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DOES A COMMUTER'S CHOICE OF WHERE TO RESIDE IMPLICATE THE DORMANT COMMERCE CLAUSE?

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Until relatively recently,[1] there was little doubt that nonresident commuters must look to the Privileges and Immunities Clause of the United States Constitution for protection against discriminatory state taxes.[2] A personal income tax levied on the income of individuals who commute to work from their personal residences located outside of the state should not implicate the "dormant" commerce clause, a restraint on state authority that has been implied from the Commerce Clause,[3] and which protects interstate business operations and transactions.[4]

Although the Commerce Clause gives Congress broad authority to regulate any activity that exerts an influence on interstate

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1. In *City of New York v. State*, 94 N.Y.2d 577, 596, 598 (2000), New York's highest court invalidated the City of New York's discriminatory commuter tax under the Privilege and Immunities and Commerce Clauses.

2. *See, e.g.*, Austin v. New Hampshire, 420 U.S. 656, 667 (1975); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920) (invalidating discriminatory commuter taxes under the Privileges and Immunities Clause).

3. *See* Cooley v. Board of Wardens, 53 U.S. 299, 319 (1851) (stating that the states may regulate commerce through their police powers only insofar as the effect on interstate commerce is sufficiently local in nature so as not to require a uniform national rule). *See also* Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("The bounds of these [dormant commerce clause] restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.").

4. In *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581 (1997), the Court stated that "[a] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *See id.* at 580-81 (invalidating, under the Commerce Clause, a discriminatory real property tax exemption because it "functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them."). *See* Armco, Inc. v. Hardesty, 467 U.S. 638, 642 (1984) (invalidating manufacturing tax exemption which discriminated against out-of-state manufacturers).

commerce,[5] the dormant commerce clause serves but one limited function: It "prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors . . . ."[6] Not every activity that Congress is capable of regulating pursuant to its Commerce Clause authority implicates the dormant commerce clause. Otherwise, the dormant commerce clause would swallow the express provision from which it was implied, in effect, relegating Congress's authority to regulate interstate commerce to the courts. The dormant commerce clause is, thus, implicated only where a state tax or regulatory measure discriminates against interstate business, or where a state tax or regulatory measure overreaches such that it has the potential of exerting excessive multiple burdens on interstate business.[7]

The United States Supreme Court has never wavered from this interpretation of the scope and application of the dormant commerce clause in more than 150 years of its decisions; a notable consistency, given that during the same period the Court had otherwise turned the dormant commerce clause practically on its head.[8] Nevertheless, the expanded meaning the Court has given to "interstate commerce," where Congress exercises its affirmative grant of authority under the so-called "positive" Commerce Clause,[9] has raised the question of whether the dormant commerce clause now completely eclipses a whole range of activities previously thought to be

5. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (personal consumption of homegrown wheat is interstate commerce); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (operation of local motel is interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (operation of local restaurant is interstate commerce).

6. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994) (non-discriminatory tax levied on all local sellers of milk, coupled with a rebate of the tax only to local milk producers, was held to be a discriminatory import tariff).

7. *See infra* text accompanying notes 39-62.

8. The Court itself has referred to its earlier Commerce Clause jurisprudence as a "quagmire" and lamented that it had "handed down some three hundred full-dress opinions [interpreting the Commerce Clause which] . . . leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of its indispensable power of taxation." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959).

9. *See generally Wickard*, 317 U.S. at 111; *Heart of Atlanta Motel*, 379 U.S. at 241; *Katzenbach*, 379 U.S. at 294.

within the exclusive domain of the Privileges and Immunities Clause.[10]

The Court had previously construed "interstate commerce" more narrowly under the dormant commerce clause to avoid striking down state taxes.[11] In dispensing with this double standard,[12] the Court has recently remarked that there is but one definition of interstate commerce, regardless of whether Congress seeks to regulate it pursuant to its affirmative grant of authority, or strike down a measure as violating the dormant commerce clause.[13] The Court's statement must be placed in its appropriate context, however, and should not be taken to suggest that the Court now views the dormant commerce clause as reaching every area within Congress's domain. Insofar as commuting impacts interstate commerce, Congress can regulate the taxation of individual commuters pursuant to its affirmative Commerce Clause authority. Where Congress is silent, however, the dormant commerce clause operates only to protect interstate business transactions and business operations from discriminatory burdens, i.e., "[t]he dormant [c]ommerce [c]lause protects markets and participants in markets, not taxpayers as such."[14] It is, thus, limited to tariff-like measures that burden competition in interstate markets.[15]

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10. *See generally City of New York*, 94 N.Y.2d at 577.

11. *See* Commonwealth Edison v. Montana, 453 U.S. 609, 617 (1981), in which the Court formally "disapproved" of its earlier narrow definition of interstate commerce for purposes of the dormant commerce clause described in *Heisler v. Thomas Colliery Company*, 260 U.S. 245 (1922). Under that earlier view, which nominally proclaimed that any tax levied on interstate commerce violated the dormant commerce clause, interstate commerce was defined narrowly so as to permit states to tax the so-called local incidents of interstate commerce. *Id.* at 260-61. A tax would, thus, not implicate the dormant commerce clause where it was imposed on goods prior to their entry into interstate commerce, or after the goods came to rest in the state. The Court formally rejected this formalistic approach in favor of a "practical" economic analysis of the tax or regulation to ascertain its true effects. *Commonwealth Edison*, 453 U.S. at 617, 625.

12. The Court first acknowledged the double standard it had been applying in *Katzenbach*, 379 U.S. at 302. *Cf.* Toomer v. Witsell, 334 U.S. 385, 394, 406 (1948).

13. *See Camps Newfound*, 520 U.S. at 574 ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation . . . [I]n *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) . . . we rejected a 'two-tiered definition of commerce.'").

14. General Motors Corp. v. Tracy, 519 U.S. 278, 300 (1997).

15. *See, e.g., Camps Newfound*, 520 U.S. at 580-81 (holding that a property tax credit which discriminated against camps marketing their services to out-of-state consumers, "functionally serves as an export tariff that targets out-of-state consumers by taxing the

Due to the narrow definition the Court had given "interstate commerce"[16] in the field of state taxation[17] prior to its landmark decision in *Complete Auto Transit v. Brady*,[18] the Court has not, as of yet, had the occasion to consider whether personal commuting implicates the dormant commerce clause. It is, nevertheless, the purpose of this article to show that, while the scope of the dormant commerce clause has been justifiably expanded in the post-*Complete Auto* era, so as to replace antiquated notions of when interstate commerce begins and ends with a practical economic analysis, the Court has exercised due care when redefining the reach of the dormant commerce clause to avoid engulfing other constitutional provisions within its path. Therefore, under a straightforward reading of the Court's Commerce Clause jurisprudence, and basic principles of construction applicable no less to the Constitution, personal commuting remains within the exclusive domain of the Privileges and Immunities Clause unless Congress provides otherwise. The Privileges and Immunities Clause has not been effectively eclipsed by the dormant commerce clause.

businesses that principally serves them."). *See also* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) (describing tariffs as "[t]he paradigmatic example of a law discriminating against interstate commerce.").

16. *See, e.g., Toomer*, 334 U.S. at 394-95 (holding that a discriminatory state tax on nonresidents for catching shrimp in state waters did not violate the Commerce Clause because "the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce."). *See also Heisler*, 260 U.S. at 261 (holding that states may tax local incidents of interstate commerce — namely, coal, which was "plainly not . . . moving" and which was "too definitely situated to be misunderstood.").

17. The Court had construed the state's power to tax interstate commerce, as limited by the dormant commerce clause, more narrowly than when Congress exercised its affirmative grant of authority to regulate commerce. *See Katzenbach*, 379 U.S. at 302 ("Nor are the cases holding that interstate commerce ends when goods come to rest in the state of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation.").

18. 430 U.S. 274, 279 (1977) (applying a practical economic analysis to the dormant commerce clause, under the assumption that a state sales tax on local transportation originating and terminating within the state could, nevertheless, burden the sale of goods delivered into the state by an out-of-state manufacturer if imposed at a discriminatory rate or if unfairly apportioned to the in-state taxable activity). *See Commonwealth Edison,* 453 U.S. at 617 (specifically rejecting the narrow definition of "commerce" that preceded *Complete Auto*).

I. Harmonizing the Scope of the Dormant Commerce Clause and the Privileges and Immunities Clause

The principal motivation for replacing the Articles of Confederation with the Constitution was to curtail the authority of individual states to enact protectionist legislation that erected barriers to interstate trade.[19] The Articles of Confederation did provide interstate commerce with a degree of limited protection against discrimination in the form of a Privileges and Immunities Clause that "was carried over into the comity article of the Constitution in briefer form, but with no change in substance or intent . . ."[20]

The Privileges and Immunities Clause in Article IV of the Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[21] Since the scope of the Privileges and Immunities Clause extends only to "Citizens" of other states, the Clause provides only limited protection to interstate commerce for two fundamental reasons. First and foremost, the Clause, by its plain language, provides interstate business with inadequate protection from state statutes aimed specifically at interstate business transactions or interstate business operations without regard to residency.[22] Second, the Court has held that a corporation is not a "Citizen" within the meaning of the Clause.[23] Since corporations have been the principal instrumentality for conducting interstate commerce, this second limitation removes most of the remaining usefulness of the Clause in restricting state laws aimed at burdening interstate commerce transacted by nonresidents. It protects only nonresident individuals from state laws intended to disadvantage them against local residents, leaving

19. Richard D. Pomp & Oliver Oldman, State and Local Taxation 1 (4th ed. 2001).

20. Austin v. New Hampshire, 420 U.S. 656, 661 (1975). Charles Pinkney, who drafted the Privileges and Immunities Clause, stated at the Constitutional Convention that it was "formed exactly upon the principles of the 4th article of the present Confederation" [its predecessor in the Articles of Confederation]. *Id.* *See also* Saenz v. Roe, 526 U.S. 489, 501 (1999); United States v. Wheeler, 254 U.S. 281, 294 (1920).

21. U.S. Const. art. IV, §2.

22. *See Austin*, 420 U.S. at 663 n.8 (noting that "[f]or purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the terms 'citizen' and 'resident' are essentially interchangeable.").

23. Paul v. Virginia, 75 U.S. 168, 177 (1869).

a huge opening for states to enact laws that burden interstate business.

To fill this void, the Commerce Clause provides a broad *express* grant of authority to Congress to address any and all aspects of this problem in the manner it sees fit. It provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States."[24] Congress has plenary power to regulate interstate commerce pursuant to this express grant of authority.[25] Its power to act pursuant to this affirmative grant of authority is occasionally referred to as the "positive" Commerce Clause,[26] to differentiate it from the so-called "negative" or "dormant" commerce clause that, by its own force, restricts the states from taxing or regulating activities so as to exert an unjustifiably greater burden on interstate commerce than on intrastate commerce.[27]

When considering the degree of interplay between the dormant commerce clause and the Privileges and Immunities Clause, it is essential to note that the Court has given effect to the dormant commerce clause in spite of its not having been made explicit in the Constitution.[28] Rather, the dormant commerce clause is a nec-

24. U.S. CONST. art. 1, §8, cl. 3.

25. Gibbons v. Ogden, 22 U.S. 1 at 193, 196 (1824) (holding that Congress's power to regulate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."). *See also* Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945) ("Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.") (citations omitted).

26. *See, e.g., West Lynn Creamery,* 512 U.S. at 193 n.9; Arizona v. Atchison, Topeka & Santa Fe Railroad Co. 656 F.2d 398, 406-07 (9th Cir. 1981).

27. Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 98-99 (1994). *See, e.g.,* Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) (holding that in the area of taxation, the Commerce Clause requires that a state taxing scheme be "internally consistent" to assure equal treatment between interstate and intrastate commerce.) *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that in the regulatory context, equality is achieved by balancing the local regulatory interest against the burden the regulation places on interstate commerce.).

28. *See, e.g.,* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534-35 (1949) ("While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the

essary implication of the delicate balance the Commerce Clause seeks to strike between (1) the Constitution's broad grant of power to Congress to regulate the national economy, and (2) the retention by the states of their police and taxing powers, even where the exercise of those powers impact interstate commerce, so long as the states do not overreach by interfering with the free flow of interstate trade.[29] Therefore, unlike the positive Commerce Clause and the Privileges and Immunities Clause, both of which are explicit in the Constitution, the dormant commerce clause is not, but is implied from the text of the Constitution when read against the backdrop of the federal-state structure that was its central concern.

While the Commerce Clause was the centerpiece of a Constitution principally concerned with the free flow of interstate trade, a core concern of the Privileges and Immunities Clause, which predated the Constitution and was carried over from the Articles of Confederation, was to place nonresidents on a substantially equal footing with residents of the state[30] "*in the pursuit of common callings*

states. *Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.*") (emphasis added). *Id.*

29. *See Cooley,* 53 U.S. at 299. The origin of the dormant commerce clause is traceable to Chief Justice Marshall's opinion in *Gibbons.* Justice Marshall construed the language "among the several States" as giving Congress the authority to regulate "that commerce which concerns more States than one." 22 U.S. at 194. He interpreted this language as giving Congress broad authority to regulate intrastate commerce as well, except as to "those internal concerns . . . which do not affect other States." *Id.* at 195. *Gibbons,* thus, interpreted the Commerce Clause as having removed this power from the states, delegating it exclusively to Congress. *Id.* at 199-200. Each state, however, retained, under the Tenth Amendment, the power "to regulate its police, its domestic trade, and to govern its own citizens" even where the exercise of those powers affects interstate commerce. *Id.* at 208. The Court has, thus, implied the dormant commerce clause from the allocation of power under the Constitution between the Congress and the states. Even where Congress does not act, the Commerce Clause operates by its own force to prevent the states from regulating interstate commerce as such, and allows the states to regulate commerce only as an incident of their local police powers, and then only to the extent that the state has a legitimate interest in the subject matter, pursuant to its police powers, that justifies the burden it places on interstate commerce. *See, e.g.,* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935) (holding that a New York regulation fixing the price of milk imported from other states was not a legitimate exercise of New York's police powers and that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.").

30. *Saenz*, 526 U.S. at 502 (holding that nonresidents may be treated differently than residents if there is a "substantial" reason for the difference in treatment); Toomer

within the state, in the ownership and disposition of privately held property within the state, and in access to the courts of the state."[31] One of the basic protections, thus, afforded nonresidents by the Privileges and Immunities Clause was the right "to ply their trade, practice their occupation, or pursue a common calling within the State," free from unjustified discrimination.[32] It is, therefore, in the federal-state balance struck by the Privileges and Immunities Clause that "a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State."[33] Once again, the federal-state structure contemplated by the Privileges and Immunities Clause is one of "substantial equality." By way of comparison, the dormant commerce clause imposes a stricter standard, generally foreclosing any justifiable basis for discrimination against interstate business transactions or operations.[34] Thus, while the "substantial equality" standard of review under the Privileges and Immunities Clause is one of *heightened scrutiny*, a tax or regulation found to discriminate against interstate commerce would rarely, if ever, withstand the *strict scrutiny* standard under the dormant commerce clause.[35]

Since the protection of individuals who commute to another state to seek employment is one of the more basic rights protected by the Privileges and Immunities Clause of Article IV, settled rules of construction dictate that the dormant commerce clause cannot

v. Witsell, 334 U.S. 385 (1948) (nonresidents of state entitled to be treated on terms of "substantial equality" with residents).

31. Baldwin v. Montana, 436 U.S. 371, 383 (1978) (emphasis added) (citations omitted).

32. Hicklin v. Orbeck, 437 U.S. 518, 524-25 (1978).

33. *Id.* at 525.

34. Although the Privileges and Immunities Clause tolerates some discrimination, so long as it meets the Court's parameters for heightened scrutiny, the dormant commerce clause generally tolerates no discrimination whatsoever, no matter how justified and no matter how small. *See Camps Newfound*, 520 U.S. at 582 (quoting Chemical Waste Mgmt. Inc. v. Hunt, 504 U.S. 334, 342 (1992)) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."). *See also* Associated Indus. v. Lohman, 511 U.S. 641, 649-50 (1994) ("Under our cases, unless one of several narrow bases of justification is shown, actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether the discrimination has occurred.").

35. *Associated Indus.*, 511 U.S. at 652.

impose a greater restriction on state authority over this identical area of personal commuting, because implied language cannot override express language in the same legal instrument.[36] More fundamentally, if the "pursuit of common callings" within a state was one of the core "privileges and immunities" that carried over into Article IV of the Constitution, then that entire subject should not be deemed to have been removed to the dormant commerce clause, because implied repeals are strongly disfavored.[37] Under another closely related canon of construction, the meaning attributed to the specific term "privileges and immunities," should not be diminished by the more general, implied, language of the dormant commerce clause.[38]

The Court has maintained the delicate balance between a state's authority to exercise its sovereign police powers and Congress's authority to regulate trade by confining the applicability of the dormant commerce clause to two circumstances: (1) taxes or regulations which exceed the state's interest in the subject of interstate commerce being taxed or regulated,[39] and (2) taxes or regulations which discriminate against interstate commerce.[40]

The taxation of individuals who commute across state lines for personal reasons fits within neither of these two circumstances. Inasmuch as the employee's place of business is not situated at his or her home, but at the employer's office located within the taxing state,[41] that state may properly apportion and, thus, tax 100% of the

36. United States v. Stanley Ferryman, 897 F.2d 584, 589 (6th Cir. 1990) ("the usual canons of construction also require that we prefer the specific over the general, what is express over what might be implied.").

37. *Baldwin*, 436 U.S. at 383; *see also* Morton v. Mancari, 417 U.S. 535, 550-51 (1974) (holding that no implied repeal unless two provisions in apparent conflict are "irreconcilable.").

38. *Morton*, 417 U.S. at 550-51. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (since the Commerce Clause and the Privileges and Immunities Clause were simultaneously adopted in the Constitution, and the two clauses are not completely coextensive with each other, the rule that where a "later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act" has no application).

39. *Pike,* 397 U.S. at 142; *Complete Auto*, 430 U.S. at 279.

40. *See, e.g.,* Maine v. Taylor, 477 U.S. 131, 138 (1986); *Complete Auto*, 430 U.S. at 279.

41. *See* Zelinsky v. Tax Appeals Tribunal of New York, 1 N.Y.3d 85, 92–5 (2003), *cert. denied*, 124 S. Ct. 2068 (2004) (upholding New York's "convenience of the employer" rule and holding that the dormant commerce clause does not grant to a law

employee's wage income without implicating the dormant commerce clause.[42] The activity the state seeks to tax — employment — takes place entirely at the employer's place of business within the taxing state, thus, furnishing "the economic justification for the State's claim upon the [entire] value taxed."[43] It follows that since 100% of a commuter's business activity takes place within the taxing jurisdiction, and no part of it takes place at the commuter's personal residence, there is no interstate business activity that would implicate the dormant commerce clause.[44] Any differential treatment of commuters as compared with local residents would, thus, be on the basis of residency, not interstate business activity, and would violate the Privileges and Immunities Clause unless there is a "substantial justification" for the differential treatment.

The aforementioned limitation on the dormant commerce clause as protecting only interstate business, rather than the choice of a personal residence, becomes more apparent in relation to corporations. State license fees imposed for the privilege of doing business are generally deemed to discriminate against interstate commerce and, thus, violate the dormant commerce clause where they discriminate against foreign corporations by reason of their place of domicile.[45] In *Kraft General Foods, Inc. v. Iowa Department of Revenue*,[46] however, the Court has indicated that taxes which discriminate based solely on a corporation's choice of domicile do not *per se* violate the dormant commerce clause where the relevant facts show that the foreign corporation conducts all of its business within

professor, who teaches at a law school located in New York City, the right to allocate any of his wage income to his home in Connecticut where he performed some of his scholarly research and writing for his own personal convenience).

42. *Id.*

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

44. *Zelinsky*, 1 N.Y.3d at 92. Even where the commuter performs some of his work at home for his own personal convenience, that does not transform the activity of commuting from one's personal residence into an interstate business:

> We note at the outset that many busy professionals, at the conclusion of a full day, routinely bring work home to the evenings or weekends. *Even when undertaken by an out-of-state commuter such as petitioner, this work cannot transform employment that takes place wholly within New York into an interstate business activity subject to the Commerce Clause.*

Id. (emphasis added).

45. *See* South Cent. Bell Tel. Co., v. Ala., 526 U.S. 160 (1999).

46. 505 U.S. 71 (1992).

the taxing jurisdiction.[47] If, as the Court has indicated, a tax that discriminates based upon a corporation's choice of domicile — a choice which, by definition, is a business decision — does not *per se* discriminate against interstate commerce, it is considerably less likely that a tax which discriminates based upon an individual's choice of personal residence violates the dormant commerce clause.

The Court has evolved separate tests to determine whether a state's effort to tax or to regulate an interstate activity violates the dormant commerce clause: (1) the so-called "*Pike* balancing test," which is applicable to determining whether a state regulation unduly burdens interstate commerce and (2) the four-part *Complete Auto* test which is applicable to taxes.[48] Each test asks essentially the same questions — if the tax or regulation discriminates against interstate commerce it usually falls without further inquiry, and if the tax or regulatory burden placed on interstate commerce exceeds the state's interest in the activity such that it amounts to discrimination against interstate commerce, the tax or regulation is, likewise, struck down.[49] The Court has limited the applicability of either test, however, to protecting interstate businesses from discriminatory burdens,[50] and has carefully refrained from using the dormant

47. *Id.* at 75-76.

> *Amicus* United States notes that a subsidiary's place of incorporation does not necessarily correspond to the locus of its business operations. A domestic corporation might do business abroad, and its dividends might reflect earnings from its foreign activity. Conversely, a foreign corporation might do business in the United States, with its dividends payments reflecting domestic business operations . . . *We recognize that the domicile of a corporation does not necessarily establish that it is engaged in either foreign or domestic commerce.* In this case, however, it is stipulated that the foreign subsidiaries did, in fact, operate in foreign commerce and, further, that the decision to do business abroad through foreign subsidiaries is typically supported by legitimate business reasons.

Id. (emphasis added).

48. *Pike,* 397 U.S. at 142; *Complete Auto*, 430 U.S. at 279.

49. *Pike,* 397 U.S. at 142; *Complete Auto*, 430 U.S. at 279. *See also Armco*, 467 U.S. at 644-45 (stating that "[a] tax that unfairly apportions income from other states," and, hence, exceeds the state's interest in the income-generating activity, "is a form of discrimination against interstate commerce.").

50. *Pike,* 397 U.S. 137 (involving an Arizona regulation requiring locally produced cantaloupes to be packaged in Arizona, ostensibly to ensure that the cantaloupes would be identified as originating in Arizona. The Court held that Arizona's interest in identifying its cantaloupes did not justify the discriminatory effect of the legislation requiring

commerce clause as a vehicle for substituting its policy judgments for that of Congress.

Under the "*Pike* balancing test," a local regulation that impacts interstate commerce withstands Commerce Clause scrutiny where the local benefits to be derived from the putative local interest outweigh the burden placed on interstate commerce.[51] The purpose of this test is to guard against a state's overreaching, the practical effect of which is to benefit local economic interests by burdening interstate competition, either by requiring business operations to be performed in the home state,[52] or by erecting a barrier to the entry of out-of-state competitors to the local market.[53] Where, however, the justification for the burden on interstate commerce is the health and safety of a state's citizens, the Court has ordinarily found the requisite justification to uphold even regulations that impose a heavy burden on the proscribed activity.[54] Such a burden is justified by the state's interest advanced by the regulation; a legitimate exercise of its police powers, rather than a veiled attempt to give a competitive advantage to the local citizenry.

Although the goals of the *Pike* balancing test are well-defined, such a test, which weighs the benefits of local legislative policy and the means available to accomplish that policy against the burden placed on interstate commerce, is by its very nature subjective. By comparison, the Court has developed a more precise formula to measure the state's interest in a subject of interstate commerce for purposes of taxation.

Under the *Complete Auto* test, a state tax will not violate the dormant commerce clause where: (1) it is applied to an activity with a substantial nexus to the taxing state, (2) it is fairly apportioned, (3) it does not discriminate, and (4) it is fairly related to the services provided by the state.[55] The Commerce Clause concerns that are central to, both, *Pike* and *Complete Auto* are whether the various

business operations (the packaging) to be performed in the home state. In situations where the balancing test applies, i.e., where the statute does not discriminate either on its face or in practical effect, the standard of review is not *strict* but *heightened scrutiny*, and legitimate health or safety regulations generally pass muster under this test).

51. *Pike*, 397 U.S. at 142.
52. *See, e.g., id.*
53. *See, e.g.,* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).
54. Maine v. Taylor, 477 U.S. 131 at 150; *Pike,* 397 U.S. at 142.
55. *Complete Auto,* 430 U.S. at 279.

states having the requisite jurisdiction over an interstate activity (consistent with due process) will be able to exert the same or similar burdens on that activity, thus destroying interstate commerce under the weight of multiple taxes or multiple regulatory restrictions. A state's reach under the Due Process Clause is extensive, and, absent the Commerce Clause, a state could tax or regulate any "purposeful" activity directed to its jurisdiction, even those having no physical contact.[56] The dormant commerce clause prevents multiple burdens of the kind that, if repeated by every state having jurisdiction over the activity, would destroy interstate commerce.[57] In essence, the dormant commerce clause limits the tax or regulatory burden so as not to exceed the state's interest in the activity being taxed or regulated. Unlike the policy-driven analysis and subjective weighing under *Pike*, however, the state's interest in taxing an interstate activity can be quantified.

A state's quantifiable interest in interstate commerce is entirely determined by the "protection, opportunities and benefits" it affords the interstate activity.[58] The degree of "protection, opportunities and benefits" a state provides to an interstate activity, may, in turn, be measured by the values derived from the activity within the jurisdiction, taking the form of local market exploitation and the use of local resources,[59] such as the amount of the sales into the jurisdiction, or the value of property or wages employed in the jurisdiction.[60] For a state tax on an activity to, both, comport with the fairness required by procedural due process, and limit the risk of multiple burdens on interstate commerce, the activity must have "some definite link, some minimum connection"[61] or nexus to the

56. Quill v. North Dakota, 504 U.S. 298, 306–07 (1992).

57. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 260 (1938) ("The tax is not one which in form or substance can be repeated by other states in such a manner so as to lay an added burden on the interstate distribution of the magazine.").

58. Wisconsin v. J.C. Penney, 311 U.S. 435, 444-45 (1940).

59. *See, e.g., Commonwealth Edison*, 453 U.S. at 609; *J.C. Penney*, 311 U.S. at 446.

60. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983); Moorman Mfg. v. Blair, 437 U.S. 267, 273 (1978).

61. *Quill*, 504 U.S. at 306 (citation omitted).

jurisdiction,[62] and the state may tax only as much of the interstate activity as is rationally related to in-state values.[63]

Where a state's interest in a taxed activity is measured in terms of these in-state values, there is reasonable assurance that each state having a substantial nexus to the interstate activity will reach only that part of the activity attributable to values on its side of the state line, and no more. The values within each jurisdiction represent the only part of the interstate activity in which each state has a sovereign interest. These values include the sales, labor and property employed within the state, which result from the "protection, opportunities and benefits" provided by that state to the interstate activity. Where the tax is measured by these in-state values (and the taxing scheme does not discriminate against interstate commerce), the role of the dormant commerce clause in restricting state taxation of interstate commerce is at an end.

Therefore, regardless of whether the dormant commerce clause is being applied to a tax or regulation of interstate commerce, the interstate labor markets being protected in cases like *Pike* or *Complete Auto* relate to the business operations performed in another state (out-of-state labor). The dormant commerce clause, thus, protects interstate business location decisions and interstate business transactions. "That is, a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."[64]

Unlike the decision to choose one state over another to locate business operations,[65] the decision of where to reside is a personal

62. Note that *Complete Auto* refers to a "substantial nexus," and those taxes imposing a greater risk of multiple burdens, such as the gross receipts and sales/use taxes, have been held to a higher nexus standard than is required by due process. *Complete Auto*, 430 U.S. at 279. *See, e.g.*, Nat'l Geographic Soc'y v. California, 430 U.S. 551, 557 (1977) (holding that a greater nexus is required for a gross receipts tax); *Quill*, 504 U.S. at 304 (discussing that a greater nexus is required for sales/use tax).

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

64. Armco, Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

65. A tax may not discriminate against taxpayers based upon where they locate their business operations because, under the Commerce Clause, "the borders between the States are essentially irrelevant . . . in matters of foreign and interstate commerce there are no state lines." *Commonwealth Edison*, 453 U.S. at 618 (citation omitted). Note that the dormant commerce clause does not protect the mere "location" of the business, but rather "the products manufactured or the business operations performed" there. Westinghouse Electric v. Tully, 466 U.S. 388, 407 n.12 (1984).

one. Personal commuting does not transform into the kind of interstate labor protected by the dormant commerce clause simply because an individual commutes to work by crossing the state line. This proposition is a necessary corollary of the *Complete Auto* test. A commuter cannot generally assert that any part of his/her interstate activity can be properly apportioned to the state of residency, because none of the value of his/her local employment is properly attributable there. Local employers, moreover, generally advertise locally to fill job vacancies, and do not ordinarily undertake extensive advertising for local employment opportunities in other states.[66] Therefore, the kind of interstate labor market protected by the dormant commerce clause, namely, labor performed in other states, is simply not placed at issue in commuting. Congress, however, clearly does have the authority to regulate commuting under the positive Commerce Clause because its broad regulatory authority extends to all subjects that impact interstate commerce, even where no discrimination is present.[67] The activity is not subject to the strict scrutiny of the dormant commerce clause where Congress chooses not to act. Rather, states must comport with the lesser "substantial equality" standard of the Privileges and Immunities Clause when taxing or regulating such an activity, unless Congress states otherwise.

II. Revisiting the New York Court of Appeals' Commuter Tax Case – *City of New York v. State.*

In the Commuter Tax Case,[68] the New York Court of Appeals ruled that New York City's commuter tax, which discriminated on its face against nonresidents of the state, violated, both, the Privi-

66. *Contra Camps Newfound*, 520 U.S. at 573 (explaining "[t]he record reflects that petitioner advertises for campers in [out-of-state] periodicals . . . and sends its Executive Director annually on camper recruiting trips across the country. Petitioner's efforts are quite successful; 95 percent of its campers come from out of State.") (citation omitted).

67. *See generally Wickard*, 317 U.S. at 111; *Heart of Atlanta*, 379 U.S. at 241; *Katzenbach*, 379 U.S. at 294 (delineating Congress' broad authority to regulate commerce). As is evident from cases such as *Cooley* and *Pike*, a state regulation can pass dormant commerce clause muster because it does not discriminate against interstate commerce or exceed the local interest in the activity that is the subject of the tax or regulation. *See also supra* text accompanying notes 46-52. Congress, nevertheless, can still opt to regulate that activity as a matter of policy.

68. *City of New York*, 94 N.Y.2d at 577.

leges and Immunities Clause and the dormant commerce clause of the United States Constitution. The decision marked the first time a commuter tax had been invalidated on dormant commerce clause grounds.[69]

For over thirty years the city imposed a tax on nonresident commuters who work in the city.[70] In 1999 the New York Legislature enacted Chapter 5 of the Laws of 1999, which repealed the city's commuter tax as it applied to New York residents, but kept in place the tax on out-of-state residents. Chapter 5 of the Laws of 1999 provided that if the repeal of the commuter tax on New York residents was held to be invalid, the entire city's commuter tax would be repealed. Residents of New Jersey and Connecticut commenced a facial attack on the constitutionality of Chapter 5 of the Laws of 1999, arguing that the partial repeal as to New York residents discriminated against out-of-state commuters, and violated the Privileges and Immunities Clause and the dormant commerce clause.[71] The New York Court of Appeals held Chapter 5 of the Laws of 1999 invalid under, both, the Privileges and Immunities Clause and dormant commerce clause, the effect of which was to repeal New York City's commuter tax in its entirety.[72]

The New York Court of Appeals based its decision on the United State's Supreme Court's decision in *Camps Newfound v. Town of Harrison*.[73] *Camps Newfound* involved a challenge under the dormant commerce clause to Maine's real property tax-exemption awarded to "benevolent and charitable institutions" incorporated in Maine.[74] The exemption was available, as a practical matter, only

69. Some of the early dormant commerce clause cases involved discrimination against non-resident traveling salespersons (who were sometimes referred to as "drummers") but the discrimination in those cases was always aimed at interstate commerce and not at the non-residency status. *See, e.g.,* Robbins v. Shelby County, 120 U.S. 489, 491 (1887) (citation omitted) (invalidating a discriminatory tax directed against salespersons for out-of-state firms that did not maintain a regular place of business in the state, i.e., "all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample . . ."); Welton v. Missouri, 91 U.S. 275 (1875) (invalidating a discriminatory tax against salespersons who sold out-of-state goods).

70. *City of New York*, 94 N.Y.2d at 587.

71. *Id.* at 592.

72. *Id.* at 593.

73. 520 U.S. 564 (1997).

74. *Id.* at 568.

where the charitable institution provided its services to Maine residents.[75] The challenge was brought by a Maine nonprofit corporation that operated a summer camp for children of the Christian Science faith.[76] The camp had aggressively marketed its services throughout the United States.[77] It was ineligible for the exemption because ninety-five percent of its campers were nonresidents of Maine.[78] The United States Supreme Court invalidated the exemption on the grounds that it "functionally serves as an export tariff that targets out-of-state consumers by taxing the businesses that principally serve them."[79]

In relying on *Camps Newfound* as an alternate ground to invalidate New York City's commuter tax, the New York Court of Appeals looked to the part of *Camps Newfound* which stated that "the movement of persons across State lines is a form of commerce. In *Camps*, the Court found that nonresident campers who crossed State lines to attend a camp in Maine affect interstate commerce."[80] Based on this reasoning, the New York Court of Appeals extended the dormant commerce clause to the thousands of commuters who crossed State lines to work in New York City.

The New York Court of Appeals, thus, appears to have read *Camps Newfound* as having been based on the right of nonresident commuters to travel across state lines, and that this right of interstate travel furnished the requisite "interstate commerce" to implicate the dormant commerce clause in that case. From a closer reading of *Camps Newfound*, however, it does not appear that its invocation of the dormant commerce clause was based solely on the movement of the campers across state lines.

For the interstate movement of individuals to be, in all instances, protected by the dormant commerce clause, the personal

75. *Id.* at 568-69. Although the Maine statute nominally awarded a lesser real property tax exemption of $50,000 to charitable institutions that provided their services to nonresident consumers, an organization would be disqualified from that exemption if the average weekly rate charged by the organization exceeded $30 per week. *Id.* at 569. The rate charged by the camp in this case was $400 per week, far in excess of that amount. *Id.* at 567.

76. *Id.*

77. *Id.* at 573.

78. *Id.* at 581.

79. *Id.* at 580-81.

80. *City of New York*, 94 N.Y.2d at 597 (citations omitted).

right of interstate travel must necessarily derive from the dormant commerce clause. The United States Supreme Court, however, has repeatedly held to the contrary, both, before and after its 1997 decision in *Camps Newfound*. In *Bray v. Alexandria Women's Health Clinic*,[81] the Court had held "[t]hat right [the individual right of interstate travel] does not derive from the negative Commerce Clause, or else it could be eliminated by Congress." Instead, the Court concluded that the right derives from the Privileges and Immunities Clause of Article IV.[82] Similarly, in *Saenz v. Roe*[83], the Court thoroughly considered the origin of the individual right of interstate travel, again concluding that it derived exclusively from the Privileges and Immunities Clause. The Court, therefore, would not have invoked the dormant commerce clause in *Camps Newfound* solely because there was a movement of the campers across state lines, as that would have directly contradicted its "individual right of interstate travel" cases.[84]

Any such holding would also have been a novel extension of its dormant commerce clause jurisprudence. In an unbroken line of cases dating back to its dormant commerce clause *dicta* in *Gibbons v. Ogden*,[85] the Court has never wavered from the role it assigned to that Clause: to protect the right to locate business operations anywhere in the United States, without regard to which side of the state line those operations are to be performed. Had *Camps Newfound* been grounded solely on the interstate movement of the campers, its holding would have represented an unprecedented extension of the dormant commerce clause to protecting the personal decision of where to reside. Again, the Court has not, to date, interpreted the dormant commerce clause as protecting personal decisions. Strictly personal decisions could never give rise to an interstate apportionment under *Complete Auto* because none of the labor activity could be apportioned to the personal residence, and, therefore,

81. 506 U.S. 263, 277 n.7 (1993).

82. *Id.* at 276-77.

83. 526 U.S. 489, 501-02 (1999).

84. The cases cited in *Camps Newfound*, such as *Edwards v. California*, 314 U.S. 160, 172 (1941), do not address the individual right to travel, but rather the enterprise of transporting persons across state lines. *Camps Newfound*, 520 U.S. at 573.

85. *See, e.g., Gibbons,* 22 U.S. at 193; *Southern Pacific*, 325 U.S. at 761.

those personal decisions are not the kind of interstate commerce the Court thought to be protected where Congress is silent.[86]

While *Camps Newfound* may have been novel in its treatment of charities as profit-making enterprises,[87] if the entities involved had been profit-making enterprises, the decision would have followed from two other Court decisions: *Tyler Pipe Industries, Inc. v. Washington*[88] and *West Lynn Creamery, Inc. v. Healy.*[89] *Camps Newfound* held a property tax-exemption discriminating against the sale of services by a camp to nonresident consumers an "export tariff."[90] It, thus, followed from *Tyler* and *West Lynn Creamery* because the discriminatory burden was placed at the retail level on the sale to the consumer. Thus, the movement of campers across state lines was merely part and parcel with the Court's finding that the consumers were solicited from other states which, therefore, resulted in interstate commerce. Simply put, the camp exploited markets in other jurisdictions; interstate commerce in the traditional sense, albeit in services rather than goods.

Camps Newfound, therefore, does not support an extension of the dormant commerce clause to personal commuting. Such a holding would have been contrary to more than 150 years of dormant commerce clause jurisprudence, which is best summarized as follows: "[A] State may not tax a transaction or incident more heavily when it crosses State lines than when it occurs entirely within the State."[91]

The foregoing shows that the restrictions imposed on states by the negative or dormant commerce clause is necessarily narrower in its scope than Congress's power to act under the positive Commerce Clause. The dormant commerce clause is delineated by the,

86. The Court's dormant commerce clause decisions have protected against state regulations or taxes that force certain interstate activities to be performed in the home state. *See, e.g.,* New Energy Company v. Limbach, 486 U.S. 269 (1988) (tax credit penalized gasohol production in other states); *See also Armco,* 467 U.S. at 638 (tax credit penalized manufacturing in other states).

87. *Camps Newfound,* 520 U.S. at 595 (Scalia, J., dissenting).

88. 483 U.S. 232 (1987) (holding that discrimination against exports violates the dormant commerce clause).

89. 512 U.S. 186 (1994) (imposing a discriminatory burden at any point in the stream of commerce violates dormant commerce clause).

90. *Camps Newfound,* 520 U.S. at 580-581.

91. *Id.* at 581.

quite specific, *Complete Auto* tests designed to protect interstate business. It does not protect against every potential burden on the national economy, only those tariff-like burdens which have a discriminatory effect on interstate markets.[92] Other potential burdens on the national economy are best handled by Congressional legislation. Moreover, since the dormant commerce clause is implied, it cannot override an entire subject area governed by an express Constitutional provision.

The foregoing notwithstanding, *Camps Newfound* appears to state the opposite conclusion: "The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."[93] The quote, however, should not be removed from its context. The Court meant it as a loophole closer, elevating substance over form. Although the property tax in that case was levied on something strictly local (i.e. the camp's property wholly situated in Maine), the Court held that the broad definition of "commerce" would, nevertheless, encompass the property tax because of its effect on interstate commerce. Both, the positive and negative aspects of the Commerce Clause extend not merely to "commerce" as such, but also to activities which, in Congress's judgment, exert a substantial effect on interstate commerce.[94]

If, as this article has sought to show, the scope of the dormant commerce clause is limited to protecting interstate business, then the point at which an activity is deemed to be a necessary incident of a business, rather than a personal activity, becomes meaningful. Commuting is distinguished from business travel, in that, with respect to the latter, the points of origination and termination are all business related (i.e., from the office to a client, to the factory, to a warehouse, etc.).

The Court has addressed this distinction in a related context, specifically, when travel is deemed to be "in pursuit of a trade or business," instead of personal commuting, for federal income tax purposes. In *Commissioner v. Flowers*,[95] the Court ruled that an attor-

92. *See, e.g., Tracy*, 519 U.S. at 300.

93. *Camps Newfound,* 520 U.S. at 574.

94. *See Wickard*, 317 U.S. at 111; *Heart of Atlanta*, 379 U.S. at 241; *Katzenbach*, 379 U.S. at 294.

95. 326 U.S. 465 (1946).

ney employed by a railroad incurred travel expenses "in pursuit of business . . . only when the railroad's business forced the taxpayer to travel . . . The exigencies of the business *rather than the personal conveniences* and necessities of the traveler must be the motivating factors."[96]

In *Flowers*, the Court distinguished business from personal travel for purposes of the federal income tax, not the Commerce Clause.[97] The early "drummers" cases,[98] nevertheless, make clear that the dormant commerce clause protects employees who travel at the behest of their employer to states where the employer maintains no place of business.[99] More generally, those cases also hold that a discriminatory tax levied on "business" travel dictated by business exigencies, as described in *Flowers*, violates the dormant commerce clause when it is applied to employees who travel for an out-of-state business.[100] The rationale of the "drummers" cases would not, however, extend dormant commerce clause protection to travel that is for the employee's own personal convenience,[101] such as commuting to work from home. Each of those cases were concerned with protecting an employer's choice of where to locate its business, not an employee's choice of where to reside.

III. Telecommuting Does Not Implicate the Dormant Commerce Clause — *Matter of Zelinsky*

In *Matter of Zelinsky v. Tax Appeals Tribunal of the State of New York*,[102] the New York Court of Appeals held that where an individual works from home for his own personal convenience and, thus, telecommutes to work, that activity does not implicate the dormant commerce clause. The case was brought by Edward Zelinsky, a law professor who taught in New York City at Cardozo Law School. Professor Zelinsky performed some of the scholarly work in connection

96. *Id.* at 474 (emphasis added).

97. *Id.* (interpreting the predecessor to Internal Revenue Code §162(a)(2) which allows as an "ordinary and necessary" trade or business deduction "traveling expenses . . . [incurred] while away from home in pursuit of a trade or business.").

98. *See* Robbins v. Shelby County, 120 U.S. 489, 491 (1887).

99. *See* Welton v. Missouri, 91 U.S. 275, 282 (1875).

100. *Id.*

101. *See Flowers,* 326 U.S. at 474.

102. 1 N.Y.3d 85 (2003).

with his teaching activities at his Connecticut home for his own personal convenience. Professor Zelinsky argued that he should be entitled to allocate some of his law school salary to his Connecticut home free from the New York State personal income tax on nonresident individuals, based on the time he spent performing some of his work.

Under the "convenience of the employer rule," however, New York will not allow a nonresident to allocate income outside the jurisdiction where such work is performed at the employee's personal convenience, and will only allow the employee to allocate where the work is performed at home for the employer's convenience. In upholding the convenience of the employer rule under the facts of this case, the New York Court of Appeals found that the work that Professor Zelinsky chose to do at home was "inextricably intertwined with the business of his New York law school. He cannot convert his employer's New York business into an interstate one when Cardozo did not employ him to carry out any of the school's business activities in Connecticut."[103]

Although Professor Zelinsky had challenged the convenience of the employer rule under the "fair apportionment" prong of *Complete Auto*,[104] the New York Court of Appeals ruled that Professor Zelinsky's bringing work home for his own personal convenience does not implicate the dormant commerce clause. As the City of New York had argued in its amicus brief, the *Zelinsky* Court stated that:

> Allowing this taxpayer to allocate his income to Connecticut when he stays home to do his work in connection with his teaching activity would enable him to avoid paying taxes that his colleagues who do that work at home — or at the law school — pay. The Constitution does not require that a nonresident who does not opt for the personal convenience of taking work home rather than traveling into work every day be taxed at a higher effective tax rate than one who does. The State need not subsidize such personal convenience, while at the same time dis-

103. *Id.* at 92.

104. *See supra* text accompanying note 55.

> couraging commuting into New York City and facilitating erosion of the tax base.[105]

Although the Court's ruling was limited to the facts of this case, its reasoning would apply to all telecommuting undertaken at the employee's personal convenience.[106] If the decision of whether or not to work from home for the employee's personal convenience is not subject to apportionment (because no business is performed at home) and for that same reason, does not implicate the dormant commerce clause, then personal commuting cannot constitute the kind of interstate trade protected by the dormant commerce clause under the U.S. Supreme Court's dormant commerce clause jurisprudence.

IV. CONCLUSION

The dormant commerce clause protects interstate markets and transactions from state taxes and regulations that discriminate or overreach. Although Congress can regulate commuting under its affirmative Commerce Clause authority, the dormant commerce clause has never been interpreted as being implicated by state classifications that result in differential treatment based upon the choice of a personal residence. Any such differential treatment is, therefore, not invalid *per se*, as generally would be the case under the Commerce Clause, but is subject to heightened scrutiny under the "substantial equality" standard mandated by the Privileges and Immunities Clause.

A contrary interpretation would not only be without any precedent in the more than 150 years of dormant commerce clause jurisprudence, but would effectively nullify the Privileges and Immunities Clause by subjecting state classifications that distinguish based on residency to the strict scrutiny of the Commerce Clause.

105. *Zelinsky*, 1 N.Y.3d at 94.

106. *See* Matter of Huckaby v. New York State Division of Tax Appeals, 6 A.D.3d 988 (3d Dep't 2004) (upholding a challenge to New York's "convenience of the employer" rule under the Due Process and Equal Protection Clauses as applied to a Tennessee resident employed as a computer programmer for a New York employer. The employee worked from his Tennessee home and, on occasion, traveled into New York to work at his employer's office. The Appellate Division, under the reasoning in *Zelinsky*, held that due process does not prohibit New York from apportioning 100% of the employee's salary, and, likewise, rejected petitioner's equal protection challenge).

The Constitution defines a balance of power as between and among the states and the federal government that has long been construed as tolerating no state discrimination against the free flow of trade, but that also recognizes the possibility of circumstances under which the residents of other states may not be entitled to be treated identically as local residents, where there is a "substantial justification" for the difference in treatment. The dormant commerce clause, implied by the Court to prevent states from overreaching into Congress' domain, should not be construed so as to override an express provision in the Constitution.