

MODULE 7A

The Dormant Commerce Clause

Philadelphia • Hunt • West Lynn • Pike • National Pork • Reeves • Peridot Tree

Constitutional Law • Fall 2026 • Professor Jorge R. Roig

The dormant Commerce Clause

What is it, and when does it apply?

WHAT?

- A negative command.
- A limit on state power.
- Created by the Court.

WHEN? • THE STATE

- The State acts.
- Its act affects interstate commerce.

WHEN? • CONGRESS

- Congress has not acted.
- The Clause governs the silence.

If Congress has spoken, it is preemption. If not, it is this.

Why a dormant Commerce Clause?

My board: arguments for, in green; arguments against, in red.

ARGUMENTS FOR

- Economic: free trade, more efficiency.
- Political: national unity; no taxation without representation.
- Historical: the Articles; trade wars.

ARGUMENTS AGAINST

- Not in the text.
- Unworkable in practice.
- Congress can act.
- Hurts local communities?

Free access “to every market in the Nation.” — H.P. Hood (1949)

The analysis in two steps

Does the law discriminate against out-of-staters?

STEP 1 • DISCRIMINATION

- On its face, or in effect or intent.
- State must show a legitimate interest...
- ...and no alternative.

STEP 2 • NO DISCRIMINATION

- Even-handed; incidental effects.
- Burden vs. local benefit (Pike).

THE EXITS

- Congress approves.
- The State is a market participant.

Discrimination is almost always fatal. Balancing almost never is.

Facially discriminatory laws

Protectionism is never a legitimate interest. Health and safety can be.

PHILADELPHIA • 1978

- New Jersey bars out-of-state waste.
- Struck: origin alone is no reason.

MAINE v. TAYLOR • 1986

- Maine bars live baitfish imports.
- Parasites, and no way to test.
- Upheld.

TENNESSEE WINE • 2019

- Two years' residence for a liquor license.
- Protectionism is not saved by the 21st Amendment.

The legitimate interest must be something other than the product's origin.

Compare Carbone with United Haulers

Both are flow-control ordinances: all local trash to one facility.

CARBONE • 1994

- The favored facility: a private company's.
- Struck down.

UNITED HAULERS • 2007

- The favored facility: a public authority's.
- Upheld.

Same trash, same haulers. The difference is who owns the facility.

Facially neutral, but discriminatory?

My board: discriminatory effect or intent triggers the same two-part test.

DEAN MILK • 1951

- Pasteurize within five miles of Madison.
- Struck.

HUNT • 1977

- No state apple grades in North Carolina.
- Struck: the effect falls on Washington.

CLOVER LEAF • 1981

- No plastic milk jugs.
- Upheld: no out-of-state tilt shown.

EXXON • 1978

- No refiner-run gas stations.
- Upheld: big vs. small, not out vs. in.

The Clause protects the interstate market, not particular firms.

A special case: West Lynn Creamery

My board: facially mixed? Two lawful parts, one unlawful whole.

1 • A TAX ON ALL MILK

- Facially neutral.
- OK by itself.

2 • A LOCAL SUBSIDY

- Only in-state farmers.
- OK by itself.

1 + 2 TOGETHER

- In-state farmers get the tax back.
- Out-of-state farmers just pay.
- NOT OK.

Together, it works like a tariff on out-of-state milk.

Step 2: no discrimination — Pike

The balancing test: burden on interstate commerce vs. local benefit.

THE CONDITIONS

- The law regulates even-handedly.
- It serves a legitimate interest.
- Its effect on interstate commerce is incidental.

THE TEST

- Upheld unless the burden is “clearly excessive”...
- ...“in relation to the putative local benefits.”

Pike: pack Arizona cantaloupes in Arizona, and build a \$200,000 plant to do it.

Balancing applied: Kassel (1981)

My board: Iowa prohibits double trucks.

THE BURDEN

- Iowa alone in the region.
- \$12.6 million a year.

THE BENEFIT

- No convincing evidence doubles are less safe.
- Very little local benefit.

THE DISSENT • REHNQUIST

- Life and limb vs. dollars.
- That is what legislatures weigh.

Balance: NOT OK. The assigned reading, Bibb, is the mudguard case.

Pike after National Pork Producers

California's Proposition 12, and a Court that splits three ways.

PARTS II-III • UNANIMOUS

- No rule against out-of-state effects.

PART IV • SPLIT

- IV-B (3): costs and morals can't be weighed.
- IV-C (4): no substantial burden alleged.
- Six Justices keep Pike.

PART V • FIVE VOTES

- “Extreme caution” before striking a state law.

The case taught as the end of Pike contains six votes to keep it.

Exception 1: congressional approval

If Congress says the States may do it, the dormant Clause steps aside.

WESTERN & SOUTHERN • 1981

- California taxes out-of-state insurers.
- Facially discriminatory.
- But the McCarran-Ferguson Act authorizes it: OK.

HOW CLEAR? • SOUTH-CENTRAL

- Congress's intent must be “unmistakably clear.”
- A parallel federal policy is not enough.

The dormant Clause is a default rule. Congress can waive it.

Exception 2: the State as market participant

A State that buys and sells may choose its trading partners.

REEVES • 1980

- South Dakota's own cement.
- Residents first in a shortage.
- OK.

WHITE • 1983

- Boston's own projects.
- Half the workers from Boston.
- OK: they work for the city.

SOUTH-CENTRAL • 1984

- Alaska's own timber...
- ...but process it in Alaska.
- Downstream: NOT OK (plurality).

A State may choose its trading partners — not govern what they do next.

Article IV: Privileges and Immunities

Every State must give citizens of other States the privileges of its own.

STEP 1 • A PRIVILEGE?

- Fundamental rights: hunting for fun is not (Baldwin).
- Earning a living is (Toomer; Camden).

STEP 2 • SCRUTINY

- A “substantial reason” for the difference...
- ...and a “substantial relationship” to it.
- New Hampshire's bar fails (Piper).

Shrimp boats: \$25 for residents, \$2,500 for everyone else. Struck down.

Distinguishing P+I and the DCC

Two clauses against the same kind of State, with different reach.

P+I • ARTICLE IV

- Citizens only: not aliens, not corporations.
- Only fundamental rights and livelihoods.
- Market participation is no defense.

DORMANT COMMERCE CLAUSE

- Corporations too.
- Reaches even neutral laws (Pike).
- Exceptions: Congress; market participant.

A city hiring rule: fine under the DCC (White), open to challenge under P+I (Camden).

Current case: Peridot Tree

Does the dormant Commerce Clause protect a market Congress has outlawed?

THE LAWS

- Cannabis licenses reserved for local residents.
- Discrimination of the Philadelphia kind.

THE NINTH CIRCUIT

- Marijuana is federally illegal.
- The Clause does not reach an outlawed market.

THE SPLIT

- The First and Second Circuits disagree.
- Is certiorari next?

“Extreme caution,” from National Pork Producers, doing new work.

For discussion: the dairy package

A hypothetical. Every step of the map is in play.

THE PACKAGE

1. No milk from hormone-treated cows.
2. A fee on all milk funds grants to in-state dairies.
3. State dining halls buy only in-state milk.
4. Dairy licenses for residents only.

QUESTIONS FOR DISCUSSION

1. Rule 1: Hunt or Exxon? Then Pike?
2. Rules 1 + 2: West Lynn?
3. Rule 3: a market participant?
4. Rule 4: the DCC, P+I, or both?

Module 7A on one slide

One line per step.

THE LINE, ONE STEP AT A TIME

- Discrimination: fatal unless a real, non-protectionist reason and no alternative.
- Neutral laws: Pike balancing, now with “extreme caution.”
- Exits: Congress approves; the State participates in its own market.
- Next door: P+I protects citizens' livelihoods; participation is no defense.
- Current: does the Clause reach an outlawed market?

Next — Module 8: limits on the federal judicial power.

Next: Module 8 — Limits on the Federal Judicial Power. Readings on the course website.