

Small retailers located in a state are concerned about the loss of business to certain large retailers located nearby in bordering states. In an effort to deal with this concern, the state legislature enacted a statute requiring all manufacturers and wholesalers that sell goods to retailers in the state to do so at prices that are no higher than the lowest prices at which they sell them to retailers in any of the bordering states.

Several manufacturers and wholesalers that are located in bordering states and that sell their goods to retailers in the state bring an action in federal court to challenge the constitutionality of this statute.

Which of the following arguments offered by these plaintiffs is likely to be most persuasive in light of applicable precedent?

- A. The state statute denies them the equal protection of the laws.
- B. The state statute deprives them of a privilege or immunity of national citizenship.
- C. The state statute deprives them of their property or liberty without due process of law.
- D. The state statute imposes an unreasonable burden on interstate commerce.

Explanation:

The **commerce clause** gives Congress the power to regulate [interstate commerce](#). The **negative implication** of this clause (ie, the dormant commerce clause) is that **states cannot** discriminate against or otherwise **unduly burden interstate commerce**. As a result, state regulations that have the practical effect of controlling wholly out-of-state conduct (ie, **extraterritorial regulations**) are unconstitutional—even if the regulated conduct affects commerce within the state.

Here, the state statute is an extraterritorial regulation since it has the practical effect of regulating wholly out-of-state conduct. That is because the statute requires all manufacturers and wholesalers selling goods in the state to do so at prices that are no higher than the lowest prices they charge retailers in bordering states. This requires out-of-state commerce to be conducted in accordance with the state statute. Therefore, the most persuasive argument that the statute is unconstitutional is that it imposes an unreasonable burden on interstate commerce.

(Choice A) State laws that substantially impact a fundamental right or intentionally discriminate against a protected class almost always violate the Fourteenth Amendment [equal protection clause](#). But there is no fundamental right to sell goods, and out-of-state businesses are not a protected class. As a result, the state statute does not deny the plaintiffs the equal protection of the laws.

(Choice B) The Fourteenth Amendment privileges or immunities clause* bars states from depriving individuals of the very limited rights of [national citizenship](#)—which do not include the right to sell goods.

*The privileges or immunities clause is almost always an incorrect answer choice on the MBE.

(Choice C) Under the Fourteenth Amendment [due process clause](#), state laws cannot deprive an individual of life, liberty, or property without adequate justification. Laws that substantially impact a fundamental right are generally unjustified under strict scrutiny. But since no fundamental right is implicated here, the state statute is likely justified under rational basis scrutiny.

Educational objective:

The dormant commerce clause prohibits states from enacting extraterritorial regulations that have the practical effect of controlling wholly out-of-state conduct—eg, by requiring out-of-state commerce to be conducted in accordance with a state statute.

References

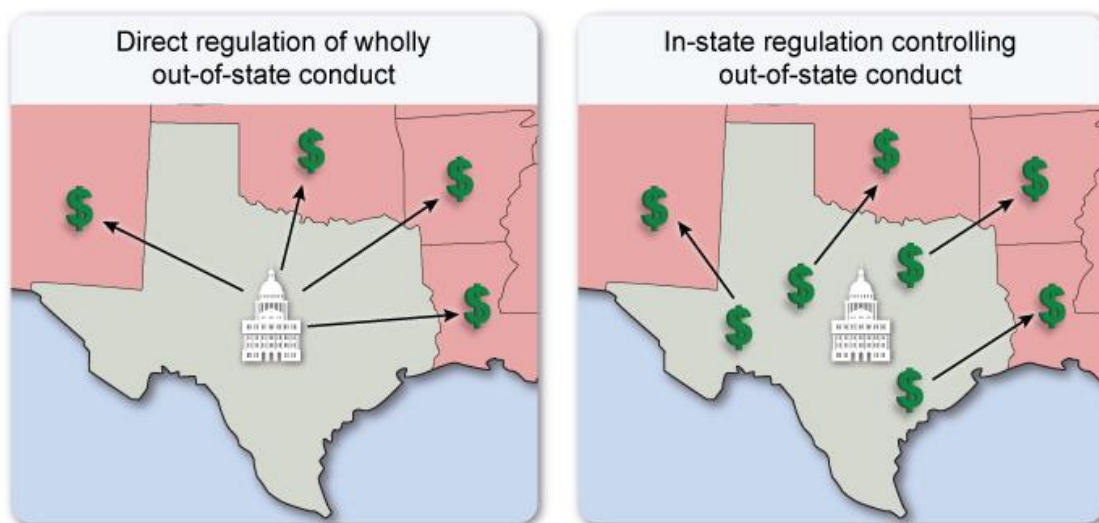
- U.S. Const. art. I, § 8, cl. 3 (commerce clause).

- Healy v. Beer Inst., 491 U.S. 324, 336–39 (1989) (holding that price-affirmation statutes violate the dormant commerce clause since they regulate commerce in other states).
- 15A Am. Jur. 2d Commerce § 40 (2019) (discussing impermissible extraterritorial regulation).

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Dormant commerce clause (invalid extraterritorial regulations)



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