



Dormant Commerce Clause (Litigator Series)

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This casebook contains a selection of 183 Federal Court of Appeals decisions that interpret and apply Dormant Commerce Clause jurisprudence. The selection of decisions spans from 2001 to the date of publication. For each circuit, the cases are listed in the order of frequency of citation. The most cited decisions appear first.

Under the Commerce Clause, Congress has the power to "regulate Commerce. . . among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause also has an implied requirement (often called the 'negative' or 'dormant' aspect of the clause) that the states not mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *American Exp. Travel v. Sidamon-Eristoff*, 669 F. 3d 359 (3rd Cir. 2012)

Dormant Commerce Clause jurisprudence arises as a "negative implication" of the Constitution's Commerce Clause. The dormant Commerce Clause restrains the several States by limiting the power of the States to erect barriers against interstate trade. And it is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *McBurney v. Young*, 667 F. 3d 454 (4th Cir. 2012)

There are two "tiers" in analyzing dormant Commerce Clause claims, depending on the type of burden at issue. The first tier applies where a state law discriminates facially, in its practical effect, or in its purpose against interstate commerce. Under such first tier review, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. The principle is grounded in the belief that the mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States" and it prohibits states from enacting laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. Unless discrimination is demonstrably justified by a factor unrelated to economic protectionism, a discriminatory law is virtually per se invalid. *Ibid.*

The second tier of dormant Commerce Clause analysis is commonly called the Pike test. Used in the absence of "discrimination for the forbidden purpose," the Pike analysis requires courts to consider "whether the state law[] unjustifiably ... burden[s] the interstate flow of articles of commerce." See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, (1970). In second tier analysis, the regulatory measure at issue is not scrutinized as strictly as under the first method and will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Ibid.*

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