

A state owned and operated an electric power system, which included a nuclear power plant. In order to ensure the availability of sites for the disposal of spent fuel from the nuclear power plant, the state refused to supply electric power to out-of-state purchasers residing in states that would not accept spent fuel from the plant for storage or disposal.

Assume that no federal statute applies.

Which of the following is the strongest argument that the state's action is constitutional?

- A. A state may condition the sale to out-of-state purchasers of any products produced in that state on the willingness of those purchasers to bear their fair share of the environmental costs of producing those products.
- B. The generation of electricity is intrastate by nature and therefore subject to plenary state control.
- C. The state itself owns and operates the power system, and therefore its refusal to supply power to out-of-state purchasers is not subject to the negative implications of the commerce clause.
- D. The state's action is rationally related to the health, safety, and welfare of state citizens.

Explanation:

The **commerce clause** grants Congress extensive authority to regulate interstate commerce. And the **negative implication** of this clause (ie, the dormant commerce clause) **prohibits states from discriminating** against or otherwise unduly burdening **interstate commerce**. But states are not restrained by this clause when they participate in the market by, for example, buying or selling goods or services (ie, **market-participant exception**).

Here, the state discriminated against interstate commerce by refusing to supply electricity to out-of-state purchasers residing in states that would not store or dispose of spent fuel. But since the state itself owns and operates the power system, the market-participant exception applies. As a result, the state's refusal to supply power is not subject to the negative implications of the commerce clause. Therefore, this is the strongest argument that its action is constitutional.

(Choice A) Discrimination against interstate commerce may be justified if it furthers a legitimate, *noneconomic* state interest and no reasonable alternative exists. But a state's *economic* interest in sharing the environmental costs of production with out-of-state purchasers cannot justify such discrimination.

(Choice B) Although generating electricity is *intrastate* (ie, within a state) by nature, supplying electricity to out-of-state purchasers is an *interstate* activity. But a state does not violate the dormant commerce clause by refusing to supply electricity to out-of-state purchasers when, as here, the state is acting as a market participant.

(Choice D) All powers not explicitly granted to the federal government by the Constitution are reserved to the states through the Tenth Amendment. This includes the states' police power to take action that is rationally related to protecting the health, safety, and welfare of its citizens. But this power does not allow states to violate other constitutional provisions—including the dormant commerce clause.

Educational objective:

A state's activities are not restricted by the dormant commerce clause when the state is acting as a market participant (as opposed to a market regulator).

References

- U.S. Const. art. I, § 8, cl. 3 (commerce clause).
- *Reeves, Inc. v. Stake*, 447 U.S. 429, 439–40 (1980) (holding that a state is not subject to the dormant commerce clause when it acts as a market participant).
- 15A Am. Jur. 2d Commerce § 33 (2019) (explaining the market-participant exception to the dormant commerce clause).

Dormant commerce clause analysis

