

In recent years, several large corporations incorporated and headquartered in State A have been acquired by out-of-state corporations that have moved all of their operations out of State A. Other corporations incorporated and headquartered in State A have successfully resisted such acquisition attempts by out-of-state corporations, but they have suffered severe economic injury as a result.

In an effort to preserve jobs in State A and to protect its domestic corporations against their sudden acquisition by out-of-state purchasers, the legislature of State A enacts a statute governing acquisitions of shares in all corporations incorporated in State A. This statute requires that any acquisition of more than 25% of the voting shares of a corporation incorporated in State A that occurs over a period of less than one year must be approved by the holders of record of a majority of the shares of the corporation as of the day before the acquisition of those shares commences. The statute expressly applies to acquisitions of State A corporations by both in-state and out-of-state entities.

Assume that no federal statute applies.

Is this statute of State A constitutional?

- A. No, because one of the purposes of the statute is to prevent out-of-state entities from acquiring corporations incorporated and headquartered in State A.
- B. No, because the effect of the statute will necessarily be to hinder the acquisition of State A corporations by other corporations, many of whose shareholders are not residents of State A and, therefore, it will adversely affect the interstate sale of securities.
- C. Yes, because corporations exist only by virtue of state law and, therefore, the negative implications of the commerce clause do not apply to state regulations governing their creation and acquisition.
- D. Yes, because the statute imposes the same burden on both in-state and out-of-state entities wishing to acquire a State A corporation, it regulates only the acquisition of State A corporations, and it does not create an impermissible risk of inconsistent regulation on this subject by different states.

Explanation:

Under the [dormant commerce clause](#), states are prohibited from discriminating against or otherwise **unduly burdening interstate commerce**. A state regulation is *not discriminatory* if it treats in-state and out-of-state activities equally. But the nondiscriminatory regulation is unduly burdensome if its **burden** on interstate commerce **clearly exceeds** its legitimate, **local benefits**. This often occurs when there is a **risk of inconsistent regulations** on the same activity by different states.

Here, the State A statute is not discriminatory since it imposes an equal burden on acquisitions by both in-state and out-of-state entities. And the statute is not unduly burdensome because there is no risk of inconsistent regulations by different states. That is because, as the Supreme Court reasoned in *CTS Corp. v. Dynamics Corp. of Am.*, corporations are typically governed by the law of the state in which they are incorporated, and this statute regulates only the acquisition of State A corporations. Therefore, the statute is constitutional.

(Choices A & B) The statute's purpose is to prevent out-of-state entities from acquiring State A corporations. And it will likely hinder acquisitions by corporations with out-of-state shareholders—adversely affecting the interstate sale of securities. But the statute's impact on interstate commerce is permissible because it is not discriminatory or unduly burdensome.

(Choice C) The negative implications of the commerce clause (ie, dormant commerce clause) *do* apply to state regulations governing the creation and acquisition of corporations if those regulations discriminate against or unduly burden interstate commerce. But the State A statute does not do so.

Educational objective:

The dormant commerce clause bars states from enacting nondiscriminatory regulations that unduly burden interstate commerce. This occurs when the regulation's burden on interstate commerce clearly exceeds its legitimate, local benefits—eg, when it creates a risk of inconsistent regulations by different states.

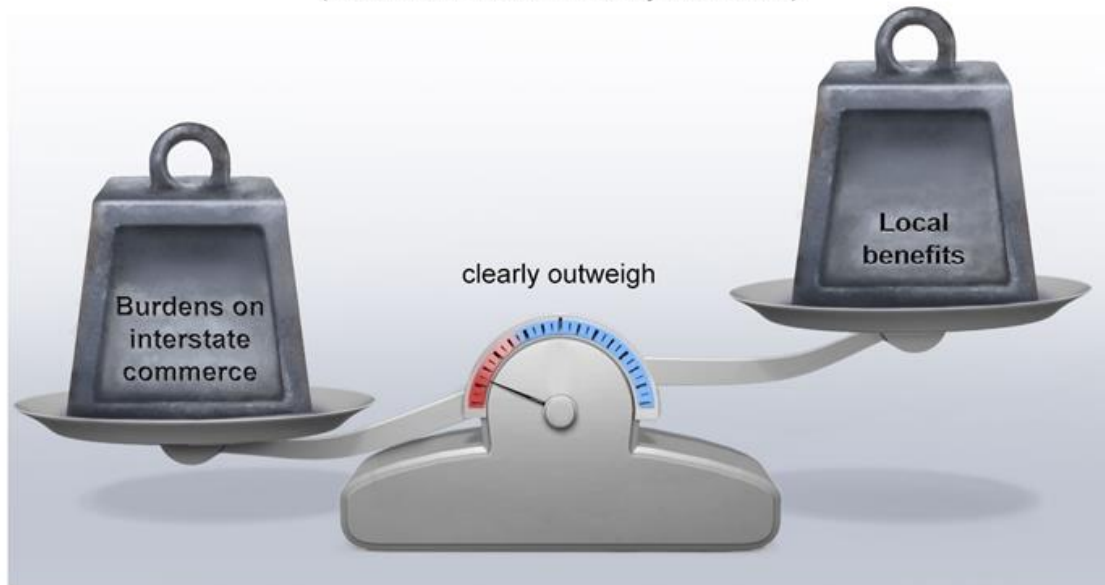
References

- U.S. Const. art. I, § 8, cl. 3 (commerce clause).
- *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88–91 (1987) (explaining that a nondiscriminatory law governing the acquisition of a state corporation does not unduly burden interstate commerce).
- 15A Am. Jur. 2d Commerce § 39 (2019) (setting forth that a nondiscriminatory law violates the dormant commerce clause if its burdens on interstate commerce clearly exceed the law's local benefits).

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Undue burden balancing test
(invalid nondiscriminatory state law)



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