

THE MARKET PARTICIPANT DOCTRINE

The Dormant Commerce Clause is implicated whenever this occurs

This question serves a switching function, it determines whether state action is subject to DCC or not

State "law" in this sense may be embodied in a statute or part of a contract or franchise

Sovereign/proprietary distinction (note its similarity to Nat'l League of Cities)

2 different kinds of state sovereign interests involved here (sovereignty over its citizens; sovereignty over itself). This is the same distinction found in 10th and cases

State action taxing or regulating economic activity

Is the State "regulating" the market or merely "participating" in it?

Inquiry: Is the state promoting its economic interests in much the same way as a private business would?

The state law governs economic relationships among 3rd parties

The state law governs the state's own contractual relationship with its trading partners

examples

Hiring employees; choosing trading partners

Buying & selling goods & services

This kind of law promotes the state's governmental (or "sovereign") interests

This kind of law promotes the state's own economic (or "proprietary") interests

This theory presumes that states in fact have private economic interests apart from their fiduciary obligations to state residents

Laws of this kind may indicate economic protectionism and lead to retaliation

Unless it has downstream regulatory effects

Possible exceptions

State Monopoly

Natural resources

Foreign Commerce

Upstream effects?

Non-economic policy matters?

See Crosby v. Nat'l Foreign Trade Council

Apply the Dormant Commerce Clause

~~Dormant Commerce Clause not applicable~~

However, state law can still be preempted, or invalid on other grounds

Theories of the Market Participant Doctrine

State has sovereign interest in disposition of its resources and treasury

State market activity is subject to same market forces as that of private trader

State is not "regulating" when it engages in proprietary activity

The MPD provides a state with complete immunity from the DCC