intentions are not helpful for a simple reason: The Framers said little about the Commerce Clause because, at the time the Constitution was adopted, there was apparently a broad, unspoken consensus supporting it.

It is thus unsurprising that Professor Denning's appeal to the Framers' intent actually appeals to their silence: "Subsidies were common during the Confederation Era, yet no one complained of them as they did taxes and other regulations aimed at incoming commerce from neighboring states."

The implications of this observation for contemporary Commerce Clause doctrine are ambiguous at best. Given the dearth of the Framers' commentary on the Commerce Clause, we can't be sure how they would have understood the clause in our present day and circumstances. Professor Denning infers that the Framers viewed tax breaks as generating more conflict between the states than equivalent direct expenditure programs, and that this view should bind us today. It is, however, just as likely that the Framers, if confronted with the modern economic development programs pursued today by most states and many localities, would conclude that a single constitutional rule should prevail for both tax and direct spending subsidies to local industries, given the similar effects of these subsidies. It is also possible that, in light of the contemporary political influence of national and international corporations, the Framers would today find the Commerce Clause a successful project, having created a national economy dominated by interstate economic actors. From this vantage, the Framers might today declare that interstate businesses are "infant industries" no more and can protect themselves and interstate trade politically in Washington and in the state capitals. We just don't know, given the limited expressions of the Framers' intent relative to the Commerce Clause. Consequently, we cannot resolve the contemporary status of the Commerce Clause prohibition on discriminatory taxation by appealing to the Framers' intent or their silence, even if we are so inclined.

It is also true that a significant portion of the population succumbs to framing effects when comparing tax breaks and equivalent



cash subsidies. This, however, is a thin reed on which to place the Commerce Clause distinction between tax incentives and direct subsidies.

The Supreme Court has repeatedly told us that dormant Commerce Clause nondiscrimination is about economic effect. While some (erroneously) perceive comparable tax and direct expenditures as being different, their economic effects are the same. Prohibiting tax incentives while condoning equivalent direct spending merely forces states to shift the form of their subsidies from tax-based incentives to direct cash outlays. Perhaps this results in some overall reduction in the quantum of states' subsidies for their local industries.

Even if that is so, the question must be asked: Given the doctrinal incoherence of the dormant Commerce Clause principle of tax nondiscrimination, is that principle worthwhile today? Despite Professor Denning's elegant arguments to the contrary, I continue to answer "no."

#### CLOSING ARGUMENT

Brannon P. Denning

It is immensely gratifying to have an accomplished scholar like Professor Zelinsky carefully consider a critique of his work and reply in kind. It would, of course, be even more gratifying if I could get him to agree with me. Alas, it appears that we have, at bottom, a fundamental disagreement. On his account, the benefits of discarding the antidiscrimination principle and the DCCD outweigh the costs; I disagree. He sees irredeemable incoherence in the DCCD's differential treatment of legislative activities with identical economic effects; I'm not so troubled. This means that we are unlikely to do better than to agree to disagree about the topic at hand. However, I'm going to make one last sally at his heavily fortified position and see if I can get him to concede some ground.

In fact, Professor Zelinsky does seem to make one concession in his reply. He writes that I "assert[] the existence of a very slippery slope," i.e., that abandoning the antidiscrimination principle in tax cases leads ineluctably to the abandonment of the DCCD as a whole. But then he agrees to ski my slope all the way down, writing that if "over the years, the dormant Commerce Clause case law in nontax contexts will become as chaotic as the Court's tax decisions . . . it will then indeed be time to retire the Commerce Clause nondiscrimina-

tion norm in nontax contexts.” That time has probably come. Just as Professor Zelinsky cites *Bacchus Imports* and *New Energy* as the *ne plus ultra* of the DCCD’s tax incoherence, there are pairs of nontax cases in which similar facts generate different results. Compare, for example, *Hunt v. Washington State Apple Advertisers Comm’n* with *Exxon Corp. v. Governor of Maryland* or *Hughes v. Oklahoma* with *Maine v. Taylor*.

Professor Zelinsky shrugs at the DCCD’s possible demise, secure in his belief that Congress would fill any void left by the abandonment of the DCCD. Again, I disagree. Professor Zelinsky may not be bothered by congressional sanction of state discrimination against out-of-state hunters, but what about the McCarran-Ferguson Act, which left regulation of the “business of insurance” to the states? Immediately after passage, and after the Supreme Court upheld the Act, states reacted by passing discriminatory laws favoring domestic insurers over those from out of state. In any event, my main point was one that Professor Zelinsky does not address: is Congress more likely to intervene to *stop* state abuses or to *facilitate* them? I concede that this is an empirical question, but in the prominent examples I can think of in the last sixty years, congressional action has inclined toward the latter.

I resist Professor Zelinsky’s suggestion that by arguing for a judicial role in policing state discrimination, I have succumbed to a judicial Nirvana Fallacy. I do not, in fact, argue that “Commerce Clause nondiscrimination issues [are] *unique* wards of the judiciary” (emphasis mine). But because I believe that the antidiscrimination principle is grounded in the command of the Constitution, I do think it represents a special concern of the judiciary. At some level, Professor Zelinsky believes this too, since he relies on other judicial doctrines for which the discriminatory/nondiscriminatory distinction is fundamental.

Nor do I suggest that judicial conceptualization and application of the antidiscrimination principle are perfect—I am, after all, guilty of urging judges and scholars to “think harder” about the DCCD. Still, Professor Zelinsky writes that my criticisms “prove much too much.” He argues that to suggest Congress might exercise its power to authorize discrimination unwisely, and thus that Congress ought not be the sole check on state abuses, means that we might as well shift everything from “the Internal Revenue Code, to patent law, to federal budgeting, to farm policy—in short, . . . the universe of Congress’s domain” to the courts. I realize that judicial decision making can be as imperfect as legislative decision making, and just as I don’t argue as a result that Congress ought to be stripped of power because of the legislative process’s defects, the imperfections of courts in fashioning

the DCCD do not warrant excluding them from policing state abuses either. (As an aside, to the extent that Professor Zelinsky believes that lack of textual sanction for judicial enforcement of the Commerce Clause deprives courts of any authority to undertake that enforcement role, I suggest that *his* is the argument that proves too much. Such a position means that the Court has no business enforcing the other *Complete Auto* factors to check state taxation, or the other constitutional provisions he favors, like the Privileges and Immunities or Equal Protection Clauses.)

As for those doctrinal alternatives, Professor Zelinsky's response that "it is not inevitable that the Supreme Court will recreate under these constitutional provisions the morass which is today the Court's nondiscrimination case law under the dormant Commerce Clause" or "recreate under the Privileges and Immunities Clause the incoherence of *Bacchus* and *New Energy*" is confusing. Professor Zelinsky's comment suggests that it isn't the distinction between discriminatory and non-discriminatory that is fatally flawed, but rather the Court's implementation of that distinction. But that is at odds with his insistence that no amount of further thinking about the antidiscrimination principle in the DCCD context can salvage it, so it ought to be chucked entirely. Unless I have misunderstood him, Professor Zelinsky's main point is that there is no principled way to distinguish between discriminatory and nondiscriminatory taxes; therefore, the DCCD should abandon efforts to do so.

And yet this distinction is central to both the Privileges and Immunities Clause of Article IV, Section 2 and the Equal Protection Clause. In the *Lunding* case itself, for example, the Court, quoting from an earlier case, explained that the Privileges and Immunities Clause bars "*discrimination* against citizens of other States where there is no substantial reason for the *discrimination* beyond the mere fact that they are citizens of other States" (emphasis added) (internal quotation marks omitted). It then stated the doctrinal test as follows:

[W]hen confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that (i) there is a substantial reason for the difference in treatment; and (ii) the *discrimination* practiced against nonresidents bears a substantial relationship to the State's objective (emphasis added) (internal quotation marks omitted).

Further, when, in *Metropolitan Life Insurance Co. v. Ward*, the Court applied the Equal Protection Clause to an out-of-state insurance company required by Alabama to pay higher taxes on premiums than do-

mestic insurance companies, its opinion began with the observation that “the jurisprudence of the applicability of the Equal Protection Clause to *discriminatory* tax statutes had a somewhat checkered history” (emphasis added). Distinguishing cases cited by Alabama to justify its differential treatment, the Court stated that

Alabama’s aim to promote domestic industry is purely and completely *discriminatory*, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama’s purpose . . . constitutes the very sort of parochial *discrimination* that the Equal Protection Clause was intended to prevent (emphasis added).

Finally, perhaps I do overstate the difficulties with the nexus and apportionment prongs of *Complete Auto*, but I do not think that abandoning the antidiscrimination prong would lead to their disappearance, as Professor Zelinsky states. My initial point was that if distinguishing between discriminatory and nondiscriminatory taxes was beyond the institutional capacities of courts, the same charge might be made about the other *Complete Auto* factors as well. More to the point, though, Professor Zelinsky presents no evidence that the remaining *Complete Auto* prongs could effectively police state taxing abuses in the absence of the antidiscrimination principle. I would be interested in examples of taxes invalidated under the antidiscrimination principle that would have been snagged by one of *Complete Auto*’s other prongs as well.

This brings me to Professor Zelinsky’s final comments about my reliance on the original understanding of the Commerce Clause and of the judiciary’s role in enforcing it. Professor Zelinsky is skeptical that much, if any, importance can be gleaned from that understanding “because, at the time the Constitution was adopted, there was apparently a broad, unspoken consensus supporting it.” Were we able to conjure the Framers and ratifiers and interrogate them about their intentions, “[i]t is . . . just as likely that the Framers, confronted with the modern economic development programs pursued today by most states and many localities, would conclude that a single constitutional rule should prevail for both tax and direct spending subsidies to local industries, given the similar effects of these subsidies.”

The Framers might even be tempted, as Professor Zelinsky is, to have the judiciary declare victory and withdraw, since “interstate businesses are ‘infant industries’ no more and can protect themselves and interstate trade politically in Washington and in the state capitals.” Maybe not, he concedes, but that is the point: “[w]e just don’t know”

what their intentions were or would be and thus we “cannot resolve the debate over the contemporary status of the Commerce Clause prohibition on discriminatory taxation by appealing to the Framers’ intent or their silence, even if we are so inclined.”

Let me clarify how I think the original understanding is helpful to the debate. In other writings, I have tried to be modest in my claims for what history can teach us, but at the same time I do not think that history is so indeterminate as to leave us entirely at sea. State discrimination against interstate commerce was a persistent (and destabilizing) feature of the Confederation Era. One of the aims of the Framers—indeed, as Professor Zelinsky notes, one of their least controversial aims—was to end commercial conflicts among the states by centralizing power over interstate and foreign commerce, which they did by entrusting that power to Congress. Some Framers thought that the mere act of doing so deprived states of the power to regulate interstate commerce at all. There was also a sense, inchoate to be sure, that the courts would have some role in enforcing the restrictions placed on state commercial regulatory and taxing powers (including the Commerce Clause).

The understanding likely went no deeper. It was left to courts, the Supreme Court in particular, to “implement” (as Richard Fallon has defined that term) those constitutional limitations through the construction and elaboration of constitutional doctrine. Since 1824, the Court has experimented with a number of doctrinal formulae—what Mitchell Berman terms “decision rules”—to enforce the Court’s understanding of the limitations the Constitution places on state power.

Throughout the Marshall and much of the Taney Courts, the debate centered upon the question of the Commerce Clause’s “exclusivity.” *Cooley v. Board of Wardens* attempted to break this stalemate by proposing an elegant compromise: national subjects required one uniform rule supplied by Congress (including uniform deregulation, if Congress had not acted); local subjects could tolerate myriad state rules, unless Congress chose to unify the area. From that, later Courts derived the direct/indirect test, eventually discarded in favor of balancing burdens on interstate commerce against local benefits, and the antidiscrimination principle.

What looks like incoherence and planned unpredictability, I argue, is merely the Court’s search for a set of tools to decide DCCD cases that reflect to some degree a shared understanding of what the Constitution requires. Since the 1870s, the Court has enforced a version of the antidiscrimination principle. Its durability, I suggest, is testament to its acceptance—even among vociferous critics of the

DCCD—as an accurate reflection of the limits the Constitution places on states. Moreover, it has worked. Blatant (and even covert) discrimination against out-of-state commerce or commercial actors is almost always invalidated when it occurs. Given the pedigree and the relative success of the antidiscrimination principle of the DCCD, Professor Zelinsky bears a heavy burden to justify its ouster. I respectfully suggest that he has not carried that burden.